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a

b

THE SUPREME COURT CASES

(2008) 6 SCC

(2008) 6 Supreme Court Cases 1

c (BEFORE K.G. BALAKRISHNAN, C.J. AND DR. ARIJIT PASAYAT, C.K. THAKKER, R.V. RAVEENDRAN AND DALVEER BHANDARI, JJ.)

ASHOKA KUMAR THAKUR . . Petitioner;

Versus

UNION OF INDIA AND OTHERS . . Respondents.

d Writ Petitions (C) No. 265 of 2006 with Nos. 269, 598 of 2006, 29, 35, 53, 336, 313, 335, 231, 425 and 428 of 2007, Contempt Petition (C) No. 112 of 2007 in WP (C) No. 265 of 2006, decided on April 10, 2008

e A*. **Education — Central Educational Institutions (Reservation in Admission) Act, 2006 (5 of 2007) — Ss. 3 and 2(d) & (g) — Reservation of 27% seats for OBCs in State-aided institutions defined as "Central Educational Institutions" in S. 2(d) and not any other private unaided institutions — Validity of — Held (*per curiam*), the said reservation is valid subject to the definition of "Other Backward Classes" in S. 2(g) of Act 5 of 2007 being clarified as follows: if the determination of "Other Backward Classes" by the Central Government is with reference to a caste, it shall exclude the "creamy layer" among such caste**

f B*. **Constitution of India — Arts. 14, 15 and 16 — Constitution (Ninety-third Amendment) Act, 2005 — Insertion of Art. 15(5) — Validity of — Held (*per curiam*), Art. 15(5) is valid to the extent that it permits reservation for socially and educationally backward classes in State or State-aided educational institutions subject to the exclusion of the "creamy layer" from the OBCs**

— Further (*per Balakrishnan, C.J.* and *Bhandari, J.*; *Pasayat and Thakker, JJ.* and *Raveendran, J.* expressing no opinion), exclusion of minority educational institutions from the purview of Art. 15(5) is also validçç

g **— However (*per Balakrishnan, C.J.* and *Pasayat and Thakker, JJ.* and *Raveendran, J.*), question of validity of the inclusion of private unaided institutions within the purview of Art. 15(5) left open for a later occasion — *Per Bhandari, J.*, said inclusion of private unaided institutions is in violation of the basic structure of the Constitution and hence invalid**

h * **Ed.**: *See* detailed Shortnotes L, N, O, P, Q, W, X, Y, YA, YC, YD, YF, YM, YN, YO, YP, YQ, YR, YV and YX, below. *See also* **Guide to the Salient Points in the Headnote,** overleaf at p. 2.

çç *See* Shortnote YV, below

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C. Constitution of India — Preamble and Arts. 14, 15 & 16 and 19 and 25, 26 & 27 and 368 — Goal of casteless society — If envisaged by the Constitution — Affirmative action — Permissible scope — Limits imposed by basic structure of Constitution — Role of education in eradicating caste[#] — Reservation based on caste (in tertiary education) as a mode for affirmative action — Efficacy and justifiability of — Violation of ethos of secularism, if any — Effect of (such) reservation on society in the short and long term — Affirmative action if to be extended in favour of the economically backward, irrespective of caste[§] — Scope of judicial review

— *Per Balakrishnan, C.J.*, reservation is one of the many tools that are used to preserve and promote the essence of equality, so that disadvantaged groups can be brought to the forefront of civil life — It is the duty of State to promote positive measures to remove barriers of inequality — Reservations provide that extra advantage to persons who, without such support, can forever dream of university education, without ever being able to realise it — This advantage is necessary — However, the fact remains that any reservation or preference shall not lead to reverse discrimination

— *Per Pasayat and Thakker, JJ.*, the ultimate objective of the Constitution is to see that no person gets discriminated against because of his caste — Hence, it cannot be said that the ultimate objective is not a casteless society — Affirmative action is nothing but a crucial component of social justice in the constitutional dispensation — But at the same time it has to be kept in view that affirmative action does not infringe the principles of equality and/or unreasonably restrain or restrict other fundamental freedoms and that it does not violate the basic structure of the Constitution — It needs no emphasis that individual rights are superior to the social rights — All fundamental rights are to be read together — Classification on the basis of castes in the long run has the tendency of inherently becoming pernicious — Therefore, the test of reasonableness has to apply — When the object is elimination of castes and not perpetuation thereof, to achieve the goal of a casteless society and a society free from discrimination based on caste, judicial review within permissible limits is not ruled out — Fact of no exclusion from the list of OBCs, noted — If reservation does not work, then alternative methods can be adopted — Social empowerment cannot be and is certainly not a measure for only socially and educationally backward classes — It also has to be for the socially and *economically* backward classes — A balance in this respect is crucial

— *Per Raveendran, J.*, to have a casteless society will be the realisation of a noble dream — The Constitution does not specifically prescribe a casteless society nor tries to abolish caste — But by barring discrimination in the name of caste and by providing for affirmative action the Constitution seeks to remove the difference in status on the basis of caste — When the differences in status among castes are removed, all castes will become equal — That will be the beginning for a casteless egalitarian society — The immediate effect of caste-based reservation has been rather unfortunate — Post reservation, there is a tendency even among the "forward" to seek the

Ed.: *See also* Shortnotes *G*, *H*, *I* and *J*, below.

§ **Ed.**: *See also* Shortnote *N*, below.

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"backward" tag — When more and more people aspire for "backwardness" instead of "forwardness" the country itself stagnates — If there is no review of caste-based reservation, the country will become a caste divided society permanently — Instead of developing a united society with diversity, we will end up as a fractured society forever suspicious of each other — While affirmative action is a road to equality, care should be taken that the road does not become a rut in which the vehicle of progress gets entrenched and stuck — Reservation is a temporary crutch and should not become a permanent liability

— *Per Bhandari, J.*, our constitutional goal is to establish a casteless and classless society — The original Framers of the Constitution did not intend to provide caste-based reservation in education to the backward classes — In inserting Art. 15(4) by the First Constitutional Amendment, Members of the First Parliament deviated from their own goal set in the Constituent Assembly — Art. 15(4) strengthens, rather than weakening casteism — *Indra Sawhney case*, 1992 Supp (3) SCC 217, upheld this decision of the First Parliament and has bound this Bench — Caste matters and will continue to matter as long as society is divided along caste lines — Implementation of Act 5 of 2007, instead of leading to a casteless India, would lead to a caste-ridden society — However, no right of action arises out of the goal to promote a casteless society, but is founded in secularism — Caste-based quotas are State-sponsored discrimination against those who are not deemed socially and educationally backward classes (SEBCs) since caste is a by-product of religion — Though affirmative action is allowed, there a point at which it violates secularism — Reservation based on caste strengthens communalism — Reservation sends the wrong message as everybody is keen to get the benefit of backward class status — Non-SEBCs naturally seek SEBC status so that they may capture SEBC benefits — Upper castes, denied a seat, harbour ill will against lower castes who gain admission (whether it was by merit or not) — These feelings are the basis for discriminatory action in social life

D. **Constitution of India — Arts. 14, 15 and 16 — Reservation in education — Negative effects on the beneficiaries of reservation — *Per Bhandari, J.*, reservation may lead to negative discriminatory action inasmuch as General Category candidates might look down upon or question the qualifications of SC/ST/OBC professionals: though the individual may have earned admission on merit alone, others may presume that reservation was a factor — Further, given that reserved category students gain admission with lower marks, it stands to reason that they would exhibit less confidence in their studies when pitted against the General Category — Research on this issue conducted in the US shows that reservation impedes academic achievement by undermining reserved category students' confidence — Thus, reservation produces consequences that may outweigh its supposed benefits**

E. **Constitution of India — Preamble and Arts. 14, 15, 16, 25 to 30, 51-A(e) & 325 and 368 — Secularism — Inherence of, in basic structure of the Constitution, re-emphasised — Reclarified that Constitution (Forty-second Amendment) by inserting "secularism" into the Preamble, only made explicit what was already implicit (*per Bhandari, J.*)**

F. **Constitution of India — Preamble, Pt. III and Arts. 14, 19 & 21 — Primacy of individual rights over social rights — *Per Pasayat and Thakker,***

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***JJ.*, it needs no emphasis that individual rights are superior to the social rights — Civil and Human Rights**

The Constitution (Ninety-third Amendment) Act, 2005 and the enactment of the Central Educational Institutions (Reservation in Admission) Act, 2006 (5 of 2007) ("Act 5 of 2007") giving reservation to Other Backward Classes (OBCs), Scheduled Castes (SCs) and Scheduled Tribes (STs) were impugned in these writ petitions.

Article 15(5) as inserted by the Constitution (Ninety-third Amendment) Act, 2005 reads as follows:

> "15(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 insofar 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."

Section 3 of Act 5 of 2007 provided for reservation of 15% seats for Scheduled Castes, 7½% seats for Scheduled Tribes and 27% for Other Backward Classes in only such State-aided institutions which were defined as "Central Educational Institutions" in Section 2(*d*) and not any other private unaided institutions. The percentage of reservation to various groups such as Scheduled Castes, Scheduled Tribes and Other Backward Classes was with reference to the annual permitted strength of the Central Educational Institutions. Section 5 of the Act mandated a proportionate increase of seats in the Central Educational Institutions over three years to provide for the abovesaid reservation.

Though the reservation in favour of SCs and STs was not opposed by the petitioners, the reservation of 27% in favour of Other Backward Classes/Socially and Educationally Backward Classes was strongly opposed by various writ petitioners in these cases.

Unanimously upholding the reservation in favour of OBCs subject to the exclusion of the "creamy layer", the Supreme Court

Held :

Per Balakrishnan, C.J.

Reservation for admission in educational institutions or for public employment has been a matter of challenge in various litigations in the Supreme Court as well as in the High Courts. Diverse opinions have been expressed in regard to the need for reservation. Though several grounds have been raised to oppose any form of reservation, few in independent India have voiced disagreement with the proposition that the disadvantaged sections of the population deserve and need "special help". But there has been considerable disagreement as to which category of disadvantaged sections deserve such help, about the form this help ought to take and about the efficacy and propriety of what the Government has done in this regard. (Para 1)

Reservation is one of the many tools that are used to preserve and promote the essence of equality, so that disadvantaged groups can be brought to the forefront of civil life. It is also the duty of the State to promote positive measures to remove barriers of inequality and enable diverse communities to enjoy the freedoms and share the benefits guaranteed by the Constitution. In the context of education, any measure that promotes the sharing of knowledge, information and

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Per Balakrishnan, C.J. *(contd.)*

ideas, and encourages and improves learning, among India's vastly diverse classes deserves encouragement. To cope with the modern world and its complexities and turbulent problems, education is a must and it cannot remain cloistered for the benefit of a privileged few. Reservations provide that extra advantage to those persons who, without such support, can forever only dream of university education, without ever being able to realise it. This advantage is necessary. However, the fact remains that any reservation or preference shall not lead to reverse discrimination. (Paras 6 and 9)

IInd Constituent Assembly Debates, 317 (Wednesday, 22-1-1947); Vth Constituent Assembly Debates, 2 (Thursday, 14-8-1947); XIth Constituent Assembly Debates, 979 (Friday, 25-11-1949); Lauterpacht: *An International Bill of the Rights of the Man* (New York, Columbia University Press, 1945); Universal Declaration of Human Rights, Preamble, G.A. Res. 217-A, UN GAOR, 3rd Session, Part 1, at 71, UN Doc A/810 (1948); Lyndon B. Johnson: Harvard University Commencement Address, *To Fulfill These Rights*, 4-6-1965; Justice Ruth Bader Ginsburg at the 51st Cardozo Memorial Lecture in 1999, *referred to*

Arjun Sen Gupta Report on "Conditions of Work and Promotion of Livelihood in the Unorganised Sector" (July 2007), *cited*

Per Pasayat and Thakker, JJ.

The respondents submit that while the Constitution really does not think of a casteless society, it prohibits untouchability in the background of Article 17. It has to be noted that both in Articles 15 and 16 the stress is on non-discrimination on the ground of caste. The Preamble of the Constitution also throws light on this aspect. Ultimately, if the social status of a man goes in the higher direction because of his education, the difference in status gets obliterated. Education is a great leveller. In that sense, the ultimate object is that every Indian citizen could have the social status which is not inferior to another and that would be obliteration of the difference in status. The ultimate objective is to see that no person gets discriminated against because of his caste. If that be so, it would not be right to say that the ultimate objective is not a casteless society. (Para 238)

As has been conceded, affirmative action is not under challenge. Affirmative action is nothing but a crucial component of social justice in the constitutional dispensation but at the same time it has to be kept in view that the same does not infringe the principles of equality of which it is a part and/or unreasonably restrains or restricts other fundamental freedoms and that it does not violate the basic structure of the Constitution. (Para 325)

Classification on the basis of castes in the long run has tendency of inherently becoming pernicious. Therefore, the test of reasonableness has to apply. When the object is elimination of castes and not perpetuation to achieve the goal of casteless society and a society free from discrimination of caste, judicial review within the permissible limits is not ruled out. But at the same time compelling State interest can be considered while assessing backwardness. (Para 328)

The ultimate object is to bring those who are disadvantaged to a level where they no longer continue to be disadvantaged. It needs no emphasis that individual rights are superior to the social rights. All fundamental rights are to be read together. The inequalities are to be removed. Yet the fact that there has been no exclusion from the list of OBCs raises a doubt about the real concern to remove inequality. The ultimate objective is to bring people to a particular level so that there can be equality of opportunity. In that context, one has to keep in view the

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Per Pasayat and Thakker, JJ. *(contd.)*

justice and redress principles. There should not be mere equality in law but equality in fact. (Paras 278 and 279)

The necessary ingredients of equality essentially involve equalisation of unequals. Linked with this question the problem posed by the petitioners is whether reservation is the only way to equalise unequals? There are several methods and modes. If reservation really does not work as contended by the petitioners, then the alternative methods can be adopted. It is the stand of the respondents that not only reservations but other incentives like free lodging and boarding facilities have been provided in some States. (Para 280)

Social empowerment cannot be and is certainly not a measure for only socially and educationally backward classes. It also has to be for the socially and economically backward classes. Unless this balance, which is very delicate, is maintained the system inevitably will develop a crack and this crack may after a certain point of time be difficult to be joined. Instead of lightening the society from castes or classes it will be overburdened and a point of time may come when we shall not be able to bear the burden any further. Timely steps in this regard will save the Indian society and democracy from a catastrophe of collapse because of something which the Constitution wants to obliterate. (Para 319)

Per Raveendran, J.

Caste has divided this country for ages. It has hampered its growth. To have a casteless society will be the realisation of a noble dream. To start with, the effect of reservation may appear to perpetuate caste. The immediate effect of caste-based reservation has been rather unfortunate. In the pre-reservation era people wanted to get rid of the backward tag—either social or economical. But post reservation, there is a tendency even among those who are considered as "forward", to seek the "backward" tag, in the hope of enjoying the benefits of reservations. When more and more people aspire for "backwardness" instead of "forwardness" the country itself stagnates. Reservation as an affirmative action is required only for a limited period to bring forward the socially and educationally backward classes by giving them a gentle supportive push. But if there is no review after a reasonable period and if reservation is continued, the country will become a caste divided society permanently. Instead of developing a united society with diversity, we will end up as a fractured society forever suspicious of each other. While affirmative discrimination is a road to equality, care should be taken that the road does not become a rut in which the vehicle of progress gets entrenched and stuck. Any provision for reservation is a temporary crutch. Such crutch by unnecessary prolonged use, should not become a permanent liability. It is significant that the Constitution does not specifically prescribe a casteless society nor tries to abolish caste. But by barring discrimination in the name of caste and by providing for affirmative action the Constitution seeks to remove the difference in status on the basis of caste. When the differences in status among castes are removed, all castes will become equal. That will be a beginning for a casteless egalitarian society. (Para 666)

Per Bhandari, J.

On careful analysis of the Constituent Assembly and the Parliamentary Debates, one thing is crystal clear: our leaders have always and unanimously proclaimed with one voice that our constitutional goal is to establish a casteless and classless society. It is our bounden duty and obligation to examine the

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Per Bhandari, J. *(contd.)*

validity of the Ninety-third Constitution Amendment in the background of the Preamble and the ultimate goal that runs through the pages of the Constitution. If we permit this impugned legislation to be implemented, instead of a casteless and classless India, we would be left with a caste-ridden society.

(Paras 364, 365 and 368)

The original Framers of the Constitution did not intend to provide caste-based reservation in education to the backward classes. Soon after the Constitution was adopted, the very same Framers acted quickly to permit reservation for SC/ST/SEBCs in education by adding Article 15(4), vide the First Amendment, to the Constitution. In doing so, they deviated from their own goal—the casteless society would have to wait. The First Parliament, by enacting Article 15(4), deviated from the original Framers' intent. They passed an amendment that strengthens, rather than weakening casteism. In *Indra Sawhney case*, 1992 Supp (3) SCC 217, the Supreme Court upheld this decision and bound us to a certain degree on this point. *Indra Sawhney case* has tied our hands. Caste matters and will continue to matter as long as we divide society along caste lines. Caste-based discrimination remains. Violence between castes occurs. Caste politics rages on. Where casteism is present, the goal of achieving a casteless society must never be forgotten. Any legislation to the contrary should be discarded. (Paras 557, 562 to 568, 574 and 605)

Indra Sawhney v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385, *followed*

The intention of Article 15 is to prohibit discrimination against citizens. This intention was only qualified for women and children. In fact, the original Framers rejected an amendment that would have watered down the prohibition in Article 15 against discrimination. A Member of the Constituent Assembly, Prof. K.T. Shah sought special protection for SC/STs. Prof. Shah effectively wanted the equivalent to Articles 15(4) and 15(5) in the Constitution but did not get it. His amendment was negated. Dr. Ambedkar disagreed with Prof. Shah on the limited ground that it would have given States the green light to segregate SC/STs from General Category students. Dr. Ambedkar was concerned that special provisions would lead to negative discriminatory action in the guise of affirmative action. Whether or not this would have happened is unclear, but his concern seems well placed. A similar problem arises today, when the general category looks down upon or questions the qualifications of SC/ST/OBC professionals: though the individual may have earned admission on marks alone, others may presume that reservation was a factor. Such a belief, regardless of veracity, cannot bode well for the career prospects of SC/ST/SEBCs.

(Paras 569 to 571)

In sum, by limiting Article 15(3) to women and children and rejecting an amendment equivalent to Article 15(4), the original Framers' intent was clear: no special provisions for backward classes (SEBC/SC/STs) in education were to dilute Article 15(1)'s prohibition against discrimination based on caste.

(Paras 573 and 574)

Constituent Assembly Debates, Vol. 7, pp. 650, 655-56, 661 and 664 dated 29-11-1948 and p. 681 dated 30-11-1948; Vol. 8, 1949, pp. 936-41; Vol. 9, pp. 645, 663-64 dated 24-8-1949 and p. 702 dated 26-8-1949; Granville Austin: *Indian Constitution*: *Cornerstone of a Nation*, pp. 26, 27, fn. 5, and p. 323, 1st Edn., 1972; Parliamentary Debates on 13-6-1951 and 29-5-1951 respectively, *referred to*

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Per Bhandari, J. *(contd.)*

In the instant case, the Union of India argued that Article 15(4), inserted by the First Amendment to the Constitution, reflects the intent of the original Framers because it was passed by the same Members that drafted the original Constitution. In the Parliamentary Debates in 1951, Prime Minister Nehru argued in favour of amending the Constitution. He and other Members of the First Parliament, as distinguished from the original Framers who had drafted the original Constitution, did not hide their disapproval of *Champakam Dorairajan*, AIR 1951 SC 226. Article 15(4) was introduced to overturn that judgment. To justify Article 15(4), which represented a dramatic departure from equality as envisaged in Articles 15(2), (3) and 29(2), Nehru said that Article 15(4) would give effect to "what … was really intended or should be intended". Yet, the original Framers, as explained above, had no intention of providing special provisions for SC/STs in education (and *a fortiori* if not for them, nor for SEBCs). What "should be intended" is a far cry from what they specifically enacted and specifically rejected. It follows that Article 15(4) deviated from the original Framers' original intent. (Para 574)

To be clear, there is no claim arising out of the goal to promote a casteless society. No right of action exists. The right of action is found in secularism. Though not explicitly found in the unamended Constitution, the original Framers made it clear that India was to be a secular democracy. Discrimination based on religion is prohibited by Articles 14, 15(1) and 15(2), 16(1) and 16(2), 29(2) and 325. The original Framers went out of their way to ensure that minorities would be able to maintain their identity. Articles 25 to 30 may be referred to. With rights come responsibilities. One of them is found at Article 51-A(*e*). Relying on these provisions, *S.R. Bommai*, (1994) 3 SCC 1, declared secularism "… a constitutional goal and a basic feature of the Constitution. Any step inconsistent with this constitutional policy is, in plain words, unconstitutional". The Court reasoned that the original Framers adopted Articles 25, 26 and 27 so as to further secularism. Secularism was very much embedded in their constitutional philosophy. This is relevant today because quotas are State-sponsored discrimination against those who are not deemed SEBCs—caste being a by-product of religion. Though affirmative action is allowed, there is a point at which it violates secularism. Finally, it is noted that the Forty-second Amendment, which formally inserted secularism into the Preamble, merely made explicit what was already implicit. (Paras 603 and 604)

S.R. Bommai v. *Union of India*, (1994) 3 SCC 1, *relied on*

Kesavananda Bharati v. *State of Kerala*, (1973) 4 SCC 225; *Indira Nehru Gandhi* v. *Raj Narain*, 1975 Supp SCC 1 : AIR 1975 SC 2299 : (1976) 2 SCR 347, *referred to*

The use of caste to identify SEBCs runs afoul of the casteless/classless society, in violation of secularism. It is said that if reservation in education is to stay, it should adhere to a basic tenet of secularism: it should not take caste into account. Reservation based on caste strengthens communalism. Reservation sends the wrong message. Everybody is keen to get the benefit of backward class status. Non-SEBCs naturally seek SEBC status so that they may capture SEBC benefits. Upper castes, denied a seat, harbour ill will against lower castes who gain admission (whether it was by merit or not). These feelings are the basis for discriminatory action in social life. (Paras 637, 371 and 576)

Discrimination is not the only problem exacerbated by reservation. Given that reserved category students gain admission with lower marks, it also stands to reason that they would exhibit less confidence in their studies when pitted against the General Category. In her work on the unintended consequences of

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Per Bhandari, J. *(contd.)*

preferential treatment for minorities in college admissions in the United States, Marie Gryphon, a policy analyst for the Cato Institute (Washington, D.C.), writes that recent research shows that reservation impedes academic achievement by undermining reserved category students' confidence. That preferences harm students' self-images, and this harm has practical costs in terms of grades and graduation rates. The point is that reservation produces consequences that may outweigh its supposed benefits. (Para 577)

The Affirmative Action Myth, Executive Summary, No. 540, 6-4-2005, pp. 9-10, *relied on*

One of the prominent advocates of reservation later realised that the policy did more harm than good. Prime Minister Nehru wrote the following letter to Chief Ministers on 27-6-1961: "I have referred above to efficiency and to our getting out of our traditional ruts. *This necessitates our getting out of the old habit of reservations and particular privileges being given to this caste or that group.* The recent meeting we held here, at which the Chief Ministers were present, to consider national integration, laid down that help should be given on economic considerations and not on caste. It is true that we are tied up with certain rules and conventions about helping Scheduled Castes and Tribes. They deserve help but, even so, I dislike any kind of reservation, more particularly in service. I react strongly against anything which leads to inefficiency and second-rate standards. I want my country to be a first-class country in everything. The moment we encourage the second rate, we are lost. *The only real way to help a backward group is to give opportunities for good education.* This includes technical education, which is becoming more and more important. Everything else is provision of some kind of crutches which do not add to the strength or health of the body. We have made recently two decisions which are very important: one is, universal free elementary education, that is the base; and the second is scholarships on a very wide scale at every grade of education to bright boys and girls, and this applies not merely to literary education, but, much more so, to technical, scientific and medical training. I lay stress on bright and able boys and girls. *I have no doubt that there is a vast reservoir of potential talent in this country if only we can give it opportunity.*" (Para 585)

G. **Constitution of India — Arts. 21-A, 45, 46 & 51-A(k) and Art. 15(5) — Importance and vital significance of the fundamental right under Art. 21-A to the Nation's progress — Effectuation of right to free and compulsory education under Art. 21-A — Necessity of — Role of primary/secondary education in eradicating caste and rendering reservation unnecessary**

— Primary/secondary education and special provisions for socially and educationally backward classes in higher education — Balancing of priorities and expenditure between — Discretion open to Government in respect of — Financial constraints as an excuse — Non-availability of — Extent of judicial intervention permissible

— Held (*per Bhandari, J.*; *Pasayat and Thakker, JJ. impliedly in concurrence*), the root cause of social and educational backwardness is poverty — Reservation sends the wrong message as everybody is keen to get the benefit of backward class status — If we want to really help the socially, educationally and economically backward classes, we need to earnestly focus on implementing Art. 21-A — We must provide educational opportunities from day one — Only then will the casteless/classless society be within our grasp — Once children are of college-going age, it is too late for reservation to have much of an effect — The most important fundamental right may be

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Art. 21-A, since without Art. 21-A the other fundamental rights are effectively rendered meaningless — Education stands above other rights, as one's ability to enforce one's fundamental rights flows from one's education — Education should be compulsory because in essence a citizen is only free when he can make a meaningful challenge to his fellow citizens' or Government's attempt to curtail his natural freedom — Without education a citizen may never come to know of his other rights — Nor would a citizen have the resources to adequately enforce them without education — This is ultimately why the judiciary must oversee Government spending on free and compulsory education

— The State is under a mandatory obligation to implement Art. 21-A on a priority basis — There is no corresponding constitutional right to higher education — An inversion in priorities between higher and primary/secondary education would make compliance with Art. 21-A extremely difficult — Spending on higher at the expense of primary/secondary education raises the spectre of conflict with Art. 21-A — According to HRD Annual Reports read with the Union of India Budget 2008-2009, *roughly seven times as much is spent on individual college students than the individual primary or secondary student* — In a country where only 18% of those in the relevant age group make it to higher education, this state of affairs is unacceptable — Statistics showing the dismal state of affairs with regard to availability of educational opportunities and the quality of education being imparted, discussed in detail — Our priorities have to be changed and the State has to place much greater emphasis on allocating more funds for primary and secondary education — Time and again, the Supreme Court has observed that the State cannot avoid its constitutional obligation on the ground of financial liabilities — Though the power of the public purse is vested in Parliament, nevertheless it remains within the judiciary's scope to ensure that the fundamental right under Art. 21-A is upheld — Supreme Court will not ignore the Art. 21-A right to education, when a dearth of quality schooling puts it in jeopardy

— Held (*per Pasayat and Thakker, JJ.*), though the Government has a large area of discretion in choosing priorities, the fundamental stress has to be on primary and secondary education so that a proper foundation for higher education can be effectively laid — It is not merely the existence of schemes but the effective implementation thereof that is important — Better coordination between the funds provider and utiliser is necessary — Lastly, financial constraint cannot be a ground to deny fundamental rights — Education — Rights and Entitlements — Fundamental right to education

H. **Constitution of India — Art. 21-A — Total compliance with — What is — Necessity of providing *quality* education — Held (*per Bhandari, J.*; *Pasayat and Thakker, JJ. impliedly in concurrence*), total compliance with Art. 21-A means that good quality education is imparted and all children aged six to fourteen regularly attend schools — Art. 21-A's reference to "education" must mean something — Implied within "education" is the idea that it will be *quality* education — Current performance indicates that much improvement needs to be made before "education" can be qualified with "quality" — The ultimate goals to be achieved under Art. 21-A would be (1) keeping children in school, (2) *ensuring that they learn how to think critically*, and (3) ensuring that they learn skills that will help them secure gainful**

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employment — Statistics showing dismal state of affairs with regard to availability of educational opportunities and the quality of education being imparted, discussed in detail — Contribution of Sarva Shiksha Abhiyan noted — Education — Rights and Entitlements

I. **Constitution of India — Arts. 21-A, 45, 46 and 51-A(k) — Provision of compulsory education under Art. 21-A — Persons responsible for ensuring that children attend school — *Per Bhandari, J.*, Art. 21-A read with Art. 51-A(k) distributes the obligation of ensuring that children regularly attend school between parents, the State and potential employers of children — Role and efficacy of attendance officers and the police in the Indian context, discussed — Education — Delhi Primary Education Act, 1960 (39 of 1960) — S. 7**

J. **Constitution of India — Art. 21-A — Implementation of fundamental right under — *Per Bhandari, J.*, various measures to be taken — Need for following carrot and stick approach i.e. financial incentives for ensuring school attendance and strict criminal penalties for preventing or not ensuring school attendance — Time-frame/deadline to be set by which Art. 21-A to be fully implemented**

— Detailed recommendations given as to: (1) enactment of comprehensive Central legislation pertaining to compulsory education that penalises employers who prevent, and parents who do not ensure that children attend school regularly, both monetarily and with imprisonment (though importation of practice of imposing fines upon the children themselves, as followed in United States, cautioned against); (2) provision of financial incentives to poor families for regular school attendance by their children, and imposition of criminal penalties on those parents availing the incentives but not sending children to school; (3) continual and consistent increases in budgetary allocation for primary and secondary education and provision of material and infrastructural support by State until full compliance with Art. 21-A is achieved; and (4) ensuring that quality education is provided

— Failure of existing patchwork of State legislation on compulsory education reviewed and explained — Efficacy of financial incentive programmes to ensure school attendance of children from poor families in various countries and Indian States of Gujarat and Haryana, highlighted

— Emphasised, that the giving of financial incentives for ensuring school attendance was the most important aspect of implementing Art. 21-A, given that in India the single most important reason why poor parents did not send children to school was that without the children working there was not enough to eat for the family

— Union of India directed to set a time-limit within which Art. 21-A was going to be completely implemented — Such time-limit to be set within six months, else, to invite intervention by the Supreme Court — Education — Rights and Entitlements — Compulsory Education Bill, 2006 — S. 7 — T.N. Compulsory Elementary Education Act, 1994 (33 of 1995) — Delhi Primary Education Act, 1960 (39 of 1960) — S. 18

K. **Constitution of India — Pt. III — Effectuation of fundamental rights — Financial constraints faced by State, held (*per Pasayat and Thakker, JJ.* and *Bhandari, J.*), cannot be a ground to deny fundamental rights**

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Per Pasayat and Thakker, JJ.

According to the National Institute of Educational Planning and Administration (in 2003) the state of affairs at the primary level of education was as under:

(*i*) About 63,000 schools in the country do not have a school building and are operating in tents or under the trees;

(*ii*) In about 71,000 primary schools — no classroom;

(*iii*) In about 95,000 primary schools — single classroom;

(*iv*) In about 8000 primary schools — no teacher;

(*v*) In about 1,15,000 primary schools — single teacher;

(*vi*) In more than 60,000 schools the pupil: teacher ratio is greater than 100:1 while the acceptable ratio is less than 40:1;

(*vii*) In about 85,000 schools — no blackboard;

(*viii*) In more than 1,00,000 schools — no electricity.

Apart from the above, according to NCERT (in 1998), only about 35% of government schools had safe drinking water, 13% had urinals and 5% had urinals for girls and only 6% had a lavatory.

It is true that there has been considerable effort in providing adequate education to all citizens. But one question still remains to be answered. There has to be balancing of priorities. The Government has said that this balancing is prerogative of the Government. It is true that the Government has a large area of discretion in choosing its priorities. But one factor cannot be lost sight of. The fundamental stress has to be on elementary education. If that is done, as a consequence there would be reduction in the need for spending more money on higher education. Stress on primary and elementary education would be a leap forward towards higher education. There has been considerable number of dropouts in the higher classes. This is a reality in spite of all steps which the Government claims to have adopted to ensure that every child of a particular age group has education as warranted by the Constitution as a fundamental right. Stress has to be on primary and secondary education so that proper foundation for higher education can be effectively laid. [Paras 284 and 358(8)]

It is not merely the existence of schemes but the effective implementation of the schemes that is important. It is to be noted that financial constraint cannot be a ground to deny fundamental rights and the provision for the schemes and the utilisation of the funds are also relevant factors. It appears that better coordination between the funds provider and the utiliser is necessary. (Para 345)

Unni Krishnan, J.P. v. *State of A.P.*, (1993) 1 SCC 645; *Bandhua Mukti Morcha* v. *Union of India*, (1984) 3 SCC 161 : 1984 SCC (L&S) 389; *Brown* v. *Board of Education*, 9 8 L Ed 873 : 347 US 483 (1953); *AIIMS Students' Union* v. *AIIMS*, (2002) 1 SCC 428; *Mohini Jain* v. *State of Karnataka*, (1992) 3 SCC 666, *relied on*

Per Bhandari, J.

The State has been making some endeavour to provide free and compulsory education since 1813 in one form or the other. When the original Framers gathered at the Constituent Assembly, their desire to provide free and compulsory education was well established. The real question in the debate was whether the original Framers would make free and compulsory education justiciable or not. They oscillated between the options, first placing it in the fundamental rights and later moving it to the directive principles under Article 45 of the Constitution. (Para 443)

P.L. Mehta and Rakhi Poonga: *Free and Compulsory Education: Genesis and Execution of Constitutional Philosophy*, New Delhi (1997) pp. 42-47; Lok Sabha Debates, 28-11-2001, Vol. 20, p. 476; Report of the D.S. Kothari Commission, 1964-1966, *referred to*

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Per Bhandari, J. *(contd.)*

To rid ourselves of reservation and its unintended consequences like casteism, our efforts must be focused on strengthening education at the primary and secondary level. Only then will the casteless/classless society which the original Framers of the Constitution envisaged be achieved. And only then will there be reason to scrap reservation altogether. (Para 578)

The first place where caste can be eradicated is the classroom. It all starts with education. In other words, if you belong to a lower caste but are well qualified hardly anyone would care about your caste. Free and compulsory education is now a fundamental right under Article 21-A. The State is duty-bound to implement this Article on a priority basis. There has been grave laxity in its implementation. This laxity adversely affects almost every walk of life. Nothing is more important for the Union of India than to implement this critical Article. (Para 369)

The Union of India should appreciate in proper perspective that the root cause of social and educational backwardness is poverty. All efforts have to be made to eradicate this fundamental problem. Reservation sends the wrong message. Everybody is keen to get the benefit of backward class status. If we want to really help the socially, educationally and economically backward classes, we need to earnestly focus on implementing Article 21-A. We must provide educational opportunity from day one. Only then will the casteless/classless society be within our grasp. Once children are of college-going age it is too late for reservation to have much of an effect. The most important fundamental right may be Article 21-A, which, in the larger interest of the nation, must be fully implemented. Without Article 21-A the other fundamental rights are effectively rendered meaningless. Education stands above other rights, as one's ability to enforce one's fundamental rights flows from one's education. This is ultimately why the judiciary must oversee the Government spending on free and compulsory education. (Paras 371 and 482)

Education should be compulsory because in essence a citizen is only free when he can make a meaningful challenge to his fellow citizens or Government's attempt to curtail his natural freedom. For this to happen he needs a certain degree of education. This is why Article 21-A may be the most important fundamental right. Without it a citizen may never come to know of his other rights; nor would he have the resources to adequately enforce them. (Para 457)

Bandhua Mukti Morcha v. *Union of India*, (1997) 10 SCC 549, *followed*

Article 21-A's reference to "education" must mean something. The Article seeks to usher in "the ultimate goal of providing universal and *quality* education". Implied within "education" is the idea that it will be quality in nature. Current performance indicates that much improvement needs to be made before we qualify "education" with "quality". (Paras 489 and 490)

The fundamental right under Article 21-A cannot be accomplished without great emphasis on primary education. An inversion in priorities between higher and primary/secondary education would make compliance with Article 21-A extremely difficult. Undoubtedly, the Government has allocated more funds of late for education, but we need to have far more allocation of funds and much greater emphasis on free and compulsory education. Anything less would flout Article 21-A's mandate. According to HRD Annual Reports read with the Union of India Budget 2008-2009, we spend roughly seven times as much on the

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Per Bhandari, J. *(contd.)*

individual college student than the individual primary or secondary student. In a country where only 18% of those in the relevant age group make it to higher education, this is incredible. (See NSSO 1999-2000). It is not suggested that higher education needs no encouragement or that higher education should not receive more funds, but there has to be much greater emphasis on primary education. Our priorities have to be changed. Nothing is really more important than to ensure total compliance with Article 21-A. Total compliance means good quality education is imparted and all children aged six to fourteen regularly attend schools. A sizeable portion of the population cannot be precluded from realising the benefits of development when almost everyone acknowledges that the children are our future. (Paras 634, 431, 432 and 490)

The specific question that has been raised by the petitioners is: should the Rs 17,000 crores allocated for the purpose of implementing Act 5 of 2007 for higher education be spent for the said purpose when primary/secondary schooling is in such bad shape? Spending on higher at the expense of lower education raises the spectre of conflict with Article 21-A. (Para 419)

[**Ed.**: There is one golden lining though in Act 5 of 2007 for the most ardent opponent of reservation: that within a time-limit of three years all affected Central Educational Institutions have to increase their capacity by 50% i.e. proportionate with the extent of reservation to be provided.]

Under Article 21-A, it is a mandatory obligation of the State to provide free and compulsory education to all children aged six to fourteen. In order to achieve this constitutional mandate, the State has to place much greater emphasis on allocating more funds for primary and secondary education. There is no corresponding constitutional right to higher education. The entire nation's progress virtually depends upon the proper and effective implementation of Article 21-A. Many countries spend 6% to 8% of gross domestic product on education. Our expenditure on education is just 4% of GDP. (Paras 420 and 422)

Unni Krishnan, J.P. v. *State of A.P.*, (1993) 1 SCC 645, *relied on*

Though an improvement over past performance, the overall education picture leaves much to be desired. The bad news is really bad. Even where we have seen improvement, there is still failure. A survey by Pratham, an NGO, fleshes out the acute problems found in rural schools. (See ASER 2007 — Rural Annual Status of Education Report for 2007, published on 16-1-2008.) The survey covered 16,000 villages. As Pratham indicates, there are an estimated 14 crore children in the age group 6 to 14 years in primary schools. *Of these 3 crores cannot read, 4 crores can recognise a few alphabets, 4 crores can read some words, and 3 crores can read paragraphs. Over 5.5 crores of these children will not complete four years of school, eventually adding to the illiterate population of India.* The national literacy rate is 65%. (Para 423)

Twenty four districts with more than 50,000 out-of-school children means we have failed Twenty four times over. Seventy one districts in which there are 60 students per teacher is just as bad, if not worse. According to Pratham (and in-line with the Ministry of HRD's six-month review), the number of out-of-school children has hovered around 7.5 lakhs. Moreover, it goes without saying that children need proper facilities. Today, just about 60% of schools can boast of a usable toilet. (Para 424)

The quality of education is equally troubling. For Standards I and II, only about 78% of students surveyed could recognise letters and read words or more

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Per Bhandari, J. *(contd.)*

in their own language. In 2006, it was even worse—only 73% could do so. It is disheartening to peruse the statistics for Standards III to V, where only about 66% could read a Standard I text or more in their own language in 2007. As Pratham stated what should be more worrying though is the fact that in Class 2, only 9% children can read the text appropriate to them, and 60% cannot even recognise numbers between 10 and 99. In the third to fifth standards, 40% of students surveyed could not subtract. The latest figures indicate that 58% children in the fifth standard read at the level appropriate for second standard students. In both 2005 and 2007, only 74% of enrolled children were in attendance. (Paras 425 and 426)

The Government is on the right track with regard to improving the infrastructure of our system, books and buildings only go so far. They are necessary but not sufficient for achieving the ultimate goals of (*1*) keeping children in school, (*2*) ensuring that they learn how to think critically, and (*3*) ensuring that they learn skills that will help them secure gainful employment. The quality of education provided in the majority of primary schools is woeful. That is why it is found necessary to review government spending on education—especially at the primary/secondary level. (Para 430)

In addition to free education and/or other financial assistance, students should also be given books, uniforms and any other necessary benefits so that the object of Article 21-A is achieved. Time and again, the Supreme Court, in a number of judgments, has observed that the State cannot avoid its constitutional obligation on the ground of financial inabilities. (Para 435)

Taking the country's rampant poverty into account, free education up to the age of 14 years is absolutely imperative. There is no other way for the poor to climb their way out of this predicament. This has also been suggested in the recommendations of the Kothari Commission on education in 1966. The Central Government has made some effort to fulfil its obligation under Article 21-A with regard to "free education". Sarva Shiksha Abhiyan is one such example. (Paras 433 and 453)

The Government should suitably revise budget allocations for education. The priorities have to be set correctly. At the same time, spending is an area in which the judiciary must not overstep its constitutional mandate. The power of the purse is found in Part V Chapter II of the Constitution, which is dedicated to Parliament. Nevertheless, it remains within the judiciary's scope to ensure that the fundamental right under Article 21-A of Part III is upheld. The Supreme Court will not ignore the Article 21-A right to education, when a dearth of quality schooling puts it in jeopardy. Lacklustre performance in primary/secondary schools is caused in part because the Government places college students on a higher pedestal. Money will not solve all our education woes, but a correction of priorities in step with the Constitution's mandate will go a long way. (Paras 482 and 483)

Hussainara Khatoon (IV) v. *Home Secy., State of Bihar*, (1980) 1 SCC 98 : 1980 SCC (Cri) 40; *M.C. Mehta* v. *Union of India*, (1998) 6 SCC 63, *relied on*

From Article 51-A(*k*), it becomes clear that parents would be responsible for sending their children to school. Article 51-A(*k*) indicates that it is parents, not the State, who are responsible for making sure children wake up on time and reach school. Thus, Article 21-A read with Article 51-A(*k*) distributes an obligation amongst the State and parents: the State is concerned with free

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Per Bhandari, J. *(contd.)*

education, parents with compulsory. Notwithstanding parental duty, the State also has a role to play in ensuring that compulsory education is feasible. (Paras 450 and 452)

Compulsory education has been introduced in one form or the other in various countries. From the historical experience of these nations, we learn that the legislation pertaining to compulsory education has played an important role in improving educational outcomes. (Para 461)

When it comes to "compulsory education", the Central Government has made no such effort as the Sarva Shiksha Abhiyan. Parliament has not passed any legislation. The executive has not issued any order. What we have is a patchwork of different State and Union Territory laws. Though, Section 7 of the Compulsory Education Bill, 2006 does envisage simultaneously targeting employers and parents. Employers would be punished when they hire a child to work too much or during school hours. Similarly, parents would also be punished for allowing this to happen. It must also be remembered that that it is not only the child who fails to attend but also the child who fails to enrol that has violated an attendance law. "Compulsory" connotes enforcement. Parliament rejected an amendment that would have saved parents from penal penalties. Those who wanted a safe haven from penal sanction for parents lost. From this vote, we know that Parliament intended to allow for future legislation that would impose penal sanctions for violations of legislation under Article 21-A. (Paras 453, 455, 456, 471 and 484 to 486)

The Indian States' laws on compulsory education fail on two accounts: (*1*) they are too lenient to have a deterrent effect i.e. no State has provided for an adequate punishment whose effect would be to deter citizens from committing a violation, and (*2*) the legislation is not adequately implemented or enforced, in part, because it does not require police officers to do the job. Section 7, T.N. Compulsory Elementary Education Act, 1994 and Section 18(1), Delhi Primary Education Act, 1960 may be referred to in this regard. Some form of compulsory education has been on the statute books since 1917. However, neither the State Governments nor their police agencies are at all serious about implementing these compulsory laws. There are hardly any cases where even fines have been imposed. In order to give effect to the constitutional right under Article 21-A, it is imperative that the Central Government pass suitable legislation. The fine should be suitably increased. Imprisonment should be a sentencing option as well. The current patchwork of State/UT legislation on compulsory education is insufficient. Small monetary fines do not go far enough to ensure the implementation of Article 21-A. (Paras 473 and 475 to 480)

In many jurisdictions in the United States, the attendance officer is responsible for enforcing compulsory attendance laws for his area or school. Given the overwhelming problem of sub-par enrolment and attendance in India, it is doubtful that one school official could sufficiently do the work of inspecting places of employment for children who have violated attendance laws. Indeed, existing legislation in India already envisages the employment of attendance officers: Section 7 of the Delhi Primary Education Act, 1960 may be referred to. Yet, there is nothing to suggest that these employees have adequately dealt with truancy. (Paras 469 and 470)

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In the name of transparency, students' attendance records could be made available to administrators and parents. (Para 439)

Students and parents in the United States often face the same fines when students fail to attend school. Fines for students make more sense when low self-control is the reason for which they fail to attend school. At the same time, punishing Indian students who have no choice but to work would make no sense. Such a punishment should not be borrowed from the United States. (Para 460)

Parents send children to work in India because parents have no other choice. Food comes first. If the State does not provide extra income so as to remove the incentive to send children to work, it is wasting its time on mere gesture. Financial assistance or incentives must be given. Only then may the Government actively enforce compulsory attendance legislation. The carrot must come before the stick. If there is no financial incentive programme in place, the Government cannot expect the poorest of the poor to send their children to school.
(Paras 468, 470, 479 and 481)

At least fourteen countries have cash-transfer programmes that target poor households with school-age children. The largest programme is in Brazil, where 46 million people receive an education transfer of up to 44 USD monthly per household in extreme poverty with children below age 16. According to the Report, the programme has reduced dropout rates up to 75% among beneficiaries in its more recent stage. Such a programme is not foreign to India. According to UNICEF, the State of Gujarat put the idea of financial incentives for youth into action. As a result, the dropout rate has come down from about 35% in 1997 to about 3% in 2006 in Classes 1-5. In girls, this rate has dropped from about 39% to about 6% in the same time period. Also students could be paid to attend school. They would receive a sum for each day of school that they attended. If you only attend 7 out of 10 school days, you would only receive 70% of the stipend. In January 2008 the Government of Haryana unfurled an incentive scheme for SC students in which students would receive a one-time payment in addition to a monthly stipend for attending school. (Paras 436 to 439)

Ultimately, this is the most important aspect of implementing Article 21-A. More than punishment, creative incentive programmes will go a long way in the implementation of the fundamental right enshrined under Article 21-A.
(Para 440)

Bandhua Mukti Morcha v. *Union of India*, (1997) 10 SCC 549; *M.C. Mehta* v. *State of T.N.*, (1996) 6 SCC 756 : 1997 SCC (L&S) 49, *relied on*

Were Compulsory Attendance and Child Labor Laws Effective? see An Analysis from 1915 to 1939 (2001) at p. 2. Prof. Adriana Lleras-Muney of Princeton University; *The Compelling Effects of Compulsory Schooling: The Evidence from Canada*, Prof. Oreopoulos, p. 23, Canadian Journal of Economics, [quoting from Eckstein, Zvi, and Kenneth I. Wolpin (1999) "*Why Youths Drop Out of High School: The Impact of Preferences, Opportunities, and Abilities*", Econometrica 67, 1295-339]; The Parliamentary Debates on Article 21-A, p. 523, 28-11-2001 at Vol. 20, Nos. 6-10; UNESCO's Education for All, Global Monitoring Report (2008) at p. 115; Incentives announced to curb dropout rate, *The Tribune*, 5-1-2008, *relied on*

[**Ed.**: For a recent review of the working of Brazil's *Bolsa Família* ("Family Fund") anti-poverty scheme see "Happy Families" in *The Economist* issue dated 7-2-2008. *Bolsa Família* works as follows. Where a family earns less than 120 reais ($68) per head per month, mothers are paid a benefit of up to 95 reais on condition that their children go to school and take part in government vaccination programmes. Municipal governments do

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Per Bhandari, J. *(contd.)*

much of the collection of data on eligibility and compliance, but payments are made by the federal government. Each beneficiary receives a debit card which is charged up every month, unless the recipient has not met the necessary conditions, in which case (and after a couple of warnings) the payment is suspended.]

The State is obligated under Article 21-A to implement free and compulsory education in toto. A carrot and stick approach appears to be the best way to implement Article 21-A. [Paras 487, 635, 487(*d*) and 635(*d*)]

In sum,

(*1*) The Central Government should enact legislation that provides low income parents/guardians with financial incentives such that they may afford to send their children to school. The State cannot cite budgetary constraints or lack of resources as an excuse for failing to provide financial assistance/incentives to poor parents. The said legislation should criminally penalise those who receive financial incentives and despite such payment send their children to work. [Paras 487(*a*) & (*b*), 635(*a*) & (*b*), 482 and 488]

Hussainara Khatoon (IV) v. *Home Secy., State of Bihar,* (1980) 1 SCC 98 : 1980 SCC (Cri) 40, *relied on*

(*2*) The Central Government should enact legislation that penalises employers who preclude children from attending school or completing homework. [Paras 487(*c*), 482 and 635(*c*)]

(*3*) The Central Government should enact legislation that the penalty should include imprisonment; the Compulsory Education Bill, 2006 would serve as an example. [Paras 487(*d*) and 635(*d*)]

(*4*) The Central Government should enact legislation that until we have accomplished for children from six to fourteen years the object of free and compulsory education, the Government should continue to increase the education budget and make earnest efforts to ensure that children go to schools and receive quality education. [Paras 487(*e*) and 635(*e*)]

(*5*) It has become necessary that the Government set a realistic target within which it must fully implement Article 21-A regarding free and compulsory education for the entire country. Parliament should fix a deadline by which time free and compulsory education will have reached every child. This *must* be done within six months, as the right to free and compulsory education is perhaps the most important of all the fundamental rights. For without education, it becomes extremely difficult to exercise other fundamental rights. The Union of India is directed to set a time-limit within which Article 21-A is going to be completely implemented. This time-limit must be set within six months. In case the Union of India fails to fix the time-limit, then perhaps this work will also have to be done by the Court. [Paras 370, 482, 487(*f*) and 635(*f*)]

L. **Constitution of India — Arts. 15(5) and 15(1) — "Socially and educationally backward classes" (SEBCs) eligible for special provisions under Art. 15(5) — Identification of — Caste if, and extent to which, may be used as a criterion — Non-caste based groups, if also eligible for special provisions under Art. 15(5)** — Scope of judicial review — Nature of protection available under Art. 15(5), if class or group and not individual based — Validity of Act 5 of 2007 in this regard**

** **Ed.**: *See also* Shortnote *N*, below.

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— Held (*per curiam*), classification of SEBCs cannot be done exclusively on the basis of caste as it would violate Art. 15(1) — Poverty, social backwardness, economic backwardness, all are criteria for determination of backwardness — However, following *Indra Sawhney case*, 1992 Supp (3) SCC 217, reiterated, caste can be a starting point, though the "creamy layer" must be excluded from the caste found to be socially and educationally backward

— *Per Balakrishnan, C.J.*, as laid down in *Indra Sawhney case*, the ideal and wise method would be to mark out various occupations, which on the lower level in many cases amongst Hindus would be their caste itself and find out their social acceptability and educational standard, weigh them in the balance of economic conditions, and the result would an eligible backward class of citizens — Caste plays an important role in determining the backwardness of the individual — In the present case, it was clear from the material on record that the lists of SEBCs were being prepared validly, not solely on the basis of caste, but after consideration of detailed data with regard to social, educational and economic criteria — Therefore Act 5 of 2007 is not invalid for this reason

— *Per Pasayat and Thakker, JJ.*, caste is the starting point, subject of course to the parameters that the caste itself satisfies the test of backwardness — In *Indra Sawhney case* it has been held that individual surveys as to backwardness are out of the question since Art. 16(4) speaks of class protection and not individual protection — Thus, if the real backwardness is found in a caste, it can be considered backward — Similarly if real backwardness is found in any other group, section or class they too can be treated as backward — Furthermore, there has to be proper identification of OBCs — For the same, the Commission set up pursuant to *Indra Sawhney case*, 1992 Supp (3) SCC 217, has to work more effectively and not merely decide applications for inclusion or exclusion of castes — A notification should be issued by the Union of India, after exclusion of the creamy layer for which necessary data must be obtained by the Central Government from the State Governments and UTs — Such notification would be open to challenge on the ground of wrongful exclusion or inclusion — Also, a periodic revision of the backward class lists by the Central Government is a statutory mandate [*see also* Shortnote *O*, below]**

— *Per Raveendran, J.*, it is clear from *Indra Sawhney case* that caste itself is not the final destination, that is, caste by itself cannot be determinative of social and educational backwardness, though caste can be the starting point for determination of backwardness

— *Per Bhandari, J.*, if 49.5% caste-based reservation was upheld in *Indra Sawhney case* for government employment, it follows that 49.5% caste-based reservation is permitted in aided educational institutions — *Indra Sawhney case* compels the conclusion that use of caste is valid — Hence, there is no choice but to uphold the impugned legislation by which the Government may still identify SEBCs, in part, by using caste — Education — Central Educational Institutions (Reservation in Admission) Act, 2006 (5 of 2007) — Ss. 2(g) and 3

M. Constitution of India — Arts. 14, 15 and 16 — "Class" and "caste" — Nature, scope and meanings of — Interrelationship between, discussed — Held (*per curiam*), class and caste are not synonymous — Words and Phrases

** **Ed.**: *See also* Shortnote *N*, below.

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Per Balakrishnan, C.J.

The Founding Fathers of the Constitution were aware of the ripples of inequality present in society, decried the notion of caste and ensured that the constitutional framework contained adequate safeguards that would ensure the upliftment of the socially and educationally backward classes of citizens, thus creating a society of equals. The interpretation of the term "socially and educationally backward", and its constituent classes, was left for future generations to decide. (Para 2)

There is a long jurisprudential history as to whether caste can play any role in determining the socially and educationally backward classes of citizens (SEBCs). If the classification of SEBCs is done exclusively on the basis of caste, it would fly in the face of Article 15(1) of the Constitution. Determination of backward class cannot be exclusively based on caste. Poverty, social backwardness, economic backwardness, all are criteria for determination of backwardness. However, in *Indra Sawhney case*, 1992 Supp (3) SCC 217, which is a nine-Judge Bench decision, it was finally settled that the "caste" could be a beginning point and a determinative factor in identifying the socially and educationally backward classes of citizens. (Paras 133, 145 and 168)

In *Indra Sawhney case* the majority held that the ideal and wise method would be to mark out various occupations, which on the lower level in many cases amongst Hindus would be their caste itself, and find out their social acceptability and educational standard, weigh them in the balance of economic conditions, and the result would be backward class of citizens needing a genuine protective umbrella. And after having adopted occupation as the starting point, the next point should be to ascertain their social acceptability. A person carrying on scavenging becomes an untouchable whereas others who were as low in the social strata as untouchables became depressed. The Court has cautioned that the backwardness should be traditional. Mere educational or social backwardness would not have been sufficient as it would enlarge the field thus frustrating the very purpose of the constitutional goal. It was pointed out that after applying these tests, the economic criteria or the means test should be applied since poverty is the prime cause of all backwardness as it generates social and educational backwardness. (Para 146)

The petitioners contended that caste cannot be used even as one of the criteria for identifying SEBCs as many persons have shifted their traditional occupations and have become doctors, engineers and lawyers. But these are only a few cases and even such persons continue to suffer social segregation based on caste. Caste plays an important role in determining the backwardness of the individual. In society, social status and standing depend upon the nature of the occupation followed. (Paras 147 and 148)

"Caste" is often used interchangeably with "class" and can be called as the basic unit in social stratification. The most characteristic thing about a caste group is its autonomy in caste related matters. One of the universal codes enforced by all castes is the requirement of endogamy. Other rules have to do with the regulations pertaining to religious purity or cleanliness. Sometimes it restricts occupational choices as well. It is not necessary that these rules be enforced in particular classes as well, and as such a "class" may be distinguished from the broader realm of "caste" on these grounds. Castes were often rated, on a purity scale, and not on a social scale. According to the early sociological theories, the term "caste" has been used to mean "class", hereditary or rigid status, and hereditary occupation. Degrees of rigidity mark the difference

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Per Balakrishnan, C.J. *(contd.)*

between class and caste systems. A class always enjoys certain privileges or at least certain advantages over others in society. When it is more or less rigorously closed, or enjoys hereditary privileges, it is called a "caste". (Paras 149 and 152 to 154)

It is possible that within a caste group there is a marked inequality of status, opportunity, or social standing—which then defines the "class" within that particular "caste" system. For example, all the Brahmins are not engaged in highly respectable employment, nor are all very wealthy. It may even be that some Brahmins may be servants of members of a lower caste, or it may also be so that the personal servant of a rich Brahmin may be a poor Brahmin. Hence, there is every reason to believe that within a single caste group there are some classes or groups of people to whom good fortune or perseverance has brought more dignity, social influence and social esteem than it has to others. (Para 156)

In India, caste, in a socio-organisational manner would mean that it is not characterised merely by the physical or occupational characteristics of the individuals who make it up; rather, it is characterised by its codes and its close-knit social controls. In the case of classes, however, there may not exist such close-knit unit social controls, and there may exist great disparity in occupational characteristics. (Para 157)

A social class is therefore a homogeneous unit, from the point of view of status and mutual recognition; whereas a caste is a homogeneous unit from the point of view of common ancestry, religious rites and strict organisational control. Thus the manner in which the caste is closed both in the organisational and biological sense causes it to differ from social class. Moreover, its emphasis upon ritual and regulations pertaining to cleanliness and purity differs radically from the secular nature and informality of social class rules. In a social class, the exclusiveness would be based primarily on status. Social classes divide homogeneous populations into layers of prestige and esteem, and the members of each layer are able to circulate freely with it. In a caste, however, the social distance between members is due to the fact that they belong to entirely different organisations. It may be said, therefore, that a caste is a horizontal division and a class, a vertical division. (Paras 158 and 159)

Indra Sawhney v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385, *followed*

M.R. Balaji v. *State of Mysore*, AIR 1963 SC 649 : 1963 Supp (1) SCR 439; *R. Chitralekha* v. *State of Mysore*, AIR 1964 SC 1823 : (1964) 6 SCR 368; *P. Rajendran (Minor)* v. *State of Madras*, AIR 1968 SC 1012 : (1968) 2 SCR 786; *A. Peeriakaruppan (Minor)* v. *State of T.N.*, (1971) 1 SCC 38; *State of Kerala* v. *N.M. Thomas*, (1976) 2 SCC 310 : 1976 SCC (L&S) 227; *K.C. Vasanth Kumar* v. *State of Karnataka*, 1985 Supp SCC 714, *clarified* and *relied on*

State of U.P. v. *Pradip Tandon*, (1975) 1 SCC 267, *limited*

State of Madras v. *Champakam Dorairajan*, AIR 1951 SC 226 : 1951 SCR 525; *Triloki Nath Tiku* v. *State of J&K*, AIR 1967 SC 1283 : (1967) 2 SCR 265; *Triloki Nath Tiku* v. *State of J&K*, AIR 1969 SC 1 : (1969) 1 SCR 103; *T. Devadasan* v. *Union of India*, AIR 1964 SC 179 : (1964) 4 SCR 680; *State of A.P.* v. *P. Sagar*, AIR 1968 SC 1379 : (1968) 3 SCR 595, *referred to*

C.A. Rajendran v. *Union of India*, AIR 1968 SC 507 : (1968) 1 SCR 721; *B. Venkataramana* v. *State of Madras*, AIR 1951 SC 229 : (1951) 1 MLJ 625, *cited*

W.H.R. Rivers: *Social Organization* (New York, 1924), p. 143; Robert H. Lowie: *The Origin of the State* (New York, 1927), p. 21; Robert H. Lowie: *An Introduction to*

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Per Balakrishnan, C.J. *(contd.)*

Cultural Anthropology (New York, 1940), p. 268; Kimball Young: *An Introductory Sociology* (New York, 1924); Cecil Clare North: *Social Differentiation* (Chapel Hill, 1926), p. 254; R.N. MacIver: *Society: A Textbook of Sociology* (New York 1937), p. 171.9; Charles Horton Cooley: *Social Organization* (New York, 1909), p. 215; G.S. Ghurye: *Caste and Race in India* (Bombay, 1979), p. 6; *Mysore Census, 1901*, p. 400, *referred to*

In the present case the Solicitor General pointed out that for the purpose of reservation under Article 16(4) of the Constitution, the Central List has been in operation for the past 14 years and not a single person has challenged any inclusion in the Central List as void or illegal. It was pointed out that the National Commission for the Backward Classes and the State Commission for Backward Classes have prepared a list based on elaborate guidelines and these guidelines have been framed after studying the criteria/indicators framed by the Mandal Commission and the Commissions set up in the past by different State Governments. Various Commissions held public hearings at various places and the National Commission held 236 public hearings before it finalised the list. It is also pointed out that during the period of its functioning the National Commission had recommended 297 requests for inclusion and at the same time rejected 288 requests for inclusion of the main castes. It is further pointed out that the Commission took into consideration detailed data with regard to social, educational and economic criteria. The Commission has also looked into whether there has been any improvement or deterioration in the condition of the caste or community being considered for inclusion during the past twenty years. That an elaborate questionnaire was prepared by the Commission and the answers in this questionnaire were considered in detail for inclusion/rejection in the list.

(Paras 160 to 162)

Thus, it is clear that the lists of socially and educationally backward classes of citizens are being prepared not solely on the basis of the caste, and if caste and other considerations are taken into account for determining backwardness it cannot be said that it would be violative of Article 15(1) of the Constitution. Therefore, Act 5 of 2007 is not invalid for this reason.

(Paras 162 to 164 and 225)

Per Pasayat and Thakker, JJ.

In respect of identifying Other Backward Classes, the first sentence of para 782 of *Indra Sawhney case*, 1992 Supp (3) SCC 217, lays emphasis to begin somewhere—with some group, class or section. It also states that there is no set or recognised method and there is no law or other statutory instrument prescribing the methodology. In this context, it has also been stated that one can well begin with castes which represent explicit identifiable social classes or groupings. Therefore, the emphasis was on beginning with castes which represent explicit identifiable social classes or groupings. Again in para 783 of *Indra Sawhney*, it has been stated that in a vast country like India it is simply not practicable to fix the test for identifying backward classes. In that background it was held that if the real objective is to discover and locate the real backwardness and if such backwardness is found in a caste it can be considered as backward. Similarly if it is found in any other group, section or class they too can be treated as backward. The intention therefore is clear that if caste is found to be backward it can certainly be treated as backward. To give any other meaning would be adding or subtracting to what has been specifically stated in *Indra Sawhney case*.

(Para 347)

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Per Pasayat and Thakker, JJ. *(contd.)*

Much emphasis has been laid on the use of the word "only" in Articles 15(1) and 16(2). It is to be noted that the respondents contend that where it is demonstrated that caste is not the only consideration the permissible provision will operate. The caste is the starting point. This is subject of course to the parameters that if the caste itself satisfies the test of backwardness which is implicit and inherent as noted in para 782 of *Indra Sawhney case*. In that case caste becomes the relevant factor. In para 782 of *Indra Sawhney case* it has not been held that caste is class. In the said paragraph it has been stated that individual survey is out of question since Article 16(4) speaks of class protection and not individual protection. In that context also it has been said that it does not mean that one can wind up the process of identification for the castes. It has also been emphasised in the said paragraph that having exhausted the castes or simultaneously with it, the authority may take up for consideration other occupational groups, communities and classes. If caste is a substitute for class, the question of any simultaneous consideration of others does not arise. Therefore, the Court observed that one may well begin with castes if one chooses and then go to other groups, sections and classes. If the Court meant to substitute the word caste with class the question of going to other classes would not arise.
(Paras 349 and 351)

In the Constitution for the purposes of both Articles 15 and 16, caste is not synonymous with class and this is clear from paras 782 and 783 of *Indra Sawhney case*. However, when creamy layer is excluded from the caste, the same becomes an identifiable class for the purpose of Articles 15 and 16.
[Para 358(7)]

Indra Sawhney v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385, *clarified* and *followed*

M. Nagaraj v. *Union of India*, (2006) 8 SCC 212; *R. Chitralekha* v. *State of Mysore*, AIR 1964 SC 1823 : (1964) 6 SCR 368; *A. Peeriakaruppan (Minor)* v. *State of T.N.*, (1971) 1 SCC 38; *K.S. Jayasree* v. *State of Kerala*, (1976) 3 SCC 730, *relied on*

M.R. Balaji v. *State of Mysore*, AIR 1963 SC 649 : 1963 Supp (1) SCR 439; *P. Rajendran (Minor)* v. *State of Madras*, AIR 1968 SC 1012 : (1968) 2 SCR 786; *State of A.P.* v. *P. Sagar*, AIR 1968 SC 1379 : (1968) 3 SCR 595; *A. Peeriakaruppan (Minor)* v. *State of T.N.*, (1971) 1 SCC 38; *State of A.P.* v. *U.S.V. Balram*, (1972) 1 SCC 660; *Janki Prasad Parimoo* v. *State of J&K*, (1973) 1 SCC 420 : 1973 SCC (L&S) 217; *State of Kerala* v. *N.M. Thomas*, (1976) 2 SCC 310 : 1976 SCC (L&S) 227; *State of U.P.* v. *Pradip Tandon*, (1975) 1 SCC 267; *Akhil Bharatiya Soshit Karamchari Sangh (Railway)* v. *Union of India*, (1981) 1 SCC 246 : 1981 SCC (L&S) 50; *B. Venkataramana* v. *State of Madras*, AIR 1951 SC 229 : (1951) 1 MLJ 625, *referred to*

Narayan Vasudev Phadke v. *Emperor*, AIR 1940 Bom 379, *cited*

Classification on the basis of castes in the long run has tendency of inherently becoming pernicious. Therefore, the test of reasonableness has to apply. When the object is elimination of castes and not perpetuation to achieve the goal of casteless society and a society free from discrimination of caste, judicial review within the permissible limits is not ruled out. But at the same time compelling State interest can be considered while assessing backwardness. The impact of poverty on backwardness cannot be lost sight of. Economic liberation and freedom are also important. (Para 328)

A periodic revision of the Backward Class lists by the Central Government is a statutory mandate. The petitioners have highlighted that there is no exclusion and on the other hand there has been inclusion. It needs no emphasis that if ultimately and indisputably the constitutional goal is the casteless and classless

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Per Pasayat and Thakker, JJ. *(contd.)*

society, there has to be more effective implementation of the National Commission for Backward Classes Act, 1993. The exercise required to be undertaken under Section 11 of the said Act is not intended to be a routine exercise and also not an exercise in futility. It has to be not only effective but also result oriented. One thing needs to be noted here. Concrete data about the number of backward classes in the country does not appear to be available. The survey conducted by the National Sample Survey reveals that the percentage is not 52% as is highlighted by the respondents. (Paras 309 and 310)

The National Commission for Backward Classes Act, 1993 in order to be wholly functional mandates determination by the Central Government of the backward classes for whom the statute is intended. Undisputedly, such determination has not been done. The plea of the respondents is that for more than half a century enough attention has not been given for the benefit of the Other Backward Classes in the matter of admissions to higher educational institutions. That cannot be a ground to act with hurry and with undetermined data. It may be as rightly contended by the respondents that the percentage can certainly be not less than 27%. But that is no answer to the important question as to the identity test. (Para 312)

The Constitution of India is not intended to be static. It is by its very nature dynamic. It is a living and organic thing. It is an instrument which has greatest value to be construed. *Ut res valeat potius quam pereat* (the construction should be preferred which makes the machinery workable). Our Constitution reflects the beliefs and political aspirations of those who had framed it. It is therefore desirable that while considering the question as to whether 27% fixed for the Other Backward Classes is to be maintained without definite data the rights of those who belong to the unfortunate categories of other economic backward classes deserve to be considered, else there shall be no definite determination of number of Other Backward Classes. While fixing the measure for creamy layer it would not be difficult also to fix the norms for the socially and economically backward classes, rather the latter exercise would be easier to undertake. (Para 334)

There has to be proper identification of Other Backward Classes (OBCs). For identifying backward classes, the Commission set up pursuant to the directions of the Supreme Court in *Indra Sawhney case*, 1992 Supp (3) SCC 217, has to work more effectively and not merely decide applications for inclusion or exclusion of castes. A notification should be issued by the Union of India. This can be done only after exclusion of the creamy layer for which necessary data must be obtained by the Central Government from the State Governments and Union Territories. Such notification is open to challenge on the ground of wrongful exclusion or inclusion. Norms must be fixed keeping in view the peculiar features in different States and Union Territories. [Paras 358(4) and (5)]

Indra Sawhney v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385, *clarified* and *followed*

Per Raveendran, J.

Identification of Other Backward Classes solely on the basis of caste will be unconstitutional. A caste can be the starting point for determination of backwardness. But it is clear from *Indra Sawhney*, 1992 Supp (3) SCC 217, that caste itself is not the final destination, that is, a caste by itself, cannot be determinative of social and educational backwardness. (Paras 650 and 664)

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Per Raveendran, J. *(contd.)*

I agree that the petitions shall stand disposed of in the manner stated by Balakrishnan, C.J. (Paras 647 and 667)

Indra Sawhney v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385; *M.R. Balaji* v. *State of Mysore*, AIR 1963 SC 649 : 1963 Supp (1) SCR 439; *R. Chitralekha* v. *State of Mysore*, AIR 1964 SC 1823 : (1964) 6 SCR 368; *State of A.P.* v. *P. Sagar*, AIR 1968 SC 1379 : (1968) 3 SCR 595; *Janki Prasad Parimoo* v. *State of J&K*, (1973) 1 SCC 420 : 1973 SCC (L&S) 217; *State of Kerala* v. *N.M. Thomas*, (1976) 2 SCC 310 : 1976 SCC (L&S) 227, *followed*

A. Peeriakaruppan (Minor) v. *State of T.N.*, (1971) 1 SCC 38; *P. Rajendran (Minor)* v. *State of Madras*, AIR 1968 SC 1012 : (1968) 2 SCR 786, *explained* and *followed*

K.C. Vasanth Kumar v. *State of Karnataka*, 1985 Supp SCC 714, *held, limited*

Per Bhandari, J.

The Supreme Court has interpreted "backward classes" to include caste as one of the criteria of classification under Article 16(4). Caste falls under class according to *Indra Sawhney case*, 1992 Supp (3) SCC 217, paras 859(3)(*a*) and (*b*). If 49.5% caste-based reservation was upheld in *Indra Sawhney case* for government employment, it follows that 49.5% caste-based reservation is permitted in aided educational institutions. While I am compelled by *Indra Sawhney case* to hold that the impugned legislation passes careful scrutiny with respect to reservation in aided institutions, its implementation is contingent upon the directions given in this opinion. *Indra Sawhney case* compels me to conclude that use of caste is valid. Thus, I have no choice but to uphold the impugned legislation by which the Government may still identify SEBCs, in part, by using caste. (Paras 556, 557, 580, 602 and 637)

Indra Sawhney v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385, *followed*

N. **Constitution of India — Art. 15(5) — "Socially and educationally backward classes" (SEBCs) eligible under Art. 15(5) for special provisions — Identification of — Social and educational backwardness if may be determined purely on economic criteria — Scope of economic criteria to be employed — Extent of population to be covered/quantum of reservation in case of reservation based on solely economic criteria — Easing of the identification load in case purely economic criteria are used — Negation of the (horrifying) need for a caste-based census — Advantage of the simultaneous removal of the creamy layer**

— Recommended (*per Pasayat and Thakker, JJ.*; *Bhandari, J. impliedly in concurrence*), passage of time shows that the occupational label has lost much of its significance — A blind eye cannot be turned to the poor, those covered by the all-encompassing expression "economically backward classes" — The poor have no caste — A person belonging to a higher caste should not be made to suffer for what his forefathers had done several generations back — If the creamy layer has to be excluded the economically backward classes have to be included — That would be social balancing and would be giving true meaning to the objectives of the Constitution — Social empowerment cannot be and is certainly not a measure for only socially and educationally backward classes — It also has to be for the socially and *economically* backward classes — Unless this balance, which is very delicate, is maintained, instead of lightening the society from castes or classes it will be overburdened — Timely steps in this regard will save Indian society and

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democracy from a catastrophe of collapse because of something which the Constitution wants to obliterate — Hence, to strike a constitutional balance it is necessary and desirable to earmark certain percentage of seats out of the permissible limit of 27% for socially and *economically* backward classes — Further, while considering the question as to whether the quota of 27% fixed for OBCs under S. 3 of Act 5 of 2007 is to be maintained without definite data, the rights of those who belong to the categories of other economic backward classes deserve to be considered — Further, while fixing the measure for creamy layer it would not be difficult also to fix the norms for the socially and *economically* backward classes, rather the latter exercise would be easier to undertake

— *Per Bhandari, J.*, the need for caste-based reservation has "worn-out" over time — Evidence for the proposition that caste is no longer a valid determinant of one's ability to move up in society is strong — Rather, the valid determinant is economic status — The data shows that income is a better determinant of educational achievement than caste — Therefore, economic criteria should be the sole means by which beneficiaries of special provisions under Art. 15(5) are to be identified — Economic criteria however must include occupation and landholdings, because income alone is insufficient — Using purely economic criteria would lighten the identification load, as ascertaining caste would no longer be required — The problem of too many people becoming eligible on the basis of economic criteria would only arise if reservation was made based on the group's proportion of the total population — If economic reservation were limited to a reasonable number, it could be upheld — Hence, the Government is urged that for a period of 10 years caste and other factors such as occupation/ income/property holdings or similar measures of economic power may be taken into consideration and thereafter only economic criteria should prevail

— *Per Balakrishnan, C.J.* (*disagreeing on this point*), as cautioned in *Indra Sawhney case*, 1992 Supp (3) SCC 217, backwardness should be traditional, based on occupations and their social acceptability and educational standard — Mere educational or social backwardness cannot be sufficient as it would enlarge the field, thus frustrating the very purpose of the constitutional goal — The contention that many persons have shifted their traditional occupations and hence caste cannot be used even as one of the criteria for identifying SEBCs cannot be accepted — Even persons who have become doctors, engineers and lawyers continue to suffer social segregation based on caste — Education — Central Educational Institutions (Reservation in Admission) Act, 2006 (5 of 2007) — Ss. 2(g) and 3

Per Balakrishnan, C.J.

In *Indra Sawhney case*, 1992 Supp (3) SCC 217, the majority held that the ideal and wise method would be to mark out various occupations, which on the lower level in many cases amongst Hindus would be their caste itself and find out their social acceptability and educational standard, weigh them in the balance of economic conditions, and the result would be backward class of citizens needing a genuine protective umbrella. And after having adopted occupation as the starting point the next point should be to ascertain their social acceptability. A person carrying on scavenging becomes an untouchable whereas others who were as low in the social strata as untouchables became depressed. The Court has

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Per Balakrishnan, C.J. *(contd.)*

cautioned that the backwardness should be traditional. Mere educational or social backwardness would not have been sufficient as it would enlarge the field thus frustrating the very purpose of the constitutional goal. It was pointed out that after applying these tests, the economic criteria or the means test should be applied since poverty is the prime cause of all backwardness as it generates social and educational backwardness. (Para 146)

The petitioners contended that caste cannot be used even as one of the criteria for identifying SEBCs as many persons have shifted their traditional occupations and have become doctors, engineers and lawyers. But these are only a few cases and even such persons continue to suffer social segregation based on caste. Caste plays an important role in determining the backwardness of the individual. In society, social status and standing depend upon the nature of the occupation followed. (Paras 147 and 148)

Per Pasayat and Thakker, JJ.

Classifications on the basis of castes in the long run has tendency of inherently becoming pernicious. Therefore, the test of reasonableness has to apply. When the object is elimination of castes and not perpetuation to achieve the goal of casteless society and a society free from discrimination of caste, judicial review within the permissible limits is not ruled out. But at the same time compelling State interest can be considered while assessing backwardness. The impact of poverty on backwardness cannot be lost sight of. Economic liberation and freedom are also important. (Para 328)

Poverty knows no caste. Poor has no caste. It is an unfortunate class. It is a matter of common knowledge that the institution of caste is a peculiarity of Indian institution when there is considerable controversy amongst the scholars as to how the caste system originated in this country. At some point of time occupation was the background for determination of castes. Maybe, at some point of time it depended on the income of the individual. But it appears to have taken a disastrous turn with difference of status of various castes leading to social inequality. But passage of time shows that the occupational label has lost much of its significance. But at the same time the poor and downtrodden who belong to the caste of their own were the founders of poor. (Para 312)

In *Indra Sawhney case* with reference to the Office Memorandum which provides for preference in favour of "poorer sections" over other members of the backward classes, the expression was held to be relatable to those who are socially and economically more backward. The use of the word "poorer" in the context was held to be a measure of the social backwardness. It is therefore unmistakably recognised that economic backwardness is a factor which can never be lost sight of. (Para 316)

One must take life in one's stride, let today embrace the past with remembrance and the future with longing. Don't look for the path far away, the path exists under your feet. What is past and what cannot be prevented should not be grieved for. (Paras 313 to 315)

A Nelson eye cannot be turned to the poor, those covered by all-encompassing expression "economically backward classes". This class of people cannot be kept out of the mainstream of governmental priorities and policies because they belong to a particular caste. The poor have no caste. A person belonging to a higher caste should not be made to suffer for what his forefathers had done several generations back. (Para 317)

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Per Pasayat and Thakker, JJ. *(contd.)*

The haves and the have nots have to coexist. If the creamy layer has to be excluded the economically backward classes have to be included. That would be social balancing and that would be giving true meaning to the objectives of the Constitution. Social empowerment cannot be and is certainly not a measure for only socially and educationally backward classes. It also has to be for the socially and *economically* backward classes. Unless this balance, which is very delicate, is maintained, the system inevitably will develop a crack and this crack may after a certain point of time be difficult to be joined. Instead of lightening the society from castes or classes it will be overburdened and a point of time may come when we shall not be able to bear the burden any further. Timely steps in this regard will save the Indian society and democracy from a catastrophe of collapse because of something which the Constitution wants to obliterate.

(Para 319)

The Constitution of India is not intended to be static. It is by its very nature dynamic. It is a living and organic thing. It is an instrument which has greatest value to be construed. *Ut res valeat potius quam pereat* (the construction should be preferred which makes the machinery workable). Our Constitution reflects the beliefs and political aspirations of those who had framed it. It is therefore desirable that while considering the question as to whether 27% fixed for the Other Backward Classes is to be maintained without definite data the rights of those who belong to the unfortunate categories of other economic backward classes deserve to be considered, else there shall be no definite determination of number of Other Backward Classes. While fixing the measure for creamy layer it would not be difficult also to fix the norms for the socially and *economically* backward classes, rather the latter exercise would be easier to undertake.

(Para 334)

To strike the constitutional balance it is necessary and desirable to earmark certain percentage of seats out of permissible limit of 27% for socially and *economically* backward classes. [Paras 357 and 358(6)]

K.S. Jayasree v. *State of Kerala*, (1976) 3 SCC 730, *relied on*

R. Chitralekha v. *State of Mysore*, AIR 1964 SC 1823 : (1964) 6 SCR 368, *cited*

William Cobbett: *Advice to Young Men*, *referred to*

Per Bhandari, J.

Chinnappa Reddy, J.'s view in *K.C. Vasanth Kumar case*, 1985 Supp SCC 714, that caste can be a factor in identifying SEBCs, as upheld in *Indra Sawhney case*, 1992 Supp (3) SCC 217, should not hold the day forever. Instead, the view of Desai, J. in *K.C. Vasanth Kumar case* should be revived. Desai, J. wanted to achieve two goals with one fell swoop of the pen. To these ends, he would have applied economic criteria to remove the creamy layer and simultaneously rid reservation of caste. Had his opinion prevailed (*1*) the creamy layer would have been removed ensuring that the truly deserving get the benefit, and (*2*) the casteless society would have been furthered. (Paras 588, 589, 599 and 602)

Constituent Assembly Debates, Vol. 7, pp. 701-02 dated 30-11-1948; *Constituent Assembly Debates*, Vol. 10, p. 978 on 25-11-1949, *referred to*

No one can say with certainty what percentage of the population is OBC, yet the Government is content with giving OBCs 27% of the seats in universities. It is not known what proportion of the population is OBC because the census does not count OBCs. It has been the Central Government policy practically since

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Per Bhandari, J. *(contd.)*

Independence to avoid the question. Taking an OBC census is horrifying because it encourages the Government to enact policy on the basis of caste. Doing so only furthers the caste divide, contrary to our constitutional aim. This has been recognised since 1950. If the Central Governments have consistently rejected an OBC census because it would promote casteism, how can this Central Government make reservation on the same ground? It is one thing to ask a citizen his caste, it is even worse to grant or reject his college application on that ground. The Government is between a rock and a hard place. The only way out is to use exclusively economic criteria. This would negate the need for a caste-based census while ensuring that reservation goes to the poor, the group for which Act 5 of 2007 was purportedly passed. (Paras 579 and 580)

Marc Galanter: "*Who are the OBCs?" An Introduction to a Constitutional Puzzle*, (1978) 13 Economic and Political Weekly, 1812 at p. 1824 at fn 78, *referred to*

Income is a much better determinant of educational achievement than caste. The table below was derived from the Reproductive Child and Health Survey, 2002-2004 (6 lakh households surveyed).

Average years of schooling:

	SC	OBC	Upper Caste Hindu
Poorest rural quintile	1.6	1.7	2.2
Richest rural quintile	5.1	5.5	6.1

For the upper castes, caste barely helps. These numbers indicate that it is one's income, not caste, that makes a real difference in determining how much schooling one completes. Therefore, if income be the bar to education, economic criteria should be the means by which we identify beneficiaries of special provisions under Article 15(5). Once economic criteria remove the relatively wealthy families (from all castes and communities), a "class" will remain. This "class" is known as "the poor". The class would share the same characteristic, irrespective of caste. They would all lack money. Economic criteria target the poorest of the poor, irrespective of caste. These criteria also simultaneously remove the creamy layer. (Paras 561, 591 and 584)

Economic criteria must include occupation and landholdings because income alone is insufficient. To decrease the likelihood that the undeserving evade identification, it is wise to employ more than one criterion. (Para 590)

Using purely economic criteria would lighten the identification load, as ascertaining caste would no longer be required. The respondents and others level a common criticism against the exclusive use of economic criteria. Most of the country is poor. Thus, too many people would be eligible for the benefit. This is only a problem if you hand out reservations based on the group's proportion of the total population. Such a reservation would be excessively unreasonable and would likely violate the *M.R. Balaji*, AIR 1963 SC 649, cap of 50%. If economic reservation were limited to a reasonable number, it could be upheld. (Para 597)

In addition to the problem of extending the benefit to too many, Chinnappa Reddy, J. in *K.C. Vasanth Kumar case* could not contemplate the idea of bestowing reservation on an economically poor Brahmin. But can one call a Brahmin sweeper, poor by occupation, socially forward? To do so would be a stretch. (Para 598)

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Per Bhandari, J. *(contd.)*

Caste-based reservation was initially a temporary measure that was to only last for ten years. The original Framers considered caste-based reservation a necessary evil. Thus, they limited it in time. Extending this time-limit has only exacerbated casteism. The Parliamentary Debates clearly reflect that the ultimate aim of reservation was a casteless and classless society for India. To this end, reservation should only be given for a specific period of time. If these reservations or benefits have to continue perpetually, then the basic goal of achieving casteless and classless society would never be accomplished. The need for caste-based reservation has "worn out" over time. Evidence for the proposition that caste is no longer a valid determinant of one's ability to move up in society is strong. More than the way society judges one based on caste, the relevant question is whether caste precludes one from rising. If caste does not, then what does? The answer is simple: money. (Paras 558 to 560)

If caste-based quotas in education are to stay, they should adhere to a basic tenet of secularism: they should not take caste into account. Instead, exclusively economic criteria should be used. As long as caste is a criterion, we will never achieve a casteless society. The Government is urged that for a period of ten years caste and other factors such as occupation/income/property holdings or similar measures of economic power may be taken into consideration and thereafter only economic criteria should prevail; otherwise we would not be able to achieve our constitutional goal of casteless and classless India. (Paras 637, 590 and 605)

K.C. Vasanth Kumar v. *State of Karnataka*, 1985 Supp SCC 714, *discussed* and *relied on*

V.V. Giri v. *D. Suri Dora*, AIR 1959 SC 1318 : (1960) 1 SCR 426; *State of Kerala* v. *N.M. Thomas*, (1976) 2 SCC 310 : 1976 SCC (L&S) 227; *Akhil Bharatiya Soshit Karamchari Sangh (Railway)* v. *Union of India*, (1981) 1 SCC 246 : 1981 SCC (L&S) 50; *M.R. Balaji* v. *State of Mysore*, AIR 1963 SC 649 : 1963 Supp (1) SCR 439, *relied on*

Indra Sawhney v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385, opinion of Kuldip Singh, J., *referred to*

O. Education — Central Educational Institutions (Reservation in Admission) Act, 2006 (5 of 2007) — Ss. 3 and 2(g) — Reservation of 27% seats for OBCs in State-aided institutions under — Absence of time-limit for expiry of — Effect on validity of Act 5 of 2007 — Periodic review of backward class lists — Need for — Scope of judicial review

— Held (*per curiam*), Act 5 of 2007 is not invalid for the reason that there is no time-limit prescribed for its operation but majority of the Judges are of the view that the review should be made as to the need for continuance of reservation at the end of 5 years

— *Per Balakrishnan, C.J.*, it is the constitutional duty of Parliament to review the situation as and when social conditions require — There is also the safeguard of judicial review and the court can say that the affirmative action has carried out its mission and is thus no longer required — Thus, there could be a periodic review after a period of 10 years

— *Per Pasayat and Thakker, JJ.*, there has to be more effective implementation of the National Commission for Backward Classes Act, 1993 — The exercise to be undertaken under S. 11 of the said 1993 Act has to be not only effective but also result oriented — The "leap" of affirmative action envisaged under S. 3 of Act 5 of 2007 has to end somewhere — It cannot hang in the air as there is nothing immortal in this world — It would therefore be rational and logical (1) to restrict operation of the impugned

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statute to a period of 10 years from its inception; (2) there must be periodic review as to the desirability of continuing operation of the statute every 5 years; and (3) a periodic revision of the backward class lists by the Central Government is a statutory mandate: the periodicity should be five years

— *Per Raveendran, J.*, a genuine measure of reservation may not be open to challenge when made — But during a period of time if the reservation is continued in spite of achieving its object the law which was valid when made may become invalid — Reservation as an affirmative action is required only for a limited period to bring forward the socially and educationally backward classes by giving them a gentle supportive push — But if there is no review of caste-based reservation, the country will become a caste divided society permanently — Instead of developing a united society with diversity we will end up as a fractured society forever suspicious of each other — While affirmative action is a road to equality care should be taken that the road does not become a rut in which the vehicle of progress gets entrenched and stuck — Reservation is a temporary crutch and should not become a permanent liability

— *Per Bhandari, J.*, one need not look past Parliament's affinity with extending time-limits on reservation to see that only the judiciary can put a stop to caste-based reservation — However, *Indra Sawhney case*, 1992 Supp (3) SCC 217, precludes this Bench from forcing the Government to wean itself off caste-based reservation by a certain date and only a larger Bench could make such a ruling — After a lapse of 10 years, special preference or reservation should be granted only on the basis of economic criteria as long as grave disparity and inequality persist — Constitution of India — Arts. 14, 15 and 16 — Temporal validity limit for affirmative action measures — Achievement of aims of affirmative action — Effect — Scheduled Castes, Scheduled Tribes and Other Backward Classes — National Commission for Backward Classes Act, 1993 — S. 11

Per curiam

Act 5 of 2007 is not invalid for the reason that there is no time-limit prescribed for its operation but majority of the Judges are of the view that the review should be made as to the need for continuance of reservation at the end of 5 years. (Para 671)

[**Ed.**: *See also* Art. 14, '(b)(2) Temporal reasonableness—Effect of passage of time' pp. 758, et seq., in **Vol. 4**, *Complete Digest of Supreme Court Cases*, 2nd Edn. and the recently decided landmark case of *Satyawati Sharma* v. *Union of India*, (2008) 5 SCC 287, Shortnote *B*.]

Per Balakrishnan, C.J.

At the outset, it may not be possible to fix a time-limit or a period of time. Depending upon the result of the measures and improvements that have taken place in the status and educational advancement of the socially and educationally backward classes of citizens, the matter could be examined by Parliament at a future time but that cannot be a ground for striking down a legislation. After some period if it so happens that any section of the community gets an undue advantage of the affirmative action then such community can very well be excluded from such Affirmative Action Programme. Parliament can certainly review the situation and even though a specific class of citizens is in the legislation it is the constitutional duty of Parliament to review such affirmative action as and when the social conditions require. There is also the safeguard of judicial review and the court can exercise its powers of judicial review and say that the affirmative action has carried out its mission and is thus no longer

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Per Balakrishnan, C.J. *(contd.)*

required. In the case of reservation of 27% for backward classes there could be a periodic review after a period of 10 years and Parliament could examine whether the reservation has worked for the good of the country. Therefore, Act 5 of 2007 is not invalid for the reason that there is no time-limit prescribed for its operation, but a review can be made after a period of 10 years. (Paras 213, 214 and 231)

Per Pasayat and Thakker, JJ.

One of the grey areas focused on by the petitioners and the respondents is the ever perplexing question "how long". Admittedly, there is no deletion from the list of Other Backward Classes. It goes on increasing. The respondents have stated that in large number of cases where applications were made for inclusion they have been turned down. But that is no answer to the question as to why and how there has been no exclusion. If it is true, as contended by the respondents that backwardness has increased instead of decreasing, then one is bound to raise eyebrows as to the effectiveness of providing reservations or quotas. (Para 277)

The ultimate objective is to bring people to a particular level so that there can be equality of opportunity. In that context, one has to keep in view the justice and redress principles. There should not be mere equality in law but equality in fact. (Paras 278 and 279)

A periodic revision of the Backward Class lists by the Central Government is a statutory mandate. The petitioners have highlighted that there is no exclusion and on the other hand there has been inclusion. It needs no emphasis that if ultimately and indisputably the constitutional goal is the casteless and classless society, there has to be more effective implementation of the National Commission for Backward Classes Act, 1993. The exercise required to be undertaken under Section 11 of the said Act is not intended to be a routine exercise and also not an exercise in futility. It has to be not only effective but also result oriented. One thing needs to be noted here. Concrete data about the number of backward classes in the country does not appear to be available. The survey conducted by the National Sample Survey reveals that the percentage is not 52% as is highlighted by the respondents. (Paras 309 and 310)

The National Commission for Backward Classes Act, 1993 in order to be wholly functional mandates determination by the Central Government of the backward classes for whom the statute is intended. Undisputedly, such determination has not been done. (Para 312)

The respondents have stated that the measures under challenge are nothing but a much needed leap towards attainment of the objectives. If it is true, the leap has to end somewhere. It cannot hang in the air as there is nothing immortal in this world; much less, a progressive measure purportedly intended to benefit the Other Backward Classes. If after nearly six decades the objectives have not been achieved, necessarily the need for its continuance warrants deliberations. It is to be noted that some of the provisions were intended to be replaced after a decade but have continued. It indirectly shows that backwardness appears to have purportedly increased and not diminished. It would therefore be rational and logical to (*1*) restrict operation of the impugned statute for a period of 10 years from its inception; (*2*) there must be periodic review as to the desirability of continuing operation of the statute: this shall be done once in every 5 years; and

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Per Pasayat and Thakker, JJ. *(contd.)*

(*3*) there has to be periodic review of the classes who can be covered by the statute: the periodicity should be 5 years. [Paras 281, 357 and 358(2)]

Indra Sawhney v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385; *M.R. Balaji* v. *State of Mysore*, AIR 1963 SC 649 : 1963 Supp (1) SCR 439; *K.C. Vasanth Kumar* v. *State of Karnataka*, 1985 Supp SCC 714; *Motor General Traders* v. *State of A.P.*, (1984) 1 SCC 222, *relied on*

State of Kerala v. *N.M. Thomas*, (1976) 2 SCC 310 : 1976 SCC (L&S) 227; *GM, Southern Railway* v. *Rangachari*, AIR 1962 SC 36 : (1962) 2 SCR 586, *cited*

Bhaiyalal Shukla v. *State of M.P.*, AIR 1962 SC 981 : 1962 Supp (2) SCR 257; *M.K. Prithi Rajji* v. *State of Rajasthan*, Civil Appeal No. 327 of 1956 decided on 2-11-1960; *State of M.P.* v. *Gwalior Sugar Co. Ltd.*, Civil Appeals Nos. 98 & 99 of 1957 decided on 30-11-1960, *cited*

Oversight Committee Report, *referred to*

Per Raveendran, J.

Reservation as an affirmative action is required only for a limited period to bring forward the socially and educationally backward classes by giving them a gentle supportive push. But if there is no review after a reasonable period and if reservation is continued, the country will become a caste divided society permanently. Instead of developing a united society with diversity, we will end up as a fractured society forever suspicious of each other. While affirmative discrimination is a road to equality, care should be taken that the road does not become a rut in which the vehicle of progress gets entrenched and stuck. Any provision for reservation is a temporary crutch. Such crutch by unnecessary prolonged use, should not become a permanent liability. (Para 666)

The Act is not invalid merely because no time-limit is prescribed for caste-based reservation, but preferably there should be a review after 10 years to take note of the change of circumstances. A genuine measure of reservation may not be open to challenge when made. But during a period of time, if the reservation is continued in spite of achieving the object of reservation, the law which was valid when made, may become invalid. (Para 651)

Per Bhandari, J.

One need not look past Parliament's affinity with extending time-limits on reservation to see that only the judiciary can put a stop to caste-based reservation. History has shown that it is not politically feasible for Parliament to say "no" to reservation—especially when caste is involved. However, the impugned legislation is not invalid as it fails to set a time-limit for caste-based reservation. *Indra Sawhney case*, 1992 Supp (3) SCC 217, precludes this Bench from forcing the Government to wean itself off caste-based reservation by a certain date and only a larger Bench could make such a ruling. A larger Bench could certainly hold that only economic criteria could be used to identify SEBCs and that it should be done by a certain date. In order to achieve a casteless and classless society, after a lapse of 10 years, special preference or reservation should be granted only on the basis of economic criteria as long as grave disparity and inequality persist. (Paras 601, 602, 625, 564 and 565)

Indra Sawhney v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385, *followed*

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P. **Constitution of India — Arts. 14, 15 and 16 — Reservation of 27% seats for OBCs in State-aided institutions under S. 3 r/w S. 2(g) of Act 5 of 2007 — Exclusion of the "creamy layer" from a caste when SEBCs are determined by giving importance to caste — Mandatory requirement of — Reasons therefor, discussed in detail**

— Shortage of "non-creamy" SEBC candidates in case of exclusion of the creamy layer — Irrelevance of [*See also* Shortnote *YD*, below]

— Held (*per curiam*), following *Indra Sawhney case*, 1992 Supp (3) SCC 217, the "creamy layer" is to be excluded from a caste deemed to be an SEBC — The "Other Backward Classes" defined in S. 2(g) of Act 5 of 2007 is to be read as "socially and educationally backward classes" other than SCs and STs, determined as "Other Backward Classes" by the Central Government and if such determination is with reference to caste, it shall exclude the "creamy layer" from among such caste

— *Per Balakrishnan, C.J.*, when socially and educationally backward classes are determined by giving importance to caste, the segment of that caste that is economically advanced does not deserve any sort of reservation for further progress in life — They are socially and educationally advanced enough to compete for the general seats along with other candidates — All the reasonings set out in *Indra Sawhney case* with respect to the exclusion of the "creamy layer" from the benefit of reservation under Art. 16(4) are equally applicable to reservation or any special action contemplated under Art. 15(5) — The contention is rejected that if the "creamy layer" is excluded there may practically be no representation for a particular backward class in educational institutions because the remaining members, namely, the non-creamy layer, may not have risen to the level or standard necessary to qualify or get admission even within the reserved quota

— *Per Pasayat and Thakker, JJ.*, non-exclusion of the creamy layer cannot be countenanced — By inclusion of the creamy layer a fresh lease of life is given to those who should have been left out — Their continuance would mean keeping the weakest amongst the weak always weak and leaving the fortunate ones to enjoy the benefits

— *Per Raveendran, J.*, when *Indra Sawhney case* has held that the creamy layer should be excluded for purposes of Art. 16(4), dealing with "backward class" which is much wider than "socially and educationally backward class" occurring in Arts. 15(4) and 15(5), it goes without saying that without the removal of the creamy layer there cannot be a socially and educationally backward class — Hence failure to exclude the creamy layer from the benefits of reservation would render the reservation for OBCs under Act 5 of 2007 unconstitutional

— *Per Bhandari, J.*, the benefits of reservation must be delivered to only those who really deserve them — This can only be done if we remove the creamy layer — In *Indra Sawhney case*, it has been aptly observed that reservation is given to backward classes until they cease to be backward, and not indefinitely — If either condition (social or educational backwardness) goes unmet, one cannot qualify for the benefit of reservation as SEBC — Being socially advanced, the creamy layer is not socially backward — Creamy layer inclusion robs the poor and gives to the rich — With the creamy layer excluded, poor OBCs would compete with poor OBCs: the playing field levelled — Further, the contention that exclusion of

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the creamy layer would lead to shortage of candidates who can afford to pay for higher education cannot be accepted, firstly since this does not seem to be borne out by the data, and secondly, this argument is self-defeating: if the creamy layer gets most of the benefit of reservation, why have reservations in the first place? — Before carrying out constitutional amendments the Union of India must clearly target its beneficiaries — The law should not be made first and the beneficiaries targeted only thereafter — Lastly, exclusion of the creamy layer does not violate the group rights of the classes sought to be benefited by Art. 15(5) for the group must contain only those individuals that belong to the group — Education — Central Educational Institutions (Reservation in Admission) Act, 2006 (5 of 2007) — Ss. 3 and 2(g)

Q. **Constitution of India — Arts. 14, 15 & 16 and 368 — Reservation of 27% seats for OBCs in State-aided institutions under S. 3 r/w S. 2(g) of Act 5 of 2007 — Non-exclusion of creamy layer if violates the basic structure of the Constitution**

— Held (*per Pasayat and Thakker, JJ.* and *Bhandari, J.*), non-exclusion of the creamy layer and forward castes from the list of backward classes will not only breach Art. 14 but also violate the basic structure of the Constitution — *Per Bhandari, J.*, the creamy layer must be excluded from the Constitution (Ninety-third Amendment) [as far as SEBCs/OBCs are concerned; no opinion expressed on exclusion of creamy layer amongst SCs and STs: *see* Shortnote *YE*, below] — Not even Parliament, *by constitutional amendment*, could dismantle the basic structure by including the creamy layer in reservation — Hence, the implied inclusion of the creamy layer amongst SEBCs/OBCs in Art. 15(5) is severed

R. **Constitution of India — Arts. 14, 15 and 16 — Exclusion of the "creamy layer" when providing reservation to SEBCs/OBCs by giving importance to caste — Nature of the principle — *Per Balakrishnan, C.J.*, the "creamy layer" principle is applied not as a general principle of equality or reservation but only as a principle of identifying the socially and educationally backward class — *Per Raveendran, J.*, a caste can be identified to be socially and economically backward, only when the creamy layer is removed from the caste and a compact class emerges — The determination is not by first identifying a caste as an SEBC and, thereafter, to remove or exclude the creamy layer for the purpose of bestowing benefits flowing to such class — *Per Bhandari, J.*, the principle of creamy layer emanates from the broad doctrine of equality itself — *Pasayat and Thakker, JJ.*, expressing no opinion on this point**

S. **Constitution of India — Arts. 368 and 15(5) — Severing of part of constitutional amendment found to be in violation of the basic structure — Test of severability applied to implied inclusion of the creamy layer [amongst OBCs] in Art. 15(5) as the same violated the basic structure of the Constitution (*per Bhandari, J.*; *Pasayat and Thakker, JJ. impliedly in concurrence*)**

T. **Constitution of India — Arts. 13(2) & 245 and 14, 15 & 16 — Doctrine of severability — Applicability — Severing of the creamy layer from the benefit of reservation conferred on SEBCs under S. 3 of Act 5 of 2007 — Test of severability applied to definition of OBCs in S. 2(g) of Act 5 of 2007 (*per curiam*)**

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U. **Constitution of India — Arts. 15(5) & (4) and 16(4) — Nature of right conferred under — Group or class based rather than being individual based — *Per Pasayat and Thakker, JJ.,* in *Indra Sawhney case*, 1992 Supp (3) SCC 217, it has been held that individual surveys as to backwardness are out of the question since Art. 16(4) speaks of class protection and not individual protection — *Per Bhandari, J.,* exclusion of the creamy layer from a caste identified as an SEBC is consistent with the group rights of the group sought to be benefited by Art. 15(5) — Jurisprudence**

V. **Constitution of India — Arts. 16(4) and 15(4) & (5) — Relative scope of "backward class" occurring in Art. 16(4) and "socially and educationally backward class" occurring in Arts. 15(4) and (5) — *Per Raveendran, J.*, the latter is wider than the former**

Per curiam

Act 5 of 2007 is constitutionally valid subject to the definition of "Other Backward Classes" in Section 2(*g*) of Act 5 of 2007 being clarified as follows: if the determination of "Other Backward Classes" by the Central Government is with reference to a caste, it shall exclude the "creamy layer" among such caste. (Para 669)

Per Balakrishnan, C.J.

When socially and educationally backward classes are determined by giving importance to caste, it shall not be forgotten that a segment of that caste is economically advanced and they do not require the protection of reservation. It has been noticed in *Indra Sawhney case*, 1992 Supp (3) SCC 217 that among the backward class, a section of the backward class is a member of the affluent section of society. They do not deserve any sort of reservation for further progress in life. They are socially and educationally advanced enough to compete for the general seats along with other candidates. (Paras 165 and 168)

It may be noted that the "creamy layer" principle is applied not as a general principle of reservation. It is applied for the purpose of identifying the socially and educationally backward class. One of the main criteria for determining SEBC is poverty. Thus, the "creamy layer" principle is introduced merely to exclude a section of a particular caste on the ground that they are economically advanced or educationally forward. They are excluded because unless this segment of caste is excluded from that caste group, there cannot be proper identification of the backward class. If the "creamy layer" principle is not applied, it could easily be said that all the castes that have been included among the socially and educationally backward classes have been included exclusively on the basis of caste. Identification of SEBC for the purpose of either Articles 15(4), 15(5) or 16(4) solely on the basis of caste is expressly prohibited by various decisions of the Supreme Court and it is also against Article 15(1) and Article 16(1) of the Constitution. To fulfil the conditions and to find out truly what is socially and educationally backward class, the exclusion of "creamy layer" is essential. (Paras 170 and 171)

Moreover, Articles 15(4) and 15(5) are designed to provide opportunities in education thereby raising educational, social and economical levels of those who are lagging behind and once this progress is achieved by this section, any legislation passed thereunder should be deemed to have served its purpose. By excluding those who have already attained economic well-being or educational advancement, the special benefits provided under these clauses cannot be further extended to them and, if done so, it would be unreasonable, discriminatory or arbitrary, resulting in reverse discrimination. (Para 171)

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Per Balakrishnan, C.J. *(contd.)*

Lastly, the majority in *Indra Sawhney case* upheld the exclusion of "creamy layer" for the purpose of reservation in Article 16(4). Therefore, this Bench is bound by the larger Bench decision of the Supreme Court in *Indra Sawhney case* and it cannot be said that the "creamy layer" principle cannot be applied for identifying SEBCs. All the reasonings set out in *Indra Sawhney case* in respect of the exclusion of the "creamy layer" from the benefit of reservation under Article 16(4) are equally applicable to the reservation or any special action contemplated under Article 15(5). Therefore, it cannot be accepted that if the "creamy layer" is excluded, there may be practically no representation for a particular backward class in educational institutions because the remaining members, namely, the non-creamy layer, may not have risen to the level or standard necessary to qualify to get admission even within the reserved quota. If the creamy layer is not excluded, the identification of SEBC will not be complete and any SEBC without the exclusion of "creamy layer" may not be in accordance with Article 15(1) of the Constitution. (Paras 171 and 173)

Hence, "creamy layer" is to be excluded from SEBCs. The identification of SEBCs will not be complete and without the exclusion of "creamy layer" such identification may not be valid under Article 15(1) of the Constitution. The "Other Backward Classes" defined in Section 2(*g*) of Act 5 of 2007 is to be read as "Socially and Educationally Backward Classes" other than Scheduled Castes and Scheduled Tribes, determined as "Other Backward Classes" by the Central Government and if such determination is with reference to caste, it shall exclude "creamy layer" from among such caste. (Paras 176, 226 and 234)

Indra Sawhney v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385, *applied*

Indra Sawhney v. *Union of India*, (2000) 1 SCC 168 : 2000 SCC (L&S) 1, *cited*

Per Pasayat and Thakker, JJ.

It has been rightly observed in *Indra Sawhney case*, (2000) 1 SCC 168, whether creamy layer is not excluded or whether forward castes get included in the list of backward classes, the position would be the same and there will be breach not only of Article 14 but of the basic structure of the Constitution. Non-exclusion of the creamy layer or inclusion of forward castes in the lists of backward classes will be totally illegal. The illegality offends the roots and foundation of the Constitution and cannot be allowed to be perpetuated. (Para 295)

Non-exclusion of the creamy layer for the purpose of admission to the educational institutions cannot be countenanced. It is inconceivable that a person who belongs to the creamy layer is socially and educationally backward. The backward status vanishes when somebody becomes part of the creamy layer. The benefits of reservation are snatched away by the top creamy layer of the backward classes and this has to be avoided at any cost. By inclusion of the creamy layer a fresh lease of life is given to those who should have been left out. Their continuance would mean keeping weakest amongst the weak always weak and leaving the fortunate ones to enjoy the benefits. If the ultimate aim is a casteless and classless society in line with the dream of the Constitution-framers that has to be chewed out. If the caste system as we know is an anachronism, then it must go. There is a feeling and it cannot be said without reason that reservation hits at the root of this belief and instead of its obliteration there is perceivable perpetuation. It is true that obliteration cannot be done immediately

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Per Pasayat and Thakker, JJ. *(contd.)*

or within a short span of time but that is no answer to the lack of seriousness in seeking obliteration. (Paras 297 and 298)

Hence, for implementation of the impugned statute creamy layer must be excluded. [Paras 357 and 358(1)]

Indra Sawhney v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385; *Indra Sawhney* v. *Union of India*, (2000) 1 SCC 168 : 2000 SCC (L&S) 1; *Indira Sawhney* v. *Union of India*, (1996) 6 SCC 506 : 1996 SCC (L&S) 1477; *Nair Service Society* v. *State of Kerala*, (2007) 4 SCC 1; *State of Kerala* v. *N.M. Thomas*, (1976) 2 SCC 310 : 1976 SCC (L&S) 227; *K.C. Vasanth Kumar* v. *State of Karnataka*, 1985 Supp SCC 714, *followed*

R.M.D. Chamarbaugwalla v. *Union of India*, AIR 1957 SC 628 : 1957 SCR 930; *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225; *Sajjan Singh* v. *State of Rajasthan*, AIR 1965 SC 845; *Kihoto Hollohan* v. *Zachillhu*, 1992 Supp (2) SCC 651, *relied on*

Attorney General for Ontario v. *Reciprocal Insurers*, 1924 AC 328; *Citizens Insurance Co. of Canada* v. *Parsons*, (1881) 7 AC 96 : (1881-85) All ER Rep 1179; *Union Colliery Co. of British Columbia Ltd.* v. *Bryden*, 1899 AC 580 (PC); *Great West Saddlery Co.* v. *R.*, (1921) 2 AC 91 : 1921 All ER Rep 605 (PC); *Shankari Prasad Singh Deo* v. *Union of India*, AIR 1951 SC 458 : 1952 SCR 89; *Attorney General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co. Ltd.*, 1914 AC 237 (PC); *Attorney General for Alberta* v. *Attorney General for Canada*, 1947 AC 503 (PC); *Hindu Women's Rights to Property Act, In re*, 1941 FCR 12; *State of Bombay* v. *United Motors (India) Ltd.*, AIR 1953 SC 252 : 1953 SCR 1069; *Punjab Province* v. *Daulat Singh*, 1946 FCR 1; *Romesh Thappar* v. *State of Madras*, AIR 1950 SC 124 : 1950 SCR 594; *Chintaman Rao* v. *State of M.P.*, AIR 1951 SC 118 : 1950 SCR 759; *Indra Sawhney* v. *Union of India*, (1995) 5 SCC 429, *cited*

In para 782 of *Indra Sawhney case*, 1992 Supp (3) SCC 217, it has been stated that individual survey is out of question since Article 16(4) speaks of class protection and not individual protection. (Para 349)

Indra Sawhney v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385, *followed*

Per Raveendran, J.

Failure to exclude the "creamy layer" from the benefits of reservation would render the reservation for Other Backward Classes under Act 5 of 2007 unconstitutional; and Act 5 of 2007 providing for reservation for Other Backward Classes will however be valid if the definition of "Other Backward Classes" is clarified to the effect that if the identification of Other Backward Classes is with reference to any caste considered as socially and economically backward, "creamy layer" of such caste should be excluded. (Para 650)

A caste can be identified to be socially and economically backward, only when the creamy layer is removed from the caste and a compact class emerges which can be identified as a socially and educationally backward class. Thus, the determination is not by first identifying a caste as a socially and educationally backward class and, thereafter, to remove or exclude the creamy layer for the purpose of bestowing the benefits flowing to such class. On the other hand, until and unless the creamy layer is removed from a caste, there is no compact class which can be termed as socially and educationally backward class at all. Thus, while the process of identifying socially and educationally backward class can conveniently start with a socially and educationally backward caste, removing the creamy layer therefrom results in the emergence of compact class which can be termed as a socially and educationally backward class. If the creamy layer is not excluded the benefit of reservation will be appropriated by such advanced sections. (Para 664)

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Per Raveendran, J. *(contd.)*

When *Indra Sawhney case*, 1992 Supp (3) SCC 217, has held that creamy layer should be excluded for purposes of Article 16(4), dealing with "backward class" which is much wider than "socially and educationally backward class" occurring in Articles 15(4) and (5), it goes without saying that without the removal of creamy layer there cannot be a socially and educationally backward class. Therefore, when a caste is identified as a socially and educationally backward caste, it becomes a "socially and educationally backward class" only when it sheds its creamy layer. (Para 665)

Indra Sawhney v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385, *explained* and *followed*

Ashoka Kumar Thakur v. *State of Bihar*, (1995) 5 SCC 403 : 1995 SCC (L&S) 1248 : (1995) 31 ATC 159; *Indira Sawhney* v. *Union of India*, (1996) 6 SCC 506 : 1996 SCC (L&S) 1477; *M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212, *followed*

M.R. Balaji v. *State of Mysore*, AIR 1963 SC 649 : 1963 Supp (1) SCR 439; *R. Chitralekha* v. *State of Mysore*, AIR 1964 SC 1823 : (1964) 6 SCR 368; *K.C. Vasanth Kumar* v. *State of Karnataka*, 1985 Supp SCC 714, *referred to*

Per Bhandari, J.

Affirmative action is employed to eliminate substantive social and economic inequality by providing opportunities to those who may not otherwise gain admission or employment. Articles 14, 15 and 16 allow for affirmative action. To promote Article 14 egalitarian equality the State may classify citizens into groups giving preferential treatment to one over another. When it classifies, the State must keep those who are unequal out of the same batch to achieve constitutional goal of egalitarian society. (Para 373)

The benefits of reservation must be delivered to only those who really deserve them. This can only be done if we remove the creamy layer. The principle of creamy layer emanates from the broad doctrine of equality itself. Unless the creamy layer is removed from admissions and service reservation, the benefits would not reach the group in whose name the impugned legislation was passed—the poorest of the poor. Therefore, including the creamy layer would be inherently unjust. The creamy layer must never be included in any affirmative action legislation. (Paras 366 and 378)

It becomes imperative to gather the original Framers' and the Members of the First Parliament's intention. Members of the Constituent Assembly and the First Parliament were one and the same. But the distinction is necessary to the extent that the First Parliament deviated from its constitutional philosophy. The First Parliament believed that "economic" was included in the "social" portion of "socially and educationally backward". Had it not been for a desire to achieve symmetry in drafting between the words occurring in Article 340 and the proposed Article 15(4), only "economically" would have been included. Had this been done, the creamy layer would have been excluded *ab initio*. The Framers were worried about creamy layer inclusion, albeit under a different name. They wanted to ensure that the "richest of the (backward) lot" would not benefit from special provisions. With their sentiment on our side, we are even more confident that we should strike out in the direction that strikes down laws that include the creamy layer. (Paras 378 to 380)

Parliamentary Debates on Constitution (First Amendment) Bill, 1-6-1951, pp. 9817 and 9830, *relied on*

In *Indra Sawhney*, 1992 Supp (3) SCC 217, the Supreme Court has aptly observed that reservation is given to backward classes until they cease to be backward, and not indefinitely. Creamy layer OBCs and non-creamy layer OBCs

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Per Bhandari, J. *(contd.)*

are not equals when it comes to moving up the socio-economic ladder by means of educational opportunity. Failing to remove the creamy layer treats creamy layer OBCs and non-creamy layer OBCs as equals. It has been held that not even Parliament, *by constitutional amendment*, could dismantle the basic structure by including the creamy layer in reservation. (Paras 382, 383 and 385)

If you belong to the creamy layer, you are socially advanced and cannot be given the benefit of reservation. Once one is socially advanced, he cannot be socially and educationally backward. He who is socially forward is likely to be educationally forward as well. If either condition (social or educational) goes unmet, one cannot qualify for the benefit of reservation as SEBC. Being socially advanced, the creamy layer is not socially backward pursuant to Articles 15(4) and 15(5) of the Constitution. (Paras 391 and 392)

The problem with Act 5 of 2007 is that most of the beneficiaries will belong to the creamy layer, a group for which no benefits are necessary. By definition, the creamy and non-creamy are unequal when it comes to schooling. Relative to their non-creamy counterparts, the creamy have a distinct advantage in gaining admission. While the creamy and non-creamy are given equal opportunity to gain admission in the reserved category, this equality exists in name only. The OBC daughter of say a Minister, IAS officer or affluent business owner will attend better schools than her non-creamy counterpart. She will go to private tuitions unaffordable to her non-creamy counterpart. She will study for the all-decisive entrance exams in a coaching centre. She will probably come home from school to find a family member waiting. And when she seeks help from her parents, they are most likely educated and able to give superior assistance with school work. Judicial notice is taken of these anecdotes, for they flesh out a simple fact: she has all the resources that her non-creamy counterpart lacks. It is no surprise that she will outperform the non-creamy. On average, her lot will take the reserved seats. The OBC Minister's daughter and the non-creamy OBC cannot be considered as equals in terms of their chances at earning a university seat; nor can they be allowed to be treated equally. To lump them in the same category is an unreasonable classification. Putting them in head-to-head competition for the same seats violates the right to equality in Articles 14, 15 and 16. (Paras 371, 386 to 388)

The statistics indicate that the failure to exclude the creamy layer ultimately leads to a situation in which deserving students are excluded. Creamy layer inclusion robs the poor and gives to the rich. Article 15(5) dupes those who actually need preferential treatment. For the poorest of the poor, reservation in college is an empty promise. Few of the financially poor OBCs attend high school, let alone college. The poor lack the resources to compete with the creamy, who "snatch away" those seats. Even the Mandal Commission, which was established in 1979 with a mandate to identify the socially and educationally backward, admitted that the creamy layer was robbing fellow OBCs of reservation. With the creamy layer excluded, poor OBCs would compete with poor OBCs—the playing field levelled. As it stands, the amendment and the Act serve one purpose: they provide a windfall of seats to the rich and powerful amongst the OBCs. It is unreasonable to classify rich and poor OBCs as a single entity. This violates the Article 14 right to equality.
(Paras 397, 404, 405, 410 and 411)

The proponents of reservation contended that if you exclude the creamy layer, there would be a shortage of candidates who can afford to pay for higher education. The Oversight Committee disagreed. The Committee relied on data

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Per Bhandari, J. *(contd.)*

from Karnataka to disprove the contention that seats go unfilled when the creamy is excluded. Furthermore, this argument harms rather than helps the Government. It cannot be seriously disputed that most of the college-going OBCs belong to the creamy layer for whom reservations are unnecessary; they have the money to attend good schools, tuitions and coaching courses for entrance exams. Naturally, these advantages result in higher test scores vis-à-vis the non-creamy layer OBCs. The result is that creamy layer OBCs would fill the bulk of the OBC quota, leaving the non-creamy layer no better off than before. If the creamy layer gets most of the benefit, why have reservations in the first place? The petitioners are justified in arguing that before carrying out constitutional amendments the Union of India must clearly target its beneficiaries. We should not make law first and thereafter target the law's beneficiaries. Failure to exclude the creamy layer is but one example of this problem. (Paras 374 and 375)

Oversight Committee, Vol. 1, September 2006, p. 69, Para 1.7, *relied on*

Unless the creamy layer is removed, OBCs cannot exercise their group rights. The Union of India and other respondents argued that creamy layer exclusion is wrong because the text of the Ninety-third Amendment bestows a benefit on "classes", not individuals. While it is a group right, the group must contain only those individuals that belong to the group. I first take the entire lot of creamy and non-creamy layer OBCs. I then remove the creamy layer on an individual basis based on their income, property holdings, occupation, etc. What is left is a group that meets constitutional muster. It is a group right that must also belong to individuals, if the right is to have any meaning. If one OBC candidate is denied special provisions that he should have received by law, it is not the group's responsibility to bring a claim. He would be the one to do so. He has a right of action to challenge the ruling that excluded him from the special provisions afforded to OBCs. In this sense, he has an individual right. Group and individual rights need not be mutually exclusive. In this case, it is not one or the other but both that apply to the impugned legislation. (Para 406)

Even the text of Articles 15(4) and 15(5) provides for creamy layer exclusion. In this sense, one could say that the term "creamy layer" is synonymous with "non-SEBC". Similar interpretation is given to "backward classes" under Article 16(4). Parliament could not reasonably make reservation for non-backwards. Such a Bill on the face of it would violate the Constitution. (Paras 393, 394 and 396)

In sum, creamy layer inclusion violates the right to equality. That is, non-exclusion of creamy layer and inclusion of forward castes in reservation violates the right to equality in Articles 14, 15 and 16 as well as the basic structure of the Constitution. (Para 390)

Indra Sawhney v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385; *Indra Sawhney* v. *Union of India*, (2000) 1 SCC 168 : 2000 SCC (L&S) 1; *M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212; *Nair Service Society* v. *State of Kerala*, (2007) 4 SCC 1; *State of Kerala* v. *N.M. Thomas*, (1976) 2 SCC 310 : 1976 SCC (L&S) 227; *K.C. Vasanth Kumar* v. *State of Karnataka*, 1985 Supp SCC 714; *Ashoka Kumar Thakur* v. *State of Bihar*, (1995) 5 SCC 403 : 1995 SCC (L&S) 1248 : (1995) 31 ATC 159, *followed*

Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. *Union of India*, (1981) 1 SCC 246 : 1981 SCC (L&S) 50, *referred to*

Prof. Basudeb Barman, MP, p. 531; Prof. M. Ramadass, MP, p. 510; and Shri C.K. Chandrappan, MP, p. 494, respectively, Parliamentary Debates, 21-12-2005; Oversight

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Per Bhandari, J. *(contd.)*

Committee, Vol. 1, pp. 33, 69 and 4.2, Appendix 1 in its Report at p. 70, Para 1.13; David Leonhardt: *The New Affirmative Action*, *New York Times*, 30-9-2007, p. 3; Report of the Backward Classes Commission, First Part, Vols. 1-2, 1980, p. 37, 8.13; (Recommendations), p. 62, para 13.7, *relied on*

Prof. Rasa Singh Rawat, Parliamentary Debate on Act 5 of 2007, 14-12-2006, *referred to*

The creamy layer must be excluded from the Ninety-third Amendment and Act 5 of 2007. The Ninety-third Amendment would be ultra vires and invalid if the creamy layer is not excluded. (Para 630)

Technically speaking, the implied inclusion of the creamy layer is to be severed. It is severable for two reasons. First, a nine-Judge Bench in *Indra Sawhney case*, 1992 Supp (3) SCC 217, severed a similar provision wherein the creamy layer was not expressly included, upholding the rest of the OM's reservation scheme. Second, because Parliament must have known that *Indra Sawhney case* had excluded the creamy layer, it seems likely that Parliament also realised that the Supreme Court may do the same. Had Parliament insisted on creamy layer inclusion, it could have said as much in the text of Article 15(5). Instead, Parliament left the text of Article 15(5) silent on the issue, delegating the issue of OBC identification to the executive in Section 2(*g*) of Act 5 of 2007. (Paras 413 and 414)

R.M.D. Chamarbaugwalla v. *Union of India*, AIR 1957 SC 628 : 1957 SCR 930, *applied*

Shri Mohan Singh, p. 474 and Shri Devendra Prasad, pp. 478-79, Parliamentary Debates, 21-12-2005, *referred to*

W. **Constitution of India — Art. 15(5) — Reservation of 27% seats for OBCs in State-aided institutions under S. 3 r/w S. 2(g) of Act 5 of 2007 — Parameters to be followed for the exclusion of the "creamy layer" from a caste when SEBCs are determined by giving importance to caste**

— Delegation of power in this regard to the Government if a valid delegation of power

— Held (*per Balakrishnan, C.J.* and *Raveendran, J.* and *Bhandari, J.*), identification of the creamy layer has been and should be left to the Government, subject to judicial direction — For a valid method of creamy layer exclusion, the Government may use its post-*Indra Sawhney case* criteria as a template, as contained in the Office Memorandum issued by Government of India, Department of Personnel and Training, dated 8-9-1993

— *Per Pasayat and Thakker, JJ.*, there has to be proper identification of OBCs — For the same, the Commission set up pursuant to *Indra Sawhney case*, 1992 Supp (3) SCC 217, has to work more effectively and not merely decide applications for inclusion or exclusion of castes — A notification should be issued by the Union of India, after exclusion of the creamy layer for which necessary data must be obtained by the Central Government from the State Governments and UTs [*See also* Shortnotes L and O, above]

— Further (*per Balakrishnan, C.J.* and *Bhandari, J.*), the delegation of power in this regard to the Government is not invalid — Education — Central Educational Institutions (Reservation in Admission) Act, 2006 (5 of 2007) — Ss. 3 and 2(g) — National Commission for Backward Classes Act, 1993 — Ss. 9 and 11

Per Balakrishnan, C.J.

The parameters contained in the Office Memorandum issued by the Government of India, Department of Personnel and Training on 8-9-1993 may be

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Per Balakrishnan, C.J. *(contd.)*

applied for exclusion of creamy layer. And the definition of "Other Backward Classes" under Section 2(*g*) of Act 5 of 2007 should be deemed to mean class or classes of citizens who are socially and educationally backward, and so determined by the Central Government; and if the determination is with reference to caste, then the backward class shall be after excluding the creamy layer. However, it is made clear that same principle of determining the creamy layer for providing 27% reservation for backward classes for appointment as set out in the abovesaid Office Memorandum dated 8-9-1993 need not be strictly followed in case of reservation envisaged under Article 15(5) of the Constitution. (Paras 227 and 174)

"Backward class" is not a new word. Going by the Constitution, there are sufficient constitutional provisions to have an idea as to what "backward class" is. Articles 340, 15(4) and 16(4) may be referred to in this behalf. It is only for the purpose of Act 5 of 2007 that the Union of India has been entrusted with the task of determining the backward class. There is already a National Commission and also various State Commissions dealing with the affairs of the backward class of citizens in this country. For the purpose of enforcement of the legislation passed under Article 16(4), the backward class of citizens have already been identified and this has been in practise since the past fourteen years. It is in this background that the Union of India has been given the task of determining the backward classes. (Para 212)

The determination of backward classes itself is a laborious task and Parliament cannot do it by itself. It is incorrect to say that there are not sufficient guidelines to determine the backward classes. Various parameters have been used and it may also be noticed that if any undeserving caste or group of persons are included in the backward class, it is open to any person to challenge the same through judicial review. Therefore, it is incorrect to say that the Union of India has been given wide powers to determine the backward classes. The delegation of power to the Union Government to determine as to who shall be the "Other Backward Classes" is not excessive delegation. Such delegation is constitutionally valid. The challenge to Act 5 of 2007 on that ground fails. (Paras 212 and 230)

Per Pasayat and Thakker, JJ.

There has to be proper identification of Other Backward Classes (OBCs). For identifying backward classes, the Commission set up pursuant to the directions of the Supreme Court in *Indra Sawhney*, 1992 Supp (3) SCC 217, has to work more effectively and not merely decide applications for inclusion or exclusion of castes. A notification should be issued by the Union of India. This can be done only after exclusion of the creamy layer for which necessary data must be obtained by the Central Government from the State Governments and Union Territories. Such notification is open to challenge on the ground of wrongful exclusion or inclusion. Norms must be fixed keeping in view the peculiar features in different States and Union Territories. [Paras 358(4) and (5)]

Per Raveendran, J.

The OM dated 8-9-1993 of the Government of India can be applied for determining the creamy layer in respect of OBCs. (Para 652)

Per Bhandari, J.

Identification of the creamy layer has been and should be left to the Government, subject to judicial direction. For a valid method of creamy layer

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Per Bhandari, J. *(contd.)*

exclusion, the Government may use its post-*Indra Sawhney case* criteria as a template. *See* the OM of 8-9-1993, Para 2(*c*)/Column 3, approved by the Supreme Court in *Ashoka Kumar Thakur*, (1995) 5 SCC 403, para 10. This schedule is a comprehensive attempt to exclude the creamy layer in which income, government posts, occupation and landholdings are taken into account.

(Paras 415 and 416)

Ashoka Kumar Thakur v. *State of Bihar*, (1995) 5 SCC 403 : 1995 SCC (L&S) 1248 : (1995) 31 ATC 159, *relied on*

However, the creamy layer schedule of the OM dated 8-9-1993 is not comprehensive. This should be revised periodically—preferably once in every five years, in order to ensure that creamy layer criteria take changing circumstances into account while keeping our constitutional goal in view. Also, apart from the people who have been excluded vide the abovesaid Office Memorandum, the Government is urged to make it more comprehensive. The Government should consider excluding the children of sitting and former Members of Parliament (MPs) and Members of Legislative Assemblies (MLAs) from special benefits and the said OM be amended accordingly. If constitutional authorities have been excluded from benefits because of their status or resources, the same should apply to children of former and sitting MPs and MLAs. It is hoped that the judiciary will not have to involve itself in this matter.

(Paras 417, 418, 631 and 632)

With respect to OBC identification Act 5 of 2007's delegation of power to the Union Government is not an excessive delegation. I agree with the Chief Justice's reasoning in this respect. (Paras 624 and 642)

X. **Constitution of India — Art. 15(5) — Educational backwardness — Standard to determine — Held (*per Pasayat and Thakker, JJ.; Bhandari, J. concurring*), while determining backwardness, graduation (not technical graduation) or professional shall be the standard test yardstick for measuring backwardness — *Per Bhandari, J.*, once a candidate has graduated from a university, the said candidate is educationally forward and is ineligible for special benefits under Art. 15(5) for postgraduate and any further studies — Held (*per Balakrishnan, C.J.* and *Pasayat and Thakker, JJ.* and *Bhandari, J.*), the educational standard of matriculation or (10+2) cannot be accepted as the standard to assess educational backwardness — Education — Central Educational Institutions (Reservation in Admission) Act, 2006 (5 of 2007) — Ss. 3 and 2(g)**

Y. **Education — Central Educational Institutions (Reservation in Admission) Act, 2006 (5 of 2007) — Ss. 4(b), 3 and 2(g) and Sch. — Exclusion of educational institutions such as superspecialities, institutions of excellence, research and institutions of national and strategic importance, etc. from operation of the Act i.e. by inclusion in the Schedule to the Act — Factors to be considered (*per Pasayat and Thakker, JJ.*)**

Per Balakrishnan, C.J.

It was contended that Parliament should not have made this legislation for reservation in the higher institutions of learning as it is not part of the duty of the State under Article 46 of the Constitution. Though at the time of attaining Independence, the basic idea was to improve primary and secondary level education, but now, after a period of more than 50 years, it is idle to contend that

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Per Balakrishnan, C.J. *(contd.)*

the backward classes shall be determined on the basis of their attaining education only to the level of 10+2 stage. In India where there are a large number of arts, science and professional colleges and in the field of education, it is anachronistic to contend that primary education or secondary education shall be the index for fixing backward class of citizens. The contention that educational standard of matriculation or (10+2) should be the benchmark to find out whether any class is educationally backward is rejected. (Paras 215, 217 and 232)

Per Pasayat and Thakker, JJ.

The ground reality cannot be lost sight of that with the limited availability of jobs and the spiralling increase in population, secondary or matriculation examination can no longer be considered to be an appropriate benchmark. It has to be at the most graduation. But the question arises whether technical education can be included while considering educational backwardness. A delicate balancing has to be done in this regard. While technical education cannot be the sole criterion for gauging educational backwardness it definitely will form part of 50% norms fixed by the Supreme Court. Slightly variable plus or minus would be the appropriate standard to gauge educational backwardness.

(Para 345)

So, while determining backwardness, graduation (not technical graduation) or professional shall be the standard test yardstick for measuring backwardness.

[Para 358(5)]

M.R. Balaji v. *State of Mysore*, AIR 1963 SC 649 : 1963 Supp (1) SCR 439; *State of A.P.* v. *U.S.V. Balram*, (1972) 1 SCC 660; *K.S. Jayasree* v. *State of Kerala*, (1976) 3 SCC 730, *referred to*

"Equality" and "excellence" are two conflicting claims difficult to be reconciled. The Constitution, in order to ensure true equality provides for special treatment to socially and educationally backward classes of citizens which is obviously desirable for providing social justice, though at the cost of merit. However, the Constitution does not provide at all for "institutional reservation". Therefore, its constitutionality is to be judged on the touchstone of Article 14. A large number of cases cropped up in this area concerning the institutional preference for admission into postgraduate medical education and superspecialities. The judiciary came forward and laid down detailed principles covering the need of such preference and to limit the extent of such reservation in view of the importance of merit in the context of national interest and international importance of universal excellence in superspecialities. (Para 324)

In terms of Section 4(*b*) of Act 5 of 2007 certain educational institutions have been excluded from the operation of the said Act. Act 5 of 2007 has been made inapplicable to them. It is to be noted that in the said provision, institutions of research, institutions of excellence, institutions of national and strategic importance have been specified in the Schedule to the Act. The proviso permits the Central Government as and when considered necessary to amend the Schedule. On an appropriate case being presented and established before the Central Government that the institution is of excellence and/or a research institute and/or an institution of national and strategic importance, the Central Government can amend the Schedule and include such institution in the Schedule. It is permissible for the petitioners and anybody else to highlight to the Government about the desirability to include an institution in the Schedule of the Act. (Para 342)

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Per Pasayat and Thakker, JJ. *(contd.)*

The Supreme Court has laid down that so far as admissions to postgraduate courses such as MS, MD and the like are concerned, it would be imminently desirable not to provide for any reservation based on residence or institutional preference. However, a certain percentage of seats are allowed to be reserved on the ground of institutional preference. But even in this regard, so far as superspecialities such as neurosurgery and cardiology are concerned there should be no reservation at all even on the basis of institutional preference and admissions should be granted purely on all-India basis. Further, classification made on the basis of superspecialities may serve the interests of the nation better, though interests of individual States may to a small extent, be affected. (Para 355)

The need of a region or institution cannot prevail at the highest scale of speciality where the best skill or talent must be hand-picked by selecting them according to capability. At the level of PhD, MD or levels of higher proficiency where international measure of talent is made, where losing one great scientist or technologist in the making is a national loss, the considerations we have expanded upon as important, lose their potency. (Para 356)

If material is shown to the Central Government that the institution deserves to be included in the Schedule, the Central Government must take an appropriate decision on the basis of materials placed and on examining the issues concerned as to whether the institution deserves to be included in the Schedule. [Para 358(11)]

Indra Sawhney v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385; *AIIMS Students' Union* v. *AIIMS*, (2002) 1 SCC 428; *M.R. Balaji* v. *State of Mysore*, AIR 1963 SC 649 : 1963 Supp (1) SCR 439; *State of Kerala* v. *N.M. Thomas*, (1976) 2 SCC 310 : 1976 SCC (L&S) 227; *K.C. Vasanth Kumar* v. *State of Karnataka*, 1985 Supp SCC 714; *Jagadish Saran* v. *Union of India*, (1980) 2 SCC 768, *relied on*

Per Bhandari, J.

There is some force in the contention that those who have completed Plus 2 should be considered educationally forward where only 18% in the relevant age-group have completed Plus 2. From this vantage point, this means that they are educationally elite. But the answer to most questions in law is not so simple. The answer often depends on the circumstances surrounding the issue. In the marketplace, a candidate who has completed higher secondary education cannot be considered "forward". The real value of the higher secondary degree is that it is a prerequisite for college admissions. The general quality of education imparted up to Plus 2 is of extremely indifferent quality and apart from that, today some entry-level government positions only accept college graduates. (Para 644)

Once a candidate graduates from a university, he must be considered educationally forward. In other words, one is educationally backward until the candidate has graduated from a university. Only non-creamy layer OBCs can avail of reservations in college admissions, and once they graduate from college they should no longer be eligible for postgraduate reservation. Once a candidate has graduated from a university, the said candidate is educationally forward and is ineligible for special benefits under Article 15(5) of the Constitution for postgraduate and any further studies. He shall no longer enjoy the benefits of reservation. He is then deemed educationally forward. For admission into Master's programmes, such as, Master of Engineering, Master of Laws, Master

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of Arts, etc. none will be a fortiori eligible for special benefits for admission into postgraduation or any further studies thereafter. (Paras 626, 644 and 371)

YA. **Education — Central Educational Institutions (Reservation in Admission) Act, 2006 (5 of 2007) — S. 3 — Reservation of 27% seats for OBCs under — Validity of quantum of reservation provided**

— Held (*per curiam*), the same is not illegal

— *Per Balakrishnan, C.J.*, Parliament must be deemed to have taken into consideration all relevant circumstances and have been aware of the statistical details of country's population

— *Per Pasayat and Thakker, JJ.*, the foundation for fixing 27% appears to be the view that 52% of the population belong to OBCs — There is no supportable data for this proposition — The Commission set up pursuant to the directions in *Indra Sawhney case*, 1992 Supp (3) SCC 217, has not acted based on the real purpose for which it was set up i.e. to identify the backward classes and not merely to act upon petitions filed for inclusion and exclusion from the list of backward classes***

— *Per Bhandari, J.*, taking an OBC census is horrifying because doing so only furthers the caste divide, contrary to our constitutional aim — The Government is between a rock and a hard place — 27% is the upper limit for OBC reservation — The Government need not always provide the maximum limit (Para 48)

YB. **Education — Central Educational Institutions (Reservation in Admission) Act, 2006 (5 of 2007) — S. 3 — Reservation of 27% seats for OBCs under — OBC candidates obtaining admission in the open competition field on the basis of their own merit whether to be counted against the 27% quota for OBCs under an enactment enabled by Art. 15(5) — Question to be left open for an appropriate case (*per Raveendran, J.*) — Question not considered by the other learned Judges — Constitution of India — Art. 15(5)**

Per curiam

Quantum of reservation of 27% of seats to Other Backward Classes in the educational institutions provided in the Act is not illegal. (Para 670)

Per Balakrishnan, C.J.

The quantum of reservation provided under Act 5 of 2007 is based on the detailed facts available with Parliament. Various commissions have been in operation determining as to who shall form SEBCs. Though a castewise census is not available, several other data and statistics are available. In *Indra Sawhney*, 1992 Supp (3) SCC 217, the Mandal Commission was accepted in principle though the details and findings of the Commission were not fully accepted by the Supreme Court. 27% of reservation in the matter of employment was accepted by the Supreme Court. The petitioners have not produced any documents to show that the backward class citizens are less than 27% vis-à-vis the total population of this country or that there was no requirement of 27% reservation for them. Parliament is invested with the power of legislation and must be deemed to have

***** **Ed.**: *See also* Shortnotes *L* and *O*, above on identification of SEBCs and periodic review of backward class lists.

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Per Balakrishnan, C.J. *(contd.)*

taken into consideration all relevant circumstances when passing a legislation of this nature. It is futile to contend whether Parliament was not aware of the statistical details of the population of this country and, therefore, 27% reservation provided in the Act is not illegal nor on that account, can the Act itself be struck down. It is therefore held that reservation of 27% of seats for Other Backward Classes is not illegal and Parliament must be deemed to have taken into consideration all relevant circumstances when fixing the 27% reservation. (Paras 220, 219 and 233)

Indra Sawhney v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385; *State of Rajasthan* v. *Union of India*, (1977) 3 SCC 592, *relied on*

Per Pasayat and Thakker, JJ.

The foundation for fixing 27% appears to be the view that 52% of the population belong to OBC. There is no supportable data for this proposition. In fact, different commissions at different points of time have different figures. It is the stand of the respondents that no commission has fixed the percentage below 52% and, therefore, there is nothing wrong in fixing the percentage at 27%. This is not the correct approach. It may be that in no case the percentage of persons belonging to OBC is less than 27% but supposing in a given case considering the fact that the actual percentage is 40% a figure less than 27% should have been fixed. The Commission set out pursuant to the directions of the Supreme Court seems to have acted somewhat on the petitions filed by the people claiming exclusion or inclusion. That was not the real purpose of the Supreme Court's decision to direct appointment of Commission. The very purpose was to identify the classes. This was the exercise which was to be undertaken apart from considering the applications for inclusion or exclusion as the case may be.
[Paras 325, 358(4) and (5)]

Per Raveendran, J.

Reservation of 27% for Other Backward Classes is not illegal. I would however leave open the question whether members belonging to Other Backward Classes who get selected in the open competition field on the basis of their own merit should be counted against the 27% quota reserved for Other Backward Classes under an enactment enabled by Article 15(5) of the Constitution for consideration in an appropriate case. (Para 653)

Per Bhandari, J.

No one can say with certainty what percentage of the population is OBC, yet the Government is content with giving OBCs 27% of the seats in universities. It is not known what proportion of the population is OBC because the census does not count OBCs. It has been the Central Government policy practically since Independence to avoid the question. Taking an OBC census is horrifying because it encourages the Government to enact policy on the basis of caste. Doing so only furthers the caste divide, contrary to our constitutional aim. This has been recognised since 1950. If the Central Governments have consistently rejected an OBC census because it would promote casteism, how can this Central Government make reservation on the same ground? It is one thing to ask a citizen his caste, it is even worse to grant or reject his college application on that ground. The Government is between a rock and a hard place. 27% is the upper limit for OBC reservation. The Government need not always provide the maximum limit. (Paras 579, 580 and 371)

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YC. **Constitution of India — Art. 15(5) — Reservation of 27% for OBCs in specified State-aided Central universities under Act 5 of 2007 — Setting of cut-off marks for — Factors to be considered and concerns to be balanced — *Per Balakrishnan, C.J.*, Government can make relaxation to some extent**

— Held (*per Pasayat and Thakker, JJ.* and *Bhandari, J.*), reasonable cut-off marks should be set so that standards of excellence are not greatly affected — Society as a whole stands to benefit from a rational reservation scheme — *Per Pasayat and Thakker, JJ.*, five (5) grace marks can be extended to OBC candidates below the minimum eligibility marks fixed for General Category students — *Per Bhandari, J.*, cut-off marks for OBC candidates should be set no more than ten (10) marks out of 100 below that of the General Category — Education — Central Educational Institutions (Reservation in Admission) Act, 2006 (5 of 2007) — S. 3

YD. **Constitution of India — Art. 15(5) — Reservation of 27% for OBCs in specified State-aided Central Universities under Act 5 of 2007 — Reversion of seats remaining vacant due to insufficient non-creamy layer OBC candidates to General Category [*See also* Shortnote *P*, *above*]**

— Held (*per Pasayat and Thakker, JJ.* and *Bhandari, J.*), whenever the non-creamy layer OBCs fail to fill the 27% reservation after adopting cut-off marks [of 5 marks or 10 marks] below that of the cut-off for the General Category, the unfilled seats shall revert to and be filled up by candidates from the General Category

— *Per Balakrishnan, C.J.* (*contra*), if the candidates are not available the State can issue appropriate guidelines to effectuate the implementation of the reservation purposefully

Per Balakrishnan, C.J.

If a strict income restriction is made for identifying the "creamy layer", those who are left in the particular caste may not be able to have a sufficient number of candidates for getting admission in the Central Institutions as per Act 5 of 2007. The Government can make a relaxation to some extent so that sufficient number of candidates may be available for the purpose of filling up the 27% reservation. It is for the Union Government and the State Governments to issue appropriate guidelines to identify the "creamy layer" so that SEBCs are properly determined in accordance with the guidelines given by the Supreme Court. In this regard the principle of determining the creamy layer laid down for appointments in OM dated 8-9-1993 need not be strictly followed. If, even by applying this principle, still the candidates are not available, the State can issue appropriate guidelines to effectuate the implementation of the reservation purposefully. (Para 175)

[**Ed.**: In para 170, *Balakrishnan, C.J.* is emphatic on the exclusion of creamy layer candidates because without doing so "there cannot be proper identification of the backward class". Else Article 15(1) and Article 16(1) would be violated, and so "the exclusion of 'creamy layer' is essential" (para 170). Further, it is opined in the next paragraph that for determining socially and educationally backward classes the "principle of 'creamy layer' is necessary". Feeling bound by the nine-Judge Bench decision in *Indra Sawhney*, 1992 Supp (3) SCC 217, His Lordship cites from the opinion of Sawant, J. therein and concludes that "all these reasonings [in respect of the exclusion of the creamy layer vis-à-vis Article 16(4)] are equally applicable to the reservation or any special action contemplated under Art. 15(5)" (para 173). Hence His Lordship rejects the contention "that if the 'creamy layer' is excluded, there may be practically no representation for a particular backward class in educational institutions because the

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Per Balakrishnan, C.J. *(contd.)*

remaining members, namely, the non-creamy layer, may not have risen to the level or standard necessary to qualify to get admission even within the reserved quota". (para 173) [*See* Shortnote *P*, above.] Later, faced with the real possibility of insufficient number of candidates being available to fill the reserved seats after exclusion of creamy layer despite "relaxation [of the admission cut-offs] to some extent" (para 175), His Lordship opines: (1) the OM dated 8-9-1993 for determining the creamy layer "need not be strictly followed" (para 175), and (2) that "the State can issue appropriate guidelines to effectuate the implementation of the reservation purposefully". (Para 175) How then the said OM should be followed and what kind of guidelines, keeping the constitutional requirements in view, can be issued has not been spelt out. With admissions two/three months away, the need of the hour was certainty in this regard for those entrusted with implementation of the 27% reservation in their educational institutions. Fortunately for them, a definitive majority view arising from the opinions of *Pasayat and Thakker, JJ.* and *Bhandari, J.* (see below) does meet the likely situation by laying down that if any reserved category seats remain vacant they shall be filled up by candidates from the General Category.]

Per Pasayat and Thakker, JJ.

The interest of no person, class or region can be higher than that of the nation. The philosophy and pragmatism of universal excellence through equality of opportunity for education and advancement across the nation is part of the constitutional creed. It is, therefore, the best and most meritorious students that must be selected for admission to technical institutions and medical colleges and no citizen can be regarded as outsider in the constitutional set-up without serious detriment to the "unity and integrity" of the nation. (Para 355)

The Central Government shall examine the desirability of fixing cut-off marks in respect of the candidates belonging to the Other Backward Classes (OBCs). By way of illustration it can be indicated that five marks grace can be extended to such candidates below the minimum eligibility marks fixed for general categories of students. This would ensure that quality and merit would not suffer. [Para 358(3)]

If any seats remain vacant after adopting such norms they shall be filled up by candidates from general categories. [Para 358(3)]

Per Bhandari, J.

It is reasonable to balance reservation with other societal interests. Reasonable cut-off marks should be set so that standards of excellence are not greatly affected. Standards of excellence should not be limited to the best aided institutions. The nation requires that its citizens have access to quality education. Society as a whole stands to benefit from a rational reservation scheme. There should be no case in which the gap of cut-off marks between OBC and General Category students is too large. To maintain standards of excellence, cut-off marks for OBCs should be set not more than 10 marks out of 100 below that of the General Category. To this end, the Government shall set up a committee to look into the question of setting the OBC cut-off at not more than 10 marks below that of the General Category. (Paras 371, 627 to 629 and 645)

The Government is urged to set OBC cut-off marks no lower than 10 marks below that of the General Category. This is only a recommendation. (Para 535)

M.R. Balaji v. *State of Mysore*, AIR 1963 SC 649 : 1963 Supp (1) SCR 439, *followed*

Oversight Committee, Vol. 1, September 2006, p. 34, Vol. 1, *relied on*

Whenever the non-creamy layer OBCs fail to fill the 27% reservation, the remaining seats would revert to General Category students. (Paras 629 and 371)

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YE. **Constitution of India — Arts. 15(5) and 341 & 342 — Special provisions that may be made for SCs and STs under Art. 15(5) — Creamy layer in SCs and STs, if to be excluded — Ruling in *M. Nagaraj case*, (2006) 8 SCC 212, on this point, if any**

— *Per Balakrishnan, C.J.*, so long as "creamy layer" principle is not applied as one of the principles of equality and is merely a principle of identification of socially and educationally backward classes, the "creamy layer" principle cannot be applied to STs and SCs, as they are separate classes in themselves and they are identified by virtue of the notification issued by the President under Arts. 341 and 342 of the Constitution — Clarified that in *M. Nagaraj case* it has not been discussed or decided that creamy layer principle would be applicable to SCs and STs — *Per Pasayat and Thakker, JJ.*, the present case does not concern SCs and STs — Also, in *M. Nagaraj case* though some observations of a general nature have been made so far as the applicability of principles to SCs and STs are concerned, really that case did not concern SCs and STs — *Per Bhandari, J.*, in the instant case, the entire discussion was confined only to OBCs — Therefore, no opinion is expressed with regard to applicability of exclusion of creamy layer to SCs and STs — However, according to *M. Nagaraj case* reservation in promotion for SCs and STs is contingent on exclusion of the creamy layer — The discussion regarding creamy layer is far from being obiter in *M. Nagaraj case* — It was held therein that if the State fails to exclude SC/ST creamy layer, the reservation must fail — Placing this contingency in the conclusion makes the discussion of creamy layer part of the ratio decidendi of *M. Nagaraj case*

Per Balakrishnan, C.J.

Firstly, in none of the decisions of the Supreme Court is it stated that the "creamy layer" principle would apply to SCs and STs. In *Indra Sawhney case*, 1992 Supp (3) SCC 217, it is specifically stated that the "creamy layer" principle will not apply to STs and SCs. In *Nagaraj case*, (2006) 8 SCC 212, in paras 110 and 120 and finally in paras 121, 122 and 123, it is only stated that when considering questions of affirmative action, the larger principle of equality such as 50% ceiling (quantitative limitation) and "creamy layer" (quantitative exclusion) may be kept in mind. In *Nagaraj case* it has not been discussed or decided that the "creamy layer" principle would be applicable to SCs/STs. Therefore, it cannot be said that the observations made in *Nagaraj case* are contrary to the decision in *Indra Sawhney case*. (Para 182)

State of Kerala v. *N.M. Thomas*, (1976) 2 SCC 310 : 1976 SCC (L&S) 227; *K.C. Vasanth Kumar* v. *State of Karnataka*, 1985 Supp SCC 714; *M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212, *clarified*

Indra Sawhney v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385, *relied on*

Secondly, so far the Supreme Court has not applied the "creamy layer" principle as a principle of equality or as a general principle applicable to all affirmative actions or for the purpose of reservation. The "creamy layer" so far has been applied only to identify the backward class, as it required certain parameters to determine the backward classes. "Creamy layer" principle is one of the parameters to identify backward classes. Right from the beginning, the Scheduled Castes and Scheduled Tribes were treated as a separate category and

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Per Balakrishnan, C.J. *(contd.)*

nobody ever disputed identification of such classes. So long as "creamy layer" is not applied as one of the principles of equality, it cannot be applied to Scheduled Castes and Scheduled Tribes. Therefore, principally, the "creamy layer" principle cannot be applied to STs and SCs, as SCs and STs are separate classes by themselves. In an earlier decision it has been stated that "Scheduled Castes and Scheduled Tribes are not a caste within the ordinary meaning of caste". And they are so identified by virtue of the notification issued by the President of India under Articles 341 and 342 of the Constitution. (Paras 183 to 186)

E.V. Chinnaiah v. *State of A.P.*, (2005) 1 SCC 394; *K.C. Vasanth Kumar* v. *State of Karnataka*, 1985 Supp SCC 714, *relied on*

Thus, the "creamy layer" principle is not applicable to Scheduled Castes and Scheduled Tribes. (Paras 186 and 228)

Per Pasayat and Thakker, JJ.

Though in *M. Nagaraj case*, (2006) 8 SCC 212, some observations of general nature have been made so far as the applicability of the principles to Scheduled Castes and Scheduled Tribes is concerned, really that case did not concern with Scheduled Castes and Scheduled Tribes. Similar is the position here. The focus on the identity test in *M. Nagaraj case* is unexceptionable. (Para 293)

M. Nagaraj v. *Union of India*, (2006) 8 SCC 212, *clarified*

M.G. Badappanavar v. *State of Karnataka*, (2001) 2 SCC 666 : 2001 SCC (L&S) 489; *Ajit Singh (II)* v. *State of Punjab*, (1999) 7 SCC 209 : 1999 SCC (L&S) 1239; *Ajit Singh Januja* v. *State of Punjab*, (1996) 2 SCC 715 : 1996 SCC (L&S) 540 : (1996) 33 ATC 239; *Union of India* v. *Virpal Singh Chauhan*, (1995) 6 SCC 684 : 1996 SCC (L&S) 1 : (1995) 31 ATC 813, *cited*

Per Bhandari, J.

It was contended that *Nagaraj*, (2006) 8 SCC 212, is obiter in regard to creamy layer exclusion. The contention of the Union of India cannot be accepted. According to *Nagaraj* reservation in promotion for SC/ST is contingent on exclusion of the creamy layer (paras 122, 123 and 124). The discussion regarding creamy layer is far from obiter in *Nagaraj*. If the State fails to exclude the SC/ST creamy layer, the reservation must fall. Placing this contingency in the conclusion makes the discussion of creamy layer part of the ratio. (Para 389)

M. Nagaraj v. *Union of India*, (2006) 8 SCC 212, *clarified*

However, in *Indra Sawhney case* the entire discussion was confined only to Other Backward Classes. Similarly, in the instant case, the entire discussion was confined only to Other Backward Classes. Therefore, no opinion is expressed with regard to the applicability of exclusion of creamy layer to the Scheduled Castes and Scheduled Tribes. (Paras 395 and 633)

Indra Sawhney v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385, *followed*

YF. **Constitution of India — Arts. 14, 15 & 16, Preamble, Pt. IV and Art. 368 — Right to equality — Nature and scope of — Extent to which may be amended or altered without violating the basic structure of the Constitution§† — Art. 15(5) if violated the basic structure of the**

§† **Ed.**: *See also* Shortnote *YT*, below

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Constitution to the extent that it pertained to State maintained or aided private institutions

— *Per curiam*, the Constitution (Ninety-third Amendment) Act, 2005 does not violate the basic structure of the Constitution so far as it relates to State maintained institutions and aided educational institutions [question as to validity of the said amendment with respect to private unaided institutions left open, except *per Bhandari, J.*: *see* Shortnote *YO*, below]

***Per Balakrishnan, C.J.*, equality is a multicoloured concept incapable of a single definition — The principle of equality is a delicate, vulnerable and supremely precious concept for our society and has embraced a critical and essential component of constitutional identity — The larger principles of equality as stated in Arts. 14, 15 and 16 may be understood as an element of the basic structure of the Constitution and may not be subject to amendment, although, these provisions, intended to configure these rights in a particular way, may be changed within the constraints of the broader principle — The variability of changing conditions may necessitate the modifications in the structure and design of these rights, but the transient characters of formal arrangements must reflect the larger purpose and principles that are the continuous and unalterable thread of constitutional identity — It is not the introduction of significant and far-reaching change that is objectionable, rather it is the content of this change insofar as it implicates the question of constitutional identity — The principles of equality cannot be completely taken away so as to leave citizens in a state of lawlessness — But the facets of the principle of equality can always be altered, especially to carry out the directive principles of State policy — If any constitutional amendment is made which moderately abridges the principle of equality, it cannot be said that it violates the basic structure of the Constitution**

— *Per Pasayat and Thakker, JJ.*, it needs no emphasis that individual rights are superior to the social rights

— *Per Bhandari, J.*, when fundamental rights are at stake, they must be harmonised with, not made subject to, the directive principles

YG[##]. **Constitution of India — Art. 19(1)(g) and Art. 368 — Right under Art. 19(1)(g) — Nature and scope of — Extent to which may be amended or altered without violating the basic structure of the Constitution — *Per Balakrishnan, C.J.*, the fundamental right under Art. 19(1)(g) is a multicoloured concept incapable of a single definition — If any constitutional amendment is made which moderately abridges the principles under Art. 19(1)(g), it cannot be said that it violates the basic structure of the Constitution — *Per Bhandari, J.,* following *Minerva Mills case*, (1980) 3 SCC 625, a total deprivation of fundamental rights, even in one limited area, may amount to an abrogation of the basic structure**

YH. **Constitution of India — Art. 368, Preamble and Pt. III — Basic structure of the Constitution — What is, and when violated or altered — Use of terms "abridge" and "abrogate" — Meaning and significance of — Applicability of the Two-Step Effect Test as laid down in *I.R. Coelho case*, (2007) 2 SCC 1 (also known as Impact or Rights test) — Amendability of**

Ed.: *See also* Shortnotes *YO* to *YS*, below

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fundamental rights — Scope — Approach of and standard to be followed by Court

— *Per Balakrishnan, C.J.*, for determining whether a particular feature of the Constitution is part of the basic structure, it has to be examined in each individual case keeping in mind the scheme of the Constitution, its objects and purpose and the integrity of the Constitution as a fundamental instrument for the country's governance — It has not been held in *Kesavananda*, (1973) 4 SCC 225 that all facets of Art. 14 or any of the fundamental rights would form part of the basic structure — If any of the basic rights enshrined in the Constitution are completely taken out, it may be argued that it amounts to alteration of the basic structure — However, if any one of the provisions relating to a particular basic feature of the Constitution is altered or modified, that does not amount to the alteration of the basic structure

— *Per Bhandari, J.*, to determine if a constitutional amendment violates the basic structure a Two-Step Effect Test as laid down *I.R. Coelho case*, (2007) 2 SCC 1 (also known as the Impact or Rights Test) is to be applied on a case-by-case basis — Step One requires us to ask if the impugned amendment affects a facet of the basic structure — If it does, then Step Two requires us to ask if the effect on the facet of the basic structure is to such an extent that the facet's original identity has been altered — Applying the Effect Test amounts to saying that the form of a constitutional amendment is irrelevant: it is the consequence thereof that matters — A total deprivation of fundamental rights, even in one limited area, may amount to abrogation of the basic structure — A constitutional amendment need not be as invidious as the Forty-second Constitution Amendment for the Supreme Court to invalidate it — If the standard were that high, constitutional amendments could destroy the basic structure by a thousand slashes — However, an abundance of caution ought to be taken before employing the basic structure doctrine — The violation must truly abrogate the basic structure — Anything short of this standard must be upheld — The will of the people, through their elected representatives, is to be heard — Words and Phrases — "Abridge", "abrogate" — Meanings and relative scope

YI. **Constitution of India — Arts. 368, 245 and 13 — Basic structure doctrine — Applicability of — Reiterated, *per Balakrishnan, C.J.*, the same is applicable only to constitutional amendments and not to ordinary legislation**

YJ. **Constitution of India — Pts. III & IV — Primacy inter se — Held (*per Pasayat and Thakker, JJ.* and *Bhandari, J.*), it needs no emphasis that individual rights are superior to the social rights — When fundamental rights are at stake, they must be harmonised with, not made subject to, the directive principles — *Per Balakrishnan, C.J.* (*contra*), the facets of the principle of equality could always be altered, especially to carry out the directive principles — Merely because the directive principles are non-justiciable by the judicial process does not mean that they are of subordinate importance**

YJJ. **Constitutional Interpretation — Internal aids — Preamble and directive principles of State policy — *Per Balakrishnan, C.J.*, when a constitutional provision is interpreted, the cardinal rule is to look to the**

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Preamble as the guiding star and the directive principles as the "book of interpretation"

YK. **Constitution of India — Arts. 32, 226, Pt. III and Art. 51 — Separation of powers — Justification for — Eternal vigilance against encroachment on civil liberties by the State — Need for — *Per Bhandari, J.*, it is precisely because the Government cannot be trusted that the powers of the State are divided amongst separate organs — Constitutional Law**

Per curiam

The Constitution (Ninety-third Amendment) Act, 2005, is valid and does not violate the "basic structure" of the Constitution so far as it relates to the State maintained institutions and aided educational institutions. The question whether the Constitution (Ninety-third Amendment) Act, 2005 would be constitutionally valid or not so far as "private unaided" educational institutions are concerned, is not considered and left open to be decided in an appropriate case. Bhandari, J. in his opinion, has, however, considered the issue and has held that the Constitution (Ninety-third Amendment) Act, 2005 is not constitutionally valid so far as private unaided educational institutions are concerned. (Para 668)

Per Balakrishnan, C.J.

It has been held in many decisions of the Supreme Court that when a constitutional provision is interpreted, the cardinal rule is to look to the Preamble of the Constitution as the guiding star and the directive principles of State policy as the "book of interpretation". The Preamble embodies the hopes and aspirations of the people and directive principles set out the proximate grounds in the governance of this country. (Paras 121 and 114)

A survey of the conclusions reached by the Judges in *Kesavananda Bharati case*, (1973) 4 SCC 225, clearly shows that the power of constitutional amendment is very wide and a close analysis of the opinions in *Kesavananda Bharati case* shows that all the provisions of the Constitution, including the fundamental rights, could be amended or altered and the only limitation placed is that the basic structure of the Constitution shall not be altered. (Para 114)

Kesavananda Bharati case clearly indicates what is the basic structure of the Constitution. It is not any single idea or principle like equality or any other constitutional principles that are subject to variation, but the principles of equality cannot be completely taken away so as to leave the citizens in this country in a state of lawlessness. But the facets of the principle of equality could always be altered, especially to carry out the directive principles of the State policy envisaged in Part IV of the Constitution. The Constitution (Ninety-third Amendment) Act, 2005 is to be examined in the light of the above position. (Para 114)

From the constitutional history of India, it can be seen that from the point of view of importance and significance, no distinction can be made between the two sets of rights, namely, fundamental rights which are made justiciable and the directive principles which are made non-justiciable. The directive principles of State policy are made non-justiciable for the reason that the implementation of many of these rights would depend on the financial capability of the State. Non-justiciable clause was provided for the reason that an infant State shall not be made accountable immediately for not fulfilling these obligations. Merely because the directive principles are non-justiciable by the judicial process does not mean that they are of subordinate importance. (Para 195)

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Per Balakrishnan, C.J. *(contd.)*

The basic structure of the Constitution is to be taken as a larger principle on which the Constitution itself is framed and some of the illustrations given as to what constitutes the basic structure of the Constitution would show that they are not confined to the alteration or modification of any of the fundamental rights alone or any of the provisions of the Constitution. Of course, if any of the basic rights enshrined in the Constitution are completely taken out, it may be argued that it amounts to alteration of the basic structure of the Constitution. For example, the federal character of the Constitution is considered to be the basic structure of the Constitution. There are large number of provisions in the Constitution dealing with the federal character of the Constitution. If any one of the provisions is altered or modified, that does not amount to the alteration of the basic structure of the Constitution. Various fundamental rights are given in the Constitution dealing with various aspects of human life. The Constitution itself sets out principles for an expanding future and is obligated to endure for future ages to come and consequently it has to be adapted to the various changes that may take place in human affairs. (Para 115)

For determining whether a particular feature of the Constitution is part of the basic structure or not, it has to be examined in each individual case keeping in mind the scheme of the Constitution, its objects and purpose and the integrity of the Constitution as a fundamental instrument for the country's governance. It is not open to challenge the ordinary legislations on the basis of the basic structure principle. State legislation can be challenged on the question whether it is violative of the provisions of the Constitution. But as regards constitutional amendments, if any challenge is made on the basis of basic structure, it has to be examined based on the basic features of the Constitution. (Para 116)

The majority in *Kesavananda Bharati case*, (1973) 4 SCC 225 did not hold that all facets of Article 14 or any of the fundamental rights would form part of the basic structure of the Constitution. The majority upheld the validity of the first part of Article 31-C, which would show that the constitutional amendment which takes away or abridges the right to challenge the validity of an arbitrary law or violating a fundamental right under that article would not destroy or damage the basic structure. (Para 117)

Equality is a multicoloured concept incapable of a single definition as is also the fundamental right under Article 19(1)(*g*). The principle of equality is a delicate, vulnerable and supremely precious concept for our society. It is true that it has embraced a critical and essential component of constitutional identity. The larger principles of equality as stated in Articles 14, 15 and 16 may be understood as an element of the "basic structure" of the Constitution and may not be subject to amendment, although, these provisions, intended to configure these rights in a particular way, may be changed within the constraints of the broader principle. The variability of changing conditions may necessitate the modifications in the structure and design of these rights, but the transient characters of formal arrangements must reflect the larger purpose and principles that are the continuous and unalterable thread of constitutional identity. It is not the introduction of significant and far-reaching change that is objectionable, rather it is the content of this change insofar as it implicates the question of constitutional identity. (Para 118)

If any constitutional amendment is made which moderately abridges or alters the equality principle or the principles under Article 19(1)(*g*), it cannot be

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Per Balakrishnan, C.J. *(contd.)*

said that it violates the basic structure of the Constitution. If such a principle is not accepted, our Constitution would not be able to adapt itself to the changing conditions of a dynamic human society. Therefore, the plea raised by the petitioners' that the present Constitution (Ninety-third Amendment) Act, 2005 alters the basic structure of the Constitution is of no force. Moreover, the interpretation of the Constitution shall not be in a narrow pedantic way. (Para 120)

Kesavananda Bharati v. *State of Kerala*, (1973) 4 SCC 225, *explained* and *applied*

Indira Nehru Gandhi v. *Raj Narain*, 1975 Supp SCC 1; *Minerva Mills Ltd.* v. *Union of India*, (1980) 3 SCC 625; *M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212, *relied on*

Golak Nath v. *State of Punjab*, AIR 1967 SC 1643 : (1967) 2 SCR 762, *held, overruled*

Berubari Union and Exchange of Enclaves, Reference under Article 143(1) of the Constitution of India, In re, AIR 1960 SC 845 : (1960) 3 SCR 250, *held, partly overruled*

I.R. Coelho v. *State of T.N.*, (2007) 2 SCC 1, *cited*

Therefore it is held that the Constitution (Ninety-third Amendment) Act, 2005 does not violate the "basic structure" of the Constitution so far as it relates to the State maintained institutions and aided educational institutions. (Paras 122 and 221)

Per Pasayat and Thakker, JJ.

It needs no emphasis that individual rights are superior to the social rights. All fundamental rights are to be read together. (Para 278)

Per Raveendran, J.

Article 15(5) is valid with reference to State maintained educational institutions and aided educational institutions. (Para 648)

Per Bhandari, J.

Kesavananda Bharati, (1973) 4 SCC 225, and its progeny provide that an amendment to the Constitution must not alter the Constitution's basic structure. To reach a conclusion regarding a basic structure challenge, the following general standard will be employed: *an amendment alters the basic structure if its actual or potential effect would be to damage a facet of the basic structure to such an extent that the facet's original identity is compromised.* (Para 496)

To determine if legislation infringes constitutional limitations and is thus invalid, the Two-Step Effect Test (also known as the Impact or Rights Test) as laid down in *I.R. Coelho case*, (2007) 2 SCC 1, is to be used. Step One requires us to first ask if the impugned legislation affects a facet of the basic structure. If it does, then at Step Two we ask if the effect on the facet of the basic structure is to such an extent that the facet's original identity has been altered. Applying the Effect Test is another way of saying that the form of an amendment is irrelevant: it is the consequence thereof that matters. (Para 497)

I.R. Coelho v. *State of T.N.*, (2007) 2 SCC 1, *applied*

The terms "abridge" and "abrogate" have been employed by the Supreme Court to distinguish between acceptable and unacceptable legislation. Whether legislation abridges or abrogates is a question of degree. Using these terms is another way of asking whether the legislation had such an effect that it changed the basic structure of the Constitution. If legislation merely abridges the basic structure, the structure's identity remains. The legislation is upheld. In this sense, Parliament may take away or destroy fundamental rights by amending the Constitution, provided that the basic structure is not altered. If it abrogates the basic structure, the structure and thus the Constitution lose their identities. The

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Per Bhandari, J. *(contd.)*

legislation must be struck down. This is determined on a case-by-case basis by applying the Effect Test (Impact/Rights Tests). As held in *Minerva Mills case*, (1980) 3 SCC 625, para 59 a total deprivation of fundamental rights, even in one limited area, may amount to an abrogation of the basic structure.

(Paras 498, 499 and 529)

I.R. Coelho v. *State of T.N.*, (2007) 2 SCC 1; *Minerva Mills Ltd.* v. *Union of India*, (1980) 3 SCC 625, *followed*

Two broad themes surface from the cases in which the basic structure doctrine has been implemented to invalidate constitutional amendments. By looking at these cases synoptically, we get a sense as to how much damage the basic structure can withstand before crumbling. When judicial review is barred, democracy evaporates. And when fundamental rights are at stake, they must be harmonised with, not made subject to, the directive principles.

(Paras 508 and 504)

The Government cannot be trusted: that is precisely why we divide its powers into separate organs. If it could be trusted, there would be no need for co-equal branches in which power is shared. Separation of powers is an axiom of democracy. (Para 509)

Had Section 55 of the Forty-second Amendment to the Constitution been upheld, the basic structure of the Constitution could have been destroyed by a single slash. Future constitutional amendments would not have been reviewed. The impugned amendment looks rather mild in comparison to the damage that would have been wrought by the Forty-second Amendment. The impugned legislation limits one fundamental right in one limited circumstance. Yet an amendment need not be as invidious as the Forty-second Amendment for the Supreme Court to invalidate it. If the standard were that high, amendments could destroy the basic structure or the essence of the Constitution by a thousand slashes. (Para 510)

Since *Kesavananda* time, many amendments have been passed and many challenges under the basic structure have been made. The Supreme Court has used caution and has refrained from using the doctrine, even when it may have been justified. An abundance of caution ought to be taken before employing the basic structure doctrine. The violation must truly abrogate the basic structure. Anything short of this standard must be upheld—the will of the people, through their elected representatives, heard. (Para 511)

Kesavananda Bharati v. *State of Kerala*, (1973) 4 SCC 225; *Indira Nehru Gandhi* v. *Raj Narain*, 1975 Supp SCC 1; *Minerva Mills Ltd.* v. *Union of India*, (1980) 3 SCC 625; *I.R. Coelho* v. *State of T.N.*, (2007) 2 SCC 1; *P. Sambamurthy* v. *State of A.P.*, (1987) 1 SCC 362 : (1987) 2 ATC 502; *L. Chandra Kumar* v. *Union of India*, (1997) 3 SCC 261 : 1997 SCC (L&S) 577, *relied on*

Granville Austin: "*Working a Democratic Constitution*", p. 506; Seervai, H.M.: "Fundamental Rights: A Basic Issue", published in three instalments in *The Times of India*, 14-2-1955, 15-2-1955 and 16-2-1955 (see Granville Austin at pp. 263-64 in *Working a Democratic Constitution*); S.P. Sathe: *Judicial Activism in India: Transgressing Borders and Enforcing Limits*, 2nd Edn., 2002, pp. 92-93, *referred to*

YL. **Constitution of India — Arts. 368, 13, 32 and Pt. III — Content of fundamental rights and basic structure — Authority competent to interpret content of the fundamental rights and determine violation of basic structure of Constitution, reiterated *per Bhandari, J.*, is the Supreme Court — Though**

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Parliament, expressing the will of the people, may enact amendments to overrule a judgment of the Supreme Court, the *final word* on the content of a right is of the Supreme Court

Per Bhandari, J.

While Parliament may amend the Constitution, it cannot alter the Constitution's basic structure. A basic structure challenge becomes an issue of institutional competence. It is not for the legislature to decide what is a reasonable restriction under Article 19(1)(*g*) read with Article 19(6), but for the judiciary. It is well established that Parliament, expressing the will of the people, may enact amendments to overrule a judgment of the Supreme Court. Nevertheless, the duty to interpret the content of our fundamental rights has been left to the courts. The important point to be noted is that the content of a right is defined by the courts. The *final word* on the content of the right is of the Supreme Court. (Para 527)

I.R. Coelho v. *State of T.N.*, (2007) 2 SCC 1; *M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212; *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225; *Indira Nehru Gandhi* v. *Raj Narain*, 1975 Supp SCC 1; *Minerva Mills Ltd.* v. *Union of India*, (1980) 3 SCC 625; *P. Sambamurthy* v. *State of A.P.*, (1987) 1 SCC 362 : (1987) 2 ATC 502; *L. Chandra Kumar* v. *Union of India*, (1997) 3 SCC 261 : 1997 SCC (L&S) 577, *followed*

State of Madras v. *Champakam Dorairajan*, AIR 1951 SC 226 : 1951 SCR 525; *S. Vinod Kumar* v. *Union of India*, (1996) 6 SCC 580 : 1996 SCC (L&S) 1480; *Union of India* v. *Virpal Singh Chauhan*, (1995) 6 SCC 684 : 1996 SCC (L&S) 1 : (1995) 31 ATC 813; *Ajit Singh Januja* v. *State of Punjab*, (1996) 2 SCC 715 : 1996 SCC (L&S) 540 : (1996) 33 ATC 239, *held, constitutionally superseded*

Indra Sawhney v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385, *held, partially constitutionally superseded*

YM. **Constitution of India — Arts. 15(5) and 19(1)(g) — Validity of Art. 15(5), to the extent that it pertained to private unaided institutions — *Per Balakrishnan, C.J.* and *Pasayat and Thakker, JJ.* and *Raveendran, J.*, question left open as (i) the impugned legislation in question i.e. Act 5 of 2007 did not pertain to private unaided institutions, and (ii) no private unaided institution had challenged Art. 15(5) — *Per Bhandari, J.*, Art. 15(5) to the extent it sought to include private unaided institutions within its purview violated the basic structure of the Constitution, and hence was invalid — Reference to private unaided institutions in Art. 15(5) hence severed [*see* Shortnote *YO*, below] — Central Educational Institutions (Reservation in Admission) Act, 2006 (5 of 2007) — Validity of**

Per Balakrishnan, C.J.

The scope of the decision in *T.M.A. Pai Foundation case*, (2002) 8 SCC 481, was later explained in *P.A. Inamdar case*, (2005) 6 SCC 537. It was held that as regards unaided institutions, the State has no control and such institutions are free to admit students of their own choice. The said decision necessitated the enactment of the Constitution (Ninety-third Amendment) Act, 2005. (Paras 125, 111 and 106)

T.M.A. Pai Foundation v. *State of Karnataka*, (2002) 8 SCC 481; *P.A. Inamdar* v. *State of Maharashtra*, (2005) 6 SCC 537, *referred to*

Unni Krishnan, J.P. v. *State of A.P.*, (1993) 1 SCC 645, *held, overruled on this point*

Act 5 of 2007 is not intended to provide reservation in "private unaided" educational institutions. None of the private unaided educational institutions have filed petitions challenging the Constitution (Ninety-third Amendment).

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Per Balakrishnan, C.J. *(contd.)*

Though the petitioners have challenged the Constitution (Ninety-third Amendment) on various grounds, they were vis-à-vis the challenge to Act 5 of 2007. The counter by the Union of India was also in that context. In the absence of challenge by private unaided educational institutions, it would not be proper to pronounce upon the constitutional validity of that part of the constitutional amendment. As the main challenge in these various petitions was only regarding the provisions of Act 5 of 2007, which related to State maintained institutions, the challenge to the Constitution (Ninety-third Amendment) so far as it relates to private unaided educational institutions, does not strictly arise in these proceedings. In the absence of challenge by private unaided institutions, it may not be proper for the Supreme Court to decide whether the Constitution (Ninety-third Amendment) is violative of the "basic structure" of the Constitution so far as it relates to private unaided educational institutions merely because the Court is considering its validity in the context of Act 5 of 2007, and so the question is left open to be decided in other appropriate cases.
(Paras 106, 109 to 111, 122 and 221)

Per Pasayat and Thakker, JJ.

Challenge relating to private unaided educational institutions has not been examined because no such institution has laid any challenge. It is to be noted that the petitioners have made submissions in the background of Article 19(6) of the Constitution. Since none of the affected institutions have made any challenge it is not considered necessary to express any opinion or decide on this question.
[Para 358(12)]

Per Raveendran, J.

The question whether Article 15(5) would be unconstitutional on the ground that it violates the basic structure of the Constitution by imposing reservation in respect of private unaided educational institutions is left open. (Para 648)

Per Bhandari, J.

Imposing reservation on unaided institutions violates the basic structure by stripping citizens of their fundamental right under Article 19(1)(*g*) to carry on an occupation. The right to select students on the basis of merit is an essential feature of the right to establish and run an unaided institution. Reservation is an unreasonable restriction that infringes this right by destroying the autonomy and essence of an unaided institution. The effect of the Ninety-third Amendment is such that Article 19 is abrogated, leaving the basic structure altered. To restore the basic structure, I sever the Ninety-third Amendment's reference to "unaided" institutions. (Para 636)

[*See* fully below Shortnote *YO* et seq. below]

T.M.A. Pai Foundation v. *State of Karnataka*, (2002) 8 SCC 481; *P.A. Inamdar* v. *State of Maharashtra*, (2005) 6 SCC 537, *relied on*

YN. **Constitution of India — Arts. 368 and 32 — Anticipatory challenge to an enabling constitutional amendment on ground that amendment concerned created the potential for a violation of the basic structure — Maintainability of such challenge — Meaning and applicability of "width test" — Practical considerations that may be taken into account by Supreme Court in deciding to consider such anticipatory challenge — Non-impleadment of parties directly affected, when inconsequential**

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— *Per Bhandari, J.*, constitutional amendments by their very nature are often enabling provisions — If they clear the way for future legislation that would in fact violate the basic structure, the court need not wait for a potential violation to become an actual one — It can strike down the entire amendment ab initio

— The "width test" asks if an amendment is so wide that in effect (actual or potential), it goes beyond Parliament's amending power — What is relevant is that the real consequences can be taken into account while judging the width of the power — The Court cannot ignore consequences to which a particular construction would lead

— Even though no private unaided institution filed a writ petition, this Constitutional Bench heard the parties for months, the best lawyers in the country argued for both sides, and a brief from an unaided institution would not have added much if anything to the substance of the arguments — The Government will likely target unaided institutions in the future and the Supreme Court will have to go through the entire exercise de novo — Such an exercise would unnecessarily cause further delay — The fate of lakhs of students and thousands of institutions is indeterminate — Hence in the public interest it would be expedient to determine the question

Per Bhandari, J.

Amendments by their very nature are often enabling provisions. If they clear the way for future legislation that would in fact violate the basic structure, the Court need not wait for a potential violation to become an actual one. It can strike down the entire amendment ab initio. The question of potential width was resolved in *Minerva Mills*, (1980) 3 SCC 625, paras 38-39. The Court acknowledged that it generally does not anticipate constitutional issues before they arise, but it *held* that circumstances required it to act before unconstitutional provisions could be passed under the authority of an unconstitutional amendment. There is no constitutional or statutory inhibition against the decision of questions before they actually arise for consideration. (Para 494)

In the present case, what we are dealing with is not an ordinary law which may or may not be passed so that it could be said that our jurisdiction is being invoked on the hypothetical consideration that a law may be passed in future which will injure the rights of the petitioners. We are dealing with a constitutional amendment which has been brought into operation which, of its own force, permits the violation of certain freedoms through laws passed for certain purposes. There is not one precise definition of the width test, however. The test asks if an amendment is so wide that in effect (actual or potential), it goes beyond Parliament's amending power. What is relevant is that the real consequences can be taken into account while judging the width of the power, is settled. The Court cannot ignore the consequences to which a particular construction can lead. To make such a determination, it follows that the Court should ask whether an amendment infringes constitutional limitations as opposed to those evolved from mere common law. (Para 494)

No unaided institution filed a writ petition in this case. Had either the Supreme Court or the respondents an objection, they could have raised it at any time during the proceedings. This Constitutional Bench of the Supreme Court listened to the parties for months. It received voluminous written submissions from the parties, yet no objection was made with regard to the fact that no

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Per Bhandari, J. *(contd.)*

unaided institution had filed a writ petition. While the court would usually implead a party if it felt their presence was necessary to the resolution of the dispute, the facts of this case are peculiar. The best lawyers in the country argued the case for both sides, and a brief from an unaided institution would not have added much if anything to the substance of the arguments. The Government will likely target unaided institutions in the future. At that time, the Supreme Court will have to go through this entire exercise de novo to determine if unaided institutions should be subject to reservation. Such an exercise would unnecessarily cause further delay. The fate of lakhs of students and thousands of institutions would remain up in the air. Therefore, looking to the extraordinary facts, it has been decided to proceed with this aspect of the matter in the larger public interest. In view of the importance of the question raised and in view of the fact that the question has been raised in many a petition, it is expedient in the interest of justice to settle the true position. (Paras 493 and 494)

Minerva Mills Ltd. v. *Union of India*, (1980) 3 SCC 625; *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225; *M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212, *relied on*

YO[$]. **Constitution of India — Arts. 19(1)(g), 15(5) and Art. 368 — Right under Art. 19(1)(g) — Extent to which may be amended or altered without violating the basic structure of the Constitution — Validity of Art. 15(5), to the extent that it pertained to private unaided private institutions — Application of the Two-Step Effect Test as laid down in *I.R. Coelho case*, (2007) 2 SCC 1 (also known as Impact or Rights Test)**

— *Per Bhandari, J.* (*the other four learned Judges leaving the question open*), it cannot be said that subjecting Art. 19(1)(g) to Art. 15(5) violates the basic structure per se — If the right to equality, considered by some as a basic postulate of the Constitution, has been limited, a fortiori Art. 19(1)(g) can be too — However, applying the Effect Test, Art. 15(5) is invalid to the extent that it pertains to private unaided institutions as it abrogates Art. 19(1)(g) and hence violates the basic structure of the Constitution

— Since reservations would have a dramatic effect on educators, the unaided institutions in which they teach and, consequently, society as a whole, Art. 19(1)(g) has been more than abridged — When education is effectively nationalised, freedom stands obliterated — The identity of the Constitution is altered when unreasonable restrictions make a fundamental right meaningless — The right to select students on the basis of merit is an essential feature of the right to establish and run an unaided institution — Reservation is an unreasonable restriction that infringes this right by destroying the autonomy and essence of an unaided institution — The State cannot ask these institutions to abridge this right in exchange for affiliation/recognition — Unaided entities, whether they are educational institutions or private corporations, cannot be regulated out of existence when they are providing a public service like education — He who funds or runs the institution holds the power to select students — Given a transparent and reasonable selection process, it is up to the unaided institution to define "merit" according to its own values — To restore the

$ **Ed.**: *See also* Shortnotes *YG* and *YM*, above

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basic structure, the Ninety-third Amendment's reference to "unaided" institutions is severed

YP. **Constitution of India — Arts. 19(1)(g), 15(5), 32 and 368 — Significance of individual liberty and freedom — Determination of whether Art. 19(1)(g) has been infringed to the extent that there has been a violation of the basic structure of the Constitution — Application of the Effect Test or Impact or Rights Test — Effect or impact on whom or what to be seen**

— Question arising as to impact or effect of Art. 15(5) on Art. 19(1)(g) rights of private unaided institutions — Choice being between considering the impact (1) on the entire constitutional framework, or (2) on citizens engaged in unaided education as an occupation, *per Bhandari, J.*, it is the latter that must be examined — Individual liberty and freedom, as protected by the Golden Triangle, must carry greater weight for those who set off on their own and refuse government money

YQ. **Constitution of India — Arts. 19, 32 and 368 — Infringement of Art. 19 rights of citizens — Number of citizens to be affected for a challenge to the infringement to be maintainable — *Per Bhandari, J.*, freedom under Art. 19 belongs to individual citizens — The reference to "all citizens" in Art. 19 means that each and every individual citizen possesses Art. 19 rights — For the impugned legislation to fall, it need not touch every sphere of society — If even one individual's freedom has been curtailed, the Supreme Court is duty bound to entertain his or her claim**

YR. **Constitution of India — Arts. 19(1)(g) & (6), 14 & 21 and Preamble — Importance and significance of Art. 19(1)(g) in the constitutional scheme and the basic structure — Significance of the Golden Triangle — *Per Bhandari, J.*, Art. 19(1)(g) is a facet of the basic structure of the Constitution — The right to freedom under Art. 19 has been long recognised as a natural and inalienable right that belongs to all citizens — Indeed, Independence would mean little without it — Also, Art. 19(1)(g) belongs to the Golden Triangle: Arts. 14, 19 and 21 are the three fundamental rights that stand *above* the rest — Without the Golden Triangle, democracy is impossible — Furthermore, Art. 19(6) provides no safe haven for reservations**

YS. **Constitution of India — Arts. 368 and Pt. III — Abridgement of fundamental rights — When amounts to violation of the basic structure — Total deprivation in a limited area vis-à-vis partial deprivation in every area — Reiterated *per Bhandari, J.*, following *Minerva Mills case*, (1980) 3 SCC 625, the former can amount to abrogation of a fundamental right just as much as the latter can so as to amount to a violation of the basic structure of the Constitution**

YT[#$]. **Constitution of India — Arts. 14, 15 and 16 — Formal equality as enshrined in Arts. 14, 15(1) and 16(1) — Existing limitations on — *Per Bhandari, J.*, generally speaking, Arts. 15(3), (4) and 16(4) necessarily limit the right to formal equality**

Per Bhandari, J.

Step One: Does Article 15(5) affect a facet of the basic structure?

Parliament may subject Article 19(1)(*g*) to Article 15(5), even though the Supreme Court has held that reservation in unaided institutions is an unreasonable restriction that cannot be saved by Article 19(6). The structure of

#$ **Ed.**: *See also* Shortnote *YF*, above

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Per Bhandari, J. *(contd.)*

our Constitution permits fundamental rights, and even the Golden Triangle of Articles 14, 19 and 21, is to be abridged in limited circumstances. To say that subjecting Article 19(1)(*g*) to Article 15(5) violates the basic structure *per se* is to ignore the examples in which the most fundamental of rights is limited. Article 16(4) expressly limits the right to formal equality in Article 16(1), a specific facet of Article 14. In this light, *Article 16(4) impliedly limits the general right to formal equality in Article 14*. The right to equality is expressed in the negative in Article 15(1). Like Article 16(4), Article 15(4) limits Article 15(1)—another facet of Article 14 formal equality—such that egalitarian equality may be pursued. Generally speaking, Articles 15(3) and (4) and 16(4) allow the State to impose Affirmative Action Programmes on the public sector. Such provisions necessarily limit the right to formal equality. If the right to equality, considered by some as a basic postulate of the Constitution, has been limited, *a fortiori* Article 19(1)(*g*) can be too. (Paras 524 and 525)

Article 15(5) expressly precludes the application of Article 19(1)(*g*). Whenever reservations are implemented under Article 15(5), citizens are stripped of their fundamental rights under Article 19(1)(*g*). By excluding Article 19(1)(*g*), Article 15(5) obviously affects Article 19(1)(*g*), a facet of the basic structure of the Constitution. The right to freedom under Article 19 has been long recognised as a natural and inalienable right that belongs to all citizens. Indeed, what would Independence mean without it? Step one is therefore cleared. What is more, Article 19(1)(*g*) belongs to the Golden Triangle—Articles 14, 19 and 21 are the three fundamental rights that stand *above the rest.* The Golden Triangle's significance becomes clear when we consider that the Government may suspend Articles 14 and 19 rights in order to implement an Emergency. In a sense, democracy is only restored when the Triangle is returned to the citizens. Without the Triangle, democracy is impossible. (Paras 500, 501 and 503)

I.R. Coelho v. State of T.N., (2007) 2 SCC 1; *Kesavananda Bharati v. State of Kerala,* (1973) 4 SCC 225; *Waman Rao v. Union of India*, (1981) 2 SCC 362, *relied on*

Minerva Mills Ltd. v. Union of India, (1980) 3 SCC 625, clarified and *followed*

Step Two: Whether Art. 15(5) affects Art. 19(1)(g) to the extent that it violates the basic structure?

As observed by Justice Brandeis of the US Supreme Court, *the need to protect liberty is the greatest when Government's purposes are beneficent.* Justice Brandeis' word of caution is relevant to today's dispute wherein the Government trumpets reservation in higher education as an answer to our age-old problems of poverty and caste. At first blush, it sounds as if reservation in higher education would help the backward help themselves. The road out of poverty is paved with education. However, the "devil is the details". With elementary freedom on the line, these details must be *carefully* scrutinised. (Paras 501 and 502)

Minerva Mills Ltd. v. *Union of India*, (1980) 3 SCC 625, *relied on*

I.R. Coelho case, (2007) 2 SCC 1, has held that the Court must apply the impact/rights test to determine whether the basic structure has been violated. Of the two questions as to (1) whether to consider the impact on the entire constitutional framework, or (2) whether to examine the effect on citizens engaged in *unaided* education as an occupation it is the latter that must be examined. Individual liberty and freedom, as protected by the Golden Triangle,

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Per Bhandari, J. *(contd.)*

must carry greater weight for those who set off on their own and refuse government money. (Para 528)

I.R. Coelho v. *State of T.N.*, (2007) 2 SCC 1, *applied*

The next question is to ascertain who is affected by reservation in unaided institutions. As held in *Minerva Mills Ltd. case*, (1980) 3 SCC 625 at para 59, total deprivation of fundamental rights, even in a limited area, can amount to abrogation of fundamental right just as a partial deprivation in every area can. Freedom under Article 19 belongs to individual citizens. The reference to "all citizens" in Article 19 means that each and every individual citizen possesses Article 19 rights. For the impugned legislation to fall, it need not touch every sphere of society. If even one individual's freedom has been curtailed, the Supreme Court is duty bound to entertain his or her claim. It is he or she who possesses the Article 19(1)(*g*) right to carry on an occupation. (Paras 529, 499 and 530)

Minerva Mills Ltd. v. *Union of India*, (1980) 3 SCC 625, *followed*

If Article 15(5) were implemented, the educator in unaided institutions would still have students to educate. "Educator" is used in the broadest sense of the term and include teachers, professors, lecturers, faculty, staff, administrators and those who finance institutions. Without one of the aforementioned, the institution cannot function properly. (Para 531)

Though affected by reservation, the educator still has a job. His occupation remains intact. Students will come. Classes will commence. Marks will be distributed. The greatest impact on the educator is that neither he nor his institution will choose whom to teach. Almost half of the time (49.5%), the State would decide for them. Selecting students or employees goes to the heart of an organisation's autonomy. The essence of an unaided educational institution is the freedom to manage its affairs. It has been held that subjecting unaided institutions to reservation is an *unreasonable* restriction. Article 19(6) provides no safe haven for reservations. (Paras 532 and 533)

The Government-imposed selection of students in turn has wide-ranging consequences for unaided institutions and their educators. At least four problems will likely arise:

(*1*) academic standards suffer;

(*2*) attracting and retaining good faculty becomes more difficult;

(*3*) the incentive to establish a first-rate unaided institution is diminished;

(*4*) and ultimately the global reputation of our unaided institutions is severely compromised. (Para 534)

First, once the State tells them whom to teach, standards of excellence will suffer. This is because those institutions will no longer be able to admit the highest-scoring students. As good as some of our institutions are, they do not teach blank slates. The best universities are the best, in part, because they attract the best students. The same can be said for almost any organisation. In the case of higher education, the universities that admit the best will likely churn out the best. The precise extent to which the university made the best so good cannot be qualified. The point is that universities alone cannot produce qualified job candidates. Forced to admit students with lower marks, the university's final product will not be as strong. (Para 535)

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Per Bhandari, J. *(contd.)*

Second, reservations weaken the incentive to establish unaided institutions: if the State usurps the right to select students, would one still spend the time and money to establish an unaided institution? The question is all the more relevant today. Tomorrow's knowledge economy requires a well-educated populace. "Well educated" does not imply a string of degrees from less than taxing institutions. Rather, it means that one will possess the skills, knowledge and creativity to compete globally. Our unaided institutions must remain places where these traits are refined. (Para 536)

Third, those inclined to teach the brightest students have even less of a reason to leave private sector jobs for the teaching profession or to join the profession in the first place. "Brightest" would come with an asterisk. They would be the brightest available under the Government's reservation scheme. These potential teachers may ask themselves: How will I teach a class in which half the students are advanced relative to the other half? In many institutions, the shortage of top-rate faculty will only get worse. (Para 537)

Fourth, reservations may have a negative impact on students seeking employment in the burgeoning knowledge economy. Recruiters have begun to trickle into campuses. They hail from domestic as well as international entities, and they too may take note of reservations in unaided institutions. The effect on educators, from the top down, would be felt. For them, little more than a semblance of occupation would remain. (Para 538)

Given the dramatic effect that reservations would have on educators, the unaided institutions in which they teach and, consequently, society as a whole, Article 19(1)(*g*) has been more than abridged. When education is effectively nationalised, freedom stands obliterated. The identity of the Constitution is altered when unreasonable restrictions make a fundamental right meaningless. The Ninety-third Amendment's imposition of reservation on unaided institutions has abrogated Article 19(1)(*g*), a basic feature of the Constitution, in violation of our Constitution's basic structure. Imposing reservation on unaided institutions violates the basic structure by stripping citizens of their fundamental right under Article 19(1)(*g*) to carry on an occupation. The establishment and running of an educational institution falls under the right to an occupation. The right to select students on the basis of merit is an essential feature of the right to establish and run an unaided institution. Reservation is an unreasonable restriction that infringes this right by destroying the autonomy and essence of an unaided institution. Unaided entities, whether they are educational institutions or private corporations, cannot be regulated out of existence when they are providing a public service like education. That is what reservation would do. That is an unreasonable restriction. When you do not take a single paisa of public money, you cannot be subjected to such restriction. The effect of the Ninety-third Amendment is such that Article 19 is abrogated, leaving the basic structure altered. To restore the basic structure, the Ninety-third Amendment's reference to "unaided" institutions is severed. (Paras 492, 539 and 636)

Unaided institutions (minority and non-minority) can admit students as they choose, provided their selection process is rational, objective, fair, transparent, non-exploitative and merit based. Stripping private unaided institutions of their right to select students would be unreasonable. Like Article 15(5) in the instant case, *Unni Krishnan*, (1993) 1 SCC 645, effectively nationalised education. *T.M.A Pai*, (2002) 8 SCC 481, overturned *Unni Krishnan*. The proposition is

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Per Bhandari, J. *(contd.)*

simple: he who funds or runs the institution holds the power to select students. The State cannot ask these institutions to abridge this right in exchange for affiliation/recognition. Unaided institutions might admit a small percentage of students belonging to the weaker sections of the society by granting those sections freeships or scholarships, if not granted by the Government. Given a transparent and reasonable selection process, it is up to the institution to define "merit" according to its own values. (Paras 513 and 517 to 520)

T.M.A. Pai Foundation v. *State of Karnataka*, (2002) 8 SCC 481; *P.A. Inamdar* v. *State of Maharashtra*, (2005) 6 SCC 537; *St. Stephen's College* v. *University of Delhi*, (1992) 1 SCC 558, *followed*

Indra Sawhney v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385, *relied on*

Minerva Mills Ltd. v. *Union of India*, (1980) 3 SCC 625, *relied on*

Unni Krishnan, J.P. v. *State of A.P.*, (1993) 1 SCC 645, *held, overruled on this point*

Islamic Academy of Education v. *State of Karnataka*, (2003) 6 SCC 697, *held, partly overruled*

R. Chitralekha v. *State of Mysore*, AIR 1964 SC 1823 : (1964) 6 SCR 368; *P. Rajendran (Minor)* v. *State of Madras*, AIR 1968 SC 1012 : (1968) 2 SCR 786, *referred to*

YU. **Constitution of India — Arts. 368 and 19(1)(g) & 15(5) — Severing of part of constitutional amendment found to be in violation of the basic structure — Test of severability applied to inclusion of private unaided institutions within the purview of Art. 15(5) as the same violated the basic structure of the Constitution by abrogating the Art. 19(1)(g) right of such institutions (*per Bhandari, J.*)** **(Paras 540 and 544)**

R.M.D. Chamarbaugwalla v. *Union of India*, AIR 1957 SC 628 : 1957 SCR 930, *applied*

State of Bombay v. *United Motors (India) Ltd.*, AIR 1953 SC 252 : 1953 SCR 1069, *relied on*

State of Bombay v. *F.N. Balsara*, AIR 1951 SC 318 : 1951 SCR 682, *held, partly relied on*

T.M.A. Pai Foundation v. *State of Karnataka*, (2002) 8 SCC 481; *P.A. Inamdar* v. *State of Maharashtra*, (2005) 6 SCC 537, *referred to*

Dorchy v. *State of Kansas*, 68 L Ed 686 : 264 US 286 (1923), *cited*

YV. **Constitution of India — Arts. 15(4) & (5), 14, 29, 30 and 368 — Art. 15(5) whether invalid as (i) it was contradictory to Art. 15(4), and (ii) the exclusion of minority institutions from its purview violated Art. 14**

— Held (*per curiam*), Art. 15(5) is not contradictory to Art. 15(4) — Both Arts. 15(4) and 15(5) being enabling provisions will operate independently in different areas — The non obstante clauses at the beginning of both Arts. 15(4) and 15(5) i.e. "Nothing in this article" refer to Arts. 15(1) and 15(2) and not to each other

— Further (*per Balakrishnan, C.J.* and *Bhandari, J.*; *Pasayat and Thakker, JJ.* and *Raveendran, J. expressing no opinion*), the exclusion of minority institutions from the purview of Art. 15(5) does not violate Art. 14 — Constitutional Interpretation — Basic rules — Harmonious construction — No constitutional provision to be rendered otiose — Tests to be applied

YW. **Constitution of India — Arts. 30 and 19(1)(g) — Minorities if possess a right or privilege which non-minorities do not (*per Bhandari, J.*)**

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Per Balakrishnan, C.J.

As has been held in *N.M. Thomas case*, (1976) 2 SCC 310, and *Indra Sawhney case*, 1992 Supp (3) SCC 217, Articles 15(4) and 16(4) are not exceptions to Articles 15(1) and 16(1) but independent enabling provisions. Article 15(5) is also to be taken as an enabling provision to carry out a certain constitutional mandate and thus it is constitutionally valid and the contentions raised on these grounds are rejected. Both Articles 15(4) and 15(5) operate in different areas. The "[n]othing in this article" [mentioned at the beginning of Article 15(5)] would only mean that the nothing in this article which prohibits the State on grounds which are mentioned in Article 15(1) alone be given importance. Article 15(5) does not exclude Article 15(4) of the Constitution. (Paras 125, 126 and 108)

It is a well-settled principle of constitutional interpretation that while interpreting the provisions of the Constitution, effect shall be given to all the provisions of the Constitution and no provision shall be interpreted in a manner as to make any other provision in the Constitution inoperative or otiose. If the intention of Parliament was to exclude Article 15(4), it could have very well deleted Article 15(4) of the Constitution. Minority institutions are also entitled to the exercise of fundamental rights under Article 19(1)(*g*) of the Constitution, whether they be aided or unaided. But in the case of Article 15(5), the minority educational institutions, whether aided or unaided, are excluded from the purview of Article 15(5) of the Constitution. Both, being enabling provisions, would operate in their own field and the validity of any legislation made on the basis of Articles 15(4) or 15(5) have to be examined on the basis of provisions contained in such legislation or the special provision that may be made under Articles 15(4) or 15(5). (Para 126)

Further, no educational institutions or any aggrieved party has come before the Supreme Court challenging the constitutional amendment on these grounds. The challenge is made by the petitioners objecting to the reservations made under Act 5 of 2007. Article 15(5) is constitutionally valid and Articles 15(4) and 15(5) are not mutually contradictory. (Paras 126 and 222)

Indra Sawhney v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385; *State of Kerala* v. *N.M. Thomas*, (1976) 2 SCC 310 : 1976 SCC (L&S) 227, *relied on*

State of Madras v. *Champakam Dorairajan*, AIR 1951 SC 226 : 1951 SCR 525; *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481; *P.A. Inamdar* v. *State of Maharashtra*, (2005) 6 SCC 537, *referred to*

State of A.P. v. *U.S.V. Balram*, (1972) 1 SCC 660, *cited*

The petitioners contended that the exclusion of minority institutions under Article 15(5) itself is violative of Article 14 of the Constitution. It was contended that the exclusion by itself is not severable from the rest of the provision. This plea also is not tenable because the minority institutions have been given a separate treatment in view of Article 30 of the Constitution. Such classification has been held to be in accordance with the provisions of the Constitution. The exemption of minority educational institutions has been allowed to conform Article 15(5) with the mandate of Article 30 of the Constitution. Moreover, both Articles 15(4) and 15(5) are operative and the plea of non-severability is not applicable. (Para 127)

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Per Balakrishnan, C.J. *(contd.)*

It may also be noted that if at all there is any violation of Article 14 or any other equality principle, the affected educational institution should have approached the Supreme Court to vindicate their rights. No such petition has been filed before the Supreme Court. Therefore, it is held that the exclusion of minority educational institutions from Article 15(5) is not violative of Article 14 of the Constitution as the minority educational institutions, by themselves, are a separate class and their rights are protected by other constitutional provisions. (Paras 128 and 223)

Per Pasayat and Thakker, JJ.

It needs no emphasis that Articles 15(4), 15(5) and 16(4) have to comply with the requirements of Article 14 and the discipline imposed in several other provisions like Articles 15(2)(*a*) and 15(2)(*b*), though, they form a part of the equality concept, each of which is so found in our Constitution. (Para 326)

Provisions of the Constitution have to be read harmoniously and no part can be treated to be redundant. Both the provisions operate in different areas though there may be some amount of overlapping but that does not in any way lead to the conclusion that Article 15(5) takes away what is provided in Article 15(4). (Para 332)

So far as the constitutional amendments are concerned:

(*i*) Articles 16(1) and 16(4) have to be harmoniously construed. The one is not an exception to the other.

(*ii*) Articles 15(4) and 15(5) operate in different fields. Article 15(5) does not render Article 15(4) inactive or inoperative. [Para 358(9)]

M. Nagaraj v. *Union of India*, (2006) 8 SCC 212; *Minerva Mills Ltd.* v. *Union of India*, (1980) 3 SCC 625 : AIR 1980 SC 1789; *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481; *State of A.P.* v. *P. Sagar*, AIR 1968 SC 1379 : (1968) 3 SCR 595; *Sarwan Singh* v. *Kasturi Lal*, (1977) 1 SCC 750; *J.K. Cotton Spg. and Wvg. Mills Co. Ltd.* v. *State of U.P.*, AIR 1961 SC 1170 : (1961) 3 SCR 185; *Shiv Shakti Coop. Housing Society* v. *Swaraj Developers*, (2003) 6 SCC 659; *CIT* v. *Hindustan Bulk Carriers*, (2003) 3 SCC 57, *relied on*

Per Raveendran, J.

Articles 15(3) to (5) enable the State to make special provisions in specified areas. The words "[n]othing in this article" occurring in Clauses (3), (4) and (5) therefore refer to Clauses (1) and (2) of Article 15. When Clause (4) starts with those words, it does not obviously refer to Clause (3). Similarly when Clause (5) starts with those words, it does not refer to Clauses (3) and (4). Clauses (3), (4) and (5) of Article 15 are not to be read as being in conflict with each other, or prevailing over each other. Nor does an exception made under Clause (5) operate as an exception under Clause (4). While Clauses (4) and (5) may operate independently, they have to be read harmoniously. (Para 655)

Indra Sawhney v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385; *State of Kerala* v. *N.M. Thomas*, (1976) 2 SCC 310 : 1976 SCC (L&S) 227; *K.C. Vasanth Kumar* v. *State of Karnataka*, 1985 Supp SCC 714, *relied on*

Per Bhandari, J.

Three tests of statutory interpretation that give guidance in resolving a conflict between statutory provisions have been laid down. First, if the Court cannot harmonise the two provisions, it must invalidate the one that completely

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Per Bhandari, J. *(contd.)*

destroys the other's purpose. The second test asks which provision came into effect at a later date (i.e. was "later in time")? That which is later shall prevail. The third test provides that the specific clause must trump the general.

(Paras 606 to 608)

Sarwan Singh v. *Kasturi Lal*, (1977) 1 SCC 750; *J.K. Cotton Spg. and Wvg. Mills Co. Ltd.* v. *State of U.P.*, AIR 1961 SC 1170 : (1961) 3 SCR 185, *applied*

While contradictory, Articles 15(4) and 15(5) can be read harmoniously. One of the express purposes of Article 15(5) was to exempt minority institutions and thus avoid conflict with Article 30(1). This is found in the text of Article 15(5) itself. Article 15(4) was not passed with an express intention to include minority institutions; nor did it arise out of a case in which minority institutions were a party. Then again, it was open to the First Parliament to exclude minority institutions from the beginning. Articles 15(4) and 15(5)'s purposes do not necessarily conflict. The first test is inconclusive. As far as the second test is concerned here, Article 15(5) was enacted later in time. As far as the third test is concerned, Article 15(5) is specific in that it refers to special provisions that relate to admission in educational institutions, whereas Article 15(4) makes no such reference to the type of entity at which special provisions are to be enjoyed. Because Article 15(5) is later in time and specific to the question presented, it must neutralise Article 15(4) *in regard* to reservation in education. The respondents, correctly pointed out that constitutional articles are to be read harmoniously, not in isolation. Our interpretation is harmonious because Article 15(4) still applies to other areas in which reservation may be passed.

(Paras 606 to 609 and 638)

T.M.A. Pai Foundation v. *State of Karnataka*, (2002) 8 SCC 481, *relied on*

Furthermore, given the inherent tension between Articles 29(2) and 30(1), the overriding constitutional goal of realising a casteless/classless society should serve as a tie-breaker. It will be a step in the wrong direction if minority institutions (even those that are aided) are subjected to reservation.

(Paras 610, 611 and 639)

Minorities possess one right or privilege that non-minorities do not: establishing and administering institutions for their community. The right to admit own-minority students in aided minority institutions has only been made subject to admitting a reasonable number of outsiders. In the instant case, aided minority institutions stand to benefit from Act 5 of 2007: instead of having to admit a reasonable number of outsiders they would be exempted from reservation. However, their non-minority counterparts would not. While this does elevate their status to a certain extent, however, the constitutional goal and philosophy must also be kept in mind. Given the ultimate goal of furthering a classless/casteless society, there is no need to go out on a limb and rewrite them into the amendment. Such a ruling would subject even more institutions to caste-based reservation. This would be a step back for the nation, furthering the caste divide. Therefore no step will be taken in that direction. (Para 622)

T.M.A. Pai Foundation v. *State of Karnataka*, (2002) 8 SCC 481; *Ahmedabad St. Xavier's College Society* v. *State of Gujarat*, (1974) 1 SCC 717 : (1975) 1 SCR 173; *Islamic Academy of Education* v. *State of Karnataka*, (2003) 6 SCC 697, *referred to*

YX. **Constitution of India — Arts. 15(5), 368 and 162 — Constitutional amendment inserting Art. 15(5) — If violated procedure prescribed under Art. 368(2) proviso — Held (*per Balakrishnan, C.J.*), since the said**

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amendment did not affect the executive power of the States under Art. 162, it was not necessary to follow the procedure prescribed under Art. 368(2) proviso — Constitution (Ninety-third Amendment) Act, 2005 — Validity of (Paras 224 and 131)

YY. **Constitution of India — Arts. 14, 15, 16, 19, 46 and 368 — Affirmative action — Principles applicable for testing validity of — Comparability of social problems associated with caste and race — Effect of structural differences between Indian and US Constitutions — Principles laid down by US Supreme Court for testing legislation relating to affirmative action, held (*per Balakrishnan, C.J.* and *Pasayat and Thakker, JJ.*), are inapplicable in the Indian context — There are structural differences between the Indian and the US Constitutions and the social conditions as well as other factors are widely different in both countries — In any case, while considering the method adopted for eradication by adopting the process of reservation indirectly the facet of strict scrutiny comes in — The strict scrutiny test has been applied in the background of Article 19 vis-à-vis compelling State needs — *Per Bhandari, J. (contra)*, we need to keep our window open and permit the light of knowledge to enter from any source — Though the caste system is peculiar to India, this social problem can be compared to some extent with the American social problem of race — Of the basis of classification on which there is case law, the one that most closely resembles caste is race — This is because both are immutable traits — Thus, though US decisions are not binding, judgments delivered by US courts on affirmative action have great persuasive value and they may provide broad guidelines as to how we should tackle our prevailing condition — Given that the Ninety-third Amendment on its face discriminates against General Category students, it should be given careful scrutiny — The Art. 14 right to formal equality deserves as much**

YZ. **Constitution of India — Arts. 245 and 13 — Constitutional validity of legislation — Standards and tests applied by US Supreme Court ("rational basis standard", "intermediate scrutiny" and "strict scrutiny"), explained and summarised — Statute Law — Words and Phrases — "Rational basis standard", "intermediate scrutiny", "strict scrutiny", "suspect legislation", "compelling State necessity"**

Z. **Precedents — Applicability of foreign case law (American and English) in constitutional contexts — Constitutional Interpretation — External aids**

Per Balakrishnan, C.J.

The Indian Supreme Court has repeatedly held that the American decisions are not strictly applicable to us. The decisions of the United States Supreme Court have not been applied in the Indian context as it was felt that the structure of the provisions under the two Constitutions and the social conditions as well as other factors are widely different in both the countries. (Paras 188 and 209)

Saurabh Chaudri v. *Union of India*, (2003) 11 SCC 146; *Bhikaji Narain Dhakras* v. *State of M.P.*, AIR 1955 SC 781 : (1955) 2 SCR 589; *A.S. Krishna* v. *State of Madras*, AIR 1957 SC 297 : (1957) SCR 399; *Kameshwar Prasad* v. *State of Bihar*, AIR 1962 SC 1166 : 1962 Supp (3) SCR 369; *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225, *relied on*

A.K. Roy v. *Union of India*, (1982) 1 SCC 271 : 1982 SCC (Cri) 152, *cited*

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Per Balakrishnan, C.J. *(contd.)*

There are structural differences in the Constitution of India and the Constitution of the United States of America. The Fourteenth Amendment to the US Constitution inter alia provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws". Whereas in India, Articles 14 to 18 are differently structured and contain express provisions for special provision for the advancement of SEBCs, STs and SCs. Further, the Preamble to the Constitution and the directive principles of State policy give a positive mandate to the State and the State is obliged to remove inequalities and backwardness from society. While considering the constitutionality of a social justice legislation, it is worthwhile to note the objectives which have been incorporated by the Constitution-makers in the Preamble of the Constitution and how they are sought to be secured by enacting fundamental rights in Part III and directives principles of State policy in Part IV of the Constitution. The fundamental rights represent the civil and political rights and the directive principles embody social and economic rights. Together they are intended to carry out the objectives set out in the Preamble of the Constitution. In the Indian Constitution there is a specific provision under the directive principles of State policy in Part IV of the Constitution requiring the State to strive for justice—social, economic and political—and to minimise the inequalities of income and endeavour to eliminate inequalities in status, facilities and opportunities (Article 38). (Paras 190 and 194)

From the constitutional history of India, it can be seen that from the point of view of importance and significance, no distinction can be made between the two sets of rights, namely, fundamental rights which are made justiciable and the directive principles which are made non-justiciable. The directive principles of State policy are made non-justiciable for the reason that the implementation of many of these rights would depend on the financial capability of the State. Non-justiciable clause was provided for the reason that an infant State shall not be made accountable immediately for not fulfilling these obligations. Merely because the directive principles are non-justiciable by the judicial process does not mean that they are of subordinate importance. (Para 195)

Article 46 enjoins upon the State to promote with special care the educational and economic interests of the weaker sections of the people and to protect them from social injustice and all forms of exploitation whereas under the Constitution of the United States of America, we get an entirely different picture. Though equality was one of the solemn affirmations of the American Declaration of Independence, slavery continued unabatedly and it was, to some extent, legally recognised. (Para 197)

Article 15(4) and Article 16(4) of the Constitution were enacted as measures of compensatory or protective discrimination to grant relief to persons belonging to socially oppressed castes and minorities. The amendment to Article 15 by inserting Article 15(5) and the new Act (Act 5 of 2007) are to be viewed in the background of these constitutional provisions. (Paras 190, 193 and 194)

The United States Supreme Court has held that race may be one of the many factors that can be taken into account while structuring an Affirmative Action Programme. At this stage, an analogy may be drawn with the Indian situation wherein the Supreme Court of India, in various cases, has held that caste may be one of the factors that can be taken into account, while providing for reservations for the socially and educationally backward classes. However, caste cannot be

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Per Balakrishnan, C.J. *(contd.)*

the "only" factor, just as race alone cannot be the only factor in the United States, while structuring reservation or Affirmative Action Programmes. (Para 205)

The principles of strict scrutiny and suspect legislation applied by the Supreme Court of the United States of America cannot be applied directly to India as the gamut of affirmative action in India is fully supported by constitutional provisions and we have not applied the principles of "suspect legislation" and we have been following the doctrine that every legislation passed by Parliament is presumed to be constitutionally valid unless otherwise proved. (Para 209)

The principles laid down by the United States Supreme Court such as "suspect legislation", "strict scrutiny" and "compelling State necessity" are not applicable for challenging the validity of Act 5 of 2007 or reservations or other affirmative action contemplated under Article 15(5) of the Constitution. (Paras 229 and 210)

State of Kerala v. *N.M. Thomas*, (1976) 2 SCC 310 : 1976 SCC (L&S) 227; *K.C. Vasanth Kumar* v. *State of Karnataka*, 1985 Supp SCC 714, *followed*

Kerala Education Bill, 1957, In re, AIR 1958 SC 956 : 1959 SCR 995; *Minerva Mills Ltd.* v. *Union of India*, (1980) 3 SCC 625 : AIR 1980 SC 1789, *relied on*

T. Devadasan v. *Union of India*, AIR 1964 SC 179 : (1964) 4 SCR 680, *held, dissenting opinion transmuted into law*

GM, Southern Railway v. *Rangachari*, AIR 1962 SC 36 : (1962) 2 SCR 586; *M.R. Balaji* v. *State of Mysore*, AIR 1963 SC 649 : 1963 Supp (1) SCR 439; *T. Devadasan* v. *Union of India*, AIR 1964 SC 179 : (1964) 4 SCR 680; *Triloki Nath Tiku* v. *State of J&K*, AIR 1967 SC 1283 : (1967) 2 SCR 265, *held, overruled on this point*

State of Madras v. *Champakam Dorairajan*, AIR 1951 SC 226 : 1951 SCR 525; *Dred Scott* v. *Sandford*, 15 L Ed 691 : 60 US 393 (1856); *Plessy* v. *Ferguson*, 41 L Ed 256 : 163 US 537 (1895); *Brown* v. *Board of Education*, 98 L Ed 873 : 347 US 483 (1953); *Gratz* v. *Bollinger*, 156 L Ed 2d 257 : 539 US 244 (2003); *Regents of the University of California* v. *Bakke*, 57 L Ed 2d 750 : 438 US 265 (1978); *Grutter* v. *Bollinger*, 156 L Ed 2d 304 : 539 US 306 (2003); *Adarand Constructors, Inc.* v. *Pena*, 132 L Ed 2d 158 : 515 US 200 (1995); *Parents Involved in Community Schools* v. *Seattle School District*, 168 L Ed 2d 508 : 127 S Ct 2738 (2007), *considered*

Granville Austin: *The Indian Constitution: Cornerstone of a Nation*, p. 52, *relied on*

Per Pasayat and Thakker, JJ.

There is a conceptual difference between the cases decided by the American Supreme Court and the cases at hand. The logic of strict classification and strict scrutiny does not have much relevance in the cases of the nature at hand. If one looks at the different statutes in India, Article 14 of the Constitution is conceptually different from the Fourteenth Amendment to the American Constitution. While interpreting the constitutional provisions, foreign decisions do not have great determinative value. They may provide materials for deciding the question regarding constitutionality. In that sense, the strict scrutiny test is not applicable and in-depth scrutiny has to be made to decide the constitutionality or otherwise of a statute. [Paras 252 and 358(10)]

The provisions of the American Constitution in United States relating to formal equality concept do not appear to have operated from the beginning of the American Constitution. In the first phase of the US constitutional law there was only affirmative action. On the other hand even under the 1919 and 1935 Government of India Acts the rights of certain class of people like Scheduled

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Per Pasayat and Thakker, JJ. *(contd.)*

Castes, Scheduled Tribes and the deprived classes have been recognised, in America, the rights have been conferred on individuals and not so much on the groups. Further, in the Indian Constitution right from the beginning affirmative action has been provided, for example, provisions made for Scheduled Castes and Scheduled Tribes. On the other hand, in India Articles 38(1) and 38(2) read with Article 46 of the Constitution make the position clear that the State is charged with the duty to secure interests of the weaker sections of the people and minimise the inequalities in income. The Constitution from its inception contained Article 17 which abolishes untouchability. (Paras 253, 273 and 274)

In India there has to be collective commitment for upliftment of those who needed it. In that sense, the question again comes back to the basic issue as to whether the action taken by the Government can be upheld after making judicial scrutiny. Much assistance is not available to the petitioners from the American decisions. (Para 268)

It needs to be clarified that the use of the expression "strict scrutiny" in *Narendra Kumar case*, AIR 1960 SC 430 has been used in a context different from its settled American usage. What really appears to be the intention for the use of the expression is "careful and deeper scrutiny" and not in the sense of strict scrutiny of the provisions as is prevalent in the American jurisprudence. (Para 269)

Indra Sawhney v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385; *Minerva Mills Ltd.* v. *Union of India*, (1980) 3 SCC 625 : AIR 1980 SC 1789; *State of Kerala* v. *N.M. Thomas*, (1976) 2 SCC 310 : 1976 SCC (L&S) 227; *A.K. Roy* v. *Union of India*, (1982) 1 SCC 271 : 1982 SCC (Cri) 152; *State of W.B.* v. *Anwar Ali Sarkar*, AIR 1952 SC 75 : 1952 SCR 284; *State of Bombay* v. *F.N. Balsara*, AIR 1951 SC 318 : 1951 SCR 682, *relied on*

Narendra Kumar v. *Union of India*, AIR 1960 SC 430 : (1960) 2 SCR 375, *clarified*

Plessy v. *Ferguson*, 41 L Ed 256 : 163 US 537 (1895); *United States* v. *Carolene Products*, 82 L Ed 1234 : 304 US 144 (1937); *Skinner* v. *Oklahoma*, 86 L Ed 1655 : 316 US 535 (1941); *Regents of the University of California* v. *Bakke*, 57 L Ed 2d 750 : 438 US 265 (1978); *Grutter* v. *Bollinger*, 156 L Ed 2d 304 : 539 US 306 (2003), *referred to*

It is unnecessary to decide as it has been contended by the petitioners whether the concept of strict scrutiny is a measure of judicial scrutiny as highlighted by the conditions in India. It is submitted that label is not relevant. (Para 352)

The ultimate object is the eradication of castes and that is the foundation for reservation. While considering the method adopted for eradication by adopting the process of reservation indirectly the facet of strict scrutiny comes in. The strict scrutiny test has been applied in the background of Article 19 vis-à-vis compelling State needs. (Para 353)

Chintaman Rao v. *State of M.P.*, AIR 1951 SC 118 : 1950 SCR 759; *State of Madras* v. *V.G. Row*, AIR 1952 SC 196, *relied on*

Per Bhandari, J.

At the outset, it is made clear that decisions of foreign countries are not binding on Indian courts. Indian courts have not adopted American standards of review. But the judgments delivered by US courts on affirmative action have great persuasive value and they may provide broad guidelines as to how we should tackle our prevailing condition. A large number of English laws have been inherited by India and America. English and American cases are frequently cited by our courts. US law is, of course, not binding but does have great persuasive value. Where others have reviewed similar issues in great detail, it

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Per Bhandari, J. *(contd.)*

behoves us to learn from their mistakes as well as accomplishments. We need to keep our window open and permit the light of knowledge to enter from any source. Let the path to our constitutional goals be enlightened by experience, learning, knowledge and wisdom from any quarter. The Rig Veda says:

Ano bhadrah krtavo yantu viswatah

"Let noble thought come to us from every side."

(Paras 545, 623, 640 and 641)

R. Venkataraman, former President of India in Foreword to Dr. L.M. Singhvi: "*Democracy and Rule of Law: Foundation and Frontiers*", *referred to*

Whenever legislation is challenged as unconstitutional, courts must ask themselves how much deference they will give to the legislature. The answer is that it depends on the nature of the impugned legislation. The United States Supreme Court has evolved three standards of review for Government action that treats different people differently. The first is the rational basis standard. When the classification is rationally related to any legitimate Government purpose, the Court defers to the State and upholds the classification. This is the most deferential of the three standards. The second standard is intermediate scrutiny, which is less deferential to the Government. Here, the Court asks whether the classification is substantially related to any important Government purpose. The third and highest level of review is known as strict scrutiny, whereby the Court requires that the classification is narrowly tailored to a compelling State interest. The strict scrutiny test is the least deferential to the Government. (Para 553)

The caste system is peculiar to this country. Perhaps the entire society has been divided on the basis of caste. This social problem can be compared to some extent with that of American society. This is because their problem of race is akin to our problem of caste. In the US, the problem of racial discrimination has existed for centuries. The cases of affirmative action decided in the United States are relevant. They show us how that society has dealt with the problem of racial discrimination. (Paras 545 and 623)

Of the classifications on which there is case law, the one that most closely resembles caste is race. This is because both are immutable traits. They are used by the powerful, or those seeking power, to justify oppression. Racism and casteism have long haunted both nations. In the United States, race raises red flags. It is often, though not always, reviewed under strict scrutiny. American courts carefully review racial classifications. Given that the Ninety-third Amendment on its face discriminates against General Category students, it should be given careful scrutiny. The Article 14 right to formal equality deserves as much. (Paras 554 and 556)

ZA. **Interpretation of Statutes — External aids — Parliamentary debates and Ministers' speeches — Relevance of — Respect for proceedings of the legislature — *Per Pasayat and Thakker, JJ.*, it is a settled position that there can be only limited use of parliamentary debates — Courts should not normally critically analyse the proceedings of Parliament — Constitution of India — Arts. 122 and 212 — Constitutional Law — Separation of powers (Para 248)**

ZB. **Constitution of India — Arts. 13, 32, 122 and 212 — Short length of parliamentary debate in passing legislation — Effect — *Per Pasayat and Thakker, JJ.*, the same cannot and does not become a ground for invalidity of the decision (Para 250)**

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State of Mysore v. *R.V. Bidap*, (1974) 1 SCC 337 : 1973 SCC (L&S) 538, *relied on*

Builders Assn. of India v. *Union of India*, 1995 Supp (1) SCC 41; *K. Nagaraj* v. *State of A.P.*, (1985) 1 SCC 523 : 1985 SCC (L&S) 280, *referred to*

ZC. Constitution of India — Arts. 30(1) and 29(1) — Relative scope — Aided minority institutions — Scope of rights of — Admission, administration and management — Curbs that may be placed on — Reservation for minority students — Extent permissible — Principles reiterated and summarised (*per Bhandari, J.*) (Paras 612 to 616)

T.M.A. Pai Foundation v. *State of Karnataka*, (2002) 8 SCC 481; *St. Stephen's College* v. *University of Delhi*, (1992) 1 SCC 558; *Kerala Education Bill, 1957, In re,* AIR 1958 SC 956 : 1959 SCR 995, *referred to*

D-M/37684/C

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104. AIR 1956 SC 614, *Ram Narain* v. *Simla Banking & Industrial Co. Ltd.* 539*g*, 540*f*
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132. (1921) 2 AC 91 : 1921 All ER Rep 605 (PC), *Great West Saddlery Co.* v. *R.* 537*e*
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I. Mr Ashoka Kumar Thakur, Petitioner-in-person

1. Our Constitution has been amended ninety-four times. It is interesting to note that more than hundred Constitution (Amendment) Bills have been submitted to Parliament and as on date, the result is that the Constitution stands devalued and defaced and many a times some of the amendments have had to pass through the test and judicial scrutiny, within the ambit and scope of judicial review and inherent power, which have been exercised by the Hon'ble Supreme Court of India, being the protector of fundamental rights and the final arbiter. One cannot forget the serious effect of the Forty-second Amendment Act introduced in 1976 on the powers of the High Courts. However, thankfully the Forty-fourth Amendment Deleted most of the pernicious provisions.

2. It is quite relevant to note the Preamble of the Indian Constitution.

3. It is well accepted by the philosophers, thinkers and academicians that if justice, liberty, equality and fraternity including social, economic and political justice, the golden goals set out in the Preamble of the Constitution, are to be achieved, the Indian polity has to be educated and educated with excellence. This view has been expressed by this Hon'ble Court in *P.A. Inamdar* v. *State of Maharashtra*[1]. The Constitution is not construed as a mere law, but the machinery by which laws are made. The Constitution is living and organic thing which, of all instruments has the greatest claim to be construed broadly and liberally. This Hon'ble Court in *Goodyear India Ltd.* v. *State of Haryana*[2], SCC para 17 has expressed this view.

†† The order of the submissions is broadly in line with the order in which the learned Senior Counsel and counsel addressed the Court, as inferable from the opinions of the learned Judges.

1 (2005) 6 SCC 537

2 (1990) 2 SCC 71

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4. The objectives specified in the Preamble contain the basic structure of our Constitution, which cannot be amended in exercise of the power under Article 368 of the Constitution. For the theory of "basic structure" this Hon'ble Court has expressed and held so in *Kesavananda Bharati* v. *State of Kerala*[3], SCC paras 292, 437, 599, 682 and 1164. Further in *Indira Nehru Gandhi* v. *Raj Narain*[4], SCC paras 251-52 (Khanna, J.) paras 664, 665 and 691 (Chandrachud, J.) paras 555 and 575 (Beg, J.) (Three Judges out of five). Lastly, in *Minerva Mills Ltd.* v. *Union of India*[5] (majority).

5. The concept relating to separation of powers between the legislature, executive and judiciary as well as the fundamental concept of an independent judiciary are now elevated to the level of basic structure of the Constitution and are very heart of the constitutional scheme. This view has been expressed in *State of Bihar* v. *Bal Mukund Sah*[6].

6. Articles 14, 15 and 16 of the Constitution intend to remove social and economic inequality to make equal opportunities available. In reality the right to social and economic justice envisaged in the Preamble and elongated in the fundamental rights and the directive principles of the Constitution in particular Articles 14, 15, 16, 21, 29, 30, 38, 39 and 46 are to make the equality of the life of the poor, disadvantaged disabled, minorities and other citizens of the society meaningful. This Hon'ble Court has expressed its view in *Valsamma Paul* v. *Cochin University*[7]. The Preamble may be evoked to determine the ambit of (*a*) fundamental rights; (*b*) directive principles of the State policy.

7. Every democracy has witnessed a tussle between legislature and judiciary. India is not different either, although the confrontation has become rather serious in the last couple of years and the recent utterances regarding the judiciary by some of the leaders of the political parties are quite serious. On the issue of "reservation" which this Court is adjudicating, they have expressed their views openly to the media and within the State Assemblies and Parliament and their anguish, ire and even resorting to scathing attacks on the Hon'ble Judges of this Court could be described to be unfortunate and alarming for the democratic system of this vast country.

8. This Hon'ble Court is expected to stand firmly and decide the sensitive issue affecting the rights of the citizenry as Upholder of the Fundamental Rights, undeterred by such attacks. As a matter of fact, there is no confrontation at all.

9. The Constitution is a permanent document i.e. meant for generations to come as such the leaders of the political parties in India, must not think beyond the next elections and avoid any confrontation with our judicial system, which is already overburdened in handling messy issues brought before it, which in fact is the creation of the legislature and the executive. The perception is that, if a particular programme

3 (1973) 4 SCC 225
4 1975 Supp SCC 1
5 (1980) 3 SCC 625
6 (2000) 4 SCC 640
7 (1996) 3 SCC 545

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is politically popular, then it has to be implemented regardless of whether it is permissible under the Constitution or not and such erroneous decisions like the present one, namely, the issue of "Reservation".

10. Time and again the Supreme Court has struck down certain measures having been taken by the Governments either Union or States as being unconstitutional. The response of Parliament is when such situation comes to resort to amend the Constitution itself. Even sometime retrospectively to implement exactly what they feel is politically convenient. This is particularly evident with regard to the contentious issues regarding reservation for the Other Backward Classes (OBC) and exclusion of the "creamy layer". The issue of reservation raised a serious controversy in the early 1990s, which finally led to the historic *Mandal case*[8].

11. In *Indra Sawhney* v. *Union of India*[8] the Supreme Court held that:

(*i*) Reservations should not exceed 50% of the jobs to be filled;

(*ii*) Reservations could be provided only at the time of entry into government service but not in matters of promotion;

(*iii*) The total quantum of reservation should not exceed 50% even if the carried forward vacancies were taken into account.

12. Over the years the person from the reserved category got the twin advantages having accelerated promotion as also with consequential seniority. This was held to be unconstitutional in *Union of India* v. *Virpal Singh Chauhan*[9]. In another case it was also held that there should be no relaxation of qualifying marks in any examination or lowering the standards of evaluation. This view has been expressed by this Hon'ble Court in *S. Vinod Kumar* v. *Union of India*[10]. Each of these principles laid down by the Supreme Court stands nullified by series of amendments made to the Articles 16 and 335 of the Constitution itself. Now each of these principles laid down by this Hon'ble Court have been diluted in one stroke by legislative process, which shows the bent of mind of the political parties. All these amendments have been upheld by the Supreme Court in *M. Nagaraj* v. *Union of India*[11].

13. On 14-12-2006 the Lok Sabha unanimously passed the Central Educational Institutions (Reservation in Education) Bill, 2006 which has taken the form of an Act and received assent of the President of India on 3-1-2007 and the same has been notified in the Extraordinary Gazette of India and has come in to force. However, this Hon'ble Court has stayed certain provisions related with seats to be reserved for the OBCs on 29-3-2007 on IA No. 13 of 2007 moved by this writ petitioner.

14. This is an Act to provide for the reservation in admission of the students belonging to the Scheduled Castes, Scheduled Tribes and the Other Backward Classes of citizens, to certain Central educational institutions, established maintained or aided by the Central Government and for matters connected therewith or incidental thereto. The Act in question extends 27% reservation for Other Backward

8 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217
9 (1995) 6 SCC 684
10 (1996) 6 SCC 580
11 (2006) 8 SCC 212-279

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Classes (OBCs) in these educational institutions without excluding the creamy layer. Eight out of nine Judges in *Mandal case*[8] had emphasised the need to exclude the "creamy layer". Even the Parliamentary Committee, which considered the Bill, had also recommended that creamy layer be excluded. The most serious feature of the Act is that it has regenerated the caste divide in the country.

15. It is grossly improper for Parliament to intentionally and deliberately ignore the judgment of the Supreme Court in making laws. This is a very disturbing trend where populist measures are taken in total disregard of the law laid down by the Supreme Court. The state of affairs is that not even a single political party ruling in the past and presently ruling this country has done anything substantial to provide primary universal education and increase the level of academic excellence in the graduate/postgraduate colleges as also in the professional colleges/institutions. The entire attention of the Central and State Governments so far is how to increase the expenditure of colleges and also grant the benefit of reservation only to certain section even belonging to the minority communities.

16. A stage has come when the entire issue of reservation for Other Backward Classes should be re-examined. The Government cannot go in for headcount and identify on the basis of respective caste(s) of the citizens of this country, because the Constitution is having no such provision. Any such effort shall have to be done by amending the Constitution itself and then enumerate and compile number of the each caste.

17. The enumeration of OBCs as "classes" in the Mandal Committee Report is entirely wrong. The defective manner in which the Mandal Commission enumerated the backward classes, requires be going into by judicially reviewing and appropriate direction issued. The issue for consideration by the Supreme Court is somewhat very ticklish and sensitive.

18. The nagging question arises as to whether the reservation policy itself be dispensed with; and whether the reservations has really helped in shaping the good quality of living standard of all members belonging to the classes, who have been extended the benefits of the reservation in more than five decades of its coming into existence namely to the Scheduled Castes and Scheduled Tribes, followed by the job reservation to OBCs without skimming off "creamy layer" among them. Now again quota of 27% having been fixed for the members belonging to the Other Backward Classes in the educational institutions, funded by the Centre and even many States have also done so and efforts are being made by other States to follow the same. And whether the reservation of seats, has led to discrimination of citizens belonging to economically depressed class(es) and more particularly the so-called upper caste(s) and Muslim and the linguistic and religious minorities.

19. The petitioner filed the instant writ petition on 22-5-2007 in the wake of serious law and order break down throughout the length and breadth of this country due to the Government of India's efforts to introduce 27% reservation of seats in the Central educational institutions, more particularly for the Other Backward Classes "OBCs" out of the annual permitted strength in each branch of the study or faculty.

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This ignited protests and counter protests in educational institutions as well as the premier medical colleges and hospitals throughout the country.

20. Followed by the interim order of the Supreme Court dated 29-5-2006, responding to the orders and necessary directions of this Hon'ble Court, the striking doctors, medical students and Engineers and other disciplines in colleges and schools called off their strike and resumed their respective jobs/duties, studies with the result the normal situation could be brought with the firm and timely intervention of the Supreme Court.

21. The pleadings in the instant writ petition were completed within the time given by the Court. The writ petition could have been heard and decided. But the ancillary issues required intervention of this Court and directions given accordingly. The Government did not wait for the Court's verdict and hurriedly completed all the required formalities and legislated the impugned Act and got it notified in January 2007 without appreciating that the present enactment shall have the adverse effect and wider ramification.

22. The provision related with OBCs in the Act is bound to create chaos, confusion, caste divide and anarchy would be writ large in otherwise peaceful atmosphere of the educational and other institutions which will be detrimental in the interest of social harmony. The equality and equal opportunity, which is expected from the State for all its citizens irrespective of castes, race, religion, colour and sex have been prejudiced.

23. It is unfortunate that classification based on castes has become the rule and the enabling provisions so incorporated in the Central Educational Institutions (Reservation in Admission) Act, 2006 are likely to become mental minima on the strength of an imaginary figure of existence of 52% of Other Backward Classes (OBCs).

24. However, the Constitutional Bench declined to look into the defects of the population data of 52% as provided by the Mandal Commission's Report because the five-Judge Bench which had framed issues/questions and referred them, had not gone into the defects of the population data. Therefore, this vital aspect remained undecided. [SCC p. 757, para 848 of *Indra Sawhney* v. *Union of India*[8] (Jeevan Reddy, J.) treated as Question 14.]

25. Based on the findings of the nine-Judge Constitutional Bench verdict, 27% reservation of seats for OBCs in the Central and State Government jobs has been enforced.

26. The Supreme Court in its judgment dated 16-11-1992[8] inter alia directed the Government to constitute a permanent body by 15-3-1993 for entertaining and examining and for recommending upon requests made for it, for inclusion and complaints of overinclusion and underinclusion in the lists of backward classes of citizens. Accordingly, the National Commission for Backward Class Bill, 1993 received the assent of the President on 2-4-1993 after being passed by both Houses of Parliament.

27. It came into force retrospectively from 1-2-1993 as the National Commission for Backward Classes Act, 1993 (27 of 1993). Section 2(*a*) defines: "backward

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classes" means such backward classes of citizens other than the Scheduled Castes and Scheduled Tribes as may be specified by the Central Government in the lists; Section 2(*c*): "lists" means lists prepared by the Government of India from time to time for purpose of making provision for the reservation of appointments or posts in favour of backward classes of citizen which, in the opinion of that Government, are not adequately represented in the services under the Government of India and any local or other authority within the territory of India or under the control of the Government of India.

28. Section 11 of the Act is related to the periodic revision of lists by the Central Government. Section 11(2) provides that the Central Government shall, while undertaking any revision referred to in sub-section (1), consult the Commission. But none of the above provisions have been observed by the Central Government so far, showing impunity to the statutory provisions, which amounts to playing fraud with the citizenry of this country.

29. The ratio of 27% having been arrived at is the mythical figure, that OBCs are 52% in the country and accordingly, the process of even the ratio of 27% reservation of seats for the students belonging to Other Backward Classes in the educational institutions funded and controlled by the Central Government got initiated from May 2007.

30. The operation of the provisions of impugned Act related with OBCs are on hold due to 29-3-2007 stay order given in IA No. 13 of 2007 of the petitioner.

31. It is submitted that the Mandal Commission was enjoined to go scientifically and demarcate backward classes. It made mess of the whole process. It firstly went by the State's list of backward castes, and then went for survey in two villages, one urban block in each of districts, thus, covering only 0.06% of population. It took "caste" only as criteria for social and education backwardness. For survey it took 4 social (3 points), 3 educational (2 points) and, 4 economical (1 point) indicators.

32. Social indicators were quite laughable. Economical indicators were given less importance. Castes with 11 overall points were declared backward, even some castes with less than 11 points were declared backward based on their so-called expertise. The Report had many bloomers. Many SCs and even surnames were included in the list of backward classes. Further, it dumped expert's 151 tables and worked only on 31 tables.

33. It is submitted that the Mandal Commission has given OBC population in India as 52% based on fictitious data. In case SC/ST (24.4%), Muslims (13%), Christians (2.4%), Sikh (1.9%), Jain (0.8%), Buddhist (0.8%) are added to OBC population in that case upper caste population in India should be 6% only, which is quite ridiculous. Based on this data OBC leaders have been asking for high reservation percentage in government jobs/educational institutions.

34. It is submitted that in *Indra Sawhney case*[8], the Hon'ble S. Ratanval Pandian, J. (concurring with the majority views) relied on the piece of evidence from the Mandal Commission's Report and "from where that Commission got the evidence"—from a book *Rise and Awakening of Depressed Classes in India* authored by J.R. Kamble, whom the learned Judge has described as noted and renowned

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sociologist, and what source for the fact put forth by the said renowned author is nothing but a cutting from *The Hindu* a well-known newspaper, published on 24-12-1932. One is required to believe that this represents the reality of whole of India today. Indeed to such an extent it does not represent reality, that it must be the basis of the State's policy today. The clear and emphatic command of the Constitution of India is that "Castes" be shunned and must be disregarded. These are vital infirmities of the Mandal Commission Report and prove beyond any reasonable doubt that how the Commission grossly and deliberately neglected the terms of reference and has its way on whims and fancies. Para 102 from the judgment of *Indra Sawhney case*[8] contains the said view of the Hon'ble Pandian, J.

35. It is submitted that in 1990 the Central Government agreed to reservation for OBCs in government jobs. Based on the Supreme Court guidelines/orders, reservation for OBCs was limited to 27% of vacancies with "creamy layer" excluded. The Central Govt. has enhanced income limit for "creamy layer" from 1 lakh to 2.5 lakhs. Further with no agriculture income tax, rural rich landlords have come out of "creamy layer". Incidentally Tamil Nadu has 69% reservation for OBC and SC/ST, which violates the Supreme Court order. By taking recourse to incorporating bill being approved by the T.N. Assembly and inserted in Ninth Schedule of the Constitution has taken the issue out of judicial review!

36. It is submitted that caste hierarchy historically has been very flexible with different castes going up or down the ladder or hierarchy depending on their economic and political powers. Many so-called backward castes in the past had given ruling dynasties during ancient and medieval period of Indian history. Presently the so-called hegemonistic backward castes namely Yadava, Kurmi, Koeri, Jat. Vokkaliga, Vaniyar, Lingayat, Khammas are ruling the roost in Bihar, U.P., Rajasthan, T.N., Andhra Pradesh and Karnataka, etc.

37. It is submitted that last caste census was done in 1931 when India consisted of present Pakistan, Bangladesh, Myanmar and Shri Lanka. Besides caste-wise table covered population of 220.7 million only, when the total population of the then India was 352.8 millions. The caste enumeration for non-Hindu population was not carried out. The entire census since 1951 have break-up of population based on religion only and for SCs/STs. SCs include Sikh and Buddhist groups also. When there has not been any caste-wise enumeration and tabulation after 1931, where does this mythical figure of 52% existence of OBCs come from, which obviously requires in-depth study vis-à-vis National Sample Survey and National Health and Family Scheme figures which are 32% and 29.8% respectively and accordingly, the ratio of reservation should have been fixed which would have perhaps justified the action of the Central Government.

38. It is submitted that Kaka Kalelkar Committee in the 1950s had enumerated approximately 1200 OBC castes based on social and economic criteria. The Mandal Commission in 1980's increased to approximately 3700 by inclusion of many more castes such as Jats, Vokkaligas, etc.

39. It is submitted that the framers of Constitution in Articles 14, 15 and 16 talked about equality before law for all without discrimination on the grounds of sex, religion, caste, sects, etc. and special provision for women and children got

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incorporated. Besides, equality of opportunity for all the citizens in matter of employment has also been guaranteed.

40. It is submitted that reservation for SCs/STs in jobs (15%/7.5%), Parliamentary and Assembly constituencies were incorporated only for 10 years up to 1961, as a special case in view of their extreme social and economic backwardness. Also due to the fact of untouchability and their social ostracism. Pt. Jawaharlal Nehru, the then Prime Minister of India in 1961 had expressed his opposition to reservation as a principle.

41. It is submitted that with reservation in colleges, chance for SC/ST, OBC and non-OBC and non-SC/ST Hindu and Muslim school graduates to enter colleges will be 117%, 94% and 65% respectively based on criteria of admission followed in educational institutions, thus making whole education process very lopsided, destroying merit and permitting reverse discrimination against non-OBC/SC/ST classes. One after another amendments in Article 15 and 16 of the Constitution are ultra vires, discriminatory and infringed the fundamental rights of citizens and shaken the root of the Constitution itself.

42. It is submitted that coming to employment in professional jobs, the ratio of SC/ST and OBC are 14.3% and 24.2% respectively, which compares very well their enrolment in colleges of 15.1% (SC/ST) and 23.3% (OBC). According to NSS data for total employment share of SC/ST, OBC and Muslim are 31%, 33% and 10% respectively which matches satisfactorily with their share of population (28.3%, 32%, 13%). Hence, there cannot be any scope for job reservation. The Government in its affidavit has passed sarcastic comments on the petitioner without having verified the data. Outbursts of Social Welfare Minister carried by the media, that Government may adopt coercive method to enforce job reservation in private sector as well requires to be tested.

43. It is submitted that the enrolment rates in primary and secondary levels for SC/ST, OBC and Muslims are much lesser than that for Upper Castes. Further dropout rates for students in schools are much higher for these groups. Hence, for all these groups enrolment rates at college level are much less than that for upper castes. The employment rates for all these groups in professional jobs are in proportion to their enrolment in colleges. Therefore, the solution is not reservation. For the sake of upliftment in the field of education and job levels for SC/ST, OBC and Muslims, the solution lies in huge governmental investment in primary and secondary level quality education. There is also need for increasing the number of schools and teachers and investment in infrastructural facilities in villages, blocks, sub-divisions and at district levels. Once higher number of students pass out of schools their number in colleges will automatically increase. It is relevant to mention here that the Government expenditure in the education is only 3% of GDP, which requires to be increased to 6% of GDP to reach optimum level quite steadily.

44. It is submitted that the pressure for reservation in IITs/IIMSs/Central Universities will decrease if both the number of institutes and universities and intake of students are increased drastically. India with average 7.5% grown rates during last 4 years and on going IT/Industrial revolution needs huge number of Engineering,

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Scientists and Doctors in future. The short-sighted policy of the Government cannot help meet the situation.

45. It is submitted that at present Indian population is divided in Urban/Rural population ratios of 30% and 70%. Caste factor is not important in urban areas because of education and job opportunities. With fact urbanisation issue of casteism will die its natural death.

46. It is submitted that Supreme Court gave series of reasons as to why the "Creamy layer" must be excluded. First, it said that reservations are to be formed as a class. To be a class, the group must be homogenous. When some in it are so clearly different from the others, it looses its character as a class. Correspondingly, the ones who have reached "advance social level or status" could no longer belong to "Backward Class". They are as forward as a member of forward class, "If some of members are far too advanced socially, (which in the context, necessarily means economically and may also mean educationally), the connecting thread between them and the remaining class snaps." We must bear in mind that under the Constitution, reservations are being made for a class not for a caste (para 784, 790-93 and paras 843-44 of *Indra Sawhney case*[8]). The Supreme Court has further emphasised repeatedly, that unless these advanced persons are excluded, they will hog all the benefits that legislation may seek to provide to the backward class and the very purpose of reservation will be defeated. In *Indra Sawhney case*[12], SCC at p. 185, para 10, this Hon'ble Court reiterated the principle in respect of "creamy layer". And again in even more stronger terms this Court has expressed the need for the exclusion of the creamy layer (*Indra Sawhney (II)*[12], SCC pp. 202, 209, paras 65 and 90).

47. It is submitted that the following controversial aspects emerge from the peculiar facts and circumstances of the present case for the determination by this Hon'ble Court in the larger public interest in addition to the basic issues already raised in the writ petition, which have been posed by this Hon'ble Court, while issuing notices to Respondents 1 to 7 vide its order dated 29-5-2006 as has been already quoted hereinbefore:

(*a*) Whether it is justified for the respondents to bring in such kind of legislation and make provisions of reservation of seats in the Central educational institutions among others for Other Backward Classes of citizens which are established, maintained or aided by the Central Government and in the matters connected therewith or incidental thereto having incorporated the same in Section 2(*g*), Section 3 sub-section (*iii*), Sections 5(1), 5(2) and Section 6 which makes provisions that out of the annual permitted strength in each branch of study or faculty, twenty-seven per cent seats shall be reserved for the Other Backward Classes, amounts to inconsistency, thus rendering the same to be void, and open to judicial scrutiny.

(*b*) Whether it is justified for the respondents to enact an Act which erodes the basic structure of the Constitution. Though Section 2 of the said Act relates to the definition of "Other Backward Classes", means the class or classes of citizens who are socially and educationally backward and are so determined by the Central Government, is inconsistent with the provisions so made in Article 15(4) and does not strike a balance between the provisions so made in Article

12 *Indra Sawhney (II)* v. *Union of India*, (2000) 1 SCC 168

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15(1); and statutory provisions made in the Sections 2(*a*) and 2(*c*) and Section 11 of the National Commission for Backward Classes Act, 1993.

(*c*) Whether it is justified that the respondents were enacting law bringing in unbridled power and authority has infringed the constitutional rights by making it mandatory to go in for 27% reservations in the admissions in the educational institutions in the Centrally sponsored and funded educational institutions amounting to inconsistency and void.

(*d*) Whether the provisions made in the statute fell within the realm of the legislature to insert legislation with the condition precedent and totally upsetting the constitutional provisions made by the framers of the Constitution and thereby eroding the basic structure of the Constitution itself by making unconstitutional, and in utter derogation of the fundamental rights?

(*e*) Whether it is justified to hold the provision in law framed by the legislation which overrides/truncate the fundamental and legal rights of the citizens and requires judicial review by this Hon'ble Court.

(*f*) Whether the legislature in its wisdom while making the statutory provisions in question i.e. Sections 2(*g*), 3(*iii*), Sections 5(1)(2) and 6 of the said Act, are justified and such framing of the legislation is fettered with the infirmity that put an embargo on the rights of an individual citizen not belonging to Other Backward Classes (OBCs) and deserves to be scrutinised.

(*g*) Whether the provisions so inserted and enforced with a view to increase the number of seats for admission in the educational institutions from academic session 2007 and mandatorily increase the seats to accommodate such persons belonging to Other Backward Classes (OBCs) without skimming off the creamy layers amongst them in the present form, is unsound and uneven and more particularly the ratio of 27% based on the sole basis of the Mandal Commission Report and its imaginary figure i.e. 52% is wholly absurd and ridiculous.

(*h*) Whether vires that flows from the present provisions of Sections 2(*g*), 3 sub-section (*iii*), Sections 5 and 6 of the said Act and is going to cause hardship, prejudice to the large sections of citizens of India and that amounts to discrimination in the nature as also in terms of Articles 13 and 14 of the Constitution of India.

(*i*) Whether the basic feature of the Constitution of India gets affected by the present Act so enacted by an Act of Parliament having been hurriedly passed and assented by the President of India and now in force is unconstitutional, ultra vires, void, unequal, discriminatory, arbitrary and mala fide and will divide the country on caste-line since the population of Other Backward Classes (OBCs) have been determined and based on erroneous findings of the Mandal Commission to the extent of 52% population which has not been gone into by this Hon'ble Court earlier and the same requires redetermination in view of the figures provided by the National Samples Survey of India to the extent of 32% and National Health and Family Survey (Government of India's own Departments and the respondents herein) to the extent of 29.8% only and other infirmities therein.

48. It is submitted that the present Act so enacted by an Act of Parliament on the basis of strength having been derived by the Constitution Ninety-third Amendment

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which has come into force with effect from 20-1-2006 by insertion of Clause 5 in Article 15 of the Constitution of India, has given rise to cause of action to challenge its validity in the present proceedings. The amendment so made is unconstitutional and has impaired adversely the fundamental rights guaranteed to the citizenry of India. The amendment itself is void because it impairs the basic constitutional structure and also breaches the fundamental and legal rights of the citizen of India. The present legislation is bound to divide the country on caste-line which is the basis of reservation made in the educational institution funded and controlled by the Central Government, completely on imaginary figures when no caste census has taken place since 1931. The act and conduct of the respondents requires to be gone into by this Hon'ble Court. It is most respectfully submitted that it is well established by the thinkers, philosophers, academicians that if justice, liberty, equality and fraternity, including social, economic and political justice, the golden goal set out in the Preamble of the Constitution are to be achieved, the independent polity has to be educated and educated with excellence. Furthermore, the Constitution is not to be construed as a mere law but machinery which laws are made. The Constitution is a living organ. The objectives specified in the Preamble contained the basic structure of our Constitution that cannot be amended in exercise of the powers under Article 368 of the Constitution and the present legislation requires to be tested with the parameters of the basic structure of the Constitution.

49. It is submitted that the present provisions require to be judicially reviewed on the doctrine eclipses the law, which is not in conformity with the fundamental rights, is void by reasons of Article 13 of the Constitution of India. But amending the law; so as to reduce such conformity, can cure the defect. Until it is done the law remains in the state of eclipse. This has been held by the Hon'ble Supreme Court in the matter titled *Deep Chand* v. *State of U.P.*[13] In the aforesaid decision, it has also been held that the post-constitutional laws, which are not in conformity with the Constitution, are void, from the very beginning. It has also been held by the Hon'ble Supreme Court of India in the matter of *Olga Tellis* v. *Bombay Municipal Corpn.*[14], that the fundamental rights cannot be waived. It had also been held that the law which is not in conformity with the fundamental rights are void to the extent of inconsistency. If the good part can be shivered from the bad part, then good part (being in conformity with the fundamental rights) can still be enforced. This view has been expressed in *Mahendra* v. *State of U.P.*[15] as also in *Harakchand Rattanchand Banthia* v. *Union of India*[16]. The Hon'ble Supreme Court has further held in the matter titled *Romesh Thappar* v. *State of Madras*[17], that if good and bad parts are inextricably bound together, then the whole law must fall, therefore, in the present context, the petitioner is constrained to move the instant application for making necessary and appropriate amendment in the pleadings in the writ petition by

13 AIR 1959 SC 648
14 (1985) 3 SCC 545
15 1963 Supp (1) SCR 912
16 (1969) 2 SCC 166
17 AIR 1950 SC 124

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bringing an insertion and assail the legislation so made now known as the Central Educational Institutions (Reservation in Admission) Act, 2006 (5 of 2007).

50. It is respectfully submitted that the Central Educational Institutions (Reservation in Admission) Act, 2006 is required to be judicially reviewed in the light of the facts that the provision so made for the Other Backward Classes (OBCs) is a complete departure from the ordinary or general or prescribed principles of law. The provisions thus oppressive, ultra vires, and violates all principles of fair play, equality and justice. The said enactment is unconstitutional and in all fairness, it deserves to be struck down.

51. It is submitted that this Hon'ble Court may be pleased to adjudicate the said Act i.e. the Central Educational Institutions (Reservation in Admission) Act, 2006 and the provisions made by bringing in Sections 2(*g*), 3(*iii*), 5(1)(2) and 6 as unconstitutional and ultra vires insofar as the reservation facilities extended to the extent of 27% to the Other Backward Classes (OBCs) are concerned.

52. It is submitted that the insertion of such provisions apparently suffers from procedural vires based on imaginary figures and is a classical example of legislative incompetence and same erodes the basic structure of the Constitution itself, hence fit to be declared as void. More particularly the provisions of Sections 2(*g*), 3(*iii*), 5(1)(2), 6 of the said Act, 2006, violates Article 14 of the Constitution of India and denies the equality, equal treatment and equal protection of law, as such, which this Hon'ble Court in a plethora of judgments, has always held to be cardinal principles of constitutional law but even the verdicts of this Hon'ble Court have been ignored and diluted by resorting to the constitutional amendments one after another by the respondents. So much so even the basic purpose for which the Ninth Schedule was introduced in 1951 by first amendment of the Constitution by insertion of Articles 31-A and 31-B have been wrongly applied. The amendments were made and the Ninth Schedule was introduced, has been utterly misused by the legislature and executives and used at the whims and fancies and so far 288 laws have been inserted in the Ninth Schedule with a view to not to be struck down by the judiciary on the ground that it violates the fundamental rights.

53. It is respectfully submitted that the Constitutional Bench of this Hon'ble Court while adjudicating, has unanimously held that even though the Act is to be in the Ninth Schedule by constitutional amendments, its provisions would be open to challenge on the ground that it destroys or damages the "basic structure" of the Constitution by eroding fundamental rights that pertain to basic structure. This Hon'ble Court has further held that "the law that abrogates or abridges the rights guaranteed by Part III of the Constitution, may violate the basic structure as a consequence of law whether by amendment in Article of Part III or by insertion in the Ninth Schedule, such laws will have to be invalidated, in exercise of judicial review power of the Court". This Hon'ble Court has further held "all amendment to the Constitution made on or after 24-4-1973 by which the Ninth Schedule is amended by exclusion of various laws therein, shall have to be decided on the touchstone of the basic or essential feature of the Constitution as reflected in Article 21 read with Article 14, Article 19 and the principles underlying them. The cut-off

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date refers to landmark judgment delivered by this Hon'ble Court by a Full Bench of Thirteen Hon'ble Judges held in *Kesavananda Bharati* v. *State of Kerala*[3] held that Parliament had the power to amend any of the provisions of the Constitution. The seven Judges ruled that Parliament should not use its power to alter the basic structure of the Constitution. Each Judge gave views on what he thought was the basic structure but there was no unanimity, other Hon'ble Judges (minority view), said fundamental rights belonged to basic structure and could not be amended by Parliament.

54. It is submitted that India is a country of religions. There exists multifarious religious groups in the country, but in spite of this the Constitution stands for a secular State of India. The word "Secular" was not present originally in the Preamble and the Forty-second Constitution Amendment in 1976 added the same. What was implicit in the Constitution until then became explicit. Even before 1976, the concept of secularism was very much embedded in the Indian constitutional jurisprudence, as many court cases during this era would testify.

55. That it is submitted that what the framers of the Constitution provided requires to be gone into in the present context. The basic approach was specified in Articles 14, 15(1), 16(1) and 16(2):

Article 14— guarantees equality to all. That was the fundamental guarantee.

Article 15(1)— made the guarantee specific in one particular

Article 15(2)— guarantee equal access for everyone to public facility like wells, restaurants, etc.

Article 15(3)— contains a proviso—"It is important as to recall the only categories for which the framers were prepared to countenance, curtailment of equal provisions," Article 15(3) provided—"Nothing in this article shall prevent the State from making any special provision for women and child." It may be noticed again that the only categories special provisions were envisaged were women and children. In particular it can further be noticed that no exceptions were envisaged on the basis of caste.

Article 16(1)— made the fundamental guarantee of equality contained in Article 14 specific in another particular, one that was particularly important in those days when job opportunities were much more than is the case now. "There shall be equality of opportunity to all citizens in matters relating to employment or appointment to any office under the State", Article 16(1) prescribes.

Article 16(2)— did for governmental employment what Article 15(1) did for a citizen's living in general.

Article 16(4) contains a proviso and again it is important as a reminder what the framers of the Constitution envisaged. Even at this preliminary stage, it is to be noted that the four points of significance mentioned herein as they bear on everything that one encounters from now on:

- The fundamental guarantee in every provision was of equality, of non-discrimination.

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- Caste was most consciously eschewed: the proviso to Article 15(1) spoke only of women and children, Article 16(4) spoke only of "any backward class of citizens"
- Where caste was mentioned, it was only to prohibit discrimination on grounds of caste.
- Where "equality" was made specific in Article 16(1) in regard to employment under the State, for instance, the expression that was used was "equality of opportunity", an expression that, we shall soon see, has been buried deep under the rhetorical flourishes of progressives.

Thus, it transpires from the above, that initially the Constitution envisages complete equality and did not mention "caste reservation at all".

56. It is relevant to mention here that three other provisions in the Constitution of India appearing on the questions, that, this Hon'ble Court may like to consider, and they came into play almost as soon as the Constitution was adopted. The first of these articles were Article 29. It had two clauses. The first provided, "any sections of the citizens residing in the territory of India or any part thereof having a distinct language, a script or culture of its own shall have the right to conserve the same". Again, it is to be noticed that the word "religion" was not mentioned: contrast that with a way this provision and the succeeding Article 30 are invoked these days to assert for instance "rights" of Muslims qua Muslims. Presently, it is brought to the notice of this Hon'ble Court the second clause of Article 29, which is an important clause since it was to have an immediate consequence. This clause provided: "No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State fund on grounds only on religion, race, caste, language or any of them". That it is stated that the next article that was to be invoked in a manner that led to changes that we encounter was Article 46 which is not enforceable. Again, it is to be noted that the article talked of "weaker section of the people": The only caste, that were mentioned were "Scheduled Castes". Finally, the framers of the Constitution incorporated a vital caveat to special measures that might be instituted to induct members of Scheduled Castes and Scheduled Tribes into government services. Article 335 provided.

57. It is submitted that the alterations and additions took place subsequently in the above provisions. It so happened that in Madras (now renamed Tamil Nadu), a student who had done manifestly well in the examinations, but who happened to have been born to parents who were not from among the Scheduled Caste was denied admission, and those who had found much worse than him but who happened to have been born to Scheduled Caste parents, were granted admission. The said decision was challenged. The Madras Government argued that Article 46, a directive principle overrode Article 29(2); that, as one of the special measures that the State was to take for the advancement of Scheduled Caste, it was entitled to grant admission to the students who had done poorly in the examinations, and deny it to the non-Scheduled Caste student who had done well. This Hon'ble Court rejected this plea decisively. The directive principles cannot override fundamental rights, it held. In particular, in

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view of the prohibition contained in Article 29(2), the meritorious students cannot be denied admission on the grounds of his caste and this is what has manifestly been done, it held in *State of Madras* v. *Champakam Dorairajan*[18]. This ruling led to a provision being incorporated in the first amendment to our Constitution. A new clause was added to Article 15, Clause (4).

58. It is submitted that hereinafter the pattern of making amendments in the Constitution repeatedly has taken place irrespective of the fact that the Constitution of India has been defaced and devalued in order to push through the political agenda of political parties. The Courts have been trying to stem the tide with some dyke: politicians have blown it up and as the politicians have blown it up and as the political parties came to defend more and more on sectional appeals, in particular on stoking castes, the alterations and additions became more frequent and of ever-increasing consequence. From *M.R. Balaji*[19] to *Indra Sawhney case*[8], this Hon'ble Court has held that Article 16(4) was an exception to the fundamental guarantee provided to all citizens that they shall have equality of opportunity in competing for government employment. The Court held, as Dr. Ambedkar has stated in that very context during the debate in the Constituent Assembly, that an exception cannot be allowed to swallow the rule. Hence, this Hon'ble Court held speaking generally, that reservation should not exceed 50% of the jobs being filled. But what has been done by the State of Tamil Nadu which is a matter of record that the said State has already crossed the limit and 69% of the jobs have been reserved purely on the basis of birth; which is typical sequence having taken place by bringing a legislation to the effect even after the Hon'ble Supreme Court decision in *Indira Sawhney*[8]. It can be seen in 1993-1994, as a consequence of the Supreme Court judgment in *Indra Sawhney case*[8], the Madras High Court held that while reservations in admissions to educational institutions may continue at their existing levels for 1993-1994, they must be brought down to 50% from 1994-1995. The Government of Tamil Nadu preferred an appeal against this order in the Supreme Court. The Court reiterated that the reservation should not exceed 50%.

59. It is submitted that on 9-11-1993, the Tamil Nadu Assembly unanimously passed a resolution requesting the Central Government to take steps to amend the Constitution so as to enable the State of Tamil Nadu to continue its 69% reservations. On 26-11-1993, an All Party Meeting emphasised that there should not be any doubt or delay in enabling Tamil Nadu to continue with its 69% reservations. The meeting over, the Tamil Nadu Assembly enacted a Bill that the Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of Appointment or Posts in the Services under the State), Bill, 1993 to continue the reservation and sent it to the Centre under Article 31-C. The Union Home Ministry held another All Party Meeting in New Delhi on 13-7-1994. The consensus was that the President of India give his assent to the Bill. On 16-7-1994, the assent was given by the President of India and accordingly, the Bill

18 AIR 1951 SC 226 (Ruling, overriden and Article 15(4) inserted in the Constitution in 1951 followed by this Court's decision.)

19 *M.R. Balaji* v. *State of Mysore*, 1963 Supp (1) SCR 439

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was notified by the Tamil Nadu Government. The matter has not stopped here. The said State Government further requested the Centre to take step to place the Act in the Ninth Schedule so that it could not be challenged in Courts. Accordingly, the Constitution was amended, and a clause got inserted for the 76th time in the year 1994 and Tamil Nadu Legislation was put beyond the reach of Courts.

60. It is submitted that even that has not been the end. Not by a long shot. A long-running strand of litigation—relating to the right of "minority institutions", to run their affairs without interference from the State has brought down an unexpected meteor on the matter which are being placed herein—that of reservations per se. The latest distortion can be seen. The course of this litigation, the decisions, and the actions the legislature have subsequently taken, show two separate shots of distortions—each as ruinous as the others. The framers of the Constitution had gone out of their way to reassure minorities. The two articles that have a bearing related with Article 29 and Article 30. Clause 2 of Article 29 which provides that "no citizen shall be denied admission into any educational institutions maintained by the State or receiving aid out of State's funds on grounds of religion, race, caste, language or any of them". Clause (1) of the Article provides "Any section of the citizen residing in the territory of India or any part thereof having a distinct language script or culture of its own shall have the right to conserve the same."

61. The scheme of these two Articles is clear as can be seen. It is twofold:

- Minorities have the right to conserve their language, script and culture.
- They have the right to establish and administer educational institutions of their choice.

Clearly, the two Articles bear on each other. They address a common objective to help minorities maintain their language, script and culture. The educational institutions that the framers had in mind and which they assured the minorities they could set up and administer are the ones that have been set up to conserve their language, script and culture. The sort of institution that is contemplated is evident from the very words and context of the two Articles: an institution set up by members of a minority for preserving the language, script and culture of that minority.

62. The first derailment was caused by placing the words "of their choice" out of context, by tearing them away from the object for which Articles 29 and 30 gave minorities the right to set up and administer institutions. A normal engineering college or a college of dentistry can by no stretch be taken to be an institution that has been set up to help conserve the language, script or culture of the minority. Yet, provided members of a minority have set up the engineering or dentistry college, it was presumed to enjoy the protection of Articles 29 and 30, and thereby be beyond the reach of the State.

63. It is submitted that three cases led to the latest amendment of the Constitution that has compounded the inequity and absurdity which the earlier falsification had embedded into the construction that came to be put to on these Articles. *T.M.A. Pai Foundation* v. *State of Karnataka*[20] was decided by eleven-Judge

20 (2002) 8 SCC 481

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Bench of this Hon'ble Court. This was followed by *Islamic Academy of Education* v. *State of Karnataka*[21] a case that was decided by five-Judge Bench of this Hon'ble Court and that has been followed by *P.A. Inamdar* v. *State of Maharashtra*[1] another case which has been hotly contested and eventually decided by a Bench of seven Judges of this Hon'ble Court. It is to be noticed that in each of these cases, both minority and non-minority colleges were involved as well as the colleges, which were not availing of any aid from the Government. This Hon'ble Court has used three variables to classify the institution, and thereby delineate the kind of authority that the State has in regard to each category of educational institutions. The variables are: is the institution a "minority" or "non-minority" institution; whether it is receiving governmental aid; is it seeking or has it received recognition from the State.

In regard to minority, unaided, unrecognised institutions, the State is not to mandate any quotas;

In regard to minority, unaided colleges to which recognition has been accorded, the State can specify standards that entrants must pass but that it is not to regulate admissions or fees;

In regard to minority, aided, recognised institutions, the State can regulate various aspects of the functioning of the institution without diluting the minority status of the institution.

64. It is submitted that insofar as prescribing quotas is concerned, this Hon'ble Court has held that there cannot be much difference between an unaided minority and unaided non-minority institutions: In either case, the State is not to prescribe quotas. It is relevant to note the paras 124 and 125 from *P.A. Inamdar* v. *State of Maharashtra*[1] (SCC at p. 601, para 124).

65. As per the petitioner's understanding, neither in the judgment of *T.M.A. Pai Foundation*[20] nor in the Constitution Bench decision in the Kerala Education Bill which was approved by *Pai Foundation*[20], is there anything which would allow the State to regulate or control admissions in the unaided professional educational institutions so as to compel them to give up a share of the available seats to the candidates chosen by the State, as if it was filling the seats available to be filled up at its discretion in such private institutions. This would amount to nationalisation of seats, which has been specifically disapproved in *Pai Foundation*[20]. Such impositions of quota of State seats or enforcing reservation policy of the State on available seats in unaided professional institutions are acts constituting serious encroachment on the right and autonomy of private professional educational institutions. Such appropriation of seats can also not be held to be a regulatory measure in the interest of minority within the meaning of Article 30(1) or a reasonable restriction within the meaning of Article 19(6) of the Constitution. Merely because the resources of the State in providing professional education are limited, private educational institutions which intend to provide better professional education, cannot be forced by the State to make admissions available on the basis of reservation policy to less meritorious

21 (2003) 6 SCC 697

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candidate. Unaided institutions, as they are not deriving any aid from the State funds, can have their own admissions (procedures) if fair, transparent, non-exploitative and based on merit.

66. It is submitted that from the above, it appears that two ratios namely; (*a*) no reservations in educational institutions that are neither receiving any governmental aid nor are seeking recognition; (*b*) and in this regard, minority and non-minority institutions are to be treated on a par were laid.

67. It is submitted that the judgment was but to be delivered, and howl went up and within days, the Constitution got yet amended for the Ninety-third time—to acclaim that has become customary for such amendments. Henceforth, Article 15 shall have a new Clause (5). The result is, the amendment has thrown overboard the judgment of the Supreme Court on both counts namely; (*a*) whereas the Supreme Court has said that there shall be no reservations in private unaided colleges, the amendment decreed that there shall be reservations; (*b*) whereas the Supreme Court had said that in this regard there shall be no difference between the minority and non-minority institutions, the amendment decreed, that there shall be a difference.

68. That it is stated that in *Indra Sawhney* v. *Union of India*[8] eight out of nine Judges held that the "creamy layer" must be excluded from the classes for which reservations are made. They gave a series of reasons for this exclusion.

69. It transpires that this fundamental point must be pondered. The Hon'ble Supreme Court has absolutely in an unambiguous terms repeatedly directed that (*a*) the creamy layer must be identified; (*b*) the identification—and the consequent exclusion—of this lot must be real; in *Ashoka Kumar Thakur* v. *State of Bihar*[22] this Hon'ble Court came down heavily on the States of Bihar and U.P. for trying to get around this requirement by positioning such "unrealistically high levels of income or other conditions" as to reduce to a nullity, and declare that they "had acted in a fully arbitrarily fashion and in utter violation of the law laid down in the Mandal Commission; (*c*) the exercise of identifying the layer must be deliberate and not just a mechanical one of going through the motion (*d*) it must seek to identify the advance sections on relevant material; (*e*) and the list must be reviewed periodically". Once backward always backward is not acceptable, (*Indra Sawhney*[12], SCC para 9).

70. It is submitted that the government affidavit talks of scientific nature of the Mandal Commission Report vis-à-vis that of NSS and NFHS Report, which is quite laughable in view of the facts, enumerated hereinabove. NSS is an organisation, which has expertise in scientific sampling and interpretation of the results. Both the technique and extent of sample coverage by NSS is far superior to that of the Mandal Commission. Further, the comment of the Government that the OBCs, SCs/STs data being subsidiary to work for basic employment data is in fact a diversionary tactics. Whole premises of NSS work was employment and income data amongst different groups of society,(urban and rural/castes), hence break-up of population in terms of SCs/STs/OBC and other was mandatory. As correctly pointed by the petitioner in his writ petition that 32.5% of the population is Hindu OBC and adding up of Muslim OBCs. As per Mandal mandate OBC percentage is increased to 36%, which is much

22 (1995) 5 SCC 403 (on Creamy Layer)

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below 52% OBC population (43.7% Hindu and 8.4% non-Hindu), the same is reiterated. NSS 1990-2000 Survey is thin survey and once data of thick survey by NSS (survey completed last year) is out after analysis correctness of figures can be authenticated.

71. It is submitted that as per NSS total employment figures for OBC, SC/ST and Muslims are 33%, 31% and 18% respectively, which compares favourably with their total population figures of 32%, 28.3% and 12.2%. Hence demand for reservation in employment for SC/ST in private sector is not justified. The Government affidavit adversely commented on the petitioner for bringing up this issue, again it is pointed out that Ministry for Social Welfare has been giving one interview after another regarding employment reservation in private sector, which would completely destroy momentum built for fast economic growth.

72. It is submitted that figuring out quotas for the OBC claimed to be under represented in a high education is inflated and fudged and the exercise has been undertaken for 27% reservation for the OBCs in the educational institutions first in the Centrally controlled institutions and further extend it to private institutions such an exercise has already been undertaken by the few States and other States are likely to follow the suit. The basis of advancement of an argument of 27% is entirely on the strength of 27% reservations in the government jobs for the OBCs on the imaginary figure of 52% determined by the Mandal Commission. But the ground reality is different as has been pointed out the infirmities in the Mandal Commission Report itself (in the foregoing paragraphs):

> "In the entire debate surrounding the proposal for reservation of 27% of seats in higher education, a key question determining the percentage of reservations in higher education has been overlooked. Are OBCs of college-going age with the qualifying level of education under-represented in higher education to the extent of 27% or more of total enrolments? In reality, the extent of OBC under-representation is less, much less, then 5%. Clearly the proposals for 27% reservation for OBCs and an across the board 54% increase in enrolments are totally unjustified. It is submitted that the assessment of fairness of access to higher education need to bear in mind that entry at each step in the educational pyramid is conditional on the successful completion of the preceding stage of education, a graduate degree for entry into a post graduate programme or a higher secondary certificate or equivalent qualification for entry into an undergraduate programme and so on down the line. To assess whether OBCs have had a fair share in enrolments to undergraduate programmes, we need to know their share among those with a higher secondary certificate.

73. That it is submitted that in 1999-2000 OBCs in urban India in 17-25 age group only 15% had acquired a higher secondary certificate compared to 18% for the total population in this age group. This has the effect of lowering the share of OBCs among those with higher secondary certificate to 26.5% compared to their 32% share in the total population in the 17-25 age group. In relation to their share among those having a higher secondary certificate or equivalent qualification—26.5% in urban India and 30.7% in rural India—in 1999-2000 OBCs in urban India had a share of a little over 25% (over 27% in rural India) among those attending undergraduate

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programme. Hence, they are under-represented by less than 2 percentage points (a little over 3 points in rural India) in graduate enrolments. Even among those attending undergraduate studies in technical subjects—agriculture, engineering and medicine, taken together—OBC under-representation is less than 4% in urban India, while in rural India they are marginally overrepresented.

74. It is further submitted that for enrolments for postgraduate studies, the question to ask is: What is the share of OBCs among graduates in the 20-30 age group? The answer 19.1% in urban India and 27.5% in rural India. And the proportion of OBCs currently attending postgraduate studies is 18.6% in urban India and 25.5% in rural India. So the extent of OBC under-representation is just 0.5% in urban India and 2% in rural India.

75. It is submitted that for the 28% of OBCs in below-poverty line households, the extent of under-representation in emoluments for undergraduate studies is indeed higher at 7 and 13 percentage points in urban and rural India respectively. But this is probably indicative of their poverty inhibiting their participation in higher education. However, for over 70% of the non-poor OBCs, and not just for the "creamy layer", the OBC under-representation in graduate enrolments is barely above 2 percentage points in rural India. In urban India, the difference between their share among those with a higher secondary certificate and those attending institutions for graduate studies at 0.3 percentage point could just reflect the margin of error surrounding the estimates.

76. It is further submitted that before drawing policy inferences, it is necessary to ask: Are we getting these results because of the inclusion of Karnataka and Tamil Nadu which have a history of reservations for OBCs? Briefly, the answer is No. Exclusion of Karnataka and Tamil Nadu does indeed lower the OBC representation in higher education. However, their share in the population eligible for entry into higher education is also reduced if anything to a great extent. So that the gap turns out to be lower in rest of India than for India including Karnataka and Tamil Nadu.

77. It is submitted that to illustrate, in urban India, excluding Karnataka and Tamil Nadu, the share of OBCs among those with a higher secondary certificate in the 17-25 age group was 22.7%%, and among those attending undergraduate programmes 22.1%. So the OBC under-representation is just 0.6%. The broad results stand: the extent of OBC under-representation in higher education is less, much less than 5%. If anything, they are strengthened by the exclusion of Karnataka and Tamil Nadu.

78. It is submitted that clearly, a 27% reservation of seats of OBCs, an attendant proposals to raise total enrolments by 54% across the board, are totally unjustified. In fact, a much simpler and vastly more cost-effective solution would be to work with slightly lower cut off for OBCs to enable them to have a higher share in the enrolments to higher education. This will enable them to make up for the very small deficit in their share in these enrolments relative to their share among those having the basic qualification for entry into higher education.

79. It is relevant to point out that the eminent sociologists and social anthropologists, namely, Shri I.P. Desai and Shri B.K. Roy Burman who, among

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others, consistently argued that inter-caste relations have undergone profound modifications at the village level. In fact, the old system of vertical, caste-based, village-based level integration, hardly exists anymore, but the Mandal Commission disregarded such expert's opinion and depending rather on dubious impressions to justify his claim that "backward castes" need to be protected in India as caste system has ceaselessly exploited them. By Mandal's own submission, his Commission did not get information from any State regarding the educational status of castes. Further. the Commission also candidly announced that the methodology, which was adopted, was not academically rigorous or sophisticated. Hardly, the Field Surveyors so deployed to assist the Commission could survey 0.06% villages. The Commission has further admitted that "Yadavas", "Kurmis" and "Koiries", the major beneficiaries of his recommendation are ruthless in their treatment of those who labour for them. But curiously enough, none of these details held the Mandal Commission back from making his sweeping recommendations favouring OBCs reservations. Riding on "Mandal's authority", castes, such as Vanniyars, Vokkaligas Linggayats, Yadavas, and Jats have muscled their way into the list of backwards. As a matter of fact, the so-called "scientific nature" of the Mandal Commission's Report so claimed in the government affidavit, exposes the hollowness of the basis of the Commission's Report itself, and the edifice on which the proponents of reservations rely, cannot claim to have their way on entirely fudged population figures, which the Mandal Commission arrived at (52% OBC population), and as such recommended 27.5% reservations in the government jobs cannot be sustained. It is stated that, as per NSS, total employment figures for OBCs, SCs/STs and Muslims are 33%, 31% and 10% respectively which compares favourably with their total population figure of 32%, 28.3% and 12.2%, hence the demand for reservation in employment for SCs/STs in private sector is not justified. The government affidavit adversely commented on petitioner for bringing up this issue. In this respect, while reiterating what has been stated in the writ petition, it is respectfully pointed out that again and again it has been pointed out in series of interviews by the Ministry for Social Welfare, (respondent herein), regarding employment reservations in private sector. This step would completely destroy the moment built for fast economic growth in India, (as sated above).

80. It is submitted that coming to the college enrolment figures, as has been detailed hereinabove to re-enforce the submission, the petitioner has to point out that the figures for OBCs/SCs/STs and Muslims are 23.3% (72%), 15.1% (53%) and 5.8%(48%) (figures in brackets give percentage of total populations). It will be seen that the proposed reservation of 27% for OBCs (based on the Mandal Commission's Report), is quite akin to (*sic* the figure) already achieved even without reservation.

81. That it is pointed out that when the school enrolment figures are analysed, the same for OBCs/SCs/STs, Muslims are: 26%(81%), 16.7%(68%) 7.4%(55%) all the figures given in here and above establishes beyond any reasonable doubt that Muslims as a group are worse off than their compatriots from their communities. The petitioner in this writ petition is not asking for reservation for Muslims but basic facts which has been wrongly and deliberately interpreted in the government affidavit, requires to be answered. This is an established fact that, probabilities of

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college induction for minimally qualified school students to get college enrolment worked as overall 74%,(SCs/STs (114%), OBCs (93% with reservation) and 65% (Others) has not been understood by the non-statistically minded officers in the Government; as such, these figures tell its own tale. It proves further that the reservation at the level of college is affected from communities other than OBCs and SCs/STs.

82. It is submitted that there is no moral, philosophical, or economic basis for reservations in colleges or employment for "Other Backward Castes". From the above figures it can be seen that college enrolment is incommensurate with that of school enrolment. Problem lies at the school level. Instead of making primary education as compulsory and for which Government requires to go in for a massive infrastructure development, to increase GDP expenditure on education, make recruitments of more teachers at all the levels and increase numbers of IIMs/ IITs/AIIMs/Centres for Excellence/Medical and Engineering colleges and improve quality of education at all the levels. Greater supply of resources at school and college levels can alone meet the demand for quality education for all the strata of society. But the present exercise of the Government to reserve 27% at IITs/IIMs/ AIIMs, etc. for the Other Backward Castes, based on the Mandal Commission's fictitious figures 52% purely on assumption of Backward Castes, and over and additional inclusions in the State lists terming them EBC and OBC, seems that Articles 15(4) and 16(4) are being rewritten and court verdicts are being thrown to the wind with impunity. The exercise is constitutional fraud, which is bound to create social tensions and divide the society on caste lines.

83. That it is stated that the dictionary defines "oversight" as "an unintentional omission or mistake", also "watchful care or management; supervision". Regardless of which definition one adopts, the Oversight Committee on the implementation of the new reservation policy in higher educational institutions (hereafter the Moily Report) did not undo any previous "oversights". The most important error of the Mandal Commission, the new reservation policy the Moily Committee was not even asked to correct, namely, the share of population of the Other Backward Castes (OBCs) in India. The original (before the Oversight) policy recommendation was to allot the OBCs only half as many reservations as their share in population i.e. their share in the population based on fudged figure has been determined to be 52% and the proportion of seats allotted was 27%. In reality, the share of the non-Muslim OBCs in the population, according to the Government's own NSSO date for 1999-2000, was only 32%. Thus, simple maths suggests that the reservations for the OBCs would mean that almost every OBC would be guaranteed a position in college. In 1999-2000 there were 12.9 million college seats and 3.94 million OBCs in the age group of 19-25 years passed out from High School; 27% reservation would mean that an OBC will have a 90% chance of gaining college admission. It is respectfully submitted that in the counter-affidavit filed jointly by Respondents 1-7, nowhere the Government answers in affirmative or negative to the above specific questions. What is the basis for the determination/classification as to who belongs to "Other Backward Class"; the modalities as to be adopted for implementation of the policy in question that belongs to OBCs and what is their percentage 32% (NSS figure) or

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52% (the Mandal Commission figure)? The petitioner is not aware of the exact nature of "Oversight Committee" i.e. Moily Report, submitted to the Government of India. It is not known whether the Moily Report even mentions, the fact, that the Government's OBC population estimate is fictitious and misleading.

84. It is submitted that it is not the only "oversight" that remained an oversight with the Government's report. The claim of the successive Governments that it believed in social justice, secularism and inclusive growth. But the available data belie the truth. So far, it has just been cheap talk. The sad reality, and one which merits focus and the indulgence of this Hon'ble Court, is the discrimination faced by Muslims. In 1999-2000 (NSSO data), the Muslim youth (age 19 to 25 years, the category for whom the reservation policy is relevant) were the worst off among all the social groups in India, even behind the SCs/STs, and considerably behind the non-Muslim OBCs. In 1999-2000, only 6.3% of this cohort was in college (and/or High School), compared to 7.6% for the OBCs, and 7.1% for the SCs/STs (unless otherwise stated all data are from NSSO large sample surveys for 1983 and 1999-2000).

85. It is submitted that NSSO data also shed light on the job situation for the Indian youth. The Muslim youth have more than twice the unemployment rate of the OBCs, 15.9% versus only 7.4% for the Muslim and 7.7% for SCs/STs. It is to be noted that, this is the rate for 19-25 year olds, not for the entire labour force. This group is likely to have a higher unemployment rate than the average, because of frictional unemployment, looking for the first job, etc. What is relevant about this data is the much higher level of unemployment of the Muslim youth.

86. It is submitted that since the above data are for a point in time, it tells the very little of the rate of progress of education in India. It could be that Muslims started off from a lower base, and have increased their educational attainment faster than the average Indian. This is not the case; the Muslim youth have increased college attendance by 50% between 1983 and 1999-2000, compared to an 80% increase for the average Indian youth. Data for the OBCs are not available for 1983; the rate of expansion of college attendance for SCs/STs between 1983 and 1999-2000 was over 115%.

87. It is respectfully submitted that the above data strongly support the conclusion that there is no moral, philosophical or economic basis for reservations for the OBCs in either college education or employment. Indeed, there is no case for any affirmative action at all for the OBCs, especially if a much more deserving community, the Muslims, are so far behind even the presumed worst off Indian, the SC/STs. If there is any social group that deserves of affirmative action of India, it is the Muslims, not the SCs/STs and definitely not the OBCs.

88. It is submitted that it could be argued that "culturally" the Muslims do not have as great a demand for education as the Hindus, and therefore, their rate of progress has been lower. But perusal of data for other Muslim countries suggests that this is not the case. Every (predominantly) Muslim country has a higher rate of improvement than India, excepting Indonesia, Malaysia and Bangladesh. The first two have considerably higher levels of educational attainment: 5 and 6.9 years for

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population above 15 years of age. Bangladesh is real outlier, at least according to the international data compiled by economist Barro and Lee. In Pakistan, there has been an 84% increase in the average level of education, almost twice the rate of increase of the average Indian Muslim. The net result is that, all things considered, there is only one community deserving of any affirmative action in education and employment in India—the Muslims. There are no data to substantiate that the relatively privileged OBCs should get any additional benefits; of course, the data suggest that the Central Government should made an all-out effort to bring the Muslims on a par with at least the SCs/STs, before any passage of legislation for any other community.

89. It is submitted that the Government in its affidavit has stressed that "creamy layer" were excluded for the purpose of recruitment to the Central Government posts based on the recommendation of R.N. Prasad Committee Report. As far as reservation in the Central Government institute is concerned the desirability or otherwise of exclusion of "creamy layer" is yet to be decided. Incidentally, there is no agriculture income tax and high income and appointment levels for "creamy layer" has made the concept itself farcical.

90. It is submitted that it is really surprising when so many countries across the world to get over racial, ethnic and general discrimination, have gone for affirmative action with so many nuances in India, we are stuck in the rut of quota-based reservation. USA, South Africa, Malaysia, Australia, New Zealand, Brazil are some of the countries having successful and beneficial run of affirmative action. India at the outset is required to follow this policy for the social emancipation, economic, as also educational and economic developments, instead of continuing with "socially divisive policy quota-based reservation".

91. It is respectfully submitted that the Supreme Court's verdict on "Mandal Reservation" was categorical that the OBC Commission had to assess the impact of quotas, but this exercise has not been undertaken so far, rather overinclusion of large number of castes by the States in the reservations list and without skimming off "creamy layer" from the list is bound to create social disorder in any manner whatsoever. The Ninety-third Amendment passed by Parliament which gives the State the power to pass laws for making special provisions for advancement in higher education of OBCs, SCs and STs, cannot stand legal scrutiny for two reasons: (*a*) it seeks to overrule the Supreme Court's verdict of 2005, in the matter of *P.A. Inamdar* v. *State of Maharashtra*[1], in which it has been categorically held that unaided institutions cannot come under the ambit of reservations; (*b*) the present amendment is not only violation of equality, but also goes against the right to create and sustain educational activities which is a fundamental right. Furthermore, this Hon'ble Court may like to review its judgment passed in Mandal Reservations, and also test as to whether the directions given have been carried out or not. Since while adjudicating fixation of quota challenged, the infirmities pointed out insofar as criteria undertaken by the Mandal Commission and figures of castes arrived at, this Hon'ble Court had declined to go into this aspect, which by all canons of justice requires to be judicially reviewed and adjudicated. The "Oversight Committee" i.e. Moily Committee in all probability has not cared to correct, namely, the share of the population of the Other

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Backward Castes (OBCs in India). The original figure before the "Oversight Policy Recommendation" was to allot the OBCs only half as many reservations has their share in the population i.e. their share in the population was assumed to be 52% and the proportions of seats allotted was 27%. Based on that, Moily Committee Report which is tickling out in various journals and interviews of Shri Veerappa Moily goes on to suggest that reliance has been placed on the previous data and accordingly, 27% reservations to the backward classes in the institutes of higher learning, etc. have been recommended and the Government considering this, and being armed with the Ninety-third Constitution Amendment had inserted Article 15(5), to have its ways. The Union Cabinet which met on 21-8-2006, cleared the Bill proposing to reserve 27% seats in all educational institutions, barring specialised ones, run and aided by the Central Government after quota hawks stubbed out the suggestion to keep rich and affluent among the "Backwards" out of the reservation's ambit. Reservation for "creamy layer" also exists in the Bill.

92. It is submitted that recently, the Hon'ble Court which took up for hearing a PIL questioning the 27% quota for OBCs in higher education in government institutions, frowned upon the idea of merging the quotas meant for extremely backward classes (OBCs & Backward Classes), a Bench comprising Hon'ble Dr. A.R. Lakshmanan, J. to merge 18% OBCs and 9% BC quota of 14%. The Bench said "amalgamation of two classes of people for reservations could be unreasonable as two different classes are treated similarly which is in violation of Article 14 (right to equality) of the Constitution, which is to "treat similar similarly and to treat different differently". In 2001, the State of Jharkhand copied a Bihar State Law and gave 73% reservation to four categories (SCs 14%, STs 32%, OBCs 18%, and BCs 9%) in professional, technical colleges. When this was challenged before the Jharkhand High Court, a Division Bench in an interim order directed the total reservations to be reduced to 50%. In accordance with the directives the State in 2002 worked out quotas for SCs at 10%, STs 26% and OBCs 14%, total 50%. "Atyant Pichhra Barg Chhatra Sangh", an NGO, challenged this in the Supreme Court. Allowing the appeal, this Hon'ble Court said that the quota pattern has been changed arbitrarily and unreasonably without undertaking any kind of study or research of the social composition of the State. Setting aside the High Court order, the Supreme Court directed the State to constitute the expert body within three months.

93. It is respectfully submitted that the provision related for the OBCs in the impugned Act, the efforts are afoot, to put the legislation in question in the Ninth Schedule of the Constitution like the Tamil Nadu Backward Classes, Scheduled Castes/Scheduled Tribes (Reservation of Seats in Educational Institutions) Act, 1993, etc. However, the nine-Judge Constitution Bench of this Hon'ble Court while adjudicating, Civil Appeals Nos. 1344-45 of 1976 in *I.R. Coelho* v. *State of T.N.*[23] delivered its verdict on 11-1-2007[23].

94. It is submitted that earlier the five-Judge Constitution Bench of this Hon'ble Court while adjudicating Writ Petition (C) No. 61 of 2002 in *M. Nagaraj* v. *Union of India*[11] and other connected writ petitions, etc. considered the broad issue that was

23 (2007) 2 SCC 1 at pp. 111-13, paras 151-52.

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referred for determination in the said case related to (*a*) validity, (*b*) interpretation; (*c*) implementation of (*i*) the Constitution (Seventy-seventh Amendment Act, 1995, the Constitution (Eighty-first Amendment) Act, 2000, the Constitution (Eighty-second Amendment)Act, 2000, and the Constitution (Eighty-fifth Amendment) Act, 2001 and, (*ii*) action taken in pursuance thereof which seeks to reverse decisions of the Supreme Court in matters relating to promotion and their application with retrospective effect.

95. The conclusion arrived at by the five-Judge Constitution Bench in the above matter is extracted and reproduced herein for the sake of facility: (SCC pp. 278-79, paras 121-26).

96. It is submitted that the respondents being aggrieved by the order of this Hon'ble Court moved IA No. 14 of 2007 in the above writ petition seeking clarification of the stay order dated 29-3-2007 without following the mandatory requirements in terms of Article 137 of the Constitution read with Order 40 Rules 3 and 5 of the Supreme Court Rules, 1966 related with review of order. The petitioner pointed out the legal requirement as also the laws laid down by this Hon'ble Court. IA No. 14 of 2007 in the above writ petition was dismissed on 23-4-2007.

97. It is submitted that the respondents filed another IA No. 15 of 2007 in the above writ petition seeking direction for an early hearing of the matter by a larger Bench consisting of five Hon'ble Judges of this Hon'ble Court in terms of Clause (3) of the Article 145 of the Constitution read with Order 35 of the Supreme Court Rules, 1966. The said IA was mentioned before the Court of the Hon'ble Chief Justice of India, on 24-4-2007 (the very next day of dismissal of IA No. 14 of 2007) by the Attorney General of India invoking his powers under Clause (3) of Article 76 of the Constitution of India. The Hon'ble Court of the Chief Justice of India directed for listing of the above writ petition on 8-5-2007; and meanwhile pleadings are to be completed.

98. That it is submitted that after hearing the petitioner and the counsel appearing for other connected writ petitions, including the learned Solicitor General, and other counsel appearing for number of interveners and others, the Division Bench of two Hon'ble Judges of this Court, passed interim order on 9-5-2007 while reserving the order on the issue of referring the matter to a larger Bench and other related issues.

99. It is submitted that in the meanwhile the parties to all the writ petitions were asked to frame issues and submit to the Hon'ble Court to consider them and frame the issues and accordingly the writ petitions could be adjudicated; and issues determined and decided by a larger Bench of this Court on being referred by the said Court.

100. It is submitted that the two-Judge Bench of this Hon'ble Court delivered its judgment on 17-5-2007 and framed the basic issues which are required to be considered by larger Bench: (*i*) the Ninety-third Constitution Amendment Act, 2005; (*ii*) Scope of Articles 15(4) and 15(5); (*iii*) scope of judicial review; (*iv*) listing of socially and educationally backward classes in terms of units of caste/communities;

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Summary of Arguments

I. Mr Ashoka Kumar Thakur, Petitioner-in-person *(contd.)*

(*v*) whether 27% reservation in socially educational backward classes/Other Backward Classes is justified; (*vi*) socially advanced persons/section or creamy layer of SEBC/OBC; (*vii*) constitutionality/validity of the 2006 Act. Overall 30 issues have been framed in each of the seven categories and matter as of now stands disposed of by the two-Judge Bench of this Court and is now before this Bench.

101. It is submitted that, in this background it is most unjustified on the part of the respondents to file IA No. 26 of 2007 in the above writ petition, and want that the stay order given by the two-Judge Bench as stated above, be vacated because some of orders passed by this Court, which were not in the knowledge of the respondents, as such the same could not be produced in the Court, when IA No. 13 of 2007 of the petitioner seeking stay was heard. The respondents have placed reliance on the orders and annexed them as Annexures VI, VII and VIII to IA No. 26 of 2007 and sought vacation of interim order dated 29-3-2007 so that the admission process in the government-aided institutions could be done in the current academic session.

102. The petitioner in his counter-affidavit has already made the above submissions to IA No. 26 of 2007 in the above writ petition that is on record in the present matter.

103. It is submitted that in view of these developments and apparent legal and constitutional fraud having been perpetuated by the respondents, it is prayed that the Hon'ble Court be pleased to:

(*a*) exercise its inherent jurisdiction and protect the fundamental rights of the citizenry of India and quash the impugned Act making erroneous provision of 27% for OBCs purely on wrong premises placing reliance on 52% imaginary figure of "Other Backward Classes" provided by the Mandal Commission Report and declare the provisions as unconstitutional and ultra vires, discriminatory; and

(*b*) further scrutinise the Ninety-third Amendment made in the Constitution and insertion of Article 15(5) and its constitutional validity;

(*c*) direct the Government to approach this Court within a time-frame as given in this regard, and place the correct data, and determine modalities to be adopted for the implementation of the policy in question;

(*d*) direct also the Government to make the National Commission for Backward Classes to be an effective and vibrant organ having adequate infrastructure to look after this important issue, with multi-members commission, nominated to the Commission who must have served as Judge of the Supreme Court, and social scientist, academicians, scientist, economist, civil servant, etc. by making amendments in the Backward Class Commission Act, 1993; and

(*e*) and allow the writ petition in above terms since the balance of convenience is in favour of the petitioner and against the respondents.

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Summary of Arguments *(contd.)*

II. Dr. M.M. Mittal, Petitioner-in-person

1. The Government in its various affidavits filed in various cases has not addressed to the basic issue of providing the data for defining and evaluating the backwardness and review of various affirmative measures as has been repeatedly stressed in various judgments of this Hon'ble Court.

The Government has made the following statements, which are to be addressed:

(*a*) "Sample survey is not sufficient to deliberate on the objectives which can be achieved by decimal census operations of the Registrar General of India, namely, to provide a detailed head count of actual numbers of citizens belonging to various caste/classes." (*Ashoka Kumar Thakur* v. *Union of India*, WP (C) No. 265 of 2006.)

While making this statement the Government has failed to appreciate the basic fact that as far as issue of OBC/SEBC is concerned, the Government is relying on the Mandal Commission Report. It is to place on record that the Mandal Commission Report and 1931 census report, both are based only on sample surveys as far as issue of OBC is concerned. During survey, 405 districts were covered, which included about 5500 district blocks and about 6 lakh villages. The urban population in year 1980 formed 25% of total 65 lakh persons. In each district only one block and two villages were covered by the study thereby making it 7% of the district blocks and 0.15% of village population (Chapter XI and Para 11.15 of the Mandal Commission Report).

(*b*) "The terms 'caste' and 'class' are employed interchangeably by keeping with the well-settled principle that caste itself is a valid classification for reservation." [*Ashok Kumar Thakur* v. *Union of India*, WP (C) No. 265 of 2006].

The various commissions/committees starting from the First Backward Commission, the Mandal Commission to Sunita Mahajan Report have desired the census to be based on caste basis for the proper delineation of backward classes. Why the Government had not gone for it. The reasons are more than obvious:

(*i*) The real percentage of OBC would be known, which would puncture the inflated figure being projected by the Government.

(*ii*) Tata Institute of Social Sciences Report (1980) on reactions to the reservations for OBC, forms a part of the Mandal Commission Report. If one goes through this report, it becomes more than obvious that issue of OBC reservation has been used mainly for political gains, which has gained manifold momentum since the politics of coalition has rooted at Centre. This facet of the government has been exposed in petition. filed before the Hon'ble Supreme Court seeking to alter the Representation of the People Act (RPA), which has been opposed by the Government as it could rock the coalitions at the Centre, thereby showing its true colours.

(*c*) "The creamy layer to be included for the purpose of reservation in education institutions. The Government has alleged that the community has suffered because it has been denied reservation in education institution for last 60 years. Once the persons belonging to creamy layer are benefited, they would act as a model of inspiration for other members of communities."

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Summary of Arguments

II. Dr. M.M. Mittal, Petitioner-in-person *(contd.)*

(*i*) If one analyses the present system of admission to higher seats of learning and of great academic pursue, some interesting results are borne out. Children of creamy layer of the so-called upper caste are rarely admitted to institutions of high academic pursue. Most of the children of this effluent class, who wish to go for higher studies, either are being admitted in private institutions or are going abroad for further studies. My statement can be substantiated by the increasing number of doctors and/or engineers who have graduated from these institutions during last 20-30 years. Mainly the children of so-called upper caste with meagre means, or limited resources who out of dedication and sheer hard work get admission to various state run institutions. These children have outnumbered the creamy layer of the OBCs and upper castes as well. The creamy layer of the OBCs is being selected on the basis of merit in its respective group by outnumbering the non-creamy layer of the OBCs. The reason is obvious because the children of creamy layer of OBCs avail all possible facilities, which are available to the children of effluent upper caste. So the non-creamy layer of the OBCs is again not in a position to take the advantage of the affirmative measures.

So the proposal in the present form is not only anti to non-creamy layer of backward classes but also to the class of the upper castes with meagre means or limited resources. Thus the issue of creamy layer in the reservation in educational institutions is much more damaging than the issue of reservation in creamy layer in services.

(*ii*) Further, the reservation in various educational institutions is prevailing for more than 30 years in all the States, for more than fifty years in most of the States and more than 100 years in few States. There is no data available from any of the States about the benefit of reservations in the upliftment of the educational status of backward classes at large. If such data would have been available, it would have helped the Government to propagate its viewpoint.

(*d*) "The National Backward Class Commission has been given statutory shape to which complaints of overinclusion can be made by any one and advice of the commission is ordinarily binding on the Central Government." (*Resident Doctors Assn.* v. *Union of India*, 598 of 2006.)

(*i*) The National Commission has circulated a questionnaire for the same purpose, which requires data on the OBCs, their educational and employment status in Central Government. As the same is not available to fill up the questionnaire, how can one approach the Commission.

(*ii*) 244 communities have been added to the existing number of 3473 recommended by the Mandal Commission. It is worthy to note that since Independence the number of backward classes is increasing day by day irrespective of various affirmative measures being taken by the State and Central Governments.

(*e*) "Caste system has percolated even among the non-Hindu religions—no doubt to a varying extent in Muslims, Sikhs, Christians, etc. maximum being in Muslims and Christians, especially those who were converts from Hindus.

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Summary of Arguments

II. Dr. M.M. Mittal, Petitioner-in-person *(contd.)*

(*Resident Doctors Assn.* v. *Union of India*, 598 of 2006.) The same observation has been made in the Mandal Commission Report. Based upon it, percentage of OBC population was arrived at 52% of total population."

Therefore it clearly indicates that in present era there are factors other than Hindu religion only, which are equally or more important. Most important one is the economic status which has not been given its due importance in various studies. If the Government had conducted periodic review of the reservation policy, it would have made us much wiser in implementing the various affirmative measures.

(*f*) "A perusal of the report indicates that 1931 census does not have even a remote connection with the identification of OBC." (*Resident Doctors Assn.* v. *Union of India*, 598 of 2006.)

In Chapter XII of the Mandal Commission Report, the Commission culled out caste/communitywise population figures from the census records of 1931 and then grouped them into broad caste clusters and religious groups (Para 12.19).

2. *Few words about the Mandal Commission Report*:

(*i*) The Mandal Commission for the survey purposes selected 0.15% of total villages and 7% of total district blocks. There is nothing on record to suggest the criteria for selecting a particular village or district block.

(*ii*) The Mandal Commission did not ask for the analytical data for reviewing the outcome of reservation already existing in various States at the time of the Mandal Commission.

(*iii*) The Mandal Commission divided the OBCs into two groups (*i*) Intermediate OBCs and (*ii*) Depressed OBCs, which were equidistributed. Knowing this fully well, no attention was paid to this observation while making recommendations. (Annexure I of the Mandal Commission Report)

(*iv*) The Mandal Commission while arriving a figure of 52% population of OBCs, has added 8.6% population of other non-Hindu communities. Thus, non-Hindu communities formed 17% of the total OBCs population. If one analyses the Mandal Commission Report, there are not more than 2% of non-Hindu communities, which have been included in OBC list.

(*v*) In various judgments it has been held repeatedly that only when a caste as a whole is socially and educationally backward, it can be designated as OBC. In the Mandal Commission Report there is nothing on record to suggest that any such criteria was adopted while delineating any caste as OBC.

3. Social backwardness is a social disease whose incidence is directly related to multiple factors, common ones being—social, economical, occupational, political, geographical, place of habitation and awareness about the various changes taking place in the society. As the various factors change from time to time depending upon the circumstances, the concept of social backwardness is of dynamic nature. So the management of social backwardness has to be dynamic which means that the various measures to be adopted as remedy have to be time-bound and reviewable. Further, it has to be strictly monitored that the majority of citizens, not few are benefited by these measures.

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Summary of Arguments

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4. Class is heterogeneous group where common denomination(s) put the persons under one umbrella irrespective of caste, region, place of birth, etc. Whereas caste in Indian perspective is compact or homogenous group which is the outcome of interaction of various factors as aforementioned in para 3.

5. During the last 30 years there is continued migration of millions of persons for jobs as unskilled labour, domestic helper, rickshaw puller, etc. from backward States to other States. So any list without taking cognizance of this factor is incomplete and cannot be accepted.

Relevance of the Mandal Commission Report today

6. The Mandal Commission Report was drafted in 1980 i.e. 27 years back. Since then there has been marked change in the social, economic and educational scenario of the society. With the passage of time different indicators for deciding social and educational backwardness have been adopted by the First Backward Class Commission, the Mandal Commission and National Commission for Backward Classes, thereby suggesting that the Government of India accepts that social issues and their management is dynamic in nature. Then how a study based on various parameters derived 27 years back has any relevance in today's perspective. Further the Government has not revised the Mandal Commission Report after ten years of its implementation as notified. So there has to be fresh determination of socially and educationally backward classes in the changed scenario of the society before planning and implementing any of the affirmative measures for the same.

The Mandal Commission Report—An analysis

7. (*a*) The expert panel has recommended 1% purposive sample of villages at district level to be able to identify a vast majority of backward classes. Taking 1% of the country's population comprising 65 lakh person be too large, it was later on decided that two villages (0.15%) and one district block (7%) in each district would be quite adequate. (Vol. 1, Ch. XI, Para 11.10.)

(*b*) The Commission undertook tour to get first hand information. It visited 84 district headquarters (20%) and only 37 villages (.006%). (Vol. 1, Ch. III, Para 3.9.)

Not only were the samples taken by the Commission statistically insignificant but also urban biased as only 0.15% of villages were surveyed and only 0.006% villages were visited whereas 72% of the population lives in villages.

(*c*) Article 340 of the Constitution refers to "socially and educationally" backward classes. The following test may therefore be applied to determine socially and educationally backward classes. (Vol. 1, Appendix 3).

(*i*) *In respect of employees belonging to Hindu communities*

(*i.i*) an employee will be deemed to be socially backward if he does not belong to any of the three twice born (dvij) varnas i.e. he is neither a Brahmin nor a Kshatriya/nor a Vaishya....

(*ii*) *Regarding the non-Hindu communities an employee will be deemed to be socially backward if either*

(*ii.i*) He is a convert from those Hindu communities deemed as socially backward as in para (i) above. ...

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Summary of Arguments

II. Dr. M.M. Mittal, Petitioner-in-person *(contd.)*

The above document clearly states that the approach of the Mandal Commission was primarily caste based.

(*d*) Estimated population of OBCs (Vol. I, Ch. XII, Para 12.21)

The population of Hindu Other Backward Classes estimated was 43.7% of total population. By adding 8.3% (52% of 16.6% population) of non-Hindu communities, religious groups, etc., the total population of OBC was arrived at 52%.

Thus the OBC population of non-Hindu communities became 16% of total OBC population.

If one analyses the list of OBCs published by the Mandal Commission, it is more than obvious that hardly 4-5% of non-Hindu communities have been included in the list.

(*e*) Ten State Governments had set up their own commissions for defining criteria for backwardness and recommending measures for its removal. Further eight States and seven territories notified list of Other Backward Classes for various affirmative measures depending on old records without setting any commission. Fourteen States and Union Territories including Madhya Pradesh and West Bengal never prepared a list of OBCs or taken any separate action for them (Vol. 1, Ch. 2, Paras 2.9 and 2.65).

(*f*) Evidence by the State Governments:

(*i*) It was rather disappointing to see that hardly any State was able to give desired information. Several States did not choose to respond even to some simple and straightforward question or important policy issues. Repeated reminders and contact at personal level did not materially alter the situation (Vol. 1, Ch. IX, Para 9.4).

(*ii*) No State Government could furnish figures regarding the level of literacy and education amongst Other Backward Classes (Vol. 1, Ch. IX, Para 9.30).

Therefore as discussed above, the Mandal Commission Report cannot be taken as the reliable document for determining other social and educational backward classes.

National Backward Class Commission (NBCC)

8. NBCC was set up by the Government of India as per direction of the Supreme Court. Section 9(1) of the Act provides that it shall examine the request for overinclusion or underinclusion or inclusion of any class of citizen as backward class. Since its inception 244 caste/communities have been added and no caste and community have been excluded.

During the last 30 years there is continued migration of persons for jobs as unskilled labour, domestic helper, rickshaw puller, etc. from backward States to other States. So any list without taking cognizance of this factor is incomplete and cannot be accepted. In none of the reports published by NBCC, there is any reference of taking cognizance of this factor.

This only suggests either the present methodology of determining Other Backward Classes should be changed or the Government of India should review its present policies of affirmative measures as they have failed to deliver the desired results.

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Summary of Arguments

II. Dr. M.M. Mittal, Petitioner-in-person *(contd.)*

Determination of backward classes—An approach

9. One of the very important issues today is, while determining the backwardness of the citizens, whether one should apply vertical division or horizontal division. Horizontal approach leads to loose heterogeneous group, allows stepwise advancement of society, is dynamic in nature, and gives equal opportunity to every one irrespective of race, caste, place of birth and religion. This Hon'ble Supreme Court in *Indra Sawhney* v. *Union of India*[1] (SCC pp. 772-725) while deliberating on "means test" and "creamy layer" have applied horizontal approach in deciding the concept of "creamy layer".

The various parameters forming the basis of horizontal approach have to be dynamic, situation based, reviewable and may be different at various steps of advancement.

Bird's eye view of vertical approach

10. When the British first gained a foothold on Indian subcontinent in 18th century, their concern was profit. After 1857 uprising, the freebooters of 18th century gave way to bureaucrat of 19th century. From the mixed belief of their superiority and fascination to rule the world, the new administrators adopted new policy of dividing the society vertically as one of the tools for ruling the country.

The British administrators were overwhelmed by ruling the greater number of people than anywhere else in the Empire, which made them to compartmentalise chunks of population with manageable groups. The most obvious way to do so was the use of India's unique caste and religious systems. The British in India used the census not only to count but made it an active participant in creation and modification of society and used the vertical approach to prolong British abilities to rule India.

India not only inherited its Constitution from the British but also mindset to rule. It is evident that the framers of the Constitution, even after realising the ill effects of vertical division, adopted the same with an aim to rule. With the advent of coalition politics, the subdued side effects of vertical approach have became more evident and palpable. Though similar instances have been seen in the past, but the recent movement of Gujjars to be included in Scheduled Tribes in Rajasthan, should make all Indians to seriously rethink about the role of vertical approach in dividing the society.

At international level, Ceylon and Iraq are two burning examples facing the outcome of vertical division. Even English society is facing the fallout of vertical division, which they used as a successful tool to rule.

Caste and determination of Backward Classes

11. The role of "caste" in determination of backward classes is being argued by learned advocates before the Hon'ble Supreme Court. What I wish to highlight about the two stands being taken by every Government in power for many years: neither the Government in power is ready to decry the word "caste" for determination of backward classes nor is ready to carry out census including caste as one of the indicators. So it is humbly submitted that if this Hon'ble Supreme Court feels that caste plays a major role in delineation of backward classes, than it should rule that caste wise enumeration of population may also be undertaken in the ensuing census.

1 1992 Supp (3) SCC 217

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Summary of Arguments *(contd.)*

III. Dr. (Lt. Col.) L.M. Khanna, Petitioner-in-person

The following basic issues arise for consideration/determination in the above writ petition:

1. What is the basis for the determination/classification as to who belongs to "Other Backward Class".

2. What are the modalities to be adopted for implementation of the policy in question since OBCs were never discriminated and depressed like SCs/STs and ostracised or faced untouchability prior to independence when presently backward "castes" hold social, economical and political power in most of the States and NSS (1999-2000) and NSS (2004-2005) surveys explicitly shows that landholding pattern, income and expenditure figures for backward classes and upper castes in both urban and rural areas does not have wide variation.

3. Whether it is justified for the reservation to OBCs not having been reviewed for the last 11 years in terms of Section 11 of the Backward Class Commission Act, to extend reservation apart from jobs, in educational institutions as well, to the extent of 27%; when both employment and enrolment figures in schools and colleges for OBCs and upper castes don't have much difference in most of the States.

4. What is the basis of preset legislation, when during last 60 years of high economic growth, mass internal migration, rapid urbanisation, complete breaking up of correlation between caste and specific type of employment, increased literacy, social, economical and political empowerment of all the castes the necessity of having reservation educational institutes for OBCs has no locus standi in face of NSS (1999-2000) and NSS (2004-2005) surveys percentage enrolment of the OBCs in schools and colleges are quite in commensurate with their population figures.

5. Whether the Mandal Commission figure of 52% OBCs based on 1931 census figure is not tenable as there has been tremendous social and economical advance during last 76 years. NSS figures of 32% and 41% also includes the politically and socially dominating castes such as Jats, Vokkaligas, Lingayats, Yadavs, Kurmi, Koeri, etc. Inflation of OBC population figures is a political scandal. The defects related to the Mandal Commission Report remained unexamined by the nine-Judge Bench deciding Mandal case.

6. Whether it is justified when the present enrolment position of all the classes in colleges shows their equivalence to that for schools. Both income and expenditure levels of different percentile of OBCs and other categories, when NSS do not show much variation. Besides many of so-called OBC castes are politically and economically dominant. As such it violates Articles 14, 15, 16 and 19 and discriminatory in nature.

7. Whether it is justified for such kind of legislation to make provisions of reservation of seats in the Central Educational Institutions among others for Other backward classes of citizens which are established, maintained or aided by the Central Government and in the matters connected therewith or incidental thereto having incorporated the same in Section 2(*g*), Section 3 sub-section (*iii*), Section 5(1) and Section 6 which makes provisions that out of the annual permitted strength in each branch of study or faculty, twenty-seven per cent seats shall be reserved for the Other Backward Classes, amounts to inconsistency, thus rendering the same to be void, and open to judicial scrutiny.

8. Whether it is justified for enactment of an Act, which erodes the basic structure of the Constitution. Though Section 2 of the said Act relates to the definition of "Other Backward Classes", means the class or classes of citizens who

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Summary of Arguments

III. Dr. (Lt. Col.) L.M. Khanna, Petitioner-in-person *(contd.)*

are socially and educationally backward and are so determined by the Central Government, is inconsistent with the provisions so made in Article 15(4) and does not strike a balance between the provisions so made in Article 15(1); and statutory provisions made in Sections 2(*a*) and 2(*c*) and Section 11 of the National Commission for Backward Classes Act, 1993.

9. Whether it is justified that the enactment of such law, bringing in unbridled power and authority, has infringed the constitutional rights by making it mandatory, has infringed the constitutional rights by making it mandatory to go in for 27% reservations in the admissions in the educational institutions in the Centrally sponsored and funded educational institutions amounting to inconsistency and void in face of the fact that in terms of Section 11 of the NCDA Act, 1993 no review has taken place.

10. Whether the provisions made in the statute fell within the realm of the legislature to insert legislation with the condition precedent and totally upsetting the constitutional provisions made by the framers of the Constitution and thereby eroding the basic structure of the Constitution itself by making it unconstitutional and utter derogation of the fundamental rights.

11. Whether it is justified to hold the provision in law framed by the legislation which override/truncate the fundamental and legal rights of the citizens and requires judicial review by this Hon'ble Court.

12. Whether the legislature in its wisdom while making the statutory provisions in question i.e. Sections 2(*g*), 3(*iii*), Sections 5(1)(2) and 6 of the said Act, are justified and such framing of the legislation is fettered with the infirmity that put an embargo on the rights of an individual citizen not belonging to Other Backward Classes (OBCs) and deserves to be scrutinised.

13. Whether the provisions so inserted and enforced with a view to increase the number of seats for admission in the educational institutions from academic sessions 2007 and mandatorily increase the seats to accommodate such persons belonging to Other Backward Classes (OBCs) without skimming off the creamy layer among them in the present form, is unsound and uneven and more particularly the ratio of 27% based on the sole basis of the Mandal Commission Report and its imaginary figure i.e. 52% is wholly absurd and ridiculous.

14. Whether vires that flows from the present provisions of Sections 2(*g*), 3 sub-section (*iii*), Sections 5 and 6 of the said Act and is going to cause hardship, prejudice to the large sections of citizens of India and that amounts to discrimination in the nature as also in terms of Articles 13 and 14 of the Constitution of India.

15. Whether the present issue of reservation presently on hold dilutes the ratio of this Court in *Indra Sawhney* v. *Union of India*[1] and *Ashoka Kumar Thakur* v. *State of Bihar*[2] (Creamy layer issue), *M. Nagaraj*[3] and *Coelho*[4] cases.

16. Whether the issues and questions of law raised in this writ petition under Article 32 of the Constitution, requires redetermination by a larger Bench of five Judges in terms of Order 35 Rule 1(1)(2) of the Supreme Court Rules, 1966 read with Article 145(3) of the Constitution of India.

1 1992 Supp (3) SCC 217
2 (1995) 5 SCC 403
3 *M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212
4 *I.R. Coelho* v. *State of T.N.*, (1999) 7 SCC 580

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Summary of Arguments *(contd.)*

IV. Mr Harish Salve, Senior Advocate, for the petitioners

Introduction

1. The present set of writ petitions have been filed to challenge the validity of the following:

(*a*) The Constitutional (Ninety-third Amendment) Act, 2005 which purported to insert sub-article (5) in Article 15 of the Constitution of India;

(*b*) The Central Educational Institutions (Reservation in Admission) Act, 2006, and;

(*c*) The present Caste-based Reservation policy of the Central Government.

PART I

Challenge to the Central Educational Institutions (Reservation in Admission) Act, 2006

2. The law is 'Facially Discriminatory'

2.1 The Act expressly provides for creation of quotas. Section 3 of the Act provides that out of the actual permitted strength in each branch of the study:

(*i*) 15% shall be reserved for the Scheduled castes;

(*ii*) 7½% shall be reserved for STs;

(*iii*) 27% seats shall be reserved for Other Backward Classes.

The challenge in the present petition is principally to sub-clause 3 of Section 3 of the Act which deals with the reservation to the extent of 27% of the total number of seats for the "Socially and Educationally Backward Classes of Citizens".

2.2 It is settled law that admissions to educational institutions should be based purely on merit. The result of the reservations as aforesaid clearly is that a student with higher merit but not belonging to the "class" of students in whose favour the reservation is made, would be denied admission. Therefore, this law is "facially" discriminatory i.e. it allows the State to "prefer" lesser meritorious students over those who would have otherwise got admission absent the act. Thus the Act discrimination on its face.

2.3 It is submitted that all facially discriminatory laws are not necessarily violative of the rule of equality—in that—laws which are facially discriminatory but are intended to bring about a positive result to promotes equality (and this process of positive discrimination is also known as affirmative action) would nonetheless be valid. Such and only such laws that are strictly intended to bring about a larger equality are protected by the "special provisions" clause in the Constitution.

2.4 The notion of a "facially" discriminatory law would be that—it is a law which, when challenged, appear to be discriminatory and thereafter it is for the State to establish its "necessity" as well as its "validity" in the constitutional scheme to save it from being declared unconstitutional. Validity of the law, absent adequate justification by the State (which the petitioners content as to satisfy the "compelling need" test) would have to be declared invalid.

3. *Is the Law Saved by Article 15(5)?*

3.1 The submission of the Union that Article 15(5) protects the validity of this law is untenable. It is submitted that Article 29(2) provides that no citizen shall be denied admission into any educational institution maintained by the State "on the grounds only of .....caste..." or any of them in a caste based quota, where caste

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becomes central to the test of identification (assuming that this is permissible), denial of admission to a student who has higher marks, is solely on the ground that he is of an "unfavoured" caste and a student belonging to some other caste is entitled to a reservation—a preferential right to admission. This clearly violates Article 29(2). This has been laid down in *Champakam case*[1] in clear and emphatic terms.

3.2 In *Champakam case*[1] this Hon'ble Court dealt with the case reservation in matters of admission at SCR p. 527.

The example given at SCR p. 532 of the above judgment is also significant.

The argument that reservations do not constitute denial "only" on the basis of caste was expressly rejected (see SCR at p. 533)

Responding to this, the Constitution was amended—not by modifying or amending the language of Article 29(2) but by insertion of Article 15(4). But for insertion of Article 15(4), *Champakam*[1] is still a good law and has not been overruled. Article 15(5) does not make an exception to 29(2) but excludes only Article 19(1)(*g*) and therefore it is submitted that Article 15(5) does not permit quotas and in any case not for religious or caste denomination.

3.3 The submissions made on behalf of the respondents, in fact, indicate a significant degree of confusion as to the scope of Article 15(4) vis-à-vis Articles 15(1) and 29(2). In *Champakam case* the Supreme Court held that setting aside quotas on communal lines would infringe the individual rights of citizens contained under Article 29(2) since it would amount to "denial of admission on the basis of caste". Dr. Ambedkar, the Law Minister who introduced the First Amendment (by which Article 15(4) was introduced), said in his speech that this interpretation would affect any ameliorative measures for backward "classes of citizens" since in the ultimate analysis any member of a backward class belonging to the Hindu community would have a caste. In fact he stated thus:

> "… then with regard to Article 16 Clause (4), my submission is this that it is really impossible to make any reservation which would not result in excluding somebody who has a caste. I thank it has to be borne in mind and it is one of the fundamental principles which I believe is stated in Mulla's last edition on the very first page that there is no Hindu who has no caste. Every Hindu has a caste—he is either a Brahmin or a Mahratta or a Kundby or a Kumbhar or a carpenter. There is no Hindu—that is a fundamental proposition—who has not a caste. Consequently, if you make a reservation in favour of what are called backward classes which are nothing else but a collection of certain castes those who are excluded are persons who belong top certain castes. Therefore, in the circumstances of this country, it is impossible to avoid reservation without excluding some people who have got a caste….."

3.4 Thus clearly what was apprehended was that reservation for backward classes, in so far as it would give preference to one Hindu over another could be construed as a violation of Article 29(2) since preference to any "Hindu" (who would inevitably have a caste) could be construed to mean a discrimination on the basis of "caste". In order to obviate this, Article 15(4) was inserted. It is for that reason that Article 15(4) is also not considered to be an exception to Article 15(1), in that it does not permit caste based reservation but permits affirmative action where people who may incidentally belong to a "caste" may also be conferred benefits. Thus

1 *State of Madras* v. *Champakam Dorairajan*, (1951) 1 SCR 525

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Article 15(4) read with Article 29(2) implies that reservation based on "caste" would be violative of Article 29(2) unless the reservation is made for the backward "classes" of citizens—a homogenous class identified for a host of relevant factors of which the caste may be one of the factor but not the only factor. The argument that classification may be any "caste plus" method is also not justified as the classification would then "predominantly" be on the basis of "caste" which has been specifically been rejected by this Hon'ble Court in a number of cases including *M.R. Balaji*[2].

3.5 The submission of the learned Solicitor General based on *Venkataramana case*[3], it is submitted is untenable. The said case which was decided on the same day as *Champakam*[1] does not purport to take a different view. Besides, *Champakam case*[1] has been the basis of deciding of the later cases—if *Champakam*[1] was wrongly decided then the elaborate discussion in the later cases dealing with Article 15 (*Balaji*[2] downwards) was entirely unnecessary.

4. *Extent of Scrutiny—Is Article 15(4) a Facet or an Exception?*

4.1 It is submitted that biggest non-issue of this case is whether Article 15(4) is a facet of Article 15(1) or is an exception to Article 15(1).

4.2 It is submitted that the said debate has always been more semantic than substantial. *Balaji*[2] flags this issue—calling it a special provision. The notion of an exception was not that the provision was an exception but that sometimes in order to promote a larger equality, an exception was necessary for achieving formal equality. In that sense it was held that such exceptions were permissible if properly made but it was held that crossing the 50% mark in reservations would make the exception swallow the rule. The 50% cap has always been maintained not because the provisions of Article 15(4) are construed as an exception to Article 15(1) but for the reason that the Rule has to be given a due weight.

4.3 In the *Thomas case*[4] the Court clarified that Articles 15(4) and 16(4) were really facets of Articles 15(1) and 16(1). *It is submitted that this description in fact further limits and circumscribes the actions taken under the those provisions rather than expand the area of operation*. The provisions are not to be construed in an unlimited fashion conferring upon the government a carte blanch power to make any special provision to any extent to promote the special interest referred to in those provisions—which would be in fact a consequence if the provision is construed as an exception. By construing Articles 15(4) and 16(4) as facets of Articles 15(1) and 16(1) it becomes necessary to further reading them in a limited sense in that they are no more than a recognition that affirmative discrimination is sometime necessary to meet a larger end of equality but at the same time preserving the rule contained under Article 15(1) or 16(1).

4.4 Affirmative discrimination, if excessive, is bound to result in reverse discrimination which is not permissible. Thus construing these provisions as facets of rule of equality this court has held that such affirmative discrimination of the kind as is conceived in Articles 15(4) and 16(4), in fact, has to be carefully weighed and measured to ensure that it protects the rule contained in Articles 15(1) and 16(1) and does not result in reverse discrimination.

2 *M.R. Balaji* v. *State of Mysore*, 1963 Supp (1) SCR 439 at pp. 469-470

3 *B. Venkataramana* v. *State of Madras*, AIR 1951 SC 229

4 *State of Kerala* v. *N.M. Thomas*, (1976) 2 SCC 310 : 1976 SCC (L&S) 227

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4.5 The "strict scrutiny" does not flow from this principle and has no relevance to this principle at all. The strict scrutiny test flows from the following:

(*a*) Class classifications, caste based classifications are inherently pernicious and, in fact, run counter to an express constitutional prohibition against them in Article 15(1). In other words the Constitution recognizes that in the longer term differentiations and classifications based on caste deserve to be abolished rather than encouraged. If caste is used as an indicia in the short term to come to form a cohesive class, then strict scrutiny is necessary to ensure that caste as a factor or indicia does not itself become the base for classification for that would be contrary to the constitutional prohibition and would not be saved by sub-article (4) or (5) of Article 15.

(*b*) There is an inherent tension between genuine social engineering and vote bank politics. The formal fulfils constitutional goals for which in the short term, affirmative discrimination is tolerated to achieve a larger equality. The whole idea of affirmative discrimination is that it is limited in time, quantum and space and designed as a remedy which would cure the disease so that in the long term no such differentiations are necessary. Vote bank politics serves precisely the converse purpose i.e. it creates permanent fissures in society which are used as vote banks. Judicial review of the strict scrutiny variety is necessary to separate measures that are genuine steps of social engineering from those which are vote bank politics and only those measures which are intended to achieve the object deserve to be upheld.

(*c*) As already submitted affirmative action—also described as affirmative discrimination is facially violative of Article 14. It is for that reason that it is for the State to explain the compelling need to justify is necessity.

4.6 Indisputably, reservation of seats is ex facie an "exclusive" measure—it excludes large sections of society from a benefit or facility or amenity—in the present case admission to educational institutions. Keeping a class of citizens out of the "zone of consideration" for facilities can only be justified the basis of compelling state needs.

4.7 It is submitted that the notion of strict scrutiny is nothing new—in fact, the test laid down for justification by the State under Article 19(6) is of a similar character. It is just that where the action was ex facie discriminatory, a greater degree of compulsion is necessary to establish a compelling State need than what is ordinarily required to be shown in the case of the economic legislation.

4.8 The reliance by the Solicitor General on *Saurabh Chaudri case*[5] to suggest that strict scrutiny has been rejected by this Hon'ble Court is untenable. Reading of paras 29-34 of the said judgment makes it clear that having first come to conclusion that the case was not governed by Article 15(1) this Court said that strict scrutiny was not called for. It is submitted that in fact a reading of *Saurabh Chaudri*[5] observations would suggest that where there is an Article 15(1) issue clearly the strict scrutiny would be called for.

4.9 In any event, *M. Nagaraj case*[6] squarely lays down the test of strict scrutiny (see SCC pp. 250, 273-74 & 277, paras 49, 112 & 119)

5 *Saurabh Chaudri* v. *Union of India*, (2003) 11 SCC 146

6 *M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212

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4.10 The report of the Parliamentary Committee also shows that they were alive to all the problems. In the law—the apprehensions and weaknesses were placed before the committee. Without any discussion, which would suggest that no mind was applied to these very problems—which admittedly were serious, the Committee report ends abruptly and recommends that the law be enacted. The debates in Parliament follow the similar pattern. The petitioner submits that if the test of strict scrutiny is applied, there is neither any material placed by the Executive Government nor is there any evidence available in the legislative material to support this measure of affirmative action.

4.11 The pleadings are equally unhelpful—at pp. 79-80—in the IA to vacate stay the Union categorically states that this is "proportionate representation" and that there is no point in a conducting a census. The reference to a "proportionate representation" is a candid admission that it is a "caste-based" not a "class-based" reservation—which inference is cemented by the fact that the Government considers there to be no point in a caste-based census which could be the only authentic way (undesirable as it may appear to be).

5. *Is a quota of 27% justified*

5.1.1 The Parliamentary Committee established to study the criticism of the Bill submitted a report, reading of which is instructive as to how matter was dealt with. It indicates that 27% reservation has been picked up because it was the same figure which was provided for in the services. The institutions in which the reservation has been made and the co-relation of those who had availed of these benefits that filling of these reservation in services was completely overlooked. 27% was just a convenient figure—and it was convenient because it was the difference between 50% cap and *22½% existing reservations for Scheduled Castes and Scheduled Tribes*. On the short ground without more it is submitted that this impugned legislation deserves to be struck down since it shows a complete lack of analysis and application of mind to the need and the requirements.

6. *The Role of Caste in Determining "Class" for Purposes of Article 15(4)*

6.1 The Statement of Law Prior to *Mandal case*[17]

6.1.1 In *Balaji case*[2] this Hon'ble Court clearly held that:

(*a*) Article 15(4) does not justify special measures for a caste but it provides for special measures for "socially and educationally backward classes". (SCR p. 459)

(*b*) "Caste is not irrelevant but should not be exaggerated." (SCR p. 460).

(*c*) "Backwardness has to be real backwardness—comparison to state averages is not correct test." (SCR p. 463)

(*d*) Reservation should not be unreasonable.

These apart from other propositions were laid down in *Balaji*[2] and it is submitted that none of these propositions have been overruled. They have been explained in later cases but the basic principle and philosophy laid down in *Balaji*[2] on the aforesaid points continues to hold the feet.

6.1.2 In *Chitralekha case*[7] this Court reiterated (at p. 386) that caste is a relevant circumstance—but it was held that there was nothing to prevent the state to adopt some other basis, as in that case the government had used the economic criteria. In

7 *R. Chitralekha* v. *State of Mysore*, (1964) 6 SCR 368

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fact, this Hon'ble Court reiterated (p. 388) that caste cannot be the sole and dominant criteria for consideration and class should under no circumstance be quoted as caste. (pp. 388-389)

6.1.3 *P. Rajendran*[8] did not seek to modify or over-rule the principles of law laid down by the earlier cases—it was a bench of 5 learned judges as was *Balaji*[2] and after noticing the law laid down in *Balaji*[2] (790-791) the Court accepted the case of the State of Madras on affidavit which is set out at SCR p. 791.

This case made out by the State of Madras was not disputed on affidavit as noticed by this Court at SCR p. 791. Since it was not disputed the Court came to the conclusion as at SCR p. 791.

This judgment is misunderstood as having held that as a matter of law class can be quoted with caste there is nothing in the judgment that justifies such an assertion.

6.1.4 *Rajendran case*[8] was followed by *Sagar*[9]—one of the learned judges (Justice G.K. Mitter) who was also party to *Rajendran*[8] judgment was on the Bench which heard *Sagar case*[9]. *See Sagar case*[9], at SCR p. 600 noticing *Balaji*[2] and *Chitralekha*[7].

Rajendran case[8] was also noted by this Court, whereafter setting out a passage from Chief Justice Wanchoo's case which is relied upon in most of the cases, this Court held as below: (*Sagar case*[9], SCR p. 601)

> "That case makes no departure from the rule enunciated in the earlier cases."

6.1.5 In *A. Peeriakaruppan case*[10] bench of three learned Judges—Justice J.C. Shah presiding (who was on the bench which decided *Sagar case*[9]). On facts what *Periakaruppan* held is stated at SCC p. 49, para 29. Having said that the Court marked a caveat at SCC p. 49, para 29

6.1.6 It is submitted that in *Periakaruppan*, as later on in Mandal, there has been a degree of judicial statesmanship. The court is loath to interfere with measures of social engineering by striking down provisions. The Court has repeatedly given the Government the opportunities to correct its course by upholding its action but directing a correction of course. As submitted later, the time has now come for this Hon'ble Court to declare this entire basis as invalid since repeated directions to correct ad hocism in this area has fallen on deaf ears.

6.1.7 *Balram case*[11] (decided by two learned judges) also said that where various criteria enumerated by Government (see p. 680) "if the caste as a whole is backward and that is established on data, it can be the basis."

6.1.8 *Pradip Tandon case*[12] where three learned judge's invalidated reservation in favour of rural hill areas is a very important judgment. The Court reviewed the law on the subject at SCC pp. 273-74, para 15. What is more important, this Court reiterated, its notion of homogeneity at SCC p. 274, para 16.

8 *P. Rajendran* v. *State of Madras*, (1968) 2 SCR 786
9 *State of A.P.* v. *P. Sagar*, (1968) 3 SCR 595
10 *A. Peeriakaruppan* v. *Sobha Joseph*, (1971) 1 SCC 38
11 *State of A.P.* v. *U.S.V. Balram*, (1972) 1 SCC 660
12 *State of U.P.* v. *Pradip Tandon*, (1975) 1 SCC 267

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6.1.9 It was on that basis that this Hon'ble Court held that 80% of the population cannot be a homogenous class (see p. 277). It is submitted that the piteous condition of the poor who live in rural hill areas cannot be overemphasised. Nonetheless, this Hon'ble Court came to conclusion that they are not socially and educationally backward—which is a pointer as to how strict the criteria of social and educational backwardness must be. The class that is sought to benefit by way of special provisions detracting from general rule of equality should be class which is so socially and educationally backward as would justify these kinds of reservations.

6.1.10 *Thomas case*[4] noticed the problem. While it did not lay down any new law, the observations of Krishna Iyer, J. at pp. 361-363 (para 124) are extremely important where the learned Judge brought out the "sociological caution".

6.1.11 In *Vasanth Kumar*[13] while no law is laid down, the observations that are of importance are per Chandrachud, C.J. at SCC p. 723, para 2 and per Desai, J. at SCC pp. 731-32, para 24. The court thereafter noticed the observation in *N.M. Thomas* (see SCC pp. 733-34, paras 24-26). See also A.P. Sen, J at SCC p. 770, para 84.

6.2 The *Mandal case*[14]

6.2.1 It is submitted at the outset that the decision in the *Mandal case*[14] has not upheld caste as a criteria nor has it upheld the Mandal list as being valid. The operative order of the majority is very clear—it is a list of the States as qualified by the list produced by Mandal are to be the basis of reservation. This is clear from a reading at p. 561 also.

6.2.2 In the *Mandal Judgment*[14] it was further directed that Commission has to be established to carry out the functions of the identification of backward classes.

6.2.3 Mandal did not over rule *Balaji case*[2] as is sometime suggested. Justice Jeevan Reddy notices the criticism of the respondent's counsel against Mandal judgment, inter alia, at SCC p. 701, para 758. Having noticed this criticism, it marks a caveat namely that Balaji was dealing with Article 15(4) whereas Article 16(4) did not contain the qualifying words "and"—*Parimoo case*[15] which sought to equate the two has, in fact, not been approved in *Mandal*.

6.2.4 *Rajendran* and *Vasantha Kumar* were also not read as holding caste can be the basis—See the majority judgment (Justice Jeevan Reddy) at SCC p. 701, para 758. In the context of Article 16(4) the Courts' observation at SCC pp. 712-13, para 728 has to be read with the observation in para 82 which proceeds on the premise that caste is nothing but a social class, socially homogenous class. It is submitted the observations in para 82 do not sanctify using caste as a basis in all conditions. This is apparent from observation of Justice Jeevan Reddy, in SCC paras 780 & 782 at pp. 715-17.

6.2.5 It is submitted that a reading of this paragraph puts it beyond any doubt that the majority did not hold that reservations can be based on caste but on the contrary held that caste can be a starting point in exercise of identification. In fact, the fallacy becomes apparent when the paragraphs dealing with the means test and creamy layer are read, per Jeevan Reddy, J., at SCC p. 724, para 792.

13 *K.C. Vasanth Kumar* v. *State of Karnataka*, 1985 Supp SCC 714

14 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217

15 *Janki Prasad Parimoo* v. *State of J&K*, (1973) 1 SCC 420

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The Court rejected the argument against exclusion of the affluent from within the class at SCC p. 725, para 792.

6.2.6 *Balaji*[2] judgment to the extent that backward classes are those similarly situated to scheduled castes or scheduled tribes was, however, not accepted on the ground that there was no warrant to import any such a priori notions: see SCC p. 726, para 795. Paras 796-97 summarise the judgment (at SCC p. 727).

6.2.7 It also becomes clear from the fact that *Chitralekha*[7] test that there can be an identification on occupation-cum-income without reference to caste was also upheld (see SCC p. 728, para 800).

6.3 *The Mandal Conclusion—was the Mandal Report Upheld*

6.3.1 It is submitted that the majority judgment (Justice Jeevan Reddy) did not uphold the Mandal Report. While discussing the Mandal Report the contention of the Union of India was accepted (see SCC p. 759, para 850 and SCC pp. 759-60, para 851)

6.3.2 In other words it is clear that what was enforced was not the Mandal Report but the State List. This Court issued express directions (SCC p. 771 onwards) for establishing a permanent commission.

6.3.3 There are, however, other judgments by other judges in the *Mandal case*[14], who went ahead and considered the report and which judgments give good reasons as to why the report lacks in merit. Reliance is placed upon judgments by Justice Kuldeep Singh, who took the view that identification of the Mandal was "wholly unconstitutional, invalid and cannot be acted upon……" the reasons are set out on pages 854-860.

6.3.4 For Justice Sahai's conclusion, the other learned Judge who examined the Mandal Reports see SCC p. 586, para 602 and SCC pp. 605-06, para 595.

6.3.5 On the lethargy in correcting the lists prompted by political expediency, the evidence before the Court was noticed in Justice Sahai's Judgment at SCC p. 607, para 598.

6.3.6 Justice Sahai noticed the issues on which the report was attacked (p. 1002) including the fact that it had relied upon obsolete material such as the caste census of 1931 and held that many of the challenges appear to be well-founded but did not consider discussion necessary.

6.4 *Law—Post Mandal*

6.4.1 Judgments, post-Mandal, follow the same trend, the emphasis being on class and not on caste. For this reliance is placed on the following:

(1) *Jagdish Negi* v. *State of U.P.*[16]: (SCC p. 215, para 14).

(2) *Indra Sawhney (II)* v. *Union of India*[17]: (SCC p. 184, para 8).

6.5 *Reservation not a Programme of "Historical Compensation"*

6.5.1 It is submitted that the repeated contention of the respondents to the effect that the present measure is a devise for historical compensation has been specifically rejected. A social government is enjoined to make provisions for development and improvement of the all persons who need state protection. The backwardness may be for any reason. The said contention has been rejected expressly in the majority

16 (1997) 7 SCC 203
17 (2000) 1 SCC 168

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judgment of Jeevan Reddy, J. in the *Mandal Judgment*[14] itself (see SCC p. 718, para 785). Similarly Sahai, J. in *Mandal* deals with the contention at SCC p. 606, para 596.

6.6 *No Statistical Basis For Any Reservations On Basis of "Castes"—The Last Census of 1931*

6.6.1 The last caste-based census is of 1931. The comments by the commissioner who conducted the census themselves suggest that not only are the figures unreliable (because of the unreliability of the data inherently) but there was a great degree of mobility amongst the castes. On this account, although the castes were indicated in the report they could not form the basis, it is submitted, for any sensible affirmative action.

6.6.2 The first Backward Classes Commission popularly known as the Kaka Kalelkar Commission—lamented the lack of unreliable data. Para 9.17 of the Mandal Report itself points out that there were large variations between the castes notified by the States and the castes included in the first Commission Report. As per Mandal this variation was because "The State Government prepared their lists on some sort of field survey and investigations….." whereas the First Commission borrowed the list prepared by the Ministry of Education "for award of post-matric scholarships". The Mandal Report starts by pointing out the serious deficiencies in the various lists of the various States.

6.6.3 The Mandal Commission claimed to have collected voluminous "evidence" and toured the country extensively—the reality is otherwise. With regard to the so called Socio Economic Field Survey conducted by the commission, which according to is was the "most comprehensive enquiry" it is submitted that in para 11.10 of the report it has been stated as under:—

> "Experts panel had recommended 1% purposive sample of villages at the district level to be able to identify vast majority of backward classes. At the subsequent meeting of the technical advisory committee presided over by director general central statistical organization, it was decided that for our purpose a sample of 1% of the countries population comprising 65 lakh persons may be too large, especially in view of the limited time available to the commission. Instead 100% coverage of two villages and one urban block in each district of the community was considered to be quite adequate."

6.6.4 It is submitted that in a "Sample Survey" the sample size and the homogeneity of the sample is very important such that the sample represents reasonably the universe i.e. the whole population of the district. It is common knowledge that distribution of communities in various areas in a district is not uniform and a group or community try to reside together for social reasons and therefore in such situation, the commission was not justified in conducting survey in only two villages and one Urban block which could not have given a true picture of the country as a whole.

6.6.5 Apart from this the commission has considered more than 20 households of a particular caste as a true representation of the particular caste. It is submitted that in a country like India 20 households can never be considered a statistically significant representation of the community where all status of the community are found in the each caste. It is submitted that before carrying out any sample survey first step is identifying the total population.

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6.6.6 In fact, para 11.10 shows how the size of the samples necessary to come to any sensible reports was cut down to meet the time available. It is submitted that it is impermissible to make measures for "affirmative discrimination" on the basis of these kinds of data and presumptions and assumptions as has been done by Mandal—its report is described itself as rough and ready—since what is at stake is the rule of equality, departure from which has to be very carefully tailored so as to ensure there is no reverse discrimination.

6.6.7 The misfortune is that despite the direction of this Hon'ble Court, pursuant to which a Commission was set up, the commission has not done any credible exercise to come to sensible figures on the basis of which affirmative discrimination can be based.

6.6.8 The reports of the Standing Committee on Social Justice and Empowerment and the Annual Report of the National Commission for Backward Classes for the year 2003-2004 itself speaks volumes about the manner in which the Commission has gone about its job.

6.6.9 It is submitted the very fact that in the last 14 years since the Mandal judgment NOT one single backward caste carried from the 31st Census has been excluded. It is submitted that if the statistics are correct then they are demonstrable proof that these affirmative actions have failed and, therefore, are unnecessary. If affirmative action in place in the States over the years has served any purpose it is impossible that in the last 76 years (the caste survey of 1931) not a single caste named on the basis of 1931 Census as a backward class has been excluded in the list ever. This completely demolishes any suggestion made by the Government that there is sufficient data available to justify reservation.

6.6.10 The parliamentary debates on the Mandal Commission Report—the speech by the leader of the Opposition (Late Mr Rajiv Gandhi) is a careful analysis of the flaws in the Mandal Report.

6.6.11 The petitioner, therefore, submits that at the time of framing of the legislation there was no basis on which an informed decision of the kind necessary to justify this kind of reservation, could have been taken.

7. *American Cases*

7.1 The respondent has suggest that American cases are on a different basis—which is indisputable—what is common, however, is that affirmative discrimination has been explored as a method in the United States as in India in order to deal with the problem of backwardness. The causes may be different but the consequences over those discriminated against in the past are broadly similar. The Mandal Judgment relies on *Metro Broadcasting case*[18] which is no longer a good law even in US. In the *Metro case*[18] the Supreme Court of the United States adopted an intermediate level of scrutiny to test the validity of a suspect classification. This approach of the Supreme Court which was a clear departure from the earlier cases which adopted the test of strict scrutiny was again abandoned in later cases. Thus the Metro Broadcasting which was relied upon in the *Mandal Judgment*[14] was an aberration and is no longer good law in the United States. The present approach of the US

18 *Metro Broadcasting Inc.* v. *Federal Communications Commission*, 497 US 547 (1990)

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Supreme Court is reflected in the judgment of *Grutter*[19], *Parents Association*[20] and the other is *Adarand*[21].

8. *Legislative History*

8.1 It is clear from the legislative history of the Constitution that the expression 'backward class' of citizens was clearly designed to focus on those who possessed certain common attributes—conceptually it was not meant to be based on the caste system. The discussion on the notion of a "backward class of citizens" is clear in the speeches by Shri Kunzru (p. 679/Vol.VII CAD), Shri K.M. Munshi (p. 696/Vol.VII CAD) and Dr Ambedkar (p. 700/Vol.VII CAD). When the 1951 Amendment was made post—*Champakam Dorairajan case*[1], the matter was discussed in Parliament—it is clear that it was group-based and not caste based, affirmative action that Parliament amending the Constitution had in mind. Secondly, this is of a great importance at the present—that while making the amendment it was clear that it had great potential for abuse and this had to be carefully monitored. Pt. Nehru's speech on the 51st Amendment is instructive (pp. 101-102, 105-107—these are the pages of the extracts from the book "Beyond Mandal and After" by Mr B.K. Roy Burman who has in annexure IV of the said book extracted the relevant passages of the Parliamentary debates). The then Law Minister Dr. Ambedkar (speech is at p. 117 onwards, at pp. 119-120) refers to the weaker class and at pp. 123-125 he refers to the importance of economic criteria. This also makes it clear that caste based reservations were not what were intended for at the time of enactment of Article 15(4).

8.2 Pt. Nehru was the architect of the First Amendment—and by 1961 he was of the view that reservation should be discontinued. His letter to the Chief Minister made it clear that these kinds of affirmative actions ought to be based on economic criteria which speaks volumes of the intent with which the said amendment was made.

9. *Creamy Layer*

9.1 In any event, it is submitted that in ascertaining backward classes, where caste is a starting point, the *Mandal Judgment*[14] clearly holds that after excluding the Creamy layer, is there a compact class which can be considered a backward class. In fact Jeevan Reddy, J. in the *Mandal Judgment*[14] has noted importance of its exclusion (at SCC p. 724, para 792).

9.2 It is, therefore, submitted that there is no question of applying creamy layer to the Article 16(4) but not to Article 15(4) but, in fact, if caste is the starting point for purposes of Article 15(4) which requires "socially and educationally" backward classes and caste is made the starting point, it would all the more be necessary to exclude the creamy layer.

9.3 It is submitted that the Court cannot direct exclusion of creamy layer, law must fail for the reason that it is obvious that the law makers on whatever material they had, assessed a 27% need for reservation without excluding the creamy layer. Moreover, the affirmative action plan was prepared (reservation in central government institutions) without considering whether the exclusion of the creamy

19 156 L Ed 2d 304
20 551 US
21 132 L Ed 2d 158

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layer would result in virtually no benefit being in real terms available at this level of education. It is submitted that if affirmative action has to be of the constitutionally permissible type i.e. a measure of social engineering to address a problem of social imbalance rather than symbolic measure to score a political point—then it is, inter alia, necessary to establish that the compelling State need for which the affirmative action is being framed and a departure being made from the rule of equality would be attained by the affirmative action. It is, therefore, clear that for want of examination of the relevant facets of the constitutionally sustainable measures of affirmative action the law must fail. In the context in which the law is made, a legislative measure would have no higher immunity from a challenge based on Articles 14 and 15(1), then an executive measure.

PART II

Validity of the Constitution (Ninety-third Amendment) Act, 2005

10. Article 15(5) does not seek to lift bar of Article 29(2) unlike Article 15(4). It is clear that Article 29(2) would continue to apply to affirmative action under Article 15(5) on its plain reading, therefore, Article 15(5) confers upon the State the power to make special provisions in relation to admission to private educational institutions which are unaided. Aided State institutions would be subject to Article 29(2) and any reservation made as condition of it would be subject to Article 15(4) not 15(5). It is, therefore, clear that Article 15(5) can apply only to private reservation. The judgment of 11 learned judges in *Pai case*[22] lays down an ambiguity that the protection of Article 19(1)(g) as well as the protection of Article 26 is available to private educational institutions. Prior to the observations made in *Pai case*[22] it was misconstrued in *Islamic Academy case*[23] there never was ever any reservation in any private unaided institution for backward classes. Even *Unni Krishnan case*[24] did not provide reservation for backward classes in private funded institutions.

11. It is submitted that on a misreading of para 68 of *Pai case*[22], a bench of five Learned Judges of this Hon'ble Court in *Islamic Academy case*[23] held that as a protem measure till laws are made, there should be some state quotas even in private unaided institutions. The states used the same for providing reservations treating them to be seats akin to seats in the Government or Aided colleges. The correctness of this proposition was doubted and the matter was referred to a Bench of seven learned Judges in *Inamdar case*[25]. After examining the law carefully, *Inamdar case*[25] emphatically laid down that there can be no question of reservations in private unaided institutions. In *Inamdar case*[25] it was held: (SCC p. 601, para 125)

12. It is submitted that it is clear that Article 19 is a part of the trilogy of articles which constitutions the basic structure. See ruling in *Minerva Mills*[26] at SCC pp. 654-56 & 660, paras 58-59, 61 & 74.

13. The law, it is submitted has developed much further after *Coelho case*[27] it is now clear that any constitutional amendment that impinges or takes away the rights

22 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481
23 *Islamic Academy of Education* v. *State of Karnataka*, (2003) 6 SCC 697
24 *Unni Krishnan, J.P.* v. *State of A.P.*, (1993) 1 SCC 645
25 *P.A. Inamdar* v. *State of Maharashtra*, (2005) 6 SCC 537
26 *Minerva Mills Ltd.* v. *Union of India*, (1980) 3 SCC 625
27 *I.R. Coelho* v. *State of T.N.*, (2007) 2 SCC 1

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conferred under Article 19 significantly would be violative of the basic structure. (*See* SCC p. 109, para 145.)

It is for this reason that this Hon'ble Court held that even a law placed in the Ninth Schedule would have to satisfy the test of trilogy of Articles—not essence of the right but the right itself. It was held: (SCC p. 108, paras 140-41)

14. It is submitted that Article 19(6) permits "reasonable restrictions" in public interest. The Hon'ble Court held in *T.M.A. Pai*[22] (over ruling *Unni Krishnan case*[24]) and reiterated in Inamdar that making provisions for advancement of backward classes etc. is a duty of the Government. The private sector contributes resources through taxation than other means. The private education institutions cannot be compelled to make reservations for the weaker sections. It is submitted that character and identity of an educational institution is central in case of private educational institutions. Compelling reservations in such an institution constitutes an unreasonable encroachment on the rights guaranteed to the private educational institutions.

15. To take an extreme example, if a successful member of the scheduled caste establishes a college entirely out of his own funds for the education of scheduled caste students, compelling him to make reservation for the backward classes would be a mockery.

16. Similar institution would be by sections belonging to denominant section and denominant religion may have reservations compatible with their own character. Compelling reservations of the backward class would be clearly violative of the character of the institution.

17. It is for this reason that these reservations have been considered unreasonable. Article 15(5), therefore, by definition permits government to do something which is unreasonable.

18. It is submitted that the judgment upholding Article 16(4-A), *Nagaraj case*[6] cannot be used to justify the constitutional validity of Article 15(5). *Nagaraj case*[6] deals with two principles of service jurisprudence which ex hypothesi are essentially matters for the Government as an employer to frame in order to regulate the service as also impart reasonableness in the matter of regulating service conditions. Reservations in promotions and carry forward of backlogs have been on the rules for a long period of time till the *Mandal case*[14] (reservation in promotion) and *Ajit Singh's* (catch up rule) laid down that there could not be reservations in promotions and upon promotion the catch up rule of seniority must apply. To enable the government to have similar rules as they had in the past an enabling amendment was made in Article 16(4-A), this Hon'ble Court held that the amendment does no more than enabling the Government to have reservations in promotions—however, if in the facts and circumstances it is found that such reservations are excessive or violative of the rule of equality they would be struck out notwithstanding Article 16(4-A).

19. In other words, it was held that these were mere enabling provisions and nothing more and cannot in any case be equated with any fundamental right of citizens for promotions. It is submitted that that principle of *Nagaraj case*[6] obviously cannot apply to the present situation where the provision under challenge expressly excludes the operation of Article 19 which protects the freedoms of the citizens. This Hon'ble Court has held that it is unreasonable to compel citizens establishing private institutions to carry the burden of reservation for the weaker sections. To enable

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Parliament to do so notwithstanding judgment of this Court is ex hypothesis destructive of the right of these institutions under Articles 19 and 26 and constitutes enabling Parliament to do something which is unreasonable. The question of extent does not apply (as in *Nagaraj case*[6]) nor is there any question of there being any difference in the facts and circumstances of the case. The very act of reservation in private institutions is per se violative of Article 19(1)(*g*)—therefore, this is a clear case where the constitutional amendment seems to abrogate the right under Article 19(1)(*g*) in its entirety conferred upon educational institutions and is violative of the basic structure.

20. In view of the above it is submitted that the impugned amendment of the Constitution is destructive of the Basic Structure and therefore cannot be sustained in law and the Impugned Act which has been enacted in the purported exercise of power conferred by the said article can be saved when tested on the touchstones of the fundamental rights contained in part III of the Constitution.

V. Mr Fali S. Nariman, Senior Advocate, for the petitioners

1. The phrase "special provision, by law" in Article 15(5), not found in Article 16(4) needs to be given its due importance:

(*a*) It suggests that there must be a felt need requiring the introduction of a statutory provision;

(*b*) How that need is to be assessed is not stated. It needs an elaborate investigation and collection of data and an examination of the data in a rational and scientific way. [See *M.R. Balaji* v. *State of Mysore*[1], SCR at p. 461.] It is apparent therefore that there must be data and material which would have to be established and proved (when challenged) in a Court of law;

(*c*) After *Balaji*[1] (SCR at pp. 467-69), it is clear that "special provision" is not a provision which is exclusive in character which would justify a State in ignoring altogether the advancement of the rest of the society; "reasonableness" is the touchstone of a "special provision";

(*d*) The "special provision" may include a provision for reservation but not necessarily so—the absence of the word 'reservation' in Article 15(5) and its inclusion in Article 16(4) is significant.

(*e*) The "special provision" has to be reasonable as not being excessive if there be reservation, and should be limited for a defined period—not for all time: "Must not be unreasonable, excessive or extravagant"—[See *Balaji*[1], SCR at p. 474]

2. In construing Articles 15(4) and 15(5), the balance must always be maintained between the fundamental right guaranteed under Article 15(1) (Non-discrimination on grounds only of caste) and Article 15(4) and Article 15(5).

3. The importance of the mandate under Article 15(1)—as emphasised in six decisions of the Supreme Court—is that we must strive towards the ideal of a casteless society: therefore to say that the starting point of identification of socially and educationally backward classes of citizens is from "caste" is to perpetuate something which Article 15(1) expressly forbids. Hence the word "classes" is used in

1 1963 Supp (1) SCR 439

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the sense of groups or communities identified on any basis that is not otherwise prohibited (such as religion, race, caste, sect, place of birth): the fact that no attempt has been made to formulate a criteria on this basis or that it is difficult to formulate a criteria on this basis is irrelevant and besides the point.

4. There are obvious criteria sufficient to identify backward groups or communities: for example they are:

1.	Income of the family:	Below a stated poverty line or Below double poverty line, etc.
2.	Educational Status of Father:	Below high school/above high School but Below graduation/Above Graduation.
3.	Educational Status of Mother:	Below primary/Above primary but below high school/Above high school.
4.	Sex:	Female/Male
5.	Environs of birth:	At home or in a Government Hospital in a rural areas/a Government Hospital in urban areas/Private hospital.
6.	Primary Schooling of child:	Government School in rural areas/ Government School in urban area/ Private School.
7.	Location of residence:	Rural areas and urban slums/Urban areas/Metropolitan cities, State Capitals, and District Headquarters.
8.	Type of living accommodation:	Kuccha house or no house/Rented house in Urban area/Semi pucca house or Pucca house in Rural area/Pucca house in urban area, Rented house in Urban Area of—sq. ft. or below
9.	Occupation or Profession of Father/guardian:	Landless, unskilled labourer/landed self-cultivating peasantry, Skilled labourer and craftsmen, Class III-IV employee or similar employee in private sector/ Family with members having White collar jobs in higher grades, businessmen, large farmers.
10.	Location of the State where the child has completed major part of secondary education (Class VI-XII):	Poorly developed State/moderately developed State/Well developed State.

5. The Assumption that Socially and Educationally Backward Classes of citizens had to be identified from some readily available data (such as caste) is not well founded: the backward classes of citizens have to be identified with reference to one or more of the criteria suggested above and when so identified those grouped

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together would then (and not until then) form a "class of citizens" who are socially and educationally backward[2].

6. It is not as if caste has always been the starting point for determination of socially and educationally backward classes. In fact, the distinguished Kaka Kalelkar, Chairman of the First Backward Classes Commission in his covering letter to the Report mentions the criteria to identify the backward and not-backward [1955 Report pages (xiv) and (xv)[3]]

It is true that in the body of the Report, it is noted that there was a caste census as "recently" as in 1931 (the Report was of 1955) and hence caste was adopted as a convenient basis for determining the "backward classes of citizens": this is the basis of the argument of a convenient "starting point". But with the Constitution of India 1950, India having set its face against a casteless society for the future, it was this that compelled every successive Government at the Centre in each census to eschew questions regarding caste.

7. Let us not say if "caste" is to be a starting point we will have to weed out the so-called creamy layer: a virtual impossibility as shown by the facts of the Kerala case [*Indra Sawhney (II)* v. *Union of India*[4]]. The argument of those who resist excluding the creamy layer (the more forward of the backward classes) is that if the particular caste is itself taken as a "class" there is no warrant in law to exclude anyone including the most forward/the more fortunate from that caste. It is respectfully submitted that there logic in this argument. Hence, the insistence by the present Writ Petitioners that 'caste' must be eschewed at the beginning, in the middle, and at the end when determining the classes of citizens who are socially and educationally backward. The Constitution does not prescribe or postulate that already formed classes should be picked up by the "special provision". In fact, the law must determine [and NOT the Government] who are the backward classes or lay down effective criteria as to how they are so determined.

8. After all, Article 15 and Article 16 are all facets of the lead provision: Article 14, and all classification and rules of classification establish that the State should itself indicate the classes of such persons or things grouped together from those left out of the group, and whether such differentia have a reasonable relation to the objects sought to be achieved by the statute, no matter whether the provisions of the statute are intended to apply to a particular person or thing or only to a certain class

2 Each of these parameters can be graded on a scale of 1 to 4 or similar and a comprehensive deprivation index can be obtained. This deprivation index will have the strength to pick up the all the true backwards and eliminate false backwards. For example: Daughter of a landless, resource-less, illiterate labourer from a village in Jharkhand will have all the plus points to avail the benefits of affirmative action policy. In contrast, a convent educated son of rich business manager from Delhi (whatever the caste may be) will not receive any benefit of the affirmative action plan.

3 In introducing the criteria, the Commission observes as follows:

> "Moreover, the nation has decided to establish a classless and casteless society, which also demands that backwardness should be studied from the point of view of the individual, and at the most, that of a family. Any other unit will lead to caste or class aggrandizement.
>
> Let us therefore, try to find criteria of backwardness that should eschew ideas of caste or class…"

4 (2000) 1 SCC 168

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of persons or things. [See *Ram Krishna Dalmia* v. *Justice S.R. Tendolkar*[5], SCR at pp. 299-300.]

9. In the impugned Act, this primary test of classification is not at all met. The impugned law permits the Government to determine how and in what manner (whether by rules, regulations or memorandum is unspecified), and it is this apparent open-ended permission to act as it pleases [in Section 2(*g*)] that affects adversely the Act and renders the entire Act unconstitutional.

10. In *Balaji*[1], it was said (at p. 461) that "if it appears that the test applied and the order in that behalf is improper and invalid, then the classification of socially and backward classes based on that test will have to be held to be inconsistent with the requirements of Article 15(4). In the present Act, (not order), there is no test at all laid down by Parliament—it is left to the Government to formulate a test that it considers appropriate.

After 1992 OBCs have not only filled their reserved 27% seats but also secured seats under general pool.

11. (*a*) Before 1993, there was no mention of OBC in Central Government services. Hence it arbitrary to even think of as to how the Government or any agency ascertain the caste status of employees who had joined the Services earlier to the year 1993.

(*b*) Government data : OBC representation has gone down because of Reservations. Data from *Mandal report* about representation of OBCs in Central Government Services (Volume I, Chapter IX, Page 42, Para 9.48):

Category of Employees	*Percentage of SC/ST*	*Percentage of OBCs*
Class I	5.68	4.69
Class II	18.18	10.63
Class III & IV	24.40	24.40
All Classes	18.71	12.55

(*c*) The current data provided by Ministry of Personnel, Public Grievances & Pensions, it is humbly submitted is not correct (As submitted by Union Of India on instruction of Hasib Ahmed Director (HE) Annexure 1).

Representation of OBCs in Central Government services on 1-1-2005

Group	*Representation of OBCs in %*
A	4.7
B	2.3
C	5.9
D (Excluding sweepers)	4.3
Total (Including sweepers)	5.21

5 1959 SCR 279

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It is beyond comprehension as to how could OBC representation go down despite 13 years of reservation. Considering average period of service to be around 35 years, about 33% of employees would have been replaced. Even if one assumes without conceding that there was not a single OBC in central services before the year 1994, if 27% reservation is implemented, the proportion of OBCs who have joined even after 1994 should have been about 8%. Considering the fact that certain posts in Group A are exempted from reservation, at least in Groups B, C, & D there should have been much higher representation.

Secondly, Some OBCs join in the open merit quota. As evident from the Annual Report of Ministry of Personnel, Public Grievances & Pension 2005-2006, apart from 27% reservation, about 9% OBC candidates joined IAS in open merit quota. Though the Hon'ble Court had asked the Central Government to provide data as to the position after the *Indra Sawhney*[6] judgment, even this burden is being discharged by the petitioners.

Civil Services Main examination. (Annexure 2)

Year	*Reserved vacancies (27%)*	*Recommended against reserved vacancies*	*Recommended against general vacancies*	*Total OBCs Recommended*
1996	174	174	39	213
1997	166	166	49	215
1998	144	144	28	142
1999	97	97	30	127

The condition is similar with regard to other services like India Engineering Services and Combined Medical Services. In 2004-2005 IAS besides 27% reserved seats numbering 26 of total 91, 9% or 8 seats of 91 of the " general category" were secured by "OBC Candidates". (Annexure 3, Annual Report of Ministry of Personnel, Public Grievances & Pensions)

Caste cannot be the criteria for determining socially and educationally backward classes under Articles 15(4), 15(5) as the ratio of Chitralekha prevails for Article 15(4). The test for Article 15(5) has to be occupation cum income where caste may or may not be one of the many consideration having a Nebulous weightage alternatively without conceding if caste at all is taken as one of the many considerations then it can be only for those castes, satisfying the test of similarity with Scheduled Castes/Scheduled Tribes

12. (*a*) *Caste cannot even be the starting point.*

In the case of *State of A.P.* v. *U.S.V. Balram case*[7] under Article 15 though not affirmed by *Indra Sawhney*[6] has been cited by the respondents in support that caste can be the starting point and nothing more is required to be done, the starting point is

6 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217
7 (1972) 1 SCC 660

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criteria not caste. See SCC paras 76, 83-A and 94 at pp. 683, 685-86 & 689. Similarly in another case arising out of Article 15 *A. Peeriakaruppan* v. *State of T.N.*[8] In SCC para 12, at p. 43. J. Hegde laid down the law in clear terms.

(*b*) *M.R. Balaji* v. *State of Mysore*[1] and *R. Chitralekha* v. *State of Mysore*[9] were differentiated as arising out of Article 15 in *Indra Sawhney*[6]. However only *Chitralekha*[9] has been affirmed for Article 15 and it still occupies the field for the purpose of Article 15. See SCC pp. 666-67, para 701 and SCC p. 668, para 704.

(*c*) It is highly pertinent to note that *Chitralekha* affirmed by *Indra Sawhney* follows the Occupation-cum-Income test which must start with criteria and can never start with caste.

13. *Socially and educationally backward classes must be similarly placed to Scheduled Caste/Scheduled Tribes.* See *Indra Sawhney* v. *Union of India* SCC p. 726, para 795. A mirror image of the above highlighted sentence would it is most respectfully submitted would read as follows: Article 15(4) expressly refers to Scheduled Castes and Scheduled Tribes; so there is every reason why we should treat their backwardness as the standard backwardness for all those claiming its protection. Hence by the same reason that *Indra Sawhney case*[6] makes the distinction between Article 15 and Article 16, relaxing the rule of similarity between SEBCs and Scheduled Caste it is humbly submitted will be overruling *Indra Sawhney*[6] judgment by a five-Judge Bench. Moreover *Chitralekha*[9] *has been specifically affirmed after being distinguished as arising out of Article 15. Hence the test has to be occupation cum income where at the most caste can be one of the many criteria if data with respect to caste is available in a scientific and rationale manner and only for those caste which show some similarity to Scheduled Castes.*

The Union of India has not replied to this contention, neither rebutted it and it is most respectfully submitted that no contention can be taken against this proposition.

OBCs are already educationally forward in the relevant age groups; hence no reservations in higher education is justified.

14. (*a*) There is comparatively low literacy in older generation of OBCs, but very high *literacy in younger generations of* OBCs who will be beneficiary (age group below 22 years) of the impugned measure. This is reflected from following set of data:

Literacy rate by age groups: 2004-2005

Age Group	*General*	*OBC*
6-13 years	90.2	80.8
14-15 years	95.7	87.5
16-17 years	95.0	85.2
18-22 years	91.4	76.9

8 (1971) 1 SCC 38
9 (1964) 6 SCR 368

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Source: NSSO 61st Round, Sch. 10 (2004-2005), as quoted in Sacchar Committee Report p. 54.

(*b*) Contrary to the Government's claim of the OBC's being educationally backward the fact is that the present generation (the intended beneficiaries) of OBCs is very well represented in the field of higher education:

Proportion of population in higher Education

Age Group years	*OBC share in total population of that age group*	*OBC share of students in that age group*
18-22	34.4	30.5
23 and above	35.1	29.2

Source: NSSO 61st round, Sch 10, (2004-2005), as quoted in Sacchar Committee report page 72.

Thus, it is submitted that in the eligible age groups and in the targeted levels of education, of proposed 27% reservations, there is hardly any under-representation.

(*c*) *Available data further substantiates the above stated submission.*

Available data shows that students belonging to so call backward classes are *advanced*. It is submitted that this fact reflects the reflects the reality that the existing list of backward classes is purely politically motivated and it has no relation with the educational backwardness and can not be designated as a list of Socially and Educationally Backward Classes, (SEBC).

The data produced by Supreme Court Judgment on 16-11-1992 on the *Indra Sawhney* v. *Union of India*[7] (SCC para 408, pp. 507-08) shows that the OBCs are not educationally backward. The cut off marks at entrance level in various courses are almost similar for Open category and Backward Classes.

Reservation for the educationally advanced

In Tamil Nadu, there is reservation of seats for 69% of seats as follows:

Backward Classes (BC)	30%
Most Backward Classes (MBC)	20%
Scheduled Castes and Scheduled Tribes	19%
Total reservation	69%

Only 31% seats are for Open Category (OC). Even in this category, more than 90% seats are cornered away by students from BC/MBC/SC.

Look at the three sets of data from Tamil Nadu, published in newspapers/books;

(*i*) In 2005 MBBS admission in Tamil Nadu, the cut-off in open competition was 294.83 marks while for Backward Classes it was 294.59 (the difference was a mere 0.24 marks out of 300 or 0.08 per cent). For Most Backward Classes, the cut off was 292.50. Over and above that, BC, MBC and SC students cornered 374 of the 433 seats in the open category.

(*ii*) According to a report in the Hindu (23-8-2004):

Admissions to the 12 government medical colleges in Tamil Nadu were: Total 1224; SC—231; BC+MBC—952 and Forward Category—28. In the open competition, only 31 in the FC (Forward Category) qualified but the numbers for the others were BC—315, MBC—45 and SC—5.

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The lowest marks under various categories were: FC—295.74; BC—294.26; MBC—292.13; and SC—287.50.

The first 14 ranks went to BC/MBC.

In the top 400 rank holders, only 31 are from FC (Forward Category).

(*d*) *Moily Committee* has the following to state:

The Oversight Committee on the Implementation of the new reservation policy in higher educational institutions (Moily Committee) is a tell-tale document showing educational forwardness of so called backwards. Annexure X of the Report describes the educational advancement of Backward Students in Southern States. This document clearly shows that OBCs are taking away the large proportion of seats even in Open Category and are nowhere educationally backward. Let us have look at some of the figures from the report:

(*i*) In Andhra Pradesh, there is 25% reservation for Backward Classes. A look at the proportion of Backward Classes Students selected in the various disciplines of engineering courses from years 2002 to 2005 depicts the following in the table.

Batch starting and ending.	*BC students as percentage of Total*
2002-2006	35.76
2003-2007	36.08
2004-2004	34.19
2005-2009	35.11
2006-2010	44.51

(Report of the Oversight Committee on the Implementation of the new reservation policy in higher educational institutions, Annexure X, of p. 332, Table 1.

(*iii*) In Kerala also similar trend is noticed. Ezahavas are considered backward in Kerala and are entitled for 9% reservations. But a look at there share in admissions in various professional colleges through entrance examinations (Engineering and Medical) provides stark ling revelations.

Year	*Ezahava through reservation*	*Ezahava through Merit*
2002-E	6.87	8.75
2002-M	7.45	9.20
2003-E	6. 51	10.59
2003-M	7.23	9.99
2004-E	4.58	12.44
2004-M	6.98	10.33
2005-E	4.89	11.46
2005-M	7.94	8.26

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Report of the Oversight Committee on the Implementation of the new reservation policy in higher educational institutions, Annexure X, p. 367

Similarly, the OBCs (or the SEBC) are entitled for 25% of reservations, but the make up to 52.44% of admitted strength. This shows that OBCs are not educationally backward.

This is not a Southern phenomenon only.

This is the admission data of admission in KGMC, Medical College Lucknow, U.P., through Combined Pre-Medical Test, 2006:

The distribution of seats

Total:	146,
General	73 (50%)
OBC	40(27%)

A at the final allotment:

General Category	49
OBC	64

The U.P. Combined Pre-Medical Tests result of 2006 proved that the OBCs are not educationally backward as more than a third of the 36 students in the merit list are OBC candidates. With 13 names in the top-36 list, OBC candidates also got ranks of third, fourth, sixth and eight in the top-10 slot.

These data it is submitted show that the so called backward students are not backward at all. They occupy up to 90% of seats in open quota in some cases and their cut-off marks are equivalent to general category. It also implies that the list of so-called OBCs include well to do socially and educationally advanced, politically dominant caste groups. It is submitted that this also reflects on a serious need for the review of caste based reservation policy as a whole. It is in this respect in a case arising out of Article 15, *A. Peeriakaruppan* v. *State of T.N.*[8], SCC para 12, p. 43 at Hegde, J. laid down in clear terms the law which raises serious questions as to there being any reasonable nexus in the impugned measure with the intended object of eliminating educational backwardness.

There is a presumption of forwardness against OBCs: "they are not backwards its just that they are not forwards"

15. *Chattar Singh* v. *State of Rajasthan*[10] clearly held that OBCs have not suffered any social injustice it is that they are just not forwards. Hence the burden shifts on the Government to prove that the intended beneficiaries are *really* backwards (see SCC pp. 749-50, paras 17-18).

Moreover as of today when we talk of OBC as of today unlike the factual situation in 1980 when the Mandal Commission submitted its report OBCs form the Political ruling class in society whose "social empowerment" has further taken place through long term reservations provided by State Governments and 16 years of Reservations provided in the Central services. The question now is of Social and Educational advancement of a *Socially Empowered class* which is not educationally backward (as per the available data submitted). In the same vein even the Scheduled

10 (1996) 11 SCC 742

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Caste and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 recognises only "Scheduled Caste" and "Non-Scheduled castes" as two categories.

Sub-dividing caste is totally irrational, unreasonable and arbitrary

16. When data cannot be collected on the basis of sub division of caste, one cannot sub divide caste on the basis of some anthropological material. For Articles 15 and 16 what is required is hard Sociological, Scientific, rational data and not some Anthropological material. Vokalligas and Lingayats cannot get into OBC/SEBC list as they form an advanced class among themselves. Even Chinnappa Reddy Commission notes: pp. 117-21):

(*i*) data cannot be collected on the basis of sub division of caste.

It has no clue as to what is the proportionate representation of various sub—castes of Lingayats in services.

(*ii*) It is impossible to make sub classification among Vokalligas and cannot be made.

(*iii*) Vokalligas and Lingayats constitute the two politically most dominant political community who are socially advanced, educationally advanced, land owning and rich.

(*iv*) Even the Mandal Commission based its criteria on caste (SCC para 667 of *Mandal Judgment*[6]) though it did not carry out any investigation as pointed out by Kuldeep Singh, J. in *Indra Sawhney* v. *Union of India*[6]. (SCC para 393(*v*), p. 497) The present list is based on commonality between state list and Mandal list to start with which does not refer to sub caste.

(*v*) The NCBC has incorporated the Lingayats in the Central List for OBC's on the basis of Chinnappa Reddy Commission which itself notes that it is impossible to get data.

(*vi*) The Commission made no effort to find the present Status of various subgroups. The Commission also ignored the positive impact of egalitarian teachings of Basaveshwara. Both the Havanur Commission and Venkataswamy Commission had considered the whole Lingayath community as forward.

(*vii*) The fact that the government has no Caste data after 1931 coupled with Mr Ravi Verma Kumar's prayer for a caste based census further substantiates this point and exposes the irrationality and unreasonability of any caste consideration in any kind of affirmative action.

(*viii*) The *Mandal Judgment*[6] allows only Caste as the starting point and no where allows sub caste as a consideration or starting point. If it is possible to go down to such micro level as sub caste then even individual survey is possible.

However as of today both the Lingayats and Vokalligas find themselves mentioned in the lists on the basis of sub division of caste. It is submitted that it is impossible to know of the Social position of sub division of caste and no data is available making the classification per se unreasonable and arbitrary. Moreover when no data of OBC is available since 1931, it is fanciful to suggest that data can be collected of sub castes after 1931.

Caste occupation nexus barely survives today and is a misleading guide.

17. Caste-occupation association was rapidly disappearing from the Indian society in early 20th century. In United Province in 1911, only in 15 out of 42, and in 1921, in 11 out of 29 castes, only around 50% workers were following their traditional occupation as their principal occupation. Taking all Hindu castes together,

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in 1911, only 29.3% of the workers were following their traditional occupation as submitted by Mr Harish Salve.

Less than 10% Brahmans, Chamars, Malis, Lunias, were engaged in their traditional occupation. Only 1% of Pasi and less than 1% of Kewats were following their traditional occupation.1931 Census shows similar findings.

The sweepers are traditionally considered from Bhangi or similar caste. But the Government data shows, 33.6% sweepers are from general category. (document submitted by Mr Parasaran showing category composition of various grades of post).

Most of the sweepers in Sulabh Shauchalayas of Delhi are Brahmins.

The National Commission for Safai Karamchari Act, 1993 in its statement of object and reasons records to the same effect "..... since persons other than those belonging to the Scheduled Caste and Scheduled Tribes also constitute a sizable proportion of Safai Karamcharis, it was felt that separate statutory national commissions needs to established for monitoring the schemes for the liberation and rehabilitation of safai karamcharis."

For Articles 15(4) and 15(5) economic consideration has to be the dominant consideration.

18. In response to the petitioner's submission that poverty, or occupation cum income criteria is the only valid criteria for any affirmative action under Articles 15(4), 15(5) and the criteria submitted for the court's consideration, the Union of India has relied on the *Indra Sawhney*[6] judgment to argue that this contention has been rejected in the *Mandal case*[6]. Therefore in support of the point that *Indra Sawhney case*[6] permits reservations/affirmative action based on economic criteria the following points are urged.

(*i*) *Indra Sawhney*[6] deals with the law laid down both for Article 15 and Article 16 and after discussing both the Articles substantiates the difference between them, distinguishes judgments under Article 15 and lays down the law for both Article 15 and Article 16 of the Constitution of India.

(*ii*) Jeevan Reddy, J. says Article 16 prohibits any classification based "*only* and *exclusively*" on "economic consideration". It is humbly submitted that economic and anything else is allowed as got from the words "*only* and *exclusively*". (SCC para 799, p. 728)

(*iii*) Pandian, J. says reservation impermissible in Article 15(4). (Paras 162-164)

(*iv*) Therefore economic cum educational backwardness is a valid test for Socially and Educationally Backward classes. Sawant, J. holds that Article 15(4), Article 38 and Article 46 deal with Poverty alleviation and the field of reservation on economic basis is dealt by Article 15 and not Article 16. (SCC para 482, p. 538 *placita b-c* and SCC p. 541, para 491)

(*iv*) The minority judgment holds against O.M. and caste based reservation, even when Caste is only the starting point and differ form the majority view in this respect.

The creamy layer criteria goes contrary to the majority view of eight learned judges of this court wherein Pandian, J. was in minority.

19. It is submitted that "creamy layer" principle is for the safeguard of welfare of real deprived and backward people among so-called OBCs. By exclusion of

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'creamy layer' among OBCs, the so-called 'forward classes' are not going to receive any benefit. Contrary to this, when the creamy layer among OBCs is excluded from reservation, they will compete with forward classes for 'general category' or 'open category' seats and thus reduce the chances of selection of a forward class candidate prejudicing the interests of forward classes and not backward classes.

The current definition of creamy layer : inconsistent with direction of this Hon'ble Court.

20. The creamy layer guidelines were developed by the "Expert Committee for specifying the criteria for identification of socially advanced persons among the socially and educationally backward classes". This Committee was headed by Justice (retired) R.N. Prasad, and submitted its report on 10-3-1993. (Annexures I & II) On the basis of this report, the Government of India issued the guidelines to define the 'Creamy layer' (Annexure III). The guidelines were subsequently modified in year 2004.(Annexures IV & V) From the inception, efforts were to include more and more of advanced sections of OBCs in the ambit of reservations and keep the definition of creamy layer narrow. A reading of few paragraphs from the 'conclusion' of the report reflects the intensions of the Committee *which it is humbly submitted was not to deny the creamy layer from any benefits.*

21. Hon'ble. Justice Pandian does not subscribe to the "creamy layer" theory. Dealing with the oft-repeated criticism that the reserved posts are lapped up by the socially advanced (creamy layer) among the socially and educationally backward classes, Pandian, J. has quoted with approval the observation of Chinnappa Reddy, J. in *Vasanth Kumar*[11]. The relevant passage is at SCC p. 763, para 72, and per Pandian, J. in *Indra Sawhney case*[6] at SCC p. 424, para 226.

22. What the Supreme Court has directed is identification of the "creamy layer". This obviously means that we have not to take note of sprinklings of cream or the mere appearance of cream at the surface. Only when the "creamy layer" is substantial and stable, formed after crossing the Rubicon of social backwardness, then and then alone can it be made the basis for disentitlement. In such a situation, can it be said that adopting a rule of caution and erring on the right side is not justified? Apprehension has been expressed, and rightly, that applying the rule of exclusion on the ground of social advancement may be counter-productive, inasmuch as by excluding those who have become capable of facing the fierce competition for appointment in the services what will remain are those of the socially backward who are simply not equipped and ready to face the competition and this will have the effect of many of the reserved seats being left vacant....

23. Out of all the judgments in *Indra Sawhney case*[6], the Committee has chosen the judgment of Justice Pandian who had not supported the concept of creamy layer. Secondly, the Committee believed that the "creamy layer" must be substantially thick before it could be considered for removal. It has resulted in a completely misconceived conception of creamy layer contrary to directions of this Hon'ble Court. Further, in 2004, the Committee observed:

> "... it is our considered view that when prescribing an income limit for excluding the creamy layer, it is to be ensured that the economic strength of the excluded section is sufficiently sound as to mean their social and educational

11 *Vasanth Kumar* v. *State of Karnataka*, 1985 Supp SCC 714

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standing on par or comparable with the creamy layer sections among forward castes/communities, so that they can compete on equal footings."

Clearly, the Committee was concerned with the welfare of rich, powerful, and advanced section of OBCs. The Committee was least concerned about the welfare of really deprived, poor, and resourceless OBCs whose share is gobbled up by the creamy layer.

24. In fact, with the present definition and methodology of implementation, only a miniscule of advanced and powerful OBCs could be weeded out. At the time of obtaining OBC certificate, it is the self declaration of the candidate which is sufficient. No detailed information is obtained. Secondly, the criteria are also ineffective. The criteria prescribed and the reality are as follows:

(*i*) Presently, creamy layer definition is limited to one generation only, i.e., to parents only. Even if the grandfather is an IAS or an industrialist, it is not considered for definition of creamy layer.

(*ii*) Creamy layer definition is used in relation to sons/daughters only. Even if a person is an IAS, he or she is considered backward life-long. There is no time cap by which such persons could be considered advanced.

(*iii*) Husband's status is not considered to define advancement of a lady. Even if an OBC girl is married to an IAS officer, she will be backward life long.

(*iv*) Apart from few constitutional posts, none of the politicians has been included in the creamy layer. All the MPs and MLAs are considered backward. Even the ministers are considered backward. (Annexure VI)

(*v*) Almost all the Class II officers are excluded from creamy layer. Creamy layer principle is applicable only when both the father and mother of the candidate are Class II officer or either of them is promoted to Class I post before the age of 40 years, if a person is promoted to IAS cadre after 40 years of age he is deemed to have not advanced. It is presumed that giving reservation to Class II officer and denying the same to Rickshaw pullers, forward caste sweepers whom the Mandal Judgment expressly includes in the definition of Backward Classes does not Violate Articles 14, 15 and 16, and also the concept of economic justice.

(*vi*) Creamy layer principle is attached to the Class II officers if either of them had a foreign assignment for more than 5 years. Even if, the total emoluments of the father/mother are more than 2.5 lakhs, creamy layer principle does not apply. Hence in certain cases a couple earning 2.6 lakhs comes within the creamy layer definition but not a couple earning 5 lakhs.

(*vii*) In defence services, only Officers equal to above the rank of Colonel are considered in the creamy layer. The officers in lower ranks very well cross the upper income limit of 2.5 lakhs. Apart from income, the other facilities provided to such officers are also not taken into consideration.

(*viii*) Income from salary and agricultural income is not clubbed together. Most of the OBC's are landed class politically powerful and economically dominant. Sometimes even more dominant that the average general class.

(*ix*) Land holding: Initially persons having irrigated land equal to or more than 65% of statutory ceiling limit were included in creamy layer. Under pressure of powerful OBC landowners, the limit was raised to 85%. In various

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States, the ceiling limit for irrigated land varies from 12 to 18 acres of irrigated land (Annexure VII). This is approximately 5 to 7 hectares (1 Acre = 0.404686 Hectares). As per current survey, only 3.6% land holdings in the country are above the size of 4.0 hectares (Annexure VIII). Thus, practically the definition has been such as to include a negligible proportion of population in creamy layer definition which comprises only those people who may be equal only to the forward most of the advanced sections which goes against the mandate of this Hon'ble Court.

(*x*) Only Un irrigated land, whatever may be the size, has not been considered to define creamy layer. Hence a person owning large tract of land in town will never be considered to be within creamy layer definition.

(*xi*) Several States do not have upper ceiling limit.

(*xii*) Mango, citrus, apple, and other similar plantations have been considered similar to agricultural land and same ceiling limit principle has been applied.

(*xiii*) The annual upper income limit was Rs 1,00,000 (one lakh) in the year 1993-94, which has been raised to Rs 2,50,000 in the year 2004. The income distribution of Indian Population brings out the following results. (Annexure IX):

Income Group	*Approximate Annual Income of family (Rs)*	*Percentage of population*
< BL	< 20,000	21.8
PL to 2 PL	20000-40,000	55.0
2 PL to 4 PL	40,000-80,000	19.3
>4 PL	> 80,000	4.0

(Official poverty line defined in terms of per capita expenditure of less than Rs 11.6 per person per day. The average family size is considered to 4 persons per family.) This shows that:

a. About 21.8% population is below poverty line.

b. Another 55% population is at poverty threshold.

c. Another 19.3% population is just above poverty threshold.

d. Only 4.0% families have an income more than Rs 80,000 per year.

e. Out of these 4% families, hardly 1% can be expected to be having an income of more than 2,50,000 per year. Considering the backwardness of OBCs, this number should be well below 1%.

Clearly, with present income limit, only less than 1% population can be excluded.

(*xiv*) Previously, whenever State Governments applied the 'mean test' to exclude the advanced section of OBCs, Income Tax limit was the Standard where the line was drawn. The NCBC has not only altered this but has gone ahead to define the exemption in such manner as the creamy layer becomes narrower and more and more powerful/affluent/advanced people who come under the definition of creamy layer would get included

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Year	*Annual income for Income Tax exemption*	*Creamy layer definition in terms of annual income*
1993	28,000	1,00,000
2004	50,000	2,50,000

The initial limit which itself was set to be at the very high standard of three and half times of income tax exemption limit has been further raised to Five times of income tax exemption limit. This raising of exemption limit from three times of income tax ceiling to five times income tax ceiling is totally unreasonable and violates the rule of Articles 14, 15 and 16, thereby violating the basic feature of Equality enshrined in the Constitution of India. All these show that:

1. The purpose of the Government is to provide benefits of reservation to the rich, advanced and powerful people among OBC castes.

2. The Government is least concerned about the welfare of really deprived and backward people.

The Central Educational Institutions (Reservation in Admissions) Act fixing 27% reservation has no basis.

25. It has been conceded by the government that it has no list as of date for Article 15(4).

26. There has been no application of mind as to who would constitute Socially and Educationally Backward Classes. The Union of India has not been able to produce either a list or a criteria.

27. There is no competent expert body to lay down criteria, and carry on the process of identification of Socially and Educationally Backward Classes. Even The National Backward Classes Commission is incompetent to apply its mind to this issue with respect to Article 15(4) of the Constitution of India.

28. The figure of population of beneficiaries has to be arrived after identification by experts with regard to the test mentioned in para 795 of the *Indra Sawhney*[6] judgment which may even be as less as 15-20%. It will be destructive to hazard a guess. Hence a statute cannot prescribe any figure without knowing the fact. Hence Section 3(*iii*) of the Central Educational Institution (Reservation in Admission) Act fails on the ground of reasonableness, arbitrariness, fairness.

29. Section 5 of the Central Educational Institutions (Reservation in Admission) Act, 2006 are interdependent and Section 5 guides and restrains the power under Section 3. It is expressly stated to this effect in Section 5.

30. The Act goes against the teeth of the *Nagaraj judgment*[12] by not providing a time frame for reservation. *See* SCC p. 278, para 123.

31. Details of annexure referred to:

1. Annexure I : Resolution of 'Ministry of Welfare', Government of India to constitute an Expert Committee to identify 'creamy layer. Source: Annual Report (2003-2004) of National Commission for Backward Classes, pp. 39-40).

2. Annexure II: Report of the Expert Committee for specifying the criteria for identification of socially advanced persons among the socially and

12 *M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212

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V. Mr Fali S. Nariman, Senior Advocate, for the petitioners *(contd.)*

educationally backward classes. Source: Annual Report (2003-2004) of National Commission for Backward Classes, pp. 41-50).

3. Annexure III: Government order for reservation of posts for OBCs and guidelines to define 'Creamy Layer". : Annual Report (2003-2004) of National Commission for Backward Classes, Pages 51-58).

4. Report of the Committee to re-define "creamy layer" criteria. Source: Annual Report (2003-2004) of National Commission for Backward Classes, Pages 77-88).

5. Annexure V: Government Order, 2004 to raise the income limit. Source: Annual Report (2003-2004) of National Commission for Backward Classes, Pages 89-90).

6. Annexure VI: Judgment of Delhi High Court quoting the circular of Government of Rajasthan dated 2-2-2001 about creamy layer.

7. Annexure VII: State-wise Ceilings on land holdings in India (2004). Source: Agricultural Statistics at a Glance 2004, Ministry of Agriculture, Govt of India.

8. Annexure VIII: Land distribution in India. Source: NSS Report No. 515: Employment and Unemployment Situation in India, 2004-2005. (Page 29).

9. Annexure IX: Population of different expenditure classes in India. Source: Report of Conditions of Work and Promotion of Livelihoods in Unorganised Sector. Page 6.

10. Annexure X: Income Tax exemption limit in various years in India.

VI. Mr K.K. Venugopal, Senior Advocate, for the petitioners

A. THE VALIDITY OF THE CONSTITUTION (NINETY-THIRD AMENDMENT) ACT, 2005

I. If Articles 15(4) and 15(5) are mutually exclusive

1. If the interpretation suggested by the Hon'ble Chief Justice on the last day of hearing (1-11-2007) were to be accepted, i.e. that Article 15(4) and Article 15(5) are mutually exclusive, with the former concerning admissions to aided institutions and the latter concerning admissions to unaided institutions, such an interpretation would result in the following inconsistencies:

(A) Article 15(5) expressly uses the phrase "whether aided or unaided", thereby implying that this is an omnibus provision for reservations in admissions, not merely restricting itself to unaided institutions.

(B) The very impugned legislation, i.e. the Central Educational Institutions (Reservations in Admissions) Act, 2006 makes provision for reservations in aided institutions, admittedly pursuant to Article 15(5), thereby clearly not pursuant to Article 15(4).

(C) The same Act of 2006 specifically excludes minority institutions from its operation by way of Section 4(c). If this Act were enacted pursuant to Article 15(4), no such exclusion of minority institutions is permissible, as that is an exception available only in Article 15(5).

II. The inconsistency between Articles 15(4) and 15(5)

2. The validity of Article 15(5) will depend upon its conflict with Article 15(4) of the Constitution. The two provisions are inconsistent with each other for the following reasons:

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Summary of Arguments

VI. Mr K.K. Venugopal, Senior Advocate, for the petitioners *(contd.)*

(A) From the very inception of the Constitution, Article 15(4) was a provision and a source of legislative power for the purpose of making reservations for Scheduled Castes (SCs) and Scheduled Tribes (STs) as well as for Socially and Educationally Backward Classes (SEBCs) of citizens in aided minority educational institutions. This is apparent from the following:

(*i*) The object of the insertion of Article 15(4) after the decision in *State of Madras* v. *Champakam Dorairajan*[1].

(*i*) The decisions of this Hon'ble Court from *Balaji*[2] to *Nagaraj*[3].

(*ii*) The various reservation legislations enacted by J&K, Uttar Pradesh, Karnataka and Tamil Nadu.[4]

(*iv*) The very fact that Article 29(2) is referred to in Article 15(4) which deals with admissions to institutions, etc.

On the other hand, Article 15(5) which provides for reservation of seats for SCs & STs as well as SEBCs in aided educational institutions expressly excludes such reservation being made at all in minority educational institutions covered by Article 30(1) of the Constitution.

(B) Article 15(4) operates with a qualification that nothing in Article 15 or in Article 29(2) of the Constitution shall prevent the State from making such special provisions for SCs and STs as well as SEBCs, while Article 15(5) operates with a qualification that nothing in Article 15 or in Article 19(1)(g) shall prevent the State from making such special provisions for SCs and STs as well as SEBCs. The qualifying words in Article 15(4) do not have any real meaning or effect for the reason that both Article 15(1) as well as Article 29(2) prohibit discrimination on grounds only of religion or caste. A special provision for reservation for SCs and STs or SEBCs can never be only on the grounds of religion or caste as it is the attributes of the religious group or the caste group in the nature of backwardness which results in the special preference and not merely their religion or caste. If so, Article 15(4) provides reservation for SCs and STs as well as SEBCs in aided minority educational institutions while Article 15(5) prohibits the same resulting in direct conflict between the two.

Note: Article 15(5) expressly covers "aided or unaided" educational institutions as much as Article 15(4) also covers such institutions.

1 1951 SCR 525

2 *M.R. Balaji* v. *State of Mysore*, AIR 1963 SC 649 : 1963 Supp (1) SCR 439

3 *M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212

4 Uttar Pradesh Public Service (Reservation for Scheduled Castes, Scheduled Tribes, and Other Backward Classes) Act, 1994 (Act 4 of 1994);

Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of Appointments or Posts in Services under the State) Act, 1993

The Jammu and Kashmir Reservation Act, 2004.

The Karnataka Scheduled Castes, Scheduled Tribes and Other Backward Classes (Reservation of Seats in Educational Institutions and of Appointment or Posts in the Services under the State) Act, 1994

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VI. Mr K.K. Venugopal, Senior Advocate, for the petitioners *(contd.)*

(C) The inconsistency between the provisions is irreconcilable when the validity of a law providing for reservation in aided minority educational institutions is to be tested. If such a law is made applicable to aided minority educational institutions, it would be consistent with Article 15(4) of the Constitution.[5] However, it would be wholly void and violative of Article 15(5) of the Constitution since the exception of minority institutions in Article 15(5) applies to aided minority educational institutions as well.

(D) The argument of the Union of India/State of Tamil Nadu that Article 15(4) and Article 15(5) are both enabling provisions and hence the two will stand together and both can be complied with stands negatived for the reason mentioned in Clause (C) above, as the Court would read Article 15(4) and uphold the legislation making provision for reservation in aided minority educational institutions while the opposite side would argue that such a reservation in aided minority educational institutions would run foul of Article 15(5) and would, therefore, have to be struck down. The theory that both can, therefore, be harmonized has no substance whatsoever.

(E) The necessary result that will follow from the respondents' interpretation is a horrendous one. What has existed all along from the inception of the Constitution to the effect that an aided educational institution, minority or non-minority shall provide for reservations for SCs & STs in any event, would no more be able to do so as it would be expressly prohibited by Article 15(5). This would result in annulling the endeavour of the founding fathers and the various provisions for neutralizing the exclusion of SCs & STs from the mainstream of society and development for centuries. Such an interpretation would be an unconscionable violation of the equality clause in the Constitution, thus violating the basic structure of the Constitution.

(F) On the other hand, there is direct inconsistency between the two provisions as pointed out above, as one provides for such reservations in aided minority educational institutions while the other prohibits such reservations in aided minority educational institutions so that, necessarily, the Court would have to reconcile the two by invoking the Doctrine of Implied Repeal and of the later law prevailing over the earlier one. In this case, both Articles 15(4) and 15(5) cover the same area of making special provision for admissions to educational institutions of SCs and STs and SEBCs, covering also reservation for these categories in aided minority educational institutions. Article 15(5) deals expressly and specifically with the same subject, therefore a special law and a later one impliedly repealing the earlier Article 15(4) pro tanto and, in any event, prevailing over Article 15(4) in this respect.

(G) In view of the fact that this exclusion of aided minority educational institutions is solely based on religion and no other considerations, it would also violate the secular basis on which the Constitution is based and hence would violate the fundamental basis of the Constitution. To extend

5 See para 161, answer to Qn. 5(b) of *T.M.A. Pai,* (2002) 8 SCC 481.

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VI. Mr K.K. Venugopal, Senior Advocate, for the petitioners *(contd.)*

this exclusion also to linguistic aided minority educational institutions is a meaningless exclusion, as every single linguistic minority which has to be judged with reference to each State separately[6] would be a non-minority in every other State in the country and hence would be wholly without rationale and violative of the basic principle of equality enshrined in the Constitution. Section 4(c) of the Central Educational Institutions (Reservations in Admissions) Act, 2006, which excludes the application of the requirement of reservations in aided minority educational institutions based on language or religion would be grossly and directly violative of Article 15(4) of the Constitution, which, as held in *T.M.A. Pai case*[7], would have to accommodate non minority students as well and which would include reservations for the weaker sections.[5]

III. How Article 15(5) overrides Article 15(4)

3. Article 15(5) is a special provision which provides for the manner of admission of SEBCs and SCs/STs to educational institutions:

i. Including private unaided educational institutions which are subjected to the burden of providing seats for SEBCs and SCs/STs, by excluding the operation of Article 19(1)(*g*);

ii. Excluding educational institutions established by minorities under Article 30;

This neutralises the judgments in *T.M.A. Pai*[7] and *Inamdar*[8] and also ensures that no reservation can be made under Article 15(4) in regard to minority aided educational institutions, thus depriving SCs/STs of even the existing reservations in aided minority institutions. See *P.A. Inamdar* v. *State of Maharashtra*[8], SCC at p. 601, paras 124-25, 127 and 139

4. Making special provisions for SEBCs and SCs/STs for admission to educational institutions including by way of reservation of seats in educational institutions, both for minority or non-minority established aided educational institutions is covered by Article 15(4) of the Constitution. Reservations in educational institutions were being provided under Article 15(4) of the Constitution prior to the insertion of Article 15(5). The validity of all provisions, orders, rules, etc., providing for reservation, were tested against Article 15(4) as may be seen from several judgments of this Hon'ble Court:

- *Balaji* v. *State of Mysore*[2]
- *R. Chitralekha* v. *State of Mysore*[9]
- *P. Rajendran* v. *State of Madras*[10]
- *A. Peeriakaruppan* v. *State of T.N.*[11]
- *State of A.P.* v. *U.S.V. Balram*[12]

6 See Para 81 and Para 161, Answer to Qn.1 of *T.M.A. Pai,* (2002) 8 SCC 481.

7 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481

8 *P.A. Inamdar* v. *State of Maharashtra,* (2005) 6 SCC 537

9 (1964) 6 SCR 368

10 (1968) 2 SCR 786

11 (1971) 1 SCC 38

12 (1972) 1 SCC 660

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VI. Mr K.K. Venugopal, Senior Advocate, for the petitioners *(contd.)*

- *Indra Sawhney* v. *Union of India*[13], SCC at (pp. 755-56) para 846.

5. Article 15(4) and Article 15(5) both commence with an exclusionary clause excluding the operation of the rest of Article 15, and hence would result in a conflict to the extent of inconsistency, but since Article 15(5) is a special provision relating to educational institutions and a later amendment, it would prevail over Article 15(4), thus in substance and effect resulting in an amendment to Article 15(4) of the Constitution.

16(4) and 16(4-A) ("Nothing in this Article...") are non obstante clauses

- *Ajit Singh (II)* v. *State of Punjab*[14], SCC at para 28

Non obstante clause in later statute will prevail

- *Solidaire India Ltd.* v. *Fairgrowth Financial Services Ltd.*[15]
- *Sarwan Singh* v. *Kasturi Lal*[16]
- *Maruti Udyog Ltd.* v. *Ram Lal*[17]

Article 15(4) stands impliedly repealed by Article 15(5)

- *Bennion*, Statutory Interpretation, S. 80—Implied Amendment

IV. The exclusion of minority institutions breaches the basic features of Secularism and Equality

6. In any case, Article 15(5) breaches the basic features of secularism and equality by excluding religious and linguistic minority institutions whether aided or unaided from having to provide reservations. This is an arbitrary distinction which is wholly inconsistent with the interpretation given to minority and non-minority institutions under Articles 19(1)(*g*) and 30 in *T.M.A. Pai*[7] and *Inamdar*[8] cases.

7. The judgments of the Supreme Court in *T.M.A. Pai*[7] and *Inamdar*[8] place the rights of minority and non-minority established educational institutions on the same footing, Article 30 of the Constitution being intended to prevent the non-minorities from depriving the minorities of an equal right in that regard. To the extent that Article 15(5) seeks to elevate the minorities based on religion to a higher pedestal, the very secular foundation on which the Constitution is built is abrogated.

- *Ahmedabad St. Xavier's College Society* v. *State of Gujarat*[18], SCC at paras 9 and 77.
- *T.M.A. Pai Foundation* v. *State of Karnataka*[7], SCC at paras 120, 138.
- *P.A. Inamdar* v. *State of Maharashtra*[8], SCC at para 94.
- *Secy., Malankara Syrian Catholic College* v. *T. Jose*[19], SCC at para 19(*ii*).

8. Equally, for the same reasons, the essence of equality is violated in regard to discharging the common burden of providing reservation of seats for the SEBCs, SCs and STs in aided private educational institutions established by minorities, when

13 1992 Supp (3) SCC 217
14 (1999) 7 SCC 209
15 (2001) 3 SCC 71
16 (1977) 1 SCC 750
17 (2005) 2 SCC 638
18 (1974) 1 SCC 717
19 (2007) 1 SCC 386

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VI. Mr K.K. Venugopal, Senior Advocate, for the petitioners *(contd.)*

such classification has no nexus with the advancement of the interests of SEBCs and SCs/STs.

Tests for Article 14

- *Ram Krishan Dalmia* v. *S.R. Tendolkar*[20], SCR at pp. 296 'B' to 297 'A'.
- *AIIMS Students' Union* v. *AIIMS*[21]

9. As a result, the Constitution (Ninety-third Amendment) Act, 2005 is violative of the basic structure as it:

(*a*) Breaches the *secular character* of the Constitution by placing a minority based on religion educational institutions on a special footing, and exempting it from bearing the common burden.

- *S.R. Bommai* v. *Union of India*[22], SCC at para 183 (p.168 'd'-'e'), Para 186 (p. 170 'f'-'g').

(*b*) Unconscionably destroys the essence of equality embedded in the Constitution by excluding educational institutions established by linguistic minorities and subjecting the non-minority established institutions alone to bear the burden of weaker sections.

- *Minerva Mills Ltd.* v. *Union of India*[23], SCC at paras 43, 44, 45, 56, 57, 58, 59, 60.
- *Bhim Singhji* v. *Union of India*[24], SCC at paras 20-21.
- *I.R. Coelho* v. *State of T.N.*[25], SCC at paras 95, 140, 141, 145, 151(*iv*).
- *Secy., State of Karnataka* v. *Umadevi*[26], SCC at para 40.

V. The exclusion of minority institutions is not severable from Article 15(5).

10. Since the intention of Parliament was not to include minority-established institutions from carrying the burden imposed by Article 15(5), such exclusion of minority established institutions is not severable. This intention is clearly evident from the Amendment that was moved to include the minority educational institutions in Article 15(5) and which was expressly rejected by the House

The test of Severability is the Intention of the legislature

- *R.M.D. Chamarbaugwalla* v. *Union of India*[27], SCR at pp. 940, 950-952
- *Kihoto Hollohan* v. *Zachilhu*[28]

20 1959 SCR 279
21 (2002) 1 SCC 478
22 (1994) 3 SCC 1
23 (1980) 3 SCC 625
24 (1981) 1 SCC 166
25 (2007) 2 SCC 1
26 (2006) 4 SCC 1
27 1957 SCR 930
28 1992 Supp (2) SCC 651

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VI. Mr K.K. Venugopal, Senior Advocate, for the petitioners *(contd.)*

- *Jia Lal* v. *Delhi Admn.*[29], SCR at paras 3, 11, 12, 15, 16, 18, 20, 21, 22, 23
- *Cooley*, *Constitutional Limitations*, at p. 177

The United States Supreme Court supports this approach

- *Poindexter* v. *Greenhow*[30], 114 US 270 (1885) at pp. 304-305
- *Spraigue* v. *Thomspon*[31], 118 US 90 (1886) at pp. 94-95
- *Connolly* v. *Union Sewer Pipe*[32], 184 US 540 (1902) at p. 565
- *Davis* v. *Wallace*[33], 257 US 478 at pp. 484-485
- *Sloan* v. *Lemon*[34], US at p. 834

Amendment moved but not made throws light on the intention of Legislature

- *Bennion, Statutory Interpretation*, S. 218

B. THE VALIDITY OF THE CENTRAL EDUCATIONAL INSTITUTIONS (RESERVATION IN ADMISSION) ACT, 2006

I. Failure to exclude the 'creamy layer'.

11. (A) The judgments of the courts have held that if a caste is treated as a backward class for the purpose of reservations, the failure to exclude the 'creamy layer' from that caste would render the identification of the caste as a backward class unconstitutional and void.

- *State of Kerala* v. *N.M. Thomas*[35], SCC at para 124.
- *K.S. Jayasree* v. *State of Kerala*[36], SCC at paras 15 & 21.
- *Akhil Bharatiya Soshit Karamchari Sangh (Rly.)* v. *Union of India*[37], SCC at para 98.
- *K.C. Vasanth Kumar* v. *State of Karnataka*[38], SCC at paras 24 & 28.
- *Indra Sawhney* v. *Union of India*[13], SCC at paras 790-93 and 843-44.
- *Ashok Kumar Thakur* v. *State of Bihar*[39], SCC at paras 3, 16 & 17.
- *Indra Sawhney (II)* v. *Union of India*[40], SCC at paras 8, 9, 10, 13, 17, 24, 27, 48, 53 & 66.
- *R.S. Garg* v. *State of U.P.*[41], SCC at para 37.

29 (1963) 2 SCR 864
30 114 US 270 (1885)
31 118 US 90 (1886)
32 184 US 540 (1902)
33 257 US 478
34 413 US 825 (1973)
35 (1976) 2 SCC 310
36 (1976) 3 SCC 730
37 (1981) 1 SCC 246
38 1985 Supp SCC 714
39 (1995) 5 SCC 403
40 (2000) 1 SCC 168
41 (2006) 6 SCC 430

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VI. Mr K.K. Venugopal, Senior Advocate, for the petitioners *(contd.)*

- *M. Nagaraj* v. *Union of India*[3], SCC at paras 6 & 80-82.
- *Nair Service Society* v. *State of Kerala*[42], SCC at paras 15, 17, 18, 19, 20, 31, 32 & 41.

(B) In view of the fact that the 'creamy layer' would be the socially and educationally advanced section of that caste, their inclusion would not only result in unequals being treated as equals, but also would result in the rest of the backward caste losing the benefit of reservation to this advanced section in that caste.

(C) As a consequence, the inclusion of that caste for the benefit of reservations would be purely on the basis of caste, thus violating Article 15(1) and Article 29(2) of the Constitution.

(D) The doctrine of severability does not apply to the present case as the courts would be legislating if they merely declare that notwithstanding Parliament's intention to the contrary, the courts direct that the 'creamy layer' be excluded from the scope of the identification of backward classes.

(E) The impugned Act is unconstitutional and void to the extent that it does not provide for excluding the 'creamy layer' from the SEBCs, and since Parliament's intention was unequivocally expressed that the law would not be passed without the exclusion of the 'creamy layer' in that law, the impugned Act in its entirety has to be declared unconstitutional and void.

II. The exclusion of Minority Institutions by Section 4(c)

12. As much as Article 15(5) is void by reason of the exclusion of minority aided educational institutions, the same invalidity would attach to the impugned act, as Section 4(*c*) excludes all minority educational institutions from the scope of the Act.

C. CONCLUSION

13. In view of the aforesaid, it is submitted that this Hon'ble Court may be pleased to:

(*i*) Strike down the *Constitution (Ninety-third Amendment) Act, 2005* as being in violation of the basic structure of the Constitution, and for being inconsistent with the other provisions of the Constitution.

(*ii*) Consequently strike down the *Central Educational Institutions (Reservation in Admission) Act, 2006* and all other legislations consequent to the Ninety-third Amendment.

VII. Mr P.P. Rao, Senior Advocate, for the petitioners

1. The policy of reservations suffers from serious infirmities, constitutional and legal and needs to be replaced by a rational policy of affirmative action for uplifting the weakest among the weaker sections of the people, namely, the Scheduled Castes, the Scheduled Tribes and Other Backward Classes consistent with the mandate of Articles 41, unamended 45 and 46 giving first priority to the bottom-most layers of the Backward Classes.

42 (2007) 4 SCC 1

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VII. Mr P.P. Rao, Senior Advocate, for the petitioners *(contd.)*

2. In the present policy, there is no attempt to remove the educational disparities among the Backward Classes including Scheduled Castes and Scheduled Tribes inter se through free and compulsory education.

3. The Policy allows the more advanced and educated sections among the Scheduled Castes, Schedules Tribes and Other Backward Classes to avail the benefit of reservations leaving the most backwards uncared for.

4. Even after sixty years of Independence and fifty-seven years after coming into force of the Constitution, free and compulsory education has not been provided for all children which should have been done by 1960 itself, notwithstanding the Constitution Bench decision in *Unni Krishnan, J.P.* v. *Union of India*[1].

5. The judgment in *Indra Sawhney* v. *Union of India*[2] needs reconsideration for the following reasons:

(*a*) It did not consider the implications of exclusion of 'creamy layer' from the backward castes which are regarded as Backward Classes.

(*b*) 'Creamy layer' is essentially economic in character. It is based on the premise that economic prosperity or a Government job wipes out backwardness caused by caste. Logically, the Court should have accepted economic backwardness as the criterion for determining Backward Classes without reference to caste.

(*c*) It is well settled that the Constitution needs to be interpreted so as to strengthen its basic structure.

(*i*) *Sub-Committee on Judicial Accountability* v. *Union of India*[3], SCC p. 719, para 16

(*ii*) *P.V. Narasimha Rao* v. *State (CBI, SPF)*[4], SCC p. 673, para 47

(*d*) In *S.R. Bommai* v. *Union of India*[5] a Bench of nine Judges held that secularism is basic feature of the Constitution and it does not permit 'religion' or 'caste' to be treated as a relevant factor for conferring benefit or imposing liability. It was held at p. 233, that all are entitled to be treated equally by the State and the State cannot prefer or promote a particular religion, race or caste which necessarily means less favourable treatment of all other religions, races and castes.

(*e*) The Court in *Indra Sawhney case*[2] did not consider the consequences of accepting 'caste' as the route for identifying Backward Classes on the Constitutional goals set out in the Preamble and in particular, the promise to promote fraternity among all citizens, assuring the dignity of the individual and the unity and integrity of the nation. Caste as the basis of identification of Backward Classes is disrupting the unity and integrity of India. The recent example is the clash of Gujjars and Meenas in Rajasthan. In the words of Dr. Ambedkar, castes are anti-national.

(*f*) Exclusion of 'creamy layer' from Backward Classes is not easy and practicable, having regard to the resistance of Governments to such

1 (1993) 1 SCC 645
2 1992 Supp (3) SCC 217
3 (1991) 4 SCC 699
4 (1998) 4 SCC 626
5 (1994) 3 SCC 1

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exclusion when the criteria for identifying creamy layer is not realistic. Therefore, Backward Classes need to be identified by applying criteria other than caste.

(*g*) Having held that the focus in Article 16(4) is in social backwardness while in Article 15(4), it is social and educational backwardness, the Court in *Indra Sawhney case*[2] erred in accepting the list of socially and educationally backward classes prepared by the Government for the purpose of Article 16(4).

(*h*) In any case, events subsequent to *Indra Sawhney case*[2] show that it is high time that 'caste' is kept out of the reckoning in identifying backwardness.

(*i*) The observations in *Indra Sawhney case*[2] are not a binding precedent for the interpretation of Articles 15(4) and (5) or for judging their validity.

Scheme of the Constitution

6. (*a*) The Preamble highlights, inter alia, the secular character of the Constitution and the resolve to secure to all citizens justice, social and economic, equality of status and of opportunity and to promote among them all fraternity assuring the dignity of the individual and the unity and integrity of the Nation. Each one of these Constitutional goals has a bearing on the interpretation of clauses (4) and (5) of Article 15 in the instant case. The secular character of the Constitution is reflected, inter alia, in Articles 15(1), 16(2) and 29(2) which prohibits discrimination of citizens, inter alia, on the ground only of religion, race or caste. They are the common factors. The Fundamental Duties set out in clauses (a), (c), (e) also highlight the need for unity, integrity of India and to promote harmony and spirit of common brotherhood amongst the people transcending the sectional diversities like religion, race or caste. The Directive Principles of State Policy contained in Articles 38(1) and (2), 39(f), 41, 45 (unamended) and 46 are relevant for understanding the scheme of the Constitution in the context of the issues involved in the present batch of cases.

(*b*) Secularism is a basic feature of the Constitution:

(*i*) *Z.B. Bukhari* v. *Brijmohan Ramdass Mehra*[6], SCC p. 24, para 11

(*ii*) *S.R. Bommai* v. *Union of India*[5]

A.M. Ahmadi, J., SCC pp. 75-79, paras 25-30

P.B. Sawant, J., SCC pp. 143-148, 145-151 k

K. Ramaswamy, J., SCC pp. 161-175, paras 176-197

B.P.J. Reddy, J., SCC pp. 232-237, paras 302-310, and SCC p. 233, para 303

(*iii*) *M. Ismail Faruqui (Dr.)* v. *Union of India*[7], SCC pp. 398-404, paras 32-38

(*c*) "Castes are anti-national". They divide people and do not allow promotion of fraternity among all citizens, assuring the dignity of the individual and the unity and integrity of the Nation.

(*i*) Speech of Dr. Ambedkar 25-11-1949 CAD Vol. 11—pp. 972 to 981 at p. 980.

6 (1976) 2 SCC 17

7 (1994) 6 SCC 360

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(*ii*) Speech of Dr. Ambedkar, 1936—Annihilation of caste.

(*iii*) Speech of Dr. Rajendra Prasad 26.11.1949 CAD Vol. XI pp. 984-994 at p. 993.

(*iv*) Report of the University of Education Commission (1949) Compilation pp. 101-30.

(*d*) "Socialism" contemplated by the Preamble of the Constitution aims at providing all opportunities for pursuing the educational activity. The opportunity to be fully educated shall not be denied for want of wherewithal.

D.S. Nakara v. *Union of India*[8], SCC pp. 325, 326, para 33

7. The following principles of interpretation of the Constitution are relevant:

Atam Prakash v. *State of Haryana*[9], SCC 256, para 5.

Sub-Committee on Judicial Accountability v. *Union of India*[3], SCC 719, para 16

P.V. Narasimha Rao v. *State*[4], SCC 673, para 47.

AIIMS Students' Union v. *AIIMS*[10], SCC pp. 458-459, para 58

P.A. Inamdar v. *State of Maharashtra*[11], SCC p. 595, para 107.

Pathumma v. *State of Kerala*[12], SCC p. 8, para 5.

8. In the context of Articles 15(4) and (5), the citizens may be classified into three categories, namely, educationally backward, educationally non-backward and educationally forward. The unamended Article 45 contemplated providing free and compulsory education to all children until they complete the age of 14 years which means about 8 to 9 years of schooling, after which they would not be educationally backward. Article 46 requires the State to promote with special care, the educational interests of the weaker sections of the people. The State has failed to implement the mandate contained in Articles 45 and 46 fully even in respect of the weaker sections of the people. So much so, the bottom layers of educationally backward classes have been suffering for want of basic education and the "special care" mentioned in Article 46. The ground reality has been noticed in the following literature:

(*i*) Dr. Kothari Commission Report, 1964-65 pp. 131-156 of the compilation.

(*ii*) National Education Policy, 1986 p. 15 pr. 5.12

(*iii*) *Mohini Jain* v. *State of Karnataka*[13], SCC pp. 676-80, paras 5-14

(*iv*) *Unni Krishnan, J.P.* v. *State of A.P.*[1], SCC pp. 730-738, paras 166-183

(*v*) National Commission to Review the Working of the Constitution, pp. 65-66 para 3.20

(*vi*) The Constitution (Eighty-sixth Amendment) Act, 2002, at pp. 67-68 of the Paper Book in WP No. 231 of 2007, *Citizens for Equality* v. *Union of India* which inserted Article 21-A, substituted Article 45 and amended Article 51-A so as to abridge the fundamental right to education until a child completes the age of 14 years as declared in *Unni Krishnan, J.P. case*[1] by a Constitution Bench.

8 (1983) 1 SCC 305
9 (1986) 2 SCC 249
10 (2002) 1 SCC 428
11 (2005) 6 SCC 537
12 (1978) 2 SCC 1
13 (1992) 3 SCC 666

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(*vii*) The Preamble of the Right to Education Bill, 2005 by the Central Advisory Board for Education which mentions the fact that the number of out of school children particularly from the disadvantaged groups and those engaged in labour, and those receiving poor quality education has remained very large.

(*viii*) All India survey sponsored by the Ministry of Human Resources Development, GOI which, inter alia, mentions the objectives of Sarva Shiksha Abhiyan (SSA), that all children should complete five years of primary schooling by 2007 and complete 8 years of elementary schooling by 2010 (pp. 121-132).

(*ix*) Article by Vinod Raina, Member of Central Advisory Board for Education.

(*x*) Report of the National Knowledge Commission, 2006. The Knowledge Commission has recommended Central legislation followed by State legislation providing for universal education of reasonable quality within three years. "School Education must be provided to all".

(*xi*) The Fundamentals of the Fundamental Right to Education in India, 2006 (by the Centre for Child and the Law, National Law School of India University, Bangalore).

(*xii*) Annual Report 2005-2006 of the Department of Elementary Education etc. Statement 9—drop out rates of SC students.

9. The material referred to above substantiates the submission that the policy of affirmative action, of which reservation in educational institutions and Government jobs is a part, suffers from 'inversion of priorities', as held in *Unni Krishnan, J.P. case*[1] in as much as without providing for the basic educational requirement of the weakest among the weaker sections, the policy gives preferential treatment to the forward sections among the backward classes who do not suffer from educational backwardness. The State's failure to provide free and compulsory education at least to the children of backward classes, SCs and STs for six decades and the high rate of drop outs among them in classes 1 to 10 leads to the irresistible conclusion that the State is concerned more about the "haves" among the backward classes rather than the "have nots". Moreover in the present policy there is no provision for removing the educational disparities among the backward classes inter se. It depresses the bottom layers and pushes up the upper layers among them. Therefore, the present policy of affirmative action is irrational, arbitrary and violative of Article 14. It is liable to be set aside with a direction to all the Governments to frame a rational policy which gives the highest priority to the illiterate segment among the weaker sections.

10. The Constitution (Eighty-sixth Amendment) Act, 2002 ex facie abridges the basic structure of the Constitution in as much as its effect is to curtail the scope of the fundamental right to life guaranteed by Article 21 which incorporates a core value of the Constitution, as interpreted in *Unni Krishnan, J.P.* v. *State of A.P.*[1]

M. Nagaraj v. *Union of India*[14], SCC paras 23 and 26.

I.R. Coelho v. *State of T.N.*[15], SCC paras 140, 141, 142, 145, 147 and 151.

Validity of the Ninety-third amendment to the Constitution

11. The Constitution (Ninety-third Amendment) Act, 2005 to the extent it permits reservation in admission to private unaided educational institutions,

14 (2006) 8 SCC 212

15 (2007) 2 SCC 1

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notwithstanding the basic feature of secularism, the principles underlying Articles 14, 15, 19(1)(*g*) and 21, abridges the basic structure of the Constitution. In *P.A. Inamdar* v. *State of Maharashtra*[11], SCC p. 603, para 132, this Hon'ble Court held that the reservation policy cannot be enforced in unaided private educational institutions, both minority and non-minority institutions. As the seven freedoms guaranteed in Article 19 and the values embodied in Articles 14, 15(1) and 21 are part of the basic structure as held by this Hon'ble Court, the impugned amendment is liable to be struck down as unconstitutional. See *M. Nagaraj* v. *Union of India*[14], SCC p. 243, paras 23, 26, pp. 245-46, paras 32 & 35, and *I.R. Coelho* v. *State of T.N.*[15], SCC pp. 108-11, paras 141, 147 and 151 Conclusion (*iii*).

12. It is also violative of the principles of equality underlying Articles 14 and 15 which are part of the basic structure to the extent it excludes minority educational institutions from its purview without there being any reasonable basis much less any rational nexus with the object sought to be achieved.

13. The Constitution is committed to removal of social and educational backwardness with appropriate measures of affirmative action so that the disadvantaged sections come up to the level of others who are not so disadvantaged. The "advancement" of socially and educationally backward classes of citizens contemplated by Article 15 is to the extent necessary to help them to rise to the level of others who are not so backward and no more.

(*a*) In *Ajit Singh (II)* v. *State of Punjab*[16], SCC p. 233, para 38 the Constitution Bench held : "affirmative action stops where reverse discrimination begins."

The bench relied on the following decisions:

(*i*) *Indra Sawhney* v. *Union of India*[2] at SCC p. 734, para 808

(*ii*) *Post Graduate Institute of Medical Education and Research* v. *Faculty Assn.*[17], SCC p. 22, para 32, (Constitution Bench)

(*iv*) *Akhil Bharatiya Soshit Karamchari Sangh (Rly.)* v. *Union of India*[18], SCC p. 286, para 73 and V.R. Krishna Iyer, J., SCC p. 301, para 102

(*b*) *E.V. Chinnaiah* v. *State of A.P.*[19] at SCC p. 426, para 80 and SCC p. 427, para 86.

14. For the purposes of Article 15(4) and (5), the classes should be both socially and educationally backward. Either social backwardness or educational backwardness alone will not do.

Yardstick for measuring educational backwardness

15. (*i*) The terms "backwardness", "social backwardness" and "educational backwardness" are relative terms. When the Constitution was made, about 80% of the population was illiterate. That was why the original Article 45 required free and compulsory education to be provided to all children till they completed the age of 14 years. The framers of the Constitution were of the view that it was necessary to provide about 8 to 9 years of free and compulsory education to every child so that no one is educationally backward in the country. The

16 (1999) 7 SCC 209
17 (1998) 4 SCC 1
18 (1981) 1 SCC 246
19 (2005) 1 SCC 394

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"socially and educationally backward classes of citizens" for whose benefit Clause (4) was inserted in Article 15 by the Constitution (First Amendment) Act, 1951 are those who did not have education up to the secondary or High School level i.e. up to standard X or XI. Any one who had education up to the X and XI standard cannot be treated as educationally backward and certainly not those who have passed the 10+2 examination and are eligible for admission to courses in higher education.

(*ii*) In *M.R. Balaji* v. *State of Mysore*[20], SCR at p. 463, the Court noted that the Nagan Gowda Committee adopted the test of average of student population in the last three high school classes for determining the educational backwardness. The Supreme Court observed that it may not be necessary or proper to put the test as high as has been done by the Committee. It means that the level of education for judging backwardness could be lower than what Nagan Gowda Committee has adopted.

(*iii*) In *State of A.P.* v. *U.S.V. Balaram*[21], SCC p. 681 para 71 the Commission appointed by the Govt. of A.P. adopted the test of average student population in Standards X and XI. The Commission took note of the report of the Backward Classes Committee appointed by the Jammu and Kashmir Government presided over by Justice Gajendragadkar, former CJI, which adopted the test of number of students on the rolls of classes IX and X for determining the educational backwardness. (p. 682, para 74). The Supreme Court approved the above determination of educational backwardness in Andhra Pradesh with reference to the student population in Classes X and XI. (pp. 685-686, para 83-A)

(*iv*) *K.S. Jayasree* v. *State of Kerala*[22], SCC at pp. 734-735 para 19, the Commission appointed by the State Government determined the educational backwardness by adopting the test whether a student has education up to the last class in the High School i.e. matriculation or standard XI. The Court has upheld it.

(*v*) Therefore, the special provisions contemplated in Article 15(4) and (5) are for the benefit of socially backward citizens who are unable to have education up to standard X or XI. Conversely, persons who have passed the 10+2 examination and who alone are eligible for admission to degree courses or professional colleges i.e. institutions of higher learning cannot be regarded as educationally backward. Articles 15(4) and (5) will have no application to them. The case of Scheduled Castes and Scheduled Tribes is different as they are treated as separate categories in need of advancement irrespective of their level of education.

16. The rights set out in Part III of the Constitution are individual rights. They are personal rights. The right to dignity of the individual is implicit in the right to equality and the right to life. A class consists of individuals. The word "class" means "a homogenous section of the people grouped together because of certain likenesses or common traits and who are identifiable by some common attributes". *State of A.P.* v. *P. Sagar*[23], SCR at p. 600. Under Article 16(4), the exclusion of "creamy layer"

20 1963 Supp (1) SCR 439
21 (1972) 1 SCC 660
22 (1976) 3 SCC 730
23 (1968) 3 SCR 595

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from backward classes is on individual basis. Logically, for inclusion in a backward class for the purposes of Articles 15(4) and (5) also, the test of social and educational backwardness needs to be applied in each individual case, so as to group individuals who satisfy the criteria together to form a class. There are no ready made socially and educationally backward classes as such in the country.

17. Having regard to the twin requirements of social and educational backwardness specified in Articles 15(4) and (5), 'caste' cannot be the route to identify backward classes. The law declared in *Indra Sawhney* v. *Union of India*[2], SCC at pp. 719-722, paras 786-789 and p. 727, para 797 and p. 767, para 859 and answer to question 3(c) to the effect that the backward classes mentioned in Articles16(4) are socially backward and not socially and educationally backward necessitates applying a different yardstick other than 'caste' for identifying backward classes for the purposes of Clauses (4) and (5) of Article 15.

18. "Caste" in its origin, is based on profession, occupation or business carried on by a family from generation to generation. Therefore, caste will be a relevant factor for judging social backwardness only of such members of backward castes who are even today carrying on their traditional occupations in the traditional manner. For others who have left the traditional occupations and switched over to other better occupations, 'caste' cannot be a relevant factor for ascertaining their social backwardness. As noticed in several decisions, in the ultimate analysis, poverty is the root cause of social and educational backwardness. Therefore "occupation" is a rational and reliable guide, and not "caste" which is a constitutionally prohibited ground of classification.

19. Special provisions needed for the advancement of socially and educationally backwardness in terms of Articles 15(4) and (5) includes free boarding and lodging facilities, free uniforms, books and stationery to be provided free of cost, library facilities and provision for extra-tutorial classes and in cases where a family is dependent on child labour, extending financial support to the family so that it can spare the child for education, see:

(*a*) *K.C. Vasanth Kumar* v. *State of Karnataka*[24], SCC at p. 811 end of para 150

(*b*) *E.V. Chinnaiah* v. *State of A.P.*[19], SCC p. 435 para 114.

20. The special provisions for the advancement of backwardness cannot be a permanent feature, see:

(*a*) *Akhil Bharatiya Soshit Karamchari Sangh* v. *Union of India*[18], SCC at p. 264, para 22.

(*b*) *State of Kerala* v. *N.M. Thomas*[25] (7 Judges), SCC pp. 376-377, para 158.

(*c*) *Preeti Srivastava (Dr.)* v. *State of M.P.*[26], SCC at pp. 142-143, para 11 (CB)

The time required for removal of educational backwardness

21. Educational backwardness has come to be measured with reference to education up to the school leaving stage. Earlier, it was the 11th class and now it is 10+2 = 12th class. If a provision is made for imparting free and compulsory education to all the children until they attain the age of 14 years by the year 2010 as

24 1985 Supp SCC 714
25 (1976) 2 SCC 310
26 (1999) 7 SCC 120

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the Union of India is committed to, thereafter within 12 years i.e. by 2022 it is possible to eliminate educational backwardness of backward classes with the help of special care which the State is required to take in terms of Article 46. Therefore, in any event, the special provisions contemplated in Articles 15(4) and (5) must come to an end before 2022. It is necessary for this Hon'ble Court to set this time-limit for the realization of the constitutional goal of securing equality of status and of opportunity and promoting fraternity among the citizens assuring the dignity of the individual and the unity of the Nation.

22. While dealing with the question of relevance under Article 16(4) the Bench of nine Judges in *Indra Sawhney case*[2] has affirmed the decision of a Constitution Bench in *R. Chitralekha* v. *State of Mysore*[27], *SCR* pp. 383-384, 386-389 wherein identification of socially and educationally backward classes was made on the basis of occupation-cum-income without reference to caste. *Chitralekha*[27] being a case under Article 15(4), the criteria applied by the State of Mysore having been approved by the larger Bench in *Indra Sawhney case*[2] and the criteria being consistent with the basic feature of secularism, this Hon'ble Court may be pleased to declare that for identification of socially and educationally backward classes the basis should be occupation-cum-income without reference to caste.

23. The decision in *Indra Sawhney* v. *Union of India*[2] to the extent it declares that the backwardness contemplated by Article 16(4) is mainly social backwardness whereas in Article 15(4) it is both social and educational backwardness is binding on this Bench. Two other principles enunciated therein, namely, that the reservation should not exceed 50% and the creamy layer must be excluded are also binding. The other aspects of reservations under Article 16(4) considered in that case do not afford much guidance for dealing with the issues raised in the present batch of cases.

24. There are certain aspects of the judgment in *Indra Sawhney case*[2] which require reconsideration:

(*a*) To the extent it permits identification of backward classes to be made through the route of caste (at pp. 716-717, paras 782, 783), it needs to be reconciled with the law declared subsequently in *S.R. Bommai* v. *Union of India*[5], SCC at p. 233 wherein another Bench of nine Judges has held that there cannot be preferential treatment with reference to caste in a secular State.

(*b*) After holding that backwardness in Article 16(4) is mainly social backwardness and not social and educational backwardness as in Article 15(4), the Court permitted the list of socially and educationally backward classes to be operated for the purpose of reservations under Article 16(4). This inconsistency between the enunciation of law and its application needs to be removed.

(*c*) While declaring that identification of backward classes could be made either through caste or by applying the occupation cum income test without reference to caste, the Court did not consider the further question as to which of these two methods will be consistent with the Scheme of the Constitution and its basic features set out in the Preamble. In other words, which will promote a casteless society? Assuming that more than one route is available for identification of socially and educationally backward classes for the purposes of Articles 15(4) and (5), and caste is one of them, the State has to follow the route (occupation cum income) which strengthens the basic structure of the Constitution and discard the other (caste). The Court has unwittingly allowed

27 (1964) 6 SCR 368

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perpetuation of caste system which strikes at the unity and integrity of the Nation. *See*:

Speech of N.A. Palkhivala pp. 63-66 of Paper Book in WP No. 231 of 2007

Article of B.G. Verghese

(*d*) The basis of 'creamy layer' is economic in character. If economic criteria are the basis for exclusion from backward classes, reason demands that the same should be the basis for inclusion in the backward classes also. Otherwise, the basis of classification would suffer from irrationality.

(*e*) Assuming that rightly or wrongly the Court considered identification of backward classes through caste was a permissible route in the then prevailing conditions, the same approach would not be reasonable at this distance of time, considering the subsequent developments and the need to promote fraternity and the spirit of common brotherhood among the people. It is settled law that what may be reasonable at one point of time, may cease to be reasonable later on. See *Motor General Traders* v. *State of A.P.*[28], SCC pp. 232-34, paras 16-17 and p. 237, para 22.

25. *Reliefs Sought*:

(*a*) The policy of affirmative action which is being implemented all over the country by all the Governments including the Union Government may be declared as discriminatory inter-se members of Backward Classes themselves and unconstitutional. The State may be directed to formulate a rational policy of affirmative action which gives highest priority to the bottom layers of Backward Classes which are illiterate and not to the more forward segments among them who are not educationally backward as at present.

(*b*) A mandamus may be issued to the Central Government to ensure that free and compulsory education is provided to every child in the country within three years i.e. by the year 2010, as per Government of India's own target and the recommendation of the National Knowledge Commission.

(*c*) The special provisions for promoting the educational interest of the weaker sections contemplated by Article 46 are over and above free and compulsory education to be provided for all. They are in the nature of providing free boarding and lodging, books, uniform and extra coaching as indicated by E.S. Venkata Ramaiah, J. in case of *Vasanth Kumar case*[24] and S.B. Sinha, J. in *E.V. Chinnaiah case*[19].

(*d*) Union of India and all the State and UT Governments may be directed to remove educational backwardness within 12 years from now or at the most 15 years from now so that there should be no reservation in educational institutions thereafter.

(*e*) It may be declared that a person ceases to be educationally backward after passing 10+2 examination and therefore, reservation in higher educational institutions is not permissible under Article 15(4) or Article 15(5).

(*f*) After holding that the Constitutional Eighty-sixth Amendment to the extent it abridges the fundamental right to education spelt out of Article 21 in *Unni Krishnan, J.P.* v. *State of U.P.*[1], violates the basic structure of the Constitution, it may be struck down as ultra vires the basic structure.

28 (1984) 1 SCC 222

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(*g*) The Ninety-third Amendment to the Constitution violates basic structure of the Constitution as reflected in Article 19(1)(*g*) as interpreted in *P.A. Inamdar* v. *State of Maharashtra*[11] it may be struck down as ultra vires the basic structure.

(*h*) The Central Educational Institutions (Reservation in Admission) Act, 2006 may be declared as ultra vires Articles 15(4) and (5) to the extent it seeks to provide reservation of seats in admission to higher educational institutions, in addition to the reasons given by Mr Harish Salve and struck down.

26. The mandate of Article 45 to provide free and compulsory education for all children until they complete the age of 14 years, has not been complied with till today notwithstanding the law declared in *Unni Krishnan, J.P.* v. *State of A.P.*[1], SCC pp. 730-31 para 166 and p. 765 para 2-6 that the right to education till the age of 14 years is part of right to life in Article 21. There is a clear violation of Article 21 of the Constitution.

27. (*a*). The following objectives of Sarva Shiksha Abhiyan are relevant:

- All children should attend school or an Alternative school such as an EGS centre or 'Back-to-School' camp, by 2003
- All children should complete five years of primary schooling by 2007
- All children should complete eight years of elementary schooling by 2010
- Focus on elementary education of satisfactory quality with emphasis on education for life
- Bridge all gender and social category gaps at primary stage by 2007 and at elementary education level by 2010
- Universal retention by 2010

(*b*) The aim of Sarva Shiksha Abhiyan as mentioned in pr.1.2 is to provide useful and relevant elementary education for all children in the 6 to 14 age group by 2010.

(*c*) The Report of the CAG (2004-2005) shows the ground realities in the implementation of the Sarva Shiksha Abhiyan.

(*d*) The Constitution does not contemplate citizens remaining backward forever. By their very nature, Articles 15(4) and (5) and Article 16(4) are transitory in nature. They are temporary provisions which cannot operate after the backward classes have advanced to the general level of others who are not backward. These special provisions have been in operation for over 57 years. As educational backwardness is capable of being wiped out within a period of 12 years, it is necessary to stipulate a reasonable time-limit for the said purpose. The argument of the learned Solicitor General at pp. 83-84 of his Written submissions is that there can be no time-limit in this respect cannot be accepted.

(*e*) It is therefore, necessary to ensure full compliance with the mandate of Article 45 and Article 21 as interpreted in *Unni Krishnan, J.P. case*[1], by the year 2010 as promised by the Government in Sarva Shiksha Abhiyan by issuing a writ of mandamus. Violation of such a vital fundamental right as the right to education cannot be tolerated any further.

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(*f*) Financial consideration cannot be an alibi where enforcement of a fundamental right is involved.

(*i*) *Municipal Council, Ratlam* v. *Vardichan*[29], SCC p. 170 para 12, p. 171 para 15, p. 174 para 24.

(*ii*) *B.L. Wadehra (Dr.)* v. *Union of India*[30], SCC pp. 606-07 paras 22-23

(*iii*) *Kapila Hingorani* v. *State of Bihar*[31], SCC pp. 32-33 paras 64-66.

(*iv*) *State of H.P.* v. *H.P. State Recognised and Aided Schools Managing Committee*[32], SCC pp. 514-15 para 16 which is case on providing free education which relied on *Unni Krishnan, J.P. case*[1].

28. All are agreed that the Constitution seeks to achieve a caste-less society. Therefore, the basis of identification of socially and educationally backward classes should be such as to facilitate and not obstruct or impede realising the aforesaid Constitutional goal.

29. The educational backwardness is susceptible to eradication within a definite time frame. The Constitution makers estimated that free and compulsory education could be provided to all children until they completed the age of 14 years within a period of 10 years from the commencement of the Constitution. Now the Union of India has assured the Court through the Sarva Shiksha Abhiyan that elementary education would be provided to all children in the 6 to 14 age group by 2010. Therefore, it should be possible to remove educational backwardness of the socially and educationally backward classes within a period of between 12 to 15 years from now, the judicially accepted yardstick for measuring educational backwardness being education up to the High School level which at present is 10+2. Once educational backwardness is removed, Clauses (4) and (5) of Article 15 will become redundant and unnecessary.

30. From the undisputed facts, it is evident that among the backward classes, there are a very large number of children who are illiterate outside the schools and there are a large number of dropouts among the children admitted to Schools. The reservations made in admissions to educational institutions so far, including Government institutions of higher learning, by the impugned Act are inaccessible to a large section among the backward classes, who do not have education up to 10+2 level. Therefore, expanding the scope of reservations in admissions for socially and educationally backward classes for the benefit of those who had 10+2 qualification without ensuring that every child belonging to a backward class is provided free and compulsory education up to 10+2 level is discriminatory inter-se members of the backward classes themselves and violative of Articles 14 and 15 of the Constitution. The present policy of affirmative action is liable to be declared unconstitutional.

31. Question No. 6 in Para 8.2 of the Order of Reference reported in (2007) 4 SCC 397, 402 is : "What is the yardstick for measuring educational backwardness in Clauses (4) and (5) of Article 15?" Decided cases including *M.R. Balaji* v. *State of*

29 (1980) 4 SCC 162
30 (1996) 2 SCC 594
31 (2003) 6 SCC 1
32 (1995) 4 SCC 507

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Mysore[20], SCR p. 463, *State of A.P.* v. *U.S.V. Balram*[21], SCC at p. 681 para 71, *K.S. Jayasree* v. *State of Kerala*[22], SCC pp. 734-35, para 19 have accepted that education up to the Secondary School level is the measure for determining educational backwardness. In terms of the decision in *M.R. Balaji case*[20], classes of citizens whose average student population works below 50% of the State's average are regarded as educationally backward classes of citizens. Classes whose average student population is slightly above or very near or just below the State average, cannot be regarded as educationally backward classes. This being the position, students who have passed 10+2 examination, cannot be regarded as educationally backward. In any event, they constitute the creamy layer among the educationally backward classes and are liable to be excluded from the benefit of special provisions made under Articles 15(4) or (5).

32. Socially and educationally backward classes contemplated by Article 15(4) and (5) are not pre-existing readymade classes. They consist of members who fulfil the criteria laid down for identification of social and educational backwardness. Only those citizens who satisfy the criteria become members of the socially and educationally backward classes contemplated in Articles 15(4) and (5). Even in the case of reservations made under Article 16(4) in employment under the State forthwith, the backward classes have been identified through 'Caste', each member who claims to belong to a backward caste has to obtain a Social Status Certificate. Only those who obtain genuine certificates from the prescribed competent authority alone are recognized as members of the backward classes. The decision in *Madhuri Patil* v. *Addl. Commr., Tribal Development*[33] deals with this aspect in detail.

33. The law declared in *Indra Sawhney* v. *Union of India*[2], 719—Question (*c*) and paragraphs 786 to 788 and the answer to Question 3(*c*) at p. 767 that the backward classes of citizens mentioned by in Article 16(4) are not the same as socially and educationally backward classes referred to in Article 15(4) warrants separate identification of socially and educationally backward classes for the purpose of Article 15(4) and (5). The lists of backward classes identified through caste for the purpose of Article 16(4) cannot be used automatically for the purpose of Article 15(4) and (5). The judgment in *Indra Sawhney case*[2] itself has approved the identification of backward classes on the basis of Occupation-cum-Income test without reference to caste and affirmed the decision in *R. Chitralekha* v. *State of Mysore*[27], SCR at pp.728-29 para 800. The Court further pointed out that there may be some groups or classes in whose case caste may not be relevant at all. "For example, agricultural labourers, rickshaw pullers/drivers, street hawkers etc. may well qualify for being designated as backward classes". The learned Solicitor General has rightly submitted that castes were structured on the basis of occupations and callings. Having regard to the judicially recognised fact that many people have left their traditional occupations and taken to more lucrative avenues of work, it is irrational to identify backward classes through caste. A rational basis would be to identify through occupations traditionally considered to be inferior, yielding low

33 (1994) 6 SCC 241

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income. As held by a Constitution Bench in *Janki Prasad Parimoo* v. *State of J&K*[34], SCC pp. 436, 437 paras 29-32, if a person wants the special advantage as a member of the backward class, he should show that his family continues to be engaged in traditional occupation even now and not that his forefathers were initially engaged in the traditional occupation. Therefore, the occupation-cum-income test approved by *Indra Sawhney*[2] relying on *R. Chitralekha* v. *State of Mysore*[27], which is a decision rendered under Article 15(4), is the correct test which should be applied for identification of backward classes under Articles 15(4) and (5).

Reply to the submissions of Shri Gopal Subramanium, ASG

34. Mr Gopal Subramanium has not dealt with the yardstick for measuring educational backwardness. All the decisions of the Court so far are consistent that it should be measured with reference to education at the high school level. Therefore, persons who have had education up to 10+2 cannot be regarded as educationally backward. Articles 15(4) and (5) require both social and educational backwardness and not either social or educational backwardness alone.

In any event, they constitute the creamy layer among the socially and educationally backward classes and therefore liable to be excluded. Therefore the contention that it is a class right and the educational attainment of individuals need not be considered is not correct.

35. At para 108 it is said *Indra Sawhney*[2] has approved the Central list by marrying the State Lists and fresh determination of educational backwardness is "unwarranted and impermissible". The ASG did not answer the submission made by me that Indra Sawhney itself has drawn a distinction between the scope of Article 16(4) which is mainly social backwardness and Article 15(4) which is social and educational backwardness. The two are different. In view of this distinction made, it is imperative to make a separate list of SEBCs for the purpose of Articles 15(4) and (5).

36. It is not correct to say that the Court has not indicated what is educational backwardness till date. Right from *Balaji case*[20] the question of educational backwardness has been considered with reference to education up to the high school level.

37. At para 109, the reply given to the Petitioners' submission that there cannot be reservation in educational institutions of higher learning offering courses after 10+2 for the simple reason that those who have already completed 10+2 are not educationally backward is that all the decisions given so far by the Court will have to be regarded as wrong. This is not correct. The fact that this aspect was not raised and considered in any of the decisions which upheld such reservations does not mean that it cannot be raised at all. Obviously, those decisions have no binding force as far as this new contention is concerned. There is no question of challenging those decisions which do not deal with this point.

34 (1973) 1 SCC 420

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38. At para 112, education up to class 12 is not an indicator of advancement. This argument goes against all the decisions which have dealt with the question as to how to measure educational backwardness.

39. At para 113, reservation at a higher level, after 10+2 stage, cannot tackle the problem of drop outs in schools mentioned by him in para 113. On the other hand, it underlines the need to prevent children from dropping out of schools by making education compulsory for them.

40. At para 115, the plea of insensitivity to class dynamics shows lack of appreciation of the constitutional claim of achieving a casteless society by ensuring equality of status and promoting fraternity among all citizens in the interest of the unity of the nation.

41. At para 116, the 'incentive' mentioned is to the 'haves' among the so-called SEBCs and not for the 'have nots'.

42. At para 118, my submission has been misunderstood. I did not say that nothing has been done for the BCs at the level of primary education. The clear submission is that the Constitutional mandate contained in Article 45 has not been complied with even in the case of BCs. What has been done by the Government so far falls short of the Constitutional requirement. Hence the need for a mandamus to compel the Government to comply with the Constitutional requirement.

43. (*a*). The reply to the arguments challenging the validity of the Eighty-sixth Amendment does not grapple with the thrust of the submissions. The fact that this Amendment was challenged in one of the WPs and not in all the WPs is liable to be rejected straightaway.

(*b*) When that WP is also tagged after notice without framing a specific question it does not mean that the validity of the Eighty-sixth Amendment has been accepted by the Court. If that be the case, the WP ought to have been dismissed. Question (5) in topic No. 8.2 arises out of WP No. 231 of 2007 only. Para 9 of the order of reference to the Constitution Bench covers this question.

(*c*) The only other argument is that it does not have direct relation with the question the Bench is considering is again not correct. The WP was filed in view of the liberty given by the Court by its Order dated 31-5-2006.

44. The Eighty-sixth Amendment has abridged the fundamental rights to education which is a part of right to life in Article 21. It has made the fundamental right subject to legislation to be made hereafter. It is violative of the basic structure for the reasons as already mentioned.

Reply to the written submissions filed by Shri K. Parasaran on 4-8-2007

45. (*a*). Submissions Nos. 1 to 13 deals with the scope of Articles 15(3), (4) and (5). It is not correct to say that the First Amendment neutralised the judgment in *State of Madras* v. *Champakam Dorairajan*[35], in the absence of any indication therein to the effect that it is open to the State to make reservation in admissions to educational institutions in favour of Muslims, Christians, Non-Brahmins (Hindus) and Brahmins separately. There is no mention of 'caste' or 'religion' in Article 15(4) at all. On the contrary, the words used are "any socially and educationally backward classes of citizens".

35 1951 SCR 525

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(*b*) To say that Article 15(4) has stood the test of time may not be accurate for the reason that it was never challenged before the judgment in *Kesavananda Bharati* v. *State of Kerala*[36] and could not have been challenged thereafter in view of the decision in *Waman Rao case*[37].

There is no mention of Article 15(4) even once in the entire judgment in *Sankari Prasad Singh Deo* v. *Union of India*[38] wherein the First Amendment was challenged with reference to Articles 31-A, 31-B and Schedule IX to the Constitution.

(*c*) Article 15(3) is different from Article 15(4) in as much as it permits making any special provision for 'women' notwithstanding the prohibition against discrimination on the ground only of 'sex' contained in Article 15(1). Article 15(4) does not provide for making any special provision in favour of a 'caste' which is a prohibited ground of discrimination in Clause (1). Had there been mention of 'caste' or 'religion' in Article 15(4), then it would have been comparable to Article 15(3). Therefore, the decisions in *Govt. of A.P.* v. *P.B. Vijayakumar*[39] and *Union of India* v. *K.P. Prabhakaran*[40] are of no assistance.

(*d*) The fact that Article 15(4) was inserted by the provisional Parliament which is none other than the Constituent Assembly itself does not make any difference in the eye of law.

46. Submissions Nos. 13 to 16 relate to the principles of interpretation of the Constitution about which submissions have been made in the opening argument on behalf of the Petitioners.

47. (*a*). Submissions Nos. 18 to 26 relate to the validity of the Ninety Third Constitutional Amendment inserting Article 15(5). It is reiterated both in *M. Nagaraj* v. *Union of India*[14], SCC p. 243, paras 23 & 26, pp. 245-46 paras 32 and 35; and *I.R. Coelho* v. *State of T.N.*[15], SCC pp. 108-11 paras 141, 147 and 151 Conclusion (iii) this Hon'ble Court was pleased to declare that Article 19 is part of the core values i.e. basic structure of the Constitution. Therefore, the scope of Article 19(1)(g) as interpreted in *P.A. Inamdar* v. *State of Maharashtra*[11], SCC p. 603, para 132 cannot be abridged. Article 15(5), to the extent it provides for making special provisions relating to admission to unaided private educational institutions abridges the basic structure of the Constitution and is liable to be struck down.

(*b*) The exclusion of minority educational institutions from the enabling power conferred by Article 15(5) abridges the core value contained in Article 14, which has been held to be a part of basic structure in the aforesaid decisions and consequently, the said exclusion of minority educational institutions is ultra vires the Constitution. In the context of advancement of SEBCs, the said exclusion is irrational having no nexus with the objects sought to be achieved.

36 (1973) 4 SCC 225
37 *Waman Rao* v. *Union of India*, (1981) 2 SCC 362
38 1952 SCR 89
39 (1995) 4 SCC 520
40 (1997) 11 SCC 638

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48. Submissions Nos. 27 to 44 relate to the validity of the impugned Act of 2006. There is no basis for contending that advancement of SEBCs contemplated by Articles 15(4) and (5) is not by way of reservation of seats in admissions to educational institutions of higher learning on the basis of population of SEBCs. Whenever the Constitution makers intended to provide for representation in proportion to the population of certain groups or categories of persons, they have categorically stated so vide Articles 330, 332, 243-D and 243-T. Neither Article 15(4), nor in Article 15(5) there is any mention of 'population' or 'reservation'.

49. For the reasons already stated and particularly having regard to the difference in the scope of Article 15(4) and 16(4) as highlighted in *Indra Sawhney case*[2], a fresh identification of SEBCs is warranted, independent of the lists of OBC's used for the purpose of Article 16(4).

50. In any event, in the absence of caste wise census since 1931, it is not possible to determine the percentage of SEBC population which deserves special provisions to be made under Clauses (4) and (5) of Article 15.

51. As already stated, educational backwardness can be removed within a time frame in the light of Article 45, the law declared in *Unni Krishnan, J.P. case*[1], the Sarva Siksha Abhiyan (SSA), and the recommendation of the National Knowledge Commission. It is necessary for this Hon'ble Court to specify an outer time-limit for the eradication of educational backwardness i.e. lack of education up to 10+2 level.

Reply to some aspects of the brief outlines of submissions of Shri K. Parasaran given on 10-10-2007

52. Submission No. 16 says that rights under Article 19(1)(g) can be abridged. This is not correct because Article 19 sets out the basic freedoms which are part of the core values and the basic structure of the Constitution as held by successive Constitutional Benches in *M. Nagaraj* v. *Union of India*[14], SCC p. 243 paras 23, 26 and pp. 245-46, paras 32 and 35 and *I.R. Coelho* v. *State of T.N.*[15], SCC pp. 108-111 paras 141, 147 and 151 and conclusions (*iii*).

53. (*a*) Submission No. 27 to the effect that the impugned Act is not invalid on the ground of reverse discrimination and the example given from *Devadasan case*[41] are not correct for the reason that while Article 15(5) on a correct interpretation permits special provisions relating to admission of SEBCs to educational institutions up to a certain level, depending upon the yardstick to measure the educational backwardness, and not beyond. The impugned Act in terms permits reservations in Universities and other institutions of higher learning far beyond the yardstick for measuring educational backwardness which amounts to reverse discrimination which is not permitted by the Constitution. The framers of the Constitution never contemplated making special provisions far in excess of removal of educational backwardness.

(*b*) Shri Parasaran has not addressed the question of yardstick for measuring educational backwardness.

41 *T. Devadasan* v. *Union of India*, (1964) 4 SCR 680

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54. Submission No. 32 to the effect that the principle of exclusion of creamy layer in OBCs has no application to Articles 15(4) and 15(5) as education stands on a differing footing is incorrect. There are two ways of identifying socially and educationally backward classes:

> (*i*) by laying down the criteria for determining backwardness and requiring every claimant to satisfy the same before he is admitted to a seat reserved for SEBCs, and
>
> (*ii*) identifying groups, for example, occupations which are generally engaged in by backward classes and eliminating the creamy layer from such classes of persons on individual basis.

Assuming, without admitting, that 'caste' could be the route for identifying SEBCs as in the case of BCs in Article 16(4), the principle of exclusion of creamy layer has to be applied. Otherwise, the forward segments of SEBCs will lap up all the reservations, leaving the backward sections where they are.

55. Submission No. 33 that the power to make special provisions in favour of SCs/STs/OBCs is a power coupled with duty and that Ajit Singh II which held to the contrary did not advert to the principles laid down in the *Privy Purse case*[42] which referred to Articles 366(24) and 366(25) is not correct. In the *Privy Purse case*[42] reported in *H.H. Madhav Rao Jivaji Rao Scindia Bahadur* v. *Union of India*[42] last para, the Court held that the power to specify SCs and STs under Articles 341 and 342 is coupled with the duty to specify because of the special provisions making reservation of seats in the House of the People and the State Legislative Assemblies contained in Articles 330 and 332. Unless the SCs and STs are specified, reservation of seats made under Articles 330 and 332 cannot be given effect to. In view of the mandate of Articles 330 and 332, the power to specify SCs and STs conferred on the President by Articles 341 and 342 was regarded as a power coupled with a duty to specify SCs and STs. Articles 15(4) and (5) confer enabling power without any further provision in the Constitution like Articles 330 and 332 to warrant exercise of the power as a matter of duty. The question is no longer res integra and is fully and directly covered by the following decisions:

> *C.A. Rajendran* v. *Union of India*[43], SCR at p. 733 *b-d*
>
> *Ajit Singh (II)* v. *State of Punjab*[16], SCC pp. 229-231 paras 28-31.
>
> *M. Nagaraj* v. *Union of India*[14], SCC p. 278, para 123.

Reply to the submissions of Shri Ram Jethmalani

56. Submission No. 5 that reservations for BCs is a fundamental feature of our Constitution is too broad a statement to be accepted. While Article 16(4) mentions about reservation of appointments or posts in favour of BCs which are not adequately represented in the services under the State, there is no mention of any reservation in Articles 15(4) and (5). Advancement of socially and educationally backward classes

42 *Madhav Rao Jivaji Rao Scindia Bahadur* v. *Union of India*, (1971) 1 SCC 85
43 (1968) 1 SCR 721

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of citizens can be achieved by providing free and compulsory education to the extent necessary to remove their educational backwardness.

57. Submission No. 6—certain questions raised overlook the following aspects :-

(*a*) The Constitution aims at a caste-less or caste-free society.

(*b*) Secularism being the basic feature of the Constitution, caste cannot be the basis or the starting point for identification of socially and educationally BCs of citizens.

(*c*) In the words of Dr. B.R. Ambedkar, "castes are anti-national. In the first place they bring about separation in social life. They are anti-national also because they generate jealousy and antipathy between caste and caste." [See Item 1 Constitution Assembly Debates at p. 10 of Compilation]

(*d*) According to the Judgment in *Indra Sawhney* v. *Union of India*[2], SCC p. 729 para 8. "Indeed, there may be some groups or classes in whose case caste may not be relevant to all. For example, agricultural labourers, rickshaw-pullers/drivers, street-hawkers, etc. may well qualify for being designated as Backward Classes."

58. If, one goes through the route of caste for identifying BCs instead of occupation, agricultural labourers, rickshaw-pullers/drivers, street hawkers etc who belong to higher castes get eliminated from SEBCs, only on the ground of caste. Therefore, identification of SEBCs through caste results in automatic elimination of many SEBCs engaged in hard labour or non remunerative occupations, though born in a higher caste.

59. The decision in *B. Venkataramana* v. *State of Madras*[44] declares that the ineligibility created by the communal G.O. in the case of the petitioner who is a Brahmin by making separate reservations for Muslims, Christians, non-Brahmin Hindus and Brahmins, besides reservation of seats for Harijans and Backward Hindus is repugnant to the provisions of Article 16 and is as such void. The question, whether identification of backward Hindus can be done on the basis of caste did not arise for consideration in that case. It was a case under Article 16 and not under Article 15.

60. The contention that a caste is a 'class' within the meaning of Article 15(4) is not correct. The Constitution makers deliberately used the expression "Backward classes" in Article 16(4) and refrained from using the expression "backward castes". The First Parliament which inserted Article 15(4) used the expression "any socially and educationally backward classes of citizens". And not 'castes', caste being a prohibited ground under Article 15(1).

61. Identification of SEBCs through caste tends to perpetuate caste system and prevents promotion of fraternity among the citizens assuring the dignity of the individual and the unity and integrity of the Nation.

62. In *Indra Sawhney case*[2], the Court by a majority having affirmed that identification of BCs could be done either going by the route of caste or by applying the occupation-cum-income test, as had been applied in *R. Chitralekha* v. *State of*

44 AIR 1951 SC 229 : (1951) 1 MLJ 625

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Mysore[27] did not address itself to the further question as to which of the two methods of identification would facilitate achieving the Constitutional goal of a caste-less society. This question needs a decision in the instant case. Castes being anti-national in the words of B.R. Ambedkar, identification through caste cannot promote fraternity or national integration which is one of the basic objectives of the Constitution.

63. According to the decision in *Indra Sawhney*[2] the scope of Article 15(4) is different from that of Article 16(4), and the accent in Article 16(4) is on social backwardness which is not the case with Article 15(4). *Indra Sawhney*[2] in SCC at p. 766, para 859 answer to Question. 3(*a*) mentions that "among non-Hindus, there are several occupational groups, sects and denominations, which for historical reasons, are socially backward. They too represent backward social collectivities for the purposes of Article 16(4)". 'Caste', at best, is an index of social backwardness which is more relevant for Article 16(4).

64. Reference must be made to the holding of another nine-Judge bench in *S.R. Bommai* v. *Union of India*[5] at SCC p. 233, para 304

65. As rightly mentioned by the learned Solicitor General in his written submissions at p. 26 para 3.6 "castes were structured on the basis of occupations and callings, which at one time in the remote past were hereditary, but ceased to be hereditary long ago. Therefore, identification of SEBCs on the basis of occupations and callings cum income would be rational and identification through castes will be irrational and unconstitutional. Moreover, as held in *Indra Sawhney*[2] at SCC p. 766 para 859 (answer to Question 3(*a*) among non-Hindus, there are several occupational groups, sects and denominations, which for historical reasons, are socially backward. They too represent backward social collectivities for the purposes of Article 16(4). The caste system is prevalent among the Hindus only and not among non-Hindus. Therefore identification of SEBCs should be by applying common criteria for all citizens irrespective of their religion. Applying different criteria for different religions would be unreasonable and discriminatory.

66. It is admitted that there has been no census with reference to caste after 1931. It is also clear that there has not been a periodic review of the lists of SEBCs as required by the decisions of this Hon'ble Court and Section 11 of the National Commission for Backward Classes Act, 1993.

67. From the materials placed on record by the learned Solicitor General, it is evident that the National Commission for Backward Classes instead of being an investigative body to collect relevant data for undertaking the revision of the lists of BCs has been functioning as an adjudicative body which considers claims for inclusion or for exclusion put forward before it by any interested person. This amounts to abdication of statutory duty which has the result of perpetuating backwardness due to the operation of outdated lists of BCs.

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PART I

PRELIMINARY

1.1. This submission is made in respect of the validity of the Constitution (Ninety-third Amendment) Act, 2005 (hereinafter Ninety-third Amendment) and the Central Educational Institutions (Reservations in Admissions) Act, 2006 (hereinafter Act of 2006) and the action proposed to be taken thereunder and other constitutional provisions by way of affirmative action.

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The Supreme Court, in its order in *Ashoka Kumar Thakur (9)* v. *Union of India*[1] (at SCC para 8) framed 7 sets of issues namely (*i*) the Constitution (Ninety-third) Amendment Act, 2005; (*ii*) Scope of Articles 15(4) and 15(5); (*iii*) Scope of judicial review; (*iv*) Listing of socially and educationally backward classes in terms of units of caste/communities; (*v*) Whether 27% reservation for socially and educationally backward classes/Other Backward Classes is justified; (*vi*) Socially advanced persons/sections or creamy layer of SEBC/OBC; (*vii*) Constitutionality/validity of the 2006 Act

PART II

RELEVANT ASPECTS OF AFFIRMATIVE ACTION IN THE INDIAN CONSTITUTION

(*i*) *The Affirmative Action Dispensation of the Constitution: Equality of Capacities' Building or Quotas*

(*a*) *Affirmative Action Goals and Techniques*

2.1. There can be no dispute about the importance of affirmative action as part of the social justice objectives of the Constitution.

Definition

By Affirmative Action is meant "the special provisions" that may be made by way of programmes, dispensations, schemes, relaxations, concessions and quotas to benefit the least advantaged without unreasonably undermining the just entitlements of others and the efficient developmental needs of society as a whole.

2.2. Affirmative action is a crucial component of social justice in the constitutional dispensation but must be so construed so that it does not (*a*) infringe the very principle of equality of which it is a part (*b*) unreasonably restrain or restrict other fundamental freedoms (*c*) violate the basic structure of the Constitution including secularism and judicial review and reasonableness

(*b*) *Affirmative Action in Articles 14, 15 ad 16: Equality, Political and Justice Texts*

Affirmative Action inherent in Article 14 as part of the Doctrine of Classification

2.3. The primary equality text of the constitution, Article 14 permits a reasonable classification for the purposes of social justice, so long as the nexus with the objectives is maintained.

This has been used in respect of special persons, the handicapped and special areas.

See on the doctrine of source:

- *Chitra Ghosh* v. *Union of India*[2]
- *D.N. Chanchala* v. *State of Mysore*[3] SCC at para 22
- *State of Kerala* v. *Roshana*[4]

See on the handicapped:

1 (2007) 4 SCC 397
2 (1969) 2 SCC 228
3 (1971) 2 SCC 293
4 (1979) 1 SCC 572

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- *Daya Ram Tripathi* v. *State of U.P.*[5]
- *Anil Kumar Gupta* v. *State of U.P.*[6]

See on the special areas:

- *State of U.P.* v. *Pradip Tandon*[7]

Special Affirmative Action Provisions impose further restrictions

2.4. However, the Constitution reposed the Affirmative Action Programme in various special provisions without affecting the overall super-eminence of equality in both the political and justice texts of the constitution.

It is submitted that the by providing for special provisions, the Constitution makers designed a special discipline for affirmative action in various provisions [including Articles 15(4), 15(5) and 16(4)] over and above the discipline provided by the general equality provision (Article 14).

Thus, Articles 15(4), 15(5) and 16(4), although a part of equality nevertheless have to comply with both:

(*a*) the requirements of Article 14; and

(*b*) plus the discipline imposed by Articles 15(4), (5), 16(4), (4-A) and (4-B)

Significantly, the Constitution makers took extra precautions in respect of affirmative action to provide restraints and restrictions in addition to those inherent in the doctrine of classification.

It is in this sense that the *Indra Sawhney*[8] decision specifically indicates that Article 16(4) is exhaustive of the provisions for reservations (at p. 694, para 743)

Political and Justice Texts

2.5. The scheme of the Constitution is to provide special provisions both in the political and the justice texts of the constitution. The political texts deal with democratic representation and expression and the justice texts are concerned with general social amelioration and opportunities.

(*i*) Political Texts

The political texts provide for representation in Parliament, legislative assemblies and Panchayats. Such representation is:

(*i*) mandatory for the SCs and STs in all three political fora (Parliament, legislative assemblies and Panchayats)

Articles 330 & 332

(*ii*) mandatory for women in Panchayats

Articles 243-D & 243-T

(*iii*) discretion for OBCs in Panchayats only

Articles 243 D & 243-T

(*iv*) mandatory for Anglo-Indians in Parliament and the Legislative Assemblies by nomination

Articles 331 & 333

5 1986 Supp SCC 497

6 (1995) 5 SCC 173

7 (1975) 1 SCC 267

8 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217

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(*ii*) Justice Texts

The justice texts of the Constitution are discretionary but should be pursued wherever possible in the light of the directive principles (Article 46) and various specific provisions of the constitution

These include:

(*a*) general affirmative action for women and children [Article 15(3)]

(*b*) general affirmative action (including quotas) for SC/ST and SEBCs in various social, economic and educational fields [Article 15(4)]

(*c*) specific provisions by way of reservations of appointments or posts in favour of all SC/STs and OBCs to redress inadequate representation in the civil services and public posts [Article 16(4)]

(*d*) special commissions to oversee the amelioration of SC/STs and OBCs [Articles 338, 338-A & 340]

Note: (*i*) Before 1992, there was an SC/ST Commissioner

(*ii*) In 1992, the Constitution (Sixty-Fifth Amendment) Act, 1990 introduced the National Commission for Scheduled Castes and Scheduled Tribes

(*iii*) In 2004, the Constitution (Eighty-ninth Amendment) Act, 2003 separated the National Commission into two Commissions for the SCs and the STs

(*e*) Statutory commissions have been created for the women [National Commission for Women Act, 1990], OBCs [National Commission for Backward Classes Act, 1993], Safai Karamcharis [National Commission for Safai Karamcharis Act, 1993], minorities [National Commission for Minorities Act, 1992]

2.6. It will therefore become clear that the constitutional dispensation has to be read as a whole and does not permit the hijacking of the justice texts for political vote-bank purposes.

Super-Classification in favour of SC/STs

2.7. It should also be noted that in introducing and amending Article 16(4-A), reservations in matters of promotion with consequential seniority by the 77th Amendment, 1995 and the 85th Amendment, 2001, was limited to the SCs and STs.

2.8. In any event, on an appreciation of the Constitution and its history, it must be accepted that the Constitution contains a super-classification in favour of SCs and STs, as opposed to any other class or classes earmarked for affirmative action.

See Krishna Iyer, J. in *State of Kerala* v. *N.M. Thomas*[9], SCC at pp. 364-65, para 128.

Quotas as Shortcuts to appease Vote-Banks

2.9. Notice needs to be taken of various aspects of the constitutional dispensation:

(*i*) affirmative action in Articles 15(4) and (5) permits 'special provisions' to be made. There is no reference anywhere to quotas. No doubt, *Indra Sawhney*

9 (1976) 2 SCC 310

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case[8], (para 846) contemplated quotas as falling within the permissible limits of Article 15(4). However, this does not make quotas mandatory.

(*ii*) Articles 16(4), (4-A) and (4-B) speak in terms of 'reservation and vacancies in terms of posts and offices'.

However, quotas may not be mandatory since the State is allowed to make 'any provisions' for reservations which need not but may include quotas.

It should be noted that affirmative action can also include concessions, relaxations, training, educational support, stipends, financial support and special educational measures.

Comprehensive Approach

2.10. It is therefore respectfully submitted that Indian governments and political parties have preferred to pursue quotas for their vote banks rather than create comprehensive affirmative action schemes for self-amelioration. The proper approach would be:

(*a*) to create an equality of capacities (as suggested by social economists like Amartya Sen) by education and comprehensive support

(*b*) use quotas only as a last resort as a system of preference amongst equals; and

(*c*) allow concessions and relaxations to an extent that would not disturb proficiency

It is clear that the rush to a quota-based affirmative action is politically motivated for the purposes of vote-banks alone and all other schemes of affirmative action are consequently neglected.

Equality of Capacities

2.11. Apart from arbitrariness, non-discrimination and reasonableness, Amartya Sen's views have altered our understanding of identifying socio-economic goals and how to achieve them. The purpose of socio-economic policy is to enhance equality of capacity and not just equality of outcomes

See Amartya Sen, *Equality of What?* Tanner Lecture on Human Values (22-5-1979: Stanford University) and other writings

2.12. The quota approach concentrates on equality of outcomes but wholly neglects the equality of capacities. Thus, quotas create unqualified people who win the lottery of quotas by patronage without achieving the enhancement of capacities.

2.13. This approach is unsound and disturbs the equality of other meritorious people without any advantage to the group.

(ii) The Meaning of 'Backward Classes' Remains Unsettled Inviting Quota Politics

Basic Criteria

2.14. The purpose of affirmative action is to provide social amelioration, a sharing of the State power and political empowerment to 'classes' which are relatively homogenous and share similar characteristics in respect of the following:

(*a*) The atrocities inflicted on the class in question

(*b*) The discriminatory patterns followed against the class

(*c*) Disadvantage suffered by the class in respect of income and level of advancement judged by clear criteria

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(*d*) Disempowerment in respect of the power of the State and political non-representation

It should be borne in mind that India has a large number of people who live below the poverty line; and, therefore, the system of exclusion must be clear and just so that the chances of similarly placed poor and salaried sectors are not adversely affected.

2.15. It is self-evident that there is no settled criteria in respect of the definition of Backward classes—and, in particular Other Backward Classes (OBCs).

The Constitution identifies SCs, STs and social and educationally backward classes (SEBCs) in Articles 15(4), (5) and 340; and backward and any backward classes (BCs) in Article 16(4). The term OBC is to be found nowhere in the Constitution but has been invented by various governments and the courts to signify the Other Backward Classes (OBCs), who in addition to the SC and ST. Inevitably, there is a confusion as between the SEBCs and the OBCs who are not interchangeable. The term OBC as inducted into Article 15 is obviously wider than the term SEBC in Article 15.

2.16. In the *Indra Sawhney case*[8], it was pointed out that:

(*a*) as far as the range of affirmative action is concerned, Article 15(4) is wider than Article 16(4) (at SCC p. 756, para 846)

(*b*) as far as the test of backwardness is concerned, Article 16(4) is wider than Article 15(4) (at SCC p. 727, paras 796-97)

It is therefore a constitutional requirement that the identification and range of affirmative action must be addressed with considerable rigour and strict scrutiny on behalf of the state since the rights of the excluded (namely those not recognised) would be directly affected.

Total Lack of Criteria

2.17. Surprisingly, for the last almost to centuries, there is a remarkable ambiguity about the criteria that is to be adopted to define the BCs, OBCs or SEBCs at their relevant points in time.

2.18. Given below is a chart indicating the continuing ambiguities in the definition of the BCs and specially the OBCs.

Period	*Criteria adopted*	*Source*
I. PRE-CONSTITUTION—1880 to 1950		
1880	Use of the term 'backward classes' to describe groups, which were illiterate or indigent, being entitled to allowances for study in elementary schools	Marc Galanter, Competing Equalities, [London: University of California Press: 1984], p. 154
05/11/1895	Fort St. George Gazette No. 40 provided for grants in aid to schools for backward classes consisting mostly of untouchables, in the Madras Presidency	Ibid, p. 154
1917	The Maharaja of Kolhapur expressed interest to Montague Chelmsford in uplifting the backward classes and especially the untouchables	Ibid, p. 154

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1918	Appointment of Committee by the Mysore Govt. to enquire into means of encouraging members of the backward classes in the public services	Ibid, p. 156
1919	Terms of reference of the Southborough Committee to advise on measures to secure representation of minorities and backward classes	Ibid, p. 154-6
1920	Joint Select Committee of the British Parliament reviewing the Southborough Committee Report and emphasising the need for education advancement of the depressed and backward classes	Ibid, p. 156
1921	Institution of preferential recruitment of backward communities who were defined as 'all communities other than Brahmins, who are not adequately represented in the public services'	Ibid, p. 156
1925	Ministry Report on the Reforms Enquiry Commission referring to backward classes a synonym for 'depressed classes' (untouchables) in contradistinction to 'non-Brahmins'	Ibid, p. 156
1928	Definition by the Hartog Committee as 'castes or classes which are educationally backward and including depressed classes, aboriginals, hill tribes and criminal tribes'	Indian Statutory Commission (Hartog Committee) 1929
1929	Distinction drawn by the Indian Central Committee between backward classes including 'aboriginals and criminal tribes' and others including 'the less advanced of the inhabitants of British India'	Indian Central Committee (1929)
1930	Recommendation of the Starte Committee that depressed classes be used to describe untouchables while the term backward classes be used to describe the wider group of disadvantaged peoples including aboriginals, hill tribes and others	Starte Committee, Bombay (1930)
1930	The Simon commission refers only to the term 'intermediate classes' and the non-Brahmin movement without any reference to backward or depressed classes	Indian Statutory Commission (1930)
1932	Hearings of the Indian Franchise committee where divergent views were expressed on the meaning of the term, some referring to backward classes as vagrant tribes, while others referred to them as untouchables and sudras	Indian Franchise Committee (1932)

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a	1932	Memorandum submitted by the United Provinces League suggesting that Hindu backward as a more suitable nomenclature to include socially, educationally and economically backward people	Indian Franchise Committee (1932)
b	1936	Use of the term backward classes in Madras Presidency to denote the 'strata above the untouchables'	Marc Galanter, (1984), p. 158
	July 1936	Reports in the Times of India on the inflation of the 'backward classes' in the Madras Presidency by the inclusion of several non-Brahmin communities	Ibid, p. 158
c	1937	Adoption by Travancore of the term 'backward communities' to include all educationally and economically backward communities	Ibid, p. 158
d	1944	List provided by the Madras Provincial Backward Classes League stating that the backward classes comprised more than 25 million people (50% of the population of the Presidency)	G.O. 190 Public Department (Services) (20th Jan 1944)
	Nov 1947	Separate reservations provided in Madras in the services for 'Backward Hindus' for about 145 communities	G.O. 3437 Public Department (Services) (21st Nov 1947)
	CONSTITUENT ASSEMBLY DEBATES		
e		Delegates from the North assumed that 'backward classes' was a vague term and was hence really a synonym for Scheduled Castes	Pandit Hirday Nath Kunzru (U.P.) at VII CAD 680; Ari Bahadur Gurung (WB) at CAD Vol. VII, p. 685
f		Expression of concern by other delegates that Schedules Castes would be a better term to use lest 'people of other castes claim to be backward'	H.J. Khandekar (CP & Berar) at CAD Vol. VII, p. 692
		Illustrations given from Mysore where Backward classes referred to 'all but Brahmins'	T. Chhaniah (Mysore) at CAD Vol. VII, pp. 689-90
g		Illustrations given from Madras where Backward classes referred to 'a stratum of non-untouchable Hindu castes'	Mhd. Ismail Sahib (Madras) at CAD Vol. VII, p. 692 differing with this view
h		Illustrations given from Bombay where Backward classes included not only SC/STs but others who were 'economically, educationally and socially backward'	Dr. K.M. Munshi at CAD Vol. VII, p. 697

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	Explanation rendered by delegates from Bihar that backward classes should be construed as 'the section between the highest castes and the Scheduled Castes'	Chandrika Ram (Bihar) at CAD Vol. VII, p. 699
	Another explanation that "it signifies people—touchable or untouchable, belonging to this community or that, who are so backward that special protection is required in the services"	Dr. K.M. Munshi at CAD Vol. VII, p. 697
	Opinions expressed that classes did not necessarily mean castes	T.T. Krishnamachari at CAD Vol. VII, p. 687
	Opinion by Dr. Ambedkar that "a backward community is a community that is backward in the opinion of the Government"	Dr. B.R. Ambedkar at CAD Vol. VII, p. 702
II. POST-CONSTITUTION—1950 to 1980		
1947	Provisions made by Bihar Govt for OBCs in post-matriculation studies on the basis of Ministry of Education list	Interview with Deva Charan Singh, All India Backward Classes Federation, (1966)
1948	Provisions made by U.P. for OBCs for 56 castes (65% of the population)	Interview with S.D. Singh Chaurasia, (1966)
Mar 1948	Requests to P.M. Nehru and Maulana Azad to set apart scholarships for OBCs as was done for SC/STs	Galanter (1984), p. 162
1948-49	Addition of OBCs to the list for award of scholarships and directions issued to State governments to prepare lists of these castes	Ibid, p. 162
1948-49	State lists of OBCs compiled • Mysore list comprising of Muslims, Christians, Jains and all non-Brahmin groups • Madras & Bombay lists did not include higher non-Brahmin castes	Ibid, p. 162
AMENDMENT TO ARTICLE 15 (1951)		
	View expressed by some Members that the listing of backward classes by the Commission and subsequent presidential specification would be determinative	Ibid, pp. 165-6
	View expressed by other members that the determination ought to be by the State Governments	Ibid, p. 166
	Observation by Dr. Ambedkar that "what are called backward classes are nothing else but a	Ibid, p. 166

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		collection of certain castes"	
a		View expressed by certain others that he backward classes should be specifically confined to 'economically backward classes' but this view was rejected	Ibid, pp. 166-67
	FIRST BACKWARD CLASSES COMMISSION		
b	1953	Establishment of the Backward Classes Commission to "determine the criteria to be adopted in considering whether any sections of people other than SC/STs should be treated as socially and educationally backward classes and in accordance with such criteria to prepare a list if such classes"	Ibid, p. 167
c		Expectations expressed in parliamentary debates that the Commission was expected to "deal with the undesirable consequences of the evolution of Hindu society and the devising of measures to eliminate inequalities specifically associated with caste"	Ibid, p. 169
d		Report of the Commission stating that 'it was difficult to avoid caste in the present prevailing conditions' and that its terms of reference 'not only correctly but inevitably relate to social hierarchy based on caste'	Report of the First Backward Classes Commission, (1955), pp. 41-42
e		Classification of the communities done by the Commission on the basis of 'the social position which a community occupied in the caste hierarchy, the percentage of literacy and its general educational advancement; its representation in Government services and the industrial sphere; economic backwardness; recent trends in advancement as a result of measures'	Report of the First Backward Classes Commission, (1955), p. 47
f		View expressed by the Commission on the lack of data: "in the absence of reliable facts and figures, the only course pen to us was to rely on the statistics available from the various Governments and the previous census reports, and to go by the general impression of Government officers, leaders of public opinion and social workers"	Ibid, p. 8
g		View of the Chairman of the Commission that "it would have been better if we could determine backwardness on principles other than caste"	Ibid, p. xiv
h	03/09/ 1956	Report of the Backward Classes Commission placed before Parliament	

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	View expressed that "further investigations will have to be undertaken so that the deficiencies that have been noticed in the finings of the Commission are made good" since "the Commission's standards other than caste were vague"	Ministry of Home Affairs (1956)
	Directions issued to Registrar General to conduct ad hoc surveys to determine suitable criteria	Galanter, (1984), p. 173
RELUCTANCE OF CENTRAL GOVERNMENT TO IDENTIFY BACKWARD CLASSES		
1957	Directions issued to State Governments to extend benefits to OBCs on the basis of the Ministry of Education lists pending finalisation of the list of OBCs	Ibid, p. 174
1961	Report of Study Group noting that weaker sections must be identified as the economically backward classes but 'caste inequality is a contributing cause of economic backwardness which is to be addressed by remedial measures'	Study Group on the Welfare of the Weaker Sections of the Village Community (1961)
May 1961	Decision of the Cabinet that no national list of OBCs ought to be drawn up and states should prepare lists on the basis of the application of 'economic criteria rather than to go by caste'	Ministry of Home Affairs (1962)
May 1961	Decision of Conference of Chief Ministers agreeing that 'economic backwardness rather than community or caste was a more appropriate criteria for providing measures for individuals'	Galanter, (1984), p. 176
August 1961	Decision of Home Ministry to not list Backward Classes on the grounds that: • if the bulk of the population were to be regarded as backward, no useful purpose would be served by such determination • caste criterion was objectionable	Letter of Minister of Home Affairs (14th August, 1961)
1961 further	Letter from Nehru to Chief Ministers dated 27th June, 1961	See Volume 5 handed over by Mr Salve, at p. 27
1990	See also speech by Mr Rajiv Gandhi in the Lok Sabha dated 6th September, 1990	See Volume 5 handed over by Mr Salve, at p. 28
1980	The Mandal Commission Report which adopted a caste-based criteria with skeletal social and educational elements	ADD

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1990	OM No. 36012/31/90-Estt. (SCT) dated 13th August, 1990, of the Union Government extends quotas to OBCs on the basis of State lists and not the Mandal Commission criteria	See *Indra Sawhney*[8], (1992) at paras 33, 675
III. STATE PATTERNS IN IDENTIFYING BACKWARDNESS		
	Varied criteria used by different states in India: • — Community (caste) criteria and income • Bihar—Community (caste) criteria and income • Gujarat—Community (caste) criteria and income • J&K—Occupation, community (caste) and residence • Karnataka—Community (caste) criteria and income • Kerala—Community (caste) criteria and income • Maharashtra—Community (caste) criteria • Punjab—Community (caste) criteria • Tamil Nadu—Community (caste) criteria • U.P.—Community (caste) criteria	Galanter, (1984), pp. 179-187

2.19. The various reports of the State Commissions also indicate a diversity of patterns veering towards caste and economic criteria. For example, the Mandal Commission Report indicates:

(*a*) From 1961, Delhi and Orissa abandoned caste criterion (at Vol. I at para 2.64)

(*b*) From 1980, West Bengal's Committee (30th August 1990), indicated that poverty and low levels of living standards rather than caste should, in its opinion, be the most important criteria for identifying backwardness. Such criteria was wholly accepted by the Government (See Vol. I at para 2.66)

(*c*) In 1964, the Patna High Court (*Nand Kishore Sharma*[10]) struck down caste based criteria (Vol. I at para 2.20)

(*d*) However, Jammu & Kashmir relied on occupational, community and backward areas as the criteria (Vol. I at para 2.29)

(*e*) In Kerala, communal reservation regimes prevailed (Vol. I at para 2.44)

(*f*) States made reservations without a formal enquiry.

[See generally the Mandal Commission Report, (1980), Vol. I, Chapter II at pp. 10-17]

2.20. Similarly, the practice of the courts has been to condone various criteria based on occupation and high school standards.

10 *Nand Kishore Sharma* v. *State of Bihar*, AIR 1965 Pat 372

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See for example:

M.R. Balaji v. *State of Mysore*[11], SCR at p. 463 (average of student population in last three high school classes)

R. Chitralekha v. *State of Mysore*[12], SCR at pp. 386-88 (occupation cum income criteria)

P. Rajendran v. *State of Madras*[13], (caste)

A. Peeriakaruppan v. *State of T.N.*[14], (caste)

State of A.P. v. *U.S.V. Balram*[15], (SCC at para 71 (average student population in standards 10 and 11)

Janaki Prasad Parimoo v. *State of J&K*[16], (occupation, community (artisans) and residence)

Pradip Tandon[7], SCC (region)

K.S. Jayasree v. *State of Kerala*[17], SCC at pp. 734-35 (education levels up to matriculation or standard 10)

However, the court rejected criteria based solely on caste in:

P. Sagar v. *State of A.P.*[18]

Indra Sawhney Case

2.21. At the time of the *Indra Sawhney*[8] decision, (1992), there seemed to be a profound lack of criteria as consequence of which, the judgment in *Indra Sawhney*[8], laid down the requirement that:

(*a*) there must be a clear criteria on a rational basis

(*b*) the criteria must be identified by some commission

(*c*) there must be periodic revision of the criteria in relation to OBCs in consultation with the commission (See SCC pp. 756-57, para 847)

2.22. In the *Indra Sawhney*[8] decision, See the mandate of the Court at SCC pp. 771-72, para 861. It is relevant to mention that the *Indra Sawhney*[8] decision did not either accept or condone the Mandal Commission criteria. (See *Indra Sawhney*[8], (1992) at paras 851, 853, 856, 857). It is respectfully submitted that it was not part of the Indra Sawhney decision to indicate that the criteria was irrelevant as long as a commission was appointed. Unfortunately, too many State governments and the Union government feel that as long as a commission is appointed, that is enough. It is precisely this that has led to the proliferation of castes and classes and created political patronage.

National Commission for Backward Classes Act of 1993

2.23. Following the *Indra Sawhney*[8] decision, (see Preamble to the Act), the National Backward Classes Commission (NBCC) was created. It is clear from the

11 1963 Supp (1) SCR 439
12 (1964) 6 SCR 368
13 (1968) 2 SCR 786
14 (1971) 1 SCC 38
15 1972) 1 SCC 660
16 (1973) 1 SCC 420
17 (1976) 3 SCC 730
18 (1968) 3 SCR 595

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definition of "lists" under Section 2(*c*) of the Act of 1993 that the commission was appointed only for quotas for Article 16(4) and not Article 15(4) because the criteria used is one of "adequate representation" which is taken from Article 16(4) directly.

Post-1993

2.24. After 1993, the NBCC simply adopted various lists from the states and added to the lists randomly. The Annual Report of the National Commission for Backward Classes (2003-2004) shows that:

(*a*) On 10-9-1993, the NBCC adopted the lists of fourteen (14) states namely Andhra Pradesh, Assam, Bihar, Goa, Gujarat, Haryana, Himachal Pradesh, Karnataka, Kerala, Madhya Pradesh, Maharashtra, Punjab, Tamil Nadu and Uttar Pradesh.

These were based on common lists drawn from the Mandal Commission Report and existing state lists.

(*b*) On 19-10-1994, the NBCC reports that the Government of India prepared a common list in respect of 4 states and 3 Union Territories namely Orissa, Rajasthan, Tripura, West Bengal, Dadra and Nagar Haveli, Daman & Diu and Pondicherry.

These lists were prepared without any survey. Some of the lists namely those of Pondicherry, Daman & Diu simply copied the list from the Mandal Commission Report.

(*c*) Subsequently, lists were prepared for 5 other states and Union Territories.

These lists were not prepared on the basis of any survey.

Absence of Criteria

2.25. The fact that no clear criteria were available is self-evident from the following the Mandal Commission Report.

See The Second Backward Classes Commission Report (Mandal), (1980), Vol. I, Chapter IX especially at paras 9.6, 9.30, 9.47 and Chapter XII at paras 12.18.

2.26. Significantly, the 186th Report of the Parliamentary Standing Committee to which the Central Educational Institutions (Reservations in Admissions) Act, 2006 was referred stated:

"…The Committee was informed that the Central List of Backward Classes at present contained a total of 2303 castes/communities. Several additions were made in the first Central List prepared in 1993. However, there had hardly been any exclusion so far from this list. It was emphasized that the process of inclusion of castes/communities could not be continued indefinitely; there was a need for putting a cap on the inclusion or further additions. Task of review of the Lists of Backward Classes needed to be taken up by the Government in consultation with the Backward Classes Commission as envisaged under Section 11 of the National Commission for Backward Classes Act, 1993 governing it…"

2.27. Historically, the category of OBCs and SEBCs has always been vague (*a*) in colonial times when this category was born; (*b*) in various applications in independent India; (*c*) in various applications by various commissions; and (*d*) in the acceptance of various applications by the Supreme Court and High Courts. That is

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the reason why the Court in *Indra Sawhney*[8], has mandated elucidation of both the method and criteria of identifying OBCs and SEBCs.

Summary

2.28. To summarise:

(*a*) Till 1950 or so, there was an emphasis on communities, by the British regime being a law and order oriented regime, which generally permitted claims for recognition on the basis of community

(*b*) Such community based criteria was prohibited by *Champakam Dorairajan*[19]

(*c*) From 1950 to the 1970s, there was a quest for a criteria but no clear criteria emerged

(*d*) From the 1980s, the emphasis shifted to caste which became a near-exclusive criterion

(*e*) In 1992, the Supreme Court in the *Indra Sawhney case*[8], laid down a mechanism and criteria which excluded caste as a criteria

(*f*) In 1992, the identification was overbroad, based on caste and could not operate for both Articles 15(4) and 16(4)

(*g*) The Act of 1993 is only for the purposes of Article 16(4)

(*h*) Since 1993, no criteria has been laid down under the Act of 1993, and

(*i*) Hence, no criteria exists as on date

Clearly, various governments think that the remedy lies in appointing a commission to legitimate caste or communal based patronage.

(iii) The OBC and SEBC Category is not a Constitutional Dustbin Designed for Political Patronage: Need for Criteria and Procedure

2.29. Judicial notice has to be taken of the fact that recognising SEBCs and OBCs has become an arena of political patronage to excite vote-banks. This is self-evident from the politics of various states which depend very greatly on a favour-for-favour patronage whereby various castes are recognised and return the favour by voting in favour of the recognising political party.

2.30. There is no consistency whatsoever in the determination of castes

2.31. The correct approach must be to:

(*a*) Take into account the factors relating to atrocity, discrimination, disadvantage and disempowerment as criteria

(*b*) Elaborate the social and educationally backward criteria

(*c*) Interpose aspects of income, land holdings and occupation

(*d*) Impose a rigorous creamy layer criteria, and

(*e*) Appoint an independent commission to properly investigate criteria for OBCs as well as SEBCs.

(iv) Reverse Discrimination: Quotas are not a Punishment for the Non-Reserved Category

2.32. Quotas should not be a punishment on others. It becomes reverse discrimination if the effect of affirmative action is that it becomes punitive.

- See Thommen, J. in *Indra Sawhney*[8], at SCC p. 460, para 315:

19 *State of Madras* v. *Champakam Dorairajan*, 1951 SCR 525

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2.33. Reverse discrimination arises when the criteria for identification or extent of affirmative action is structured in such a manner that the non-beneficiaries who are better qualified are deprived of their entitlement in ways that are unfair.

2.34. It follows from this that Article 15 cannot be exalted to a provision that it creates reverse discrimination.

2.35. See per Krishna Iyer, J. in *Akhil Bharatiya*[20] at SCC p. 286, para 73.

2.36. Again, Krishna Iyer, J. put it most poignantly when in the *Akhil Bharatiya case*[20] (1981), he made the statement at SCC p. 301, para 102.

2.37. *Ajit Singh (II)*[21], (1999) summarised the implications of this at SCC p. 233, para 38.

2.38. If the structural balance of equality in the light of efficiency is disturbed and individual rights encroached upon by excessive support for group expectations, this would amount to reverse discrimination.

Argument of Historic Discrimination should not be Entertained

2.39. In our view, in determining the beneficiaries of affirmative action, historic discrimination is not by itself a factor. The correct approach is to look at the continuing wrong, not past discrimination which was inflicted by some other generation for which the present generation cannot be forced to pay the price.

2.40. In America which has suffered intolerable racism which continues to exist in extreme forms, the criteria of punishing present generations for the wrongs of their forefathers has been rightly discarded. No doubt, past intolerances are relevant to the extent to which they perpetrate present conduct. Beyond that, it is the present that must be examined.

See:

- *University of California Regents* v. *Bakke*[22]
- *Gratz* v. *Bollinger*[23]
- *Grutter* v. *Bollinger*[24]

2.41. In our present context, this is all the more important. Since the Mandal Commission used the demographic statistics of the Census of 1931, vast changes have taken place.

In 1931, the rural-urban divide was 10:90

At present, the rural-urban divide is 60:40

We are therefore concerned with the present as reflected by the past and not to provide equities for historical discrimination except to the extent which it continues; and, to the extent to which it continues.

(v) Principles of Exclusion and Inclusion are anti-poor, anti-salaried sector and anti-lower income families and groups

2.42. The principles of exclusion and inclusion in identifying beneficiaries will not just affect the well-off but also

20 *Akhil Bharatiya Soshit Karamchari Sangh (Rly.)* v. *Union of India*, (1981) 1 SCC 246
21 *Ajit Singh* v. *State of Punjab*, (1999) 7 SCC 209
22 (1978) 57 L Ed 2d 750
23 (2003) 156 L Ed 2d 257
24 (2003) 156 L Ed 2d 304

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(*i*) the poor who are not SC/ST & OBC

(*ii*) the salaried sector who are excluded from reservations and who do not have enough income to find alternative educational opportunities

(*iii*) those whose incomes in the non-salaried sector do not contain sufficient financial surpluses to find alternative means of education, and

(*iv*) the well-off for whom alternative fora of education are prohibitive

All this is not to suggest that SC/STs and OBC have alternative fora of education. Much rather, it is to emphasise that a situation should not arise whereby *merit* and *eligible* candidates cannot access education in India because they are (*a*) *excluded* by faulty criteria and (*b*) *prevented* excess quotas from getting education at all. If both the public and private sector in education are subjected to high level reservations, the effect on the 'excluded' sector is likely to be invidious and unreasonable. *This is why principles of exclusion and inclusion have to be rigorous in their design and implementation.*

2.43. This is borne out by data. It is quite clear from the Arjun Sengupta Report on 'Conditions of Work and Promotion of Livelihood in the Unorganized Sector (July 2007)' that there are large sections of the population who are not SC/ST or OBC but who are equally if not more vulnerable.

An overall breakdown of the statistics suggests that the extremely poor, poor, marginally poor and vulnerable sections of the population are increasing both in terms of quantum as well as in terms of percentage from 1993 to 2005

		In Million		
Sl. No.	*Expenditure Class*	*1993-1994*	*1999-2000*	*2004-2005*
1.	Extremely Poor (up to 0.75 PL*)	103	87	70
2.	Poor (0.75 PL to PL)	172	174	167
3.	Marginally Poor (PL to 1.25 PL)	168	200	207
4.	Vulnerable (1.25 PL to 2 PL)	290	349	392
5.	Middle Income (2 PL to 4 PL)	139	167	210
6.	High Income (> 4 PL)	24	26	44
7.	Extremely Poor and Poor (1+2)	274	262	237
8.	Marginal and Vulnerable (3+4)	458	549	599
9.	Poor and Vulnerable (7+8)	732	811	836
10.	Middle and High Income (5+6)	162	193	253
11.	Total	894	1004	1090
		Percentage Share and Average Consumer expenditure per capita per day		
Sl. No.	Expenditure Class	1993-1994	1999-2000	2004-2005
1.	Extremely Poor (up to 0.75 PL)	11.5	8.7	6.4 (9)
2.	Poor (0.75 PL to PL)	19.2	17.3	15.4 (12)

* PL refers to the Poverty Line.

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3.	Marginally Poor (PL to 1.25 PL)	18.8	19.9	19.0 (15)
4.	Vulnerable (1.25 PL to 2 PL)	32.4	34.8	36.0 (20)
5.	Middle Income (2 PL to 4 PL)	15.5	16.7	19.3 (37)
6.	High Income (> 4 PL)	2.7	2.6	4.0 (93)
7.	Extremely Poor and Poor (1+2)	30.7	26.1	21.8 (11)
8.	Marginal and Vulnerable (3+4)	51.2	54.7	55.0 (18)
9.	Poor and Vulnerable (7+8)	81.8	80.7	76.7 (16)
10.	Middle and High Income (5+6)	18.2	19.3	23.3 (46)
11.	Total	100.0	100.0	100.0 (23)

Note: The terms extremely poor, poor, marginally poor and vulnerable arte defined in terms of the poverty line based on food security.

2.44. More significantly, when vulnerability is represented by taking into account the SC/ST, OBCs, Muslims and others, a startling result emerges to suggest that the system of inclusions and exclusions inherent in the criteria for identifying SC/ST and OBCs results in a huge number and percentage of people who are excluded who also fall within the categories of the extremely, poor, poor, marginally poor and vulnerable.

		Social Categories (% share in own total)				*Percentage of Unorganised Workers*	*Education*	
Sl. No.	*Economic Status*	*SC/STs*	*All OBCs except Muslims*	*All Muslims except SC/STs*	*Others*		*Illiterates*	*Primary and below primary*
1.	Extremely Poor (up to 0.75 PL)	10.9	5.1	8.2	2.1	5.8	8.1	5.0
2.	Poor (0.75 PL to PL)	21.5	15.1	19.2	6.4	15	19.0	14.2
3.	Marginally Poor (PL to 1.25 PL)	22.4	20.4	22.3	11.1	19.6	22.2	19.4
4.	Vulnerable (1.25 PL to 2 PL)	33	39.2	34.8	35.2	38.4	36.9	40.0
5.	Middle Income (2 PL to 4 PL)	11.1	17.8	13.3	34.2	18.7	12.8	18.9
6.	High Income (> 4 PL)	1	2.4	2.2	11	2.7	1.0	2.5
7.	Extremely Poor and Poor (1+2)	32.4	20.3	27.4	8.5	20.8	27.1	19.2
8.	Marginal and Vulnerable (3+4)	55.4	59.6	57.1	46.3	57.9	59.1	59.4
9.	Poor and Vulnerable (7+8)	87.8	79.9	84.5	54.8	78.7	86.2	78.6
10.	Middle and High Income (5+6)	12.2	20.1	15.5	45.2	21.3	13.8	21.4

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11.	Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0
12.	Total (in Millions)	302	391	138	258	423	270	164

2.45. If we examine the relative vulnerability of SC/ST, OBCs and other in terms of land holdings, a similar result inheres.

Social Group	*Sub-Marginal* (<0.4 ha)	*Marginal* (0.4–1 ha)	*Small* (1–2 ha)	*Medium* (2–4 ha)	*Large* (> 4 ha)	*Total*
STs	24.8	37.4	19.7	12.1	6.0	100.0
SCs	56.4	26.5	9.9	4.8	2.4	100.0
OBCs	35.2	32.3	16.9	9.56	6.0	100.0
Others	29.3	29.2	19.6	12.9	9.1	100.0
Total	35.9	31.1	16.8	10.0	6.2	100.0

2.46. Another test relates to indebtedness which once again affirms that the indebtedness of persons other than SC/STs and OBCs is equally high.

Social Group	*Formal*	*Informal*	*Both*	*Total*
STs	16.6	16.8	2.9	36.3
SCs	17.1	28.3	4.7	50.2
OBCs	19.8	25.6	6.0	51.4
Others	25.1	18.6	5.7	49.4
Total	20.4	23.0	5.3	48.7

2.47. It is also important to stress that where an all-India criteria is used to identify OBCs, incongruous results inhere—in that the OBCs in the rural areas in the best placed states (Kerala, Karnataka, Maharashtra and Haryana) are better off than the 'forward' sections in the worst placed states (Bihar, U.P., Madhya Pradesh and Assam).

The statistics are as follows:

Household Consumption (monthly per capita expenditure) State wise	*STs*	*SCs*	*OBCs*	*Others*	*All (Rural)*
WORST-OFF STATES					
Bihar	337	329	385	458	384
U.P.	425	399	442	563	466
Madhya Pradesh	325	375	418	516	401
Assam	437	414	436	422	426
BETTER-OFF STATES					
Kerala	674	597	724	871	766
Karnataka	404	419	507	560	500
Maharashtra	384	429	490	570	497
Haryana	508	543	641	834	714

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Literacy Rates State wise	*Percentages*
WORST-OFF STATES	
Bihar	47.5
U.P.	57.4
Madhya Pradesh	64.1
Assam	64.3
BETTER-OFF STATES	
Kerala	90.9
Karnataka	67.0
Maharashtra	77.3
Haryana	68.6

Source: NSSO 55th Round, Differences in Level of consumption among Socio-Economic Groups 1999-2000, July 1999-June 2000

2.48. Needless to add, the poverty ratio of the general category persons in the worst-off states is higher than that of the OBCs in the better off states.

The poverty ratio of the general category persons in the worst-off states are as follows: Bihar (26.5), U.P. (17.7), Madhya Pradesh, (12.2) and Assam (40.0).

The poverty ratio of the OBCs in the best-off states are as follows: Kerala (10.8), Karnataka (16.1), Maharashtra, (22.2) and Haryana (11.9).

2.49. It will thus be clear that the exclusionary/inclusionary policies eventually work out to be anti-poor in addition to rendering the salaried and middle-income groups vulnerable when quota systems are introduced and relative opportunities are correspondingly decreased.

(vi) Creamy Layer

2.50. Although it is suggested that the concept of creamy layer is of recent origin, this is not entirely correct. Past reports determining SEBCs and OBCs have been solicitous to point this out.

See:

- Report of the Backward Classes Commission, Tamil Nadu (1974) at Vol. I, p. 100, para 206:

"…We think, it is time that the Government recognises the inequity that is being perpetrated in this system. The sons of a senior official, or of a doctor, engineer, accountant, lawyer or anybody similarly placed in a good profession, and sons of landlords and business executives should have reason to complain of educational (*sic*) handicaps. While scholarships are intended to overcome economic handicap, reservation in appointments is primarily intended to overcome social and educational (*sic*) handicaps. If it is recognised that in every caste there is a class which has overcome educational (*sic*) and social handicaps, that section should be regarded as forward section, though the caste may be included in the list of Backward Classes or may hold a ritually lower social status…."

- Report of the Karnataka Second Backward Classes Commission, (1986) at Vol. I, p. 220, para 9.69:

"…This has been done mainly, keeping in view the fact that even castes/communities identified as backward classes and recommended to

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get the benefit under these provisions, have an affluent section, which might take advantage of reservation available under these categories and walk away with the major share of the cake…."

- Report of the Second Backward Classes Commission, (Gujarat) (CV Rane Commission), (1983) at Vol. I, p. 70 (at para 15.1) and p. 58 (at para 12.8):

"…looking to the abnormal rise in the cost of living and some increase in income level and other relevant circumstances, we feel that for the purpose of excluding those who are well-to-do, while identifying socially and educationally backward classes, income limit should be fixed at Rs 10,000 (rupees ten thousand only) per annum. It would, however, be open to the Government to review the position from time to time and to suitably raise or adjust the above income limit…"

- Report of the Commission for Reservation of Seats in Educational Institutions (Kerala), (1965) at p. 77 (at para 34)

2.51. As far as the courts are concerned, the recognition of the creamy layer has been made in a large number of cases.

See:

- *Indra Sawhney (II)* v. *Union of India*[25], at SCC pp. 184-85, 190-91 and 202, paras 9-10, 13, 27, 29, and 65;
- *Indra Sawhney* v. *Union of India*[8], at SCC pp. 724-25, paras 792-93 (per Jeevan Reddy, J.);
- *M. Nagaraj* v. *Union of India*[26], at SCC pp. 260, 272 & 277-78, paras 80, 110, 120, & 121-22;
- *K.C. Vasanth Kumar* v. *State of Karnataka*[27], SCC at paras 24, 25, 28 and 72;
- *State of Kerala* v. *N.M. Thomas*[9], SCC at para 124;
- *Ashoka Kumar Thakur (8)* v. *Union of India*[28], SCC at paras 17-8;
- *M.G. Badappanavar* v. *State of Karnataka*[29], SCC at paras 13-14;
- *Nair Service Society* v. *State of Kerala*[30], SCC at paras 32, 42-43, 47, 53-54;
- *Ashoka Kumar Thakur (8)* v. *Union of India*[31], SCC at para 40; and
- *R.S. Garg* v. *State of U.P.*[32], SCC at para 37.

Does creamy layer apply to OBCs in Article 15(4)

2.52. There can be no doubt that creamy layer:

(*a*) applies to OBCs in the context of Article 16(4)

25 (2000) 1 SCC 168
26 (2006) 8 SCC 212
27 1985 Supp SCC 714
28 (1995) 5 SCC 403
29 (2001) 2 SCC 666
30 (2007) 4 SCC 1
31 (2007) 4 SCC 361
32 (2006) 6 SCC 430

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- *Indra Sawhney*[8], (1992) at para 793

(*b*) applies to SC/STs in the context of Article 16(4)

- *Nagaraj*[26], (2006) at paras 80, 121 & 122

The suggestion made across the Bar that the extension of the creamy layer principle to SCs in the *Nagaraj case*[26], (2006) was only by way of obiter is simply not correct. The ratio of the *Nagaraj*[26] decision is that even if the various impugned amendments (77th, 81st and 85th) were held valid, any legislation or executive action would nevertheless have to ensure that the requirements of the ceiling limit of 50% (the numerical benchmark), creamy layer, compelling reasons including backwardness, inadequacy of representation and the overall administrative efficiency were satisfied.

2.53. As a matter of principle, suggestions for the creamy layer had been made for SCs, STs and OBCs (See *K.C. Vasanth Kumar*[27], as also for Article 15(4) (See *K.S. Jayasree*[17]; *K.C. Vasanth Kumar*[27])

2.54. It is precisely because the creamy layer principle emanates from the doctrine of equality itself, there is no principled reason as to why it should not apply to Article 15(4). See *Indra Sawhney (II)*[25], SCC at p. 190, para 27.

2.55. Thus, exclusion of the creamy layer is part of what the *Nagaraj*[26] decision calls "the equality code" indicated by Articles 14, 15 and 16 of the Constitution irrespective of any amendment.

PART III

INTERRELATIONSHIP BETWEEN THE EQUALITY CLAUSES (ARTICLES 14-18) & THE FREEDOM & LIBERTY CLAUSES (ARTICLES 19 & 21)

(*i*) *Article 14 as the Foundation of Equality*

3.1. Article 14 is the foundation article of equality which is not defeasible and can never be abrogated or taken away.

It should be noted that:

(*i*) the non obstante clauses in Articles 15(1), (4), (5), 16(4), (4-A), (4-B) and (5) do not refer to Article 14, thus preserving the pre-eminence of Article 14 as the foundation article on equality

(*ii*) the importance of Article 14 as part of the golden triangle has been judicially affirmed

- *Minerva Mills Ltd.* v. *Union of India*[33], SCC at para 74
- *I.R. Coelho* v. *State of T.N.*[34], SCC at paras 109, 141, 146, 149, 151(*iv*)
- *Bachan Singh* v. *State of Punjab*[35], SCC at para 11
- *Maneka Gandhi* v. *Union of India*[36], SCC at paras 4, 48-49, 72
- *T.R Kothandaraman* v. *T.N. Water Supply & Drainage Board*[37], SCC at para 1

33 (1980) 3 SCC 625
34 (2007) 2 SCC 1
35 (1982) 3 SCC 24
36 (1978) 1 SCC 248
37 (1994) 6 SCC 282

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Article 14

(*iii*) it should be noted that although attempts were made to subordinate Articles 14 and 19 in various amendments, the Court has made it clear that these attempts cannot be treated as stare decisis or precedents

These decisions are referred to in this submission at para 6.26

3.2. Article 14 permits a reasonable classification including:

(*a*) invoking the doctrine of source which is another form of quotas and reservations

- *Chitra Ghosh*[2],
- *D.N. Chanchala*[3], SCC at para 22
- *Pradip Tandon*[7], SCC at para 38

(*b*) permitting provisions for vulnerables such as the handicapped

- *National Federation for Blind* v. *Union Public Service Commission*[38]
- *Swati Gupta* v. *State of U.P.*[39]
- *Mohd. Siddiq Ali* v. *High Court of A.P.*[40]

(*c*) reservations for SC/ST and other groups (However, in the *Indra Sawhney case*[8], the Court made it clear in the context of Article 16(4) that it is exhaustive (at para 743) of the reservations that can be made. Further, the Court held that quotas were permissible under Article 15(4)

Thus, theoretically, as in the American constitution, it was possible to build in affirmative action into Article 14 itself.

(ii) Constitution Mandates Special Discipline for Affirmative Action

3.3. Thus, even though affirmative action was possible under Article 14, the Constitution laid down strict enabling provisions over and above those that might have been imposed by the doctrine of classification.

Therefore, the conditions laid down in Articles 15(3), (4), (5) and 16(4) etc. are additional conditions which must be strictly adhered to.

3.4. Thus, the special conditions in different articles are different.

(*i*) In the case of women and children [Article 15(3)], the beneficiaries are easily identifiable and the State is expected to make only special provisions

[Note: Quota provisions are rarely made for women even though other special provisions are made for both women and children]

(*ii*) Article 15(4) requires the additional constitutional requirement of (*a*) identifying SEBCs and SC/STs; and (*b*) to make appropriate special provisions which may or may not include quotas

(*iii*) Article 16(4) is clearly concerned with quotas because the basis of Article 16(4) is that it enables the SC/STs and OBCs to share the power of the State

- See *Indra Sawhney*[8], at SCC pp. 662 & 720, paras 694 and 788.

38 (1993) 2 SCC 411
39 (1995) 2 SCC 560
40 (2005) 13 SCC 207

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It follows that the additional requirements and discipline attached to affirmative action must be strictly adhered to; and, it is not enough to rely on the doctrine of reasonable classification alone.

(iii) Enabling Provisions for Affirmative Action do not create Fundamental Rights

3.5. Articles 15(3), (4), (5) and 16(4) are enabling provisions and therefore do not create fundamental rights.

3.6. In *Indra Sawhney*[8], (1992), the Court proceeded on the basis that an Article such as 16(4) was an enabling provision

3.7. On this basis, *Ajit Singh (II)*[21] (SCC at paras 28-32) came to the following conclusions:

(*a*) Articles 16(4) and 16(4-A) do not confer a fundamental right paras 28-31

(*b*) There is no power coupled with a duty in relation to affirmative action which only enables a discretion para 32

3.8. This very question was agitated in a not too noticed Constitution Bench in *Ajit Singh (III)* v. *State of Punjab*[41], where the discretionary, enabling nature of Article 16(4) was reiterated. See *Ajit Singh (III)*[41] at SCC pp. 431-32, paras 3 and 4. On this basis, the review petitions were dismissed.

3.9. It, therefore, follows that as the individual right in Articles 14 and 15(1) is an enforceable right whereas the group expectation in Article 15(4) is not a fundamental right but only an enabling power which is not a power coupled with a duty.

(iv) Non obstante Clauses

3.10. The non obstante clauses in Articles 15(3), (4) and (5) cannot be read as saying: "notwithstanding the doctrine of equality shall…"

If such an interpretation is given, the doctrine if equality itself would be swallowed up by the non obstante clause.

3.11. Thus see *Post Graduate Institute of Medical Education & Research* v. *Faculty Assn.*[42] at SCC p. 22, para 32 the observations of a Constitution Bench in the context of Article 16 (reiterated by a Constitution Bench in *Ajit Singh (II)*[21], at SCC p. 232, para 34). Hence the *non obstante clause in Article 15(5) has a limited meaning*. But the non-obstante clause in Article 15(5) is overriding and must be taken to imply a brazen overruling of Articles 15(1) and 15(4) to read to say "No principle of equality shall affect the constitutional amendment". It is precisely this that makes the amendments invalid by confronting equality with inequality and promoting the latter as valid.

3.12. It is the general principle of equality that will prevail both as a matter of constitutional priority and statutory interpretation. Thus, for example see *Ashwini Kumar Ghose* v. *Arabinda Bose*[43] at SCR p. 24.

(v) Anti-Discrimination Provisions

3.13. Articles 15(1) and 16(2) are anti-discrimination provisions which exclude, inter alia, 'caste' as a criterion for identification or beneficial treatment.

41 (2000) 1 SCC 430
42 (1998) 4 SCC 1
43 1953 SCR 1

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The word 'only' means that caste be used 'only' incidentally and not as the basis of affirmative discrimination.

3.14. The non obstante clause does not let in caste but permits it to be a mere starting point as long as other starting points are used and caste is not the final criteria.

It would be entirely invidious if under the cover of caste, a perfunctory attempt is made to legitimate the caste criteria by adding on some social and economic criteria.

An overwhelming use of caste criteria to identify classes would suggest that the overt approach is to include caste. This is impermissible.

(vi) Relationship between Articles 15(4) and 15(5)

3.15. Government and aided institutions cannot be permitted to discriminate on grounds of caste (Article 29(2)). However, the non obstante clause in Article 15(4) suggests an incidental and non-substantive use of caste would not vitiate an Affirmative Action Programme.

Article 15(4) is, thus, subject to the constraints of (*a*) being applicable to SC/STs and SEBCs; (*b*) in order to make special provisions which are shown to be necessary.

3.16. Article 15(5) is a special and later provision which deals exclusively with educational institutions and; thus, carves out an independent area of operation for all educational institutions which no longer fall in Article 15(4).

However, any affirmative action under Article 15(5) would, itself, be rendered nugatory by Article 29(2) which is specifically not excluded.

This being the case, the observations in *Champakam Dorairajan*[19] continue to be applicable in the case of Article 15(5) although they may be obviated to the extent suggested above in the case of Article 15(4).

3.17. An anomalous situation is created whereby the Government cannot rely on Article 15(4) for the purpose of affirmative action in educational institutions, because this falls within the domain of Article 15(5).

Likewise, Article 15(5) is subject to the discipline of Article 29(2) and therefore, prohibits, inter alia, caste being used as a criterion for affirmative action at all

(vii) Summary of Submissions on Article 15 as a whole

3.18 It may be summarised that:

(*i*) Article 15 is an anti-discrimination clause which, inter alia, excluded caste as a criteria for affirmative benefits

(*ii*) Articles 15(3), (4) and (5) are only illustrative of the classification inherent in Article 14 See *Indra Sawhney*[8], (1992) at paras 741-2

(*iii*) However, the affirmative action provisions in Articles 15(1), (2) & (3) are subject to further discipline and control beyond the doctrine of classification

(*iv*) Articles 15(3), (4) & (5) are enabling provisions and do not constitute an enforceable fundamental right

(*v*) Government and aided institutions cannot be permitted to discriminate on grounds of caste [Article 29(2)]. However, the non obstante clause in Article 15(4) suggests an incidental and non-substantive use of caste would not vitiate an Affirmative Action Programme

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(*vi*) Article 15(4) is, thus, subject to the constraints of (*a*) being applicable to SC/STs and SEBCs; (*b*) in order to make special provisions which are shown to be necessary

(*vii*) Article 15(5) is a special and later provision which deals exclusively with educational institutions and; thus, carves out an independent area of operation for all educational institutions which no longer fall in Article 15(4)

However, any affirmative action under Article 15(5) would, itself, be rendered nugatory by Article 29(2) which is specifically not excluded.

This being the case, the observations in *Champakam Dorairajan*[19], continue to be applicable in the case of Article 15(5) although they may be obviated to the extent suggested above in the case of Article 15(4).

(*viii*) an anomalous situation is created whereby the Government cannot rely on Article 15(4) for the purpose of affirmative action in educational institutions, because this falls within the domain of Article 15(5)

(*ix*) likewise, Article 15(5) is subject to the discipline of Article 29(2) and therefore, prohibits, inter alia, caste being used as a criterion for affirmative action at all

Thus, if the Government relies on Article 15(5), the use of the caste criteria is prohibited. It cannot fall back on Article 15(4) which has been superseded in educational matters by Article 15(5) which is a special and later provision—both provisions containing non obstante clauses.

3.19. This is without prejudice to the argument that Article 15(5) is invalid and unconstitutional.

PART IV

RELEVANCE OF THE MANDAL CASE AND THE AMERICAN DECISIONS

(*i*) *On certain aspects of the Mandal case and judicial review*

Mandal Commission criteria not approved in Indra Sawhney case[8]

4.1. It is important to stress that the Court expressed no opinion on the correctness or adequacy of the criteria adopted by the Mandal Commission in identifying beneficiaries.

- *Indra Sawhney*[8], at SCC pp. 764-65, para 856

4.2. More specifically, the Court proceeded on the assumption that the impugned memorandum in the *Indra Sawhney case*[8] of 13-8-1990 was based not on the Mandal Commission Report but the State lists.

- *Indra Sawhney*[8], at SCC p. 765, para 857

No doubt the Court said that the Mandal Commission criteria "cannot be said to be irrelevant".

See also *Indra Sawhney*[8], (1992) at SCC para 851, p. 760, placita (*a*) and (*e*)-(*f*)

4.3. However, the Court felt that the matter was to be resolved by a permanent Commission which will:

"…examine complaints of over-inclusion or under-inclusion" (SCC p. 764, para 855)

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4.4. Thus, the Mandal Commission cannot be the basis for any Government to adopt criteria which, in any case was dated, but to proceed to appoint a commission which would examine the issues at length.

4.5. Even if caste is the starting point, the idea is to consider all available groups.

- *Indra Sawhney*[8], at SCC p. 727, paras 796-97

Scope of Judicial Review

4.6. The scope of judicial review must necessarily depend upon the facts and circumstances of the case.

4.7. In *Indra Sawhney*[8], while adopting the general view that due deference has to be given to the political executive which represents the will of the people, the Court answered the question as to whether its review was limited to cases of "demonstrably perverse identification or demonstrably unreasonable percentage"— See SCC p. 753, para 842

4.8. In *Indra Sawhney*[8], while pronouncing on judicial review on the adequacy of representation in Article 16(4), the Court accepted that deference would have to be given to the 'opinion' of the State but at the same time indicated that the Court cannot hide behind its subjective satisfaction in order to obviate judicial scrutiny. (SCC p. 728, para 798)

4.9. The case of *Subramaniam Swamy* v. *Director, CBI*[44], is irrelevant to the present controversy. There can be little doubt that the concept of reasonableness can apply to legislation. This has been settled as far back as *V.G. Row case*[45]. Equally, the concepts of arbitrariness and reasonableness apply to administrative action.

(*i*) The concept of reasonableness is part of the basic structure of the constitution

See *Nagaraj*[26], SCC at paras 23, 24 & 26; *I.R. Coelho*[34], SCC at para 61

(*ii*) Reasonableness is also a consistent basis for judicial review and has now to be considered from the point of view of proportionality

See *Teri Oat Estate (P) Ltd.* v. *U.T. Chandigarh*[46], (2004) 2 SCC 130 at paras 45-53

(*iii*) The test of proportionality is that the method chosen by the legislature or the executive is least invasive to fundamental right

See *Teri Oats*[46] at SCC p. 145, para 46

4.10. In the present case, it should be remembered that Article 15(1) represents an individual right whilst Articles 15(3), (4) & (5) are only enabling provisions.

The onus of showing that the identification criteria and methodology invoked is on the Government.

4.11. Applying the principles of reasonableness and proportionality (which in this context does not mean in proportion to the population but the nature of the identification and the need for affirmative action), in respect of the guaranteed

44 (2005) 2 SCC 317

45 *State of Madras* v. *V.G. Row*, AIR 1952 SC 196

46 (2004) 2 SCC 130

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fundamental rights, the court must adopt 'strict scrutiny' because of the enormity of the inclusionary and exclusionary effect.

Strict scrutiny is another form of proportionality and relevant to OBC determinations since so much of the OBC identification is an act of political patronage to create vote-banks.

(ii) Submissions on the American Decisions

4.12. While it is normally not necessary to cite American decisions for propositions which are not res integra in Indian law, the decisions may assist in elucidating similar problems such as racism and casteism.

4.13. In principle, in American law, quotas are not consistent with equality (See *Bakke*[22], and the Michigan cases (2003, *Gratz*[23] and *Grutter*[24]). *Paradise*[47] was an extreme and special case where there was:

(*a*) proven hostile exclusion in that establishment over decades; and

(*b*) the quota was temporary

It was an extreme case, with very limited controlled application in that circumstance.

4.14. In all other respects:

(*i*) Equality also includes affirmative action but it should not unnecessarily trammel the interests of the non-minority community;

- *University of California Regents* v. *Bakke*[22], L Ed 2d at pp. 774-6, 780-82 (per Powell, J).
- *United Steel Workers* v. *Weber*[48], L Ed 2d at p. 492 (per Brennan, J); p. 497 (per Blackmun, J).

(*ii*) Quotas are permitted only when there is a demonstrated case of overt and defiant hostility.

- *Wendy Wygant* v. *Jackson Board of Education*[49], L Ed 2d at pp. 269, 270 (per O'Connor, J).
- *United States* v. *Paradise*[47], L Ed 2d at pp. 222-224, 230-32 (per Brennan, J); p. 234 (per Powell, J.); p. 235 (per Stevens, J).

(*iii*) Preferred and excessive protection of affirmative action beneficiaries is unconstitutional

- *Firefighters Local Union* v. *Stotts*[50] (1984) 467 US 561 at p. 499 (per White, J.); p. 505 (per O'Connor, J.)
- *Wendy Wygant* v. *Jackson Board of Education*[49], L Ed 2d at p. 268 (per Powell, J.), at p. 277, (per O'Connor, J.)

(*iv*) Rigorous scrutiny is called for in respect of Affirmative Action Programmes which must be narrowly tailored. (This is also in consonance with the *Indra Sawhney*[8] and *Nagaraj*[26] decisions.)

- *University of California Regents* v. *Bakke*[22], L Ed 2d at pp. 787-789 and 790-92 (per Powell, J.).

47 *United States* v. *Paradise*, 1987 L Ed 2d 203
48 (1979) 61 L Ed 2d 480
49 (1986) 90 L Ed 2d 260
50 (1984) 467 UA 561

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- *Gratz* v. *Bollinger*[23], L Ed 2d at pp. 280-84 (per Rehnquist, J.)
- *Grutter* v. *Bollinger*[24], L Ed 2d at pp. 336-339 (per O'Connor, J.)
- *City of Richmond* v. *Croson*[51], L Ed 2d at p. 876; at pp. 881-82; 888; and 890-91 (per O'Connor, J.) Seattle Decision

4.15. Further, in *Parents involved in community schools* v. *Seattle School District No. 1*[52], the Supreme Court dealing with classification solely on the basis of race for the purpose of determining which schools were to be attended by children, held that:

(*i*) the school districts must demonstrate that their use of such classifications is "narrowly tailored" to achieve a "compelling" government interest. [Roberts, C.J. at pp. 2, 13]

(*ii*) to establish that racial classifications are narrowly tailored, the government must demonstrate how and when the classifications are employed, in terms that are not so broad and imprecise that they cannot withstand strict scrutiny [Robert, C.J., Scalia, J., Thomas, J., Alito, J. at p. 5]

(*iii*) there was a failure on the part of the districts to show that they considered methods other than explicit racial classifications to achieve their stated goals.

Narrow tailoring requires 'serious, good faith consideration of workable race-neutral alternatives' [Roberts, C.J., Scalia, J., Thomas, J., Alito, J. at pp. 4, 6, 22 & 64]

(*iv*) plans directed towards 'racial balance' (and not racial diversity, which is permissible) are violative of the equality principle, hence unconstitutional. [Roberts, C.J., at p. 19]

(*v*) all race based government decision making, regardless of context is unconstitutional and cannot be justified by remedial purpose or good faith. [Thomas, J. at pp. 33-34]

(*vi*) application of racial criteria results in exclusion of some people, which pits races against each other, exacerbates racial tension and provokes resentment. [Thomas, J. at p. 39]

PART V

FUNDAMENTAL FLAWS UNDERLYING THE NINETY-THIRD AMENDMENT AND THE ACT OF 2006

5.1. There are certain fundamental flaws underlying the Ninety-third Amendment and the Act of 2006 which need to be brought to the attention of the Court.

(i) Rewriting of the relationship between the golden triangle (Articles 14, 19 and 21)

5.2. The Ninety-third Amendment and the Act of 2006 result in a rewriting of the relationship between Articles 14, 19 and 21 which the *Minerva Mills case*[33], described as the 'golden triangle' which was inviolate and could not be undermined.

- See *Minerva Mills*[33], at SCC p. 660, para 74.

51 (1989) 102 L Ed 2d 854
52 (2007) 551 US

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5.3. This composition of the golden triangle has been affirmed in *Nagaraj*[26], (at para 23) and *I.R. Coelho*[34], (at paras 122, 139 & 149).

Hitherto constitutional amendments after 1973 have never excluded Articles 14, 19 or 21. The Ninety-third Amendment for the first time ousts the applicability of Article 19 from the affirmative action of Article 15(5).

(ii) Extension of the fundamental rights chapter to private institutions and effect on the efficiency of education

5.4. The Constitution clearly defines 'State' (Article 12) and 'laws' (Article 13) in terms of State actions. The Ninety-third Amendment introduces rights against private institutions. Even though the *T.M.A. Pai decision*[53], protected all unaided institutions from the State's reservation programmes, it should be noted that the *Islamic decision*[54], tried to impose a quota on such private institutions and was specifically overruled by a larger seven-judge Bench in *Inamdar*[55].

5.5. Private institutions are deprived of their constitutional rights under Article 19, which was rightly interpreted in *T.M.A. Pai*[53], overruling the decision in *Unni Krishnan*[56]. The amendment totally annihilates the rights of these institutions.

- See *T.M.A. Pai*[53], at SCC pp. 540-42, paras 35-45.

5.6. Significantly, the amendment impliedly accepts the interpretation of Article 19 in *T.M.A. Pai*[53], but nevertheless simply excludes the applicability of the Article.

5.7. It must be borne in mind that education is a head of charity and is not for the purpose of profit-making, to the extent that essential revenues may be earned.

- See *T.M.A. Pai*[53], at SCC pp. 535 & 545, paras 26 & 57.

5.8. The *T.M.A. Pai decision*[53], in fact, inaugurated a new constitutional regime in educational matters which consisted of:

(*i*) Partnership between Government and private institutions including minority institutions

- *T.M.A. Pai*[53], at paras 38-39.

(*ii*) Constitutional rights to all private institutions under Articles 19, 26 and 30

- *T.M.A. Pai*[53], at paras 18-26, 48-49.

(*iii*) All institutions to have autonomy—with maximum autonomy to unaided institutions and aided institutions not to be treated as Government departments

- On unaided institutions and maximum autonomy
  T.M.A. Pai[53], (2002) at paras 36, 40, 55, 61, 62, 68, 139 and 144
- On aided institutions
  T.M.A. Pai[53], at para 72

Note: Autonomy means and includes freedom in respect of (*a*) management; (b) finances and fees; (*c*) student selection; and (*d*) selection of teachers and discipline

- See *T.M.A. Pai*[53], at paras 50, 116, 139

53 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481
54 *Islamic Academy of Education* v. *State of Karnataka*, (2003) 6 SCC 697
55 *P.A. Inamdar* v. *State of Maharashtra*, (2005) 6 SCC 537
56 *Unni Krishnan, J.P.* v. *State of A.P.*, (1993) 1 SCC 645

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- See also *Inamdar*[55], SCC at para 118

5.9. The cause of an efficient and sound education will suffer if private institutions are drawn into the 'quota domain'. *T.M.A. Pai*[53], rightly envisages a partnership which will protect the minorities.

- See *T.M.A. Pai*[53], SCC at paras 38 & 39

(iii) Continued reliance on Caste as a primary indicator is invidious and contrary to secularism

5.10. There is a distinction between "caste" as a private preference and caste as a public criteria. While people in their private lives may treat caste as a personal preference, the State cannot use caste as the basis for any or all decisions.

- Articles 15(1), 16(2), 17, 29(2) and 46
- See also for instance Sections 123(3) & (3-A) of the Representation of the People Act, 1951 which prohibit appeal by any candidate on the grounds of caste

As far as the SCs are concerned, the criteria of caste may be used as part of a constitutional mandate (*a*) to eliminate untouchability; (*b*) provide support for those who have been victims of untouchability by way of affirmative action; and (*c*) devise legislations to abolish untouchability [Article 15(2)].

The reliance upon caste as a exclusionary and inclusionary basis for identifying OBCs and SEBCs is contrary to the Constitution which contains many provisions directed towards creating a casteless society in the public domain.

Although various public criteria that are used claim to use caste only as a 'starting point' of identification, in fact, the starting point remains the endgame. Attempts are made by the Government to clothe castes as classes. However, the present approach is to earn vote-bank support on a caste basis. The politics of many states have been rewritten on this basis.

(iv) Usurpation of Judicial Power: Dramatic Overruling

5.11. The Ninety-third Amendment is part of a continuing stream of amendments by Parliament to overturn Supreme Court decisions and sit in appeal over them.

Thus, it will be seen that:

- the Constitution (Seventy-seventh Amendment) Act, 1995 overruled the decision in *Indra Sawhney*[8], by adding Article 16(4-A)
- the Constitution (Eighty-first Amendment) Act, 2000 overruled the decision in *Indra Sawhney*[8], by adding Article 16(4-B)
- the Constitution (Eighty-second Amendment) Act, 2000 overruled the decision in *S. Vinod Kumar*[57], by amending Article 335
- the Constitution (Eighty-fifth Amendment) Act, 2001 overruled the decisions in *Virpal Singh Chauhan*[58], and *Ajit Singh*[59], (1996) 2 SCC 715 by amending Article 16(4-A)

57 *S. Vinod Kumar* v. *Union of India*, (1996) 6 SCC 580

58 *Union of India* v. *Virpal Singh Chauhan*, (1995) 6 SCC 684

59 *Ajit Singh Januja* v. *State of Punjab*, (1996) 2 SCC 715

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- the Constitution (Ninety-third Amendment) Act, 2005 overruled the decisions in *T.M.A. Pai*[53], and *Inamdar*[55], by adding Article 15(5) to the constitution
  - See Preambles to the constitutional amendments
  - See the Statements of Objects and Reasons to the constitutional amendments
  - See generally Rajeev Dhavan, Reserved! How Parliament Debated Reservations 1995-2007, (2007)

(v) Violation of procedural and substantive limitations on the power of amendment

5.12. Article 368 contains:

(*i*) procedural provisions which require differential majorities and ratifications—depending on which provisions are sought to be amended. Provisions which affect the federal structure and judicial power need ratification by one half of the legislatures

(*ii*) implied limitations that the basic structure of the Constitution cannot be violated

In this case, the Ninety-third Amendment usurps the judicial power by sitting in appeal over the courts thereby ingressing into the judicial power which is protected by the basic structure of the constitution. In violating the golden triangle of Articles 14, 19 and 21, the Ninety-third amendment and the Act of 2006 are violative of a balance between rights which are part of the basic structure of the constitution. The Amendment and Act violate principles of equality. A caste criteria for public decisions is contrary to the secularism of the constitution.

This is explicated later in these submissions.

(vi) Reasonableness as part of basic constitutional requirement

5.13. Amendments and statutes have to satisfy the requirement of reasonableness which is a basic requirement of the constitution.

See:

- *Nagaraj*[26], at SCC pp. 243-44, paras 23, 24 & 26
- *I.R. Coelho*[34], SCC at para 61 [9-judge Bench] (affirming and quoting *Nagaraj*[26] with approval)

(vii) Creamy Layer

5.14. It is clear that there is no exclusion of the creamy layer by either the Ninety-third Amendment or the Act of 2006. One would have thought that once the creamy layer concept has been declared integral to equality, it was necessary to make provision for the creamy layer. In the absence of such a provision, it is possible that any criteria would be including the creamy layer could well be found to be in excess of the Amendment or the statute.

See on the exclusion of creamy layer:

- Debates on the Ninety-third Amendment
- Debates on the Act of 2006

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in Rajeev Dhavan, *Reserved! How Parliament debated Reservations*, 1995-2007 at pp. 126-167 (on the Amendment) especially at p. 145, at pp. 168-201 (on the Act) especially at pp. 179, 183, 187 & 189

(viii) Exclusion of Minority Institutions is proper

5.15. The exclusion of minority institutions by Article 15(5) is both legitimate and proper. Minority institutions are in a separate class by themselves which have been recognised by Articles 29 and 30 which are a code in themselves in that:

(*i*) institutional autonomy is accorded to all minority institutions under Article30

This has been held repeatedly by the Court in:

- *Sidhrajbhai Sabbai* v. *State of Gujarat*[60]
- *T.M.A. Pai*[53], (2002) at paras 36, 40, 42-4, 55, 61, 62, 65 68, 119, 127, 139 and 144 (in respect of unaided institutions) & para 72 (unaided institutions)
- *Islami*[54], at para 9
- *Inamdar*[55], at para 118

(*ii*) the constitutional limitations for minority institutions is distinct

- See *Sidhraijbhai*[60], SCR at pp. 852, 856-857 (applying the dual betterment test of reasonable regulations which are benefit of the institution)
- *T.M.A. Pai*[53], at paras 105, 107 and 118, 119 and especially para 122
- *Inamdar*[55], at para 122

(*iii*) minority institutions have to cater to their own students.

- Earlier, the minority quota (if it can be called that), was permissible to 50% even in respect of aided institutions—See *St. Stephen case*[61], SCC 558 at para 102
- *T.M.A. Pai case*[53] (SCC at para 151), permits the state governments to enlarge or contract the 50% rule.

This being the case, minority institutions cannot be subjected to further quotas and limitations. Since this is the case for aided minority institutions, unaided institutions have a discretion for a full quota for minority students for whom, inter alia, they have been created.

5.16. Nothing is gained by deleting the exception for minorities under Article 15(5). In fact, the provision should be interpreted so as to exclude all private institutions, whether minority or otherwise.

5.17. Broadly it will be seen that in the light of the above, the Ninety-third Amendment and the Act of 2006 are questionable for their validity and violate basic principles of the Constitution and equality.

60 (1963) 3 SCR 837

61 *St. Stephen's College* v. *University of Delhi*, (1992) 1 SCC 558

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PART VI

SUBMISSIONS ON THE BASIC STRUCTURE

(i) Basic Structure Doctrine

6.1. *Kesavananda case*[62], lays down the power under Article 368 to amend the Constitution subject to the implied limitation that no amendment can "alter" the basic structure of the constitution.

6.2. Thus, in *Kesavananda case*[62]:

(*i*) 9 of the 13 judges signed a summary statement (at p. 1007 of SCC) which stated

"(1) *Golak Nath case*[63] is overruled

(2) Article 368 does not enable Parliament to alter the basic structure of the Constitution"

(*ii*) 7 of these 9 judges actually struck down 31-C or parts thereof

(*iii*) Of the 7, six judges (namely Sikri, C.J. (para 432) Shelat and Grover, JJ. (para 604). Hegde and Mukerjea (paras 718, 735), Reddy, J. (paras 1185-9, 1206) struck down Article 31-C which empowered the legislature to abrogate Articles 14, 19 and 31 by legislation.

Khanna, J. (paras 1483, 1518) struck down only part of Article 31-C which excluded judicial review

6.3. Since *Kesavananda*[62], it is clear that the basic structure doctrine is not limited to judicial review.

6.4. The Supreme Court has invoked the basic structure doctrine to clarify the following features of the Constitution

(*a*) the integrity of the judiciary, judicial review and the separation of powers

- *Kartar Singh* v. *State of Punjab*[64] per K. Ramaswamy at para 412
- *S.P. Sampath Kumar* v. *Union of India*[65], SCC at para 3 (referring to judicial review as a part of the basic structure)
- *Kesavananda Bharati*[62], at para 292
- *Indira Nehru Gandhi* v. *Raj Narain*[66], per Mathew, J. (at paras 341, 521), per Khanna, J. (at para 210), per Chandrachud, J. (at para 664)
- *A.K. Roy* v. *Union of India*[67], SCC at para 23
- *L. Chandra Kumar*[68], SCC at paras 78-9 and 90
- *I.R. Coelho*[34], SCC at paras 63, 67

62 *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225
63 *Golak Nath* v. *State of Punjab*, AIR 1967 SC 1643 : (1967) 2 SCR 762
64 (1994) 3 SCC 569
65 (1987) 1 SCC 124
66 1975 Supp SCC 1
67 (1982) 1 SCC 271
68 (1997) 3 SCC 261

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- *State of Bihar* v. *Bal Mukand Shah*[69], SCC at paras 32-34

(*b*) Federalism

- *S.R. Bommai* v. *Union of India*[70], (per Sawant and Kuldip Singh, JJ. Pandian, J. concurring) at para 96
- *ITC Ltd.* v. *Agricultural Produce Market Committee*[71], SCC at paras 58-9
- *State of Haryana* v. *State of Punjab*[72], SCC at para 12

(*c*) Secularism

- *S.R. Bommai*[70], per Ahmadi, J. (SCC at para 29), per Sawant, J. (at paras 144, 153), per Ramaswamy K., J. (at para 186)
- *Indra Sawhney*[8], (1992) per Kuldip Singh, J. (at paras 339 and 350)
- *M. Ismail Faruqui (Dr.)* v. *Union of India*[73], SCC at paras 36-8 (per Verma, J.), paras 135 and 142 (per Bharucha, J.)
- *R.C. Poudyal* v. *Union of India*[74], (per Agarwala, J.) SCC at para 199
- *Valsamma Paul* v. *Cochin University*[75], SCC at para 25

(*d*) Equality

- *Saurabh Chaudri* v. *Union of India*[76], SCC at para 82
- *M.G. Badappanavar* v. *State of Karnataka*[29], SCC at para 1
- *Indra Sawhney (II)*[25], SCC at paras 64-5, 85
- *Dalmia Cement (Bharat) Ltd.* v. *Union of India*[77], SCC at para 11
- *State of U.P.* v. *Dr. Dina Nath Shukla*[78], SCC at para 6
- *Raghunathrao Ganpatrao* v. *Union of India*[79], SCC at para 199
- *Bhim Singhji* v. *Union of India*[80], SCC at para 20
- *Nagaraj*[26], SCC at paras 31, 33, 70, 80 & 102
- *I.R. Coelho*[34], SCC at paras 95, 108, 109, 130

(ii) Use of Basic Structure to strike down constitutional amendments

6.5. Apart from identifying the basic structure, the basic structure doctrine has been used in the following context:

- *Kesavananda Bharati* v. *State of Kerala*[62] invalidating the Constitution (Twenty-fifth) Amendment Act

69 (2000) 4 SCC 640
70 (1994) 3 SCC 1
71 (2002) 9 SCC 232
72 (2002) 2 SCC 507
73 (1994) 6 SCC 360
74 1994 Supp (1) SCC 324
75 (1996) 3 SCC 545
76 (2003) 11 SCC 146
77 (1996) 10 SCC 104
78 (1997) 9 SCC 662
79 1994 Supp (1) SCC 191
80 (1981) 1 SCC 166

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- *Indira Gandhi* v. *Raj Narain*[66] invalidating Article 329-A(4) as inserted by the Clause 4 of the Constitution (Thirty Ninth) Amendment Act, 1975
- *Minerva Mills* v. *Union of India*[81], SCC at para 2 read with *Minerva Mills* v. *Union of India*[33], SCC at paras 17-22 invalidating Articles 368(4) and 368(5) inserted by Section 55 of the Constitution (Forty Second) Amendment Act, 1976
- *Sambamurthy* v. *Union of India*[82], SCC at paras 3-5 invalidating Article 371-D as introduced by the Constitution (Thirty Second) Amendment Act, 1973 as unconstitutional
- *Kihoto Hollohan* v. *Union of India*[83], SCC at paras 61-2 invalidating Para 7 of the 10th Schedule as it sought to amend the powers of the Supreme Court and High Courts without following the procedure laid down by Article 368(2)

6.6. We have already noted that the term used in the *Kesavananda*[62], summary statement is "alter".

"Parliament (cannot) alter the basic structure of the Constitution".

(iii) Means cannot justify Ends

6.7. The view that broader due deference be given to the broader goals of the Constitution of the Constitution even if the *means* may result in a violation of equality is misconceived. There is no doubt that the Preamble of the Constitution has wide libertarian and social justice goals. Equally, the Directive Principles of the Constitution indicate social goals which animate the whole Constitution.

There are two kinds of majoritarianisms: one based on democracy (such as a parliamentary consensus) and the other based on notions of utilitarian social justice. Both forms of majoritarianism threaten the basic structure which the Kesavananda decision created to protect the Constitution from majoritarianism of both kinds.

6.8. *Indra Sawhney*[8], has noted that Article 14 is the means to achieve the end.

- See *Indra Sawhney*[8], at SCC pp. 734-35, para 808

6.9. At the same time, it is important to draw attention to the structural emphasis in the Constitution

- Article 13 of the Constitution invalidates all laws which violate Part III rights
- Article 37 makes it clear that the Directive Principles are not justiciable in a Court of law

Significantly, both Part III and Part IV of the Constitution convey the same meaning of State in Articles 12 and 36 of the Constitution.

6.10. Without detracting from the expansive meaning given to Fundamental Rights in the light of Directive Principles, Directive Principles cannot be used to undermine basic structure principles underlying fundamental rights, including especially the principles of equality, fundamental freedoms, due process, religious freedom and judicial enforcement.

81 (1980) 2 SCC 591
82 (1987) 1 SCC 362
83 1992 Supp (2) SCC 651

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6.11. If the view that the ends justify the means is accepted, the basic principles and purposes of Part III of the Constitution to guarantee fundamental rights would itself be undermined. This is why See *Minerva Mills case*[33] at SCC p. 654, para 57.

6.12. Ends cannot justify means; and must be achieved in such a way that the protections of the Constitution cannot be undermined. Unconstitutional means cannot justify constitutional goals contrary to the basic structure and subject to the disciplines of the Constitution.

(iv) Balance and Structure: Principles laid down by the Supreme Court are sacrosanct

6.13. In order to determine infringements of the basic structure, it has to be borne in mind that the Supreme Court is the ultimate arbiter of the Constitution and its interpretation of fundamental values such as 'equality', 'fundamental freedoms', 'reasonableness', and 'judicial review' are sacrosanct.

They must be respected and cannot simply be worked away.

(v) The Golden Triangle

6.14. The 'golden triangle' of Articles 14, 19 and 21 is not to be altered. The limitation of amendment applies in respect of the power to vary these parts of the golden triangle which form the foundation of the fundamental rights chapter.

6.15. See the emphasis laid on the 'golden triangle' of the Constitution, per Chandrachud, J. in *Minerva Mills*[81], SCC p. 660, 591 (at para 74).

See also:

- *I.R. Coelho*[34], SCC 1 at paras 109, 141, 146, 149, 151 (iv)
- *Nagaraj*[26], SCC at p. 23
- *Bachan Singh*[35], SCC at para 11
- *Maneka Gandhi*[36], SCC at paras 4, 48-49, 72
- *T.R. Kothandaraman*[37], SCC at para 1

(vi) Argument of Width

6.16. The view that

(*i*) there is a prima presumption of constitutionality

(*ii*) possibility of abuse cannot be used to strike down an amendment

cannot be applied to the impugned constitutional amendment mechanically.

6.17. In *Kesavananda*[62], at SCC p. 427, paras 531-32, the Court recorded and accepted the width test (the width of power and its potential on real consequences).

6.18. Further, in *Minerva case*[33], the enlarged amendment Article 31-C was struck down precisely because of its potential effect on fundamental rights. See at SCC p. 656, paras 61-62:

If the 'potential width' test were not applied, no constitutional amendment could ever be struck down as along as the judicial review is not removed.

It cannot be that Parliament and Government may violate the basic structure with impunity subject to possible litigation whereby the courts may have the power to check such violations in some way. Surely the correct constitutional principle is that ingressing the basic structure is a per se violation of the Constitution. Otherwise, Parliament can always destroy the basic structure as the judicial power would correct Parliament. Such an argument abuses the very basis of *Kesavananda*.

6.19. The limited power of Amendment cannot become an unlimited one.

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- See *Minerva Mills*[33] at SCC p. 643, para 17

The fact that an amendment "permits" violation of the fundamental freedom invites examination.

- See *Minerva Mills*[33] at SCC p. 649, para 39

6.20. The width test requires that it is not enough to validate an amendment by saying that some laws (or actions will be saved). If the width of an amendment invites abrogation of the basic structure, it must fail. Thus see *Minerva*[33] at SCC p. 655, para 58). Applying this, the Court recognised "disturbing trends" which would undermine the basic structure, inter alia of equality (at SCC p. 656, para 61).

6.21. Given the fact that the purpose of the 'basic structure' doctrine is to protect, the essential test *cannot* be an extreme test that unless the working of the Constitution is jeopardised the basic structure of the Constitution is not violated.

Thus, combining the 'width' test with the idea that the basic structure must not "*alter*", the test as exemplified in the practice should be:

> "An amendment will alter the basic structure if its actual and potential effect would be to injure, undermine or change the rigour of the basic structure in question so that governance under the Constitution would be materially altered or threatened to dilute the significance of the basic structure in question and the principles on which it is based."

This means that Parliament cannot:

(*i*) change the basic structure

(*ii*) invent means to achieve ends which will violate the basic structure

(*iii*) upset the balance between various fundamental rights including the 'golden triangle'

(*iv*) enact amendments which are so wide that they possess the power to destroy the basic structure

6.22. Thus, the test must broadly be that the amendment must not be to:

> "threaten or have the potential to threaten, injure, undermine or damage the facet of the basic structure in question".

(*vii*) *Equality as Basic Structure*

6.23. It is impossible to conceive of the Constitution without equality as one of its central components. This is self evident from the observations of the Supreme Court in various cases

- *Kesavananda Bharati*[62], [thirteen-Judge Bench] in this respect was summarised in *Indra Sawhney (II)*, (2000) 1 SCC 168 at SCC p. 202, para 64 [three-Judge Bench]
- *T.M.A. Pai* v. *State of Karnataka*[53], at SCC pp. 578, 639 & 689, paras 138, 300 and 425 [eleven-Judge Bench]
- *Raghunathrao Ganpatrao*[79], [five-Judge Bench] at SCC p. 245, paras 199 relying on *Bhim Singhji*[80], [five-Judge Bench] (Note also the ratio of the decision)
- *Saurabh Chaudhari*[76], at SCC p. 179, para 82 [five-Judge Bench]
- *Indra Sawhney (II)*[25], at SCC pp. 183, 202, paras 7 and 65 [three-Judge Bench]

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- *M.G. Badappanavar* v. *State of Karnataka*[29], at SCC pp. 672-73, para 13 [three-Judge Bench]
- *M. Nagaraj* v. *Union of India*[26], at SCC pp. 245-46, 255, 260 & 273, paras 31, 33, 70, 80 & 112 [five-Judge Bench]
- *I.R. Coelho* v. *State of T.N.*[34], at SCC pp. 97, 101 & 105, paras 95, 108, 109 & 130 [nine-Judge Bench]

6.24. Any attempt to show that equality is not part of the basic structure would be incorrect and misconceived. In fact, in *Indira Gandhi*[66], See per Mathew, J. at SCC pp. 135-36, paras 332-334.

Note also Chandrachud, J. (at SCC p. 252, para 664) and Khanna, J. (at SCC pp. 91-92, paras 209-210)

6.25. Thus, in *Minerva Mills*[81], Chandrachud, J. speaking for the Constitution Bench emphasised the significance of the 'golden triangle' (at para 74).

Thus, equality is matter of *individuation* and not just broad group rights based on a classification. The decisions in *Waman Rao* v. *Union of India*[84], and *Bhim Singh*[80], also make it clear that the basic structure is inviolate and ingressions into equality are impermissible.

(viii) Exclusion of Article 14 by Articles 31-A, 31-B and 31-C irrelevant

6.26. The exclusion of Article 14 by Articles 31-A, 31-B and 31-C are not precedents for a complete exclusion of the equality code. In *Waman Rao*[84], at SCC pp. 394-95, para 43, the Court refused to invoke stare decisis to accept Article 31-A on a principled basis.

6.27. *Thus* Articles 31-A, 31-B and 31-C were not approved in principle as a constitutional device to obviate fundamental rights or the basis structure. Articles 31-A, B and C were all exposed to the basic structure and fundamental rights after 24 April 1973.

6.28. In *Minerva Mills*[33], (at SCC p. 659, paras 71-72) it was specifically stated to this effect.

6.29. In *Minerva Mills*[33], the court took the view that:

(*i*) The fact that Article 31-A was enacted did not undermine the judgment in *Kesavananda*[62]

(*ii*) A stare decisis approval of Article 31-A did not create a device to abrogate fundamental rights in future.

6.30. It is, therefore, respectfully submitted that an appeal to Articles 31-A, B and C as a principled precedent representing a judicially approved departure from the principles of equality is not tenable.

(ix) Balancing Individual and Group Rights

6.31. Equality in the Indian Constitution conceives:

(*i*) the *individual right* to be treated fairly, without discrimination and be given equality of opportunity

(*ii*) *affirmative action* in various provisions of the Constitution (including Articles 15(3), (4) and 16(4)) to recognise group expectations and enable

84 (1981) 2 SCC 362

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classifications as a basis for enabling preferences and benefits for target beneficiary groups.

6.32. While it is trite to say that the Constitution permits classifications as part of equality, neither the doctrine of classification nor affirmative action can swamp the individual right to equal opportunity. It is not enough to make a classification and establish a nexus to the aims of the classification.

The doctrine of classification does not exhaust equality.

6.33. Equality is not just a matter of classification or group rights but an individual right to equality of treatment and opportunity.

- In *Col. A.S. Iyer* v. *V. Balasubramanyam*[85], at SCC p. 659, para 57, a Constitution Bench approved the observation of Subba Rao, J. in dissent.

6.34. The concept of equality would be trivialised if the present controversy was portrayed as a group social justice versus individual right. Group claims are merely a basis for affirmative action. Individual rights have to be balanced against each other.

It is precisely to ensure this that the Court in *Mandal*[8] ensured that:

(*i*) group rights were not excessively defined or protected;

(*ii*) individual rights remained at the centre of the court's concern; and

(*iii*) a balance was evolved to promote equal opportunities while protecting all individual rights

6.35. Even in matters where no fundamental right to an activity exists because the activity is res extra commercium, the right to equality and the right to not be treated arbitrarily is safeguarded

- *Khoday Distilleries Ltd.* v. *State of Karnataka*[86], SCC at para 60(*h*)
- *Khoday Distilleries Ltd.* v. *State of Karnataka*[87], SCC at para 13

6.36. Any other view would make the fundamental rights meaningless. It should be noted that although Ambedkar championed group rights while piloting the Constitution, he observed in relation to an argument about group rights of a village [VII Constituent Assembly Debates (CAD) 39 (4-11- 1948]

"…the individual is the basic constituent unit…"

(x) Violation of the Judicial Power: Judicial Usurpation

6.37. Under the broad theory of separation of powers, the judicial power is reposed in the judiciary. It is impermissible for the legislature to usurp the judicial power and sit in appeal over decisions of the court by brazenly overruling them.

6.38. The independence of the judiciary and protecting the inherent powers of the judiciary in respect of all matters that fall within its domain as the custodian of the Constitution and its values are part of the basic structure of the Constitution consistent with the doctrine of separation of powers as applicable in this regard.

- *Kesavananda Bharati*[62], at para 292

85 (1980) 1 SCC 634
86 (1995) 1 SCC 574
87 (1996) 10 SCC 304

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- *Indira Gandhi* v. *Raj Narain*[66], per Mathew, J. (at paras 341, 521), per Khanna, J. (at para 210), per Chandrachud, J. (at para 664)
- *A.K. Roy* v. *Union of India*[67], SCC at para 23
- *L. Chandra Kumar*[68], SCC at paras 78-9 and 90
- *State of Bihar* v. *Bal Mukand Shah*[69], SCC at paras 32-34
- *I.R. Coelho*[34], SCC at paras 63, 67

6.39. Where the Supreme Court or the High Courts have decided a matter in exercise of their judicial power or made an interpretation, the legislature, cannot reverse such a decision by sitting in appeal over that decision.

- *People's Union for Civil Liberties (PUCL)* v. *Union of India*[88], SCC at paras 33-37 and 78
- *State of T.N.* v. *M. Rayappa Gounder*[89], SCC at para 5
- *Madan Mohan Pathak* v. *Union of India*[90], SCC at paras 9 and 50
- *Cauvery Water Disputes Tribunal, Re*[91], SCC at para 76
- *G.C. Kanungo* v. *State of Orissa*[92], SCC at para 28
- *S.R. Bhagwat* v. *State of Mysore*[93], SCC at paras 15-18 and 20
- *Municipal Corpn. of the City of Ahmedabad* v. *New Shrock Spg. and Wvg. Co. Ltd.*[94], SCC at para 7
- *S.S. Bola* v. *B.D. Sardana*[95], SCC at para 127
- *Peddinti, Venkata Murali Ranganatha Desika Iyengar* v. *Govt. of A.P.*[96], SCC at para 12
- *Virender Singh Hooda* v. *State of Haryana*[97]

6.40. Although the doctrine of usurpation of judicial power and a bar on the legislature to not sit in appeal over a judgment of the court has normally been applied in respect of legislative power, it applies and has been applied with equal force to Parliament and any other authority exercising the constituent power to amend the Constitution in as much as it affects the application of the doctrine of separation of powers to restrain the pivotal role of an independent judiciary as the custodian of the rule of law.

- *Kesavananda Bharati*[62], at para 577
- *Minerva Mills*[33], at para 87

88 (2003) 4 SCC 399
89 (1971) 3 SCC 1
90 (1978) 2 SCC 50
91 1993 Supp (1) SCC 96
92 (1995) 5 SCC 96
93 (1995) 6 SCC 16
94 (1970) 2 SCC 280
95 (1997) 8 SCC 522
96 (1996) 3 SCC 75
97 (2004) 12 SCC 588

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PART VII

VALIDITY OF THE NINETY-THIRD AMENDMENT

7.1. Constitutional amendments can only be made if:

(*a*) they follow the procedure laid down in Article 368 or other relevant provisions of the Constitution [procedure test]

(*b*) they are not contrary to the implied limitation that the basic structure of the Constitution cannot be altered [substantive limitation test]

Procedure

7.2. For our purposes, the proviso to Article 368(2) of the Constitution requires that matters affecting the judiciary and the federal structure require not just a 2/3rd majority in Parliament but also ratification by the various State governments.

Note (*i*): As far as the *judiciary* is concerned, it should be noted that the proviso applies where Chapter V of Part V (High Courts) and Chapter V of Part VI (Supreme Court) are affected

Note (*ii*): As far as the *federal structure* is concerned, reference is made to Article 162 dealing with the executive power of the states

7.3. It is submitted that the Amendment affects both the judicial power and the federal structure in that:

(*a*) the executive power of the states under Article 162 read with List III, Entry 25 has been taken away

(*b*) the amendment seeks to overrule the judgments of the Court in *T.M.A. Pai*[53], and *Inamdar*[55] and seems to prefer the law laid down in *Islamic*[54], which was specifically overruled in *Inamdar*[55].

7.4. Since the direct and inevitable impact of the Amendment (to use the test of *Maneka Gandhi case*[36] (at paras 17-20), is to affect both the judicial and the federal power, the Amendment needed to be ratified by one-half of the State Legislatures.

Substantive

7.5. Substantively, by enacting the Ninety-third Amendment, Parliament:

(*a*) overrules *T.M.A. Pai*[53], and *Inamdar*[55], and sits in appeal to prefer the judgment in *Islamic*[54].

This is nothing more than sitting in appeal over the Supreme Court and usurping the judicial power by a 'brazen overruling' of a Court decision without bothering to change the basis of the law.

(*b*) accepts that Article 19 provides valuable rights to educational institutions and simply takes away those rights without more

(*c*) hitherto provided for affirmative action in Articles 15 and 16 without affecting Articles 14, 19 or 21 (golden triangle). The Amendment is unique since for the first time there is a special annihilation of the right under Article 19 without even interposing a test of reasonableness which is also basic to the interpretation of the fundamental rights chapter

In other words, Article 19 rights have been arbitrarily taken away without any moderating constitutional limitation.

(*d*) the Ninety-third Amendment clearly fails the width test in that there is a total discretion in the Government to annihilate other rights and discriminate between various institutions

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(*e*) violates Article 14 of the Constitution in treating unequals equally

(*f*) sub silentio amends Article 12 of the Constitution and thereby alters the very basis of the fundamental rights chapter which is directed against state action and not private persons or institutions

(*g*) creates an entirely unworkable and contrary dispensation whereby the Affirmative Action Programme in Article 15(4) will be subjected to the discipline of Article 29(2) but in matters of education, Article 15(5) will not submit to the discipline of Article 29(2)

As a consequence, Article 15(4) will not apply to educational institutions; and any potential action under Article 15(5) based, inter alia, on the forbidden criteria of Article 29(2) would be unsustainable

(*h*) a very anomalous situation will be created arising out of the *Nagaraj*[26] and *Coelho*[34] *cases* whereby Article 19 will continue to operate even if the Amendment is held valid. Thus, any action under the Amendment would have to be judged by Article 19 standards even though the Amendment purports to oust the operation of Article 19

7.6. It is therefore respectfully submitted that the Ninety-third Amendment fails both on procedural and substantive grounds.

7.7. The ratio of *Nagaraj case*[26] for Article 15(5) may be summarised as follows:

Even if changes in the equality provisions to permit reservations or affirmative action are made by constitutional amendment, such constitutional amendments will nevertheless be subject to the tests of (*a*) equality (*b*) reasonableness or proportionality (*c*) compelling need (*d*) maintenance of excellent standards (*e*) cream layer and (*f*) 50% ceiling

7.8. Thus, *Nagaraj case*[26] details the following basic structure limitations:

(*a*) balancing equality and equity (para 44)

(*b*) reasonableness and proportionality (paras 23, 24, 26)

(*c*) compelling need justified on facts (paras 108, 110, 121, 122, 123)

(*d*) excellent standards in civil service or perforce educational institutions (paras 41 & 108)

(*e*) creamy layer (paras 82, 120-3)

(*f*) 50% limitation (paras 56-58)

7.9. Alternatively, even if the Ninety-third Amendment is valid, the limitations laid down in *Nagaraj*[26], and *I.R. Coelho*[34] will apply in that any action taken under the Amendment will be:

(*a*) subject to Articles 14, 19 and 21 even though Article 19 ahs been specifically excluded by the non obstante clause [*Coelho*[34], and *Nagaraj*[26]]

(*b*) the creamy layer will apply [*Nagaraj*[26]]

(*c*) the concept of reasonableness will apply [*Coelho*[34] and *Nagaraj*[26]]

(*d*) any action would be subject to demonstrating compelling interest under conditions of strict scrutiny [*Coelho*[34] and *Nagaraj*[26]]

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7.10. The Parliamentary debates also show that the Ninety-third Amendment is clearly as usurpation of the judicial power and that Parliament acted in a hasty way to produce unreasonable results.

*See Parliamentary Debates on the Ninety-third Amendment

**See also summary of these debates in Rajeev Dhavan: *Reserved! How Parliament Debated Reservations*, 1995-2007 at pp. 126 at 137-154

It is necessary to emphasise that the entire basis of invoking the basic structure doctrine arose because Parliamentary majoritarianism would not be allowed to affect the basic structure of the constitution. This was a clear example of parliamentary using brute majorities without adequate discretion.

PART VIII

VALIDITY OF THE ACT OF 2006

(*i*) *Act Self-Deceptive*

8.1. The Act of 2006 is an exercise in 'self-deception' requiring lifting of the legislative veil to examine whether the legislative facts on which the Act is founded, are plausible or self-defeating.

8.2. It is permissible for courts to lift the veil of a statute to decide whether the real nature of the legislation is self-defeating or self-deceptive.

- *Indra Sawhney (II)*[25], at SCC p. 195, para 36 citing *Kesavananda Bharati*[62]:

8.3. In this case, the legislature has proceeded on the basis of legislative facts that:

(*i*) the OBC reservation should be pegged at 27% and the SC/ST reservations should be pegged at 15% and 7.5% respectively

(*ii*) the annual permitted strength of the existing institutions is flexible to accommodate a mandatory increase in seats

(*iii*) deemed universities, directly and indirectly aided and affiliated institutions are part of the Central Government's machinery

(*iv*) the mandatory increase of seats can be achieved without any onerous financial inputs or loss of efficiency

(*v*) the OBCs have already been satisfactorily identified to meet the requirements of the equality clause

(*vi*) quotas alone are appropriate

8.4. A lifting of the veil will show that:

(*a*) the purpose of the Act was to overrule the *Inamdar*[55], decision

[See Debates on the Act]

(*b*) the Joint Committee examining the legislation was convinced that the appropriate exercise to identify beneficiaries had not been conducted thereby questioning the entire exercise

[See the 186th Parliamentary Standing Committee Report on the Central Educational Institutions (Reservations in Admissions) Bill of 2006]

8.5. The Report of the Committee which examined the Bill had specifically warned Parliament that:

(*i*) no comprehensive or authentic census-based data and there was "an urgent need for carrying out a census on caste and community basis" [para 12]

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(*ii*) "the Chairman of the National Commission for Backward Classes was of the view that reservations proposed for the Backward Classes in the Bill was not proportional to their population" [para 13]

(*iii*) the Central List containing a total of 2303 caste communities was prepared in 1993 and "there has been hardly any exclusion so far from the list. It was emphasised that the process of inclusion of caste communities cannot be continued indefinitely. There was a need for putting a cap on the further inclusions. The task of reviewing the lists of backward classes needed to be taken up in consultation with the Backward Classes Commission as envisaged under Section 11 of the National Commission for Backward Classes Act, 1993 governing it" [para 25]

(*iv*) "the Committee was given to understand that there has been a long pending and consistent demand from some State Governments/State Backward Classes Commissions for undertaking a comprehensive census of backward classes. It was emphasised that if such a task was not accomplished, such affirmative action as extending reservations would not have legitimate and just basis" [para 25]

(*v*) "the various tests followed in the country were uneven" [para 14]

(*vi*) in-depth studies were required in respect of faculties, infrastructure, additional funding for the proposed expansion and retaining the level of excellence [para 28]

(*vii*) there was a major limitation on data since 1931 and the limited data available from NSSO Surveys from 1998-99 consisted of only sample surveys [para 36]

(*viii*) "no acceptable mechanism existed to group people into different categories" [para 37]

(*ix*) "a comprehensive survey with periodic reviews was essential" [para 38]

(*x*) the concept of faculty or university was too wide [para 39]

(*xi*) there was a need for a creamy layer which should however not be treated as the basis for the exclusion from the class [para 46.1]

(*xii*) mechanisms needed to be provided for minorities [para 47]

8.6. These factors show that the legislative facts on which the Act of 2006 was founded is wholly misleading and incorrect.

8.7. Other information that was publicly available quite clearly shows that the data supporting the legislative facts on which the Act of 2006 is founded are wholly incorrect.

This has been noted in the interim order in *Ashoka Kumar Thakur (8)*[28], SCC pp. 369-70, (at para 12).

8.8. The background debates also show that the Act of 2006 is clearly as usurpation of the judicial power and that Parliament acted in a hasty way which also shows that the entire exercise must be treated as unreasonable.

See Parliamentary Debates on the Act of 2006

See also summary of these debates in Rajeev Dhavan, *Reserved! How Parliament Debated Reservations, 1995-2007* at pp. 168 at 175-192

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(ii) Substantive Invalidity

8.9. The Act of 2006 is unreasonable, arbitrary and capricious and contrary to Articles 14 and 21 as well as the tests laid down in *Nagaraj*[26] and *Coelho*[34] on the basis that:

(*a*) the implementation of reservations is mandatory and rigid in its implementation and timeframe without considering the feasibility and effect [Sections 3, 5 and 6]

(*b*) the quotas for the OBCs, (as also the SCs and STs) have been declared to be at 27% (and 15% and 7.5%) without examining either the criteria for eligibility or the numbers and percentages [Section 3]

(*c*) while SC and ST have been defined in the Act with reference to Articles 341 and 342 of the constitution [Sections 2(*h*) & 2(*i*)], the OBCs have been defined as "class or classes of citizens who are socially and educationally backward and are so determined by the Central Government" [Section 2(*g*)]

This leaves the road wide open for political patronage since no other guidelines have been provided by the Act and there is no mention of creamy layer

(*d*) central educational institutions have been clubbed together and treated as if their predicament was the same and they could suffer the demands of the Act with equal facility with or without recourse to Government funds [Section 3 read with 5]

(*e*) the Act envisages that the annual permitted strength can and must be increased by a significant number of seats within 3 years (necessarily starting in 2007) and that the prior approval of the appropriate technical authorities will be forthcoming [Sections 5 and 6]

(*f*) aided institutions with limited resources will particularly be hit by the Act

The aided institutions covered by the Act include deemed universities and other institutions receiving aid as well as their constituent units [Sections 3(d) and 4]

(*g*) the cost of the mandatory infrastructure increase is wholly unreasonable even if financial inputs are deferred for a year or two within the 3 year period [Section 5]

(*h*) standards of education with this forced imposition will necessarily decline. The deference to maintaining standards of education in Section 5(2) is clearly insufficient because the requirement of the 3-year period remains.

(*i*) an infrastructure increase of 49.5% [See Section 3] can only produce fragile and questionable results

(*j*) the courses for which the reservations and increases will apply cover Bachelors, Masters and doctoral levels. [Section 2(j)]. This will require a vast increase of resources which will be thinly spread in terms of teachers, infrastructure, staff and curricula.

(*k*) the exclusion of areas of specialisation including post-doctoral level is vague and arbitrarily left to the Central Government [Section 4(*d*) read with Schedule]

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(*l*) the lack of provision of a creamy layer

(*m*) the lack of any compelling necessity to enact this legislation in the manner and form in which it is enacted

(*n*) the entire Act must fail and no provisions are severable

See *R.M.D. Chamarbaugwalla* v. *Union of India*[98], AIR 628 at para 22 which exhaustively deals with the principles of severability

See *Delhi Transport Corpn.* v. *D.T.C. Mazdoor Congress*[99], SCC at paras 125, 240-256 [per Mukharji, C.J.] and paras 321, 329-332 [per Ramaswamy, J.] on the permissibility of reading down a statute

PART IX

SUBMISSIONS ON RELIEF

9.1. It is respectfully submitted that both the constitutional amendment and the Act of 2006 are ultra vires the Constitution.

9.2. Alternatively, even if the constitutional amendment is valid, the Act of 2006 must be subjected to the judicial review on the following basis:

(*a*) reasonableness,

(*b*) whether clear criteria have been laid down to identify the OBCs,

(*c*) whether OBCs will be defined in terms of the 27% quantum,

(*d*) whether there was a compelling necessity other than political patronage to enact this legislation in the manner and form in which it is enacted,

(*e*) whether the Act provides for any creamy layer exclusions,

(*f*) whether caste is implicitly borne into determining the OBC categories since there seems to be an overt and implied reliance on the Mandal Commission criteria,

(*g*) whether the criteria for OBCs is objectively determined by a separate commission on the basis of relevant data which does not include caste criteria.

9.3 Adequate directions be given to the Government so that:

(*i*) the criteria for SEBCs is clearly articulated without any reference to caste criteria,

(*ii*) taking into account the claims of all communities and classes,

(*iii*) a creamy layer test be devised and rendered applicable to the provisions of the Act of 2006,

(*iv*) the National Backward Classes Commission should engage in a de novo exercise including periodic revisions,

(*v*) compelling necessity should be shown so that it meets the standards of strict scrutiny both by the administrative authorities as well as the courts.

98 AIR 1957 SC 628

99 1991 Supp (1) SCC 600

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BROAD SUBMISSIONS

1. The present group of writ petitions have been filed wherein the present "affirmative action" policy of the Government of India have been challenged as being discriminatory and against general public interest. The said policy is intended to "uplift" the so called socially and educationally backward sections of the society by a process of "positive discrimination" in the form of Reservations or Quotas in the admissions to the Central Educational Institutions. The Central Government seeks to take shelter under the enabling power conferred under Articles 15(4) and 15(5) of the Constitution for the said purpose.

2. The challenge in the present writ petitions to the Constitutional Amendment, the Central Educational Institutions (Reservation in Admission) Act, 2006 and the policy of reservation of the Central Government is broadly as under:

(*a*) The Provisions of Article 15(5) of the Constitution is destructive of the basic features of the Constitution is it destroys the delicate balance of the various fundamental rights that the citizens of the country enjoy.

(*i*) The Ninety-third Amendment abridges the inviolable concept of freedom enshrined in Article 19 of the Constitution of India and violates the delicate balance between the freedoms enjoyed by the citizens and the "reasonable restrictions" that can be placed by the State.

(*ii*) The amendment acts like a "proviso" to Article 19(6) allowing the state to do an act which was held to be not permissible under 19(6) of the Constitution, it redefines "reasonableness" to include an action which has been held to be unreasonable in the constitutional scheme.

(*iii*) It overemphasises the ends specified in Part IV of the Constitution and enables the State to abrogate the means contained under Part III to achieve the said goals and thus alters the delicate balance between part III and Part IV of the Constitution which is the basic feature of the constitution.

(*iv*) The amendment alters the structure and code of Article 15 to redefine the limits and extent of affirmative action. Article 15(5) overturns the delicate balance between equality and egalitarianism enshrined under Article 15 thereby violating the principle of equality.

(*v*) The provision makes an exception for the minority institutions covered under Article 30 and therefore treats them differently from the other private institutions enjoying protection under Article 26(*a*) of the Constitution.

(*vi*) The amendment is a "further" step in direction of the "incremental erosion" of the fundamental rights and the freedoms enjoyed by the citizens.

(*vii*) The Amendment abridges "Golden Triangle" comprising Articles 14, 19 and 21 of the Constitution of India.

(*b*) Assuming that Article 15(5) is valid and not destructive of the equilibrium of equality established under the Constitution, The Central Educational Institutions (Reservation in Admission) Act, 2006 which has been enacted in purported exercise of the said powers, is in excess of the said powers and is not saved either by Article 15(5) or by Article 15(4) of the Constitution.

(*i*) Article 15(4) or Article 15(5) do not expressly provide for quotas, they save only the "special provisions for the advancement of…" the target

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beneficiaries. They do not create any group rights [unlike Article 16(4) etc.] as were created for SCs and STs.

(*ii*) In order to be saved by Article 15(4) or Article 15(5), a special provision must specify the "target beneficiaries" with a necessary degree of specificity and the principles on which such identification is to be made should be in consonance with the constitutional prohibitions, restrictions and limitations.

(*iii*) The quality of special provisions must spell out the object and the goal to be achieved and the nexus of the measure with the objectives must be established with a necessary degree of specificity. There ought to be a quantitative correlation between the benefits conferred and the extent of the "problem" sought to be remedied, the correlation being "reasonable" and not "proportionate".

(*iv*) The effect of the measure must be established on hard empirical data—and even experimental legislation must have some established sociological basis in praesenti and not anthropological literature of past.

(*c*) The Central Educational Institutions (Reservation in Admission) Act, 2006:

(*i*) Does not provide for the manner or the principles on which the beneficiaries have to be identified and reserves the said power with the Central Government. Considering the difficulties that have dogged the selection of criteria of backwardness and the identification of "socially and educationally backward class"—it was obviously a matter of Legislative Choice and since identification of the target beneficiaries is an integral part of the "special provision", by not laying down the principles for guiding the actions of the Central Government, the legislation is a text book case of "excess delegation of powers".

(*ii*) Lacks the necessary nexus with the ultimate objective i.e. removal of social and educational backwardness and if the act and the policy purports to achieve an imaginary end, the act is therefore arbitrary, unreasonable and violative of the principle of intelligible classification.

(*iii*) Gives rigidity and permanency to the measure i.e. continuous reservation of seats for the "beneficiaries" without any provisions for review. It makes the "means" that are ideologically intended to alleviate social and educational backwardness, an end in itself and therefore the measures provided in the Act cannot be sustained.

(*iv*) Allows continuation of reservation without a review and therefore results in excessive reservation and permits reverse discrimination. Thus such a provision cannot be sustained in law.

(*v*) Purports to create 100% quotas in the additional seats created in the educational institutions and the law is therefore facially discriminatory and is violative of Articles 15 and 29(2) of the Constitution of India.

(*vi*) Is inflexible and is for an indefinite period of time. It fixes the nature of the measure (i.e. quotas) as well as the extent of the measure (i.e. 15% for SCs, 7½% for STs and 27% for SEBCs when other measures (like

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marks equalisation, scholarships etc.) could have achieved the desired results in a given case.

(*vii*) Does not provide for any safeguards which are necessary in any affirmative action policy i.e.

A mechanism for identification of the objectives to be achieved in hard quantitative terms which the Government seeks to achieve as a "social government" with the implementation of a policy. Laying down of goals and objectives is vital so that the policy can have a provision in the nature of a "sunset clause" i.e. a time when the measure would cease on achieving the goals set.

A mechanism for identification of the results of the policy and to assess the efficacy of the measure chosen in light of the objectives to be achieved.

A mechanism for a continuous review of the benefits/drawbacks of the policy itself.

A mechanism for a continuous review of the identification of the "Target" beneficiaries on the basis of the principles provided under the Legislation.

(*d*) The Act does not prescribe the manner of identification of a the "class" for the purposes of Article 15(5) and the means chosen by the Central Government for identification of the "Target Beneficiaries" is based not just predominantly but exclusively on the basis of Caste (i.e. in the absence of a proper definition of backwardness—a Caste which the Central Government feels is "socially and educationally backward"). It is submitted that identification of a class on the basis of caste is in complete derogation of provisions of Article 15(1) and therefore makes the classification per se "suspect". The said means lacks the necessary elements to empirically establish homogeneity, is out of tune with Article 340 and lacks the data to establish compelling State interest.

(*e*) The identification of Socially and Educationally Backward Class on the basis of "Caste" creates vested interests in backwardness—they do not "remedy" backwardness and the caste system (which is the ultimate goal) but edifies and perpetuates it. The measure and the means chosen by the Government is therefore antithetical to the constitutional goals and as such the policy itself is untenable and unsustainable.

(*f*) The policy of the central government does not make any effort to remove the "creamy layer" to arrive at a compact class of "Backwards" deserving the benefits of the policy. Thus the policy allows conferment of benefits to undeserving persons forming part of the group identified by the Central Government on the basis of "Caste".

(*g*) The action of the State Government lacks in the basic details of the extent of the measure. It takes within its sweep all undergraduate, graduate and post graduate education. The ground work to adopt this measure has not been quantified which had to be done before the act was put into place. Without the said home work, the nexus and the correlation between the quotas and backwardness being remedied, cannot obviously be established. It is submitted that there is no data to establish:

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(*i*) The exact social malaise sought to be remedied—i.e. the level of social and educational Backwardness.

(*ii*) The manner in which "across the board" quotas in undergraduate, graduate and postgraduate education would cure this "malaise". This data ought to be drawn upon more than five decades of experience of quotas that have been in place over the said period.

SUBMISSIONS IN DETAIL

I. BASIC STRUCTURE

(*i*) *Amendment re-defines "reasonableness" and enables the State to act unreasonably.*

3. The Ninety-third Constitution Amendment has introduced sub-article (5) in Article 15 of the Constitution. The said article purports to "empower" the State to make special provisions for the "Scheduled Castes, Scheduled Tribes and the Socially and Educationally Backward Classes" in matters for their admission to the education institutions including the government institutions, government aided institutions and all private unaided institutions (however excluding the minority education institutions covered by article 30 of the constitution). The said amendments have been brought to nullify the effect of the Judgment of this Hon'ble Court in *T.M.A. Pai Foundation* v. *State of Karnataka*[1] as explained and clarified in *P.A. Inamdar* v. *State of Maharashtra*[2] by which this court has defined and clarified the rights that the private educational institutions have in terms of Article 19(1)(*g*) of the Constitution and the extent of the "reasonable" restrictions that can be imposed on the institutions Under Article 19(6) of the Constitution.

4. *The impugned amendments purport to re-define "reasonableness" so as to increase the power of the state under Article 19(6) of the Constitution.* It is submitted that this court in the above cases had held that fixation of quotas and reservation of seats in private education institutions amounts to "Nationalization of education" and would constitute an "unreasonable restriction" on the rights of an unaided private educational institution. *The impugned amendment seeks to legitimize an "unreasonable" action of the legislature or the executive government* which has already been held to be so by this court in the abovesaid cases. The said amendments therefore affect the delicate balance and the theme of "reasonableness" that runs through the entire constitution.

5. In this regard while defining reasonableness the observations of this court in *P.A. Inamdar* v. *State of Maharashtra*[2] at SCC p. 601, para 125 may be referred to.

6. The above observations of this Hon'ble court have to be seen in light of the Provision of 19(6) of the Constitution which allows the state to impose "reasonable restrictions" in the interest of General public. It is submitted that this court by the above judgment found that the requirement of setting aside "quotas" is not a reasonable restriction and therefore the amendments seek to redefine backwardness and permits the state to act unreasonably. It is submitted that the power of defining scope reasonableness in consonance with the constitutional scheme is with the courts alone and by the impugned amendments the state seeks to overturn the definition of

1 (2002) 8 SCC 481
2 (2005) 6 SCC 537

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reasonableness as defined by the courts. In this regard the observations of this court in *Minerva Mills Ltd.* v. *Union of India*[3] at SCC p. 660, para 73 may be referred to.

7. It is submitted that the Supreme Court is the final arbiter of the fundamental rights and protector of the fundamental freedoms and liberties. It protects the citizens from invidious action of the State which trample and abrogate their fundamental rights. The Constitution requires the State to act reasonably and the parameter of reasonableness in the constitutional scheme is defined by the constitutional courts. If the action of the state was reasonable it could have been upheld within the parameters of Articles 14 and 19(6) and there was no need for the amendments. Thus the one and only object of the present amendments under challenge is to permit the Government to do an unreasonable act, which the petitioner submits cannot be permitted.

8. It must also be noted that in *T.M.A. Pai Foundation* v. *State of Karnataka*[1] as explained and clarified in *P.A. Inamdar* v. *State of Maharashtra*[2] *this Court did not decide against the permissibility of providing reservations for a select classes on account of "absence of a source of power" to provide reservations but because of the of its unreasonableness within Article 19(6).* Article 15(5) merely provides for a source of power but since the said power has been held to be "unreasonable", such a provision, it is submitted, is unsustainable.

9. In addition to the above it is also submitted that the present impugned amendments alters the "Supremacy of the Constitution" which is the basic feature of the Constitution to "Supremacy of the Legislature". It is submitted that Our Constitution is a "Controlled Constitution" wherein a "limited" constituent power to "Amend" has been given under Article 368. The Courts in India are the ultimate protector of the Constitution and while doing so it categorises a particular act to be "Unreasonable" and "Unconstitutional". The legislature instead of acting in a reasonable manner seeks to alter the "yardstick" itself by amending the Constitution by exercising its constituent power. The same act which was unreasonable and unconstitutional becomes reasonable and constitutional which the Petitioner submits is giving supremacy to the legislature and is a fraud on the constitution. *If laws which are struck down as violating fundamental rights can be protected by amending the Constitution to redefine "constitutionality" there will be end to the freedoms guaranteed under Part III.*

10. It is submitted that Article 15(5) enables the state to make or protect a law to provide for reservations in private education institutions which has been held to be an unreasonable encroachment on the fundamental rights of the citizen. It is submitted that the present amendment seeks to insulate the law made under the said provision from the operation of Article 14 since it redefines reasonableness to make an unreasonable act reasonable and then expressly excludes the freedom contained under Article 19(1)(*g*) of the Constitution.

11. It is submitted that the arena of affirmative action for the advancement of the weaker sections was defined under Article 14 which while prohibiting "Class Legislation" but permits "Classification on a proper intelligible differentia" and Article 15 which flows from Article 14 but puts a restriction against classification on the categories specified in sub-article (1) thereof. The areas where such affirmative actions can be provided looking at the freedoms enjoyed by the citizens has been

3 (1980) 3 SCC 625

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outlined by Article 15 itself that is to say Article 15(1) to Article 15(4), extending reservations in the private institutions has been found to be an unreasonable encroachment on the freedoms enjoyed by them. The right to setup and run an educational institution is provided under Article 19(1)(*g*) i.e. private institutions generally, Article 26(*a*) i.e. private charitable institution and also Article 30(1) i.e. private minority institutions. The extension of reservations or imposing social obligations of the state on the private institutions has been held to be an unreasonable restriction extending the domain of Article 15 so as to encroach the freedoms contained under Article 19 and the reasonableness contained under Articles 14 and 15 of the Constitution. The amendment alters the structure and code of Article 15 to redefine the limits and extent of affirmative action. It is submitted that Article 15(5) overturns the delicate balance between equality, freedom, egalitarianism enshrined under Article 15 thereby violating the basic structure.

(*ii*) *Amendments alter the balance between Part III and Part IV of the Constitution*

12. It is submitted that the Balance between the Directive principles contained under Part IV and the fundamental rights contained under Part III is the foundation of the Constitution of India. While Part IV gives the ultimate goals that any government must always strive to achieve, Part III provides the discipline which must always be observed while striving to observe the said goals. This balance between Part III and Part IV of the Constitution has been held to been held to be a Basic Feature of the Constitution and where this balance is sought to be affected by elimination of the "discipline" contained under Part III, that the amendment would violate the Basic structure of the Constitution. The interplay between the Fundamental rights and the Directive Principles has been elucidated by this court in *Minerva Mills Ltd.* v. *Union of India*[3] (*see* SCC p. 654, paras 56-57).

13. Thus it is submitted that this delicate balance between the directive principles and the fundamental rights ought to be maintained and protected. The directive principles cannot be given a primacy or the state be given a "free hand" to adopt any means to attain the goals set out in Part IV of the constitution. The present impugned amendments have been made for enabling the state to implement its reservation policy in private education institutions which have been held to be "*... acts constituting serious encroachment on the right and autonomy of private professional educational institutions....*" Which cannot be "*... held to be a regulatory measure in the interest of the minority within the meaning of Article 30(1) or a reasonable restriction within the meaning of Article 19(6) of the Constitution....*" The argument put forward by the state to justify the amendment is that the said amendment is intended to achieve a high social objective of empowerment of the weaker sections of the society. Reliance has also been placed on the provisions of Articles 38 and 46 contained in Part IV of the Constitution of India. It has been suggested that since the amendment is to secure the objective contained in Part IV, the impugned amendments as well as the act are valid. *It is submitted that the impugned amendments seek to neutralize the limitations and the discipline contained in Part III for the attainment of the social goals and as such the said amendment alter the delicate balance between Part III and Part IV of the Constitution of India.*

14. Further the observations by Hegde and Mukherjea, JJ. in *Kesavananda Bharati* v. *State of Kerala*[4] (at SCC p. 503, paras 714-15) are of great relevance.

4 (1973) 4 SCC 225

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15. The impugned amendments seek to specifically exclude the operation of Article 19 of the Constitution and since the present amendment has been made in the charter of equality which includes Article 15 and which itself flows from Article 14 of the Constitution, it is submitted that the present amendment alters both Articles 14 and 19 of the Constitution of India.

(*iii*) *Whether Articles 14 and 19 constitute Basic Features of the Constitution*

16. The said issue is no longer res-integra and has been unequivocally held to be so in the case of:

(*i*) *Minerva Mills Ltd.* v. *Union of India*[3] at SCC pp. 654-55 & 660, paras 58-59 & 74;

(*ii*) *I.R. Coelho* v. *State of T.N.*[5] at SCC pp. 108-09, paras 141 & 145.

(*iv*) *Impugned amendments—"incremental erosion" of fundamental rights.*

17. It is submitted that the present impugned amendments as a further step by which the legislature seeks to take away the fundamental rights "step by step". The amendment is a "further" step in the direction of "incremental erosion" of the fundamental rights and the freedoms enjoyed by the citizens. At first effort was made by exercising the constituent power to denude Part III of its content by the 42nd Amendment by which Article 31-C was amended and it was provided that any law made to effectuate a policy contained under Part IV will not be void on the ground of its inconsistency with Articles 14 and 19 of the Constitution. This Court in *Minerva Mills case*[3] held that the said amendment was unconstitutional being violative of the Basic Structure. The present amendments propose commence the process of independently and individually amend the Fundamental rights to denude them of their content. It is submitted that the said amendments therefore cannot be sustained in law. It is submitted that the amendments made in Article 16 by which sub-articles (4-A), (4-B) were inserted were found in *M. Nagaraj case*[6] to be flowing from Article 16(4) itself did not offend the restrictions placed by Article 16(4). Article 15 however proposes to make out a "new field" by prescribing reservation in private sector institutions which was not available under Article 15(4). The said amendment seeks to exclude the operation of Article 19(1)(*g*) in totality and therefore it is submitted that the said amendment cannot be sustained. In this regard observations of Hegde and Mukherjea, JJ. in *Kesavananda Bharati* v. *State of Kerala*[4] at SCC pp. 486-87, para 666 and at SCC p. 507, paras 726-27 may be referred to.

It is submitted that the present amendment is a step in the same direction of encroaching on the fundamental freedoms not conferred but guaranteed under the constitution. The "excuse" or the "justification" for the amendment may be for a genuine cause but still *a freedom once lost is lost forever.*

(*v*) *Amendment enables the State to discriminate*

18. The impugned amendment specifically excludes the application of Article 19(1)(*g*) of the Constitution in respect of the laws made under the said Article 15(5). It however expressly provides that the law made under the said article would be subject to the rights of the Minorities contained under Article 30 and since no exclusion from application has been made for Article 26(*a*) it is submitted that the institutions who continue to be governed by the said article, would not be affected by

5 (2007) 2 SCC 1

6 *M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212

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the provisions contained under Article 15(5). Thus the amendment clearly allows the state to discriminate and "impose" reservations in cases governed by the provisions of Article 19(1)(*g*) however charitable institutions governed by Article 26(*a*) and the Minority institutions governed by Article 30(1) have been left out.

19. It is well settled that the right to setup educational institutions is governed by Articles 19(1)(*g*) as well as Article 26(*a*) and the minority institutions have a right under Article 30(1) of the Constitution. Observations by this court in *T.M.A. Pai Foundation* v. *State of Karnataka*[1] clearly state the same at SCC p. 535, para 26.

20. Similarly the observations made in *P.A. Inamdar* v. *State of Maharashtra*[2] at SCC pp. 555-56, para 6 can also give support to the above submission.

21. Thus it is submitted that the present amendment "enable" the state to discriminate among institutions governed under the provisions of Article 30(1) and those covered by Article 26(*a*) on one hand and the institutions governed by the provisions of Article 19(1)(*g*) on the other. While the amendments gives primacy to the rights of minorities to establish and run educational institutions under Article 30(1) which were held to be at par with the rights of the all community including the majority community under 26(*a*) if maintained for charitable purposes as well as the rights of all citizens under Article 19(1)(*g*) of the Constitution. There is no justification for this differential treatment. It is submitted that the provision therefore emasculates the fabric of equality which runs throughout the Constitution and builds discrimination and disparity in the Constitution itself. It is thus submitted that such amendments cannot be sustained.

II. CHALLENGE TO THE ACT

(*i*) *Excessive Delegation of unguided powers*

22. Section 2 of the Act lays down the definitions and sub-clauses (*g*), (*h*) and (*i*) of the said section defines Other Backward Classes, Scheduled Castes and the Scheduled Tribes respectively which are being reproduced hereunder:

> (*g*) "Other Backward Classes" means the *class or classes of citizens who are socially and educationally backward,* and *are so determined by the Central Government.*
>
> (*h*) "Scheduled Castes" means the Scheduled Castes *notified under Article 341 of the Constitution*;
>
> (*i*) "Scheduled Tribes" means the Scheduled Tribes *notified under Article 342 of the Constitution.*

23. Section 3 of the said Act lays down the "extent of Reservations" that would have to be provided at the time of admission of students in the Central Education Institutions.

24. It is submitted that the Act providing for Reservations in the admission to Central Education Institutions deprive the members of the general category of an opportunity to be considered for admission in respect of the seats that have been reserved under the provisions of the Act for the classes specified and unless the government can justify that the "special provision" (which necessarily includes the identification of the Target Beneficiaries) satisfies compelling state interest and comes within the four corners of the Article 15(4) or 15(5) of the Constitution. Thus identification of beneficiaries of the policy is the most important ingredient of Affirmative Action Program. The persons so chosen ought to be the really

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"deserving" so as to form a class in whose favour a classification can be made. In this regard reliance has been placed on *M.R. Balaji* v. *State of Mysore*[7], SCR at pp. 457-58.

25. It is submitted that the Act does not lay down the mechanism for identifying and quantifying the "Backward Classes". Section 2(*g*) of the Act defines the term "backward classes" to mean "... the class or classes of citizens who are socially and educationally backward, and are so determined by the Central Government..." Thus the Act allows the Central Government to identify backward classes without laying down the manner or the principles and indicia of the basis of which "backwardness" can be gauged and classification can be made. Considering the difficulties that have dogged the selection of criteria of backwardness and the identification of "socially and educationally backward class"—it was obviously a matter of Legislative Choice whereby a principle ought to have been prescribed keeping into view the objective of Article 15(5) for the guidance of executive power. Under the present act, identification has been left totally on the Central Government without any guidelines it is submitted that the present is a clear case of excess and over delegation without boundaries to circumscribe state Action.

26. It must be noted that the present enactment has been made after the judgment in *M. Nagaraj* v. *Union of India*[6] wherein it has been held that "... Backwardness has to be based on objective factors...." It is submitted that Act does not lays down any "objective factors" for determination of "backwardness" for the guidance of the state and after the said pronouncement it was imperative for the legislature to lay down in no uncertain terms as to who they consider to be backward and what are the determinant factors of "Backwardness".

27. With regard to delegation of unguided power, the observations of this Hon'ble Court in *State of Rajasthan* v. *Basant Nahata*[8] at SCC p. 92, para 19 may be referred to.

28. The legal position has been explained by a Constitution Bench of this Court in *Kishan Prakash Sharma* v. *Union of India*[9] (see SCC p. 226, para 18).

See also:

i. Hamdard Dawakhana (Wakf) v. *Union of India*[10]

ii. Krishna Mohan (P) Ltd. v. *MCD*[11]

29. It is thus submitted that in the present case the legislature has neither defined the "Backward classes" nor laid down the principles or guidelines for determination of the Backward classes for the purposes of the act and have left the said essential ingredient of the policy with the executive Central Government. It is thus submitted that this delegation of unguided, uncanalised and unbridled power by the legislature to the executive and that too of a essential legislative function renders the legislation bad for excessive delegation of power.

7 1963 Supp (1) SCR 439
8 (2005) 12 SCC 77
9 (2001) 5 SCC 212
10 (1960) 2 SCR 571
11 (2003) 7 SCC 151

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30. In response Shri Parasaran, learned Senior Counsel has argued that the principles for identification have been laid down in the various judgments as well as the "Mandal Commission Report". It is submitted that the reliance placed on the judgments is clearly unjustified. The identification of the target beneficiaries is always a matter of policy i.e. for "whom" the policy has been made and to whom the benefits are intended to be directed. The decisions rendered by the courts will not decide as to whom the Government wishes to "uplift" under an affirmative action policy, this decision was of the Legislature and which, the Petitioner submits, is absent from the impugned legislation. The respondents have also relied upon the indicia given by the Mandal Commission Report which the Petitioner submits is wholly untenable and the same was pointed out during the opening submissions[12]. In any case it is submitted that despite the report, for acceptance of a criteria, it ought to have been reflected in the legislation and not left for the executive government to decide and the same therefore clearly amounts to excessive delegation of power.

31. Without prejudice to the above it is submitted that in the absence of guidelines for identification, the manner of identification by the Central Government, as contended by the learned Solicitor General is also unjustified "Common lists by the Mandal Commission and the State Lists" is also faulty and cannot be permitted.

32. Apart from the defects which have been already been pointed out it is submitted that the test for identification being predominantly caste based, such identification is impermissible in the constitutional scheme and the endeavour of the Petitioner in the present submission as well as the earlier submission was to show that the either the lists followed by the States were (purely or at least predominantly) caste based and were prepared without any survey or ground work[13]. It is submitted that the identification of beneficiaries for the reservation policy is on the basis of caste as such is in violation of the provisions of Article 15(1) of the Constitution. The Class that the Constitution makers envisaged for upliftment for a totalitarian growth of the country is entirely different from the Class which the present Government seeks to identify for conferment of discriminatory benefits and is antithetical to the constitutional scheme which rests on equalitarian principles and aims at an egalitarian society.

33. The learned Solicitor General has also stated that the facts relating to the manner of identification by the States were "half facts" and aimed to "prejudice the court". It is submitted that the said allegation is entirely without basis since the submissions were based on recorded facts from government documents and extracts from the reports of the various state commissions which had been annexed along with the said submissions. The object of the submission was to show the manner in which the identification had been carried out by the states and which the Central Government seeks to work by identification of castes for conferment of benefits. The Learned solicitor has placed detailed submissions with regard to the working of the National Commission for Backward Classes and the manner in which it carries on with the task. It is submitted that when the initial premise of the Commission which proceeds to identify "castes" that are backward without looking at the object of

12 At the time of opening arguments, along with the written arguments a separate submission was made pointing out the defects and the shortcomings in the recommendations of the Mandal Commission Report and the same was annexed to the submissions as Annexure B.

13 The defects in the state lists have also been pointed out in the opening arguments and the same were annexed to the earlier submissions as Annexure A.

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identification and the constitutional scheme which is sought to be addressed as a consequence of identification, the contention that the petitioners have not challenged the report/recommendations of the commission is of no avail. In addition the fact that the commission had invited objections or conducted public hearings (wherein a few persons interested to corner the benefits attend) is of no avail and are really a farce. The learned solicitor has sought to justify the recommendations of the NCBC on the ground that a number of application for "inclusion" in the lists have been rejected. The solicitor has however not addressed or replied to the grievance of the Petitioners of "over inclusion" of communities or a review of the communities already included to determine whether the benefits to them should continue.

34. It is submitted that the challenge by the petitioners is in respect of the manner of identification which permits "inclusion of persons who don't deserve" and at the same time "excludes the deserving for no apparent reason". The entire methodology of identification of "castes" as "backward" suffers from this basic defect as a result of which the identification on the said basis cannot be permitted. Even where the creamy layer is excluded it would only deal with a part of the problem i.e. exclusion of the undeserving but does not address the problem of inclusion of the deserving.

35. It must be noted that even where a caste is identified as backward and the persons of the said castes are conferred with the benefits, the inclusion may be of persons of a class but exclusion of a person equally deserving is "only" on the basis of caste thus in violation of the provisions of Article 15(1). Thus where a person belonging to the so-called "upper" caste applies for a post or a seat, he is denied admission only because of his caste and not for any other reason. Thus a proper methodology ought to be adopted so as to find out the real backward who need state protection.

(*ii*) *The "EXTENT" and "NATURE" of affirmative action.*

36. The Act provides for reservation for the different categories in the following manner:

(*i*) Scheduled Castes	15%
(*ii*) Scheduled Tribes	7½%
(*iii*) Other Backward classes	27%

37. The Petitioner most respectfully submits that the "Extent" and the "Nature" of affirmative Action/reservation provided to the different categories is wholly unjustified and arbitrary.

(*ii.i*) *Extent of Reservation*

38. It is submitted that there is no justification for reserving 49½ percent seats for admission in the Central Education Institutions. It has always been stated that the said percentages have been prescribed on the basis of the population of the "castes" comprised in the said categories. At the outset it is submitted that the extent of reservation has to be decided on a basis that the overall efficiency and merit is not affected. Even if it is assumed (without admitting) that the population of the "Reserved communities" is more still it is submitted that it does not warrant a provision for reservation equal to their strength and the extent of reservation has to be provided only on a minority of seats keeping into view the overall efficiency and merit. It is submitted that the "special provisions" must spell out the object and the goal to be achieved and the nexus of the measure with the objectives must be

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established with a necessary degree of specificity. There ought to be a quantitative correlation between the benefits conferred and the extent of the "problem" sought to be remedied, the correlation being "*reasonable*" and not "*proportionate*". The contention and the justification of the state and various quarters in favour of the extent of reservations provided on the proportion of the population is wholly without basis, the extent of reservation ought to depend on the nature and character of the institution and therefore there cannot be broad based straitjacket formula for reserving seats in all institution in a like manner.

39. Articles 15(4) or 15(5) are not directed towards providing "proportionate representation" or "adequate representation" and therefore the quantum of reservation ought to be worked out keeping into focus the future Impact analysis, over all efficiency, merit and the nature and character of the institution where the reservation is sought to be provided. Any determination of the extent of reservation without considering the future Impact of the reservation would be unjust, arbitrary and unreasonable.

40. In addition even if it is to be held that the extent of reservations ought to depend on the proportion of the population, then a caste census becomes inevitable. It is submitted that such a census would not be in the larger interest of the national unity and integrity and as such ought not be promoted or advanced. In any case if the court were to permit a "caste census" then it is submitted that at the time of prescribing extent of reservations:

(*a*) The requisite proportion of the population of the eligible age group has to be taken. For example for admission into undergraduate courses, the population of the age group from 18-23 years may be justifiable and for admission to the graduate courses, age group from 23-27 years ought to be taken. It has to be then seen how many persons of the said age group are still in need of state protection and after an analysis is done, the extent of reservation may be prescribed.

(*b*) The class—"Scheduled Castes" or "Scheduled Tribes" or "Backward classes" constitute of a number of "Castes" thus while determining representation and the population, individual population of the individual castes ought to be worked out to see who among the Scheduled Castes or the Scheduled Tribes or the Backward Classes are not adequately represented. The benefit thereafter can be given to only the said communities who are not adequately represented and those communities to whom benefit has been given or who are already represented should not be allowed to take the benefit of reservation otherwise it would amount to unreasonable discrimination without reasons or justification and thus violate Article 14 of the Constitution of India.

(*ii.ii*) *Nature of Affirmative Action*

41. The provisions of Article 15(4) as also Article 15(5) enable the state to make "special provisions" depending upon the ground realities. The Constitution gives the government ample "elbow room" to undertake the social engineering depending on "level of backwardness" and as such the said articles themselves inherently require:

(*a*) an analysis of the "level of backwardness" on "objective factors" and in hard quantitative terms, and

(*b*) the measure that would be sufficient for removing the said backwardness and bring the deprived at par with the others.

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42. It is submitted that the nature of benefits conferred on the Other Backward Classes, the Scheduled Castes and the Scheduled Tribes must be akin to the level of backwardness and reservation in the form of "quotas" (being the extreme measure) be reserved for the most backward amongst them. it is submitted that other classes can be equalised with the general category in the form of marks equalization i.e. by awarding some additional marks like it is being given to the women candidates seeking admission in colleges. It is submitted that conferment of more benefits than what is necessary to bring them at par with the general category will amount to reverse discrimination and would be discriminatory and violative of Article 14 of the Constitution. It is submitted that the object of any Affirmative Action Programme is to bring parity and provide an opportunity to all but a benefit that allows the said classes to exceed parity would be violative of the principle of equality and would amount to reverse discrimination.

43. It is also submitted that the Other Backward Classes cannot generally be granted benefits akin to the benefits conferred on the Scheduled Castes and the Scheduled Tribes. The condition of the Scheduled Castes and the Scheduled Tribes on the basis of which benefits of reservations were bestowed is hugely different from the conditions of the alleged Other Backward Classes. It is submitted that the argument put forward regarding oppression for thousands of years (without going into the efficacy of the said claim) does not hold good so far as the Other Backward Classes are concerned. The classes like the Jats, Yadavs etc. who have now been accorded the Other Backward Classes Status have been rulers for a number of years and own huge areas of land and as such should not be entitled to the benefits of reservations.

44. Apart from this the qualitative nature of the benefits to be given to the OBC's, the benefits should also be in accord with the level of backwardness and the same cannot be akin to the benefits and privileges given to the Scheduled Castes and the Scheduled Tribes. It is submitted that so-called OBC's have always competed as part of General Category and there is no justifiable reason for reserving a certain portion of the seats in central educational institutions for them separately.

45. The present act not only fixes the nature of the measure (i.e. quotas) as well as the extent of the measure (i.e. 15% for SCs, 7½% for STs and 27% for SEBCs when other measures (like marks equalisation, scholarships, etc.) could have achieved the desired results in a given case. It is submitted that the central government will have to continue with reservations as the only mode of "special provision" when the Constitution empowers it to uplift and alleviate backwardness for the purposes of Article 15(5) by various ways depending on the extent of Backwardness. *The act is therefore "inflexible" and cannot be regarded as a means of social engineering which necessitates a more flexible instrument with an inbuilt capacity and capability to effect changes on the basis of the ground realities.* The act is for an indefinite period and does not provide for a time frame when the measure would cease to exist. It is thus submitted that the act, which makes the affirmative action policy rigid and inflexible and does not give any elbow room for a change of the nature or extent of benefits is unreasonable and unjustifiable.

(*iii*) *Essentials of an "Affirmative Action Program"*

46. It is submitted that Reservations have been accepted by this court as a "means"—"Proportionate Equality" i.e. equality in fact for achieving the end—"Formal Equality" i.e. equality in law. Thus the aim of any Affirmative Action

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Programme should be to achieve the said end and the manner in which the said objective has to be achieved has to be outlined in the Act/policy. The policy must be a comprehensive policy which lays down the objectives and the manner in which the objective is sought to be achieved by the mode adopted keeping into view the safeguards. The Act must therefore have:

(*a*) A *policy statement* on the object which is sought to be achieved including the quantifiable goals to be achieved after carrying out the overall Impact assessment.

(*b*) The "*means*" through which the object would be achieved and the "Measure" by which the implementation would be carried out subject to the limitations and safeguards including the following:

(*i*) The Quantitative Cap

(*ii*) The Qualitative Cap

(*iii*) The Time Cap

(*c*) A *mechanism for a continuous check* whether the policy is giving the desired results and whether the "means" and the "measure" chosen are justified and warranted.

47. It is submitted that the Act in question does not have any goals or the quantifiable objectives that it seeks to achieve. The Affirmative Action Programme that the government has devised under the Act has, it is submitted, no direction in the sense that it cannot be ascertained what the government seeks to "finally achieve" or how the success of the policy would be measured. As stated above and also laid down by this Hon'ble Court in *M. Nagaraj* v. *Union of India*[6] while dealing with reservations under Article 16 of the Constitution the court held that "*123.* ... even if the State has compelling reasons, as stated above, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling-limit of 50% or obliterate the creamy layer or extend the reservation indefinitely." (SCC p. 278, para 123). Thus in other words there has to be:

(*i*) *A Quantitative Cap* i.e. the maximum number of seats that will have to be reserved. The maximum number of seats Actually reserved ought to have nexus with the object and keeping into view the overall efficiency and merit and the nature of the institution where the reservations have to be provided. In the present case the government has prescribed reservation of 49½% without any ground work which it is submitted is wholly arbitrary and unreasonable.

(*ii*) *A Qualitative Cap* which includes

(*a*) *Identification of the targeted persons* to whom the benefit is to be given such that the group is a homogenous group comprising of all deserving and similarly situated persons. And;

(*b*) the *nature of benefit* to be extended depending on the level of backwardness so as to bring them at par and to remove the effects of backwardness (if any) which may be there on account of any reasons historical or otherwise.

(*iii*) *A Time Cap* i.e. the period through which the provision for reservation or the so-called "positive discrimination" is to continue. The Act does not provide for any time through which the reservations would continue. It is

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submitted that the Act gives permanency to the means without any quantifiable objects to be achieved and therefore the Act is arbitrary and unreasonable. Any Affirmative Action Programme ought to have targets and must cease as soon as the threshold is achieved, for continuing reservations thereafter would amount to reverse discrimination. It is an undisputed fact that Affirmative Action Programme is a form of discrimination albeit considered to be a positive discrimination to achieve a positive end and therefore can continue only until there is justification for its continuation. The justification can be seen and judged only when there are continuous reviews of the policy keeping into view the objects and goals of the policy.

(*iv*) *The Act does not have an inbuilt system of "checks and balances"—policy not comprehensive but unidirectional.*

48. It is submitted that the Act does not provide for a permanent mechanism for a continuous review of the benefits being given to the "Reserved Category". The present act does not provide for any safeguards which are necessary in any affirmative action policy i.e.

(*i*) A mechanism for identification of the objectives to be achieved in hard quantitative terms which the government seeks to achieve as a "social government" with the implementation of a policy. Laying down of goals and objectives is vital so that the policy can have a provision in the nature of a "sunset clause" i.e. a time when the measure would cease on achieving the goals set.

(*ii*) A mechanism for identification of the results of the policy and to assess the efficacy of the measure chosen in light of the objectives to be achieved.

(*iii*) A mechanism for a continuous review of the benefits/drawbacks of the policy itself.

(*iv*) A mechanism for a continuous review of the identification of the "Target" beneficiaries on the basis of the principles provided under the Legislation.

49. The policy of affirmative action which empowers the state to continue in its path of positive discrimination is a form of the doctrine of classification and can therefore be applied only till the unequals remain unequal. Any extension of benefit thereafter would necessarily imply reverse discrimination which has been held in catena of cases to be impermissible. It is submitted that to ensure that the "affirmative" does not become "negative", a regular and continuous review of the policy of reservation (so also other means of affirmative Actions) is necessary which cannot be a temporary phenomena but a permanent fixture in the wholesome policy of affirmative Action. In our case, the legislature has not provided any system of continuous evaluation so that the policy does not become a policy resulting in reverse discrimination. The government refuses to tread this path in the fear of political backlash more so in the present era of coalition politics where none of the parties is in a position to attain full majority. But this fight for political supremacy can be no ground for denial of equality and a wholesome review of the policies of discrimination at least to enquire and see its real benefits and the real beneficiaries. Thus the review should not only be of the nature of the benefits provided but also of the "class" to whom the benefits are directed. In this regard the observations of this

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Hon'ble court in *A. Peeriakaruppan* v. *State of T.N.*[14] at SCC p. 49, para 29 may be referred to.

(*v*) *The measure chosen ought to have Nexus with the Objective*

50. It is also submitted that the policy which is meant to be an "affirmative Action policy" must have a nexus with the ultimate objective and therefore it must indicate as to how the policy will achieve the desired results (i.e. to achieve "Formal Equality"). It must be understood that the ultimate objective is not to give admission in institutions but the ultimate objective of the policy must be such that as a result of the implementation policy the said "Reserved Category" become capable to compete on their own (without any State aid). Thus the objective has to be capacity building. If the policy cannot achieve the said result then it is submitted that either the policy itself is faulty (which emphasises the "means" and overlooks the "end") or that the "means" chosen for the Affirmative Action Programme is not correct.

51. *Success of the policy is dependant not on the fact whether it leads to the increase in admission numbers but on the fact whether it enables the "reserved communities" to stand on their own and compete with others on a one to one basis.*

52. In view of the above it is submitted that the Act which provides and overemphasises the "means" (i.e. reservations) to achieve an unknown end and that too without safeguards and limitations is therefore arbitrary and violative of Article 14 of the Constitution of India.

53. It is submitted that the policy in the present case which is sought to be implemented by the impugned act over emphasizes the means (i.e. quotas for the reserved communities) and completely overlooks the end (i.e. removal of backwardness). The reasoning given of historical "misconduct" by the ancestors of the General Category has never been accepted and can never be a justifiable reason for providing for a policy since it breeds inter se acrimony among communities. The fact that Constitution provides under Article 48 as a directive principle to take special care for the SCs and the STs does not mean that the government is absolved of all duties that they may have for the persons equally deserving in other communities. Similarly the fact that the provisions of Article 15(4) or 15(5) or 16(4) may be called group rights does not mean that the responsibility of the State for the "individual citizen" ceases or is non-existent. The policy of the Government therefore has to be a universal policy which not only takes care of the SCs and STs but all others who equally deserve State protection.

(*vi*) *Section 5 vis-à-vis rights of the "General Category" of students.*

54. Section 5 seemingly protects the number of seats available to the General Category and provides that the number of seats reserved for the "Other Backward Classes" shall be limited to the extent of the increase in the number of seats.

55. The Union of India has placed heavy reliance on the provisions of Section 5 of the Act to contend that the opposition by the "General Category" students on the provisions of reservations is "unjustified". It is submitted that the argument of the Respondent Union and the States cannot stand constitutional scrutiny. It is submitted that Article 29(2) which has been held to be a charter of rights of the students against any form of discrimination (including caste based reservation) provides that no person shall be denied admission in institutions maintained wholly or partially out of

14 (1971) 1 SCC 38

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state funds on the grounds of caste, sex, religion etc. Thus every person has an equal right to be considered for admission into institutions maintained by the state and similarly if the seats are increased, every person will have a right to be considered for every "increased" seat. The present act purports to create 100% quotas in the additional seats created in the educational institutions and the law is therefore facially discriminatory and is violative of Articles 15 and 29(2) of the Constitution of India.

56. It is also submitted that the government seeks to provide reservation to the members of the Backward Classes by increasing the number of seats in the existing Central Education Institutions. This increase in seats would entail increase in infrastructure which the government proposes to finance through adequate budgetary provisions. It is submitted that the said increase in infrastructure would therefore be financed through tax collections and therefore every member of the public (including the general category) is entitled to be considered for the said increase in seats. It is submitted that there is no difference in law if one considers setting up colleges for the "reserved communities" exclusively or if additional facilities are provided in the same compounds of existing colleges exclusively for the "Reserved communities". It is submitted that as the former cannot be permitted the later cannot also be permitted since the consequence in law is the same for both the situations. It is therefore submitted that contention of the government that the members of the General category should not be aggrieved by the provision for reservations since the number of "their" seats are not being affected, does not hold good in law. It is submitted that if the government provides for additional facilities, all including the members of the general category have an equal right to be considered for admission in the said seats. Any denial of admission or to a right to be considered for admission without justifiable reasons would be discriminatory and violative of the fundamental rights and the principle of equality.

III. PRINCIPLE FOR IDENTIFICATION OF "BACKWARD CLASS" FOR THE PURPOSES OF ARTICLE 15(5).

(*i*) *Indicia—the starting point leading to identification of the class*

57. The Government, under the Act, seeks to provide Reservations to promote the "depressed classes". The Act is a part of the "Affirmative Action Program" which permits the state to discriminate under an illusion that it would help to achieve "proportionate" or "egalitarian" equality but it ignores the fact that the ultimate object of the Government should be to achieve "Formal equality" i.e. equality in law. It is submitted that the criterion for classification for conferring discriminatory benefits must always have a nexus with the ultimate object and the policy must also be directed towards attaining the said object. It must always be remembered that when a policy is adopted it becomes central to the discussions that follow and interest get vested around it. The basis of the policy therefore has to be carefully selected since the focal point of the policy becomes rigid with the passage of time and political vested interests resist its change. The criterion for a policy should and must always reward growth and development and should not be an incentive to remain poor and backward.

58. It is submitted that the benefits under the Act are in the nature of a "Group Centric" affirmative Action where the benefits are conferred if a pre-existing "Group" satisfies certain conditions i.e. the group described as "a Scheduled Caste" or "a Scheduled Tribe" or "a Backward class (read backward caste)". It is submitted

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that this cannot be allowed as it allows persons (within the said group) to take benefits even though they do not deserve the same and at the same time leaves out persons who really deserve state protection but are left out on account of the fact that the group they belong to do not satisfy the tests. It is submitted that the present is therefore a classic case of identification of faulty groups. It is submitted that though benefit under Article 15(4) are available to a "Class" but unless the "Class" is homogenous in the sense that "all" in the said class also "deserve" the benefits, it would result in discrimination and would be violative of the Articles 14 and 15(1) of the Constitution.

59. The *STARTING POINT* for the identification of Backwardness *is laying down the criteria or indicia to define "social and educational backwardness" on objective and quantifiable terms so that there is no room for any ambiguity and thereafter applying the said criteria on the entire populace*. The persons qualifying the criteria would collectively form a class to whom benefits would be conferred. *It has been argued by the respondents that the provisions of Articles 15(4) and 15(5), like Article 16(4), are group rights and therefore indicia has to be applied to a group and not individuals. The said argument itself is faulty since it is only after the group is properly identified such that it comprises of all persons who are backward, that the right of the "group" would commence*. Thus formation of a group by applying the indicia of backwardness would precede the creation of a right and that indicia would thereafter have to be applied to an individual to form a group. It must be noted that the identification is to be done of a class which is socially and educationally backward. *The words "class" in the said Article do not represent pre-existing group to which the indicia of backwardness ought be applied but a group would be formed after applying the indicia of backwardness*. In this regard the holding of this court in *M.R. Balaji* v. *State of Mysore*[15] at SCR p. 459 may be referred to.

60. In addition it is submitted that when Article 15(1) specifically prohibits discrimination on the basis of caste and therefore conferment of affirmative Action benefits on the basis of "caste" is wholly unjustified and arbitrary. It is submitted that the state cannot be permitted to differentiate on a basis, even for affirmative Action, for which it is prohibited from and all citizens are protected against such discrimination by the state. "Affirmative Action" is a form of discrimination where a person or a group is given preference over the others and therefore if the identification of the group is on the basis of caste it would fall within the prohibition contained under Article 15(1). Thus, it is submitted that the conjoint reading of the provisions of Article 15 enjoins the state to lay down secular conditions which "exclusively" cover the "Backward Classes" and apply the same to all individuals irrespective of their caste, religion, sex, place of birth, etc. The individuals satisfying these conditions would thereafter be collectively called the "Backward Classes" to muster the Constitutional mandate. In the words of Pandit Nehru:

> "... I don't particularly like the words "backward classes of citizens" and I hope the select committee will find some better wording. *What I mean is this; it is the backward individual citizen that we should help. Why should we brand groups and classes as backward and forward....*"

61. It is further submitted that Articles 15(1), 15(4) and 15(5) ought to be interpreted harmoniously and if the State is allowed to do something (i.e.

15 1963 Supp (1) SCR 439

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discriminate on the basis of caste) under Articles 15(4) and 15(5), the provisions of Article 15(1) would become redundant and otiose. It is submitted that Article 14 prohibit discrimination and Article 15(1) specifically prohibits the state from discriminating on certain criterion. Affirmative Action Programme is aimed to achieve a positive outcome but it is a form of discrimination nonetheless. It is therefore reiterated that the state cannot be allowed to do something indirectly which is cannot do directly and therefore it is submitted that for affirmative Action also:

(*a*) The state has to devise an objective and quantifiable CRITERIA FOR DEFINING SOCIAL BACKWARDNESS for the purpose of Article 15 on a secular basis not prohibited under Article 15(1).

(*b*) The state has to devise an objective and quantifiable CRITERIA FOR DEFINING EDUCATIONAL BACKWARDNESS for the purpose of Article 15.

(*c*) Apply the criteria to the populace to determine the "CLASS" which is homogenous and exclusively comprises of the "Socially and Educationally Backward Class" satisfying both the criteria laid down above.

(*ii*) *Article 15(4) being a facet of Article 15(1)—its effect*

62. During arguments made by the learned Solicitor General it was submitted that the petitioners had argued that the provisions of Articles 15(4) and 15(5) are "exceptions" to the provisions of Article 15(1). At the outset it is submitted that it has never been the submissions of the petitioners that the provisions of Article 15(4) so also Article 15(5) (assuming the validity of the said provision is upheld) are exception to Article 15(1).

63. The submission of Shri K. Parasaran, learned Senior Counsel for the Union of India was however to the contrary who submitted that the provisions of Article 15(4) have to be read like the provisions of Article 15(3) which permits the state to make special provisions for women even though Article 15(1) prohibits discrimination by the state on the basis of sex. It was thus contended that "Class" under Article 15(4) can be read as Caste and discrimination on the said basis would be constitutionally permissible. It was thus impliedly contended that the Provisions of Article 15(4) ought to be read as an exception to Article 15(1). It is however submitted that the fallacy in the argument of Shri Parasaran is that while Article 15(3) specifically empowers the State to make special provisions for women Article 15(4) directs the state to identify a class and not a caste which is socially and educationally backward. Thus where discretion has been left upon the state, the said discretion has to be exercised within the limitations prescribed by the Constitution itself—i.e. the areas left after excluding the prohibited categories prescribed under Article 15(1).

64. It is submitted that once it is accepted that Article 15(4) is a facet of Article 15(1) and not an exceptions to it, while implementing the provisions of Article 15(4) the requirement and the prohibitions contained under Article 15(1) will have to be given due weight else the action taken under Article 15(4) would run counter to the express prohibition contained under Article 15(1). The very fact that Article 15(4) is not an exception, as was the submission of the learned Solicitor General, is that it is not sufficient that the Respondent Union of India are able to bring the legislation within the provision of Article 15(4) but at the same time due weight also has to be given to rule contained in Article 15(1). It is submitted that if the provisions of the

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Statute under challenge, though enacted in exercise of powers under Article 15(4), falls foul of the mandate of the rule contained under Article 15(1), then such legislation would be unconstitutional and will have to be declared void in terms of Article 13 of the Constitution of India. It is a settled principle of law that where an exception is provided to the rule and an action under challenge falls within the exception, the action need not conform to the rule. Where however a provision is considered not as an exception but as a facet of the rule, implementation of such a provision must be done in a manner that the rule is given due importance and is not rendered a dead letter. Thus, the very fact that Articles 15(4) and 15(5) are facets of the rule contained under Article 15(1) while implementing the provisions of Articles 15(4) and 15(5) which are mere enabling powers it must be ensured that the rule contained under Article 15(1) is duly protected, else the action would be unconstitutional and unsustainable in law.

65. The submissions by the state that it is obliged to remove inequalities and backwardness does not flow from the fact that the provisions of Articles 15(4) and 15(5) are not exceptions but is on account of the fact that the Indian government which is a social state is undoubtedly required to do "social engineering" but the manner in which the Government acts ought not be in derogation of the fundamental rights else the provisions would be void. It is submitted that the mere fact that the measure is designed for a desirable end does not mean that any action of the Government would be constitutional. There may be several ways to arrive at a final destination but the only those means as are in conformity with the fundamental rights would be permissible. The Constitution itself allows classifications under Articles 14, 15(1) and 16. The real issue therefore is whether the State is properly classifying persons and whether the classification made by the government has a nexus with the object it seeks to achieve. Thus, what is required to be seen is:

(*a*) What are the indicia to identify a person as backward?

(*b*) How many persons conform to the indicia and therefore form a cohesive class forming the backward class?

(*c*) What are the measures which are required for the removal of backwardness; and

(*d*) Whether the Measure adopted and the Means chosen for removal of backwardness are in conformity with the fundamental rights and have a nexus with the object which the State seeks to achieve—i.e. to remove backwardness by building capacities and to achieve formal equality?

66. It is submitted that the submissions of the learned Solicitor General does not address the real issue of identification i.e. the indicia on the basis of which the class called the "backward class" is to be identified such that the group of persons identified are really persons who deserve the said protection.

(*iii*) *Backwards akin to Scheduled Castes and Scheduled Tribes*

67. It is submitted that with regard to the identification of Socially and Educationally Backward Classes for the purposes of Article 15(4), it has been held that the such class has to be similar to the "Scheduled Castes" and "Scheduled Tribes". In this regard the observations of this court in *M.R. Balaji* v. *State of Mysore*[15], SCR at p. 458 may be referred to.

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68. Thus the indicia to be chosen for the identification of a backward class ought to be such as would identify, classify and then group persons facing deprivation akin to the Scheduled Castes and the Scheduled Tribes. The criteria to be taken must also be such as would not identify a large section of the populace else it would defeat the very objective of the provision. For the purpose of identification of a Backward Class, a comparison has to be made not with the "Most Advanced Section of the Society" but akin to the Scheduled Castes and the Scheduled Tribes. In this regard the observations of this court in *M.R. Balaji* v. *State of Mysore*[15] at SCR pp. 459 and 465-66 may be referred to.

(*iv*) *National Guiding Benchmark for Identification*

69. The present "identification" by the Central Government on which the government has placed extensive reliance has been made State-wise. It is based on the presumption that backwardness will get removed form all the states at the same rate and on the same date, which it is submitted may not be true. A State has been used as a unit to define socio-educational backwardness of castes. For example, if the State literacy rate is 90%, the castes with literacy rates of 80-85% are considered backward. In contrast, in another state with literacy rate of 55%, the castes with literacy rates of 60-65% are considered advanced. The present guidelines and all criteria (except one) being used by the National Backward Classes Commission are State wise which cannot be a guiding line for whole of the country as the disparities over various parts of the country is not uniform. A state is taken as an insulated unit. All parameters are measured only and exclusively in relation to the State averages.

70. The Mandal Commission used 11 indicators to define backwardness and prepared State wise lists. Again, these indicators are State based. Further it is also submitted that the said indicators were *never* tested on ground with any investigation[16]. It is submitted that the socio-economic-educational condition differ from state to state, it is preposterous to believe that the Backward Classes of all States are equally deprived. It is submitted that the Backward classes from developed States are for more *advanced and forward than* the forwards in underdeveloped States. It is submitted that a Central legislation and the identification must take into consideration the said aspect.

71. In many underdeveloped States, so-called forward castes are either at the same level or at a lower level of advancement as compared to OBCs in the developed States. A caste considered to be forward in one state may live much below the status of a backward caste from other States. But the Government of India treats them differently resulting in EQUALS BEING TREATED UNEQUALLY.

72. A case study can be a comparison of the two states Kerala on one hand and Bihar on the other. While the state of Kerala is much more "advanced" in comparison with a state like Bihar. As per the National Human Development Report, 2001[17]. The Human Development Index, 2001 put the value of Kerala double that of Bihar:

Bihar:	0.367
Kerala:	0.638

16 *Beyond Mandal & After* Shri B.K. Roy Burman, the head of technical committee of Mandal Commission which was handed over to the court at the time of arguments.

17 *Ibid*, Ch. 2, p. 25

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Further educationally also Kerala is way ahead of Bihar as can be gauged from the fact that literacy rate of Bihar and Kerala for the year 2001[18] was as under:

Bihar: 47.5%

Kerala: 90.9%

Similarly the districts with maximum and minimum Literacy rates in said respective States as per the 2001 Census[19] is as under:

State	*District with maximum literacy rate*	*District with Minimum literacy rate*
Kerala	Kottayam 95.9%	Palakkad 84.3%
Bihar	Patana 63.8	Kisanganj 31.0

Thus, from the above it is evident that the most developed district of Bihar is lagging far behind in comparison with even the most backward district of Kerala. The said disparity is not a recent phenomenon. Even a century back, Kerala (State of Travancore in pre-independent India) was the most developed State educationally. The literacy rate of the said states in 1931[20]

Kerala (Travancore): 28.9%

Bihar: 05.3%

It is submitted that even the "Exterior castes" i.e. the Scheduled castes in Travancore had a literacy rate of 14.9% which was much higher than that of Bihar State as a whole[21]. Thus educationally residents of the State of Kerala are far ahead of the State of Bihar. So the social groups of these two States cannot be treated on equal footing. Similar disparity is visible in the financial status and the consumption patters of the people in the said States.

73. Thus from the above it is submitted that the communities who may be considered as "Backwards" in the State of Bihar may even be far advanced than the backward communities of a state like Bihar. The present policy however treats them as equals and the said category of "backwards" would be competing for the "reserved seats" and in such a situation the seats would be cornered by the so-called backwards from the more advanced States leaving the really deserving high and dry. The object of the policy is not to benefit the advanced sections of the society but to help those who really deserve the benefits. When a central policy is to be formulated then a "Sum total" of the backwards of the states is not feasible due to the disparities among people living in different States. A national policy therefore requires that a proper identification of the backwards is made at a national level.

74. Thus from the above the following principles are easily discernable:

(*i*) The *starting point* for any identification *is to lay down the indicia/measure for to define backwardness* i.e. the indicia for social and educational backwardness.

(*ii*) The *measure chosen should be in conformity with the constitutional limitations* and in consonance with the constitutional objectives including Article 15(1).

18 Source: The Registrar General of India, 2001 a:123-27

19 Source: The Registrar General of India, 2001b, 59, 118-149

20 Source: Census of India, 1931, Vol. I, p. 339

21 Source: Census of India, 1931, Vol. I, p. 494

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(*iii*) The *indicia has to be applied to persons and not to pre-existing groups to form a class* i.e. a compact class comprising of the persons who can all be termed as backward on the basis of the indicia laid down.

(*iv*) The indicia should be applicable for the entire country as a whole and cannot be applied as a sum total of the backwards in various states *thus there has to be a National Benchmark of backwardness.*

(*v*) The *identified category of "backwards" should be akin to the Scheduled castes and the Scheduled Tribes* in their standing. *Identification should not be in comparison with the "most advanced sections of the population*".

(*vi*) The indicia *should not result in the identification of a majority of the population* but effort has to be made to identify the really backward.

IV. SUSPECT LEGISLATION, STRICT SCRUTINY AND NARROW TAILORING

75. Under the constitutional scheme, the state is permitted to classify on an intelligible differentia under Articles 14 and 15(1) itself. Where however the "Purpose" for which the classification is to be made impinges the fundamental rights of others (in the present case Articles 19 and 29(2) of the Constitution) or if the government chooses to identify a backward class on a criteria which is among the prohibited classifications under the constitutions itself, then the classification would be per se suspect and would therefore call for strict scrutiny and narrow tailoring by the court to ensure that the mode of classification chosen is a not garb for a deeper intent of self promotion and laced with vested political interests directed towards disintegration and division in the society. The measure chosen would then have to be narrowly tailored such that the means are strictly to achieve the goals and no "additional" benefits may accrue to any person.

76. It has been argued by the Central Government as well as the states that the principle of "strict scrutiny" and "Narrow tailoring" are American concepts which cannot be adopted in Indian conditions. It has been argued that in India there is a presumption of the validity of a legislative enactment and judicial interference is limited. *It is submitted that there is undoubtedly a presumption in favour of an enactment but where the enactment is for conferment of affirmative action benefits i.e. conferring benefits in preference to others or by classifying, and that too on a basis which is expressly prohibited by the Constitution then such legislations are per se suspect.* The rule being "equality" and the doctrine of classification an exception to the rule to achieve larger equality. Thus unless the classification can be sustained as being for a legitimate objective and measure for classification on an intelligible differentia, such legislations cannot be sustained.

77. The test of strict scrutiny is not alien to the Indian judicial system and has been used by this Hon'ble Court in the case of *Nair Service Society* v. *State of Kerala*[22] (see SCC p. 25, para 47).

78. The respondents have for the said purpose placed reliance on SCC p. 164, para 36 of the judgment of this Hon'ble Court *Saurabh Chaudri* v. *Union of India*[23].

79. At the outset it is submitted that the paragraph relied upon by the respondents to buttress the argument of the petitioner that the Doctrine of Suspect Legislation, strict scrutiny and narrow tailoring does not apply under the Indian

22 (2007) 4 SCC 1
23 (2003) 11 SCC 146

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constitutional system, itself allows that "... *such a test may be applied in a case where a legislation ex facie is found to be unreasonable. Such a test may also be applied in a case where by reason of a statute the life and liberty of a citizen is put in jeopardy*..." and thus the submission of the respondents that such a test is alien to the Indian judicial system is entirely without basis. In addition it is submitted that the judgment rendered in the case of *Saurabh Chaudri* v. *Union of India*[23] is clearly distinguishable since the above observations at SCC p. 164, para 36 were made after the observations made in that very case at SCC pp. 162-64, paras 29, 33-34.

80. Thus from the above it is evident that the reliance by the respondents on the judgment in *Saurabh Chaudri*[28] is entirely misconceived.

V. "CASTE" AS A MEANS OF CLASSIFICATION AND IDENTIFICATION—15(1) VIS-À-VIS 15(4) AND 15(5)

81. As has already been submitted, the Act does not prescribe the manner of identification of a the "class" for the purposes of Article 15(5) and from the submission of the learned Solicitor General on behalf of the Central Government before the court during arguments wherein it has been candidly admitted that no formal determination/identification has been made for the purpose Article 15. It is submitted that submission of the Central Government and the States in support of "caste" as a valid basis of classification indicates the manner in which the State seeks to identify the "Target Beneficiaries" for the purposes of Article 15. The said identification is based not just predominantly but exclusively on the basis of Caste (i.e. in the absence of a proper definition of backwardness—a Caste which the Central Government feels is "socially and educationally backward").

82. It is submitted that identification of a class on the basis of "caste" is in complete derogation of provisions of Article 15(1) and therefore makes the classification per se "suspect". It is submitted that the Part III of the Constitution comprising the chapter on fundamental rights is essentially restriction and limitation on "state action" such that any action in violation of the fundamental rights is void in terms of Article 12 of the Constitution. Article 15(1) prohibits the state to discriminate on the basis of religion, race, caste, sex, place of birth or any of them. Thus the state cannot discriminate on any of the modes for which it is specifically prohibited. Articles 15(4) and 15(5) enables the state to identify "backward class" which is socially and educationally backward and therefore for the purpose of identification of the measure chosen cannot be one which has been specifically barred by Article 15(1) else it would entail allowing the state to do something indirectly which it cannot do directly.

83. It has been argued by the learned Solicitor General as well as Shri K. Parasaran that "Caste" is itself a "Class" and so far as the Hindu Community is concerned nothing further is required to be done. It is submitted that the said submission by the learned counsel for the Central Government as well as the States is in the teeth of the express language of Article 15(1) which prohibits discrimination "only" on the basis of caste. The argument put forth by the respondents is that classification "only" on the basis of caste is justified so far as the Hindu Community is concerned. It is submitted that the said contention is not only contrary to the express prohibition language of Article 15(1) but is also contrary to a settled principle laid down by this court in a number of cases. *See*:

(*i*) *M.R. Balaji* v. *State of Mysore*[15] (at SCR pp. 461-63)

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(*ii*) *R. Chitralekha* v. *State of Mysore*[24] (at SCR pp. 388-89)

(*iii*) *State of A.P.* v. *P. Sagar*[25] (at SCR p. 600 B-C)

(*iv*) *State of U.P.* v. *Pradip Tandon*[26] (at SCC pp. 273-74, paras 14-15)

84. Thus from the above it is submitted that the contention of the respondents that caste is a class for the Hindu Community and nothing further is required to be done is clearly unsustainable and allowing the same would be a fraud on the constitution.

85. Caste as a means of classification lacks the necessary elements to empirically establish homogeneity which is a necessary ingredient to constitute is as a "class". Every community constitutes of a number of members each of whom may have a different social or economic condition. The provisions of an affirmative action policy is directed towards persons who are backward and need "state protection" and not for persons who disguise as backward when they are not. Thus if a Caste or a Community is "declared" backward every person of the community is not backward and the affluent among the community, posing as "backwards" would corner the benefits that are not directed towards them. Similarly there are persons in other communities who do not get declared backward since a "majority" of the members of the community are not "backward", they really deserve state protection. It is thus submitted that choosing caste as a basis is in fact a short cut to hide the inaction on the part of the government to identify a "homogenous class" to be called a backward class.

86. The identification of Socially and Educationally Backward Class on the basis of "Caste" creates vested interests in backwardness—they do not "remedy" backwardness and the caste system (which is the ultimate goal) but edifies and perpetuates it. The measure and the means chosen by the Government is therefore antithetical to the constitutional goals and as such the policy itself is untenable and unsustainable. It is submitted that the measure chosen ought to have nexus with the constitutional objectives and the policy adopted should at-least not be in conflict with the said objectives if it is not in consonance with the same. It is therefore a question of choice between a measure which is in conflict with the constitutional goals but which is "practically feasible" (or politically necessary) on one hand and the one which though is in tune with the constitutional principles but requires a certain degree of "Home work" to be done by the social engineer. It is submitted that practical difficulties cannot be a license to violate fundamental rights and the means to be adopted ought to give due regard to the said rights and the constitutional court which is the ultimate protector of fundamental rights of citizens will not shy away from restraining the Government from acting in violation of the same. In this regard the observations of this court in *Nair Service Society* v. *State of Kerala*[22] at SCC p. 29, para 57 may be referred to.

The present policy of the Government to classify on the basis of caste and caste alone is in violation of the fundamental rights and in fact promotes ill effects of the "caste system". It is antithesis to the constitutional objectives of Equality, Unity of the

24 (1964) 6 SCR 368
25 (1968) 3 SCR 595
26 (1975) 1 SCC 267

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Nation, fraternity and common brotherhood among the citizens and as such the said provisions cannot be sustained.

Learned Solicitor General's "Fundamental Truths"

87. The learned Solicitor General has premised his submissions on a few "Fundamental Facts". It is submitted that there cannot be any dispute with regard to the first two submissions i.e.:

> "(*i*) that there is backwardness in the country;
>
> (*ii*) that large sections of the country are socially and educationally backward;"

The rest of the premises of the learned Solicitor General are not fundamental truths but are value statements based on perceptions. Backwardness may be on account of caste system but it cannot be forgotten that poverty plays an important role in the same and the effects of poverty can be seen in every community. Additionally the submission that there was a "prohibition" of person from engaging themselves in occupations other than their traditional occupations has to be seen in the light of constitutional developments. It is submitted that the evidence of occupational restrictions was in fact in favour of the petitioners and in the report of the Census Commissioner who conducted the 1931 census, it has been clearly stated that there has been extensive movement of persons of a community to other occupations and after independence with the enactment of Article 19(1)(*g*) which gives a freedom to all citizens to engage themselves in any business, occupation, vocation or profession, occupational restrictions was on account of choice and not "prohibitions as has been contended. In any case it is submitted that the provisions for reservation is not to remedy "past discrimination" but is intended to be an ameliorative measure in praesenti for alleviating the "difficulties" or Backwardness which may be for any reason.

88. It is the obligation of a Social State to undertake programs for the upliftment of the poor and backward and the reason on account of which the backwardness arose cannot be a justification for the identification of the target group on a particular basis. It is submitted that as a social state all the citizens irrespective of the caste to which one may belong are entitled to State protection if they deserve the same (i.e. they are backward in the real sense at the present juncture). If any person has ceased to be backward even though his forefathers might have suffered past discrimination, he would not be entitled to the benefits. Thus past historical discrimination is entirely irrelevant for conferment of benefits in the present times.

VI. CASTE—TRADITIONAL OCCUPATIONS—FALLACIES

89. It is submitted that the learned Solicitor General has by extensively referring to the lists prepared by the Central Government sought to justify Castes as being a "Class" and so identified as backward by the Central Government to be really Traditional Occupations. It is submitted that if the government considers that the persons engaged in the said occupations are "socially and educationally backward" then the benefit ought to go to persons who are actually and really carrying on that occupation and not to persons whose forefathers once carried on the said activity. *Thus if a person of other castes are engaged in the said "Occupation" which is considered to be Backward, then it is wholly unjustified that they should be excluded from the operation of the Policy. There exclusion would therefore be "exclusively" on*

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account of their caste and therefore the said classification falls foul of Articles 14 and 15(1) of the Constitution.

90. *It is submitted that even if it is assumed that Caste is a Class which is considered to be backward and the inclusion of persons is justified, the exclusion of persons who are similarly situated but are excluded "only" and "entirely" on the basis of their caste would be violative of Article 15(1). It is submitted that the provisions of Article 15(1) which is an individual right and is couched in a negative form is a limitation on the exercise of the powers of the State. It is therefore submitted that if the "exclusion" is "only" on the basis of caste the provisions made by the State under Article 15(4) would be directly in violation of the prohibition contained under Article 15(1) and such action cannot be sustained in law.*

91. It is submitted that identification of castes as a class and to justify the same as being occupations on a presumption that the persons belonging to a particular caste continue to follow a particular occupation and that too in the present constitutional scheme which gives freedom to choose any business, occupation or profession is entirely fallacious. It is submitted that while a person may continue to belong to a particular "caste", he may have ceased to continue with the traditional occupation which was considered 'Backward' on account of the freedom guaranteed to him under the Constitution. A person may or may not still be "backward" but then caste is not a relevant factor for determination of backwardness and if occupation is a criteria for backwardness then other following the said occupation albeit belonging to a different case may be equally entitled for benefits under the state's policy. It is therefore submitted that the rationale behind the Government choosing "caste" as the basis for identification contending that Caste is nothing but "Traditional Occupations" not justified and benefits cannot be given to those who ceased to carry on with the said activity. In this regard the observations of this Court in *Janki Prasad Parimoo* v. *State of J&K*[27] at SCC p. 437, para 32 may be referred to.

92. It is submitted that the caste-occupation nexus had already weakened at the time of the 1931 census and the same is evident from the following table.

93. Even post Independence the evidence of caste-occupation nexus breaking down is evident from the census reports. For example the in the state of Haryana the occupations followed by the different casts identified as Scheduled castes is clearly evident. The persons of the said castes are employed as cultivators, agricultural labourers, livestock, forestry, fishing, plantations, orchards, mining activities, manufacturing activities, construction, trade and commerce, transport storage and communication activities as well as other services. A copy of the chart of Scheduled Castes from the census report of the state of Haryana is annexed herewith and marked as *Annexure A*.

94. That apart from the submission made above if the central government chooses to identify persons on the basis of occupations and makes provision for persons actually engaged in such activity then the same can be easily identified through the system of census wherein information from the persons can be easily gathered which can be used for policy formulation including the target beneficiaries as well as the extent of benefits to be provided for them. It is submitted that the Ministry of Labour and Employment has come out with a detailed classification of occupations known as the "National Classification of Occupation—2004" and at the

27 (1973) 1 SCC 420

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time of census the same can be used for quantification of persons who are occupied in such occupations irrespective of castes and the occupations that are considered "backward" can thereafter be enlisted to confer benefits for their upliftment of the individuals forming part of the said class. A copy of the National Classification of Occupations is being annexed herewith and marked as *Annexure B*.

95. In addition it is also submitted that measures can also be made for improvement of the occupation itself so that it may not be considered "backward" for example provisions may be made for "organizing agricultural labour" so that they have rights that were made available for "industrial labour". They are properly remunerated and provided with facilities like medical aid, education for children at a primary level and financial support at higher levels, housing facilities and even a form of "social security" and "job security". Thus effort ought to be made for the upliftment of the class such the class may not be regarded as Backward and thereafter efforts may be directed towards other more deserving persons.

VII. "CREAMY LAYER"

96. The present policy of the government is with an avowed stand—i.e. *NOT TO EXCLUDE* the "creamy layer" from the "castes" that the government considers "backward" and detailed submissions have also been made in this regard. It has been stated that if the persons of the Creamy Layer are excluded then no one would be able to take the benefits. It is submitted that the object of exclusion of the creamy layer was to make the class a "compact class" of persons who can be identified as backwards. *The deliberate stand of the Respondents is "not to exclude" such persons from the benefits of the policy and therefore it is submitted that the present policy is not intended for the so called "Socially and Educationally Backwards" but is for the "Affluent from among the said Castes" who cannot at all be termed as Backwards. Thus under the present policy "inclusion" of persons is also "only" on the basis of their castes (there being no difference between such persons and the persons who belong to the so-called "advanced castes") which is in the teeth of the provisions of Article 15(1).*

Please see: *Indra Sawhney (II)* v. *Union of India*[28] (at SCC p. 190, para 27 and pp. 199-200, paras 48-49 & 53)

97. The present policy is undoubtedly directed towards the "advanced sections" of the society who indecently also belong to the favoured "castes". Thus it is submitted that the present policy is not for the "Backward Class" but for the affluent persons and is nothing but a *Fraud on Power* and *Fraud on the Constitution*. The submission by the Learned Counsel for the states were specifically considered by this Hon'ble Court in the above case and rejected and as such the contention against exclusion of the creamy layer cannot be sustained.

98. The question then arises whether the impugned act can be "read down" to "save" the legislation. In this regard it is submitted that the present act has been enacted for a select category of persons added with the submission that "... if the Creamy Layer is excluded.... No one of the backward class would be able to take admissions...". Thus the amendment is for the "forward" among the backward classes and was directed towards the said persons. It is submitted that from the submissions made above if the court comes to a conclusion that the special provision for the "creamy layer" is unjustified and unconstitutional, then the impugned

28 (2000) 1 SCC 168

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legislation ought to declared unconstitutional. In this regard the observations of this Hon'ble Court in *Minerva Mills Ltd.* v. *Union of India*[3] at SCC p. 657, para 65 may be referred to.

99. In addition to the submission made above, it is submitted that the mere fact that the judgment of this court in *Indra Sawhney*[29] required exclusion of the Creamy Layer shows that the class identified on the basis of castes is not a "compact" class of backwards. The requirement of exclusion of creamy layer also means that the identification of a class is not on a proper indicia of identification. If the class is properly identified on a basis of proper indicia of backwardness then the question of exclusion of the creamy layer would not arise. Thus it is submitted that the requirement of exclusion of creamy layer is intertwined with the indicia chosen by the government to identify communities or "pre-existing groups" as backwards.

100. The issue of creamy layer can be considered in another aspect i.e. the process of exclusion of "Creamy Layer" is part of the process of identification itself and not means of "depriving" certain members of the "caste" from the benefits of the policy. It is submitted that without exclusion of the creamy layer, a compact class of persons who are "socially and educationally Backward" does not come into being and the right under the policy would not commence. Thus it is submitted that exclusion of member of the community from the benefits does not arise. The said argument of the respondents however gives support to the submission of the Petitioner that the benefits under the act is not to a "class" but to "castes" in complete derogation of the provision of Article 15(1). It is also submitted that if the state is permitted to identify castes or groups as backward then it would be giving legitimacy to the very action that has been expressly prohibited by the Constitution since the identification would be of "castes" and not "persons belonging to a homogenous class of Backwards". In this regard the observations of this court in *Indra Sawhney* v. *Union of India*[29] at SCC p. 724-25, para 792 may be referred to.

101. It is submitted that post Indra Sawhney-I, Government of India and various state governments had come out with guidelines for defining "creamy layer". The government came out with a detailed policy wherein it specified "individuals" within the "castes" to whom the benefit of reservation should not be extended. It is submitted that these conditions are all secular conditions which can be adequately modified and applied to "all citizens" of the country irrespective of the caste consideration. Any one who satisfies these conditions (i.e. a person belonging to the "Creamy Layer") would NOT be entitled to the benefits under the policy and all persons falling outside the said conditions would get the benefit. It is also submitted that exclusion of the creamy layer can solve only half of the problem i.e. exclusion of "unfits" to form a class but the other limb of the problem—non-inclusion of the members in other communities who are equally backward is not addressed by the present policy. The indicia of "Creamy Layer" under the present policy is being applied only to the "specified castes" but it also exclude deserving persons not belonging to the said "specified castes". It is therefore submitted that the basis chosen by the state for classification treats equals unequally and unequals equally and therefore the same cannot be said to confirm to "intelligible differentia" of classification thus violate Article 14 of the Constitution of India.

102. Without prejudice to the above and the submission of the Petitioner that under the provisions of Article 15(4), identification cannot be of pre-existing groups

29 1992 Supp (3) SCC 217

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but a class has to be formed on the basis of predefined objective secular indicia it is submitted that if this court permits the Government to identify castes or groups then it is submitted that exclusion of creamy layer becomes imperative. It must also be noted that exclusion of "Creamy Layer" is not restricted to the Socially and Educationally Backward Classes alone. As has already been stated that SEBCs for the purposes of Article 15(4) are Akin to the Scheduled Castes and Scheduled Tribes as has been held by this court in a number of cases already referred to above and therefore if Creamy Layer is to be applied to the SEBCs then there is no justification for not applying the same to the SCs and STs. in any case the fundamental principle behind exclusion of the creamy layer is not to confer benefits to undeserving persons and therefore if a person (even if he is part of the Scheduled Caste or a scheduled Tribe) is affluent and his children have not suffered on account of backwardness then there is not justification for extending benefits to them as a "protected class" as it would then result in reverse discrimination. It must also be noted that exclusion of creamy layer has been held to be a "constitutional requirement" (*M. Nagaraj case*) and as such the same cannot be ignored.

VIII. ABSENCE OF EMPIRICAL DATA TO JUSTIFY AFFIRMATIVE ACTION

103. It has been extensively argued on behalf of the Respondent Union of India by the learned Solicitor General after placing the lists of "Backward Castes" that enlisted communities are backward and that the petitioners have not placed any data to impugn that any community listed therein to suggest that any of them is not a "Backward community". It is submitted that the said submission of the learned Solicitor General fails to take into account the explicit observation of this Hon'ble Court in *M. Nagaraj* v. *Union of India*[6] at SCC p. 278, para 123 it has been emphatically held that the duty to establish that a particular measure is within the four corners of an enabling provision is on the state which chooses to undertake the said action.

104. It is submitted that the provisions of Article 15(4) are also enabling provisions and therefore if the State chooses to exercise that enabling power for conferment of discriminatory benefits, it has to establish the reasons for the exercise of that power i.e. existence of compelling reasons and also show that the "measure" and the "means" chosen have a nexus with the object and the purpose which prompted the exercise of the said power. If the exercise of power is in favour of persons who really do not deserve the benefits, or if the nature and the extent of the measure is in excess of "malaise" sought to be remedied, then the exercise of the enabling power has to be set aside and declared un-constitutional.

105. It is submitted that in the present case, by the impugned legislation, the Central Government take within its sweep all undergraduate, graduate and post graduate education without the basic details of the extent and the nature of the measure required to remedy the "malaise". It is submitted that the ground work required to adopt the said measure has not been quantified which had to be done before the act was put into place. Without the said home work, the nexus and the correlation between the quotas and backwardness being remedied, cannot obviously be established. It is submitted that there is no data to establish.

(*i*) The exact social malaise sought to be remedied—i.e. the level of social and educational backwardness.

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(*ii*) The nature and extent of the measure to be adopted on the basis of the extent of the problem found.

106. It is submitted therefore that the onus to establish as to how and in what manner the present policy of "across the board" quotas in undergraduate, graduate and postgraduate education courses would cure this "malaise" is on the state and the submission that the petitioners have not shown any data to challenge any wrongful inclusion in the list is not justified. The challenge by the petitioner is of the policy and the manner of identification itself and if the Government contends that the policy is just, fair and reasonable and in consonance with the constitutional requirements, it would have to show and establish the same with hard empirical data.

107. In the present case, the respondent has not placed before the court any data so as to justify either compelling interest or that the identified group of persons forms a comprehensive class of "socially and educationally backwards". Thus the present policy is unsustainable and is in fact a means to make "class legislations" and not proper classification.

IX. ANNEXURES

(*i*) Annexure A: A copy of the chart of Scheduled Castes from the census report of the state of Haryana

(*ii*) Annexure B: A copy of the National Classification of Occupations—2004, prepared by the Ministry of Labour and Employment.

X. Mr G.E. Vahanvati, Solicitor General of India

I. WHETHER ARTICLE 15(4) AND ARTICLE 16(4) ARE EXCEPTIONS TO ARTICLE 15(1) AND ARTICLE 16(1) RESPECTIVELY:

1.1 The petitioner's contentions (A) that the impugned legislation is ex facie discriminatory, (B) that the legislation is 'suspect', (C) and, the invocation of the American doctrine of 'strict scrutiny' is based on a fundamental fallacy viz. that Article 15(4) is an exception to Article 15(1). It is submitted that the basis for the petitioners' contention [that Article 15(4) is an exception to Article 15(1)] is wrong and this has been emphatically rejected by this Hon'ble Court on various occasions.

1.2 Initially this Hon'ble Court in certain cases starting from *Rangachari case*[1], at SCR p. 607 [5 Judges]; considered that Article 16(4) is an exception to Article 16(1). This reasoning was followed in *M.R. Balaji case*[2], at SCR p. 455 [5 Judges]. Thereafter, in *T. Devadasan case*[3], at SCR p. 700 [5 Judges] this view prevailed. Subba Rao, J. [as he then was] dissented. He held that Article 16(4) was not an exception to Article 16(1).

1.3 The view that Articles 15(4) and 16(4) were exceptions to Articles 15(1) and 16(1) was again reiterated in *Triloki Nath case*[4], at SCR p. 104 [5 Judges]. Even in *U.S.V. Balram case*[5], SCC pp. 683-84, paras 79-80 [3 Judges] [which upheld the A.P.

1 *Southern Railways* v. *Rangachari*, (1962) 2 SCR 586
2 *M.R. Balaji* v. *State of Mysore*, 1963 Supp (1) SCR 439
3 *T. Devadasan* v. *Union of India*, (1964) 4 SCR 680
4 *Triloki Nath* v. *State of J&K*, (1969) 1 SCR 103
5 *State of A.P.* v. *U.S.V., Balram*, (1972) 1 SCC 660

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List] the contention that Article 15(4) is not an exception to Article 15(1), was rejected.

1.4 The 'new thinking' on the scheme of Equality came about in *N.M. Thomas case*[6] (7 Judges). In this case, all the Judges wrote separate Opinions on the issues raised before the Court. The majority Opinion led by Ray, C.J., Mathew, J., Krishna Iyer, J. and Fazal Ali, J. [Constituting 4 Judges] stated that Articles 14, 15 and 16 are all parts of the scheme of equality. The Scheme of Equality seeks to achieve Real Equality and not Formal Equality only. The Majority held that Article 15(4) and Article 16(4) are not exceptions to Articles 15(1) and 16(1) respectively. The relevant observations of the majority in this regard may be referred to as follows. Ray, C.J. (SCC p. 335, para 37); Mathew, J. (SCC p. 347, para 78); Krishna Iyer, J. (SCC pp. 368, para 136); and Fazal Ali, J. (SCC pp. 384-85, para 184).

1.5 In *Vasanth Kumar case*[7] Justice Chinnappa Reddy (at SCC para 68, pp. 759-60) noted the change in approach in *Thomas case*[6].

1.6 The said issue is now conclusively settled by *Indra Sawhney case*[8]. This Hon'ble Court by a majority [6:3] upheld the principle laid down in *Thomas case*[6] that Articles 15(4) and 16(4) are not in the nature of an exception to Articles 15(1) and 16(1) but an emphatic statement of Equality.

1.7 Jeevan Reddy, J. [for M.H. Kania, C.J., M.N. Venkatchaliah, J., A.M. Ahmadi, J. and for himself] raised this as an issue—Question 2(*a*) (at SCC pp. 691-92, paras 741-42)

1.8 Similarly, Sawant, J. answered Q.1 (at SCC pp. 515-16, paras 428-30).

1.9 It is therefore respectfully submitted that Articles 14, 15 and 16 form part of a Scheme of the Constitutional Right to Equality. Articles 15 and 16 are incidents of the Right to Equality. Articles 15 and 16 give effect to Article 14. It is further submitted that Equality, as guaranteed in Our Constitution, not only covers formal equality but also Real and Absolute Equality. Articles 14 and 15(1) therefore contemplate (and indeed) postulate classification to achieve the Constitutional Objective of Real Equality. Articles 15(4) and 16(4) complement Articles 15(1) and 16(1). The said sub-articles emphatically reiterate the mandate of Equality and can never be considered as exceptions to Article 15(1) and Article 16(1).

II. WHAT IS THE EFFECT OF HOLDING THAT ARTICLES 15(4) AND 16(4) ARE NOT EXCEPTIONS TO ARTICLES 15(1) AND 16(1) RESPECTIVELY:

2.1 Equality, the mandate of our Constitution, is rooted in Article 14 which consists of two parts. Firstly, it commands the State not to deny to any person 'equality before law'. Secondly, it commands the State not to deny the 'equal protection of the laws'. Equality before law prohibits discrimination. It is negative in concept. The concept of 'equal protection of the laws' requires the State to give special treatment to persons in different situations in order to establish equilibrium amongst all. It is positive in character. The twin result is that while equals should be treated equally (prohibition of discrimination), unequals will have to be treated

6 *State of Kerala* v. *N.M. Thomas*, (1976) 2 SCC 310
7 *K.C. Vasanth Kumar* v. *State of Karnataka*, 1985 Supp SCC 714
8 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217

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unequally to make them equal so that real equality, which is one of the corner-stones of our Constitution, is achieved.

2.2 See per Venkatramaiah, J. in *Vasanth Kumar case*[7] at SCC p. 800, para 130.

2.3 In similar terms, see per Jeevan Reddy, J., in *Indra Sawhney case*[8] at p. 633, para 643

2.4 Once it is accepted that Articles 15(4) and 16(4) are not exceptions to Articles 15(1) and 16(1) respectively, the dynamics of the debate changes. There is no question then of treating the social welfare measure as being 'facially discriminatory' or "ex facie" violative of the rule of equality. See per Justice Sabyasachi Mukherji, C.J. speaking for the Constitution Bench [Five Judges] in *Marri Chandra case*[9] at SCC p. 138, para 8.

2.5 Subba Rao, J. [as he then was] in his dissenting opinion in *T. Devadasan case*[3] had explained the position by way of an example (see SCR p. 700).

2.6 In similar vein, this Hon'ble Court in the *N.M. Thomas case*[6] had held as under:

Ray, C.J. (SCC pp. 331-32, paras 21 & 24)

Mathew, J. (SCC pp. 343-44, para 66)

2.7 In *Akhil Bharatiya Soshit case*[10], see observations of Chinnappa Reddy, J. after holding that Article 16(4) is auxiliary to the fulfilment of Article 16(1), at SCC p. 310, paras 125-26.

2.8 Justice Chinnappa Reddy thereafter extensively relies upon the opinion of Ray, C.J. in *N.M. Thomas case*[6]: see SCC p. 312, para 127.

2.9 In *K.C. Vasanth Kumar case*[7] Chinnappa Reddy, J. relying on *Akhil Bharatiya Soshit*[10] observed that 'Article 16(4) in truth flowed out of Article 16(1)' [see Para 76].

2.10 In *Indra Sawhney case*[8] see observations of Sawant, J. concurring with the majority at SCC pp. 509-10, para 415.

2.11 It is respectfully submitted that Article 14 thus casts a mandatory duty on the State to remove inequalities. Articles 15(4) and 16(4) are not exceptions to the mandate of equality but are concrete measures to bring about the mandate of equality enshrined in Article 14. It is respectfully submitted that the effect of Article 15(4) not being an exception to Article 15(1) is that the State is obliged to remove inequalities and backwardness. This obligation of the State flows not merely from the Directive Principles (Article 46) but has its source in the mandate of equality itself under Article 14.

2.12 Seen in this light, judicial review of any provisions for weaker sections under Article 15(4) must proceed on a completely different footing than in relation to a provision which is to be construed as a "proviso" or an "exception."

2.13 Any special provision made under Article 15(4) and Article 15(5) cannot be treated as exceptions to the Rule of Equality but a necessary incidence of the Equality principle. In these circumstances, there cannot be any question of a 'suspect classification' of a provision under Articles 15(4) and 15(5). The burden is on the

9 *Marri Chandra Shekhar Rao* v. *Dean, Seth G.S. Medical College*, (1990) 3 SCC 130

10 *Akhil Bharatiya Soshit Karmachari Sangh* v. *Union of India*, (1981) 1 SCC 246

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Petitioners to show that any special provision made under Article 15(4) or 15(5) is not in consonance with the Article 15(4) or Article 15(5).

2.14 This principle was recognised by this Hon'ble Court for the first time in *Rajendran case*[11]. This Hon'ble Court held that the onus is on the Petitioner to show that a caste is not socially and educationally backward.

2.15 It is submitted this Hon'ble in *Indra Sawhney case*[8] approved this principle of *Rajendran case*[11]. *See* Jeevan Reddy, J. speaking for the majority at SCC pp. 668-69, paras 705-06.

2.16 It is further submitted that the American doctrine of 'strict scrutiny' has been expressly rejected by this Hon'ble Court in *Saurabh Chaudri case*[12], SCC p. 164, para 136 on the basis that in India there is presumption in favour of constitutionality of legislation. As such, the strict scrutiny test is not applicable even to ordinary legislation. In the instant case, the impugned legislation has been enacted under the specific mandate of the Constitution and therefore stands on a much higher footing than ordinary legislation. In these circumstances, the petitioner's contention that the impugned legislation has to be subjected to the "strict scrutiny" test is clearly misconceived [This is more elaborately dealt with in Part VII below].

III. IDENTIFICATION OF BACKWARD CLASS: CAN CASTE BE THE BASIS?

3.1 Whilst dealing with the aspect of identification of backwardness and socially and educationally backward classes, a few fundamental truths cannot be forgotten. It cannot be seriously denied:

(*i*) that there is backwardness in this country;

(*ii*) that large sections of the country are socially and educationally backward;

(*iii*) that this problem is not new but is age old;

(*iv*) that such backwardness arose because of certain peculiarities of the caste system which proceeded on the assumption that the choice of occupation of members of a caste was pre-determined in many cases;

(*v*) that members of particular castes were prohibited from engaging themselves in occupations other than those certain occupations which were considered to be degrading and impure.

3.2 Three crucial judgments (which were described in *Indra Sawhney case*[8] as marking a significant shift in the approach) are

(*i*) *P. Rajendran* v. *State of Madras*[11],

(*ii*) *A. Peeriakaruppan* v. *State of T.N.*[13], and

(*iii*) *State of A.P.* v. *U.S.V. Balram*[5].

While the first two judgments have been placed before this Hon'ble Court (in part), the third judgment has not been read extensively.

3.3 In *Rajendran case*[11]

(*i*) Chief Justice Wanchoo emphasises the importance of the word 'only' occurring in Article 15(1) and categorically holds that a caste is also a class of

11 *P. Rajendran* v. *State of Madras*, (1968) 2 SCR 786

12 *Saurabh Chaudri* v. *Union of India*, (2003) 11 SCC 146

13 (1971) 1 SCC 38

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citizens and if the caste as a whole is educationally and socially backward, reservation can be made in favour of such a caste on the ground that it is a socially and educationally backward class of citizens within the meaning of Article 15(4) (see SCR p. 790).

(*ii*) In its reply, the State of Madras emphasised the history as to how the list of backward classes had been made starting from the year 1906. Wanchoo, C.J. notices that the main criterion for the inclusion in the list was the social and educational backwardness of the caste based on the occupation pursued by those castes (at SCR p. 79).

(*iii*) What Justice Jeevan Reddy describes as a "shift in approach" is to be found in the second paragraph of Wanchoo, C.J.'s judgment (at SCR p. 791).

[In the present case before your Lordships, apart from making broad and generalised allegations with regard to over inclusion, no real effort has been made to suggest that any particular caste mentioned in the list is not really educationally and socially backward.]

3.4 In *A. Peeriakaruppan* v. *State of T.N.*[13]

(*i*) Hegde, J. observes that advantages secured due to historical reasons should not be considered as fundamental rights (vide SCC pp. 46-47, para 21)

(*ii*) Hegde, J. categorically held that a caste has been recognised as a class. (vide SCC p. 48, paras 25, 26, & 27)

3.5 After the judgment in *State of A.P.* v. *P. Sagar*[14] the State Government had issued a G.O. No. 876 dated 12 April, 1968 appointing a Commission to determine socially and educationally backward classes the lists were challenged in the *State of A.P.* v. *U.S.V. Balram*[5].

(*i*) See at SCC para 84, at p. 686 the observations of Vaidialingam, J.;

(*ii*) In para 88 the learned Judges note that two decisions of this Hon'ble Court where lists prepared of backward classes on the basis of caste had been accepted as valid. These two decisions are the case of *Rajendran*[11] and *Peeriakaruppan*[13] referred to hereinabove.

(*iii*) The learned Judges had called for the records relating to Writ Petition No. 285 of 1970 (*Rajendran case*[11]) and compared the lists of the State of Andhra Pradesh with that of the State of Madras since Andhra Pradesh originally formed part of the State of Madras. See the observations at SCC para 93, p. 689.

(*iv*) The conclusion is referred to in SCC para 94.

3.6 The fact that castes were structured on the basis of occupations and callings is also noted by Venkataramaiah, J. in *Vasanth Kumar case*[7] at SCC p. 786, para 109.

3.7 The learned Judge also quotes Pandit Jawaharlal Nehru, the Discovery of India, at SCC p. 787, para 109.

3.8 The discussion on the law in relation to identification of backward classes is found in two separate sections of the majority judgment written by Justice Jeevan Reddy. The first section which deals with the decision of this Court on Articles 16 and 15 is contained in Paras 695 to 714 (SCC reference). The second section is found in the answer to Question 3(*a*) is to be found in paras 746 to 779 of SCC. An analysis of the discussions on the point shows:

14 (1968) 3 SCR 595

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(*i*) The learned Judges in *Indra Sawhney case*[8] [para 696 at SCC p. 664*b*] noted the judgment in *B. Venkataramana* v. *State of Madras*[15]. This judgment was given on the same day as in *Champakam case*[16].

(*ii*) In *B. Venkataramana case*[15] the learned Judges' attention was drawn to the provisions of the Madras Provincial and Subordinate Services Rule, 1942 in which Clause 3(*a*) in Rule 2 defined the expression backward classes to mean "a communities mentioned in Schedule III to this part." In para 697 at SCC p. 665 Reddy, J. notes that hardly any decision refers to *Venkataramana case*[15] notwithstanding that *Venkataramana case*[15] was a decision rendered with reference to Article 16. Again see SCC in para 756, p. 700 of *Indra Sawhney case*[8] where the learned Judges refer to *Venkataramana*[15].

(*iii*) The learned Judges in *Indra Sawhney case*[8] [at SCC para 705] discussed the significance of the judgment in *Rajendran case* (the observations in *Rajendran case*[11] at SCR pp. 790-91).

(*iv*) *Rajendran*[11] is noticed in SCC paras 705-06, p. 669.

In similar vein, the learned Judges in para 760 again described *Rajendran case*[11] as being one in which caste vis-à-vis class debate took a sharp turn.

(*v*) In para 708, p. 670 it is noted that *Rajendran case*[11] was expressly referred to in *Peeriakaruppan case*[13].

(*vi*) The learned Judges [at SCC para 710, pp. 670-71] expressly agree with the observations in the *Balram case*[5].

(*vii*) The majority decision heavily relies upon and quotes with approval the opinions of Justice Chinnappa Reddy and Justice Venkatramaiah in *Vasanth Kumar case*[7]. Both the learned Judges in *Vasanth Kumar case*[7] took the view that identification of backward classes on the basis of caste cannot be taken exception to for the reason that in the Indian context caste is a class[17] (para 714).

(*viii*) At SCC para 762, p. 704 the learned Judge again notes the opinion of Justice Chinnappa Reddy in *Vasanth Kumar case*[7] where Justice Chinnappa Reddy opined that caste is the primary index of social backwardness and social status and economic power is entwined with caste. At SCC para 764, p. 705 Justice Venkataramiah's opinion in the said judgment has also been quoted by the learned Judge at length. Venkatramaiah, J. in his opinion cited the Constituent Assembly Debates to observe that "identification of backward classes can be made on the basis of caste." They also rely on the opinion of Chinnappa Reddy, J that caste is the primary index of social backwardness, so that social backwardness is often readily identifiable with reference to a person's caste. He held that identification of SEBCs in the Indian milieu is a difficult and complex exercise, which does not admit of any rigid or universal tests. It is not a matter for the courts. The 'backward class of citizens', he held, are the very same SEBCs referred to in Article 15(4).

(*ix*) In the background of the analysis of the judgments of this Hon'ble Court right from 1951, the pre-independence history and the Constituent

15 AIR 1951 SC 229 : (1951) 1 MLJ 625

16 *State of Madras* v. *Champakam Darairajan*, (1951) 1 SCR 525

17 Referred to at SCC p. 675*b* of Jeevan Reddy, J.'s opinion

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Assembly Debates on this issue, the learned Judges in *Indra Sawhney case*[8] came to the following conclusions:

(*a*) At SCC para 765, p. 705 of the judgment:

"The above opinions emphasise the integral connection between caste, occupation, poverty and social backwardness. They recognise that in the Indian context, lower castes are and ought to be treated as backward classes…."

(*b*) Further observation in SCC para 765, pp. 705-06:

"Rajendran and Vasanth Kumar (opinions of Chinnappa Reddy and Venkataramiah, JJ.) constitute important milestones on the road to recognition of relevance and significance of caste in the context of Article 16(4) and Article 15(4)."

(*c*) At para 771 (at SCC p. 710*d*):

"All the above material does is to show that in pre-Independence India, the expressions 'class' and 'caste' were used interchangeably and that 'caste' was understood as an enclosed class."

(*d*) The learned Judges also noticed the discussions in the Constituent Assembly and the Debates in Parliament where Dr. Ambedkar had clearly stated as Minister of Law, that 'backward classes were nothing but a collection of certain castes.'

(*e*) In para 777 the learned Judges explain the reason why the expression which was used was 'class' and not 'caste'—the reason was obvious. It was meant to cover not only the classes of Hindus but also the backward group classes in other sections of the population. See also SCC paras 778-79, pp. 712-14.

3.9 It is submitted that the aforementioned conclusions arrived at by the learned Judges in majority judgment in the *Indra Sawhney case*[8] cannot be impeached and are indisputable.

3.10 The contention of the petitioners that caste is only a starting point is a misreading of the first sentence of para 782 of Jeevan Reddy, J.'s judgment. The reliance on the words, "one has to begin somewhere" to mean that caste is only a starting point and "something more" is required, is neither logical nor practical. In para 783 the learned Judges categorically stated that individual survey is out of the question. If individual survey is out of the question and a caste is identified as being backward, then nothing more can be done and the caste is the determining factor of backwardness. Further, the observations in para 782 of the judgment are in answer to the Question 3(b) relating to identification of backward classes of citizens and does not deal with Question 3(a) which deals with the meaning of the expression "backward classes of citizens" which have been dealt with above. Besides, the conclusion in SCC para 783, p. 717 is entirely in line with the analysis of the answers to Question 3(a) and must be highlighted. Once again see at SCC para 784, p. 718.

3.11 In this context, the words of Justice Pandian in *Indra Sawhney case*[8] in para 101, at SCC pp. 388-89 are telling.

3.12 To similar effect is the conclusion of Sawant, J. in SCC para 453, p. 525.

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3.13 The fact that this Hon'ble Court in *Indra Sawhney case*[8] has held caste to be the determining factor for assessing backwardness has now put beyond any controversy by the Constitution Bench in *Nagaraj case*[18]. See at SCC para 120, pp. 277-78 of *Nagaraj case*[18].

IV. THE MANDAL REPORT AND THE COMMON LISTS

4.1 The contention of the Petitioners that the majority in *Indra Sawhney case*[8] did not accept or approve the Mandal Commission's Report is not correct. In SCC para 856, p. 764, Jeevan Reddy, J. observed as under:

> "*856.* ... it is unnecessary for us to express any opinion on the correctness or adequacy of the exercise done by the Mandal Commission."

4.2 However, at several places earlier in the judgment, the learned Judges have noted the magnitude and complexity of the exercise which had been undertaken by the Mandal Commission. The Mandal Commission Report has been dealt with in several places in the judgment which inter alia are as follows:

(*a*) In para 662, the learned Judges referred to the Seminar conducted by the Department of Anthropology, Delhi University in March 1979 in relation to the Questionnaire to be issued to all departments of Central Government and to the State Government. The learned Judges also notice that the Commission had undertaken country wide touring undertaken the Commission. The learned Judges also notice the evidence recorded by it and the socio-economic survey conducted by it.

(*b*) In para 661 the learned Judges quote paragraph 3.2 of the Mandal Commission Report in which it was inter alia stated that the Commission had made special efforts to associate the leading sociologist, research organizations and specialized agencies of the Country with every important facet of its activity.

(*c*) In SCC para 667, p. 644 the learned Judges noted Chapter IX which sets out the advice tendered by the Central and State Governments and Chapter X which dealt with the evidence tendered by the public. They observed

> "*667.* ... Chapter XI is quite important in as much as it deals with the 'Socio-Educational Field Survey and the criteria of backwardness'."

(*d*) The criteria adopted by the Mandal Commission, as noted in para 667, are significant. On this aspect,

(*i*) Whilst dealing with these criteria, see the observations at para 788, SCC p. 721,

(*ii*) And again at SCC para 795, pp. 726-27 on the criteria, and

(*iii*) Thirdly see SCC para 854, p. 764.

4.3 No Report of this kind can be without some flaws or blemishes. In *Balram case*[19], this Hon'ble Court noted the difficulties faced by the Commission for the purpose of identification or ascertainment of backwardness (SCC para 83-A).

4.4 To similar effect are the observations in *Indra Sawhney case*[8] at SCC para 854(*b*), p. 764.

18 *M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212

19 *State of A.P.* v. *U.S.V. Balram*, (1972) 1 SCC 660 at pp. 685-86. This approach was approved by the majority in *Indra Sawhney case* (at SCC para 709, p. 670)

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4.5 There are several reasons why the learned Judges observed that it was not necessary to express any opinion on the correctness or adequacy of the Report of the Mandal Commission. These are as follows:

(*a*) They noted (in para 850) the submissions of the Government of India that it had taken care by 'marrying' the Mandal Commission List with the State List.

(*b*) In para 851(*a*), the learned Judges observed that the Mandal Commission Report had not been accepted by the Government of India in full. The Government did not accept the List of Other Backward Classes prepared by the Commission in its entirety-the First Memorandum expressly directs that only those classes will be considered as Backward Classes which are common to both the Mandal Commission List as well as the respective State List.

4.6 In this connection, it is extremely significant to note that the particulars had been furnished by the Union of India in relation to the Common List and it was the contention of the Union of India which has been accepted by the learned Judges that the State List have stood the test of time and judicial scrutiny. The details of the particulars of the State Lists have been extracted by the majority at SCC para 851(*a*) at pp. 760-62. The judgment itself shows that the various states had been asked to respond to the material placed by the Central Government and several of them had done so.

4.7 The importance given to the State List can hardly be overemphasised. Their Lordships were aware of the discussions in the Constituent Assembly. Their Lordships were aware of the importance of the speech of Dr. Ambedkar, the Chairman of the Drafting Committee, in relation to the Draft Article 10(3) [which is presently Article 16(4). See SCC p. 375, para 40. This approach has been accepted by the Central Government and the same has also found favour with the learned Judges in *Indra Sawhney case*[8].

4.8 The Petitioners have ignored the findings in para 854(*b*) that strictly speaking the establishment of a Commission under Article 340 was not necessary to identify backward classes.

(A) The importance given to the State List is again emphasised at SCC para 854(*b*), pp. 763-64.

(B) In this regard, the learned Judges also noticed the List prepared by the State of Goa which was prepared without appointing a commission. (See SCC para 852, p. 763.)

4.9 To similar effect is the observations of Sawant, J. in SCC para 551, p. 566.

4.10 The approach of the learned Judges marks the recognition of the fact that more than 40 years had passed and no reservations have been made in favour of OBC for one or other reason in the Central Services, see SCC para 854, p. 764), though in many States, such reservations were in force.

4.11 In para 857, the Mandal Commission Report is described as the 'catalyst' which brought into existence reservation in favour of OBCs, coupled with the observation that the OM dated 13 August, 1990 does not incorporate the observations of the Mandal Commission as such but it incorporates in fact the State Lists.

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4.12 It is respectfully submitted that the observations in SCC para 857, p. 765 must be kept in mind in approaching a matter of this kind.

4.13 At this stage it becomes necessary to deal with another aspect of the matter. On 20-9-2007, one of the Counsel for the petitioners presented a compilation of 'material' to show that the State Lists are defective and ought not to have been accepted by the Central Government. This exercise is totally wrong and misleading for several reasons:

(*i*) The Central Government had placed all the material before the Bench of 9 Judges categorically stating the purpose for which each list had been prepared, namely the State List. There is nothing in the judgment to suggest that there is any such stand was taken before the 9 Judges.

(*ii*) Secondly, no application has been made to review this part of the judgment of the majority. No attempt was made to even place this subsequently.

(*iii*) The Central Lists have been operating for 14 years for the purposes of reservations and posts and not a single person has challenged any inclusion in the Central List as being void or illegal.

(*iv*) Further, the State Lists have also been operating both for the purposes of Articles 16(4) and 15(4) and there has been no challenge at all in any State or in the Supreme Court with regard to the State List.

(*v*) There has not been a single complaint made before the State Commission or the National Commission with regard to over-inclusion of any caste, community, etc.

(*vi*) In any case, the submissions made on the basis of the said compilation is flawed and misleading which is clear from the note annexed to this Written Submission as APPENDIX-I

V. WORKING OF THE NATIONAL COMMISSION FOR THE BACKWARD CLASSES:

5.1 The counsel for the petitioners have made wide ranging allegations in relation to the working of the National Commission for the Backward Classes ("the Commission"). These allegations may be summarised as under:

(*i*) That there are no guidelines or criteria evolved by the Commission;

(*ii*) That no proper procedure is followed by the Commission;

(*iii*) That several requests for inclusion have been mechanically accepted;

(*iv*) That such requests have been accepted without any proper consideration or survey;

(*v*) That inclusions have been made of communities not entitled to be considered a backward class for political and extraneous considerations:

(*vi*) That all this is part of what is described as 'vote bank politics.'

(*vii*) It has been submitted that the Commission lacks adequate staff and infrastructure and as a result it has not been able to carry out its work effectively. This is based on the Annual Report of the National Commission for Backward Classes for 2003-2004, [Annexure P-4 to the Writ Petition No. 29 of 2007 filed by Youth For Equality].

5.2 It is submitted that these submissions made by the petitioners are inaccurate and baseless. The Commission has framed elaborate guidelines for consideration of

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requests for inclusion and complaints of non-inclusion in the Central List for Other Backward Classes. These guidelines have been framed after studying the criteria/indicators framed by the Mandal Commission and the Commissions set up in the past by different State Governments and other relevant materials. These criteria are based on social, educational and economic factors. It is also made clear that they are intended to aid the Bench/Commission but do not fetter the due exercise of discretion by it. It is also made clear that whilst dealing with traditional crafts or traditional hereditary occupations, the Commission recognises, the foundation of the caste system was traditional occupations.

5.3 The Commission holds public hearings and its Benches sit at various places for holding public hearings. Para 10 of the Guidelines reads as follows:

> "10. In all cases, publicity regarding the date and venue of the sitting of the Commission's Bench and the castes/communities etc. to which the sitting pertains may be made though mass media and all those who have any views to express or data to furnish to the bench may be invited to do so, in addition to addressing the State Governments and applicants to furnish all material and data in their possession."

As a matter of fact, the records show that the Commission has held 236 public hearings since its inception.

5.4 The Commission has also formulated an elaborate questionnaire for requests for inclusion in the State Lists. It has framed guidelines for filling up the questionnaire. The questionnaire is in two parts. Part 1 of the questionnaire relates to general description of the data of the State, and Part 2 is designed to secure a complete and comprehensive profile of each caste/community in respect of which the request for inclusion or complaint of non inclusion is made. The questionnaires are at. Several requests for inclusion—as can be seen from some of the advices which have been placed in the compilation—so that where the questionnaire has not been properly filled in or filled in at all, the requests are rejected.

5.5 The data called for by the Commission is significant. Detailed data is required to be submitted with regard to social, educational and economic criteria. Another important aspect is that the Commission requires the application to furnish particulars of improvement or deterioration in the condition of the caste. The relevant questions in this regard are as under:

> "(*c*) Has there been any improvement in the condition of the caste/community during the last twenty years? If so, in what respects?
>
> (*d*) Has there been any deterioration in the condition of the caste/community during the last twenty years? If so, in what respects?"

5.6 It is significant to note that during the period of its functioning, the Commission has recommended 297 requests for inclusion and at the same time rejected 288 requests for inclusion of main castes and 243 requests for inclusion of sub caste/communities.

5.7 The particulars of the communities for which advices have been tendered by the Commission for rejection are to be found in the compilation annexed to these Submissions at pp. 39 to 51 thereof.

5.8 Some sample advices tendered by the Commission have been annexed to show the detailed and exhaustive nature of the work undertaken by the Commission

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a and the voluminous material, historical and contemporaneous which has been taken into account by it.

(A) CHASAS of Orissa—recommended for inclusion

(*i*) In the materials placed before this Court there is an advice rendered in respect of the inclusion of Chasas of Orissa in the Central List. Later, details of the public hearing are set out. Chasas were separately included by Entry 27 in the State List, but they did not figure in the Mandal List. Later, is the noting at b the public hearing that Chasas are regarded as Shudras and this is how the community is referred to even today by the upper caste. In respect of Chasas, the Commission in its findings held as follows:

"3. Chasas are the caste of Cultivators, belonging to the middle and lower peasantry. They are socially and educationally backward community. Being numerically a very large community, some among them may be found in Class I c government jobs and in professions, but, by and large, their representation in professions and government jobs is very low compared to their population size."

(*ii*) It further noted that their counterparts in other parts of Orissa, the Paikas and Kultas, have been included in the Central OBC List and concluded that Chasas is a peasant community largely comprising of small and marginal farmers, share-croppers, tenants and landless labour.

d *(B) Samples for rejection and partial inclusion.*

(1) Jats in Uttar Pradesh, Madhya Pradesh and Haryana and Rajasthan

(2) Lingayat caste of Karnataka

(3) Kayastha caste of Rajasthan and Delhi

(4) Khandayat and Mahanayak of Orissa

(5) Marathas in the case of Maharashtra e

(C) In relation to Jats:

(*i*) the geographical distribution of Jats is noted. The Commission compared the Jats in the North West to the Reddys and the Kamma of Andhra Pradesh and a section of Vellala of Tamil Nadu and observed as follows:

"A study of these exceptional castes shows that they had the following f advantages:

(*i*) Non-subjection to intermediary tenures like Jagirdari and Zamindari (in the areas inhabited by them or most of the areas inhabited by them).

(*ii*) Residence in areas not under princely rulers or Chieftains belong to other castes.

(*iii*) Availability of dependable irrigation.

g (*iv*) Accession of political power in the recent past, i.e. late medieval and modern period, though rulership and chieftainship of native State rules of their own castes.

58. The first two were necessary conditions. The third was a highly facilitating condition, the fourth was not absolutely essential but certainly gave a tremendous advantage. It is the accrual and accretion of these conditions in different combinations that enable a few of the peasant castes h such as the one mentioned above to make sufficient social as well as economic progress that they came to be regarded by themselves as well as

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by others as advanced communities and objectively they ceased to fulfil criteria of 'social backwardness'."

(*ii*) At paras 85 to 92, the Commission considers the position of Jats in general and then proceeds to consider the specific requests for inclusion in relation to Jats in Punjab. It held that they are certainly not socially backward and that they themselves like the Camas and Reddys of Andhra Pradesh decided not to seek inclusion.

(*iii*) As far as Haryana is concerned, the applicants had relied on the report of the Haryana Backward Classes and Gurnam Singh Commission for backward classes. In 1999, The Commission rejected the findings of the Gurnam Singh Commission holding that what has been given as backward score in that report was undependable as far as Jats were concerned. The concluding sentence as far as Jats in Haryana reads as follows:

"108. It is clear from the general analysis at sub-section C(*i*) of Section IV above as well as from the analysis of the data in the Gurnam Singh Commission's Report that the Jats of Haryana are not Socially Backward and are in fact Socially Advanced."

(*iv*) In relation to Jats from Delhi, the State Commission had held that they were not backward and the Commission agreed with this.

(*v*) In relation to Jats from Uttar Pradesh, the Commission relied on the work of Professor Dipankar Gupta, a well known scholar and research expert in Sociology. One of the submissions made for inclusion in the list of backward classes was mal nutrition which the Commission rejects as being a piteous plea. The contention of the Jat Sabha that Jats are historically considered to be the same as Yadavs is also rejected.

(*vi*) The claim of the Jats of Madhya Pradesh to be included in the List of Backward Classes was rejected observing that the applicants were themselves not serious since they had not even filled in the questionnaire.

(*vii*) The position of the Jats of Rajasthan was different and it was concluded that the condition of the Jats of Rajasthan was comparable to that of States of Bihar, U.P., etc. which were under oppressive tenurial systems. The Commission held that on the basis of the data available the Jats of Rajasthan, except the Jats of Bharatpur and Dhawalpur, are socially backward.

(*viii*) It is submitted that the aforesaid advice was clearly indicates the due consideration given to each and every aspect on merits on the basis of detailed data which is available.

(D) The Lingayats

(*i*) The advice dated 31 March, 1998 in relation to inclusion of 16 Lingayat/ sub-castes, their synonyms/communities and the rejections of other is instructive. At para 6 at p. 180, the Commission notes the State List dated 17 September, 1994 in which other Lingayats/sub-castes had been specifically included on the recommendations of the Chinnappa Reddy Commission. The position of Lingayats castes vis-à-vis the State and Mandal List is at pp. 181-82. The Commission has done a detailed appraisal of Lingayatism on ethnographic grounds. It is observed that Lingayats cannot be taken as a homogenous class, but it consists of may sub-divisions or sub-groups which can be taken as castes

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or caste-like groups which are very much comparable to the castes or sub-groups in the traditional Hindu society.

(*ii*) This advice is also very significant because it shows the procedure followed and shows due consideration of objections for inclusion. Perusal of Heading VI shows that the Karnataka State Backward Classes Federation had submitted a Statement of Objection to the inclusion before the Commission. Several people appeared representing different associations before the Commission had argued that there was no case for including any of these Lingayats at all. One of the arguments was that Lingayatism denounces the caste system and professes social equality for all.

(*iii*) Significantly, at the hearing of the objectors also voiced their apprehension that the some of the forward caste of Lingayats will obtain false certificates in the name of listed Lingayat backward classes. This malpractice was taken seriously by the Commission and as a result of this, the Mahasabha as the representative body of the community, wrote a letter dated 9 September, 1997 stating as follows:

"We, as the representative body of the community, have constituted a Committee to keep watch and ward on such events and see that there will not be any misuse of the benefits. The committee also gives wide publicity to give public warning. If at all any misuse is found, it will be dealt with appropriate action. The Committee consists of a convenor and four members representing four Revenue Divisions. We assure that the Committee meets periodically and reviews the reports from different parts of the State."

(*iv*) 16 Lingayat castes/sub-castes were recommended for inclusion. As against that, for Lingayat Aradhya/Jangama it was noted that none of the Commissions accepted/recommended their inclusion. The Commission further disagreed with the inclusion of Matapathis among Jangams in the Mandal Commission List. The Commission categorically held that Lingayat Aradhya/Jangama cannot be considered to be socially backward class but are socially advanced Similarly, Lingayat Panchacharu/Panchamasali was not recommended for inclusion.

(*v*) Significantly, the original request of the All India Veerasaiva Mahasabha sought inclusion of the entire Lingayat community in the Central List of Backward Classes. In this connection, the Commission felt as follows:

"it is necessary to make a positive finding of the Bench that all other castes/sub-castes/groups of Lingayats than those 16 castes/sub-castes/synonyms found by the Bench as Socially Backward in the above Section, are not Socially Backward but are Socially forward, and, therefore, they should not be included in the Central List of Backward Classes for Karnataka".

(*vi*) The List which recommends the inclusion of such Lingayats shows that it is actually the Lingayats whose position were akin to other castes were included.

(*vii*) The Commission whilst submitting its advice noted as under:

"(V) In view of the malpractices indulged in by some members of certain forward castes/communities of obtaining false caste-certificates in the name of the castes/sub-castes/communities included in the List of

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BCs/SCs/STs, it is desirable that the Central Government as well as the State Governments. take the following steps:

(*a*) Provide a statutory base for the process and machinery of caste-certification, which should be fully transparent, whether as an Independent Act or as a chapter included in the relevant Acts already existing in some States, including Karnataka, covering different aspects of reservation, with the twin-objective of expeditiously issuing caste-certificates to the genuine members of Backward Classes (and also of SCs and STs) without any scope for harassment and effective detection of false claims and nipping in the bud of such claims, and if, in rare cases, false claimants escape vigilance at entry point, providing for the earliest subsequent detection and sever penalties both for holders and beneficiaries and for issuers of false certificates.

(*b*) The watch and ward system of internal vigilance and safeguards within the community set up by the All Indian Veerasaiva Mahasabha as per their letter dated 9-9-1997 mentioned at para 21 above, may be guided and monitored by the Central Government and the respective State Government so as to ensure that such Committees function effectively and encourage other castes/communities to set up similar internal systems of vigilance and safeguards."

(E) Kayasthas of Rajasthan & Delhi

(*i*) The advice made in relation to the request made by Kayastha of Rajasthan and Delhi for inclusion in the Central List makes interesting reading. The Kayastha were not included in the Mandal List, the State List or the Central List for Backward Classes for any State/UT. An application from the Akhil Bhartiya Kayastha Mahasabha, Delhi admitted the fact that the Kayastha community has rendered services to the nation and gave the names of a few eminent Kayastha personalities which read as follows:

"Dr. Rajendra Prasad, Lal Bahadur Shastri, Swami Vivekananda, Netaji Subhash Bose, Jagdish Chandra Bose, Shanti Swaroop Bhatnagar, Maharshi Aurobindo Ghosh, Munshi Prem Chand, etc."

(*ii*) The submission made was that the community had shown remarkable decline is extremely important. The contention was that the community was basically a service class community which had been adversely affected by the reservation quota. The Commission after considering the ethnographic evidence in detail also referred to judicial decisions in relation to the position of Kayastha and concluded in its findings at that the grounds advanced in the representation were not really serious. The Commission concluded as under:

"The facts admitted by them and ethnographic and socio-historical literature abundantly bring out the fact that the Kayastha community is socially and educationally advanced and in fact educationally it is among the most advanced."

(F) The Khandayats of Orissa

Equally significant is the advice rendered in relation to the request made for inclusion of the Khandayat caste in the Central List. When the Central List was first finalised in 1993, Orissa was one of the States which did not have a State List of its own. Orissa had come out with a State list in 1994 on the basis of the NK Das Commission which recommended inclusion of Khandayats in the State

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List. Khandayats had not been included in the Central List because they were not found in the Mandal Commission List. The submission before the Commission was that Chasa and Paikao were synonyms of the Khandayat caste. However, the Commission in its findings disagreed with this submission and found that that there were no valid grounds made by the NK Das Commission for inclusion of the Khandayats in the Backward Classes.

(G) Marathas of Maharashtra

(*i*) The advice in relation to Marathas from Maharashtra is at pp. 278 to 302. An application was made by the Akhil Bharatiya Maratha Mahasangh for inclusion of Maratha caste in the Central List on the ground that they were Kunbi. The application was supported by Dr. K.G. Deshmukh, former Vice-Chancellor, Amravati University and ex-Chairman, Maharashtra Public Service Commission.

(*ii*) As in the case of Lingayat the Commission also heard objections to this request (para 10 at p. 286). After noting the voluminous summary on the file including the Maharashtra State Gazetteers, the Commission concluded that Maratha is not one and same as the Kunbis caste as claimed by the applicants.

(*iii*) In para 19 at p. 298 the Commission notes that the Maratha caste had dominated the modern history of Maharashtra and provided the largest number of Chief Ministers. None of these Chief Ministers had recommended the inclusion of Marathas as a backward class. It is submitted that this is significant because it militates against the submissions of the petitioners that inclusions are being made on a political basis.

(*iv*) It is also important to note that the applicants had threatened an agitation if the community was not included in the List of Backward Classes. The Bench (at para 21 at p. 300) disagreed with this situation and hoped that the mention of agitation was not really serious.

5.9 The aforesaid analysis of the guidelines, procedure and the sample advices clearly demonstrate the following:

(A) It is incorrect to state that there are no guidelines or procedure of the Commission. It is submitted that the above analysis would clearly show that there is an elaborate procedure which has to be followed by the Commission while considering requests for inclusion. Further detailed guidelines have been laid down for various issues including making applications, filling up the questionnaire, etc.

(B) A survey of the aforesaid facts also demonstrates that the Commission had applied its mind by going through an elaborate procedure on the applications made to it for inclusions in the Central List. It is also relevant to point out that the Commission has till date rejected 531 cases for inclusion.

(C) It is incorrect to state that the Commission has mechanically allowed all applications for inclusion in the Central List. The advices which have been discussed hereinbefore indicate that the Commission while examining the applications had taken note of the ethnographic history of the concerned castes/sub-groups/communities. It has also taken note of the recommendations of the various State Commissions in this regard. It has also considered the status of the concerned caste and socio educational backwardness of the caste concerned.

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(D) An analysis of the said sample advices also indicate that the Commission while considering the applications, had conducted various public hearings where the views of the public as well as the State Governments and the State Commissions were heard and considered. Wide publicity of these public hearings was given so that interested parties can raise any objection to the proposed inclusion. Such objections, if any, were heard and examined by the Commission at length.

(E) The argument that the inclusions are motivated by political considerations is erroneous in as much as the Commission has emphatically rejected politically dominant castes such as the Marathas from being included in the Central List. In fact, the said advice would clearly demonstrate that the Commission had rejected the inclusion of Marathas in the Central List in spite of the fact that the members of the said community had threatened agitation.

(F) In view of the extensive work which the Commission has done as evident from the above discussion, the argument of the petitioners that the Commission has failed to perform its functions is ill-founded.

VI. SCOPE OF ARTICLE 29(2); IMPORTANCE OF THE WORD 'ONLY'

6.1 The petitioners contend that since Article 15(5) does not override Article 29(2), the basis for making reservations for SEBC in educational institutions under Article 15(5) is violative of Article 29(2). This is based on the argument that unlike the non obstante clause in Article 15(4) which specifically lifts the bar of non-discrimination under Article 29(2), Article 15(5) does not provide for the same. The contention is not correct.

6.2 Since 1951 measures for reservation has been the subject-matter of challenge before this Hon'ble Court beginning with *Champakam case*[16]. The same Bench decided, on the same day, the case of *B. Venkataramana* v. *State of Madras*[15]. This Hon'ble Court in both cases struck down the communal G.O. since it was based on religion. In *B. Venkataramana case*[15], this Hon'ble Court held that reservation in favour of backward classes is permissible. S.R. Das, J. speaking for the Court quashed the G.O. (see AIR p. 230, para 4).

It is submitted in the said case recognised the principle that reservation for backward classes which is not based 'only' on the grounds specified in Article 29(2) is permissible. [See para 6.4 below]

6.3 The argument of the petitioners that reservation under Article 15(5) without reference to Article 29(2) would render 15(5) invalid as being denial of right to admission on the basis of caste was squarely addressed by Dr. B.R. Ambedkar's speech on the enactment of the First Amendment to the Constitution to bring in Article 15(4). The relevant passage reads as under:

"My view is that in Article 29, Clause (2), the most important word is 'only'. No distinction shall be made on the ground only of race, religion or sex. The word 'only' is very important. It does not exclude any distinction being made on grounds other than those mentioned in this article and I respectfully submit that the word 'only' did not receive the same consideration which it ought to have received.

Then with regard to Article 16, Clause (4), my submission is this that it is really impossible to make any reservation which would not result in excluding

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somebody who has a caste. I think it has to be borne in mind and it is one of the fundamental principles which I believe is stated in Mulla's edition on the very first page that there is no Hindu who has not a caste. Every Hindu has a caste—he is either a Brahmin or a Mahratta or a Kundby or a Kumbhar or a carpenter. There is no Hindu—that is the fundamental proposition—who has not a caste. Consequently, if you make a reservation in favour of what are called backward classes which are nothing else but a collection of certain castes, those who are excluded are persons who belong to certain castes. Therefore, in the circumstances of this country, it is impossible to avoid reservation without excluding some people who have got a caste."

6.4 Article 29(2) is not attracted in this case at all. Article 29(2) is violated if a citizen is denied admission 'only' on the basis of his own caste. It has no application when the denial of getting a seat is due to paucity of seats for the reason that some seats are reserved for a class on account of its backwardness. The fact that such backwardness has been identified and caste becomes the basis does not violate Article 29(2). This is clear from *B. Venkataramana case*[15].

6.5 It is submitted that Article 15 and Article 16 provides for positive and protective discrimination to facilitate special provisions in favour of 'backward classes of citizens' on the basis that the same is valid classification. This concept of positive discrimination in favour of 'backward classes of citizens' is also the mandate of Article 14. Article 15(5) provides for reservation in favour of not only SEBCs but SCs and STs as well. The objective of Article 15(5) is positive discrimination based on the valid classification to meet the objectives of social justice i.e. providing opportunities to the weaker sections of the society.

6.6 Article 29(2) is a protection given by the Constitution against denial of admissions to educational institutions on the ground of religion, race, caste, language or any of them. A plain reading of Article 29(2) shows that it does not apply if provision is made for backward classes. When the basis for classification is not solely on those grounds, the same does not fall foul of Article 29(2). The ground for classification in the present case is not only caste but it is part of measures to bring about equality between the unequals which cannot be antithetical to Article 29(2). The mandate for providing 'special provisions' in the nature of reservation of seats in educational institutions under Article 15(5) has to be necessarily read into Article 29(2). In other words, classification made for the purpose of Article 15(5) cannot be said be discriminatory in nature so as to attract the bar under Article 29(2).

6.7 This view is buttressed by the view taken by Justice P.B. Sawant, in his concurring opinion in *Indra Sawhney case*[8] in which he has dealt with the scope of Article 29(2) and its relationship between Articles 14, 15 and 16. The discussion on this issue is reflected at SCC para 415, pp. 509-10, and para 435, p. 518 of the judgment.

6.8 In *E.V. Chinnaiah case*[20] Justice S.B. Sinha in concurring with the majority opinion has discussed the issue of 'reservation' and the nature and scope of protective discrimination permitted by the Constitution in providing reservation. At SCC para 83, p. 426 of the judgment, the learned Judge opines as follows:

20 *E.V. Chinnaiah* v. *State of A.P.*, (2005) 1 SCC 394

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6.9 It is submitted that under the impugned legislation, candidates will not be denied admission on the ground that they belong to a particular caste. The basis for denial of admission would be that seats are reserved for candidates belonging to SEBCs. As such, Article 29(2) does not apply.

VII. RELEVANCE OF AMERICAN JUDGMENTS AND THE STRICT SCRUTINY TEST IN THE INDIAN CONTEXT

7.1 The American doctrines and tests relating to "strict scrutiny," "compelling statements" and "narrow tailoring" are tests which are premised on an approach which does not apply to India at all. These proceed on the basis that any attempt to take measures on the basis of race are discriminatory in the first instance as they affect individual rights. If this is so, then the measures have to be subjected to the strict scrutiny test and can be upheld if they narrowly tailored to suit compelling State interest and it has been so held. In *Saurabh Chaudri* v. *Union of India*[12] the Constitution Bench was asked to strike down institutional preference as being suspected classification incapable of withstanding the strict scrutiny test. This contention was repelled at SCC pp. 163-64, paras 35-37.

7.2 Therefore, it is clear that under our system, there is presumption of constitutionality, and as mentioned above, there is a greater presumption of constitutionality under the scheme of equality which mandates positive steps to remove backwardness.

7.3 At this stage it must be noted that in this very case, Justice Sinha wrote what is described as a 'concurring judgment' and in paras 86 and 87, referred to American judgments quoted from the judgment in *Jennifer Gratz and Patrick Hamacher* v. *Lee Bollinger*[21]. After quoting from the said judgments, the learned Judge holds that the validity of institutional reservation must be judged on the touchstone of the equality clause. In para 91 it was held that even applying the said tests, institutional reservation cannot be held to be unconstitutional. If this judgment is to be read as accepting that the strict scrutiny test is to be applied in India, then it is not, to that extent, a concurring judgment, but in this aspect it would have to be held to be not in accordance with the majority judgment.

7.4 The context of Justice Sinha's observations in *Nair Service Society case*[22] have to be read with reference to *Saurabh Chaudri case*[12] (to elaborate). The observations in *Nair Service Society case*[22] once again refer to American tests without noticing the majority judgments in *Saurabh Chaudri case*[12].

7.5 The American judgment flows from the principle that all governmental action based on race—a group classification long recognised as "in most circumstances irrelevant and therefore prohibited," ... should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed. These ideas have long been central to this Court's understanding of Equal protection, and holding benign state and federal racial classifications to different standards does not square with them.

21 (2003) 539 US 244

22 *Nair Service Society* v. *State of Kerala*, (2007) 4 SCC 1

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7.6 On the other hand, the position in India is absolutely different. Indian Constitution specifically contains provisions like Articles 15(4) and 16(4), which permit special provisions for backward classes, and not backward individuals. Hence, our Constitution specifically permits class based reservation. Further, we have already seen how the Supreme Court has categorically declared class based reservation to be a facet of Articles 14, 15(1) and 16(1) itself, and not merely an exception. Hence, if class based reservations are a facet of Articles 14 and 15(1) and 16(1) itself, they cannot be assumed to be suspect because they cannot be assumed to be violative of the individual right of equality, and therefore cannot be subjected to strict scrutiny.

7.7 Therefore, the American law upholds race-based affirmative action only when the same is individual specific, without compromising on the merit of the beneficiary of affirmative action. This affirmative action is justified by saying that cultural diversity helps the entire student body or the society in understanding each other and enriches their lives. Hence, at all times, the focus is on how the affirmative action will benefit the white population. In India, on the other hand, there is no enrichment benefit to be drawn for the majority through affirmative action. The Indian law is very clear that our caste system has historically suppressed the backward classes in the most hideous ways, and therefore we must now make them come up into the mainstream. The focus here is on the encouragement of the backward classes, and not how their being in the mainstream will help the forward classes. Further, we are not looking for any cultural diversity through affirmative action since we are diverse enough as it is, and the backward classes are essentially from the same cultural background. Lastly, we do not make a pretence about the fact that the backward classes cannot compete with the forward classes. Whereas in America it is essential that the beneficiary of the affirmative action must be able to compete with the rest. To adopt this as the position in India will be to miss the entire point, that these backward classes due to the past injustices are in no position to compete with the mainstream, and they need affirmative action to push them up. So all the assumptions that our Constitution rests on stem from the fact that equality is an individual right, while affirmative action is a class based measure. So, when we judge it as a class based measure, we cannot rely on a jurisdiction that does not even recognise class based rights under the equality doctrine.

VIII. SARVA SHIKSHA ABHIYAN: TOWARDS UNIVERSAL ELEMENTARY EDUCATION

8.1 It has been argued on behalf of the Petitioners that the Right to Free and Compulsory education is a meaningless right, as there has been no effort on the part of successive governments to concentrate on elementary education. In this behalf, the petitioners are clearly wrong, and they ignore the massive strives which have taken place in the Education sector as a result of the Government initiatives.

8.2 The Sarva Shiksha Abhiyan (SSA) is the national flagship programme launched in 2001-2002 for achieving the goal of Universalisation of Elementary Education (UEE) through a time bound approach in partnership with states and local bodies. It is also an attempt to provide an opportunity for improving human capabilities to all children (6-14 years age), through provision of community-owned quality education in a mission mode.

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8.3 The major components of SSA are [See SG COMP VOL.III; Page 2]:

- Opening new schools
- Alternative schooling facilities for out-of-school children
- School grant @ Rs 2000 per annum
- Teacher grant @ Rs 500 per teacher per year
- Teaching Learning Equipment for new schools
- School maintenance grant @ Rs 5000 per annum
- Civil Works (school buildings, additional classrooms, drinking water and toilet facilities, boundary walls, Block Resource Centres, Cluster Resource Centres, etc.)
- Teachers for new schools and additional teachers in existing schools to improve teacher pupil ratios
- Inclusive education for children with special needs
- In-service teacher training
- Community participation & training
- Innovations/initiatives for SC, ST children, promotion of girls education & early childhood care and education/computer aided learning
- Free text books for SC, ST & girls
- Remedial Teaching
- Decentralised academic resource centres at block and cluster level
- Monitoring, evaluation and research

8.4 The achievement of these objectives is ensured through timely release of funds from the Central Government. The total outlay for the SSA in the 10th Plan was 17000 crores. The releases by the Government and Expenditures during the 10th Plan are as follows:

(Rs in crores)

Year	*GOI Budget*	*GOI Releases*	*Actual Expenditure Out of Total Funds available*
2002-03	1569.26	1569.26	1305.65
2003-04	2732.32	2732.29	3057.48
2004-05	5079.58	5139.75	6598.39
2005-06	7810.75	7508.40	10002.33
2006-07	11104.00	10886.55	14779.29

8.5 The Integrated Child Development Services (ICDS) was launched on 2-10-1975. Today, the ICDS represents one of the world's largest and most unique programmes for early childhood development. This is being given shape to by 1.4 million functionaries, comprising of the Anganwadi helpers, Anganwadi workers, supervisors, Child Development Project Officers and District Programme Officers. By 2004, there were 7,50,000 Anganwadis in operation under the ICDS in the country, which was expected to go up to 1 million by 2006.

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8.6 These efforts had helped the Sarva Shiksha Abhiyan achieve the following results as of April 2005:

- The number of out-of-school children had come down from 32 million in 2001 to 10.4 million as of April 2005.
- Gender gap in enrolment both at the primary and elementary level had declined.
- Dropout rates had fallen by 4.1 percentage points between 2001-2002 and 2002-2003 as compared to a decline of 3 percentage points over the next decade. Significantly, the decline in dropout rate for girls was higher than that for boys. At the primary level, the dropout rate among girls had come down from around 70.9% in 1960-1961 to 33.72% in 2002-2003 and the gender gap currently had been eliminated.
- 770,000 additional posts of teachers had been sanctioned across the country under SSA.
- More than 120,000 new schools had opened since 2001.
- Provision of more than 310,000 additional classrooms, around 115,000 school buildings, 220,000 toilets and 150,000 drinking water facilities.
- Teachers were given regular in-service training and annual grants for developing teacher-learning materials to improve the quality of teaching-learning outcomes.
- Free textbooks were distributed to all girls, and children belonging to marginalised groups.

8.7 The Mid-Day Meal Scheme announced on 15th August, 1995 is the largest school nutritional program in the world.

8.8 The National Programme for Education of Girls at Elementary Level (NPEGEL) was launched in September, 2003 and is an integral but gender oriented component of the Sarva Shiksha Abhiyan. It provides additional components for enhancing the education of underprivileged/disadvantaged girls at the elementary level through more intense community mobilisation and development of Model Cluster Schools.

8.9 The Kasturba Gandhi Balika Vidyalaya (KGBV) was launched in July 2004, and is designed to encourage the greater participation of girls in education at the upper primary level. Under the scheme, 750 residential schools at the upper primary level have been sanctioned for girls belonging predominantly to disadvantaged and marginalised groups.

8.10 The States have also enthusiastically participated in the SSA and the contribution of the State share to the programme has improved significantly.

8.11 The SSA is premised on the basis that education is a fundamental right for children in the age group of 6-14 years. The SSA Scheme recognises this, and is striving to address the need for access and quality education for each child. This realisation has led to the adoption of a strong rights-orientation within the programme, and 2 dimensions of work that have been regarded crucial for the 2nd Phase of the SSA under the 11th Plan are as follows:

"(*i*) Improvement of the quality of education imparted in the primary and upper primary schools through a range of coherent and comprehensive strategies

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with clearly defined goals that help in measuring progress. Quality of education is a much discussed issue and there is no clear consensus on what constitutes quality, how to measure it, or whether it can be measured at all. The meaning of 'improved quality needs to be defined in operational terms through clearly identified outcome indicators or various dimensions like teacher competence, classroom processes, teaching learning materials, students' performance, etc. There is a need for states to envision the change they want in simple terms and to communicate it to teachers, educational administrators and all others involved with school education. Sharing this vision with parents could help increase the accountability of the system to work towards achieving this change. Monitoring of identified outcomes at all levels and across time periods would be necessary.

(*ii*) Focus on disadvantaged and educationally backward areas and social groups that are lagging behind. This focus should include higher resource allocations, capacity building for preparation and implementation of strategies based on identified needs, more intensive monitoring and supervision and tracking of progress. The ways of working in these identified pockets and with disadvantaged social groups would need to be different from the usual pattern under the SSA. The focus on the most vulnerable groups of children who are still out of school would require partnership with NGOs and a commitment to a rights-based, equity oriented approach. Equity needs to permeate each process under SSA beginning with planning. Equity issues need to become a central theme in the discussion and vision for quality improvement."

8.12 As a result of the various measures adopted, the following milestones had been reached towards the goal of Education for all as on November 2005:

- Overall Literacy: Rise from 52 per cent (in 1991) to 65 per cent (in 2001).
- Gross Enrolment Ratio in Elementary Education: Rise from 32.1 in 1950-51 to 82.5 in 2002-2003.
- Gender Parity: Gender disparity in GER at elementary stage declined from 17.1 percentage points in 2001-2002 to 4.1 percentage points in 2002-2003. Some states had approached gender parity while others were approaching it.
- Out-of-school children: Down from 32 million in 2001 to 9.5 million in April 2005.
- Dropout rate at primary level: Down by 4.1 per cent from 39 per cent in 2001-2002 to 34.9 per cent in 2002-2003.
- Pupil Teacher ratio: improved to 40:1, New posts of teachers sanctioned: 770,000.
- Number of Schools: a dense network of over one million schools. 94 per cent of rural population have a school within 1 km. New schools opened since 2001: 120,000.
- Absolute number of Non-literates: Declines from 328 million in 1991 to 296 million in 2001.
- Enrolment of Children with Special Needs: 1.46 million children enrolled in schools in 2004-2005.

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8.13 Further, the increase in Educational infrastructure as on 2005 can be seen from the following table:

Sl. No.	*Items*	*Targets Approved 2005-2006*	*Cumulative Targets including 2005-2006 and progress*	
1.	Opening of New Schools	35306	Approved	157967
			Completed and in Progress	117677 (74.5%)
2.	Construction of School Buildings	34262	Approved	117174
			Completed and in Progress	77342 (66%)
3.	Construction of additional classrooms	141886	Approved	314779
			Completed and in Progress	143358 (45.5%)
4.	Drinking water facilities	40760	Approved	151907
			Completed and in Progress	90165 (59.3%)
5.	Construction of toilets	65771	Approved	222405
			Completed and in Progress	120710 (54.3%)
6.	Supply of free textbooks	61.2m children	Supplied	57.7m children
7.	Teacher Appointment	156610	Approved	770495
			Completed and in Progress	402797 (52.3%)
8.	Annual in-service training of Teachers	3,252,785	Approved	3,252,785
			Completed and in Progress	2,179,366 (67%)

8.14 The implementation of the Sarva Shiksha Abhiyan by the Government of India has been a quantum leap towards the attainment of the Goal of Universalisation of Elementary Education and the State promoted realisation of the Fundamental Right to Education of children below 14 years of age. The progress made in relation to the key input targets of the SSA is phenomenal and can be seen from the table set out below.

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Sl. No.	*Items*	*Cumulative Targets including 2006-2007*	*Achievements (up to 31-3-2007)*	
1.	Construction of School Buildings	183461	Completed and in Progress	157516 (85.85%)
2.	Construction of additional classrooms	692678	Completed and in Progress	650442 (93.90%)
3.	Drinking Water Facilities	170267	Completed and in Progress	158361 (93.01%)
4.	Construction of toilets	235041	Completed and in Progress	203577 (86.61%)
5.	Supply of free textbooks	6.69 crore	Supplied	6.40 cr (96%)
6.	Teacher Appointment	10.12 lakh	Completed and in Progress	7.95 Lakh (78%)
7.	Teacher Training (20 days)	34.05 lakh	Completed and in Progress	2952395 (87%)
8.	Enrolment in EGS/AIE centres	1.27 crore children	69 lakh	54%
9.	Opening of New Schools	240072	Completed and in Progress	193220 (80%)

8.15 Further, the following are the latest figures showing the progress in educational indicators.

(*i*) Primary School Coverage has increased from 86.96% (2002) to 96% and that of Upper Primary School has increased from 78.11% to 85.3% with the opening of 1.34 lakh Primary Schools and 1.01 lakh Upper Primary Schools.

(*ii*) Gross Enrolment Ratio at Primary Stage is 107.8 and at Upper Primary Stage it is 69.9. GER at elementary stage has increased from 82.4 (2001-2002) to 93.5 (2004-2005).

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(*iii*) The number of Out-of-School children has reduced to 75 lakh (2007) from 320 lakh (2001-2002). These form 36% hardest to reach category of all 6-14 age group children. Number of Districts with more than 50,000 Out-of-School has reduced from 48(2005) to 24(2006). (Assam 1 District, Bihar 11 Districts, Chhattisgarh 1 District, Haryana 1 District and West Bengal 9 Districts).

(*iv*) Girls Enrolment has increased from 43.7% (2001) to 46.7% (2004) at Primary and from 40.9% to 44% at Upper Primary Stage. Gender Gap at Primary level has reduced to 6.6 per cent points and at Upper Primary 9.2 per cent points. Only 42 Districts have Gender Gap of more than 10 per cent points at Primary Stage whereas at Upper Primary Stage 71 Districts have gender gap of more than 20 per cent points.

(*v*) At national level there is no difference in GER of Scheduled Castes and Scheduled Tribes at Elementary Stage. The percentage share of SCs is 18.64% and STs 9.02%.

(*vi*) Drop Out Rate has fallen by 11.3 percentage points at Primary level since 2001. The dropout decline between 1999-2000 was 2.3%. Girls drop out decreased sharply at 15 per cent points. SC dropout gap is 5.21% and ST dropout is at 13.32 per cent points at primary level.

(*vii*) Transition rate from Primary to Upper Primary has increased from 74.15 (2003-2004) to 83.36 (2005-2006).

(*viii*) Pupil Teacher Ratio (PTR) has improved from 1:39 (2003-2004) to 1:36 (2005-2006)—PTR at primary stage is 1:41 and at upper primary stage is 1:29. Once remaining 2 lakh teachers are recruited it will decline further. There are only 71 Districts that have PTR >60.

(*ix*) Student Class Room Ratio (SCR) has improved from 1:42 (2003-2004) to 1:39 (2005-2006).

8.16 The submission of the petitioners that the Government has not taken any initiative to impart free and compulsory education to children below 14 years of age is completely ill founded in light of the facts cited above. Therefore, the argument that the impugned Act is a colourable exercise of power aimed at securing a vote-bank amongst the Backward Classes because the Government is not interested in taking real and effective measures for providing elementary education must fall flat on its face.

IX. HAS THERE BEEN PROPER CONSIDERATION OF THE FINANCIAL BURDEN?

9.1 One of the submissions on behalf of the petitioners has been to attack the Impugned Act on the ground that there has been no proper consideration of the provisions of the Bill in Parliament, particularly in relation to the Financial Memorandum and it was argued that no attempt was made to even ascertain what the overall financial implication of the measures contemplated in the Act would be. This, it was submitted, can be gone into by this Hon'ble Court by invoking the doctrine of "lifting the legislative veil".

9.2 It is submitted that these contentions are misconceived both in law and in fact. Firstly, it is well settled that an Act of Parliament cannot be challenged on the ground of non-application of mind. Justice Chandrachud in *K. Nagaraj* v. *State of*

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A.P.[23] while dealing with a challenge to an Ordinance on the ground of non-application of mind, clarified that the Legislature as a body cannot be accused of having passed a law for an extraneous purpose or with non-application of mind (see SCC pp. 548-49, para 31).

Further, it is an unheard of principle in law that legislation can be challenged on the basis of alleged lack of debates in parliament. It is well settled that reference to Parliamentary Debates can only be made for a limited purpose. In *Builders Assn. of India* v. *Union of India*[24], Jeevan Reddy, J. observed that the opinion of the Law Ministry and the reply of Minister of State for Finance in Parliament is not of much relevance for the construction of the sub-clause under consideration in that case. In *State of Mysore* v. *R.V. Bidap*[25] [5 judges] see observations of Justice Krishna Iyer at SCC para 5. He further went on to clarify that even when such external aids are admissible for the purposes of interpretation, resort may be had to these sources with great caution and only when incongruities and ambiguities have to be resolved.

9.3 Thus, it is clear that debates in Parliament are not usually relevant for construction of the provisions of an Act. Even when they are relied on, it is only as a secondary means of interpretation to help remove any ambiguities; and never considered to be binding as to the true object or intent of a provision or an Act. In light of such limited importance attached to Parliamentary Debates in statutory interpretation, assailing an Act on the ground of insufficiency of Parliamentary Debates is an unheard of and unsustainable proposition in law.

9.4 Secondly, this argument overlooks a very crucial aspect namely, the Constitution of an Oversight Committee (the Moily Committee) under the orders of the Prime Minister on 27-5-2006 to look, inter alia, into the following aspects and submit its report by the 31-8-2006 (subsequently extended to 30-9-2006).

> "(1) Implementation of 27% reservation for the OBCs in institutes of higher learning and
>
> (2) Assessment of additional infrastructure and other requirements for increasing the overall availability of seats to a level so that the present level of seats available to the general category students does not decline."

9.5 On 29-5-2006, three separate groups were constituted to give suitable inputs to the Oversight Committee vide letter No. 1-I/2005-U I (A)[26] issued by Department of Secondary & Higher Education, Ministry of Human Resource Development. These groups were as follows:

Group for Technological/Engineering Institutions:

1. Prof. M. Anandkrishnan, former VC, Anna University and former Professor, IIT, Kanpur—Chairman
2. Prof. Sanjay Dhande, Director, IIT, Kanpur—Member
3. Prof. S.K. Dube, Director, IIT, Kharagpur—Member

23 (1985) 1 SCC 523
24 1995 Supp (1) SCC 41
25 (1974) 3 SCC 337
26 P. 27 in Vol. II of the Report of the Oversight Committee

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4. Prof. Sanjeev Bhargava, Director, IIT, Jabalpur—Member
5. Prof. R.P. Dahiya, Director, NIT, Jaipur—Member
6. Prof. N. Balakrishnan, Associate Director, IISc, Bangalore—Member
7. Prof. Y.V. Rao, Director, NIT, Warangal—Member
8. Prof. I.M. Mishra, Dean Saharanpur Campus, IIT, Roorkee—Member
9. Dr. Indra Rajaraman, Professor, NIPFP—Member

Group for Management Institutions:

1. Dr. Samuel Paul, former Director, IIM, Bangalore—Chairman
2. Prof. Bakul Dholakia, Director, IIM, Ahmedabad—Member
3. Prof. Krishna Kumar, Director, IIM, Kozhikode—Member
4. Prof. Shekhar Chaudhary, Director, IIM, Kolkata—Member
5. Prof. S.D. Awale, Director, NITIE, Mumbai—Member
6. Prof. Devi Singh, Director, IIM, Lucknow—Member

Shri Ravi Mathur, Joint Secretary, Technical Education Bureau, Department of Secondary and Higher Education was appointed as the Convenor of both the above Groups.

Group for Central Universities:

1. Shri Sayed Famid, former VC, AMU and Chancellor, Jamia Hamdard—Chairman.
2. Prof. Panjab Singh, VC, BHU—Member
3. Prof. Deepak Pental, VC, Delhi University—Member
4. Prof. Pramod Tandon, VC, NEHU—Member
5. Prof. Syed B. Hasnain, VC, Hyderabad University—Member
6. Dr. M. Govinda Rao, Professor, NIPFP—Member Dr. T.R. Kem, Additional Secretary, UGC was appointed as the Convenor of the Group.

9.6 The Oversight Committee has given a detailed report summarising the group deliberations, academic infrastructural and procedural issues. Chapter 3 contains the road map for the implementation of reservations. Chapter 6 contains a detailed analysis of the estimate of resources required for the expansion. Table 6.3 gives a summary statement of the expenditure requirements. Non-recurring expenses for all the 5 sectors i.e. Agriculture, Central Universities, Management, Medical and Engineering came to an aggregate of 6587.62 crores, whereas recurring expenditure aggregated to 5750.60 crores. Thus, the total comes to 12338.22 crores. To this is added 1680 crores for Merits Scholarship Scheme, 1500 crores for Research Fellowship, 1752 crores for IT Infrastructure, making a grant total of 17720.22 crores. Further, Table 6.4 gives the year wise phasing of expenditure.

9.7 It is unfortunate that the petitioners who relied on one section of the Oversight Committee's report (in relation to creamy layer) overlooked substantial portions of the report and the detailed study which had been undertaken, both Institution and Sector-wise with regard to each and every aspect of the infrastructural needs. The report is a carefully structured report, and it is important to highlight the following paragraphs from the covering letter of the chairman of the report [See p. 10; Volume I, Moily Committee Report]:

"A simpler way of implementing the reservations was to steamroll our way through, in the name of social equity, regardless of its impact on quality and

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excellence. We have deliberately chosen the more difficult way which delivers equity in a manner that enhances excellence, i.e. by making concomitant investments in faculty and infrastructure and by bringing much needed governance related reforms involving institutional, financial and administrative autonomy and process reengineering in our Higher Educational Governance system. It is easy to equalise by 'mindlessly levelling everyone down to lowest common-denominator'. Our effort has been to create an upward moving equalisation process where the disabilities are overcome by the erstwhile excluded sections and the system brings out the best in them.

Besides the many out-of-the-box innovative ideas concerning faculty and infrastructure related issues, I believe three of our recommendations, which cut horizontally across the five groups, are critical to the establishment of the goal of an 'inclusive society, in pursuit of excellence'. These four programmes are considered by the Oversight Committee to be integral to the above vision and should be considered to be in severable part of our core recommendations.

(*a*) the project for networked digital campuses—in 84 Central Government institutions.

(*b*) National Merit Scholarship Scheme for 100,000 SC/ST/OBC and other economically backward students through classes IX-XI.

(*c*) The scheme for tapping and retention of potential researchers "National Science Talent for Research and Innovation" (10,000 fellowships of Rs 100,000 per annum) right through undergraduate to PhD programme.

(*d*) Expansion of post matriculation scholarship for SCs/STs to cover OBCs, with outlays being doubled during the XI Plan."

9.8 This report was known to Parliament, and in light of the fact that the estimates had already been made and the detailed study had already been undertaken, it is futile to suggest that there should have been a "debate" on the financial aspects of the impugned Act.

X. 27%: IS IT JUSTIFIED?

10.1 It cannot seriously be disputed that large sections of the population are socially and educationally backward. In fact, Dr. Ambedkar in his speech in Parliament while moving the Constitution (First Amendment) Bill, 1951 agreed that 80% of our people are backward, and that we have to tackle the problem of backwardness.

10.2 It is nobody's case that the total population of OBCs in this country is less than 27%. In fact the petitioners have relied on NSSO Survey [55th Round] which stated that the total population of OBCs in India was around 36%. It needs to be kept in mind that the said survey is a sample survey which is primarily concerned with the employment and unemployment statistics of the country.

10.3 The National Sample Survey Organisation (NSSO) has conducted its 61st Round of survey which was published in October 2006. This survey indicates that the total OBC population in India is around 41%. The summary of findings of the said survey is quoted herein below.

"3.2.3.1 Distribution of persons by social group: As per the 61st round survey (July 2004—June 2005) estimates, about 75 per cent of the 972 million

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population of India stayed in the rural areas. Distribution of persons by social group at the all-India level is presented in Statement 3.3, separately for males and females in the rural and urban areas. The distribution of persons by social group for different states/union territories are given in Statement 3.3.1. A similar pattern as for the households is revealed in the distribution of person over the social groups in the rural and urban areas of all-India and states. The proportion of persons belonging to the categories ST, SC and OBC were about 8 per cent, 20 per cent and 41 per cent at the all-India level...."

10.4 27% reservation in relation to appointments in posts has been upheld in *Indra Sawhney case*[8]. In this connection it is important to note that in the impugned Act Parliament has taken made provisions to ensure that reservation does not affect seats in the General Category.

XI. MUST THERE BE A TIME-LIMIT FOR RESERVATION?

11.1 It is submitted that conceptually there cannot be any time-limit imposed for the policy of reservation in admission or in employment. The policy of reservation flows from the mandate of equality and till the time the constitutional objective of 'real equality' is achieved, there is a Constitutional mandate on the State to have special provisions in the nature of reservation for the upliftment of backward classes.

11.2 It is further submitted that the policy of reservation is framed in the instant case by the legislature and the legislature would itself review to ascertain the advances made and grounds achieved.

11.3 It cannot be forgotten that reservations in Central Government Educational Institutions are sought to be introduced for the first time after 57 years of the coming into force of Constitution. It is the beginning of a long overdue process of social engineering. Significant start has been made. It is respectfully submitted that this is not the time to set time-limits.

11.4 In matters of this kind, namely, removal of backwardness, removal of untouchability and achieving a caste free society, there can be no time limits. No time-limit can be fixed for measures for social engineering.

SUPPLEMENTARY SUBMISSIONS

I. CONSTITUTIONALITY OF THE NINETY-THIRD AMENDMENT

12. The Ninety-third Amendment clearly intended to make an enabling provision in the Constitution, to pave the way for the State to make any special provision, by law, for the advancement of any 'Socially & Educationally Backward Classes of Citizens'. Clause (5) of the Article 15 also clearly provides that this special provision related to the admission of these classes to educational institutions, including private educational institutions, whether aided or unaided except the minority educational institutions.

13. In this regard, it is respectfully submitted that the petitioners have wrongly premised the writ petition on the ground of Equality. The policy of reservation is based on the historical factum and social factum of the deprivation of SCs, STs and SEBCs/OBCs, which the Mandal judgment and other judgments of this Hon'ble Court have taken note of. In the interest of equity and justice, it is not possible to allow a situation in which the bulk of the seats are out of bounds for the vast majority of India, who belong to the weaker sections of our society. Such a situation goes

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against the basic constitutional feature of Equality. By denying the nation the benefit of the full contribution of this vast majority has been injurious to the optimal progress of the nation as a whole. If the legitimate aspirations of these classes for due share in the avenues for advancement are not satisfactorily addressed, it would adversely affect rule of law, law and order and the realisation of the country's full potential. It is the duty of the Legislature and the Executive to take note of this and take remedial measures. This is what has been done in the present endeavour. This issue has been thoroughly gone into by the Hon'ble Supreme court in a number of cases and finally in the judgment in the *Mandal case*[8] (*Indra Sawhney case*). It has been clearly established in this case that the "equal protection" clause requires the State to afford substantially equal opportunities to those, placed unequally, 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 for beneficial treatment in order to attain the result which establishes an equilibrium between two sections placed unequally.

14. Thus it is clear from the observations of the Hon'ble Supreme Court discussed herein above that the basic Constitutional feature of Equality necessarily implies and includes the removal of inequality, including social inequality, and social justice measures covering all fields including reservation for this purpose, which in turn includes Reservation in education. All these together, including such Reservation, form part of the basic structure of the Constitution. Without these measures including Reservation, the Constitutional mandate of Equality will largely remain a dead letter.

II. CHOICE OF RESERVATION/CASTE BASED RESERVATION AS A MATTER OF POLICY.

15. The petitioners have misunderstood the principle of equality and social justice and are opposed to the policy of Reservation on a misunderstanding of the concept of equality. It is submitted that the petitioners' reliance on what they call "affirmative action" is misplaced since that is a concept coined in the context of the Constitution of the United States, which does not contain the various Constitutional mandates in the Indian Constitution, which provides sufficient reason for reservation as an instruments for implementing the Constitutional mandate of Equality including removal of social inequality is a matter within the Constitutional domain of the legislature and the executive. Among the important instruments so selected as appropriate to the Indian context is one of reservation. Under Articles 16(4), 15(4) and now 15(5), the States is fully empowered and mandated to make adequate provision of reservation for SCs/STs and SEBCs/OBCs. Reservation in educational institutions and other walks of life can be provided under Article 15(4), just as reservation can be provided in services under Article 16(4). Article 15(5) specifically includes and mandates the States to provide reservation by law in admission to educational institutions. While Article 16(4) is confined to reservation in services, Article 15(4) covers every possible and necessary action to improve the condition of SEBCs/OBCs, SCs & STs, and Article 15(5) covers all possible and necessary action by law in the matter of admission to educational institutions including the reservation for the advancement of the same three categories/classes of people. This position

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including the State's power to choose reservation as one of the instruments of the policy of Equality and equalisation upheld in Hon'ble Supreme Court's judgments in many cases and finally in its judgment in *Indra Sawhney case*[8].

16. The projection of reservations as caste based is erroneous. This misnomer is based on a widely prevalent misconception. It is not correct to refer to the identification of SEBC/OBC and providing them reservation as "caste-based". This issue was considered in the *Indra Sawhney case*[8] in which it was held that reservation is not being made under Clause (4) in favour of a 'caste' but a 'backward class', and once a caste satisfies the criteria of backwardness, it becomes a backward class for the purposes of Article 16(4) and that it is sufficient to say that the classification is not on the basis of the caste but on the ground that that caste is found to be a backward class not adequately represented in the services of the state.

17. This Hon'ble Court rejected the contention that the list of socially and educationally backward classes for whom reservation is made under R. 5 is nothing but a list of certain castes and that reservation in favour of certain castes based only on caste considerations, violates Article 15(1), which prohibits discrimination on the ground of caste only; by holding that if the reservation in question had been based only on caste and had not taken into account the social and educational backwardness of the caste in question, it would be violative of Article 15(1). This Hon'ble Court further held that it must not be forgotten that a caste is also a class of citizens and if the caste as a whole is socially and educationally backward class of citizens within the meaning of Article 15(4), and though the list of socially and educationally backward classes has been specified by caste, that does not necessarily mean that caste was the sole consideration and that person belonging to these castes are also not a class of socially and educationally backward citizens.

III. CONTENT AND DURATION OF 'SPECIAL PROVISION' UNDER ARTICLE 15

18. The Ninety-third Amendment in the Constitution inserted a Clause (5) enabling the State, specially, to provide "special provision", by law, for the advancement of SEBCs and this 'special provision' has been specified as reservation in admission to educational institutions including private educational institutions. With this amendment the legislature has made it specific that admission in schools is a form of 'special provision', for which State has been specifically authorized. The provision in Article 15(4) is a similar enabling provision but the Article 15(5) makes it more specific so as not to leave it to any doubt, whether admission in educational institutions is a valid form of 'special provision'. This enabled the Central Government and the State Government to undertake legislation to enact laws for this purpose. Different States re already providing reservations in admissions for SEBCs in their State, through State laws or executive orders, this amendment would enable these States to provide constitutional support to their reservation policy making it easier for the Executive to implement the policy. This also paved a way to the Parliament for providing a legal frame to the existing reservation policy for SC and ST being implemented through executive orders apart from making provisions for reservation of SEBCs. The legislative frame will give strength and support to the reservation policy both for SC and ST and for SEBCs.

19. The situation in which provision is being made for SEBCs is inherent in its nomenclature itself. The OBCs are termed as Socially and Educationally Backward

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Classes (SEBCs), which already indicates that such castes are backward as a class and there is a need to ameliorate their conditions, for which reservation I admission is being considered as a method. The continued social backwardness and educational backwardness of certain castes has been identified in the preparation of Central List and State Lists of SEBCs. Those lists have been notified by the respective Government after due deliberation and after establishing their backwardness through statutory mechanism of National/State Backward Classes Commission. As such, the Ninety-third Amendment has been made in a situation which is well known and has been well established.

20. It is respectfully submitted that the question of a limit and content of reservation has been left by Parliament to be specified under the statute enacted for implementing the reservation policy. This has been done in the form of the Central Educational Institutions (Reservation in Admission) Act, 2006. Act in the present case. State legislatures, have either already enacted a law, defining the scope and content of reservation or will do so in near future, consequent upon the enabling constitutional amendment.

21. It is further submitted that so far as limit on duration is concerned, while no such limit has been imposed in the constitutional amendment, the SEBCs are to be subjected to an objective criteria regarding their continuance in the State or Central List of OBCs, depending on their social and educational status in the Society. There is a specific provision in Section 11 of the National Commission of Backward Classes (NCBC) Act, that the Commission is required to conduct a periodic revision of the list of OBCs. As long as a particular caste is educationally and socially backward, it will continue to be included in the central list of OBCs. In case the NCBC recommends its exclusion from the list, the particular caste will no longer be able to avail the benefit of reservation. The review is to be undertaken by NCBC with an interval of 10 years. The NCBC last undertook this exercise in 2003 and advised the Govt. not to delete any of the caste/communities notified in the Central List. As such, it is clear that the benefit of reservation, under the reservation scheme for SEBCs will continue till such time they are included in the list of OBCs.

22. Deletion of any of the castes included in the Central List, or for that matter deletion of any caste from the State list by any State Backward Classes Commission, would result in an automatic discontinuance of the benefit to that caste, both at the Central and State level.

23. Apart from this, there is a continuous and dynamic process of consideration of complaints of over-inclusion or under-inclusion under Section 9 of the National Commission of Backward Classes Act, 1993. Thus the petitioners' submission that the Central Government List referred to in Section 2(*c*) of the Backward Classes Act, 1993 and the definition of "Other Backward Classes" in Section 2(*g*) of the Central Educational Institutions (Reservation in Admission) Act, 2006 is static or based on outdated material is fundamentally erroneous.

24. It is therefore submitted that since the circumstances, and limit on content and duration of the reservation being made available are well defined in the Act enacted after Ninety-third Amendment of the Constitution, it can not be said that either the Amendment or the Act is in violation of the basic structure of the Constitution.

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IV. NON-AVAILABILITY OF PROTECTION UNDER ARTICLE 19(1)(G) TO NON-MINORITY INSTITUTION.

25. It is submitted that Article 19(1)(*g*) employs expressions namely profession, occupation, trade or business. Education is regarded as an activity that is charitable in nature and has not been regarded as trade or business, where profit is the motive. Though education is a profession, the restriction imposed on this freedom granted under Article 19(1)(*g*) in providing reservation for SEBCs, or SCs and STs does not infringe upon their right to a profession in form of establishment and management of educational institutions. The phrase concerning Article 19(1)(*g*) used in Clause 5 of this Article 15 relates to the right the State to make 'special provision' and is no way affecting the right to any individual to practice the profession of education.

V. SCOPE OF ARTICLES 15(4) AND 15(5)

26. Article 15(4) is to facilitate a beneficial discrimination in the nature of "special provision" for the benefit of the classes mentioned therein, including socially and educationally backward classes of citizen. Article 15(5), therefore, supplements the provision under Article 15(4) in clearly stipulating that reservation in educational institution, whether aided or private, is a form of "special provision" and it cannot be regarded as unreasonable in the view of a specific provision to this effect in the Constitution.

27. It is, therefore, submitted that in view of the specific provision under Article 15(5), reservation in admission to educational institutions for SEBCs is a legitimate form of 'special provision' and can not be considered "unreasonable" with, reference to any other provisions in the Constitution.

28. It is further submitted that reservation of seats in educational institutions in professional and technical institution has always been regarded as a well-recognised method of advancement of socially and educationally backward class. Reservation in Medical Colleges is permitted (*Ajay Kumar* v. *State of Bihar*[27]). Insofar as institutions of excellence, research institutions of national and strategic importance are concerned, the Central Educational Institutions (Reservation in Admission) Act, 2006 makes a specific provision under Clause 4(*b*) of the Act to, exclude them from the purview of the reservation.

29. The necessary ingredients of "special provision" under Article 15(4) have been specifically defined in Article 15(5), which clearly mentions the nature of protective action. Insofar as extent of this action is concerned the limit has already been defined as total reservation for all categories is not to exceed 50% of the sanctioned seats. In the present case, the total reservation for SEBCs, including SC and ST comes to only 49.50%.

30. It cannot be said that the Government does not have a rational policy of action to ensure imparting of free and compulsory education to the illiterate sections amongst all the citizens. The Sarva Shiksha Abhiyan (SSA) is an effort to universalise elementary education. In order to ensure that the priority is translated into reality, a monitoring mechanism in the form of a National Mission is headed by Prime Minister. The Executive Committee of the National Mission is chaired by the Minister of Human Resource Development. The SSA, inter alia, envisages to bridge

27 (1994) 4 SCC 401

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all gender and social category gaps up to elementary education level by 2010. The concern for educational of socially disadvantaged group is interwoven in the SSA.

31. Articles 340, 15(4) and Article 15(5) speak of "Socially and Educationally Backward" classes. It has been held by this Hon'ble Court that any class of citizens, in order to be eligible for inclusion in the Lists of SEBC/OBC, should be both socially and educationally backward, and it is not enough if they are socially or educationally backward. It has also been held by this Hon'ble Court that the backward classes of citizens in Article 16(4) include—apart from SCs and STs—the Socially and Educationally Backward Classes of Article 15(4); this now also applies to new Clause (5) of Article 15. It has also been held by this Hon'ble Court that the SEBC/OBC can consist only of classes and not individuals. It has also been held that a class has first to be shown to be socially backward and then it has to be shown to be also educationally backward in order to quality for inclusion in the List of SEBC/OBC.

VI. SCOPE OF JUDICIAL REVIEW

32. It is submitted that the reservations in the present case have been made not on the basis of executive orders but by a Central Legislation passed almost unanimously by Parliament. The scope of judicial review in relation to assessing the wisdom and validity of law made by Parliament is very limited. Such legislation cannot be decided on the ground of ordinary arbitrariness evolved in relation to Article 14 in the context of executive action. It is well settled that the tests in this behalf are completely different and the scope of judicial review is very limited.

33. The power of judicial review, as enshrined in Articles 32 and 136 of the Constitution for this Hon'ble Court and in Articles 226 and 227 for the High Courts must also be considered in the context of the concept of separation of powers as an essential component of the rule of law, which is the basic feature of the Indian Constitution. Moreover, in the matters involving socio-political value choices, there can be no element of subjectivity, which will undermine legal certainty, an essential element of law.

VII. IDENTIFICATION OF OBCS BY THE MANDAL COMMISSION AND ESTIMATION OF THEIR POPULATION

34. For identification of OBCs amongst the Hindu communities, the Mandal Commission had relied on "caste" as the unit of identification arguing that castes are the only readily and clearly "recognisable and persistent collectivities". The Commission had adopted a multiple approach for preparation of comprehensive lists for all States/UTs. The main source examined for the preparation of these lists were:

- Socio-educational field survey;
- Census Report of 1931 (particularly for the identification of primitive tribes, aboriginal tribes; hill tribes, forest tribes and indigenous tribes);
- Personal knowledge gained though extensive touring of the country and receipt of voluminous public evidences; and,
- Lists of OBCs notified by various State Governments.

35. In respect of OBCs amongst the non-Hindu communities, the Mandal Commission had noted that the caste could not be weighed as a basis for identifying

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those who are socially and educationally backward among them. They relied on the rough and ready for identifying non-Hindu OBCs as under:

- All "untouchables" converted to any non-Hindu religion; and
- Such occupational communities which are known by the name of their traditional hereditary occupation and whose Hindu counterparts have been included in the list of Hindu OBCs. (Example: Dhobi, Teli, Dheemar, Nai, Kumhar, Lohar, Darji, Badhai, etc.)

36. The Mandal Commission culled out caste/community-wise population figures and grouped them into broad caste clusters and religions groups. These collectivities were subsequently aggregated under five major heads, namely, (*i*) Scheduled Castes and Scheduled Tribes, (*ii*) Non-Hindu communities, religious groups, etc. (*iii*) Forward Hindu Castes and Communities. (*iv*) Backward Hindu Castes and Communities, and (*v*) Backward non-Hindu Communities.

37. The Commission has derived the population of Hindu OBCs by subtracting from the total population of Hindus, the populations of SCs, STs and that of forward Hindu caste and communities and it worked out to 52%. But the same approach could not be adopted by the Commission in respect of non-Hindu OBCs. Assuming that roughly the proportion of OBCs amongst non-Hindu was of the same order as amongst the Hindus, population of non-Hindu OBCs was also taken as 52% of the actual proportion of their populations of Hindu and non-Hindu OBCs naturally added up to nearly 52% (43.70% + 8.40%) of the country's population.

38. The Estimated population of OBCs by the National Sample Survey. Organisation (NSSO) 55th Round of Survey during the year 1999-2000, in Rural and Urban Area is 37.4% and 31.4% respectively. 61st Round of Survey during the year 2004-2005, estimated OBC population as 41% All India Population.

39. The data used by the Mandal Commission was not outdated and this has been accepted by this Hon'ble court. Nevertheless, this Hon'ble Court, in the case of *Indra Sawhney* v. *Union of India*[8]. (known as *Mandal case*) had directed that the Central Government, each of the State Governments and the Administrations of the Union Territories shall, within four months, from the date of judgment, (viz. 16-11-1992) constitute a permanent body for entertaining, examining and recommending requests for inclusion and complaints of over inclusion and under inclusion in the Lists of Other Backward Classes of citizens. The advice tendered by such body shall ordinarily be binding upon the Governments. The judgment also mentions that it shall be open to the government of India and the respective State Governments to devise the procedure to be followed by such a body. The body or bodies so created can also be consulted in the matter of periodic revision of lists of OBCs. Further, Hon'ble Supreme Court stated that neither the Constitution not the law prescribes the procedure or method of identification of backward classes. Nor is it possible or advisable for the court to lay down any such procedure or method. It must be left to the authority appointed to identify. It can adopt such method/procedure as it thinks convenient and so long as its survey covers the entire populace, no objection can be taken to it. Identification of the castes among and along with, other occupational groups, classes and sections of people.

40. From the above, it is evident that such permanent bodies created in pursuance to the judgment of the Supreme Court have the mandate to formulate their

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own criteria for inclusion of a particular caste/community in the Central/State List of OBCs. In pursuance of the direction by the Hon'ble Supreme Court, the National Commission for Backward Classes (NCBC) was constituted in 1993 (as per National Commission for Backward classes Act, 1993). Sub-section (1) of Section 9 of the NCBC Act, 1993 lays down that "The Commission shall examine requests for inclusion of any class of citizens as backward class in the lists (as defined in Clause (C) of Section 2 of NCBC Act) and hear complaints of over-inclusion or under-inclusion of any backward class in such lists and tender such advice to the Central Government as it deems appropriate". Section 8(2) of the Act says that "The Commission shall regulate its own procedure" and accordingly, NCBC has formulated guidelines which lay down criteria for consideration of requests for inclusion of castes/communities in the Central List of OBCs. Section 9(2) of the NCBC Act states that "the advice of the Commission shall ordinarily be binding upon the Central Government".

41. So far 28 States/UTs have set up their own Commissions/Committees for inclusion and exclusion of OBCs in the State List.

42. The Commission has formulated the following guidelines for considering requests for inclusion in the list of Other Backward Classes:

(*i*) Social: Castes and Communities having no representation in the State Legislative Assembly and/or district-wise Panchayati Raj institutions during the ten years preceding the date of the application. Poor representation may be taken to refer to a caste or community whose presence in the body is less than 25% of its proportion in the population etc.

(*ii*) Educational: (A) Castes and communities, whose literacy rate is at least 8% less than the State or District average. (B) Castes and communities of which the proportion of matriculates is at least 20% less than the State of District average. (C) Castes ad communities, of which the proportion of graduates is at least 20% less than the State or District average.

(*iii*) Economic: (A) Castes and communities, a significant proportion of whose members reside only in Kaccha houses. (B) Castes and communities, the share of whose members in number of cases and in extent of agricultural lands surrendered under the Agricultural Land Ceiling Act of the State, is nil or significantly low etc.

43. On receipt of a representation for inclusion/exclusion of a caste in the Central List of OBCs, a case is registered in the Commission. Thereafter, a questionnaire based on social educational and economic backwardness adopted by NCBC, is sent to the representationist, State Backward Classes Commission and the concerned Department of the State Government. After receiving reply for the questionnaire, a status report is prepared on the basis of the reply received and the ethnographic literature available with the Commission and the report is submitted to the Chairman. After the approval of the status report by the Chairman, a date of meeting is fixed for public hearing. Proceedings of the public hearing are then placed in the Commission/s meeting and a decision regarding inclusion/exclusion of the caste is taken in the meeting. The Commission, thereafter, sends its advice to the Ministry.

44. In view of factual situation detailed above, it is respectfully submitted that the Census of 1931 was not the basis for identification of castes for inclusion in lists

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of SEBC/OBC. The exact use to which the 1931 Census was put by the Mandal Commission in its Report, has been explained by this Hon'ble Court in *Indra Sawhney case*[8].

45. SEBCs/OBCs have already been identified and notified and such identification and notification by the Central Government in 1993 onwards is for prospective application for all purposes including the present purpose of reservation in education. The procedure for changes in those lists has already been laid down by the Hon'ble Supreme Court and the National Commission for the Backward Classes Act, 2003 (hereinafter referred to as the "NCBC" Act) NCBC Act and, therefore, there is no need for any fresh identification and further hold-up of the already long overdue reservation or percentage for SEBC/OBC in education under the impugned Act.

46. Census data are required only for estimating the percentage of their population in the total Indian population. This has been done by the next best method, by projection and estimation from the latest available pre-Independence Census. This was considered adequate for the purpose by this Hon'ble Court again and again in *Balram*[28] as well as *Indra Sawhney*[8]. That position, it is respectfully submitted, still stands.

47. It is submitted that there is no material to proceed on the basis that that the percentage of OBCs would in any method of calculation, be less than 27%. No estimate of any organisation or any body has said that the SEBC/OBC are less than 27% of the total population of India and all estimates place them at well above 27%.

48. The limitations of NSSO Survey in the matter of estimation of the universe i.e. the total population, is well understood. If a sample survey method were adequate to estimate the universe of population, India and so many other countries would not have been and would not still be undertaking the much costlier decennial censuses. The petitioners have referred to NSSO sample survey estimating the population of the backward classes being only about 86% including SEBC/OBC of Minorities. They have therefore erroneously concluded that the Mandal Census-based estimation of 52% is wrong, and therefore, the reservation of 27% for SEBC/OBC is unjustified. In the subsequent sample survey of 2004-2005, there has been a sharp increase of about 6% in NSSO's estimation of SEBC/OBC even though the few inclusions in the Lists during this period do not justify any significant variation in the population SEBC/OBC. The increase can only be attributed to methodological improvements and improving understanding of NSSO. It is quit possible that when the methodological improvements are completed, the gap between their sample survey estimates and Mandal's Census-based estimates may narrow down further. In any case, a sample survey-based estimation cannot supersede a Census headcount based estimation and projection in the matter of universe of the total population.

49. Pursuant to the Interim Order of this Hon'ble Court dated 29-3-2007, the Government consulted Leaders of various political parties and (by consensus) concluded that such a census will be pointless because it will only show how much more than 27% the BC population is. As against this reservation at the Central level is only 27%. This percentage of 27% reservation for SEBC/OBC was recommended by the Mandal Commission and accepted by Government because it was on the one

28 *State of A.P.* v. *U.S.V. Balram*, (1972) 1 SCC 660

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had not in excess of their population proportion and at the same time within the limit of 50% fixed by the Hon'ble Supreme Court ordinarily, for all reservations under Article 16(4). On the other hand, it was concluded, there are sound reasons which make it undesirable to change now the policy adopted before the first post-Independence census, i.e. Census of 1951 to discontinue the pre-Independence practice of caste-based census data.

50. The objection that there has not been any determination of Other Backward Classes, is, it is respectfully submitted, not correct.

(*i*) The lists of OBCs identified on the basis of social and educational backwardness have already been determined and notified by the Central Government in the Ministry of Welfare (now named as Ministry of Social Justice & Empowerment), the nodal Ministry in charge of the subject.

(*ii*) These lists are State-wise.

(*iii*) Once issued, these State-wise Lists are in force and binding for any or all purposes, subject to modifications, deletions, additions from time to time in accordance with the National Commission of Backward Classes Act, 1993 and in the light of directions of this Hon'ble Court in *Indra Sawhney*[1].

(*iv*) These State-wise Lists, already notified by the Central Government, are and have to be automatically and naturally followed by every Ministry and other Central Authorities for any or all purposes pertaining to SEBC/OBC such as making provisions in the Five Year and Annual Plans for development, scholarships, developmental loans by the National Backward Classes Finance Development Corporation, etc. apart from appointment to civil posts and vacancies reserved for them under any Ministry or Authority of body of Central Government.

(*v*) The same State-wise Lists already notified by the Government, with updating from time to time on the basis of any inclusion or exclusions or modifications from time to time as per law are also naturally followed for the present purpose of reservation for SEBC/OBC which has been provided in the 2006 Act.

(*vi*) This is similar to the situation regarding SC and ST covered by clause (*h*) and (*i*) of Section 2 whose State-wise Schedules have already been notified in the past, subject to changes made from time to time in accordance with Article 341 and Article 342, and do not need to be notified again by the Central Government for this purpose.

(*vii*) The State-wise Lists of SEBC/OBC, as in the case of State-wise Schedules of SC and ST, already notified in the past by the Central Government in the appropriate Ministry, following the prescribed constitutional/statutory procedures laid down for each, subject to changes if any made in keeping with the prescribed relevant constitutional/statutory procedure, apply for all purposes, which may either be already in existence or may arise afresh at any time. There are plans, programmes, policies and schemes which were introduced afresh even for SC and ST by different Ministries at different points of time. On each occasion there was no fresh notification of schedules of SCs and STs, and the Schedules already in existence were followed automatically and naturally for

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every such new purpose or policy or programme or scheme. The same principle applies to SEBC/OBC, whose State-wise Lists have already been notified.

51. The basis of the listing of castes and communities comprising the SEBC/OBC in the first phase was upheld in *Indra Sawhney*[8]. The actual lists were prepared by an Expert Committee in 1993 on the basis of the principle of commonality between the Mandal List for a State and State Government's own List upheld in *Indra Sawhney*[8] and notified on 10th September 1993. All subsequent additions have been made on the basis of the principle of commonality upheld by this honourable court as above and in accordance with the procedure of National commission of Backward Classes established by an Act in 1993 pursuant to a direction of the Supreme Court in *Indra Sawhney*[8].

VIII CONCEPT OF CREAMY LAYER (RULE OF EXCLUSION FOR THE PURPOSE OF RECRUITMENT)

52. In pursuance to the Supreme Court's Direction, the Government of India had appointed an Expert Committee in February 1993 to specify the basis, applying the relevant and requisite socio-economic criteria to exclude socially advanced persons/sections (creamy layer) from the OBCs.

53. On the basis of its recommendations, the Government of India issued an O.M. dated 8-9-1993 providing the rule of exclusion (creamy layer) applicable to the children of the persons of the schedule (of the OM). It also provides that the children of persons having gross annual income of Rs one lakh or above for a period of three consecutive years falls within the creamy layer. This income limit has now been raised on 9-4-2004 from Rs one lakh to Rs 2.5 lakh for determining the creamy layer amongst OBCs.

54. The concept of creamy layer is being followed for purposes of public employment by State Governments/UT administrations. Many State Governments/UT administrations have adopted the criteria formulated by the Central Government and others have devised their own criteria.

IX. APPLICABILITY OR OTHERWISE OF 'CREAMY LAYER' IN THE CONTEXT OF EDUCATION

55. In the case of SEBC/OBC, as distinct from Scheduled Castes and Scheduled Tribes, while the directions of the Hon'ble Supreme Court in *Indra Sawhney*[8] have been fully implemented by the Government of India in 1993 itself in the context of reservation in Central employment, it is respectfully submitted that the applicability of this principle in the context of reservation in admission to the educational institutions is distinct from its application in the context of reservation in employment, for the following reasons:

(*i*) There are certain conceptual issues that need to be considered with regard to this concept in the educational context.

(*ii*) For example, the first entrants in the field of modern higher education are pioneers who become role models and reference points for other members of the family community, etc. They become leaders of progress for the community/castes/constellation of similarly placed castes. If they are nipped away, this advantage is lost for the entire caste/community/constellation of similarly placed castes which are in the process of educational advancement. This advantage was

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available without any obstruction to those who for long had what Indra Sawhney (per Justice Sawant) refers to as "cent per cent reservation in practice in all fields, in favour of the high caste(s), to the total exclusion of others" which "was a purely caste-based and class-based reservation" during their period of availing of and advancement through modern education introduced and provided by the British Rulers in the 19th century. This facilitated their progress to their present level of advancement and eminence in various fields. It will be deleterious to the educational advancement of the castes/communities which are backward at present, if they are denied this natural advantage by excluding any section of them as "Creamy Layer" in education.

(*iii*) Generally capacity to reach up to higher education, and professional and technical education, presupposes that the family in the earlier generation has already made some progress in education and has also some measure of financial competence. If children of such families are excluded on the ground of SAPS/CL, the total stock of suitable candidates will tend to fall short of 27%.

(*iv*) In this context, an essential difference between reservation in employment and reservation in higher education needs to be noted. A successful candidate in the former begins to earn; in the case of the latter, selection for admission through reservation is the beginning of heavy expenditure for the family. Even before selection, the family has to incur heavy expenditure for coaching or preparation for entry into higher education. In this context, cutting off a section as SAPS/CL may result in shortfall of SEBC/OBC quota.

(*v*) There is a danger that the top qualified candidates with adequate cut-off marks, may be cut off as SAPS/CL. At the other end, candidates who are not SAPS/CL may be cut off on the ground that their marks are too low as compared to the cut-off point. The result of this will be leakage at both ends and flow of quota seats to the general category, defeating/truncating the Constitutional policy of Reservation.

(*vi*) Higher Education, Professional and Technical Education is a stage where capacity has to be created for occupying reserved posts not only in government but also posts and positions in the Private Sector and general economy. The Department of Personnel & Training has excluded all scientific and technical posts from the purview of reservation for SEBC/OBC by its Order dated 13-5-1994. This creates a lacuna in an important area. Adequate number of competent candidates inter alia for filling scientific and technical posts needs to be generated and also to occupy positions in the private sector and open market. To facilitate this, it is necessary not to exclude any section from the SEBC/OBC as SAPS/CL in the matter of admission to higher educational, professional, technical and scientific educational institutions.

(*vii*) The Executive and Legislature have taken all aspects of the matter into account and decided not to exclude the SAPS/CL from the purview of reservation. This needs to be given weightage keeping in view all the above factors.

(*viii*) One important factor is that the Indra Sawhney direction on the creamy layer is only in the context of Article 16(4), i.e. reservation in employment under the State. See the direction at SCC para 793, p. 725 in *Indra Sawhney*[8].

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(*ix*) It is submitted that the purpose of higher education is beyond mere employment, and education is a process of preparing the SEBCs of citizens for equal opportunities in all walks of life, including employment in public posts. The denial of opportunity of access to high education of all SEBCs alike is therefore not comparable with the situation in respect of consideration for employment.

56. This reservation does not enable a member belonging to SEBCs/OBCs to the benefit of reservation without having qualified with reference to the criteria stipulated, which in no event can be less than that prescribed for SCs and STs. In fact, the differential between qualifying marks for general category and that of SCs and STs, and OBCs that is possible for admission in education is much narrower than and hence incomparable to the degree of latitude available and possible for prescribing qualifications for public employment. This narrow range of flexibility in respect of qualifying marks for admission, necessitated by the need of each institution to prescribe cut-off norms in order to maintain academic standards will have the effect of reducing the chances of adequate number of SEBC/OBC candidates for filling the entire quota of 27% being available if SAPS/CL is excluded.

XI. Mr Gopal Subramanium, Additional Solicitor General of India

1. The present batch of cases involve the constitutional validity of the Constitution (Ninety-third Amendment) Act, 2005 and the Central Educational Institutions (Reservation in Admissions) Act, 2006. These written submissions support and supplement the submissions made by Shri Ghulam E. Vahanvati, Solicitor General of India and Shri K. Parasaran, Senior Advocate.

2. Part I of these submissions deals with constitutional law of the United States and US Supreme Court judgments on "affirmative action", which have been relied upon by the petitioners. Part II highlights the concept of real equality enshrined in the Indian Constitution and analyses certain important decisions of the Supreme Court of India. Parts III and IV are replies to certain arguments made by Shri P.P. Rao and Dr. Rajeev Dhavan, who appeared on behalf of some of the petitioners.

I.
US CONSTITUTIONAL LAW CONCEPTS AND DOCTRINES: WHETHER RELEVANT OR TO INDIA

Introduction

3. These submissions are in respect of one specific issue that is before the Court, which has emerged because of the reliance by the petitioners on decisions of the Supreme Court of the United States in support of their case. These decisions involve judicial review of "affirmative action" programmes on the basis of the "strict scrutiny" doctrine.

4. It is submitted that US constitutional and civil rights law pertaining to affirmative action and strict scrutiny developed as responses to a set of social circumstances. The legal position cannot be understood without appreciating these

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circumstances, which in turn requires a study of American constitutional history. Such a study would demonstrate that the very basis of the law and its development in the United States and in India has been entirely different. Consequently, the law has progressed in different directions. To import the current US position into Indian constitutional law, unmindful of the histories of the two, would neither be appropriate nor justified.

5. At this stage it would be relevant to note the approach of this Hon'ble Court on the issue of reliance on foreign precedents and laws.

6. A The difference between Constitutions arising out of difference in texts and underlying social objectives was felicitously summarised in *Kesavananda Bharati* v. *Union of India*[1], per Hegde & Mukherjea, JJ. at SCC p. 484, para 659.

7. A similar thought was echoed by Jaganmohan Reddy, J. at SCC p. 614, para 1107 in the same case.

8. A In *A.K. Roy* v. *Union of India*[2]. See observations of Chandrachud, C.J. (speaking on behalf of himself, Bhagwati & Desai, JJ.) at SCC p. 288, para 8.

9. Thus, this Court has repeatedly exercised conscious circumspection concerning application of foreign precedents to Indian constitutional law.[3]

10. One may also approach the issue from the viewpoint of constitutionalism. In essence, constitutionalism is the idea that Government can and should be legally limited in its powers. A necessary corollary of this principle of constitutionalism is that Government should faithfully discharge its constitutional duties, and that all organs of the State share this responsibility. If the constitutional duties imposed on the Indian State are very different from those imposed on the Government of the United States, judgments from the United States, apart from being irrelevant may well cast a disruptive shadow on Indian constitutional jurisprudence.[4]

11. The petitioners have placed active reliance on the following decisions of the United States Supreme Court:[5] *Regents of the University of California* v. *Bakke*[6], *Grutter* v. *Bollinger*[7], *Gratz* v. *Bollinger*[8] and *Parents Involved in Community*

1 (1973) 4 SCC 225

2 (1982) 1 SCC 271

3 The observations of Scalia, J. in his dissenting opinion in *Atkins* v. *Virginia*, 536 US 304 (2002) may be noted: "Equally irrelevant are the practices of the 'world community', whose notions of justice are (thankfully) not always those of our people. We must never forget that it is a Constitution for the United States of America that we are expounding. … where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution". 536 US at 347.

4 This analysis is not intended to show any disrespect to the American courts and is solely intended to demonstrate their contextual inapplicability.

5 Other decisions find place in the compilations handed over by learned counsel for the Petitioners, but have not been relied upon in the oral submissions.

6 438 US 265 (1978).

7 539 US 306 (2003).

8 539 US 244 (2003).

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Schools v. *Seattle School District*[9]. These judgments, broadly speaking, lay down the following propositions:

(*a*) The Court will apply the standard of strict scrutiny while reviewing legislation involving suspect classification

(*b*) Such legislation is valid if two conditions are met: (*i*) there is a compelling governmental interest in making the classification, and (*ii*) the legislation has been narrowly tailored to meet that classification and goes no further than necessary.

(*c*) Classification based on race is a suspect classification, and

(*d*) Accordingly, while race can be a factor in admission policies of educational institutions, it cannot be the sole factor and it cannot lead to the imposition of quotas, which are per se unconstitutional.

12. Each of these propositions has been rejected in Indian law. The Indian Constitution neither admits of "suspect classification" nor of "strict scrutiny". As will be pointed out in detail, the Supreme Court in *Saurabh Chaudri* v. *Union of India*[10] has expressly held so. The constitutionality of quotas as such has been repeatedly affirmed, and the question in each case is whether the particular quota under challenge is valid or not. Given this completely different constitutional position, reliance on US affirmative action judgments is wholly misconceived. This argument is developed in detail in these submissions.

13. The broad structure of these submissions is to set out the development of the law in the United States and juxtapose it with the Indian position. Within this structure, the submissions proceed chronologically, because that is the most convenient way to understand the development of the law, which has happened in phases. The first phase is the period between the Declaration of Independence and the Civil War. The second phase is the period between the 13th, 14th and 15th Amendments and the "separate but equal" doctrine. The third phase is the period after the decision in *Brown* v. *Board of Education*[11] and leading up to the decision in *Regents of the University of California* v. *Bakke*[6]. The final phase is the period after Bakke.

The First Phase (1776–1860s): The Early Decades of the Constitution

14. Equality was one of the solemn affirmations of the American Declaration of Independence. Para 2 of the Declaration reads:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.

15. However, one of the greatest contradictions of American history is the coexistence—for nearly a century—of this affirmation of equality along with arguably the one of the most unequal social arrangement of history: slavery. It is fundamental to recognise that during the first century of the independent United

9 127 S Ct 2738 (2007).
10 (2003) 11 SCC 146.
11 347 US 483 (1954).

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States, slavery was legally recognised. As Abraham Lincoln expressed it in his 1855 speech at Illinois, "all men are created equal, except Negroes"[12].

16. The most famous (or infamous) exemplification of the status of African-Americans at that time is the decision of the US Supreme Court in *Dred Scott* v. *Saunders*[13]. The immediate issue before the Court was whether Scott had standing to bring an action in Federal Court—a right that was then available only to citizens of the United States. Thus the larger question the Court had to decide was whether African-Americans could be US citizens (60 US 393 at p. 403). Chief Justice Taney delivered the opinion of the majority of the Court. He first set out the "state of public opinion" at the time of the Declaration of Independence: (US at 403)

> [African-Americans] had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.

17. The Chief Justice went on to list the consequences of giving citizenship to African-Americans:

> It would give to persons of the negro race, who were recognised as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went. And all of this would be done in the face of the subject race of the same colour, both free and slaves, and inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State. (US at p. 417).

18. The Chief Justice concluded that

> It is impossible, it would seem, to believe that the great men of the slaveholding States, who took so large a share in framing the Constitution of the United States, and exercised so much influence in procuring its adoption, could have been so forgetful or regardless of their own safety and the safety of those who trusted and confided in them.

12 The speech was part of an election debate Lincoln was having with Judge Stephen A. Douglas. They were both contesting for the position of Senator from Illinois.

13 60 US 393 (1856).

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19. Chief Justice Taney, therefore, concluded that it was impossible that the intention at the time of drafting the US Constitution could have been to extend citizenship to African-Americans. And if this were so,

> No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilised nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favour than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. (US at p. 426)

20. In other words, as far as Chief Justice Taney was concerned, under the American Constitution, once a slave, always a slave and never a citizen. This was the state of affairs nearly one hundred years after Independence. The judgment has been described by Prof. Alan Dershowitz as a blight on American history[14] and also as "one of the most wrongly decided cases ever in the history of US Supreme Court"[15].

21. Thus, in the first phase of US constitutional law leading up to the Civil War, far from having affirmative action, the United States actually had a legally acknowledged system of discrimination in the most extreme form i.e. slavery. On the other hand, in independent India, the very starting point is different: the framers of the Constitution were aware of the developments in the United States and thus the Constitution does much more than guarantee formal equality: it specifically enables the State to make special provisions for the scheduled castes, scheduled tribes, socially and educationally backward classes and other weaker sections.

The Second Phase (1860s-1950s): the Amendments, and the Beginnings of 'Strict Scrutiny'

22. After the Civil War, various Amendments were made to the US Constitution to include the Bill of Rights. For our purposes, the most important ones are set out below:

> *13th Amendment (enacted in 1865)*
>
> **§1.** Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> *14th Amendment (enacted in 1868)*
>
> **§1.** All persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

14 Alan M. Dershowitz, *America on Trial* 116 (Warner Books, New York, 2004). Dershowitz is Felix Frankfurter Professor of Law at Harvard Law School.

15 Philip C. Aka, "The Supreme Court and Affirmative Action in Public Education, With Special Reference to the Michigan Cases", (2006) *Brigham Young University Education & Law Journal* 1, 19.

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15th Amendment (enacted in 1870)

§1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, colour, or previous condition of servitude.

23. Thus, the Supreme Court decision in Dred Scott was overcome by a Constitutional Amendment. Along with these Amendments, various Civil Rights statutes were enacted in the period 1865-1875 to give concrete effect to the Constitutional mandate.

24. Therefore, when the 14th Amendment gave the "equal protection of the laws" to all persons, it meant it quite literally: discrimination, which had been the order of the day, was being outlawed. All too often, this difference in context is forgotten when applying US 14th Amendment decisions in the Indian context. The goals underlying Articles 14, 15 and 16 of the Indian Constitution were, from the very beginning, much more than the State "not denying" equality simply because independent India had never had legal segregation as a method of officially denying opportunities to certain classes. On the other hand, what India did have was large-scale social and educational backwardness. Untouchability was still being widely practiced, along with its consequent extreme all-round deprivation and exploitation. Article 17 of the Constitution specifically abolished untouchability and made its practice in any form an offence. Article 15(4) (brought in by the Constitution (First Amendment) Act, 1951 and Article 16(4) specifically enabled the State to make special provisions for scheduled castes, scheduled tribes and socially and educationally backward classes/Other Backward Classes. Article 38(1) casts a responsibility on the State to secure and protect a social order in which justice, social, political and economic, shall inform all the institutions of the national life. In particular, Article 38(2) charges the State with the responsibility of eliminating inequalities of status, facilities and opportunities, not only among individuals but also amongst groups of people. The unmistakable goal underlying these provisions is the bringing about of a truly egalitarian society. The context provided by these provisions and goals completely changes the parameters of the debate on permissibility of affirmative action and its scope. That is the reason judgments of the United States courts have little or no relevance.

25. Returning to the American Constitution, the joy as a result of the Amendments and the Civil Rights legislation turned out to be short-lived as a result of the "separate but equal" doctrine created by many State laws, also called the "Jim Crow" laws[16]. This doctrine maintained that the 14th Amendment was complied with even if there was legal segregation, as long as the segregated facilities were roughly equal. As a matter of fact, the facilities for whites would always be superior to the facilities for other races. Refer to P.C. judgment.

16 The origin of the term "Jim Crow" law has been traced to the hit 1828 minstrel song "Jump Jim Crow". Jim Crow was the caricature of a shabbily dressed rural black, and the term was being used to refer to racial segregation by 1837. See "Jim Crow laws", *Wikipedia*, permanent URL <http://en.wikipedia.org/w/index.php?title=Jim_Crow_laws&oldid=162002987>.

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26. Even then, this doctrine was upheld by the Supreme Court in *Plessy* v. *Ferguson*.[17] This case involved a challenge to a Louisiana statute that provided for equal but separate accommodations for black and white passengers in trains. The Court rejected the challenge. Justice Brown famously observed:

> If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane. (US at p. 552)

27. He concluded that racial segregation was a reasonable exercise of State police power for the promotion of the public good and upheld the law. (US at p. 550)

28. Thus, even in this second phase, affirmative action was never truly initiated—the country was still struggling to establish even a formally equal society.

29. At the same time, another very important development in constitutional law was taking place, which would later have a serious impact on affirmative action programmes. This was the birth of the doctrine of strict scrutiny.

30. "Strict scrutiny" is one of the three standards for judicial review of legislative and administrative action developed in the United States, the others being "rational basis" and "intermediate scrutiny".

31. The origin of this standard can be traced to the decision in *United States* v. *Carolene Products*[18]. The question before the Court was whether the Filled Milk Act 1923, which prohibited the shipment in interstate commerce of skimmed milk compounded with any fat or oil other than milk fat, so as to resemble milk or cream, transcended the power of Congress to regulate interstate commerce or infringed the Fifth Amendment. Justice Harlan Stone, writing the opinion for the Court, upheld the law, holding that the existence of facts supporting the legislative judgment was to be presumed, for regulatory legislation affecting ordinary commercial transactions was not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it was of such a character as to preclude the assumption that it rested upon some rational basis within the knowledge and experience of the legislators (US at p. 152). However, he added what has been described as "the most celebrated footnote in constitutional law":[19]

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. (US at p. 153)

32. What the Court was saying was that economic legislation would be judged by a standard of "rational basis"—so long as the law was a rational way of furthering a legitimate governmental purpose, it was valid. However, where the legislation "on its face" appeared to be violating any of the fundamental rights, a more exacting standard would be applied.

17 163 US 537 (1896).

18 304 US 144 (1938).

19 Lewis F. Powell Jr., "*Carolene Products* Revisited", (1982) 82 *Columbia L. Rev.* 1087.

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33. The precise term "strict scrutiny" was used by the Court for the first time in *Skinner* v. *Oklahoma*[20]. The Oklahoma Habitual Criminal Sterilisation Act provided for vasectomy to be performed on any person convicted two or more times for crimes amounting to "felonies involving moral turpitude". Justice Douglas, giving the opinion of the Court, described the statute as violating the right to have offspring—"a right which is basic to the perpetuation of a race" (US at p. 536). The question before the Court was whether this statute violated the 14th Amendment. Holding that it did, see per Justice Douglas at US p. 541.

34. A phrase used therein caught on, and was soon used by the Court in several decisions. It developed into a two-pronged analysis. First, the Court would determine whether there was a "compelling governmental interest" in enacting the statute under consideration. Second, the Court would determine whether the statute was the "least restrictive alternative" to achieve that interest. (This is also called the "narrow tailoring" requirement.) Thus, in a sense, both the ends and the means were up for judicial review. The important cases that shaped this two-pronged approach included *Korematsu* v. *United States*[21] and *NAACP* v. *Alabama*.[22]

35. Soon, a theory developed that the strict scrutiny standard was an exacting, inflexible one that invalidated nearly every statute to which it was applied. It was famously observed that the standard was "strict in theory but fatal in fact"[23]. However, both the Court (as discussed subsequently) and constitutional scholars have confirmed that this is a myth. Empirically speaking, more than two-thirds of all laws examined under the strict scrutiny standard have been upheld.[24]

The Third Phase (1950s-1970s): Brown to Bakke—The Civil Rights Movements

36. The landmark decision, to which the modern era of equality can be traced, is *Brown* v. *Board of Education*[11]. The plaintiffs challenged the "separate but equal" doctrine as unconstitutional. Thurgood Marshall, later to become the first African-American Judge of the Supreme Court, argued for them that "segregated public schools are not equal and cannot be made equal" (US at p. 488). The Court agreed with his submission. Chief Justice Warren delivered the unanimous opinion of the Court (US at p. 494).

37. In overruling *Plessy*[17], the Court in *Brown*[11] set right sixty years of error. Equality finally meant equality, at least at a formal level. There followed the second *Brown*[25] decision, where Chief Justice Warren famously ordered district courts to ensure that African-American children are admitted to schools on a non-discriminatory basis with "all deliberate speed".[25]

20 316 US 535 (1942).

21 323 US 214 (1945).

22 357 US 449 (1958).

23 Gerald Gunther, "The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection", (1972) 86 *Harv. L. Rev.* 1, 8.

24 Adam Winkler, "Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts", (2006) 59 *Vanderbilt L. Rev.* 793.

25 *Brown (II)* v. *Board of Education*, 349 US 294 (1955).

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38. Thus, with the decision in *Brown*[11], legal segregation finally ended in the United States. In 1964, the Civil Rights Act was enacted. This Act prohibited discrimination in voting eligibility requirements, public accommodations, and access to public facilities. It also prohibited discriminatory practices by agencies that received federal funding and also by most classes of employers.

39. Soon, however, it was realised that this was not enough. In 1965, then President Lyndon Johnson said:

> But freedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please.
>
> You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "You are free to compete with all the others," and still justly believe that you have been completely fair.
>
> Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates.[26]

40. The above statement indeed sums up the entire philosophy behind affirmative action. In the next decade or so, initiatives by the government and civil society gave a huge impetus to affirmative action programmes in the United States.

41. Side-by-side, the strict scrutiny doctrine was also growing, and was being applied to all laws that used racial classification. It must be remembered that by now formal equality was a constitutional right, and so racial classification was now being done as a tool of affirmative action.

42. In India, this was the period of our early constitutional jurisprudence. The scope of Article 14 and the doctrine of reasonable classification was being established. The Indian Supreme Court did use the phrase "strict scrutiny". The first case in which this phrase is used seems to be *Narendra Kumar* v. *Union of India*[27]. It was however used in an entirely different sense. In this case, the validity of the Non-Ferrous Metal Control Order, 1958 issued under the Essential Commodities Act 1955 was challenged. The Order imposed restrictions on the sale of copper and also fixed maximum sale prices, and was challenged on the ground of violation of Articles 19(1)(*f*) and 19(1)(*g*). Considering the meaning of "reasonable restrictions" under Article 19(2), Das Gupta, J. speaking for the Constitution Bench held that the Court would employ strict scrutiny to see that the test of reasonableness was satisfied. In other words, the Court used the phrase simply to mean that it would carefully look at laws that appeared to restrict fundamental rights. The technical sense in which the term is used in the US—of compelling governmental interest and narrow tailoring—was not adopted here. Indeed, as the facts stated above indicate, there was no question of classification at all in this case and the fundamental right alleged to be violated was the right to carry on business. How legislative

26 Lyndon Johnson, "To Fulfil These Rights" (Commencement address at Howard University, 4 Jun. 1965), *Lyndon Baines Johnson Library's Selected Speeches of Lyndon Johnson*, <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650604.asp>.

27 See e.g. *Narendra Kumar* v. *Union of India*, (1960) 2 SCR 375.

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classification was to be judicially reviewed had already been decided in decisions such as *Ram Krishna Dalmia*,[28] with no reference to the strict scrutiny standard.

43. Turning back to the United States, the first case in the Supreme Court in which an affirmative action programme was challenged as violating the Equal Protection Clause was *DeFunis* v. *Odegaard*[29]. The case involved the University of Washington Law School, which had an affirmative action programme that targeted and benefited minority applicants. DeFunis, a Caucasian male, was denied admission to the school and blamed his rejection on the affirmative action program—which according to him violated the Equal Protection Clause. The law school defended the program by pointing out that factors other than grades and test scores were taken into consideration in its admissions decisions and that the use of race was compellingly necessary to expand opportunities for minorities to enter the legal profession, given their lack of access in the past. A state trial court ruled in favour of DeFunis and ordered his admission to the law school in 1971. The state Supreme Court reversed that ruling, and DeFunis appealed to the US Supreme Court, which granted review. DeFunis was allowed to remain in school, pending disposition of the appeal. By the time the Court considered the case in 1974, he was in his final year of law school and expected to graduate. Therefore, the Court, in an opinion by Chief Justice Burger, dismissed the suit on the grounds that the case had become moot. Four justices—Brennan, Douglas, Marshall, and White—dissented from the judgment. They asserted that the Court should have given the case full consideration and warned that the controversy would inevitably wind its way back into the Court.

44. The prediction of the dissenting judges came true four years later, in *Regents of the University of California* v. *Allan Bakke*[6]. In this case, the challenge was to the University medical school's special admission programme, under which 16 of the 100 positions in the class were reserved for disadvantaged minority students. The Court issued a complex decision. Four justices (Chief Justice Burger, Stevens, Stewart and Rehnquist) ('the Burger plurality') held that the case could be decided on the basis that the admissions programme violated Title VI of the Civil Rights Act because it created a quota, it was not necessary to determine the scope of the Equal Protection Clause of the 14th Amendment and it was also not necessary to determine whether race could ever be a factor in university admissions. Four other judges (Brennan, White, Marshall and Blackmun) (the Brennan plurality) held that the scope of Title VI was the same as the scope of the Equal Protection Clause and one could not determine the one without determining the other. They further held that race could legitimately be a factor to be taken into consideration in university admission programmes.

45. Justice Powell's opinion determined the outcome of the case. He agreed with the Brennan plurality that race could legitimately be a factor to be taken into consideration in university admission programmes, and that Title VI prohibited only those classifications that were also prohibited under the Equal Protection Clause. He also agreed with the Burger plurality that the quota in the medical school's admission

28 *Ram Krishna Dalmia* v. *Justice S.R. Tendolkar*, 1959 SCR 279.

29 416 US 312 (1974).

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programme violated Title VI, and also held that it violated the Equal Protection Clause.

46. Thus, it is difficult to identify the "majority opinion" in *Bakke*[6]. This difficulty was noted by Jeevan Reddy, J. in *Indra Sawhney*[30] at SCC pp. 677-82, paras 718-726. Generally, Justice Powell's opinion has been taken as the leading opinion. He held: (US at 327-28)

> [The] white "majority" itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality, for then the only "majority" left would be a new minority of white Anglo-Saxon Protestants. There is no principled basis for deciding which groups would merit heightened judicial solicitude and which would not. Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups. Those classifications would be free from exacting judicial scrutiny. As these preferences began to have their desired effect, and the consequences of past discrimination were undone, new judicial rankings would be necessary. The kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence—even if they otherwise were politically feasible and socially desirable.

47. Therefore, according to Justice Powell, a simple majority-minority (or black-white) split was simply impossible to make in the United States, and consequently any quota based on such a distinction was unconstitutional.

48. Clearly, the basis of Justice Powell's decision is inapplicable in India. Here, there is a constitutional recognition of SEBCs, a statutory mechanism at the level of the Centre and appropriate mechanisms in the States to determine SEBCs/OBCs, and the lists of SEBCs prepared on this basis have been approved by the Supreme Court in *Indra Sawhney*. This is apart from the constitutional recognition of Scheduled Castes and Scheduled Tribes.

49. Further, Justice Powell goes on to observe: (US at 308)

> The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination.

50. Under the Indian Constitution, the interest of the State is much more than the above. Indeed, it is not so much an "interest" as it is a constitutional responsibility and mandate to remove social inequality and establish a regime of equality. Affirmative action in India goes beyond remedying the ill effects of "identified discrimination", though this is the primary factor insofar as Scheduled Castes and Scheduled Tribes are concerned. Insofar as Backward Classes are concerned, the raison d'être for constitutionally mandated action is the very fact of backwardness itself. It is not concerned with, and need not be correlated with, or tailored to, discrimination. It is important to recognise this legal distinction, though it must also

30 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217

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be borne in mind that many of the Backward Classes faced and continue to face social discrimination as well.

51. The following observation of the Brennan plurality also merits consideration: (US 327-28)

> [C]laims that law must be "colour-blind" or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality. This is not to denigrate aspiration; for reality rebukes us that race has too often been used by those who would stigmatize and oppress minorities. Yet we cannot… let colour-blindness become myopia which masks the reality that many "created equal" have been treated within our lifetimes as inferior both by the law and by their fellow citizens.

52. From the above close textual analysis of *Bakke*[6], the following propositions emerge: (1) the difficulty that Justice Powell pointed out in identifying minorities—which was responsible for the striking down of the quota—does not exist in India. (2) the interest of the State under the Indian Constitution in eliminating backwardness is much beyond a real, legitimate and substantial interest and indeed a constitutional responsibility and mandate that goes far beyond issues of "discrimination". (3) requiring the elimination of race (or caste in the Indian context) from the factors taken into consideration in admission decisions would be wrong. This apart, the operative portion of the judgment—declaring quotas unconstitutional—is contrary to the Indian constitutional position. Thus, the judgment is completely inapplicable to the Indian scenario.

53. By this time, in Indian constitutional law, the interpretation of the right to equality had taken a decisive turn away from the US model. Nowhere is this clearer than the majority judgments in *N.M. Thomas*[31] (discussed below). Before proceeding to this case, a chronological approach is in order.

54. See Article 14 of the Indian Constitution.

55. The dual guarantee of Article 14 stands in contrast with the right enshrined in the 14th Amendment, which is confined to equal protection alone. In *Indra Sawhney*, Jeevan Reddy, J. observed, "The content and sweep of these two concepts is not the same though there may be much in common." (SCC p. 633, para 643) It may be noted that the inspiration for the phrase "equality before the law" came from the Irish Constitution and the Universal Declaration of Human Rights. The absence of this phrase in the US Constitution must be taken note of.

56. The difference between Article 14 and the 14th Amendment was noted in the early years of our Supreme Court. In *State of W.B.* v. *Anwar Ali Sarkar*[32], See per B.K. Mukherjea, J. at SCR pp. 319-20.

57. The tests for determining whether a legislative classification was violative of Article 14 were stated in several cases. Reference to merely a few would suffice. See *State of Bombay* v. *F.N. Balsara*[33], SCR at pp. 708-09.

31 *State of Kerala* v. *N.M. Thomas*, (1976) 2 SCC 310

32 1952 SCR 284.

33 1951 SCR 682

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58. See the observations made after surveying all the previous cases, in *Ram Krishna Dalmia* v. *Justice S.R. Tendolkar*[34], SCR at pp. 297-98.

59. And finally, the telling observations of the Judges in *State of Kerala* v. *N.M. Thomas*[31] are conclusive, as set out below.

60. *Per* Ray, C.J. at SCC pp. 332, 334 & 338, paras 24, 31 & 44.

61. *Per* Mathew, J. at SCC pp. 340 & 343, paras 53 & 65-66.

62. *Per* Krishna Iyer, J. at SCC p. 369, para 14.

63. Thus, the Supreme Court of India has categorically clarified the dual guarantees in Article 14, which are absent in the text of the Fourteenth Amendment. This difference, which makes affirmative action a State choice in the US and a constitutionally mandated State responsibility (covering a slew of measures including reservation) in India, must be underscored. In India, there is a positive obligation on the State to ensure that there is real equality of opportunity and status.

The Current Phase (1980s till date): After Bakke

64. Two decisions handed down the same day in 2003 considered the effect of *Bakke*[6]. In *Grutter* v. *Bollinger*[7], applicants to the University of Michigan Law School who were denied admission challenged the school's race-conscious admissions policy, alleging that the admissions policy encouraging student body diversity violated their equal protection rights. Stated in broad terms, the admissions policy required an assessment of each applicant based on all information available in the applicant's file, including "hard variables" such as grades and scores and "soft variables" such as how the applicant would contribute to law school life and diversity. Diversity was not limited to ethnic or racial diversity alone. The Court applied the strict scrutiny standard and upheld the law. Justice O'Connor delivering the opinion of the Court noted that "context matters when reviewing race-based governmental action under the Equal Protection Clause." (US at p. 327) Further, Justice O'Connor held: (US at pp. 326-327)

> Strict scrutiny is not "strict in theory, but fatal in fact." Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it. As we have explained, whenever the Government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection. But that observation says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny. When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied.
>
> (Internal quotation marks and citations omitted.)

65. Having stated the legal standard, Justice O'Connor held that the admissions programme was flexible enough to ensure that each applicant was evaluated as an individual and not in a way that made race or ethnicity the defining feature of the application (US at p. 317).

34 1959 SCR 279

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66. It is important to note that Justice O'Connor specifically refers to the guarantee of equal protection of the laws. The distinction between this phrase and "equality before the law" as used in Article 14 has already been explained above.

67. In *Gratz* v. *Bollinger*[8], the University of Michigan's undergraduate admissions policy was challenged. The method of selection was that every applicant from an under-represented racial or ethnic minority was automatically awarded 20 points out of the 100 needed for admission. The US Supreme Court held that this was unconstitutional. Application of the strict scrutiny standard meant that the requirement in US constitutional law was that affirmative action must be individually tailored to address each individual beneficiary. The University's programme did not meet this standard and hence was declared unconstitutional. On the other hand, the law school's admission policy in Grutter did meet this standard and hence was valid.

68. Neither of the above judgments has any applicability to the Indian context. By its very nature, reservation under Article 15(5) is a class right. It is not intended to be individually tailored, and no judgment in the past sixty years has required it to be so. It has in fact been repeatedly clarified that the right created by Article 15(4) is a class right.[35] Under Indian law, reservation must be justified with reference to the class of beneficiaries. In the US, affirmative action must be justifiable with respect to each individual beneficiary. There is a fundamentally different constitutional choice that has been made, and *Gratz*[8] therefore cannot be adopted in India.

69. For the same reasons as stated above, Grutter also is of little relevance here. A striking reason for the non-applicability of cases like *Gratz*[8] and *Grutter*[7] may be drawn from Justice Connor's observation in *Grutter*[7] that "the Law School's interest is not simply to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin" (US at p. 329). On the other hand, our constitutional scheme specifically envisages, enables and mandates the use of reservations/quotas and the interest of the State is therefore precisely to ensure that a specified percentage of SCs, STs, and SEBCs[36] form part of student bodies in all educational institutions.[37]

70. In *Parents Involved in Community Schools* v. *Seattle School District*[9] the Supreme Court struck down the school districts' use of race as a tie breaker in deciding student allocations in oversubscribed schools. The critical factual finding was that in Seattle, the schools had never been legally segregated. Given the strict scrutiny standard and this factual finding, the Court naturally concluded that the school had no compelling interest in using race as a tie breaker. Again, since neither the factual finding nor the legal standard is applicable here, this judgment has no applicability in India.

71. In the meantime, any doubts about the non-applicability of the strict scrutiny doctrine in India were well and truly set at rest in *Saurabh Chaudri* v. *Union of*

35 Extensive submissions have been made on this point by the learned Solicitor General, which are adopted and hence not repeated here.

36 In some States called OBCs or even just BCs.

37 Also see Sawant, J. in *Indra Sawhney*, 1992 Supp (3) SCC 217 at p. 511, para 418 (The various provisions in the Constitution relating to reservation, therefore, acknowledge that reservation is an integral part of the principle of equality where inequalities exist.)

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India[10]. This case—decided by a Constitution Bench—involved the constitutional validity of reservations based on domicile or institution in the matter of admission to postgraduate courses in government-run medical colleges. See per V.N. Khare, C.J., speaking for the majority at SCC p. 164, para 36.

72. The Court went on to uphold the constitutional validity of such reservations, though it laid down certain criteria to be followed in future.

73. In his concurring opinion, S.B. Sinha, J. held that institutional reservation would be valid even if the strict scrutiny test was applied. In two subsequent decisions, the learned judge has expressed the opinion that legislative classification under Articles 15 and 16 must pass the test of strict scrutiny.[38] There is no basis to presume that the technical meaning that the term has acquired in the United States has been imported into Indian constitutional law, and therefore the only conclusion is that the term "strict scrutiny" has been used only in its natural sense of the Court carefully examining the impugned legislation. Any other interpretation would be contrary to the decision of the Constitution Bench in *Saurabh Chaudri*[10].

74. It must also be pointed out that the Indian Supreme Court has not been unmindful of the developments in the United States. Decisions such as *Bakke*[6] have been referred to in most of our decisions on reservations. However, the rule that quotas are per se invalid has never been accepted. It must also be borne in mind that in India affirmative action is not a matter of choice for the State: it is a constitutional duty, unlike in the US Indeed, the Court in *Indra Sawhney*[30] cautioned that racial discrimination in the US was just around 200 years old (when compared to the centuries-old caste system) and far less complex than the caste system, when considering US Supreme Court decisions on affirmative action.

Conclusion

75. Having considering US law in detail, the issue may be placed in context. The constitutionality of affirmative action as a concept is not in issue here. In India, in order to deal with the ill effects of the centuries-old rigid caste system, operating with social and religious sanction, and pervasive social and educational backwardness, a constitutional choice was made—democratically—in 1950 that executive and legislative measures would include reservations for SC, ST, SEBCs OBCs. The key differences may again be noted. In the US, there was a good reason for the 14th Amendment to provide formal equality because the country had legally sanctioned slavery for nearly a century. In India, and hence the right to equality always meant something more. Secondly, the Indian Constitution guarantees "equality before the law", something that is absent in the US Constitution. This guarantee imposes a positive obligation on the State to bring about real equality, as interpreted by various decisions including *N.M. Thomas*[31]. No such positive constitutional obligation appears to exist in the United States. Thus, affirmative action in the US and India is common only in name. In nature and character it is entirely different. Under these circumstances, judgments from the US, while entitled to respect, must be approached with great caution, for their adoption would lead to the jettisoning of over half a century of our jurisprudence.

38 *R.S. Garg* v. *Union of India*, (2006) 6 SCC 430, para 27 and *Nair Service Society* v. *State of Kerala*, (2007) 4 SCC 1, para 34.

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II.

REAL EQUALITY—THE INDIAN VIEW

Introduction: What Equality is Not

76. Having studied the development and current position in US law and the reasons why adopting that position is neither permissible nor appropriate for India, this section of submissions concentrates on the equality discourse in India.

77. The issues before this Court are not simply related to admission to educational institutions. Rather, it is a debate about the meaning to be given to the fundamental right to equality enshrined in Part III of the Constitution and the rights of those who are specially spoken about by the Constitution. Is the constitutional obligation on the State merely that it will treat people equally, or is the obligation something more—that the State will take positive steps; will strive to create an equal Indian society? It is respectfully submitted that it has to be the latter. The positive constitutional obligation involves in its very essence the stepping beyond frontiers of formal equality and taking such steps as necessary to create an equal Indian society.

78. In *A Theory of Justice*, John Rawls discusses different conceptions of equality.[39] The first model he considers is the "system of natural liberty". In such a system, positions are open to all those able and willing to strive for them. Whatever distribution is achieved in this manner is taken as a just system. The Petitioners' view of equality in the instant case would seem to be along these lines. While this model has its initial attractiveness, the distribution of assets is strongly influenced by natural and social contingencies. The distribution mirrors the cumulative effects of prior distributions of natural assets as these have been developed or left unrealised and their use favoured or disfavoured by social circumstances and such chance contingencies as accident and good fortune. As Rawls puts it, "Intuitively, the most obvious injustice of the system of natural liberty is that it permits distributive shares to be improperly influenced by these factors so arbitrary from a moral point of view".

79. The second model he considers is "liberal equality". This tries to correct the drawbacks mentioned above by stipulating that positions should not only be open in a formal sense, but that all should have a fair chance of attaining them. In other words, people with similar aspirations and skills should have similar life chances, irrespective of the social class into which they are born. However, Rawls goes on to point out, even this system is morally imperfect. Even if it eliminates the influence of social contingencies, it still permits the distribution of wealth and income to be determined by the natural distribution of abilities and talents. But this distribution is simply the outcome of a natural lottery, and hence is arbitrary from a moral perspective. More importantly perhaps, the extent to which natural abilities develop and reach fruition is affected by all kinds of social conditions and class attitudes. Even the willingness to make an effort, to try, and so to be "deserving" in the ordinary sense is itself dependent upon happy family and social circumstances. He also points out in a different context, "no one deserves his place in the distribution of

39 John Rawls, *A Theory of Justice* § 12 (1971).

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natural assets any more than he deserves his initial starting place in society"[40]. Even the system of liberal equality fails to take this into account.

80. The Indian Constitution is conscious that equality per se can never ensure equality de facto. While equality in a formal sense is the starting point, equality in action is the fundamental essence of equality under the Constitution. The Indian Constitution, its goals of justice economic and social, as well as fraternity, are intended to encourage society to advance the disadvantaged sections of society. Affirmative action is not, as is contended by the petitioners, a 'sop' handed out by a benevolent State. Rather, it is the acknowledgement of the right of the Backward Classes to be treated as equal with the rest of society. Under the Indian Constitution, affirmative action is a mandatory constitutional obligation.

Equality: The Constitutional Scheme

81. It is submitted that Articles 15(4) and 16(4) characterise an important aspect of equality as understood in the Indian Constitution: First, they display a cognizance of the state of natural inequality that exists in the country. The Indian Constitution is unique in this respect because it takes note of this inequality existing in the society. In other words, citizens may appear to be unequally endowed because in fact the opportunities which are made available to them are unequal; and second, Articles 15(4) and 16(4) reiterate equality as a dynamic concept—i.e. one that is capable of remedying this state of inequality. The special provisions contemplated in Article 15(4) must be viewed in this light.

82. As long as the existence of a socially and educationally backward class is made out, Articles 15(4) and (5) steps into play. The determination under this provision is not with respect to individuals: any such determination would be self-defeating and time consuming. The determination is of a class. Such a determination of a class necessarily requires an awareness of social and educational backwardness in society, which is an expert function. If a unit of society (including a caste) is characterised by social and educational backwardness, that unit may correctly be described as a socially and educationally backward class.

83. The submission of the petitioners that there must be a quantitative correlation between the benefit conferred and the extent of problems sought to be remedied is not warranted by the provisions of Article 15(4) or 16(4). It is submitted that what is relevant is the existence of a class of people who are socially disadvantaged, deprived or backward.

84. The positive obligations contained in many Articles of the Constitution such as Articles 14, 15(1), 15(4), 16(1), 16(4), 16(4-A), (4-B), 46 (State actions), 330, 331, 332, 333 (for representation in State Legislatures and Parliament), 338 and 338-A (in respect of Constitutional Commissions), 341 and 342 (for determining Scheduled Castes and Scheduled Tribes) constitute a wide panoply of provisions revealing a consistent Constitutional intention. This is made even clearer by the proviso to Article 164 (specifically providing that there will be a Minister in charge of tribal welfare who may have additional charge of Scheduled Castes and backward classes in Chattisgarh, Jharkhand, Madhya Pradesh and Orissa).

40 Ibid at p. 311.

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85. It is important to recognise the broad features of the caste system, which includes (*a*) the rule of gradation of status or hierarchy, (*b*) detailed rules ensuring separate character, and (*c*) division of labour and inter-dependence. More importantly, a certain position in a social hierarchy, immobility within that hierarchy, and a confinement to only certain kinds of work, can often be significant contributory factors to social and educational backwardness.

86. Louis Dumont's definition of caste (in his work *Homo Hierarchicus*)[41] was adopted by the Hon'ble Supreme Court in *K.C. Vasanth Kumar* v. *State of Karnataka*[42] at SCC p. 730, para 22.

87. Formal equality—or a non-discrimination principle simpliciter—is based on very narrow notions of "merit". However, legal equality in the truest sense depends not merely on the absence of disabilities, but on the presence of abilities. The enabling provisions of Articles 15(4) and 15(5) are a manifestation of this aspect of equality.

88. Thus, the existence of special provisions rests on recognition of existing social disparities as well as their genuine historical basis. Dr. Ambedkar's speeches in the Constituent Assembly clearly contemplated that such special provisions were to enable backward classes to come into the mainstream.

89. It must also be noted at the outset that unlike members of Scheduled Castes who could be identified (primarily) as the victims of untouchability, Other Backward Classes do not have a single specific or particularised identifying factor. On the contrary, they are defined with reference to regions or States. It is this that prompted Dr. Ambedkar to state that a backward class was one that had to be determined by each local government.[43]

The Philosophy of Real Equality: N.M. Thomas[31]

90. The importance of decision of the Supreme Court of India in *State of Kerala* v. *N.M. Thomas*[31], for the understanding of the philosophy of real equality, cannot be overstated. In particular, the judgments of Chief Justice A.N. Ray, Justice Mathew and Justice Krishna Iyer deserve careful reading and conscious application.

91. The subject-matter in Thomas was Rule 13-AA of the Kerala State and Subordinate Service Rules, 1958 by which the State Government was empowered to further exempt, for a specified period, members of the Scheduled Castes and Tribes already in service from passing certain departmental tests. The Rule was struck down by the High Court as being violative of Articles 16(1) and (2) and not saved by Article 16(4).

92. The following points made in Ray, C.J.'s judgment in *N.M. Thomas case*[31] are particularly noteworthy:

(*a*) Articles 14, 15 and 16 form part of a string of constitutional guaranteed rights that supplement each other. Under Article 16 there can be a reasonable

41 Louis Dumont (1911-1998), was a French anthropologist, associate professor at Oxford University during the 1950s, and director at the École des Hautes Études en Sciences Sociales (EHESS) in Paris. He is regarded as a specialist on the cultures and societies of India.

42 1985 Supp SCC 714

43 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217, at p. 375 para 40 (*per* Pandian, J., quoting the Constituent Assembly Debates).

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classification of employees in matters relating to employment or appointment, SCC at p. 331, para 21.

(*b*) Discrimination is the essence of classification. Equality is amongst equals, SCC at p. 332, para 24.

(*c*) The rule of parity is the equal treatment of equals in equal circumstances. The question of unequal treatment does not arise between persons governed by different sets of circumstances, SCC at p. 334, para 31.

(*d*) Preferential treatment for members of backward classes with due regard to administrative efficiency alone can mean equality of opportunity for all citizens, SCC at p. 338, para 44.

93. In a scholarly judgment, Mathew, J. held:

(*a*) There is a distinction between equality in the moral sense and in the physical sense. Promotion of real equality has to compensate for the fact that men are actually born different. This is what is called proportionate equality, SCC at p. 340, para 53.

(*b*) Complete equality of opportunity may be impossible to achieve. But measures calculated to mitigate surmountable obstacles to ensure equality of opportunity can never incur the wrath of Article 16(1), SCC at p. 341, para 57.

(*c*) The following observation deserves to be quoted in full:

> It is clear that one is not really offering equality of opportunity to *X* and *Y* if one contents oneself with applying the same criteria to *X* and *Y*. What one is doing there is to apply the same criteria to *X* as affected by favourable conditions and to *Y* as affected by unfavourable but curable conditions. Here there is a necessary pressure to equal up the conditions. To give *X* and *Y* equality of opportunity involves regarding their conditions, where curable, as themselves part of what is done to *X* and *Y* and not part of *X* and *Y* themselves. Their identity for this purpose does not include their curable environment, which is itself unequal and a contributor of inequality (see Williams, The Idea of Equality), SCC at pp. 342-43, para 62.

(*d*) If we want to give equality of opportunity for employment to the members of the scheduled castes and scheduled tribes, we will have to take note of their social, educational and economic environment, SCC at p. 343, para 64.

(*e*) Equality of opportunity depends not merely on the absence of disabilities, but on the presence of abilities. Differential treatment of persons who are unequal is an integral part of the guarantee of equality, SCC at p. 343, paras 65-66.

(*f*) Part IV of the Constitution imposes on the Government an affirmative obligation to promote equality and liberty, SCC at p. 344, para 67.

(*g*) Decisions in the US suggest that the traditional approach to equality may be inadequate. In these areas, the inquiry whether equality has been achieved no longer ends with numerical equality; rather the equality clause has been held to require resort to a standard of proportional equality which requires the State, in framing legislation, to take into account the private inequalities of wealth, of education and other circumstances, SCC at p. 344, para 67.

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(*h*) If equality of opportunity guaranteed under Article 16(1) is effective material equality, then Article 16(4) is not an exception to Article 16(1), SCC at p. 347, para 78.

(*i*) The ultimate reason for the demand of equality for the members of backward classes is a moral perspective which affirms the intrinsic value of human beings and calls for a society which provides these conditions of life which men need for development of their varying capacities, SCC at pp. 349-50, para 89.

94. And in the eloquent words of Krishna Iyer, J.:

(*a*) The Court must interpret Articles 16(1) and (2) so as to remove the ugly inferiority complex which has done genetic damage to Indian polity and advance the remedy, informed by sociology and social anthropology, SCC at p. 362, para 120.

(*b*) The genius of Articles 14 to 16 consists not in literal equality but in progressive elimination of pronounced inequality. To treat sharply dissimilar persons equally is subtle injustice, SCC at p. 370, para 142.

(*c*) Assessment of equal opportunity cannot remain legalistic or individualistic, SCC at p. 372, para 148.

95. The Court's observations indeed capture the very spirit of real equality. The judgment of the High Court was reversed and the Rules were upheld.

The Philosophy Reaffirmed: Indra Sawhney

96. It is submitted that Jeevan Reddy, J. observed (speaking for himself, M.H. Kania, C.J. and M.N. Venkatachaliah, J. and A.M. Ahmadi, J.) in *Indra Sawhney* v. *Union of India*[30] that previous decisions of the Supreme Court on reservations had not been entirely consistent: the Court had not spoken "with one voice" (SCC at p. 657, para 683). However all doubts in this matter were emphatically settled in this case. The philosophy spelt out in *N.M. Thomas*[31] was affirmed. As a result of the answers given in this case, most of the contentions urged by the present petitioners stand refuted. They cannot be permitted to re-agitate the same contentions.

97. In *Indra Sawhney*[30], the Court put it beyond doubt that Article 16(4) was not an exception to Article 16(1) but merely a facet of it: see SCC p. 692, para 741.

98. It was further held that reservation was one form of special provision while preference, concession and exemption were other forms, sometimes called "lesser forms". Thus, the use of the word "reservation" contained in Article 16(4) was capable of taking in all forms of special preference including preference, concession, exemption and relaxations, SCC at pp. 692-94, para 743.

99. In principle, caste was also a social class, and could be considered for being declared as a backward class under Article 16(4). This formulation applies where the caste was capable of conveying the caste-occupation-poverty nexus. In such a case, the caste would be a correlate of a socially and educationally backward class.[44]

44 *Indra Sawhney* at pp. 388-89, para 101, at p. 392, para 115, at p. 394, para 122, at p. 396, para 126 (Pandian J); at p. 511, para 418, at p. 525, para 453, at p. 539, para 484 (Sawant, J.); at p. 669, para 706, at p. 702, para 760, at p. 716, para 782 (Jeevan Reddy, J.).

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100. It may be noted that earlier, the Justice Chinnappa Reddy Commission[45] had also considered the issue of caste being the basis for determination of Backward Class. The said Commission noted the experience of the Karnataka Government, which had tried to abandon caste. The Commission said:

> As a result of the decision of the Supreme Court in *Balaji's case*[46], the Government of Karnataka wholly abandoned the basis of caste and, pending an elaborate study and investigation of the problem which would take a long time, decided as an interim measure to classify backwardness on the basis of (1) economic condition, (2) occupation (3) social backwardness. [Eventually], the Government classified people whose annual income was Rs 12000 or less and who were pursuing occupations of agriculture, petty business, inferior services, crafts and those whose occupation involved manual labour, as socially and economically Backward Classes. The income ceiling was subsequently raised to Rs 2400 per annum.
>
> It appeared that the result of the Government order of 1963 did not benefit the truly Backward Classes or Castes, which required to be helped, but mostly benefited certain dominant communities such as Brahmins, Lingayats and Vokkaligas. When the 1963 Government Order was first brought before the Court, the High Court of Mysore in *Viswanath* v. *Govt. of Mysore*[47] characterised it as "very imperfect" but felt compelled not to strike it down in the light of what was thought to have been laid down by the Supreme Court... The High Court however expressed the hope that the State would soon make an exhaustive enquiry and "make a more appropriate classification".

101. Pandian, J. referred to such affirmative action under Article 16(4) as not merely a part of the Constitution but also a national commitment. (See SCC p. 366, para 22).

102. Backwardness is an expression of wide import and can bring within its field social backwardness, educational backwardness, economic backwardness, political backwardness and even physical backwardness. Pandian, J. noticed that this Court had never laid down a rigid formula exhaustively listing out the specific criteria to qualify for a backward class. (See SCC p. 376, para 45).

103. One of the important areas covered by the decision is on the possible indicators for social and educational backwardness. Broadly, there can be only two—either the means test alone or multiple indicators including economic criteria. It is important to note that if economic criterion alone is accepted, it would not satisfy the test of "social and educational backwardness". Pandian, J. expressly differed from the economic backwardness test applied by Desai, J. in *Vasanth Kumar*[42].

104. In view of the judgment in *Indra Sawhney*[30], the following propositions are now irrefutable:

> (*a*) The doctrine of equality is enshrined and embodied in Articles 14, 15 and 16 of the Constitution. These provisions need to read together with the principles of governance set out in Part IV of the Constitution. These Articles

45 It must be noted that this Commission was specifically commended by Jeevan Reddy, J. in *Indra Sawhney*.

46 *M.R. Balaji* v. *State of Mysore*, 1963 Supp (1) SCR 439

47 AIR 1964 Mys 132

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not only contain injunctions against the State, but also contemplate positively empowering provisions enabling the State to promote and nurture a de facto state of substantive equality. Equality thus, as contemplated in the Indian Constitution, is not merely a norm—but also an actual outcome. Substantive equality, as an outcome, is predicated not just on equal treatment—but on equal opportunity in education and employment. SCC at p. 401, para 147 (Pandian, J.).

(*b*) Not only is equality before law a special feature of the Indian Constitution, there are two special articles spelling this out under Articles 15 and 16. Article 16(4) is only a facet of Article 16(1) and not an exception to it. It is merely clarificatory of the primary intent of Article 16(1). Under the umbrella of substantive equality, it is therefore open to the State to enact laws making special provisions under Articles 15(4) and 16(4). The classes of citizens mentioned in Articles 15(4) and 16(4) would be entitled to special treatment in the matter of education and appointments/posts in the services of the State.

(*c*) The Court cannot ignore the caste-occupation-poverty nexus. Social backwardness leads to educational backwardness, and they both culminate in economic backwardness. Merely granting financial aid will not improve the situation of SEBCs. Further, SEBCs cannot be identified on purely economic criteria: SCC at pp. 393-94, para 117 (Pandian, J.); 538 para 482 (Sawant, J.); 779 para 715 (Jeevan Reddy, J.).

(*d*) The argument based on the 1931 census is a red herring. That census was never used for identifying the backward classes: SCC at p. 398, para 134 (Pandian, J.); 647-649 para 669 (Jeevan Reddy, J.)

Conclusion

105. The above analysis puts it beyond doubt as to what the underlying constitutional obligations are towards socially and educationally backward classes. There is a positive obligation on the State to take steps to eradicate their backwardness. In discharge of this obligation, the State is entitled to create reservations in education and employment. Such measures would not be violative of the right to equality, but rather would be measures that strengthen and actualise this right.

III.

REPLY TO THE SUBMISSIONS OF MR. P.P. RAO

106. This part of the submissions deals with certain arguments made by Shri P.P. Rao.[48] Many of the arguments made by Shri Rao have already been responded to by the learned Solicitor General and by Shri K. Parasaran, learned Senior Counsel appearing for the Union of India and the State of Tamil Nadu. The specific arguments dealt with in these submissions are:

(*a*) "Educational backwardness" is a relative concept. In India, a person who has been educated up to Class XII cannot be considered educationally backward.

(*b*) Following from the above, reservations in undergraduate and postgraduate admissions is unconstitutional as all applicants for these

48 In WP (C) No. 29 of 2007 (*Youth for Equality* v. *Union of India*) and WP (C) No. 231 of 2007 (*Citizens for Equality* v. *Union of India*). Unless otherwise indicated, the term "petitioners" in this part of the submissions refers to the petitioners in these two writ petitions alone.

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programmes would have completed Class XII and ipso facto can no longer be considered educationally backward.

107. The first response to the contention on educational backwardness is that this contention's premise is flawed. Since the premise is flawed, its conclusion is incorrect. The contention's premise is that each individual beneficiary of reservations under Article 15(5) must be educationally backward. This is incorrect, regardless of the definition of educational backwardness that is adopted. The right created by Articles 15(4) and (5) is a class right. The requirement of Article 15(5) is that the beneficiary of reservation must be a member of a class that is educationally backward. Examination of each individual beneficiary's position for the purpose of identification of the class is not warranted.

108. Different States have adopted different methods for determining educational backwardness of a class. The State Lists of Backward Classes were prepared after such determination. The Central List, prepared by "marrying" the State Lists with the Mandal List, was accepted in *Indra Sawhney*[30]. The issue of reviewing the binding conclusions of *Indra Sawhney*[30] does not arise in this case. A fresh judicial determination of "educational backwardness" is unwarranted and impermissible. As the Petitioners themselves say, educational backwardness is a relative concept and is therefore best left to the executive and to experts to determine. It is respectfully pointed out this Court has not been inclined to lay down any definition of the term "educational backwardness" till date.

109. The effect of the petitioner's submissions is that there can never be reservations in undergraduate or postgraduate admissions. This is in any event wrong, because it would mean that virtually every decision given by this Hon'ble Court upholding reservations in admissions was wrongly decided.[49] The petitioners are not challenging the correctness of any of these decisions. Therefore, their contention that educational backwardness stops at Class XII automatically fails.

110. The petitioners' contention in essence is that backwardness stops at Class XII. This is an untenable contention given the social, educational, economic and political realities of this country. The petitioners are focussing on "educational backwardness" alone, disregarding that in India, social backwardness, educational backwardness and economic backwardness go together[50]. Even an attempt at establishing any blanket cause-and-effect relationship amongst the three would be simplistic, and trying to discuss just one without appreciating the other two, as the petitioners are trying to do, would just be completely inappropriate. A sense of the social and economic position of persons belonging to the backward classes is given by the latest reports of NSSO and the Arjun Sengupta Report, is subsequently dealt with.

111. It is submitted that a person of the Backward Classes has enormous difficulties in joining, attending and remaining in school. To begin with, the student has to contend with the social structure where fairness of treatment and absence of prejudice have evolved slowly and it is only in conditions of fairness and absence of

49 For e.g., *State of Punjab* v. *Dayanand Medical College*, (2001) 8 SCC 664 (reservation in medical college admissions upheld).

50 See *Indra Sawhney*, 1992 Supp (3) SCC 217 at pp. 393-394, para 117 (Pandian, J.); at p. 538, para 482 (Sawant, J.); at p. 779, para 715 (Jeevan Reddy, J.).

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prejudice that a sustained attempt by the student to educate herself no longer disintegrates into fitters. The student must, in addition, overcome the debilitating effects of poverty, which has placed her in a disadvantaged position in every respect (e.g., nutritional deprivation, etc.). In fact, many children are required to start contributing to the household income from a very early age. Thus, the student has to confront the entanglements arising out of caste from an early age.

112. To compete in a modern world it is inconceivable to suggest that education up to Class XII is any substantial indicator of advancement. For instance, we may consider the following figures:[51]

All-India Pass Percentages

Exam	All Students	SC Students	ST Students
High School	64.4	55.9	47.4
Intermediate	65.6	61.7	55.7

113. The cumulative effect of all this results in a constant pressure on backward class students to drop out of school and join in their traditional occupations. This pressure increases as the child completes high school. If all reservation policies were to stop at the level of high school, the opportunity for backward class students to enter college would be severely reduced. The constitutional mandate of real equality of opportunity would be reduced to an empty statement.

114. The final goal of all affirmative action policies is to ensure equality of status and opportunity. Conscious and positive social perceptions of egalitarian society is very important in this endeavour. Extending the benefits of higher education to backward class students has the potential to bring about a forward change in this perception. The more highly qualified persons we have from the backward classes, the closer we move to achieving real equality.

115. The petitioners' contention is also seriously insensitive to class dynamics. This is a phenomenon which is admittedly complex, but which cannot be ignored. The inspirational effect of success stories within the community—for instance, if some members of a backward class do extraordinarily well in education—is something that must be taken into consideration. The potential for the backward classes to develop role models from amongst themselves cannot be ignored. These are all necessary facets of affirmative action, which have a catalytic effect on improvement in the situation of the socially and educationally backward classes.

116. Indeed, the very fact that reservations exist at the level of college education itself can operate as an incentive for students from the backward classes to complete their school education.

117. The conclusion that follows from the above is that it is unrealistic to advance the contention that backwardness stops at Class XII.

118. The petitioners' contention also gives the misleading picture that the Government is doing nothing for the backward classes at the level of primary

51 Source: "Selected Educational Statistics, 2004-2005" (published by the Statistics Division, Department of Higher Education, Ministry of Human Resource Development, Government of India)

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education, apart for reservations in higher education. This is incorrect. In addition to the Sarva Shiksha Abhiyan[52], there are several measures apart for reservations that have been taken for the backward classes, including:

(*a*) Pre-Matriculation Scholarships for OBCs, which aims to motivate children of OBCs studying at pre-matriculation stage in recognised schools.

(*b*) Post-Matriculation Scholarships for OBCs, which is intended to promote higher education by providing financial support to OBC students studying at post-matriculation/post-secondary levels including PhD degrees, etc.

(*c*) Hostels for OBC students, which aims at providing better hostel facilities to students belonging to Other Backward Classes.

(*d*) Assistance to voluntary organisations working for the benefit of OBCs, a scheme launched with the major objective of involving voluntary sector for improving the educational and socio-economic conditions of the OBCs through skill upgradation.

(*e*) The National Backward Classes Finance & Development Corporation (NBCFDC) provides additional channel of credit facility to backward classes for economically and financially viable schemes and projects; and upgrade the technological and entrepreneurial skills of individuals or groups belonging to the Other Backward Classes.

119. For all the reasons stated above, the petitioners' contention in respect of educational backwardness deserves to be rejected.

120. A contention has also been raised that the Constitution (Eighty-sixth Amendment) Act, 2002, which inserted Article 21-A and Cl. (*k*) in Article 51-A of the Constitution, is violative of the basic structure of the Constitution. It is submitted that this contention is untenable. At the outset, however, three things may be noted about this contention:

(*a*) This contention has been raised only in WP (C) No. 231 of 2007 and no other petition supports this contention.

(*b*) This issue does not find a place in the questions referred to this Constitution Bench for adjudication by the Order of reference.

(*c*) It has no direct relation with the question that this Bench is considering, i.e. reservation for SEBCs in central educational institutions.

121. Furthermore, the Eighty-sixth Amendment Act inserted Article 21-A, which now specifically guarantees the fundamental right to education for all children in the age group of 6-14. In Indian, formal education generally begins at the age of six, and that has been kept in mind while enacting Article 21-A. There are other constitutional provisions concerning the care of children below the age of six. The contention that an amendment that inserted a fundamental right is violative of the basic structure of the Constitution is untenable. Hence, the petitioners' submissions on this issue should be rejected.

52 *See* the Submissions of the learned Solicitor General, Part VIII

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IV.

REPLY TO THE SUBMISSIONS OF DR. RAJEEV DHAVAN

122. It has been submitted on behalf of the Petitioners that the Arjun Sengupta Report on "Conditions of Work and Promotion of Livelihood in the Unorganised Sector (July 2007)" establishes that there exists a huge number and percentage of people who are not in the categories of OBC, SC and ST but who are equally or more vulnerable. This is to suggest that these non-OBC/SC/ST are being left out of the special provision that are being made under the impugned legislation; hence the legislation is discriminatory. It is submitted that this statement is grossly inaccurate as it does not bring out as to how these figures compare to figures of the OBC, SC and ST and is contradicted by conclusions arrived at in the Arjun Sengupta Report.

123. First it is to be noted that the data that the Arjun Sengupta Report relies on is NSSO Data (mostly the 61st Round NSSO Data 2004-2005).[53] The NSSO methodology is based on scientific sampling and its figures are drawn from a sample survey conducted for determining employment, unemployment and consumption levels in the country. Further, the tables in the Report, which give a break up along socio-religious lines, have made Hindu OBCs as one category and Muslims (including OBCs) as a separate category.

124. Even taking the figures of NSSO as they are, the various Tables of the Arjun Sengupta Report (Tables 1.3, 7.12, 7.7, 9.2 and Fig. 6.2 relating to Consumer Expenditure, Landholdings, Poverty Ratios Among Farmers, Indebtedness and Education respectively) show that there are substantial disparities between various social groups contrary to the submissions of the Petitioners. In fact, the Arjun Sengupta Report itself, in the analysis of the data, notes this differentiation arising out of social identity.

Consumer Expenditure/Income Levels

Table 1.3: Percentage Distribution of Expenditure Classes by Social Identity, Informal Work Status and Education, 2004-2005 (at p. 7 of the Report)

Sl. No.	*Economic Status*	*Social Categories (percentage share in own total)*			
		STs/ SCs	All OBCs except Muslims	All/Muslim except STs/SCs	Others* (without ST/SCs, OBCs & Muslim)
1.	Extremely Poor (Avg. of Rs 8.9 pcpd*)	10.9	5.1	8.2	2.1

53 Initially the petitioners relied upon NSSO sample surveys of 1999-2000 which was shortly after the commencement of reservation for SEBCs/OBCs in the Centre. In the subsequent sample survey of 2004-2005, there has been a sharp increase of 6% in NSSOs estimation of SEBCs/OBCs. This increase is substantial in comparison to the few inclusions in the lists during this period. Obviously, the increase was attributable to the methodological improvements. With NSSO gaining greater experience, especially with regard to SEBCs, it is entirely conceivable that the gap between the sample survey estimates and Mandal's census based estimates may narrow down or the figures may even exceed Mandal's percentages.

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a	2.	Poor (Avg. of Rs 11.6 pcpd)	21.5	15.1	19.2	6.4
	3.	Marginally Poor (Avg. of Rs 14.6 pcpd)	22.4	20.4	22.3	11.1
b	4.	Vulnerable (Avg. of Rs 20.3 pcpd)	33	39.2	34.8	35.2
	5.	Middle Income (2-PL* to 4-PL)	11.1	17.8	13.3	34.2
c	6.	High Income (>4-PL)	1	2.4	2.2	11
	7.	Extremely Poor and Poor (1+2)	32.4	20.3	27.4	8.5
	8.	Marginal and Vulnerable (3+4)	55.4	59.6	57.1	46.3
d	9.	Poor and Vulnerable (7+8)	87.8	79.9	84.5	54.8
	10.	Middle and High Income (5+6)	12.2	20.1	15.5	45.2
e		All	100.0	100.0	10.0	100.0
		All (in millions)	302	391	138	258

* pcpd—per capita per day

* PL—Poverty Line

125. The above Table in Arjun Sen Gupta's Report (at p. 7) identifies a group of f all "Poor and Vulnerable (9)" (which includes those with consumer expenditure up to an average of Rs 20 per capita per day) and finds an overwhelming bulk of the OBC, SC and ST belonging to this group.

126. The Report (at p. 7) reads as follows:

> As will be seen in Table 1.3, what is quite significant is that 79% of the informal or unorganised workers, 88% of the SCs and STs, 80% of the OBC g population (except Muslims) and 84% of the Muslims (except SC/STs) belong to the poor and vulnerable group. They have remained poor at a bare subsistence level without any job or social security, working in the most miserable, unhygienic and unliveable conditions, throughout this period of high economic growth since the early nineties. … Education can be a liberating capability but access to it is made difficult, if not impossible, by such inherited characteristics as lower social status, rural origin, informal work status and gender or a h combination of these.

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127. Hence, it is seen, that in comparison to 80% of the OBC population who belong to the "poor and vulnerable" group, only about 54.8% of the "Others" (non OBC/SC/ST/Muslim) category fall in this group. It is further seen from the table, in the category of the "Extremely Poor" the proportion of the OBCs (at 5.1%) is more than double the proportion of Others (at 2.1%). Similar is the position with regard to next category of "Poor": 15.1% of the OBCs belong to this category while 6.4% of Others belong to this category. This leads to the incontrovertible conclusion that the incidence of poverty is much higher in the category of OBCs.

Indebtedness

128. Another table of the Sen Gupta Report that the Petitioners have relied on relates to indebtedness of different caste groups—Table 9.2 of the Report (at page 136) titled "Prevalence of Rate of Indebtedness by Social Groups: All India (Percentages) (2003)". After merely presenting the Table, it is concluded by the Petitioners that, "it affirms that the indebtedness of the persons other than SC/STs and OBCs is equally high".

Table 9.2: Prevalence Rate of Indebtedness by Social Groups: All India (Percentages) (2003) (at p. 137 of the Report)

Social Group	*Formal*	*Informal*	*Both*	*Total*
ST	16.6	16.8	2.9	36.3
SC	17.1	28.3	4.7	50.2
OBC	19.8	25.6	6.0	51.4
Others	25.1	18.6	5.7	49.4
Total	20.4	23.0	5.3	48.7

129. To conclude that the indebtedness of the persons of various socio-religious groups is comparable is the consequence of simplistic appreciation of the Table without going into the qualitative details of the loans. Such a conclusion is belied by the analysis in the Report itself.

130. The Report states that the economic and socially backward groups including small and marginal farmers and Scheduled Castes and Other Backward Classes are more dependent on informal sources compared to the higher castes and medium and large farmers. (para 9.8). The Report goes on to state that with no collateral to offer in lieu of loans and incapacity and difficulty in following the required procedural formalities to access formal sources, these farmers prefer to approach the easily reachable informal sources, such as private money lenders and traders. This increases their vulnerability and also checks their entrepreneurial initiatives to invest in agriculture to increase productivity and income levels. (para 9.10)

131. The Report in para 9.13 then goes on to state that loans of productive capital and current expenditure as percentage of total loans outstanding increase with farm size (land holding patterns have been seen above). The significance of loans for consumption and unproductive purposes such as marriages and consumption expenditure is higher among the marginal and small farmers. The Report thereafter states that SCs have the highest share of consumption and unproductive loans, followed by the OBCs and STs. Among the higher castes, unproductive loans

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account for less than 30% of the total outstanding loans. (See Table 9.3 at p. 137 and Table 9.4 at p. 138).

132. The Report concludes in para 9.14 that,

> The indebtedness situation clearly shows that the economically and socially backward groups, particularly the marginal farmers and the scheduled castes, are far more vulnerable than the medium and large farmers and the higher castes. This is so because the former group is more dependent on informal sources and for consumption purposes. Given their poor economic situation, they face the credit constraint on the one hand, and on the other, the possibility of being wedged in a perpetual debt trap.

Agricultural Labour and Other Rural Labour

133. The caste-occupation link is a vital part of the caste system and has its consequent impact on tilting of current educational and economic opportunities in favour of the socially advanced and adverse to the SC, ST and OBC. This link has been well brought out in the well studied analysis in *Indra Sawhney*[30], SCC at para 779 (per Jeevan Reddy, J.).

134. In rural India, agricultural labour is the crucial indicator of socio-economic vulnerability and strength. The higher the proportion of agricultural labourers in a social group/community, the greater its vulnerability. The following NSSO 61st Round Data (Statement 3.5) brings out the inter-group composition:

SOCIAL GROUP	PERCENTAGE OF AGRICULTURAL LABOUR IN EACH GROUP IN RURAL INDIA
SC	40.5
ST	34.0
OBC	22.4
Others/Socially Advanced	15.6
All Social Groups Combined	25.8

135. In the context of Agricultural Labour the Arjun Sen Gupta Report (at p. 115) states that,

> What this decomposition of agricultural labourers into socio-religious groups indicates is the existence of many structural constraints that are often mediated through one's social status/identity. Despite the fact that the agricultural labourers as a group form the bottom layer of the working class, the differentiation arising out of social identity is indeed striking. The historical weight of social exclusion coupled with the absence of any fallback mechanism of social security or protection is indeed a powerful initial condition debilitating this section of the working poor. (para 7.21)

136. Now, looking at the data of NSSO (Statement 3.5) with regard to the total agricultural labour (agricultural labour plus other rural labour), similar disparities emerge across social groups:

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SOCIAL GROUP	PERCENTAGE OF TOTAL RURAL LABOUR IN EACH GROUP
SC	56.0
ST	45.3
OBC	32.7
Others/Socially Advanced	23.3
All Social Groups combined	36.7

137. It is seen from the Table above that a good majority of the SC are tied down as labourers; this is also the fate of one-half of the STs and about one-third of the OBCs, but only less than a quarter of the socially advanced.

138. Similarly, the Arjun Sen Gupta Report (at p. 117), giving the percentage break up of various social categories in the group of all agricultural labourers states that,

> Agricultural labourers as a group consist largely of those belonging to Scheduled Castes and Scheduled Tribes (46.7% in 2004-2005) and OBC category (33.95%), which partly reflects the proportion of these social groups in the population. They together constitute 80% of the agricultural labourers. The Hindu higher castes are the least likely to be agricultural labourers (8% in 2004-2005). (para 7.26)

139. The Arjun Sen Gupta Report also considers the incidence of Poverty amongst Agricultural Labourers under the heading: Poverty Among Agricultural Labourers (at p. 114). It compares the "Poverty Ratios Among Rural Agricultural Labourers across Socio-Religious Groups" and concludes that it varies substantially. Nearly 40% of Hindu STs engaged as agricultural labourers are below the poverty line, followed by Muslim agricultural labourers at 31.5%, and SC Hindus at 31%. These three poorest groups are followed by agricultural labourers in other religions at 26.1% that includes SCs belonging to the Sikh community and Dalit Christians and Adivasis. 24% of the Hindu OBCs engaged in agricultural labour are below the poverty line. The Report states that Hindu upper castes even among agricultural labourers are the least likely to be poor, at 16%. (para 7.20)

Education

140. Fig. 6.2 of the Arjun Sen Gupta Report (at page 102) is titled "Incidence of Out of School Children (Labour Pool) and Child Labour (5-14 years) Across Socio-Religious Groups 2004-2005" which is set below:

Social Groups	*Out of School Children*	*Labour Pool*
Hindu ST	27.6%	6.7%
Hindu SC	22.6%	3.4%
Hindu OBC	16.6%	3.2%
Hindu Upper	7.9%	1.7%
Muslims	24.2%	4.4%
Other Religions	10.9%	2.5%

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a **141.** It is evident from the above that the proportion of Hindu OBCs who are out of school is 16.6% while the proportion of Hindu upper castes who are out of school is 7.9% which is less than half the figure of the OBCs. The Table further reveals that from amongst the 16.6% of Hindu OBCs out of school children, 3.2% are engaged in child labour while the corresponding figure for Hindu upper castes is 1.7%.

142. The following table indicates the present educational status of each social group which is also an indication of the group's present level of achievements and future prospects:

b Percentage of Household with no Literate Adults of Age 15+, Social Group-Wise

	BOTH MALE AND FEMALE	
Social Group	Rural Households	Urban Households
c SC	32.7	14.8
ST	38.1	14.3
OBC	25.7	10.3
Others/Socially advanced (SA)	15.9	4.6
All Social Groups combined	26.1	8.4

d **143.** This shows that in the lowest ladder of non-education, the SC and ST are at the bottom, the Socially Advanced on top and the OBCs in between, closer to SCs than to Socially Advanced.

144. The data regarding levels of general education for each social group is even more important in assessing the prospects of each social group.

e

	PERCENTAGE OF GRADUATES AND ABOVE	
Social Group	*Urban Male*	*Urban Female*
SC	6.6	3.9
ST	10.8	7.4
OBC	10.6	6.0
Socially Advanced	23.8	18.2
f All Social Groups combined	16.2	11.5

145. It can be seen that the socially advanced are far ahead of the OBC, ST and SC. The OBCs are even slightly lower than the ST.

146. In the light of the above, it is submitted that the petitioners' submissions based on the Sengupta Report and NSSO Data deserve to be rejected.

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XII. Mr K. Parasaran, Senior Advocate, for the Union of India

PART I

I. VALIDITY OF THE CONSTITUTION NINETY-THIRD AMENDMENT ACT, 2005

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3. Preamble and its Importance—Relevance in Interpretation of the Provisions of the Constitution
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12. Article 368(2) proviso not attracted
13. Article 15(5) is not violative of the Basic Structure of the Constitution
14. Egalitarian Equality

II. CONSTITUTIONAL VALIDITY OF THE CENTRAL EDUCATIONAL INSTITUTIONS (RESERVATION OF ADMISSION) ACT, 2006 (ACT NO. 5 OF 2007)

1. Section 2(*g*) of the Act not an excessive delegation
2. The absence of provision for periodic review will not invalidate the Act
3. Quantum of reservation provided for in the Act is valid
4. Quantum of reservation is a legislative fact
5. The Act cannot be held to be bad for any illegality, error, defect or deficiency in the exercise of the power under the Act

5-A. The contention that special provisions can only be made up to 10+2 stage is untenable

6. Validity of Section 3 of the Act does not depend up on Section 5
7. Excluding Minority Institution under Section 4(*iii*) of the Act would not affect the validity of the Act
8. Principle of Reverse Discrimination not applicable
9. American Doctrine of Strict Scrutiny and Narrow Tailoring are not applicable in India
10. Exclusion of creamy layer has no application to SC and ST both in regard to employment and education
11. Exclusion of creamy layer has no application in the matter of reservation in education
12. Articles 15(4) and 15(5) are provisions of "power coupled with duty"
13. Vote Catching' not a valid argument on validity
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PART II

RESPONSE TO THE QUESTIONS FRAMED IN THE ORDER OF REFERENCE

PART I

I. VALIDITY OF THE CONSTITUTION NINETY-THIRD AMENDMENT ACT, 2005

0. It is submitted that in order to adjudicate upon the validity of the Constitution Ninety-third Amendment incorporating Article 15(5) and the Central Educational Institutions, (Reservation of Admission) Act, 2006[1], the principles governing interpretation of the Constitution, the Preamble, Part III and Part IV, the inter relationship between Part III and Part IV, the Constitutional promise to the weaker sections, the protection to the minorities under Article 30, the basic structure doctrine, the scope of Article 368, that fundamental rights could be abridged by an amendment of the Constitution, the context in which Articles 15(4) and 15(5) were respectively incorporated, the principles governing the validity of enabling provisions, in particular inter alia, when the principles contained in Part IV which are "fundamental in the governance of the country" are applied in making amendments to the Constitution and plenary legislation, the distinction between the vesting of power, the exercise of the power and the manner of its exercise, presumption as to the validity of Constitution Amendments and plenary legislation, non-applicability of the American doctrine of strict scrutiny and narrow tailoring in testing the validity of social welfare legislation in India; and above all, the egalitarian equality pervading Part III and Part IV, the noble vision set out in the Preamble and the means set out in Part IV to march towards the goal set out in the Preamble have all to be borne in mind.

1. Relevant Articles of the Constitution

1.1. The relevant provisions of the Constitution which have to be considered in the present case are, the Preamble, Article 14, Article 15, Article 16, Article 19, Article 27, Article 28, Article 29, Article 30, Article 38, Article 45, Article 46, Article 73, Article 162, Article 245, Article 246, Article 254 read with List III Entry 25, Article 330, Article 332, Article 334, Article 335, Article 338, Article 338-A, Article 340, Article 341, Article 342, Article 366(24) and (25) and Article 368.

2. Principles as to Interpretation of the Constitution

2.1. The articles of the Constitution have to be read as an integral logical whole, construing one part in the light of the provisions of the other parts, rendering no portion unnecessary or redundant; that the Constitution outlines principles and not engrave details; that it is meant to endure and be capable of flexible application to changing times and circumstances; and that the articles have to be so interpreted as to advance the object of their incorporation.

2.2. Relevant principles of Interpretation of the Constitution as expounded by this Hon'ble Court are, inter alia were laid down in the cases below, as follows:

1 Hereinafter referred to as 'Act'.

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Summary of Arguments

XII. Mr K. Parasaran, Senior Advocate, for the Union of India *(contd.)*

(*a*) *Kihoto Hollohan* v. *Zachillhu*, 1992 Supp (2) SCC 651 at p. 676, paras 26 and 27.

(*b*) *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481 at p. 582, para 148.

(*c*) *R.C. Poudyal* v. *Union of India*, 1994 Supp (1) SCC 324 at p. 385, para 124

(*d*) *M. Nagaraj* v. *State of Karnataka*, (2006) 8 SCC 212 at pp. 240-41, para 19.

2.3. The Constitution, subject to the context, may also be interpreted on the principles of interpretation of statutes. Kindly see Article 367 as to applicability of General Clauses Act, 1897 to the interpretation of the Constitution. The principles governing interpretation of statutes is summarised in *RBI* v. *Peerless General Finance and Investment Co. Ltd.*[2]

2.4. It is best interpreted when the Court knows why it was enacted, the mischief sought to be suppressed and the remedy sought to be advanced. It should be so interpreted to advance the social purpose and larger public interest and Constitutional goals.

2.5. In a modern progressive society the words used in an enactment may have to be so interpreted to take in later developments, thoughts and advancements and need not be static to mean or confine its meaning to what was at the time of enactments[3]. Interpretation will depend upon the larger societies demand of the times[4].

2.6. When social welfare measures are sought to be implemented and the Constitution has to be interpreted in such context, it has to be kept in mind that Preamble is the text which sets out the goal to be reached; that Part III is the texture into which is woven a pattern of rights; that they do not attempt to enunciate distinct rights that Part IV is the context which gives colour to Part III and that, Fundamental Rights and Directive Principles are both complementary and supplementary to each other. When testing the validity of any provision it also has to be kept in view that the Constitution is an enduring one inter alia aiming at social transformation with special care to the weaker sections and their upliftment.

3. *Preamble and its importance—Relevance in Interpretation of the Provisions of the Constitution*

3.1. The Preamble is a part of the basic structure of the Constitution. The edifice of our Constitution is built upon the concepts crystallised in the Preamble[5]. The Preamble was finalised after long discussion and adopted last so that it embodies the fundamentals underlying the structure of the Constitution. The following passages in *Kesavananda Bharati* v. *State of Kerala*[6], throw light:

2 (1987)1 SCC 424 at pp. 450-51, para 33.

3 *Senior Electric Inspector* v. *Laxminarayan Chopra*, (1962) 3 SCR 146 at pp. 156-57. In this regard see also In *State* v. *S.J. Choudhary*, (1996) 2 SCC at pp. 436-37, para 18.

4 *Zee Telefilms Ltd.* v. *Union of India*, (2005) 4 SCC 649, para 35 at p. 684.

5 *Minerva Mills Ltd.* v. *Union of India*, (1980) 3 SCC 625 at p. 654, para 57.

6 (1973) 4 SCC 225. Hereinafter referred to as "*Kesavananda Bharati*".

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Sikri, C.J.: (SCC pp. 322-24, paras 85, 89 & 94-98; p. 327, para 116); Shelat and Grover, JJ.: (SCC p. 420, para 507; p. 422, paras 515-16); Khanna, J.: (SCC pp. 787-89, paras 1473 & 1475; p. 791, para 1479)

3.2. Preamble secures and assures to all citizens Justice, social, economic and political. Preamble also secures and assures Equality of status and of opportunity. Social Justice will ultimately lead to equality of status and Economic and Political Justice will ensure Equality of Opportunity. 'Equality of Status' is mentioned before Equality of Opportunity. It is 'egalitarian equality' which will usher in equality of status and of opportunity in a caste ridden society like ours, where OBCs, SCs and STs are looked down upon as inferior in status. Education and the economic well being of an individual gives a status. When large number of OBCs, SCs and STs get better educated and get into Parliament, legislative assemblies, public employment, professions and into other walks of public life, the attitude that they are inferior in status will disappear. This will promote Fraternity assuring the dignity of the individual and the unity and integrity of the nation. "The single most powerful tool for the upliftment and progress of such diverse communities is education[7]."

3.3. The first step to achieve social integration is to bring the lower or backward social groups to the level of the forward or higher social groups[8].

3.4. According to *Random House Dictionary of the English Language* 'Frater' means "a brother, as in a religious or fraternal order: comrade." 'Fraternity' means "a group of persons associated by or as by ties of brotherhood". According to the *New Shorter Oxford English Dictionary on Historical Principles*, 'Frater' means "the dining room of a monastery" "a brother: a comrade".

4. *Fundamental Rights in Part III not to be read in isolation; Rights in Part III are not absolute rights. They are subject at least to other provisions in Part III*

See (*a*) *Rustom Cavasjee Cooper* v. *Union of India*, (1970) 1 SCC 248 at p. 289, para 52.

(*b*) *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481 at p. 578, para 135.

5. *Fundamental Rights and Directive Principles of State Policy*

5.1. Part III and Part IV are both rights which are fundamental. See *Unni Krishnan, J.P.* v. *State of A.P.*, (1993) 1 SCC 645 at p. 728, para 154 (B.P. Jeevan Reddy, J. quoting from the speech of Sardar Vallabhai Patel).

5.2. Part III is enforceable. Part IV is made not enforceable by a court, for the reason inter alia as to financial implications and priorities. If the Directive Principles are sought to be enforced by the Court, the expenditure required to satisfy any judgment, decree or award of any court or arbitral tribunal in enforcement thereof will be charged on the consolidated fund of India under Article 112(3)(*f*) and the consolidated fund of the State under Article 202(3)(*e*). This was sought to be taken care of by making Part IV unenforceable. Section 106(2) of Government of India Act, 1915-1919[9] and Section 226 of the Government of India Act, 1935[10] ousted the

7 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481 at p. 529, para 1.

8 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 at p. 512, para 421.

9 Section 106.

10 Section 226.

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original jurisdiction of the High Courts in matters concerning with revenue. Article 225 proviso of the Constitution enacted that such restrictions on the exercise of original jurisdiction of the High Courts shall no longer apply to the exercise of such jurisdiction. The proviso was deleted by the Forty-second Amendment[11], but was re-enacted by the Constitution Forty-fourth Amendment Act. After advent of the Constitution, the Supreme Court and the High Courts have jurisdiction even with regard to financial matters. The implementation of the Directive Principles, by legislation and/or executive action has large financial implications. They were, therefore, not included in Part III, and were made not enforceable by the court. It is not an instance of ouster of jurisdiction. Principles of Part IV have to be gradually transformed into fundamental rights depending upon the economic capacity of the State.

5.3. *Max Mohammad* v. *State of Haryana*[12] illustrates the problem. The judgment of this Hon'ble Court which granted relief based on equal pay for equal work led to the State of Haryana not being able to satisfy fully the judgment due to financial constraints. Contempt proceedings were initiated. This Hon'ble Court dropped the contempt proceedings as already substantial amounts had been paid. This Hon'ble Court observed that when the directions were given this Court was not conscious as to the magnitude of the liability when the order was passed.

5.4. It is to avoid such situations where large financial implications may precipitate problems, the Directive Principles were made unenforceable under Article 37. The very concept of enforceability under Article 37 carries with it the implication that matters mentioned in Part IV are also rights. What is not a right does not require to be made unenforceable. Even when enforcing the fundamental rights, the Supreme Court has taken into account the financial implications and then ruled on the nature of the relief to be granted. See in this connection *D.S. Nakara* v. *Union of India*[13] and also *State of H.P.* v. *Umed Ram Sharma*[14]. In view of Article 37, the Supreme Court as "judicial arm" of the State has also to effectuate the Directive Principles by harmoniously interpreting Part III with Part IV. The State will have to make laws implementing the Directive Principles of the State Policy in phases depending upon the "economic capacity"[15].

5.5. In due course of time all Directive Principles will be transformed into Fundamental Rights. This Hon'ble Court so transformed equal pay for equal work occurring in Article 39(*d*) into a fundamental right[16]. Similarly Article 45 was transformed into a fundamental right under Article 21[17] which has now received ratification by the constituent power by the 86th Amendment inserting Article 21-A. (Article 21-A has not yet been brought into force).

As to the effect of the provisions of Part IV, see the following:

11 Such deletion may be violative of the basic structure of the Constitution.

12 (1994) 6 SCC 332

13 (1983) 1 SCC 305 at p. 343, para 63.

14 (1986) 2 SCC 68 at pp. 76-78, paras 17, 18 & 22

15 See Article 41

16 See *Randhir Singh* v. *Union of India*, (1982) 1 SCC 618 at p. 622, para 8

17 *Unni Krishnan, J.P.* v. *State of A.P.*, (1993) 1 SCC 645.

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XII. Mr K. Parasaran, Senior Advocate, for the Union of India *(contd.)*

(*a*) *Minerva Mills* v. *Union of India*[5] SCC at p. 654 para 57.

(*b*) See Hegde and Mukherjea, JJ. in *Kesavananda Bharati*[6] (SCC p. 502, paras 712-13); Shelat and Grover, JJ. (SCC p. 427, para 533 and p. 459, para 596) and Chandrachud, J. (SCC p. 1000, para 2120)

6. *Preamble, Part III and Part IV are to be read as part of a logical whole*

6.1. Clause (1) of Article 38 obligates the State to "strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life".

6.2. Clause (2) of Article 38, says, "the State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations."

6.3. Under Article 46, "the State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation".

6.4. Both Part III and Part IV are fundamental in character. Part III guarantees basic freedoms to the individual. Part IV assures and mandates social security, justice and freedom from exploitation by laying down guiding principles for future governments. See Shelat and Grover, JJ. in *Kesavananda Bharati*[6] (SCC p. 422, para 515); and Khanna, J. (SCC p. 791, para 1480)

6.5. Directive principles embody a commitment to the weaker sections which was imposed by the Constitution makers on the State to bring about economic and social regeneration of the teeming millions who are steeped in poverty, ignorance and social backwardness. They incorporate a pledge to the coming generations of what the State would strive to usher in. See Shelat and Grover, JJ. in *Kesavananda Bharati*[6] (SCC p. 427, para 53 and p. 454, para 582)

6.6. See the observations in *State of Gujarat* v. *Mirzapur Moti Kureshi Kassab Jamat*[18] per a Bench of seven Hon'ble Judges of this Hon'ble Court at SCC at p. 561, para 39. See also SCC p. 566, para 47 and p. 569, para 58. See also *Pathumma* v. *State of Kerala*[19] and *Indra Sawhney* v. *Union of India*[20], *State of Karnataka* v. *Ranganatha Reddy*[21] and *U.P. SEB* v. *Hari Shankar Jain*[22].

6.7. Whichever Article is sought to be interpreted, whichever statute whose Constitutional validity is sought to be questioned, the Court will consider whether it is made consistent with socialistic goals set out in the Preamble and Directive Principles enunciated in Part IV and strive to give such an interpretation as will promote the march and progress towards a Socialistic Democratic State and advance the egalitarian ethos of the Constitution.

18 (2005) 8 SCC 534

19 (1978) 1 SCC 1 at pp. 10, 11, para 9

20 Hereinafter referred to as "*Indra Sawhney*". See B.P. Jeevan Reddy, J. in 1992 Supp (3) SCC 217 at p. 632, para 641, at pp. 632, 633, paras 642, 643, 644 and at p. 635, para 647.

21 (1977) 4 SCC 471 at p. 516, para 83

22 (1978) 4 SCC 16 at p. 24, para 5

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6.8. See also the observations in *Atam Prakash* v. *State of Haryana*[23] per a Constitution Bench of this Hon'ble Court.

7. Interpretation of Articles 15(4) and 15(5)

7.1. On a harmonious reading of Preamble, Part III and Part IV, it is manifest that there is a Constitutional promise to the weaker sections/SEBCs. Constitutional promise is a solemn duty. It has to be fulfilled.

7.2. See *Indra Sawhney*[24], per B.P. Jeevan Reddy, J. at SCC p. 751, para 836 placitum *b-c*.

7.3. In *State of Madras* v. *Champakam Dorairajan*[25], a contention was urged on behalf of State of Tamil Nadu that Article 46 "charges" the State with promoting with special care the educational and economic interests of the weaker sections of the people. This contention was negatived for the reason that Article 46 was unenforceable by reason of Article 37 and cannot override the provisions in fundamental rights in Part III. This subordination of the directive principles to fundamental rights is no longer good law after the decision of this Hon'ble Court in *Kesavananda Bharati*[6], *Pathumma* v. *State of Kerala*[19] and *State of Gujarat* v. *Mirzapur Moti Kureshi Kassab Jamat*[18].

7.4. The decision of this Hon'ble Court in *M.R. Balaji* v. *State of Mysore*[26] has accepted the argument as to "charge" rejected in *Champakam Dorairajan*[27]. The above principle flows from Articles 15(4), 16(4), 16(4-A), 16(4-B), Articles 38, 45 and 46 and now also by Article 15(5).

7.5. The duty to resort to affirmative action to discharge a duty to render Justice, Social, Economic and Political is, inter alia, to be done by several special provisions made in exercise of the powers under Articles 15(4) and 15(5) which are part of Part III.

7.6. Article 15(4) includes education. Article 15(5) expressly mentions special provisions in educational institutions at all levels up to the highest level, to be made by law removing disability by operation of Article 19(1)(*g*) (so ruled in *T.M.A. Pai Foundation* v. *State of Karnataka*[28] and *P.A. Inamdar* v. *State of Maharashtra*[29]) with regard to educational institutions.

7.7. After this Hon'ble Court ruled that education up to the age of 14 years which should be free and compulsory, is a fundamental right, Article 15(4) and 15(5) would now comprehend only higher education after the age of 14. Otherwise the said sub-articles will be rendered otiose. The need to provide for such higher education for the classes of citizens may be visualised from the observations in *Pradeep Jain (Dr.)* v. *Union of India*[30] which was in the context of equality of opportunity for

23 (1986) 2 SCC 249 at p. 256, para 5

24 1992 Supp (3) SCC 217, SCC at p. 751, para 836 placitum *b-c*.

25 Hereinafter referred to as "*Champakam Dorairajan*", 1951 SCR 525 at p. 530

26 Hereinafter referred to as "*M.R. Balaji*", 1963 Suppl (1) SCR 439 at p. 470.

27 1951 SCR 525 at p. 530

28 Hereinafter referred to as "*T.M.A. Pai Foundation*", (2002) 8 SCC 481.

29 Hereinafter referred to as "*P.A. Inamdar*", (2005) 6 SCC 537.

30 Hereinafter referred to as "*Pradeep Jain*", (1984) 3 SCC 654 at p. 676, para 13.

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admission into medical colleges. Please see also *Indra Sawhney* v. *Union of India*[31], SCC at p. 506, para 404, passage from Pandit Nehru in *Discovery of India* is quoted with approval.

7.8. Article 15(4) is an enabling provision. State has to make 'special provision' for 'advancement of any Socially and Educationally Backward Classes of Citizens or for Scheduled Castes and Scheduled Tribes'. Article 29(2) will not come in the way. Article 15(4) was introduced by Constitution First Amendment Act, 1951 to neutralise the decision of this Hon'ble Court in *Champakam Dorairajan*[25], which struck down the Communal G.O. providing for reservation in educational institutions on the basis of Race (Anglo-Indians), Religion (Christians and Muslims), Caste (Brahmins, Non-Brahmins, Harijans) as violative of Article 29(2).

7.9. *Champakam Dorairajan*[25] has to be read with *B. Venkataramana* v. *State of Madras*[32] decided by the same Bench on the same day. It approved the reservations to the extent of seats for Harijans and Backward Hindus as the reservation for the reason that it was in favour of backward classes of citizens as envisaged in Article 16(4) by observing that the petitioner did not belong to that class. But the Court struck down the reservation on the ground of religion, race and caste viz. on ground of petitioner being a Brahmin and not a Muslim, Christian or non-Brahmin. See *B. Venkataramana* v. *State of Madras*[32], MLJ at p. 627. The schedule of Backward Classes was set out in Scheme III, Part I of the Madras Provincial and Subordinate Rules (a copy of the same tendered during the hearing). These rules were made in exercise of the powers conferred under Section 241(2)(*b*) read with Sections 255 and 275 of the Government of India Act, 1935. The schedule identifies the Backward Classes solely on the basis of caste. The Supreme Court did not find it invalid on that ground.

7.10. It is submitted that, therefore, special provision for advancement of any socially and educationally backward classes of citizens may be made by determining the socially and educationally backward classes on the basis of caste. Article 15(4) neutralised *Champakam Dorairajan*[25] ruling. Constitution (First Amendment) Act inserting Article 15(4) is not challenged and not open to challenge. It was enacted by, the Provisional Parliament which consisted of the very same Members who constituted the Constituent Assembly. See observations in *Kesavananda Bharati*[6] at SCC p. 474, para 636. In view of Article 15(4) determination of Backward Classes will be valid when it is on the basis of caste being taken into account overriding operation of Articles 29(2) and 15(4).

7.11. Our Constitution is not caste blind. See *E.V. Chinnaiah* v. *State of A.P.*[33]

7.12. See *Indra Sawhney*[31], SCC p. 715, para 799 placita *a-e*

8. *The Reason for Incorporation of Article 15(5)*

8.1. The need for Article 15(5) arose in the context of rulings of this Hon'ble Court in *T.M.A. Pai Foundation*[28] and *P.A. Inamdar*[29].

8.2. In *Unni Krishnan, J.P.* v. *State of A.P.*[17] this Hon'ble Court ruled that Article 19(1)(*g*) is not attracted to establishing and running educational institutions.

31 1992 Supp (3) SCC 217
32 (1951) 1 MLJ 625.
33 (2005) 1 SCC 394 at p. 426, para 83.

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However, *Unni Krishnan*[17] was overruled on this aspect in *T.M.A. Pai Foundation*[28]. It held that the right to establish and run an educational institution is an "occupation" within the meaning of Article 19(1)(*g*)[34].

8.3. With regard to Private Aided Professional Institutions (non-minority), *T.M.A. Pai Foundation*[28] ruled that as there is no fundamental right to carry on occupation with the funds coming as aid from the State, the State has jurisdiction to provide for reservation in those institutions[35]. *P.A. Inamdar*[29] ruled that in unaided institutions there could be no reservation of seats by the State.

8.4. In *P.A. Inamdar*[29], the scope of ruling in *T.M.A. Pai*[28] was considered in the context of *Islamic Academy of Education* v. *State of Karnataka*[36]. See *P.A. Inamdar*[29], at SCC p. 589, in paras 92 placita *e-f*, 93; at p. 601, paras 124 and 125 placita *d-e*, and at p. 603, para 132.

8.5. The above ruling disabled the State to resort to its enabling power under Article 15(4) of the Constitution in the matter of admissions in private educational institutions. With regard to unaided minority and non-minority educational institutions *T.M.A. Pai Foundation*[28], when holding that Article 19(1)(*g*) is attracted, has not given effect to Preamble and Directive Principles of State Policy in the context of reservation. *P.A. Inamdar*[29] was only interpreting *T.M.A. Pai Foundation*[28].

8.6. The above two rulings necessitated the enactment of Constitution Ninety-third Amendment Act, 2005 inserting Article 15(5) by which enabling power was conferred on Parliament and the State Legislatures, so that they will have legislative competence to pass a law providing for reservation in educational institutions which will not be hit at by Article 19(1)(*g*). But rights of minorities under Article 30 being inalienable and an additional protection which could not be overridden, Article 15(5) excluded institutions falling under Article 30.

8.7. *Kesavananda Bharati*[6] ruled that while fundamental rights may not be abrogated, they can be abridged. In this context three types of rights have to be borne in mind. Fundamental right to property which existed before Twenty-fourth Amendment was one which could be even completely abrogated in view of Preamble and Part IV. The validity of Twenty-fourth Amendment of the Constitution abrogating or abridging the fundamental rights has been upheld. The right under Article 19(1)(*f*) has been completely abrogated by the Forty-fourth Amendment of the Constitution. Right to life under Article 21 read with Article 14 can neither be abridged nor abrogated. Right under Article 19(1)(*g*) can be abridged, but not abrogated. It is permissible for the constituent power to abridge the same. This abridgement is in the context of need for reaching the goal of the Preamble of the Constitution by enacting laws to redeem the "promise" made to the backward classes of citizens and the "charge" on the society to be redeemed. Submission is it is inappropriate to even view it as abridgement. It is an instance of transforming the principles of Part IV into Part III whereby it becomes enforceable. Articles 15(4), 16(4) and now 15(5) which are part of Part III operate as a limitation on formal or technical equality.

34 (2002) 8 SCC 481 at p. 535, para 25.

35 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481 at pp. 550-51 paras 71, 72.

36 (2003) 6 SCC 697.

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8.8. Fundamental Rights guaranteed under Part III of the Constitution are not absolute rights. See *T.M.A. Pai Foundation*[28] SCC p. 578, para 135

8.9. See also *Waman Rao* v. *Union of India*[37] SCC p. 380, para 14

8.9-A. Articles 19(2) to (6) are instances of abridgement of fundamental rights which are part of original Constitution. By amendment also, when Directive Principles of State Policy are transformed in to Fundamental Rights, they will operate as abridgement of rights under Articles 19(1)(*a*) to (*g*) and will take the place of limitations in Part III on Fundamental Rights of some citizens to ensure the Fundamental Rights of rest of the citizens in the context of social welfare legislations. [Kindly see *T.M.A. Pai Foundation*[28] at p. 578 para 135 quoted above]. Keeping this principle in view the observation of Khanna, J. in *Kesavananda Bharati*[6], SCC at p. 762 that fundamental rights may be abridged has to be appreciated.

8.9-B. Article 15(4) introduced by 1st Amendment is a similar instance of the Fundamental Rights of general category of citizens abridged to ensure the Fundamental Rights of BCs, SCs, and STs. It can be viewed as a restriction or a limitation on the Fundamental Rights of that class of citizens. Mr K.K. Venugopal not only conceded the validity of Article 15(4) but proceeded on the ground that it is a basic feature. Article 15(5) is a similar provision and well within the Constituent power of amendment viewed even as a restriction or limitation on Fundamental Rights having the effect of abridgment of Fundamental Rights of general category of citizens. This process of apparently abridging the rights of general category of citizens is in truth and substance one of balancing of rights of all sections of citizens in the process of advancement of weaker sections.

8.10. In *Indra Sawhney*[24] this Hon'ble Court held provision under Article 16(4) could be made by an executive order[38]. The said principle will apply also to Article 15(4). In *M.R. Balaji*[39] dealing with Article 15(4) this Hon'ble Court also had taken the same view. However, after the judgments in *T.M.A. Pai Foundation*[28] and *P.A. Inamdar*[29] Article 15(4) has to be read and interpreted in the light of principle of law declared therein as inbuilt into Article 15(4).

8.11. *T.M.A. Pai Foundation*[28], it is submitted, did not consider the question as to whether reservation policy would be an unreasonable restriction on the right under Article 19(1)(*g*). It only declared the right of establishing and running an educational institution to be a fundamental right under Article 19(1)(*g*). The ruling in *P.A. Inamdar*[29], held that imposing the reservation policy of the Government in unaided non-minority institutions (and minority institutions) would be an unreasonable restriction on the right under Article 19(1)(*g*). Power under Article 15(4) and Article 15(5) could now be invoked by plenary legislation made by Parliament to impose the policy of reservation prevailing over Article 19(1)(*g*). In regard to minority institutions limitation under Article 30 operates and hence they had to be excluded from the ambit of Article 15(5).

37 Hereinafter referred to as "*Waman Rao*", (1981) 2 SCC 362

38 1992 Supp (3) SCC 217 at pp. 687-89, paras 735-37.

39 1963 Supp (1) SCR 439 at p. 457

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8.12. A constitutional amendment became necessary to neutralise the said two judgments so that law as it prevailed before *T.M.A. Pai Foundation*[28] and *P.A. Inamdar*[29], got restored just as by the Twenty-fourth Amendment the law as it prevailed before the ruling in *I.C. Golak Nath* v. *State of Punjab*[40] stood restored and its validity being upheld in *Kesavananda Bharati*[6]. The amendment leaves the law declared by this Hon'ble Court intact in relation to minority educational institutions, i.e. Article 30(1).

9. *Article 15(5) is an Enabling Provision*

9.1. Article 15(5) vests power in Parliament and the State Legislatures and enables them to make special provisions in favour of Socially and Educationally Backward Classes of Citizens in the matter of their admission to educational institutions. Its validity has to be tested on principles applied to test the validity of vesting of enabling power. The vesting of power under Article 15(5) has to be tested on the principle of basic structure. The exercise of power thereunder will be tested on the principles applicable to test the validity of the legislative/executive actions and not by reference to the vesting power. See for the principle per Khanna, J. in *Kesavananda Bharati*[6] (SCC p. 765, para 1421). See also *Charan Lai Sahu* v. *Union of India*[41] and *M. Nagaraj* v. *State of Karnataka*[42], (as to enabling provision vesting power).

9.2. Article 15(5) invests power in Parliament and State Legislatures to make special provisions by law for the advancement of any socially and educationally backward classes of citizens or for Scheduled Castes and Scheduled Tribes relating to their admission to educational institutions including private educational institutions, whether aided or unaided by the State. It is an accepted and known method of conferring legislative power.[43]

9.3. Legislative power is conferred by Constitution. See e.g. Articles 246, 254 etc. Article 15(5) is a similar provision conferring legislative power. It is well settled that Lists I, II and III in Seventh Schedule only demarcate the field of legislation and do not confer power. Power has to be traced to the Articles of the Constitution[44]. See illustratively Article 262 of the Constitution which has been held to confer legislative power. The Inter-State Water Disputes Act ousting the jurisdiction of Courts including even Supreme Court has been held as enacted under Article 262. The said Act has been held to be not on any of the topics of legislations mentioned in List I of

40 Hereinafter referred to as "*I.C. Golak Nath*", (1967) 2 SCR 762.

41 (1990) 1 SCC 613 at p. 666, para 63.

42 Hereinafter referred to as "*M. Nagaraj*", (2006) 8 SCC 212 at p. 270, para 106.

43 Instances of Article in which Parliament by law is so enabled are as follows: Articles 2, 3, 22(7), 32(3), 33, 34, 59(3), 80(5), 81(1)(*b*), 82, 83(1) and (2), 97, 98(2) and (3), 100, 101(1), 102(1)(*a*) and (*e*), 105(3), 120(2), 133, 134, 135, 138(2), 139, 140, 148(3), 169(1), 171(2), 172, 222(2), 230(1), 231, 239, 239-A, 239-AA, 241(1), 243-ZC(3), 244-A, 245, 247, 248, 252, 262(1), (2), 267, 268-A(2) and (6), 269(2), 275, 280(2), 285(1) and (2), 286, 289(2) and (3), 302, 303, 307, 312, 312-A, 315(2), 323 B, 341(2), 342(2), 366(9), 371 E.

44 *Union of India* v. *H.S. Dhillon*, (1971) 2 SCC 779 at pp. 792-93

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Seventh Schedule. In this regard kindly see *the Cauvery Water Disputes Tribunal, In re*[45].

9.4. Article 15(5) is not a case of abdication or delegation of power. It is a conferment of legislative power. The Constitution conferring legislative power on Parliament/State Legislatures is not open to challenge on the ground of excessive delegation. The concept of delegation or excessive delegation does not arise. Parliament and the State legislatures are the only limb of each State which have legislative power and on which alone legislative power may be conferred[46]. Conferring legislative power on them in regard to specified subject-matter is not delegation.

10. *Exemption of Minority Educational Institutions in Article 15(5)*

10.1. Exempting the minority educational institutions falling under Article 30 is to conform to the constitutional mandate of additional protection for minority. The right by way of protection to minority is 'inalienable'.[46]

10.2. When India attained freedom it was arrived at as a compromise of an idea of having separate electorates based on religion and a decision taken to have a system of joint electorates so that every candidate in an election would have to seek support of all sections of the constituency. In turn special safeguards were provided for minorities in Part III.[47]

10.3. Exempting minority institutions falling under Article 30 is a ratification by a constitutional provision of the ruling of this Hon'ble Court in *T.M.A. Pai Foundation*[28] and *P.A. Inamdar*[29].

10.4. Not to exclude such minority educational institutions would result in a Social Secular Democratic Republic being transformed into a theocratic State. As the exclusion of minority educational institutions is valid, the argument as to severability in deciding the validity of Article 15(5) is misplaced[48].

10.5. The contention that exclusion of minority educational institutions is violative of the secular character of the constitution is misconceived. Minorities are both based on religion and language. Both fall under Article 30 and both have been excluded. Also among minorities, there is no favourable treatment in favour any one religious minority or linguistic minority as against another. Not to exclude them would convert a democratic State into a theocratic State and would thereby violate 'Secularism'. The reasons for excluding minority educational institutions is to conform to Article 30, and the law laid down by this Hon'ble Court in *T.M.A. Pai Foundation*[49] and *P.A. Inamdar*[29].

45 1993 Supp (1) SCC 96(II) at p. 136, para 67 between placita '*f*'-'*h*'. (also see para 62 at p. 134 and para 65 at p. 135)

46 Per Sikri, C.J. In *Kesavananda Bharati* v. *State of Kerala*, SCC at p. 329, para 128.

47 *T.M.A. Pai Foundation* v. *State of Karnataka*, SCC at p. 592, para 166.

48 See *T.M.A. Pai Foundation* v. *State of Karnataka*, SCC at p. 615, para 228 between placitum *d-e*.

49 (2002) 8 SCC 481 at pp. 582, 583 para 149. (In this regard kindly see also paras 84, 85, 86 at p. 554, para 87 at p. 555, para 103 at p. 561, para 107 at p. 563, para 141 at p. 579, paras 142, 143 at p. 580, para 148 at p. 582, para 149 at pp. 582, 583, para 151 at p. 584, para 152 at pp. 584, 585, para 155 at pp. 585, 586.)

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11. *Interrelationship between Articles 15(4) and 15(5)*

11.1. The argument that Article 15(4) is a general provision and Article 15(5) is a special provision is not tenable. Article 15(5) is an additional provision. They complement each other. They operate in the same field and the enabling power is vested in the same authority viz. Parliament/State Legislatures.

11.2. Under Article 15(4) both legislative and executive power could be exercised for making provisions for the advancement of socially and educationally backward classes of citizens. Article 15(5) in addition enables exercise of power by law prevailing over Article 19(1)(*g*) in the matter of admission in educational Institutions. Article 15(5) does not conflict with Article 15(4) or override Article 15(4). They complement and supplement each other.

11.3. Article 15(5) aims at neutralising the effect of the ruling in *T.M.A. Pai Foundation*[28] and *P.A. Inamdar*[29]. The interpretation placed by the Supreme Court on an Article of the Constitution becomes part of that Article and that Article with the content of such meaning as interpreted by the Supreme Court is, within the constituent power of amendment. Such amendment is again open to judicial review by the Supreme Court to ensure that an amendment does not violate the basic structure of the Constitution. It is part of the principle of checks and balance provided for by the Constitution. The principle of testing the plenary legislation as to whether it has legislative power to reverse the judgment of the Court does not apply to amendments of the Constitution. Twenty-fourth Amendment introducing Article 13(4) was in reversal of the ruling in *I.C. Golak Nath*[40]. It was upheld and declared to be not violative of the basic structure of the Constitution. Article 16(4-A) was similarly upheld in *M. Nagaraj*[42].

11.4. Article 15(4) was incorporated by the Provisional Parliament whose members were the very same members of the Constituent Assembly and it is as good as part of the original Constitution and is not open to challenge; nor ever challenged. It contemplates making special provisions. Reservation is the highest form of special provision[50]. Article 15(4) and Article 16(4) are part of constitutional promise[51] to weaker sections/socially and educationally backward classes of citizens and SCs and STs. That promise has to be redeemed. The Ninety-third Amendment and the impugned Act are in the discharge of a duty to redeem the said promise. They do not violate the basic structure of the Constitution, but aim at egalitarian equality which is a basic postulate of the Constitution.

11.5. Articles 15(5) does not open with the usual pattern of non obstante clause with opening words 'notwithstanding', but uses the expression "Nothing in this Article or in sub-article (*g*) of Clause (1) of Article 19 shall prevent the State from making any special provision". Being a provision which is additional to Article 15(4), reading Article 15(4) and Article 15(5) together, they provide that if anything in any part of Article 15 and/or Article 19(1)(*g*) and/or anything in Article 29(2), which prevents the State from making any special provisions for the advancement of

50 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 at p. 693, para 743 placitum '*a*'. B.P. Jeevan Reddy, J. held, "In our opinion, reservation is the highest form of special provision, while preference, concession and exemption are lesser forms."

51 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 at p. 751, para 836

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socially and educationally backward classes of citizens or for SCs and STs, that disability is removed.

11.6. As there is nothing in Article 15(4) which prevents the State from making any special provision, Article 15(5) does not operate to override Article 15(4). They have to be read together as supplementary to each other, Article 15(5) being an additional provision in the context mentioned earlier.

11.7. As submitted earlier, to get over the situation created by *T.M.A. Pai Foundation*[28] and *P.A. Inamdar*[29], legislative power had to be conferred on Parliament and State Legislatures to make laws ensuring that nothing in Article 19(1)(*g*) shall prevent them from making such law. By reason of the ruling in *M.R. Balaji*[52] in the context of Article 15(4) and the principle of the ruling in *Indra Sawhney*[24] in the context of Article 16(4), by executive power, special provision could be made for the advancement of SEBCs in the field of education. However, the executive power of the State Legislatures to the extent of Article 19(1)(*g*) required legislative backing by virtue of the rulings in *T.M.A. Pai Foundation*[28] and *P.A. Inamdar*[29]. Article 15(5) restored the legislative competence to Parliament and State Legislatures removing the disability operating by virtue of Article 19(1)(*g*) and thereby restored executive power coextensive with legislative power.

11.8. There is no conflict between Articles 15(4) and 15(5). There is no occasion to deal with the question as to Article 15(4) being allegedly a general provision and Article 15(5) being allegedly a special provision. On the contrary Articles 15(4), 15(5), 29(2), 30(1) and 30(2) all together constitute a Code in relation to admission to educational institutions. They have to be harmoniously construed in the light of Preamble and Part IV.

11.9. See as to principles of harmonious construction, in *Venkataramana Devaru* v. *State of Mysore*[53]. In this regard see also *K.M. Nanavati* v. *State of Bombay*[54].

11.10. Constitutional provisions are not to be interpreted as conferring conflicting powers in the same authority in the same field. Necessarily, both the provisions have to be harmoniously interpreted. If more than one interpretation could be placed on Article 15(5) that interpretation which will make the provision valid and in harmony with the other provisions of Article 15 has to be placed thereon.

11.11. In the field covered by Article 15(4) and Article 15(5), they are unfettered. If there is a common field, then both have to be construed harmoniously. Under Article 15(4) special provision could be both by law as well as by executive order. Under Article 15(5) special provision can only be by law. Article 19(1)(*g*) can be overridden by Constitution Amendment by way of abridgement and power can be conferred only on legislature to enact law based on such amendment of the Constitution. Therefore there is no conflict with executive power. However, executive power cannot be exercised for imposing reasonable restrictions on Article 19(1)(*g*) right. It could be by law. Therefore 15(5) is in addition to Article 15(4). In the context of Article 19(1)(*g*), Article 15(5) operates. In all other respects both Articles 15(4) and 15(5) will operate.

52 1963 Supp (1) SCR 439
53 (1958) 1 SCR 895 at pp. 918-19
54 (1961) 1 SCR 497 at pp. 524-26.

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11.12. Articles 15(1) and (2) are prohibitions and Articles 15(4) and (5) will operate to override them in the areas and in favour of citizens mentioned therein. Article 15(4) being not such a prohibition, Article 15(5) does not override Article 15(4). See the objects and reasons of Ninety-third Amendment. The rule to be applied for interpretation of Article 15(5) is the rule of suppressing the mischief and advancing the remedy.

12. *Article 368(2) proviso not attracted*

12.1. The plea that Ninety-third Amendment is invalid for alleged violation of the Proviso to Article 368 is not tenable. Article 15(5) does not interfere with the executive power of the States. The power of Parliament and State Legislatures to legislate is provided for in Articles 245 to 255. The executive power of the Union extends to the matters with respect to which Parliament can make laws. See Article 73 and that of the State executive to mattes with respect to which the State Legislature has power to make laws. Under the Proviso to Article 162, in any matter with respect to which the State Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to and limited by the executive power expressly conferred by the Constitution or by any law made by Parliament upon the Union or authorities thereof.

12.2. The Ninety-third Amendment does not expressly or impliedly make any change in Article 162. Article 368(2) proviso is not attracted to the present case as contended for. There is no breach of Article 368(2) proviso. Article 15(5) does not seek to make any change in Article 162 either directly or indirectly. It is the Articles of the Constitution which confer power on Parliament and State Legislatures. The entries only demarcate the field of legislation. See *Union of India* v. *H.S. Dhillon*[44]. The field of legislation as to education is Item 25 of List III. By virtue of the 42nd Amendment of the Constitution, education, which was in Entry 11 in List II was deleted and inserted in List III as Entry 25. As the field of legislation is in List III, in view of the operation of Article 254 will operate. Article 162 proviso will be attracted to executive power of State which is co extensive with legislative power. By reason of Proviso to Article 162 the executive power of the State be subject to and limited by the executive power expressly conferred by the Constitution or by any law made by Parliament, upon the Union or authorities thereof. Article 15(5) does not change this position. The executive power of the State is not touched by the Amendment, but is preserved in accordance with the rulings of this Hon'ble Court.

12.3. In view of the rulings of this Hon'ble Court in *T.M.A. Pai Foundation*[28] and interpreted in *P.A. Inamdar*[29], without legislative support, no reservation can be made in private educational institutions merely by exercise of the executive power. In view of the rulings in *T.M.A. Pai Foundation*[28] and interpreted in *P.A. Inamdar*[29], a disability precipitated from making reservation in unaided institutions. Hence that disability had to be removed by the Constitutional Amendment introducing Article 15(5). Article 15(5) opens with the word "nothing in this Article or in sub-clause (*g*) of Clause (1) of Article 19 shall prevent the State from making any special provision....."

12.4. With regard to matters falling under Concurrent List, the position is covered by the Proviso to Article 162 from which the following position emerges:

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(*a*) The executive power of the State shall be subject to and limited by the executive power expressly conferred by this Constitution on the Union;

(*b*) The executive power of the State shall be subject to and limited by any law made by Parliament;

(*c*) The executive power of the State shall be subject to and limited by the executive power expressly conferred by the Constitution or any law made by Parliament upon the Union or any authorities thereof;

(*d*) The executive power of the State shall be limited by the executive power conferred by law made by Parliament.

The Ninety-third Amendment does not fall within the scope of Proviso to Article 368.

13. *Article 15(5) is not violative of the Basic Structure of the Constitution*

13.1. *Kesavananda Bharati*[6] ruled that it is permissible to amend the Constitution by abridging the fundamental right.

13.2. Article 15(5) does not abrogate fundamental right under Article 19(1)(*g*). Article 15(5) incorporates the principles of Part IV in Part III. It becomes part of Fundamental Right and so cannot be considered as abridgement of Fundamental Rights. Assuming that there is an abridgement of Fundamental Right, it is in a limited area of admissions to educational institutions, such abridgment does not violate the basic structure of the Constitution. Article 15(5) is, therefore, not violative of the basic structure of the Constitution.

13.3. There are no implied and inherent limitations on the power of the amendment of the Constitution as, ruled by the majority view in *Kesavananda Bharati*[6]. The relevant passages are as follows; Sikri, C.J. at SCC p. 365; Shelat and Grover, JJ., SCC at p. 453; Hegde and Mukherjea, JJ., SCC at p. 483; Jaganmohan Reddy, J., SCC at pp. 627-28. Ray, J. at SCC pp. 593-94, para 1064, Palekar, J. at SCC p. 726, para 1333, Khanna, J. at SCC pp. 776-77, paras 1447-48, Mathew, J. at SCC p. 881, para 1715, Beg, J. at SCC p. 913, paras 1935-37, Dwivedi, J. at SCC pp. 942-43, para 1932, Chandrachud, J. at SCC pp. 987-88, para 2083.

13.4. Therefore, 7 Judges have ruled that there is no implied limitation on the Amending Power under Article 368 of the Constitution.

13.5. The principle of equating "constituent power" to ordinary legislative power which is "constituted power" and on that the principle testing the validity of the Constitutional Amendment is not permissible.

13.6. It is submitted that Constituent power to amend, includes the power to amend Fundamental Rights. The Constitution Twenty-fourth Amendment provided that 'nothing in Article 13 shall apply to the amendment of the Constitution under Article 368' and 'nothing in Article 13 shall apply to any amendments made under this Article'. The objects and reasons for the Twenty-fourth Amendment indicated that it was restoring the law as it prevailed before *I.C. Golak Nath*[40]. The exercise of constituent power had the effect of reversing *I.C. Golak Nath*[40]. This Hon'ble Court upheld the validity of the Twenty-fourth Amendment in *Kesavananda Bharati*[6]. The test applied to plenary legislation was not applied.

13.7. In view of Articles 13(4) and 368(3) introduced by the Twenty-fourth Amendment, the validity of which was upheld in *Kesavananda Bharati*[6],

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Fundamental Rights under Part III are amendable. Fundamental Rights are capable of abridgment by such amendment. See *Kesavananda Bharati*[6] per Khanna, J. at SCC p. 762, para 1416. See also the observations of this Hon'ble Court in *Kesavananda Bharati*[6] on Parliament's amending power including Fundamental Rights which are relevant in this context at SCC pp. 756-57, 770 & 806.

13.8. Constitution Amendments for giving effect to the Directive Principles of the State Policy would not offend the basic structure of the Constitution.

13.9. The submission is that amendments which may abridge individual rights to promote Constitutional ideal of "justice, social, economic and political" and "equality of status", are not liable to be struck down as such amendments cannot be held to violate the Basic Structure of the Constitution, but strengthen the egalitarian equality doctrine comprised in Articles 14, 15 and 16 read with the Preamble and Part IV. Such amendments aid the progress towards reaching the goal of egalitarian society and strengthen the basic structure foundation of the Constitution. In *Waman Rao*[55] See SCC p. 389, para 29.

13.10. In the implementation of policies to achieve "justice, social, economic and political" and "equality of status and opportunity" which are social objectives to bring about an egalitarian society, State may be faced with problems of conflict between individual rights and interest on the one hand and rights and welfare of vast sections of the population on the other. The approach in such situations of conflict is that the right of the individuals has to be conditioned by social responsibility. Kindly see the following passages in *Kesavananda Bharati*[6], SCC at p. 790, paras 1476 & 1478 per Khanna, J. Kindly see in this connection the observations of Hon'ble Justice Mathew, in *Indira Nehru Gandhi* v. *Raj Narain*[56].

13.11. It is submitted that the validity of the Constitution Ninety-third Amendment is not to be tested by elevating the rights of the general category candidates to the same level and placing it at par with the larger interests of society. Larger social purpose of upliftment of the socially and educationally backward classes of citizens would stand at a higher footing and prevail and would have primacy. Individual rights of general category candidates would be subordinate to such larger social purpose. It is a constitutional imperative.

13.12. The Amendment in furtherance of the goals set out in Preamble and values set out in Part IV. It strengthens the foundation of the Constitution. "The democratic foundations are missing when equal opportunity to grow, govern and give one's best to the society is denied to sizeable section of the society"[57]. Hence, the requirement of reservation. Kindly see, *Indra Sawhney* v. *Union of India*, SCC at p. 509, para 411 and SCC at p. 686, para 733.

14. *Egalitarian Equality*

14.1. The content of the concept of social justice may vary from country to country and at different stages of social development. In the context of social welfare measures, its categorical imperative is constant. That constant is the concept of

55 (1981) 2 SCC 362

56 1975 Supp SCC 1 at p. 124, paras 286, 287 and 288.

57 Per Hon'ble Justice Sawant in *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 at p. 509, para 411 between placita *a-b*.

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justice—social, economic and political' 'equality of status and of opportunity' and 'to promote among them all fraternity'—the noble vision set out in the Preamble.

14.2. Articles 330 and 332 contain benign provisions to afford empowerment in the political arena in favour of SCs/STs in the House of People and in the Legislative Assemblies of States.

14.3. Such a provision is unnecessary in the case of backward classes of citizens as a member of that class could on the strength of their population get elected.

14.4. Article 16(4) is an enabling provision whereunder the State may make reservation of appointments or posts in favour of any `backward classes of citizens' which will include SCs/STs who are also backward.

14.5. In *Indra Sawhney*[24] see SCC at pp. 632-33, para 642 and SCC at p. 693, para 743.

14.6. The objective behind Articles 14, 15(4), 15(5), 16(1) and 16(4) read with Articles 38 and 46 is to march towards the goal envisaged by the Preamble. "The single most powerful tool for the upliftment and progress of such diverse communities is education[58]." Educational opportunities play an important and vital role in achieving these objectives. See *Indra Sawhney*[59].

14.7. The submission is that the same principles apply to Articles 15(4) and Article 15(5).

14.8. Article 16(4) is not an exception to Clause (1). It is an instance and an illustration of the classification inherent in Clause (1). Please see *Indra Sawhney* v. *Union of India*[31], SCC at p. 691, para 741 placitum *d-e*.

14.9. It is respectfully submitted that the same principle would govern the interpretation of Articles 15(4) and 15(5). See *Indra Sawhney* v. *Union of India*[31], SCC at p. 512, para 421.

14.10. The submission is this can be achieved only by providing them adequate educational opportunities at every level, more so at higher levels.

14.11. See *Pradip Jain*[60] where this Hon'ble Court was dealing with equality in the context of educational opportunities to the weaker sections in para 13. It may be noted that *Pradeep Jain*[61] was dealing with medical education.

14.12. See

(*a*) *Indra Sawhney* v. *Union of India*[31], SCC at pp. 515-16, para 429.

(*b*) *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481 at p. 529, first para

14.13. Reservation is the "highest form of special provision"[62]. Article 15(4), Article 15(5) and Article 16(4) are part of the constitutional promise to weaker sections/socially and educationally backward classes of citizens and SCs and STs.

58 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481at p. 529, para 1

59 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 at p. 734, para 808 and p. 766, para 859 answer to Question 2(*a*).

60 (1984) 3 SCC 654 at pp. 676-77, para 13.

61 *Pradeep Jain* v. *Union of India*, (1984) 3 SCC 654.

62 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 at p. 693, para 743.

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That promise has to be redeemed. The Ninety-third Amendment and the impugned Act are in the discharge of a duty to redeem the said promise.

14.14. Article 15(3) is part of the original Constitution and provides for 'special provisions' for women and children. "Special Provisions" in Articles 15(3), Article 15(4) and Article 15(5) have to bear the same interpretation. As to the interpretation of Article 15(3), kindly see *Govt. of A.P.* v. *P.B. Vijaya Kumar*[63]; followed in *Union of India* v. *K.P. Prabhakaran*[64].

14.15. In *Govt. of A.P.* v. *P.B. Vaya Kumar*[63] see SCC at p. 525, para 8, and SCC at p. 526, para 8

14.16. *Union of India* v. *K.P. Prabhakaran*[64] related to appointment to the posts of Enquiry-cum-Reservation Clerks in Reservation offices in the specified Metropolitan cities of Madras, Bombay, Calcutta and Delhi. The Railway Administration took an administrative decision and issued a Circular that both the upper and lower class reservation counters in the Reservation Offices in the metropolitan cities "would have to be manned only by women." Madras High Court[65] struck down the Circular Delhi High Court[66] upheld it. This Hon'ble Court upheld the validity of such reservation in favour of women relying upon Article 15(3).

II. CONSTITUTIONAL VALIDITY OF THE CENTRAL EDUCATIONAL INSTITUTIONS, (RESERVATION OF ADMISSION) ACT, 2006 (ACT NO. 5 OF 2007)

0. (*i*) OBCs, SCs and STs must be enabled to compete with non-reserved category by placing them on a level playing ground along with them and ensure a real and effective equality of opportunity for them. In the context of the history of the country the inequality in status is primarily due to prevailing caste system. OBCs, SCs and STs have also to be brought to a position of enjoying equal status. This alone will bring about fraternity thereby assuring dignity to them. By egalitarian proportional equality to avail them higher education they will be enabled to qualify themselves to reach positions which will give them economic and social status. They will also be able to enter private fields of occupations, become entrepreneurs, specialists in different fields and subjects and will have an opportunity to reach national and international repute in a particular field and thereby enhance their status. Higher education confers on them great dignity. The amendment, therefore, does not affect the basic structure of the Constitution. The Act does not suffer from any Constitutional infirmity.

(*ii*) Mandal Commission made recommendation both in regard to education and employment and recommended 27% reservations in their favour. The Central Government discharged its solemn duty towards the socially and educationally backward classes of citizens vis-à-vis public employment only in the year 1990 which was the subject-matter of the decision in *Indra Sawhney*[31]. After the said decision, the policy of reservation was implemented by the Central Government from 1993. Parliament having realised that the executive has not exercised its power

63 (1995) 4 SCC 520.
64 (1997) 11 SCC 638.
65 (1979) 1 SLR 553.
66 (1979) 2 SLR 560.

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enabled by Article 15, has intervened by the impugned Act mandating reservation in educational institutions which is a solemn duty and Constitutional obligation.

1. *Section 2(g) of the Act not an excessive delegation*

1.1. Section 2(*g*) of the Act defines "Other Backward Classes" as "class or classes of citizens who are socially and educationally backward and are *so determined by the Central Government*". It does not suffer from the vice of excessive delegation. The identification of backward classes could therefore, be done in the exercise of the executive power except in areas covered by Article 19(1)(*g*) where it has to be backed by plenary legislation. The content and meaning of the phrase `backward classes of citizens' is settled by rulings of this Hon'ble Court. They have been exhaustively dealt with in *Indra Sawhney*[31]. There are sufficient guidelines by the authoritative pronouncements of this Hon'ble Court, both for Parliament as well as to the executive while exercising its delegated power under Section 2(*g*) read with Section 3 of the Act. Preamble, Part III and Part IV (referred to earlier in this written submissions) also provide adequate guidance. The said delegated power has to be read along with Section 7 which ensures effective parliamentary control on the exercise of the executive power.

1.2. The plea of the petitioner that Parliament itself should have determined by the Act the OBCs and the Act suffers from excessive delegation and for lack of guidelines, is not tenable. It is submitted that the Report of the Mandal Commission the judgment in *Indra Sawhney*[31] and the earlier cases have laid down the guidelines and tests.

1.3. In *Registrar of Coop. Societies* v. *K. Kunjabmu*[67], this Hon'ble Court has laid down, that a generous degree of latitude must be permissible in the case of welfare legislation, particularly those which are designed to further the Directive Principles of State Policy when considering the power of delegation. Please see, *Registrar of Coop. Societies, Trivandrum* v. *K. Kunjabmu*[67] SCC at p. 342, para 3.

1.4. There is no excessive delegation also for the reason that Section 7 provides for laying the Notification before Parliament. The notification determining the backward classes of citizens, will have to be placed before Parliament under Section 7 of the Act. This provision maintains control by Parliament and meets the argument as to excessive delegation. In *M.K. Papaih and Sons* v. *Excise Commr.*[68], this Hon'ble Court laid down the principle that laying of rules before the legislature is sufficient control over delegated legislation[69]. See also *Quarry Owners Assn.* v. *State of Bihar*[70]. As Parliamentary control is ensured, it is not open to challenge as to alleged excessive delegation.

1.5. Backward classes of citizens have to be identified on the materials and evidence and therefore, Parliament necessarily has to leave it to the executive. If Parliament itself has to identify in the Act itself, it will have to be preceded by a long drawn process which would be impracticable and cause enormous delay. It is

67 (1980) 1 SCC 340.

68 (1975) 1 SCC 492 at 497 para 18, at p. 498, paras 23 and 24.

69 The decision in *M.K. Papaih and Sons* v. *Excise Commr.*, (1975) 1 SCC 492 has been followed with approval in *A.K. Roy* v. *Union of India*, (1982) 1 SCC 271 at p. 314, para 54 in *R.C. Tobacco (P) Ltd.* v. *Union of India*, (2005) 7 SCC 725 at p. 739, para 26.

70 (2000) 8 SCC 655 at p. 684.

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appropriate to leave identification to the executive. Such determination of each class as backward class would be open to judicial review by this Hon'ble Court. In such a situation, the scope of judicial review is wider than if the identification is made by Parliament.

1.6. Determination may be even a determination made earlier. It is not necessary that it should be only a future determination after the Act. Kindly see by way of analogy the principle on the construction of words "dying intestate" occurring in Hindu Law of Inheritance (Amendment) Act, 1929. See *Lala Duni Chand* v. *Mt. Anar Kali*[71].

2. The absence of provision for periodic review will not invalidate the Act

2.1. It is not a legal requirement that in regard to any welfare measure, a time-limit should be prescribed for the duration of its operation and if it is not so done, the law would be bad. Merely because a time-limit has not been fixed, the Act will not be rendered invalid. There is power in Parliament to review periodically the matter and either make modifications in the Act or repeal the Act. Insofar as the present Act is concerned, it is for the first time, certain special provisions are being made in favour of socially and educationally backward classes of citizens, SCs and STs for reservation of seats in Central Educational Institutions after 56 years of the coming into force of the Constitution. At its very commencement, a time-limit may not be anticipated and fixed. Over a period of time depending upon the result of the measures taken and improvements in the status and educational advancement of the socially and educationally backward classes of citizens, the matter could always be reviewed. The Act cannot be struck down at the very commencement, on the ground no time-limit for its operation has been fixed. The absence of a provision for review will not invalidate the Act. Articles 330 and 332 have been periodically reviewed and constituent power has been exercised to extend the time. Similarly plenary power of Parliament having regard to the progress and advancement of the socially and educationally backward classes of citizens.

2.2. One of two methods may be followed. A time-limit may be fixed and by periodic review, the time may be extended or no time-limit may be prescribed and it may be periodically reviewed as the occasion demands and then repealed when the time is ripe. There is also the safeguard of judicial review based on the principle "*Cessante ratione legis cessat ipsa lex*". If Parliament falls, the Court will exercise its power of judicial review on the principle of the rulings in *H.H. Shri Swamiji of Amar Mutt* v. *Commr., HR & CE*[72] and in *Motor General Traders* v. *State of A.P.*[73] If reservation has fulfilled the constitutional promise and become unnecessary, on the principle that a law valid when made, may get worn out by passage of time and violate Article 14, the Court may on the facts of given case on judicial review declare it to be so.

3. Quantum of reservation provided for in the Act is valid

3.1. Article 16(4) speaks of adequacy of representation and Article 335 speaks of efficiency of administration. Articles 15(4) and 15(5) contain no such limitation. The

71 AIR 1946 PC 173. This decision has been followed with approval by this Hon'ble Court in *Daya Singh* v. *Dhan Kaur*, (1974) 1 SCC 700 at p. 704, para 5.

72 (1979) 4 SCC 642

73 (1984) 1 SCC 222

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number of seats available in educational Institutions is not adequate to meet the demand. In *T.M.A. Pai Foundation*[28] at SCC p. 584, para 151 in the context of power of reservation in minority educational institutions, this Hon'ble Court ruled.

3.2. Applying the same principle to non-minority educational institutions in the matter of providing reservation for SC/ST/OBC, the ratio of population is a relevant consideration in fixing the quantum of reservation.

3.3. Population is the basis for reservation of seats in Lok Sabha and State Assemblies[74], Panchayats and Municipalities[75]. It is because of the language of Article 16(4) and Article 335 which operated as limitations, that reservation based on population was ruled out in the matter of appointments to services in *Indra Sawhney*[31]. In the absence of any such words of limitation in Article 15, population is a relevant consideration in the matter of making reservation in educational Institutions. In any event, the Act falls within the rule of 50% which according to some learned Judges of the Supreme Court is 'rule of thumb' to meet the ends of justice and a rough and ready measure. In *Indra Sawhney*[76] this Hon'ble Court held "what is more reasonable than to say that reservation under Clause (4) shall not exceed 50% of the appointments or posts". On the law declared by this Hon'ble Court, for reservation within the 50% ceiling, it is submitted that, no additional reason by way of justification is needed. The quantum of reservation mandated by the Act is justified. It is just, fair and reasonable.

3.4. Fixation of quantum of reservation has already been determined by this Hon'ble Court in *M.R. Balaji*[52] affirmed in *Indra Sawhney*[31]. See *K.C. Vasanth Kumar* v. *State of Karnataka*[77].

3.5. The reservation in favour of OBCs is 27%. Adding the percentage of reservation for SCs, STs, it does not exceed 50%. Fixing of 50% serves two purposes. It constrains the Central Government that the total percentage of reservation does not exceed 50%. The Act further ensures that operating on the quantum of 50% reservation, the percentage of reservation in favour of OBCs is not so made as to prejudice the quantum of reservation made to SCs/STs. This Hon'ble Court did not find it necessary in *M.R. Balaji*[52] to call for any data to rule that total reservation has to be at 50%. It is submitted that 50% reservation passes the test of Article 15(4), when by judicial mandate 50% has been held to be justified. The position will be the same, when Parliament also fixes 50%.

3.6. The contention that the population of OBC has not been determined does not advance the case of the petitioners. It is indisputable that population of OBCs exceed 27%. SCs and STs constitute more than 221/2%. Therefore, the quantum of reservation fixed is permissible and valid. In *Indra Sawhney*[78] this Hon'ble Court held "the backward classes (including the Scheduled Castes and Scheduled Tribes) in this country by whichever yardstick they are measured do constitute a majority of the population".

74 Articles 330 and 332.
75 Articles 243-D and 243-T.
76 1992 Supp (3) SCC 217 at p. 734, para 807.
77 1985 Supp SCC 714 at p. 752, para 58.
78 1992 Supp (3) SCC 217 at p. 685, para 732.

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3.7. 50% reservation has social purpose to serve[79]. It is only when large number of reserved categories are brought into educational institutions and services, they will come together. If they are not brought into position in large numbers and are only of small group, the reference to them as inferior would continue. When large number of people get into the field, this practice of attributing stigma of inferiority will eventually vanish and fulfil the objective of the Preamble as to equality of "status".

4. *Quantum of reservation is a legislative fact*

4.1. The quantum of reservation within the 50% has been determined by Parliament. The petitioners have argued that it is a legislative fact and a legislative fact is open to judicial review. It is submitted that legislative facts are conclusive and the Courts do not exercise the power of judicial review by examining legislative facts.

4.2. *Indra Sawhney (II)* v. *Union of India*[80], is a case wherein Kerala State Backward Classes (Reservation of Appointments or Posts in the Services under the State) Act, 1995[81] was challenged.

4.3. This Hon'ble Court struck down Section 3 of the Kerala Act. That there was no creamy layer in Kerala was not the determination of a legislative fact, but a declaration contrary to axiomatic fact as obviously there were IAS officers serving in the State who satisfy the requirement of creamy layer. That there were persons satisfying the criteria of creamy layer was axiomatic fact. Therefore, declaration was struck down. They applied the principle of scrutiny as was done in the context of the last part of Article 31-C declaration which was declared invalid.

4.4. Legislative declaration is different from a legislative fact. Legislative declarations are of different types. Declarations by law made by Parliament in Acts enacted in the legislative field under Entries 52, 53, 54 and 56 are instances where, by declaration Parliament assumes jurisdiction in denudation of the power of the State Legislature. These declarations will not be judicially reviewed.

4.5. Legislative facts are conclusive and the Court will not judicially review the same. See *S.P. Mittal* v. *Union of India*[82] at SCC p. 117, paras 173-74.

4.6. It is respectfully submitted that the judgment in *Indra Sawhney (II)* v. *Union of India*[80] has to be interpreted in conformity with the judgment of the Constitution Bench in *S.P. Mittal*[82], and cannot be interpreted to conflict with the same.

5. *The Act cannot be held to be bad for any illegality, error, defect or deficiency in the exercise of the power under the Act*

5.1. The Act cannot be invalidated on the ground that the exercise of the power under the Act by the executive is bad. If, in any given case, if the exercise of the power is invalid, it is that which will be invalidated and not the Act itself.

5.2. As to distinction between the vesting of the power and exercise of the power, see the present written submissions at para 9 (supra).

79 Kindly note: As to whether it could exceed 50% does not arise in this case and may not be decided in this case as Tamil Nadu matters are still pending and may be decided in those proceedings.

80 (2000) 1 SCC 168.

81 Hereinafter referred to as "Kerala Act"

82 Hereinafter referred to as "*S.P. Mittal*", (1983) 1 SCC 51.

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5.3. In *P.J. Irani* v. *State of Madras*[83] this Hon'ble Court has held that possibility of the power conferred being improperly used is no ground for pronouncing the law itself invalid. See also *Collector of Customs* v. *Nathella Sampathu Chetty*[84].

5.4. The validity of the Act has to be tested on its terms and not on the basis of any executive action under the Act.

5-A. *The contention that special provisions can only be made up to 10+2 stage is untenable*

5-A.1. The contention that only up to 10+2 a special provision for advancement of BCs, SCs and STs should be made, if accepted, would result in higher education being the privilege of the higher classes and lower education being the desert of BCs, SCs and STs. It would be distortion of the concept of social advancement of downtrodden and a negation of the goal envisaged by the Preamble.

6. *Validity of Section 3 of the Act does not depend upon Section 5*

6.1. Validity of Section 3 does not depend upon Section 5. Section 5 only operates in favour of the open category candidates. It is not, therefore, liable to be struck down. It is a transitory measure. In cases where Section 5 of the Act is incapable of being operated by reason of requirements of conditions that may be imposed by statutory authorities such as Medical Council are not satisfied or are not capable of being satisfied in a given case, Section 5 will not come into operation. If Section 5 of the Act could not be resorted to for such reason, the situation will be covered by the principle that "a party disabled to perform it without any default in him, there the law will in general excuse him": *impotentia excusat legam* or *lex non cogit excusat legam*". See *Presidential Poll, Re*[85]. Section 5 and/or Section 3 will not be rendered unconstitutional for that reason.

6.2. The validity of a statute has to be tested by the generality of cases it covers and not on its operation in peculiar instances.

Kindly see

(*a*) In the matter of the *Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938*, AIR 1939 FC 1 at p. 25

(*b*) *R.S. Joshi* v. *Ajit Mills Ltd.*, (1977) 4 SCC 98 at 106 para 10. See also *N. Vasundara* v. *State of Mysore*[86]

7. *Excluding Minority Institution under Section 4(iii) of the Act would not affect the validity of the Act*

7.1. With regard to 'minority' institutions the rule of reservation of 50% cannot be applied. This will destroy the 'minority' character of the institution. The reason is, if one looks at the 50% of 'minority' admitted and say it is a 'minority' institution. Others can say 'look at 50% being non-minority, it is a non-minority institution'. The submission is, it should clearly and unambiguously project a minority character.

83 (1962) 2 SCR 169 at p. 180.

84 (1962) 3 SCR 786 at pp. 824-26.

85 (1974) 2 SCC 33 at p. 49, 50 para 15.

86 (1971) 2 SCC 22 at p. 28 followed with approval in *Saurabh Chaudhari* v. *University of Delhi*, (2003) 11 SCC 146 at p. 177, para 68.

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7.2. See *Kerala Education Bill, 1957, Re*[87]. But they did not relate to admission of reserved category candidates. It related to admitting non minority candidates to conform to Article 27 of the Constitution.

7.3. In *St. Stephen's College* v. *University of Delhi*[88] this Hon'ble Court held that the State may regulate the intake in this category with due regard to the need for the community in the area which the institution is intended to serve, but in no case such intake shall exceed 50 per cent of the annual admission and that the minority institutions shall make available at least 50 per cent of the annual admission to members of communities other than the minority community.

7.4. However, *T.M.A. Pai Foundation*[28] did not agree with the view as to the requirement of 50% seats for non minority in aided minority institutions. See *T.M.A. Pai Foundation*[89]. See *P.A. Inamdar*[90] at SCC p. 589, paras 92-93 and at SCC p. 600, para 123.

7.5. Having regard to the law laid down in *T.M.A. Pai Foundation*[28], and as interpreted in *P.A. Inamdar*[29], minority educational institutions required to be excluded from the operation of the present Act.

8. *Principle of Reverse Discrimination not applicable*

8.1. Article 15(5), which enables the exercise of power under the impugned Act are not invalid on the ground of reverse discrimination. The reservation itself cannot be struck down on the principle of reverse discrimination. The illustration of horse race in *T. Devadasan* v. *Union of India*[91] is appropriate in this regard.

8.2. Reservation is in the nature of handicap in favour of backward classes. Reservation brings the reserved class on a level playing field with open category applicants. Bringing them to a level playing field by reservation cannot by itself be held to be bad as a case of reverse discrimination.

8.3. The principle of reverse discrimination cannot be applied ignoring Articles 15(4), 15(5) and 16(4), Part IV and the Preamble. In the U.S. Constitution there are no provisions like Articles 15(4), 15(5) and 16(4) etc. *T.M.A. Pai Foundation*[28] held, Part III does not confer unfettered rights, they are subject to other provision in Part III. Article 15(4), 15(5) and 16(4) are provisions in Part III.

8.4. In *Indra Sawhney*[92], B.P. Jeevan Reddy, J. after examining the U.S. Constitution and decisions of U.S. Supreme Court, held that those principles are not to be applied in deciding the cases under the Indian Constitution and adverts to Articles 15(4) and 16(4).

9. *American Doctrine of Strict Scrutiny and Narrow Tailoring are not applicable in India*

9.1. The principle of strict scrutiny and narrow tailoring followed in U.S. has been expressly ruled by this Hon'ble Court as not applicable in the context of Indian

87 (1959) 1 SCR 995 at p. 1052.
88 (1992) 1 SCC 558 at p. 614, para 102.
89 (2002) 8 SCC 481 at p. 584, para 151.
90 (2005) 6 SCC 537.
91 (1964) 4 SCR 680 at p. 700.
92 1992 Supp (3) SCC 217 at pp. 685-86, para 732.

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Constitution and Indian conditions. In India there is presumption as to the Constitutionality of a law, and a fortiori a Constitution amendment. See *Saurabh Chaudri* v. *University of Delhi*[93], which is a case dealing with admissions to Post Graduate Medical Courses in Colleges and a challenge to the validity of 75% seats being reserved on the basis of institutional preference.

9.2. There is a presumption in favour of the validity of legislative enactments[94]. A fortiori there is a presumption in favour of validity of amendment to the Constitution[95].

10. *Exclusion of creamy layer has no application to SC and ST both in regard to employment and education*

10.1. Principle of exclusion of creamy layer does not apply to SC/ST. Article 341, Article 342, Article 366(24) and (25) of the Constitution would militate against such course of action. *E.V. Chinnaiah* v. *State of A.P.*[96] held that SC/ST form a single class. *Indra Sawhney*[31] while dealing with creamy layer said the discussion in this regard is only in relation to OBC. SC/ST would in any event be more backward in comparison to OBC. The observations in *M. Nagaraj*[97] cannot be construed as requiring exclusion of creamy layer in SC/ST.

10.2. The exclusion of creamy layer has to be considered separately for SCs/STs and separately for SEBCs. In relation to SCs/STs, *Indra Sawhney*[31] has ruled under the heading "identification of backward classes of citizens". See SCC at p. 725, para 792. The submission is that the concept of creamy layer is not relevant in the context of SCs/STs. See: *Indra Sawhney* v. *Union of India*[31], SCC at p. 726, para 795, p. 727, paras 796-97 and pp. 730-31, para 803

10.3. The observations of this Hon'ble Court in *M. Nagaraj*[98] should not be read as conflicting with the decision of this Hon'ble Court in *Indra Sawhney*[31]. If so read, this will have to be construed and interpreted as holding the concept of creamy layer as having reference to only OBCs and not SCs/STs. This is without prejudice to the plea that in *M. Nagaraj*[97], both OBCs as well as creamy layer were not within the scope of amendments of the Constitution challenged in *M. Nagaraj*[97]. The concept of creamy layer did not and could not arise for consideration in the context of the Constitution Amendments challenged therein.

10.4. In *M. Nagaraj*[97] the validity of the Constitution (Seventy-seventh Amendment) Act, 1995; the Constitution (Eighty-first Amendment) Act, 2000 and the Constitution (Eighty-fifth Amendment) Act, 2001, inserting Articles 16(4-A) and 16(4-B) were under challenge. Those provisions provided for reservation in matters of promotion with consequential seniority and for carry forward of vacancies to be filled up in any subsequent year or years and amendment in Article 335 inserting an

93 (2003) 11 SCC 146 at p. 164, para 36.

94 *Saurabh Chaudri* v. *University of Delhi*, (2003) 11 SCC 146 at p. 176, para 65; *Hamdard Dawakhana* v. *Union of India*, (1960) 2 SCR 671 at p. 679.

95 *State of J&K* v. *Triloki Nath Khosa*, (1974) 1 SCC 19 at pp. 29, 30; *State of Bombay* v. *F.N. Balsara*, (1951) SCR 682 at pp. 708, 709.

96 (2005) 1 SCC 394 at p. 412 in para 26.

97 *M. Nagraj* v. *State of Karnataka*, (2006) 8 SCC 212

98 (2006) 8 SCC 212 at p. 227, para 120, p. 278, paras 121-23.

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enabling provision in favour of the members of the SCs/STs for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of services or posts. Issues relating to creamy layer did not arise for consideration in deciding the validity of the above amendments.

10.5. If observations in *M. Nagaraj*[97] are held to refer to SCs/STs in the context of creamy layer, they are obiter, may be rendered per in curiam and contrary to the decision of earlier larger Bench of this Hon'ble Court in *Indra Sawhney*[31].

10.6. The rulings of this Hon'ble Court in—*Maqbool Hussain* v. *State of Bombay*[99] and *Babulal Mehta* v. *Collector of Customs*[100] were held to be obiter dicta in *Mohandas Issardas* v. *A.N. Sattanathan*[101] and *Sk. Dawood* v. *Collector of Madras*[102]. The Supreme Court in *Ranchhoddas Atmaram* v. *Union of India*[103], explained away *Maqbool Hussain case*[99], *Babulal Mehta case*[100] resulting in *Mohandas Issardas*[101] and *Sk. Dawood*[102] holding the two Supreme Court rulings as not even obiter being rendered good law.

10.7. It may also be noted that in the gradation, SCs/STs are below the level of OBCs. The alleged creamy layer (this is in demurrer) will still be below the OBCs. It would be incongruous to exclude such persons for the purposes of Articles 15(4) and 15(5) or the impugned Act and it would be denying to the SCs/STs the benefit sought to be conferred by reservation on OBCs.

10.8. In regard to SCs/STs there could be no concept of creamy layer at all. SCs/STs are defined in Articles 366(24) and (25) read with Articles 341 and 342. Under Article 341, the President may with respect of any State or Union Territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State or Union Territory, as the case may be. Article 342 in relation to Scheduled Tribes is in pari materia.

10.9. The determination and classification has to be and can be only in the manner provided for by the Constitution. See *Narbada Prasad* v. *Chhagan Lal*[104]. This principle has been reiterated in *Gujarat Electricity Board* v. *Girdharlal Motilal*[105], *State of Gujarat* v. *Shantilal Mangaldas*[106] and *CIT* v. *Anjum M.H. Ghaswala*[107].

10.10. Once the President so determined under Article 341(2), it is only by law made by Parliament that there can be exclusion from the list of Scheduled Castes specified in the notification issued under Article 341(1). Once SCs/STs are identified,

99 1953 SCR 730
100 1957 SCR 1110
101 AIR 1955 Bom 113
102 AIR 1961 Mad 1
103 (1961) 3 SCR 718
104 (1969) 1 SCR 499 at p. 502
105 (1969) 1 SCR 589 at p. 593
106 (1969) 1 SCC 509 : (1969) 3 SCR 341 at p. 372.
107 (2002) 1 SCC 633 at p. 644, para 27.

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it in its entirety constitutes that class without any distinction of creamy layer and non-creamy layer. See *E.V. Chinnaiah* v. *State of A.P.*[96] SCC at p. 415, para 32 and p. 417, para 37.

10.11. See also the definition of Schedule Castes in Article 366(24), "Scheduled Castes" means such castes, races or tribes or parts of or groups within such castes, races or tribes as are deemed under Article 341 to be Scheduled Castes for the purposes of this Constitution and in Article 366(25) "Scheduled Tribe" means such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under Article 342 to be Scheduled Tribes for the purposes of this Constitution.

10.12. It is a "deeming" by the Constitution. When the law creates a legal fiction such fiction should be carried to its logical end[108]. In any event *M. Nagaraj*[97] if it is interpreted as laying down that the principle of exclusion of creamy layer affects the SCs and STs will be rendered per in curiam[109] for not adverting to Articles 341 and 342 and the passages in *Indra Sawhney*[31] referred to above.

11. *Exclusion of creamy layer has no application in the matter of reservation in education*

11.1. Principle of exclusion of creamy layer in OBC was in the context of Article 16(4). It has no application to Articles 15(4) and 15(5). Education stands on a different footing.

11.2. The reasons for exclusion of creamy layer under Article 16(4) in the context of adequacy of representation and efficiency of administration are not applicable to Article 15(4) and/or Article 15(5) in view of their language and operation. Even using the word "creamy layer" which is a metaphor the exclusion of each particle of cream before they precipitate into such an extent of layer at which point of time it is that class itself which will stand denotified and excluded from "backward classes" and not individuals who are particles of the so-called cream of that class even before they precipitate as creamy layer.

11.3. Equality of opportunity of education is a must for every citizen and the doctrine of "creamy layer" is inappropriate and inapplicable in the context of opportunity for "education". There has to be opportunity for all in the context of education. The constrains of availability of seats to meet the demand of all enables an appropriate proportion being reserved for OBCs/SCs/STs and leaving the rest to open category.

11.4. In the matter of education there cannot be any exclusion on the ground of creamy layer. Identification being on the basis of social and educational backwardness, the concept of creamy layer cannot be imported to exclude groups and communities identified as socially and educationally backward classes. Such exclusion would be counterproductive and would retard the development and progress of groups and communities and their eventual integration with rest of the society.

108 *Builders Assn. of India* v. *Union of India*, (1989) 2 SCC 645 at pp. 672, 673, para 36 also see *State of Bombay* v. *Pandurang Vinayak Chaphalkar*, 1953 SCR 773 at p. 778; *Voltas Ltd.* v. *Union of India*, 1995 Supp (2) SCC 498 at p. 505, para 8.

109 *Nirmal Jeet Kaur* v. *State of M.P.*, (2004) 7 SCC 558.

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12. *Articles 15(4) and 15(5) are provisions of "power coupled with duty"*

12.1. Various provisions in the Constitution conferring power to make special provisions in favour of SC/ST/OBC etc. is a power coupled with duty. The decision of this Hon'ble Court in *Comptroller and Auditor General of India* v. *K.S. Jagannathan*[110] is consistent with it. It was overruled in *Ajit Singh (II)* v. *State of Punjab*[111] without adverting to the principles laid down in *H.H. Maharajadhiraja Madhav Rao Jiwaji Rao Scindia Bahadur* v. *Union of India*[112] which inter alia illustratively referred to Articles 366(24) and 366(25).

12.2. It is submitted that the said definitions are for the purposes of the Constitution and one of such purposes is reservation under Articles 15(4) and 16(4) and now also Article 15(5). To ensure that the democratic foundations are not missing, enabling power is conferred by Articles 15(4), 15(5) and 16(4) in Part III of the Constitution. It is therefore, a power coupled with duty.

12.3. It is well settled that the word 'may' in a given case could be interpreted as 'shall' and 'shall' may be interpreted as 'may'. Apart from such instances, there is another category, where though by virtue of the word 'may', the enabling power is discretionary power, that discretionary power is a power coupled with duty. *See Chief Controlling Revenue Authority* v. *Maharashtra Sugar Mills Ltd.*[113,114]. See also *Alcock Ashdown and Co. Ltd.* v. *Chief Revenue Authority*, 50 IA 227 at p. 236

12.4. In the present case, the nature of thing empowered to be done is to reach the goal of egalitarian equality. The right of the person or persons for whose benefit the power is to be exercised and the duty of the State is traceable to the Preamble, viz. justice, social, economic and political, equality of status and of opportunity and to promote among them all fraternity assuring the dignity of the individual and also the duty of the State to apply Article 46 read with Article 37 viz. promotion of educational and economic interests of SCs, STs and other weaker sections. It is the constitutional duty to apply the principles in the governance of the country and in making law for the reason that it is 'constitutional promise of social justice' which has 'to be redeemed[115]. It is an instance of 'first charge' on the States and the Centre. See *M.R. Balaji* v. *State of Mysore*[52], SCR at p. 470.

12.5. A Constitutional promise[116], an obligation and a duty to march towards egalitarian equality, a charge[26] on the State and a goal of grand and noble vision of Preamble and the declaration in Article 37 that the principles in Part IV are "fundamental in the governance of country" and mandating that "it shall be the duty of the State to apply those principles in making laws" makes the enabling power under Articles 15(4) and 16(4) and now Article 15(5), the highest form of duty of the State and Articles 15(4) and 15(5) have to be necessarily interpreted as power coupled with duty. To hold that it is discretionary power and is not compellable to be

110 (1986) 2 SCC 679.

111 Hereinafter referred to as "*Ajit Singh (II)*", (1997) 7 SCC 209.

112 (1971) 1 SCC 85 : (1971) 3 SCR 9 at p. 85.

113 1950 SCR 536 at p. 544.

114 *Julius* v. *Bishop of Oxford*, (1874-1880) All ER 43 at p. 47 placitum 'I'

115 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 at p. 751, para 836.

116 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 at p. 751, para 836 placita *b-c*

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exercised, may result in the State never exercising the power at all and the very purpose and object sought to be achieved by the insertion of Articles 15(4) and 15(5) will be defeated. Article 46 enjoins a duty on the State to promote the educational and economic interests of the weaker sections in particular SCs and STs.

12.6. *Comptroller and Auditor General of India* v. *K.S. Jagannathan*[110] and *Superintending Engineer, Public Health, U.T. Chandigarh* v. *Kuldeep Singh*[117], interpreting Article 16(4) ruled that it is a power coupled with duty. However, *Ajit Singh (II)*[118] overruled the same. *Ajit Singh (II)*[111] so ruled for the reason that *C.A. Rajendran* v. *Union of India*[119] held that Article 16(4) conferred only discretionary power and did not create any constitutional duty or obligation. The observation did not create any 'constitutional' duty or 'obligation' as mentioned in *Ajit Singh (II)*[111] is no longer good law in view of the ruling in *Indra Sawhney*[31] in which B.P. Jeevan Reddy, J. observed that "it is a constitutional promise to be redeemed[115]". It is submitted that a constitutional promise is necessarily a solemn duty and P.B. Sawant, J. observed that "It is a positive right, and the State is under an obligation to undertake measures to make it real and effectual[120]." So in regard to both aspects, the ruling in *C.A. Rajendran*[119] that the Article 16(4) did not create any obligation is in direct conflict with *Indra Sawhney*[31] which is by a larger Bench.

12.7. The more important ground is that it is directly in conflict with the principle laid down in *H.H. Maharajadhiraja Madhav Rao Jiwaji Rao Scindia Bahadur* v. *Union of India*[121] which is a ruling of a Bench of 11 Hon'ble Judges. J.C. Shah, J. spoke for himself and six learned Judges[122]. They ruled that Article 366(24) and 366(25) defining SCs and STs read with Articles 341 and 342 which provide that the power of duty to specify the castes, races, or tribes or parts of or groups within castes, races or tribes as SCs and/or STs is for the purposes of the Constitution and therefore, it is power coupled with duty. The power coupled with duty is for the purpose of the Constitution and therefore, the other provisions of the Constitution will be rendered ineffective if the power is not so exercised. SCs and STs are part of weaker sections contemplated by Article 16(4). Though Articles 15(4) and 15(5) mentions backward classes and SCs and STs separately, all of them constitute weaker sections. The principle enunciated in *H.H. Maharajadhiraja Madhav Rao Jiwaji Rao Scindia Bahadur* v. *Union of India*[121] illustratively by reference to the Articles with regard to SCs/STs is equally applicable also to backward classes. *Indra Sawhney*[24] is also by a larger Bench. Larger Bench decisions prevail over the decisions of a smaller Bench conflicting with larger Bench[123].

117 (1997) 6 SCC 199.

118 (1999) 7 SCC 209 at pp. 228, 229, 230 at paras 27, 29, 32.

119 Hereinafter referred to as "*C.A. Rajendran*", (1968) 1 SCR 721.

120 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 at pp. 515-16, para 429.

121 (1971) 1 SCC 85 : (1971) 3 SCR 9.

122 viz. Sikri, J., Shelat, J., Bhargava, J., C.A. Vaidyalingam, J., Grover, J., and Dua, J.

123 *Mattu Lal* v. *Radhe Lal*, (1974) 2 SCC 365 : (1975) 1 SCR 127 at p. 135; *N. Meera Rani* v. *Govt. of T.N.*, (1989) 4 SCC 418 at p. 429, para 13 and at p. 434, para 21; *G.M. Telecom* v. *A. Srinivasa Rao*, (1997) 8 SCC 767 at p. 770, para 7; *CIT* v. *Trilok Nath Mehrotra*, (1998) 2 SCC 289 at p. 290, para 4; *N.S. Giri* v. *Corpn. of City of Mangalore*, (1999) 4 SCC 697 at p. 701, para 12; *P. Ramachandra Rao* v. *State of Karnataka*, (2002) 4 SCC 578 at p. 602, para 28.

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12.8. The rulings in *C.A. Rajendran*[119] as well as *M.R. Balaji*[52] which are referred to and relied upon to negative the submissions as to power coupled with duty in *Ajit Singh (II)*[111] proceeded on the fundamental assumption that Article 16(4) is an exception. After *State of Kerala* v. *N.M. Thomas*[124] it is no longer an exception, but a part of principle of equality and emphatic way of stating it. So the reliance on *C.A. Rajendran*[119] and *M.R. Balaji*[52] for holding that it is not compellable duty is no longer good law and not tenable. It is to be remembered "Constitutional issues are not solved by mere appeal to the meaning of the words without an acceptance of the line of their growth[125]".

12.9. Special provisions for the advancement of such SEBCs, SCs and STs being for the purpose of ensuring egalitarian equality and expressly overriding Article 29(2) and included in Part III so as to acquire enforceable efficacy cannot be rendered futile by interpreting it as discretionary power which is not coupled with duty. The reasons given in *Ajit Singh (II)*[111] are therefore not attracted.

13. *'Vote Catching' not a valid argument on validity*

13.1. The validity of constitutional amendment and the validity of plenary legislation have to be decided purely as questions of constitutional law. The submission as to vote catching, etc. is inappropriate.

13.2. See *State of Rajasthan* v. *Union of India*[126]. The Court quoted from Charles Black in 'Perspectives in Constitutional law'. See *State of Rajasthan* v. *Union of India*[126], SCC at p. 660, para 149.

13.3. The contention of vote catching is wholly unsustainable. The Constitution being Sovereign, Socialist, Secular, Democratic, Republic, sovereign power vests in the people as is well known in government of the people, by the people, for the people. Political parties before they go to polls announce manifesto and on being returned to power seek to implement the same; after expiry of the term for which they are elected, they again go back to the people inter alia to account as to the promise they had kept up. It is the discharge of their obligation to account to those who elect them. In this process they have necessarily to implement the policies which they consider as beneficial to the people which is welcomed by the people. There may be cases in which a policy may be intended to be benign but unconstitutional or ultra vires. Constitutional Validity of a measure does not depend upon whether it is popular or not. The Supreme Court is vested with final say to decide on their constitutionality.

13.4. A completely different reason for the failure to effectuate the object and purpose underlying Article 16(4) is adverted to by Sawant, J. See *Indra Sawhney*[127].

124 (1976) 2 SCC 310.

125 *R.C. Poudyal* v. *Union of India*, 1994 Supp (1) SCC 324 at p. 385, para 124.

126 (1977) 3 SCC 592.

127 (1992 Supp (3) SCC 217 at pp. 503, 504, para 401.

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14. *Universal Declaration of Human Rights*

14.1. The Ninety-third Amendment is alleged to violate Article 26 of Universal Declaration of Human Rights and therefore liable to be struck down. This plea is not tenable.

14.2. International law and Municipal law have to be harmoniously interpreted and applied. See *Gramophone Co. of India Ltd.* v. *Birendra Bahadur Pandey*[128]. See *Kesavananda Bharati*[129], per Khanna, J.

14.3. It is submitted that in Article 26 of the Universal Declaration of Human Rights emphasis is and has to be on making available to the weaker sections access to educational opportunities and removing barriers in their way, in as much as it says "*shall be equal accessible*". 'Equally accessible' is in accordance with Preamble of equality of opportunity. (emphasis supplied)

14.4. Right to equality of opportunity operates at every level and it being provided for at particular levels either by legislation or by executive action cannot be held to be unconstitutional by picking holes in the implementation of such duty in certain other areas like free and compulsory education up to the age of 14 years or invoking the Universal Declaration of Human Rights. Pandit Nehru in Discovery of India wrote:

> "... not only must equal opportunities be given to all, but special opportunities for educational, economic and cultural growth must be given to backward groups so as to enable them to catch up with those who are ahead of them[130]".

14.5. Article 15(4) contemplates making special provision for the advancement of SEBCs/SCs/STs which has been interpreted to include the policy of reservation of seats. This existed from 1950 onwards even at a time when Article 45 had not been amended by the 86th Amendment. *M.R. Balaji*[52] is a case decided in the context of Article 15(4) with regard to higher education i.e. MBBS and Engineering courses.

14.6. See the answer to question No. 11 in *T.M.A. Pai Foundation*[131].

14.7. Merit has to be understood in its proper context in the background of Articles 15(4) and 16(4) bearing in mind the peculiar and special past history of India. As to what constitutes merit has to be appreciated in the light of the judgment of this Court. See *K.C. Vasanth Kumar* v. *State of Karnataka*[132] per O. Chinnappa Reddy. See also *Pradeep Jain (Dr.)* v. *Union of India*[133] and *Indra Sawhney*[134].

14.8. Further, merit has to be interpreted in the context of egalitarian equality and not formal equality. Therefore, the requirement of Article 26(1) of Universal

128 (1984) 2 SCC 534 at p. 540, para 5, See also *V.O. Tractoroexport, Moscow* v. *Tarapore and Co.*, (1969) 3 SCC 562; *Trendtex Trading Corpn. Ltd.* v. *Central Bank of Nigeria*, (1977) 1 All ER 881.

129 (1974) 3 SCC 225 at pp. 785-86, para 1467.

130 Quoted in *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 at p. 506 in para 404.

131 (2002) 8 SCC 481 at p. 591.

132 1985 Supp SCC 714 at pp. 737-38, para 35.

133 (1984) 3 SCC 654 at pp. 676-77 at para 13.

134 1992 Supp (3) SCC 217 at p. 506, para 405.

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Declaration is fully satisfied. It is education which gives a great dignity to a class of persons and/or an individual.

15. *Relevance of debates in Parliament for interpretation or testing the validity of an Act or provision therein*

15.1. It is respectfully submitted that the speeches in Parliament, constitutional debates, textbooks of living authors and views expressed in articles or otherwise by living authors do not normally constitute evidence before the Court.

15.2. Debates in the Constituent Assembly had been adverted to by this Hon'ble Court when there is ambiguity in the interpretation of the Constitution as one of the material which could be adverted to. As different members express different views, their views will not control the situation. The legislature manifests the collective will and intent of the Members of Parliament.

15.3. See *Umayal Aehi* v. *Union of India*[135] per the Federal Court. The above decision has been followed with approval in *Doypack Systems Pvt. Ltd.* v. *Union of India*[136].

15.4. See also the well-settled ruling in *Sanjeev Coke Mfg. Co.* v. *Bharat Coking Coal Ltd.*[137].

15.5. The speech of the mover of the Bill may be relevant as to interpretation. See *K.P. Varghese* v. *ITO*[138].

15.6. Criticism that there is no adequate debate in Parliament has no relevance in judging the validity of legislation. A lot of political process and debates take place before the matter comes up before Parliament. Also there is public opinion built up on the subject-matter till then. All these have to be seen and appreciated before criticising the debates in Parliament.

PART II

RESPECTFUL RESPONSE TO THE QUESTIONS FORMULATED BY THIS HON'BLE COURT ON 17-5-2007 IN *ASHOK KUMAR THAKUR* v. *UNION OF INDIA*[139]

1. THE CONSTITUTION (NINETY-THIRD AMENDMENT) ACT, 2005:

Q. 1. *Whether the Constitution (Ninety-third Amendment) Act, 2005 and Article 15(5) are unconstitutional as being violative of the basic structure of the Constitution?*

Q. 3. *Whether the Ninety-third Amendment insofar as it empowers the government to make special provisions by way of reservations in educational institutions (including private educational institutions) is violative of the basic structure of the Constitution?*

A. The Constitution (Ninety-third Amendment) Act, 2005 does not violate the basic structure of the Constitution. The Amendment inserting Article

135 AIR 1945 FC 25 at p. 30.
136 (1988) 2 SCC 299 at p. 326.
137 (1983) 1 SCC 147 at p. 172, para 25.
138 (1981) 4 SCC 173 at 184, para 8.
139 (2007) 4 SCC 397.

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15(5) is valid and consistent with the egalitarian principles of the Constitution, as envisaged in the Preamble, Part III and Part IV. The Amendment strengthens the Constitutional foundation and democratic values and the egalitarian ethos and values of the Constitution.

Q. 2. *If the Amendment is valid, how is it to be interpreted and implemented?*

A. Article 15(5) is a provision in addition to Article 15(4) and it has to be so interpreted to advance the purpose for which it was incorporated. "... we must strive to give such an interpretation as will promote the march and progress towards a Socialistic Democratic State...consistent with the socialist goals set out in the Preamble and the Directive Principles enumerated in Part IV...."

Q. 4. *Whether the Ninety-third Amendment confers on the State an unbridled power to make special provisions for socially and educationally backward classes; without indicating the circumstances when such provision may be made, and without imposing any limit either on the contents of duration of such special provisions and is, therefore, wholly destructive of the right of equality of the citizens and thereby violative of basic structure?*

A. Ninety-third Amendment confers an enabling power on Parliament and State Legislatures to make any special provisions "by law". It is only the legislature which can make the law. The Constitution only outlines broad and general principles. Guidelines will be necessary only for the executive when they are making subordinate legislation or exercise executive power. As to conferment of such power on the legislature, see several articles of the Constitution set out in the footnote in para 9.2 in the written submissions, above

The Constitution will only refer to the subject-matter with regard to which it confers legislative power. It will not give details as to making legislation. The interrelation between the constituent power and legislative power is not the same or similar like the legislative power and power of delegated legislation.

The provisions in the Constitution may fix a period of duration and thereafter if prevailing circumstances so require may from time to time extend the duration or it may not fix time-limit at all and periodically review the same and when the time is appropriate, repeal the same. The Amendment is, therefore, not destructive of right to equality of citizens or violative of basic structure of the Constitution.

Legislature has the benefit of several rulings of this Hon'ble Court culminating in *Indra Sawhney*[31] in making the provisions for the advancement of backward classes of citizens.

Q. 5. *Whether depriving the protection of Article 19(1)(g) to non-minority institutions (while excluding minority institutions from Article 15(5)], after the decision in P.A. Inamdar v. State of Maharashtra*[29] *which held that non minority institutions enjoyed a similar protection, upsets the delicate balance of the Constitution, and is inconsistent inter alia with the principles of secularism and thereby is violative of the basic structure?*

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Summary of Arguments

XII. Mr K. Parasaran, Senior Advocate, for the Union of India *(contd.)*

A. Rights under Part III are subject to the limitations mentioned in Part III. Matters mentioned in Part IV have to be transformed into fundamental rights in a phased manner subject to the limits of economic capacity of the State. As the Directive Principles under Article 46 has been transformed to Part III by inserting Article 15(4), after *Champakam Dorairajan*[140] it operates as part of fundamental rights and, therefore, cannot be held to violate any fundamental right of the citizens or the basic features of the Constitution. Further being a part of Part III, it harmonizes the rights of OBCs/SCs/STs on the one hand and the rest of the citizens on the other hand. In any event, Article 15(4) and now Article 15(5) being in Part III operate as limitations on the rights of others. Article 15(5) is consistent with the constitutional promise and ethos of social justice to weaker sections and is in conformity with Preamble, read with Part IV particularly Articles 38 and 46. Any amendment which is consistent with and that gives effect to the principles mentioned in Part IV has to be held to be consistent with the basic structure of the Constitution. Minority institutions have special rights and protection under the Constitution which are inalienable. Minority and non minority institutions are two different classes. There is valid nexus in excluding the institutions falling under Article 30 from Article 15(5). Not to so exclude the minority institutions would have the effect of converting a secular Constitution into a theoretic one. The minorities are not merely religious, they are also linguistic. Among religious minorities, no special favour has been shown to any particular religious group. Also there is no distinction between religious minorities and linguistic minorities. As such, there is no violation of or infringement of the principles of secularism. There is no violation of any delicate balance.

2. SCOPE OF ARTICLES 15(4) AND 15(5):

Q. 1. *What is the true ambit and scope of Articles 15(4) and 15(5) of the Constitution?*

Q. 2. *If Article 15(5) is valid, what is the true scope and ambit?*

A. The context and the need for Article 15(5) has been set out in the written submissions. Articles 15(4) and 15(5) have to be read as supplementary and complementary to each other and interpreted harmoniously to advance the purpose of its incorporation viz. advancement of educational interests of socially and educationally backward classes of citizens and SCs and STs. The context of incorporation of Article 15(4) by the First Amendment and the context of incorporation of Article 15(5) by Ninety-third Amendment and the Objects and Reasons of the Amendment manifest the mischief sought to be suppressed and remedy sought to be advanced.

Q. 3. *What is the meaning of the term 'special provisions' in Articles 15(4) and 15(5) of the Constitution? Does it include 'quotas' by reservation of seats especially in higher educational institutions and professional and*

140 *State of Madras* v. *Champakam Dorairajan*, 1951 SCR 525.

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XII. Mr K. Parasaran, Senior Advocate, for the Union of India *(contd.)*

technical education (particularly those of national stature of importance and in courses categorised as speciality or super speciality). Is it permissible measure of advancement of socially and educationally backward classes?

A. The concept of "special provisions" has been discussed by this Hon'ble Court (*Indra Sawhney*[31] at p. 693, para 743 and in *Govt. of A.P.* v. *P.B. Vijayakumar*[63], SCC at p. 525, para 8). Reservation is the highest form of special provision. *T.M.A. Pai*[7], SCC p. 529, para 1 holds education covers all stages up to the highest levels. It is permissible and necessary to provide for reservation in Institutions of higher learning.

Q. 4. *If the answers to above questions are in the affirmative, then what are the necessary ingredients of any 'affirmative action' programme of the State including the 'nature and extent' of the benefits proposed and the limitations thereon, in order to balance the rights between Articles 14, 15, 29(2) and its facet' in Articles 15(4) and 15(5)?*

A. The principles as to affirmative action under the American Constitution are inappropriate in the context of Indian Constitution. There is no corresponding provisions like Articles 15(4), 16(4) and now 15(5) in the American Constitution. (See as to this *Indra Sawhney*[31] SCC pp. 685-86, para 732.) In the matter of balancing of rights between individuals who claim to have higher social status, their interest is to be subordinated to the larger interests of society as a step towards social justice (see Khanna, J. in *Kesavananda Bharati* v. *State of Kerala*[6] SCC at p. 790, para 1478).

Q. 5. *Whether a rational policy of affirmative action that would ensure imparting free and compulsory education to the illiterate sections among all the citizens including the backward classes, is absent and if so, whether affirmative action in favour of SEBCs is discriminatory and unconstitutional?*

A. Each measure has to be tested for its validity on its own merits. Matters of priority do not fall within judicially manageable standards. The validity of one measure is not to be tested with reference. to the alleged failure or deficiency on the part of the State in regard to another area of permissible affirmative action.

Q. 6. *What is the meaning of the words "for the advancement of any socially and educationally backward classes of citizens" in Articles 15(4) and 15(5)? What is the yardstick for measuring educational backwardness in Clauses (4) and (5) of Article 15?*

A. Measures for determining educational and social backwardness have been dealt with in detail in *Indra Sawhney*[31] and the norms evolved by Mandal Commission have been approved. (Detailed submissions have been made by the learned Solicitor General both in his oral arguments and written submissions)

Q. 7. *Whether substitution of the expression "socially and educationally backward classes of citizens" by "socially and economically backward classes" would result in fulfilling constitutional intentions and objectives?*

A. The expression "socially and educationally backward classes of citizens" is not permissible to be substituted by expression "socially and

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XII. Mr K. Parasaran, Senior Advocate, for the Union of India *(contd.)*

economically backward classes". That, if at all may be done, has to be by an Amendment of the Constitution subject to judicial review on the touchstone of basic structure. There is clear difference and distinction between educational backwardness and economic backwardness. They are not identical or interchangeable concepts. One cannot be substituted for another. In *Indra Sawhney*[31] these issues were considered. A measure of providing for 10% reservation in appointments for economically weaker sections was held to be unconstitutional. It was further held that Article 16(4) is not aimed at poverty alleviation. Substituting the word 'economic' in the place of 'educational' would be contrary to the Constitutional intention and objectives.

3. SCOPE OF JUDICIAL REVIEW:

Q. 1. *Having regard to the fact that special provision by way of reservation in Central educational institutions has been made by law enacted by Parliament and the enabling provision of Article 15(5) vesting the power in the State to making such provision by law, is the scope of judicial review restricted or not?*

A. Scope of judicial review in regard to Constitutional Amendments is limited to the Basic Structure doctrine and compliance with the procedural requirement of Article 368 of the Constitution. The validity of a Constitutional Amendment cannot be tested with reference to the principles which are applicable to plenary legislation.

Q. 2. *What are the parameters and limits of judicial review of a law enacted by Parliament providing for reservation in pursuance of the mandate of Articles 15(4) and 15(5), having regard, inter alia to the order of reference to a Constitution Bench in Subramaniam Swamy (Dr.) v. Director, CBI*[141]?

A. Parameters and limits of judicial review in regard to Constitutional Amendments, plenary legislations, subordinate legislations, executive orders, etc. are different. As a Reference is pending before a Constitution Bench in this regard, issues in this regard may be appropriately considered in the said reference. It may not be necessary to consider this aspect. in the circumstances of the present case.

4. LISTING OF SOCIALLY AND EDUCATIONALLY BACKWARD CLASSES IN TERMS OF UNITS OF CASTE/COMMUNITIES:

Q. 1. *Whether reservations based solely or principally upon the basis of caste are impermissible under Article 15?*

Q. 2. *Whether a reservation that relies significantly on "caste" to identify its beneficiaries is inherently divisive and incompatible with the Unity and integrity of the Nation?*

141 (2005) 2 SCC 317

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XII. Mr K. Parasaran, Senior Advocate, for the Union of India *(contd.)*

Q. 3. *If the answer to Questions (1) and (2) above is in the affirmative, then how, in what way and on what basis are the beneficiaries of "special provisions" to be identified, selected, included or excluded?*

Q. 4. *Does the Union of India's method, manner and extent of identifying and compensating beneficiaries of 'special provisions' perpetuate caste and backwardness?*

Q. 5. *Whether "caste based" reservations are a permissible form of affirmative action under Article 15? If the answer to the question above is in the affirmative, then what are the permissible criteria for the identification of the "class" to whom the benefits under an affirmative action programme are to be extended under Article 15?*

Q. 6. *Whether the reservation policy of the State which lacks a Continuous Review Mechanism is violative of Articles 14, 15, 21 and 29(2)?*

Q. 7. *Whether, after the judgment in Indra Sawhney case*[31]*, the classification of backward classes on the basis of caste for the purposes of Article 16(4) would equally apply to Article 15(4) and Article 15(5) of the Constitution?*

A. The questions listed out in para 4 have been dealt with by the learned Solicitor General in his oral arguments and written submissions. In *B. Venkataramana* v. *State of Madras*[32], this Hon'ble Court approved the reservation made to the extent of seats for Harijans and Backward Hindus on the ground that it was in favour of Backward classes of citizens and held that the petitioner did not belong to that class and rejected the petitioner's contention to this extent. But the petitioner succeeded on the ground of his being discriminated against non-Brahmin, Muslim and Christian which was on the ground "only" of caste/religion and hit at by Articles 16(1) and 29(2). Article 15(4) introduced by First Amendment neutralised the same and Articles 15(1) and 29(2) stood overridden. Therefore, identification of backward class may even be on the sole ground of caste. In *Venkataramana case*[32] the Rules framed under the Government of India Act was based only on caste, but was not struck down by this Hon'ble Court. The criteria for identification of Socially and Educationally Backward Classes of Citizens and their identification by the State Governments and Central Government have been held to be valid in *Indra Sawhney*[31]. The principles laid down by this Hon'ble Court will be applied by the State Governments and the Central Government in the context of special provisions under Articles 15(4) and 15(5). Referring to continuous review mechanism, it is implicit that as and when there is improvement in the conditions of Socially and Educationally Backward Classes of Citizens, measures being provided for their upliftment would be reviewed and wherever required necessary remedial action would be taken. Not to so provide in express terms in advance in any legislation or executive measure, cannot be held to be violative of Articles 14, 15, 21 or 29(2) of the Constitution.

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XII. Mr K. Parasaran, Senior Advocate, for the Union of India *(contd.)*

5. WHETHER 27% RESERVATION IN SOCIALLY EDUCATIONAL BACKWARD CLASSES/OTHER BACKWARD CLASSES IS JUSTIFIED

Q. 1. *Whether the Act insofar as it mandates reservation of 27% in all educational institutions (including private aided institutions) irrespective of and unrelated to the "compelling need" of the State and without any limit of time and without any computable data for identification of persons as OBCs, is violative of Articles 14, 15, 21-A and 29(2) of the Constitution?*

A. The Act provides for reservation in favour of OBCs/SCs/STs. It is not an Act providing for reservation in favour of OBCs alone. The Act has to be seen in its proper perspective as providing for reservation in favour of weaker sections i.e. SC, ST and OBC in the matter of their admission to educational institutions, for their upliftment and eventual integration with the rest of the society. There is a compelling need at present to provide for effective measures for the upliftment of the weaker sections by providing, inter alia, educational opportunities to them. The burden of proving the contrary is on the petitioners and this burden has not been discharged by the petitioners. The data available and matters of common knowledge, fully justify the measures taken by the Union and the States. There is no violation of Articles 14, 15, or 29(2) of the Constitution. (Article 21-A has not yet come into force.)

Q. 2. *Special provision by way of reservation of 27% for OBCs in Central Educational Institutions being within the percentage authorised by Indra Sawhney case*[31] *and it having been ensured that there will be increase of seats so as not to diminish the number of seats available for non reserved category, could such provision be held to be unconstitutional?*

A. There is no infirmity in the reservation provided in favour of SCs, STs and OBCs. Section 5 is a beneficial provision made for the benefit of general category candidates. However, as submitted in the written submissions, the validity of Section 3 of the Act does not depend upon Section 5. Section 3 is valid irrespective of the validity or otherwise of Section 5. The validity of Section 3 does not depend upon Section 5. Section 3 is a social welfare measure aimed at upliftment of OBCs/ SCs/STs. It will be valid even if additional seats are not created or cannot be created in favour of general category candidates. Section 5 is ameliorative in nature.

Q. 3. *Whether the Central Educational Institutions (Reservation in Admission) Act, 2006 (Act No. 5 of 2007) is violative of Articles 14, 15(1), 19, 21 and 29(2) of the Constitution?*

A. For the reasons set out in detail in the written submissions, the Act cannot be held to be violative of Articles 14, 15(1), 19, 21 and 29(2) of the Constitution.

6. SOCIALLY ADVANCED PERSONS/SECTIONS OR CREAMY LAYER OF SEBC/OBC

Q. 1. *Would at all the concept of "creamy layer" propounded in the context of public employment in Indra Sawhney case*[31] *be applicable to special*

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provision by way of reservation for education provided for by law made by the State?

A. The concept of creamy layer propounded in *Indra Sawhney*[31] is in the context of public employment under Article 16(4). The limitation of adequacy of representation and efficacy in administration which operate on Article 16(4) have no application to Article 15 in the area of education. In any event, the concept of creamy layer has no application in so far as SCs/STs are concerned. *Indra Sawhney*[31] itself made a distinction in this regard.

Q. 2. *Whether in balancing formal equality vis-à-vis de facto equality under Article 14 and Article 15(5) "creamy layer" should or should not be excluded?*

Q. 3. *Whether the concept of Socially Advanced Persons/Sections or creamy layer of SEBC castes/communities formulated in the Indra Sawhney case*[31] *for the purpose of exclusion from reservation of appointments or posts under Article 16(4) is applicable in relation to reservation in education including higher education and admission to seats in educational institutions under Article 15(4) and Article 15(5)?*

A. In the matter of education there cannot be any exclusion on the ground of creamy layer. Identification being on the basis of social and educational backwardness, the concept of creamy layer cannot be imported to exclude groups and communities identified as socially and educationally backward classes. Such exclusion would be counter productive and would retard the development and progress of groups and communities and their eventual integration with the rest of the society.

Q. 4. *Whether the provisions of the Act insofar as it does not exclude or make provision for the identification and exclusion of the "creamy layer" from the beneficiaries of reservation fall foul of Articles 15 and 29(2)?*

A. The Act cannot be held to be bad as it expressly does not exclude creamy layer. The Act cannot be so construed or its validity tested or determined on that basis. The Act provides for reservation in favour of SCs/STs/OBCs. Insofar as OBCs are concerned, determination is to be made under Section 2(*g*) of the Act by the Executive Government. Having regard to the scheme of the Act, the Act cannot be held to be bad on this ground.

7. CONSTITUTIONALITY/VALIDITY OF THE 2006 ACT

Q. 1. *Whether the reasons given by the Union and the data furnished by it in order to justify and sustain Act No. 5 of 2007 satisfies the requirements of a valid exercise of affirmative action as laid down in various judgments (e.g. M. Nagaraj v. Union of India*[97] *and can provide a valid basis for reservation of the kind sought to be attained by the impugned Act?*

A. There is a presumption in regard to constitutionality of an Act of Parliament. American doctrine of strict scrutiny and narrow tailoring are

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not applicable in the Indian context as held in *Saurabh Chaudri*[142]. Presumption as to the constitutional validity of the Act has not been dislodged by the petitioners by producing any tangible material or evidence. There exists compelling need at present to take affirmative action and provide for educational opportunities in favour of weaker sections of the society. It is for the first time after 57 years after the advent of the Constitution, such measure is being undertaken by the Union Government in favour of weaker sections. Similar provisions exist in different States. There is no challenge to such measures being undertaken by the States in the present proceedings. The validity of a social welfare legislation cannot be tested or decided ignoring the ground realities which are matters of common knowledge. There exists educational backwardness in a large scale and there is compelling need to provide affirmative/positive measures in their favour to bring them up to the level of the rest of the society.

Q. 2. *Whether the Act is in violation of Article 26 of the Universal Declaration of Human Rights which postulates that technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit?*

A. Article 26 of the Universal Declaration of Human Rights has to be understood in the Indian context in its application to India. Emphasis in Article 26 is that education at higher level shall be equally accessible to all. The present legislation is a measure in the said direction of providing access to weaker sections to educational opportunities including at higher levels. The expression 'merit' in Article 26 of the Universal Declaration has also to be understood in the context of the law laid down by this Hon'ble Court in *Pradeep Jain*[61], *K.C. Vasanth Kumar*[143] and other decisions and keeping in view Part IV of the Constitution and the Constitutional promise of social justice to the weaker sections adverted to in *Indra Sawhney*[31]. Provisions made in exercise of power under Article 15(4) and/or Article 15(5) have to prevail and cannot be sought to be overridden by interpreting law as if there is a conflict.

XIII. Mr Ram Jethmalani, Senior Advocate, for the respondents

1. Putting it as politely as possible the submissions of the petitioners and those who have supported the main petition are an attempt to have a nine-Judge judgment reversed by a five-Judge Bench. One of the counsel in his very short submissions plainly argued that *Indra Sawhney case*[1] was wrongly decided and a larger bench should be constituted. This argument, while it has the merit of being frank and bold is improper and impertinent.

2. Certainty of law is itself a value which has to be jealously preserved and the frequency with which earlier judgments are reversed creates instability and chaos.

142 *Saurabh Chaudhri* v. *University of Delhi*, (2003) 11 SCC 146.

143 *K.C. Vasanth Kumar* v. *State of Karnataka*, 1985 Supp SCC 714.

1 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217

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No one can know here one stands. It creates contempt for law and the judiciary. The current law can be contemptuously disobeyed and the contemnor left free to argue that the law which he disobeyed is wrong and in any event it requires to be reversed.

3. See *Maganlal Chhaganlal (P) Ltd.* v. *Municipal Corpn. of Greater Bombay*[2], SCC paras 23-24 at p. 427 and *Bengal Immunity Co. Ltd.* v. *State of Bihar*[3], *S.P. Gupta* v. *Union of India*[4], at SCC p. 376, para 196 and *Union of India* v. *Raghubir Singh*[5] at pp. 773-74, paras 21 and 22. Those authorities are of relevance to this proposition. They establish that merely because a previous case appears to be wrongly decided is no ground for reversing it unless two conditions are satisfied:

a. That it is manifestly wrong in almost the Wednesbury sense;

b. That it is productive of grave public mischief which can only be remedied by the reversal of the judgment.

Indra Sawhney[1], SCC para 683 at p. 657 may usefully be read.

4. Article 14 consists of two parts. The first requires that all citizens must possess and be subject to the same rights and obligations. The second part is not a surplusage. The law must provide equal protection. When a law punishes the rich and poor alike for sleeping under bridges or stealing a loaf of bread, it does not provide equal protection. It only accentuates inequality and injustice. The second part without recourse to any other article including directive principles makes affirmative action mandatory.

5. It is true that equality of citizens is a basic feature of the Indian Constitution but by equality is meant not formal or technical equality but real and substantial equality. Reservations whether for access to public conveniences or to government jobs or in educational institutions are recognised techniques of producing real equality mandated by the Constitution. The conclusion is that reservations for backward classes is a fundamental feature of our Constitution.

6. The word 'only' used in Articles 15(1) and 16(2) is decisive. Even if reservations are made for castes, the classification will become invalid if it is only on the basis of caste. If some other additional requirement is imposed, that case goes outside the prohibition of Article 15(1). If Reservations are made for backward castes they cannot be attacked on the ground of violation of Article 15(1). This has been settled in a number of cases, the authority of which cannot be questioned in these proceedings.

Authorities :

B. Venkataramana v. *State of Madras*[6] noticed in *Indra*[1] in SCC paras 695, 696 and 697 at pp. 662-65. (a case under Article 16). Further noticed in SCC para 756 p. 700. This principle has been accepted in other cases: *P. Rajendran* v. *State of Madras*[7] at SCR pp. 790-91. Noticed in *Indra Sawhney case*[1] at SCC para 705 at p. 668.

2 (1974) 2 SCC 402
3 AIR 1955 SC 661
4 1981 Supp SCC 87
5 (1989) 2 SCC 754
6 AIR 1951 SC 229
7 (1968) 2 SCR 786

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7. Caste is a class within the meaning of Article 15(4). See dissenting judgment of Justice Subba Rao in *T. Devadasan* v. *Union of India*[8] majority judgment in *State of Kerala* v. *N.M. Thomas*[9] and *Indra Sawhney*[1], SCC paras 765, 774, 779, 784-86 and 789, pp. 705-19. Caste is a class in which an innocent human is trapped by birth over which he has no control and from which he cannot freely exit because the exit is blocked by a cruel and arrogant society. The word class in Article 15 means a conglomeration of castes. A caste is nothing but a class that in the course of Indian social history, has enclosed itself primarily by endogamy and secondarily by commensality. It primarily refers to a 'class' that is identified by being within or without the social organisation called the Chaturvarnya. It refers to one out of five, the four within and the firth outside. The word 'Backward' was put in with the intention of substantially excluding the three upper classes i.e. the Triya Varnikas who often fought one another for their exclusive interests but were always unanimous and united in suppressing the Shudras and the untouchables. By reason of limitations imposed by the use of the qualifying epithet the backward classes are substantially the following:

a. Untouchables or Depressed classes, Harijans or Scheduled Castes;

b. Scheduled Tribes;

c. Shudras who stand midway between the (a) untouchables and the three privileged classes i.e. Triya Varnikas, Brahmins, Kshatriya and Vaishyas. This last is the OBCs i.e. Other Backward Classes;

d. Perhaps some new comers who may be hereinafter noticed. Some individuals may have to suffer today for the benefit of victims of long historical injustice persecution and humiliation who must be raised in self esteem and social confidence. Social backwardness, poverty and inadequate or no education are a vicious circle. Reservations are not compensation for past injustice which has already come to an end. It is obstinately persisting even today. The legislature has so found. The *Indra Sawhney*[1] Court has held that injustice is still continuing and lingering effects of past discrimination are visible. [SCC paras 795-97, pp. 726-27 and para 859(*b*) at p. 767.]

8. Principles on which the validity of an Indian statute can be impeached are laid down in a series of authorities of the Privy Council and this Hon'ble Court. A parliamentary statute is perfectly valid if it satisfies two conditions:

(1) In Pith and substance it must fall under some entry in List I or List III.

(2) It must not infringe any other provisions of the Constitution.

The Indian Parliament Act 5 of 2007 is valid because both these conditions are satisfied. It is legislation under Entry No. 20 of the Concurrent List III. It does not offend Article 15(1) or Article 14 because the basis of reservation in educational institutions is not Caste only but Cast plus Backwardness. Articles 15(4) and 15(5) expressly permit this clarification and neither Article 14 nor Article 15(1) is breached.

9. A statute cannot be declared ultra vires merely because backwardness is a complex concept and no precise definition is possible. This is a field in which this

8 (1964) 4 SCR 680
9 (1976) 2 SCC 310

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XIII. Mr Ram Jethmalani, Senior Advocate, for the respondents *(contd.)*

Hon'ble Court must scrupulously respect legislative judgment and adopt a policy of nearly total non interference. In fact this court is bound to assume that a state of facts existed at the time of the enactment of the statute which would validate the statute. There is a presumption of constitutional validity and the burden of establishing invalidity is so heavy in this particular case that it is impossible for the petitioner to discharge it. The relevant authorities in support of this proposition are incapable of being questioned. See *Pathumma* v. *State of Kerala*[10] (seven-Judge Bench). Out of the seven principles it lays down, numbers 1, 2, 3(*a*) (3-C), 3(*h*), 6 and 7 are relevant. *Charanjit Lal Chowdhury* v. *Union of India*[11], *Mohd. Hanif Quareshi* v. *State of Bihar*[12] & *State of Madras* v. *V.G. Row*[13] at AIR p. 200. *Indra Sawhney*[1], SCC para 842, p. 753.

10. The petitioner places strong reliance on several American authorities. It is submitted that these authorities are either irrelevant or do not support the propositions contended for. The declaration of Independence of 1776 contained a statement which is factually incorrect and a denial of reality. The statement was : 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights.....

When the American Constitution came to be framed it did not contain the constitutional right of equality. Even the Fifth Amendment of 1871 did not introduce this concept. Though an overwhelming majority of population professed Christianity owing allegiance to the Pope in Rome, Blacks and women were severely discriminated against. When women tried to get admission to the Bar they were rejected on the ground "that the brilliant light of the law is not for such tender leaves".

It is the 14th Amendment of 1868 which in Section 1 provided "that the State shall not deny to any person the equal protection of the laws". Even after this injunction a wholly white Supreme Court produced thirty years later the judgment in *Plessy* v. *Ferguson*[14] which laid down the doctrine of 'Equal but Separate'. This case held the ground for almost century when in 1954 it came to be reversed by *Brown* v. *Board of Education*[15]. See how a 20th century enlightened Court had no difficulty in holding that 'separate though equal' itself involved humiliation and was a denial of equality. The case is an authority for the proposition that there is a sever dichotomy between formal equality and real equality.

It is the spirit of *Brown* which animates cases like *Thomas*[9] and *Indra Sawhney*[1] and the present impugned legislation. Our Constitution does not subscribe to the falsehood that we are created equal. In truth we are created terribly unequal. Sometimes the degrading inequality is almost inhuman. The Constitution of India mandated the complete erasure of all the ugly scales and spots of past wounds inflicted by a cruel society.

10 (1978) 2 SCC 1
11 AIR 1951 SC 41
12 AIR 1958 SC 731
13 AIR 1952 SC 196
14 (1896) 41 L Ed 256
15 (1954) 48 L Ed 873

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XIII. Mr Ram Jethmalani, Senior Advocate, for the respondents *(contd.)*

It is important to notice SCC paras 727-29, pp. 682-83 of the *Indra Sawhney*[1] and the American case referred to therein. Mr Justice Reddy made his final conclusion in SCC para 732, at pp. 685-86 which also is important.

11. The validity of the impugned statute cannot be challenged on any of the following grounds :

(*i*) That the legislature has used population figures from a census of 1931. The total population of a country is irrelevant. What is relevant is the percentage of the backward classes in the total population. There is a presumption under Section 114 of the Evidence Act that the percentages continue unless the contrary is proved. No such proof is forthcoming. The percentage of backward classes must have increased if at all and not gone down for obvious reasons.

(*ii*) That the beneficiaries have not been identified with a necessary degree of specificity. It is submitted that the Constitution creates no such requirement. The beneficiaries are backward classes. Their method of identification has been closely examined and accepted as valid despite some deficiencies which are inevitable. This matter is not capable of judicial management. The Court must, therefore, adopt a stand off policy.

(*iii*) That no nexus has been established between the Statute and the remedy. This objection is not even intelligible. To make portal of higher education available to pupils of backward classes is to equip them for equal competition with the rest of the student world. This is a legitimate constitutional goal.

(*iv*) That the remedial effect of the law has not been established on hard empirical data. This argument is absurd. The legislature has clearly carried out the objectives of the latest constitutional amendment (Ninety-third). The challenge to that amendment is equally frivolous.

(*v*) That a quantitative co-relation between the problem and the benefit has not been established. This argument could be relevant if what was being considered was the reasonableness of a restriction on a fundamental right. That not being the case the argument is thoroughly untenable as well as misleading.

(*vi*) That the Act is a measure for the benefit of 'caste'. It is true that it is for the benefit of backward classes but that is perfectly valid.

(*vii*) That the legislation creates a vested interest in backwardness. It may be that some people in desperation may wrongly claim to be backward but this is not an argument against the validity of the Statute. The remaining attacks are equally irrelevant.

12. The limit of 50% on reservations under Article 16(4) is not applicable to all reservations. It is not inexorable even for Article 16(4). See SCC para 810, p. 735, *Indra Sawhney*[1]. The Act minimises every practical disadvantage to the non backward classes.

13. Reservations are not destructive of merit or anti-meritarian. See *Indra Sawhney*[1], SCC paras 832-41, pp. 749-53.

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Summary of Arguments *(contd.)*

XIV. Mr T.R. Andhyarujina, Senior Advocate, for the State of Kerala

I. *True construction of Article 15(4) and Article 15(5)*

1. Articles 15(4) and 15(5) operate in different fields. This is seen from the circumstances under which each provision came to be enacted by amendments to the Constitution.

2. Article 15(4) was introduced in the Constitution by the Constitution (First Amendment) Act, 1951. See *M.R. Balaji* v. *Mysore*[1], SCR at p. 455 where this Court stated the reason for its introduction.

3. Article 15(4) enables a State to make a "special provision" for backward classes and ST and SC which could be done by *both law or by executive order*. Referring to a similar expression of "provision" in Article 16(4), see per Jeevan Reddy in *Indra Sawhney*[2], SCC at p. 688, para 736. See also Pandian, J. SCC p. 407, paras 170-71 and Sawant, J. p. 557, para 526.

A "special provision" in Articles 15(4) and 16(4) is in marked contrast with Articles 16(3) and (5) which enables the State to take action by "law" only. It is erroneous to submit that under Article 15(4) the State can make special provision for the advancement of SEBC, ST and SC only by executive power. If action under Article 15(4) can be taken by executive power a fortiori it can be done by legislation.

4. The special provision in Article 15(4) is not restricted to advancement of SEBC, ST and SC in educational institutions only. It enables the State to make several kinds of positive action programmes in addition to reservations. See *Indra Sawhney* v. *Union of India*[2], SCC at p. 756.

5. It is well settled that as a condition for giving aid the State can make reservations for SEBC, ST and SC in educational institutions which are State owned or State aided. *T.M.A. Pai*[3] recognised this at SCC p. 550, para 71.

The State however could not make such reservations in private *unaided* educational institutions, as held by this Court lately in *T.M.A. Pai*[3] as clarified and explained in *Inamdar*[4] at SCC p. 601 para 124. This disability was because *T.M.A. Pai case*[3] held, overruling *Unni Krishnan, J.P. case*[5] that private unaided educational institutions had a fundamental right to "occupation" of carrying on education under Article 19(1)(*g*) and State regulation of admissions in such institutions would not be regarded reasonable restrictions on that fundamental right to carry on business under Article 19(6). See *T.M.A. Pai*[3] SCC at p. 533 para 20.

6. In this background, in Parliament's view the law emerging from *Inamdar*[4] on reservations of SC, ST and SEBC in private educational institutions required correction and clarification.

7. Therefore, Parliament introduced Article 15(5) by the Constitution (Ninety-third Amendment) Act, 2006 to enable the State to make special provision for the

1 1963 Supp (1) SCR 439
2 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217
3 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481
4 *P.A. Inamdar* v. *State of Maharashtra*, (2005) 6 SCC 537
5 *Unni Krishnan, J.P.* v. *State of A.P.*, (1993) 1 SCC 645

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advancement SC, ST and SEBC *in relation to a specific subject viz., admission to educational institutions including private educational institutions* whether aided or unaided by the State notwithstanding the provisions of Article 19(1)(*g*). The amendment was truly aimed at unaided educational institutions which were held immune from regulation by State in admissions as unambiguously held in *Inamdar*[4] by reason of their fundamental right to carry on occupation under Article 19(1)(*g*).

This is evident from the Statement of Objects of the Ninety-third Amendment Act.

8. As an ordinary State regulation of private unaided educational institutions would be breaching the fundamental right to occupation under Article 19(1)(*g*) as held in *T.M.A. Pai*[3] and *Inamdar*[4], the special provision in Article 15(5) had to be by "a law" only, and not executive action inconformity with reasonable restrictions in public interest which can be imposed on the rights in Article 19(1)(*g*) only by a law under Article 19(1)(6). Hence the qualification in Article 15(5) of "*a special provision by law*".

9. In making reservations the fundamental rights of other citizens would have to be borne into mind and any reservation whether under Article 15(4) or Article 15(5) cannot be excessive.

10. Article 15(4) and Article 15(5) are thus separate enabling provisions enabling the State to make special provisions for the advancement of SEBC and ST and SC.

11. Article 15(4) is a general provision for advancement of SEBC, SC and ST not restricted to educational institutions but can protect reservations in admissions to educational institutions which are maintained by the State or receiving aid out of State funds. Article 15(5) is limited to special provisions for admissions in educational institutions and enables the State to make reservations even in private unaided educational institutions by a law overriding their rights under Article 19(1)(*g*).

Articles 15(4) and 15(5) are not exclusive of each other. There is a common area. Reservations in admissions in government maintained or aided educational institutions may receive the protection of both Articles 15(4) and 15(5) if made by substantive law.

12. Article 15(5) rightly makes no exclusion of Article 29(2), as in private unaided educational institutions Article 29(2) cannot on its terms apply. As regards private aided educational institutions Article 15(4) makes Article 29(2) inapplicable.

13. Though found in an anti-discrimination provision (Article 15), Article 15(5) confers substantive power to the State over private educational institutions in the matter of admissions overriding their right to carry on business under Article 19(1)(*g*).

14. Article 15(5) excludes this power over private educational institutions which are "minority educational institutions referred to Clause (1) of Article 30". This exclusion was put in as minority educations institutions have a right to administer educational institutions of their choice under Article 30(1). Such an exclusion had to be put in as a later constitutional amendment like Article 15(5) could possibly be construed as enabling the State to take away the guaranteed rights of religious and linguistic minorities in matters of admissions guaranteed by Article 30(1). See

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Inamdar[4] at SCC pp. 588-89, para 91. The saving for minority educational institutions in Article 15(5) is really ex abundanti cautela as minority educational institutions were constitutionally protected and at all times considered different from other private educational institutions. Article 30(1-A) in protecting the property of minority educational institutions in compulsory acquisition recognised the special position of minority educational institutions. There is, therefore, no question of any favour to minority educational institution in making this exclusion at the expense of other private educational institutions as alleged.

15. No question of Article 15(5) prevailing over Article 15(4) arises. Each operates in a different field. Parliament's intention is clear that both should operate by the use of the words "Nothing in this Article (Article 15) shall prevent the State from making any special provision" in both Articles 15(4) and 15(5), thereby giving scope for both sub articles to operate separately. Parliament could have deleted Article 15(4) if it was its intention in introducing Article 15(5). It deliberately did not. It is settled law that no article of the Constitution should be read as defeating or nullifying another. If at all there is an inconsistency, which is not reconcilable, they should be so interpreted that if possible effect should be given to both. See *Venkataramana Devaru* v. *State of Mysore*[6], SCR at p. 915. Constitutional provisions cannot be nullified by the rule of special prevailing over general as contended.

II. *Alleged violations of the Basic Structure of the Constitution.*

16. Does Article 15(5) take away the basic structure of the Constitution? The Basic Structure of the Constitution should not be trivialised to mean every feature of the Constitution. In *Kesavananda Bharati*[7] at SCC p. 767, para 1426. Khanna, J. made observations as to the limited scope of an amendment destroying the basic structure.

17. It has been submitted by the petitioners that Article 15(5) destroys the basic structure of the Constitution by the following:

(A) By placing a minority religious educational institution on a special footing it breaches the "secular character of the Constitution"

(B) By excluding educational institutions established by minorities and subjecting the non-minority educational institutions to bear the burden of weaker section the essence of equality is destroyed.

Ans: In the first place Article 15(4) excludes not only minority religious educational institution but also minority linguistic educational institutions referred to in Article 30(1). No question of secularism can arise in case of linguistic educational institutions of minorities.

Secondly, the special treatment of minority educational institutions flows from Article 30(1) of the Constitution itself.

18. In *Ahmedabad St. Xavier's College Society* v. *State of Gujarat*[8] Khanna, J. explained the purpose of Article 30 at SCC p. 772, para 77.

19. It has been held in a catena of cases that the State cannot impose any restriction on the right of the minorities to administer educational institutions so long

6 1958 SCR 895

7 *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225

8 (1974) 1 SCC 717

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as such institutions are unaided by the State except to the limited extent that regulations can be made for ensuring excellence in education. See *Kerala Education Bill, 1957, Re*[9], *State of Kerala* v. *Mother Provincial*[10], *Ahmedabad St. Xavier's College Society* v. *State of Gujarat*[8]. *Father Thomas Shingare* v. *State of Maharashtra*[11], SCC at p. 764(16).

20. Article 15(5) by excluding minority educational institutions from reservation in admission only gives recognition to the special position of minority education institutions.

21. The use of secularism is misapplied by the petitioners. Secularism in the Constitution implies no favour or bias to a particular religion or faith. No religion or faith is favoured by the exclusion of all minority religious institutions Article 15(5). All are treated uniformly by their exclusion from State regulation in admissions.

22. No question or destroying any principle of equality also arises by the recognition that minority educational institutions stand on a different basis.

23. It is submitted that Article 15(5) by making special provision for admission of SEBC, ST and SC in educational institutions destroys equality and the basic structure of the Constitution.

Ans: The special provision for admission in educational institutions for SEBC, ST and SC on the other hand promotes real or egalitarian equality. See *Indra Sawhney* v. *Union of India*[2] per Sawant, J. at p. 509 paras 413 and 415.

24. It is submitted that the nullification of Supreme Court's judgments in *T.M.A. Pai*[3] and *Inamdar*[4] in relation to private educational institutions being protected from State regulation in reservations of SC, ST and OBC destroys judicial power and the basic structure of the Constitution.

Ans: It is well settled that constituent power may set aside judicial verdicts on fundamental rights. To give a few examples; the Constitutional 24th Amendment Act 1972 set aside *Golak Nath case*[12], the Constitution (First Amendment) Act, 1951 set aside *Champakam Dorairajan case*[13], Article 31-B introduced by Constitution (First Amendment) Act, 1951 to set aside judicial verdicts on fundamental rights is not held invalid, see *I.R. Coelho* v. *State of T.N.*[14], SCC at p. 91.

25. It has been submitted that Article 15(5) amends Article 162 of the Constitution to the extent that it deprives the State of the power to reserve seats in educational institutions by executive order and is therefore violative of basic structure.

Ans: Article 15(4) does not take away the power of the State to make reservations in its own institutions by an executive action under Article 162. If now Article 15(4) requires a law to make reservation in private educational institutions aided or unaided, it does no more then other Articles of the Constitution require the State to abridge fundamental rights by a substantive law e.g. Articles 16(3), 16(5) and 19(2) to (6). No question of violating basic structure, etc. can conceivably arise.

9 1959 SCR 995
10 (1970) 2 SCC 417
11 (2002) 1 SCC 758
12 *Golak Nath* v. *State of Punjab*, (1967) 2 SCR 762
13 *State of Madras* v. *Champakam Dorairajan*, 1951 SCR 525
14 (2007) 2 SCC 1

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26. It is argued that Article 15(5) amends Entry 25 List III to the extent that the State can no more make laws for reservation of seats in minority educational institutions and therefore it is contended the amendment in Article 15(5) required ratification under Article 368(2).

Ans: The State's power to legislate under Article 245 is always subject to the other provisions of the Constitution including fundamental rights. The State cannot legislate under any entry of the State or Concurrent list to deprive minorities of their fundamental rights under Article 30(1) to administer educational institutions of their choice which includes the right to admit students of their. Therefore, there is no question of Entry 25 of List III being amended by Article 15(5).

27. It is urged that Article 15(5) destroys the fundamental right of private educational institutions under Article 19(1)(*g*).

Ans: The right to carry on any business is not part of the basic structure of the Constitution.

The right to business has in the past been excluded completely or partially by a law providing for a State monopoly by amending Article 19(6) by the Constitution (First Amendment) Act, 1951.

28. The right to property, a concomitant to the right to carry on a profession, business etc. has been held not to be a part of the basic structure in *Kesavananda Bharati case*[7] para 14221 per Khanna, J. It has been deleted from the Chapter on Fundamental Rights by the Constitution (Forty-fourth Amendment) Act, 1978. The right to carry on a business cannot be on a higher pedestal.

29. There is no reason for excluding private educational institutions who carry on an occupation from sharing the burden of providing for advancement of SEBC, ST& SC. This Court even whilst holding that private educational institutions have the right to occupation under Article 19(1)(*g*) has stated that imparting education is a charity. See *T.M.A. Pai*[3], SCC at p. 547.

XV. Ms Indira Jaising, Senior Advocate, for the State of Andhra Pradesh

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I. CONSTITUTIONAL GOALS/OBJECTIVES

1. It is submitted that the Preamble to the Constitution sets out the objectives/goals of all governance by the State. The first objective/goal set forth is Justice—Social, Economic and Political.

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2. The related goal to be achieved is set forth as Equality of Status and opportunity.

3. Equality of status and opportunity are components of social justice.

4. That the existence of the caste system in India has meant that we inherited an unequal society characterised by hierarchy of status and opportunity, which resulted in social and educational backwardness. Economic and educational backwardness are manifestations of social backwardness and hence also manifestations of inequality of status and opportunity.

5. That in a situation of pre-existing inequality and historic oppression to achieve equality, there is an active duty on the State to remove disability based on caste.

6. This is the reason why this Hon'ble Court in several decisions has held that Articles 16(4) and 15(4) are not exceptions to Article 14 but are a part of the same scheme.

7. The Constitutional guarantee of Equality is made not only to individuals, but also to groups of individuals. It is often these groups that raise the question of inequality between themselves and others and other members of society e.g. women, racial and ethnic groups, religious minorities and castes. Through Articles 15 and 16 in terms refer to sections, classes, groups. Articles 26, 29 and 30 further recognise group rights as fundamental rights.

8. Reservations under Articles 15(4) 16(4) and 16(5) in matters of employment and education are recognised and are considered as justifiable means for the removal of disability faced by disadvantaged groups based on their unequal social and educational status.

9. In furtherance of the Constitutional Scheme under Article 15(3) it is permissible to make special provisions for women and children as groups, which has led to reservation or demarcating a certain number of seats in Local Bodies and other institutions for women.

II. CASTE DISABILITY

10. It is submitted that the Constitution does not abolish caste but untouchably as stated in Articles 17 and 15(2) of the Constitution of India. However, the Preamble, which requires Justice, Social, Economic, Political and Equality of status and opportunity does visualise a society where the hierarchical and discriminatory basis of cast would be abolished.

11. The Constitution abolishes discrimination based on caste alone inter alia through Article 15(1). What this implies is the removal of hostile discrimination based on cast. It also implies that measures are taken to end disabilities based on cast. It however does not mean that cast cannot be taken into consideration as a contributory factor towards social and educational backwardness. Therefore this Hon'ble Court has held that caste is a reliable indicator of backwardness since it is the very basis on which the sections of society were deprived of their due and disabilities were perpetrated in the course of history which continues till date as well in various ways.

12. The Expression "special provisions" cannot be confined to preferences or other forms of affirmative action alone. They take within their sweep, reservations in

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employment and educational institutions. The same expression finds place in Article 15(3) whereby the State can make reservations in employment for women in education and employment. In fact such reservations have been made. Reservation of seats in Panchayats for women is a part of the Constitutional scheme and consistent with Article 15(3). Hence no distinction can be made between "reservations" or "quotas" on the one hand and "preferences" on the other hand.

III. OBLIGATION OF THE STATE

13. It is submitted that Articles 2, 12, 162, 246 and 309 and division of legislative subjects in the lists under the Seventh Schedule outlines the Federal Structure of Union of India. Collection of Vital Statistics including registration of births and deaths falls within Entry 30 of List III of Seventh Schedule. Economic and Social Planning falls in Entry 20 of List III of Seventh Schedule. Legal, Medical and other Professions fall within Entry 26 of List III of Seventh Schedule. Inquiries and statistics for the purposes of any of the matters specified in List II of seventh schedule fall within Entry 45 of List III of Seventh schedule. Article 309 empowers the states to regulate recruitment and service conditions. The federal scheme outlined in the Constitution shows that it is logical for the Centre to keep in view the steps taken by the States i.e. schemes of reservation in employment before the year 1992 and rely on the Statistics collected by the States for the purpose for testing the credence, strength and correctness of the data collected by Mandal Commission to implement the report. Not only the Centre, but also he States have the obligation to advance social justice. The task of identifying socially and educationally backward classes has been undertaken by various States for the purpose of making reservations in employment and in education. The federal scheme outlined in the Constitution shows that it is logical for the Centre to keep in view the identification of SEBCs made by the States and schemes of reservation in employment and rely on the statistics collected by the States for the purpose for testing the above mentioned credence, strength and correct ness of the data collected by Mandal Commission to implement the report.

14. It is further submitted that the State Governments have been making reservations in employments and in educational institutions in their respective states either by law or by executive orders for several decades.

15. While SC and ST can be identified only by the President under the auspices of Article 341, SEBCs can be identified by the Centre under the auspices of Article 340 or by the State under Article 162 read with Entries 20, 25 and 26 in the concurrent list under the seventh schedule read with Articles 245 and 246 of the Constitution of India.

16. States have also been doing it in exercise of their parens patriae power to further the interests of persons under disability in their territory. In *Charan Lal Sahu* v. *Union of India*[1], SCC para 35, p. 648 it has been explained that State is under a paternal obligation to protect the weak and disabled citizens "who are not in a position to assert and secure their rights." In such a situation "the State must come into picture and protect and fight for the right of the citizens. The Preamble to the Constitution, read with the Directive Principles inter alia Articles 38, 39 and 39-A enjoin the State to take up these responsibilities. It is the protective measure to which the welfare State is committed. It is therefore necessary for the State to ensure that the fundamental rights are in conjunction with the directive principles.

1 (1990) 1 SCC 613

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17. Further States are best suited to identify socially and educationally backward classes of populations within their territory. Hence reliance by the various Commissions appointed under 340 by the centre on State lists is rational and legitimate.

(V) TABULAR METHODOLOGY FOR THE IDENTIFICATION OF SOCIALLY AND EDUCATIONALLY BACKWARD COMMUNITY IN INDIA WITH SPECIAL EMPHASIS ON THE STATE OF ANDHRA PRADESH

18. *No.*	*Date*		
1	1902	Kolhapur	Reservations in employment was for the first time was introduced in the Princely State of Kolhapur The said reservation policy was formulated and started by the Maharaja of Kolhapur.
2.	1918-1921	Mysore	The Maharaja of Mysore also started reservations in the field of employment in May 1921. In the case of the Mysore [princely] state, the Maharaja of Mysore appointed the Chief Judge of Mysore, Justice Miller as the chairman of the committee (Justice Miller Committee), to ensure adequate Representation in 1918. And on the basis of the committee's report, which was submitted three years later in 1921, the Maharaja passed the order. The criteria followed by the Miller Committee to determine backwardness was based on the level of education, especially English.
3.	1921	Madras	Madras Presidency introduced Communal G.O. in which reservation of 44 per cent for non-Brahmins, 16 per cent for Brahmins, 16 per cent for Muslims, 16 per cent for Anglo-Indians/Christians and eight per cent for Scheduled Caste
	*	*	*
6.	1943		Reservations for Scheduled Castes. These were a direct result of the efforts of Dr. Ambedkar who was a member of the Viceroy's Executive Council. These inter alia included reservations on the basis of literacy, scholarships for deserving candidates etc.
7.	1953-1955	Kaka Kalelkar Commission	The first backward classes commission, headed by Kaka Kalelkar, submitted its report in 1955.

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8.	1956-61	From *Indra Sawhney*[2], SCC pp. 639-40, para 658
9.	1953-56	The State of Andhra Pradesh was formed on the 1st of November, 1956 under the States Reorganisation Act, 1956 with the merger of the Andhra Region, which formed part of the erstwhile Madras presidency and Telangana Region of Nizam State. In the state of Nizam, reservations to backward classes in educational institutions and services were provided under GOMs No. 10 dated 30-5-1953 for 112 castes. (The 112 castes were derived from the lists prepared in 1921 in the Madras presidency) In pursuance of the provisions contained in the Constitution, the Composite State of Madras maintained a list of backward classes (other than the Scheduled Castes and Scheduled Tribes) in that State and made special provisions in regard to admission to educational institutions, reservation of posts in government services, grant of scholarships and other concessions for the upliftment of these backward classes. After the formation of the of Andhra State in 1953, the list maintained by the composite Madras State was continued in the Andhra State with some modifications. The former Government of Hyderabad also maintained a list of backward classes in that State and made special provisions for their upliftment and this was continued after the creation of the State of Andhra Pradesh in 1956. Thus when the State of Andhra Pradesh was formed there were two lists of backward classes in the State one for the Andhra area and the other for the Telangana region. In the said lists there were 146 communities in all that is 86 in the Andhra region and 60 in the Telangana region. Thus it can be conclusively deduced that Andhra Pradesh inherited the backward lists prepared in 1921

2 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217

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10.	1963	In September 1963 the validity of the backward classes GOMs No. 1886 Health dated 21st June, 1963 making reservations of seats in Government medical colleges was considered by the High Court of Andhra Pradesh and the G.O. was struck down as being violative of Articles 15 and 29(2) of the Constitution having been based solely without applying the criteria as laid down by this Hon'ble Court in *M.R. Balaji* v. *State of Mysore*[3].
11.	1964	The State directed the Director of Social Welfare to take further action to check up the lists of backward classes, which were scraped in GOMs 301, Education dated 3rd February 1964 with the view to select from those lists those castes or communities, which were backward. In accordance with the directions and the recommendations of the Cabinet Sub-Committee a list of 112 communities as backward was drawn up.
12.	1968	The validity of the in GOMs 301, Education dated 3rd February, 1964 was attacked in Writ Petitions 1268, 1287 of 1968 before the High Court of Andhra Pradesh on the grounds that the list so prepared were solely on the basis of caste and violated the constitutional inhibitions and the fundamental rights guaranteed to the citizens. The High Court allowed the writ petitions and struck down the reservations made in professional colleges for the backward classes and observed that there was no material placed before the Court from which it could be determined that the Government applied the criteria laid down by this Hon'ble Court in *Balaji*[3]. On appeal this Hon'ble Court upheld the above decision of the High Court in its judgment dated 27th March, 1968 in the *State of A.P.* v. *P. Sagar*[4].
13.	1968	It was in light of all these developments the Government of Andhra Pradesh in GOMs No. 870 Education dated 12th April, 1968,

3 1963 Supp (1) SCR 439
4 (1968) 3 SCR 595

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constituted a multi member commission, initially headed by Justice Manohar Prasad ex-Chief Justice of Andhra Pradesh High Court and later by Shri Anantaraman, ICS, to investigate the said claims of the backward classes. (Also known as the Report of the Backward Classes Commission) which was to determine the criteria to be adopted in considering whether any sections of citizens of India in the State of Andhra Pradesh (other than Scheduled Castes and Scheduled Tribes specified by notifications issued by the President of India under Articles 341 and 342 of the Constitution of India) may be treated as socially or educationally backward classes and in accordance with such criteria prepare a list of such backward classes setting out also their approximate numbers and their territorial distribution. The same was done under the auspices of the Public Inquiry Act of 1956 It was further asked to investigate the conditions of all such socially and educationally backward classes and the difficulties under which they labour and make recommendations as to the special provisions which may be made by the Government for their advancement and for promotion of their educational and economic interests, generally and with particular reference to

- The reservation of seats in educational institutions maintained by the State or receiving aid out of State Funds.
- The concessions such as scholarships which may be given by way of assistance
- The percentage or proportion of such reservations, the quantum of such assistance and the period during which reservations may be made or given out

It was further asked to advise the Government as to the backward classes of citizens (other than Scheduled Castes and Scheduled Tribes) which are not adequately represented in the services under the State

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and prepare a list of all such backward classes and make recommendations as to—

- The reservation of appointments or posts in favour of such backward classes
- The percentage or proportion of such reservations and the period during which reservations may be made.

The Commission adopted the following criteria for determining the social and educational backwardness of citizens—

- The general poverty of a class and community as a whole
- Occupations pursued by the classes of citizens, the nature of which must be inferior or unclean or undignified and un-remunerative or one, which does not carry influence or power.
- Caste in relation to in Hindus
- Educational backwardness

The Commission toured all the districts in the State and in the neighbouring States of Tamil Nadu, Kerala and Mysore, collected a mass of evidence and material in respect of the various classes of citizens in the State and the neighbouring States and brought out a well-considered report after having gone into the matter in great detail. The Commission presented its report to the Government on 28th June, 1970.

The Commission dedicated a chapter towards the reservation of seats in educational institutions.

The Commission also recommended 30% of the seats in professional colleges for backward classes but the Government while accepting the recommendations reduced the quantum of reservations from 30% to 25% and apportioned the seats among the four groups of backward classes herein under

Group A 7% Aboriginal and Nomadic Tribes

Group B 10% Occupational and Vocational

Group C 1% Scheduled Castes converted to Christianity and their progeny

Group D 7% Others

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13. (*sic*)	1970		The Government of Andhra Pradesh accepted the said recommendations in toto and GOMs No. 1793 dated 23-9-1970, which provided for reservation to backward classes under four distinct groups with separate quota for each group for a period of 10 years. However on a subsequent date the Government deleted two castes and added 3 more castes to the original list.
14.	1972		The order passed by the Government of Andhra Pradesh was challenged before the Hon'ble High Court of Andhra Pradesh and the same was quashed. The State Govt., however, approached this Hon'ble Court which upheld the Government order as also the list of the Socially and Educationally Backward Classes in its judgment of June 1972 in *State of A.P.* v. *U.S.V. Balram*[5]. This Hon'ble Court also observed that a caste is also a class of citizens and as such a caste can be socially and educationally backward, the reservation made of such persons will have to be upheld not withstanding the facts that a few individuals in that group may be both socially and educationally above the general average. This Hon'ble Court's judgment gave relief to the Backward Classes from 1972 onwards by way of reservations. The concept of social justice for the Backward Classes became a reality because of this Hon'ble Courts verdict.
	1972		The next important landmark in the history of Backward Classes is the Backward Classes Conference conducted by the Andhra Pradesh Government. The State Government under the leadership of Dr. M. Chenna Reddy realised the force behind the upliftment of weaker sections and the need to tackle this problem on a war footing. It announced extension of reservations for further period of ten years from 1980.
15.	1979	Mandal Commission	The plan to set up another commission was taken by the Morarji Desai Government in

5 (1972) 1 SCC 660

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			1978. The decision was made official by the president on 1-1-1979. The commission is popularly known as the Mandal Commission, its chairman being B.P. Mandal.
16.	1980	Mandal Report Submitted	The report of the commission was submitted in December 1980. It called for reserving 27% of all services and public-sector undertakings under the Central Government and 27% of all admissions to institutions of higher education (except in states that have reserved higher percentages) for Other Backward Classes (OBCs), over and above the existing 22.5% reservation for SCs and STs.
	*	*	*
18.	1981-82		In 1982 the Andhra Pradesh Government appointed Sri. N.K Muralidhara Rao, IAS as a "One Man Commission" of Inquiry for Backward Classes in GOMs No. 12 Social Welfare (p1) Department dated 22nd January 1982. The said Commission was appointed with the following terms of reference • Review the recommendations made by the Andhra Pradesh Backward Class Commission, 1970 and the implementation thereof for the purpose of determining the need to constitute the existing special provisions in there favour under Articles 15(4) and 16(4) of the Constitution of India, and to review the existing list of Backward Classes in the light of social and educational progress achieved by those classes. • To examine the social and education backwardness of minority communities for the purpose of including within the purview of the Backward Classes of citizens under Articles 15(4) and 16(4) of the Constitution of India. • The Commission is authorised to— (*a*) Obtain such information as it may consider necessary or relevant for its purpose in such manner as it may think

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			appropriate from the Secretaries to Governments, Head of Departments, Districts Collectors and such other authorities, organisations or individuals as may in its opinion be of help to it.
			(*b*) Hold its sittings at Hyderabad and at such other places and at such times as may be determined by it and
			(*c*) Visit such parts of the State of Andhra Pradesh, as it considers necessary or convenient.
			The object of the review of this recommendations and implementations thereof was to determine the need to continue the existing reservations.
			The methodology followed by the said commission was along the lines of the methodology used by the Mandal Commission.
			Much like the report of the Backward Class Commission of 1970 (Anantaraman Commission), the Muralidhara Rao Report had dedicated Chapter V discussing the concessions recommended for the Socially and Educationally Backward Classes in the State of Andhra Pradesh.
			It is submitted that the Commission recommended that the policy of reservations to be continued for a period of 25 years with periodic reassessments.
			The Muralidhar Rao Commission appointed in 1981 submitted its report in 1982.
	19.	13-8-1990	The First OM dated 13th August, 1990 expressly directs that only those classes will be treated backward for the purpose of Article 16(4) as are common to both the Mandal List and the Respective State Lists. What it does in affect is to adopt and enforce the respective State Lists as obtained on August 13th, 1990. In this sense the lists prepared by Mandal have no real significance at present. The State Lists were prepared both for the purpose of Articles 15(4) and 16(4) and the particulars of the basis and the status of the various lists as on record (see chart in para 851

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			Indra Sawhney[2]) do establish that these State Lists have been prepared after due inquiry and investigation and have stood the test of time and judicial scrutiny unless declared invalid by any court or commission. The State Lists must be deemed to be valid and enforceable. Paras 851 and 852 of Mandal Judgment.
20.	1993	Andhra Pradesh Commission for Backward Classes Act	The Andhra Pradesh Commission for Backward Classes Act (APCBC) Act No. 20 of 1993 comes into force.
21.	1994	AP Commission for Backward Classes	In exercise of the powers conferred by Section 3 of the APCBC Act No. 20 of 1993 the AP Commission for Backward Classes which was constituted vide GOMs No. 9 SW (P2) Deptt. dated 26-1-1994 started functioning w.e.f. 31-3-1994 with the mandate of the backward classes socially, educationally and economically on par with other socially advanced communities and to achieve a just and egalitarian society. The department inter alia aims at ensuring better opportunities for the poor belonging to the Backward classes to utilise educational facilities, eradicating poverty against them and eliminating current inequalities that prevent them from realising their potential.
	1994		The Commission so appointed was on along the lines of the Commissions in other States with the mandate to look into issues like the inclusion and non-inclusion of backward castes in the list of Backward Classes. It is important to note that the Commission so appointed was different from the two commissions appointed earlier in as much as the earlier ones were appointed under the auspices of the Public Inquiry Act of 1956 and were ad hoc in their nature. However the current Commission was a permanent one which was to continue till the existence of backwardness. Justice Putta Swamy was the first chairman of this Commission. The commission appointed a research team to study the socio-economic position of all

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		castes in the State.
22.	2000-2001	In the year 2000, the period of ten year for BC reservations elapsed. The Government of Andhra Pradesh however, extended the reservations through G.O. No 23 dated 31st May, 2001.
23.	2001	Later in the month of July the Govt. of Andhra Pradesh issued another GOMs No. 36 dated 25th July, 2001 which provided for inclusion of the words "subject to the revision that may be suggested by the AP Commission for backward classes" to para 2 of the GOMs.

It is therefore submitted that reservations in the State of A.P. have been in existence for a number of years as has been pointed out above. The said reservations have advanced the concept of social justice and brought about the desired result in uplifting the weaker sections of the people and in particular, Scheduled Castes, Scheduled Tribes and the Socially and Educationally Backward Classes. It has resulted in a more inclusive society and has upgraded skills and education among backward classes substantially. A closer look at the Parmaji Research findings and the Government of Andhra Pradesh BC Welfare Department Outcome Budget 2007-2008 which are discussed below, reiterates this humble submission.

VI. RESERVATION AND GROWTH IN ACHIEVEMENT

19. It is submitted that to further substantiate that reservations and other measures taken by the State Government to achieve equality on a subjective scale have resulted in growth and advancement, thereby creating a nexus between special provisions and the goals sought to be achieved, it is imperative to look at the research findings published by Dr. S. Paramji in the book Caste Reservation and Performance.

20. Dr. S. Paramji is a renowned academic and is a professor of Education at Kakatiya University, Warangal in Andhra Pradesh.

21. Chapter 5 of the said research findings are dedicated to show that reservations have resulted in growth, which was, envisaged. Realising the need to tap the rural talent and 'to provide it opportunities for development', the Central Government has evolved a scheme of Scholarships for talented rural children. Under the scheme two talented boys in each block who enter a secondary a school are awarded scholarships of Rs 1000 each per annum for a period of three years to be availed in a residential school. Taking advantage of such a scheme the State Government of Andhra Pradesh established the first residential school in Sarvail in Nalgonda District In 1971 followed by a residential school for tribals at Kinnersani and a residential junior college at Nagarjunasagar for boys in 1975 with the philosophy to do social justice to the academically backward but talented children from the rural areas, who otherwise would not have had such an opportunity. Under the scheme both the teacher and the students live together on the same campus, which provides scope for intense educational and social interaction.

22. Another feature of the residential school/college is the identical social and educationally milieu it provides to Forward classes, Backward Classes and Scheduled Castes and Scheduled Tribes candidates who come from diverse socio

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cultural and economic conditions. The students from such diverse backgrounds stay together for a number of years in an identical residential situation interacting with each other and the teacher on the campus.

23. Much like the residential school programs mentioned herein above and which are a part of the study attached herewith the professional programs like medical and engineering education too are of a long period as it requires it students to associate with the campus life for a period of about 5 years.

24. The study which is attached herewith tries to answer questions like

- What could be the results of such sustained academic interaction?
- Will the backward sections, which start with a wide initial academic difference, lag far behind their compatriots from the higher caste by the end of their studies? Or
- Will they narrow down the initial differences? Or
- Will they excel in comparison with the forward class students in performance towards the end of the educational professional program?

The answers to the above questions were found after examination inter alia study of both residential and professional institutions.

The institutions included in the study are

1. Residential Schools Sarvail,
2. Residential School Kinnersani
3. Residential Junior College Nagararjunsagar
4. Osmania Medical College
5. Hyderabad Regional Engineering College
6. Warangal and Jawaharlal Nehru Technological University

25. Chapter 5-A deals with caste levels and performance level during schooling at residential High School Sarvail, the objective of the investigation was to find out how the children from the backward sections of the society, namely, the BCs, SCs and the STs fare academically when they are put along with the forward class students in the same residential school situation for a period of a few years (three years in this case) The sole intention was to find out that if the initial difference if any narrow down over the years or not.

26. The results revealed that during their stay at the school the students generally recorded a positive growth in the percentage of marks secured in the subsequent examinations when compared to marks secured in class VIII as the starting point. The only negative growth recorded is by one BC. C grade candidate. Even the strength of the sub-class group BC A was two and so BC A two was being excluded from the discussing along with the BC C candidate.

27. The results reviled that while the FC (N=21) candidates had scored a mean score of 72.02% in class VIII their score in class X had been 76.59%, which signifies a relative percentage, increase of 6.34. The BC D (N=5) group which had scored 70.4% marks in class VIII had scored 77% marks in class X and thus recorded a percentage growth of 9.37 %. The BC B (N=38) which ad scored 71.86% in class VIII had scored 75.57 in class X and had recorded a relative increase of 5.16. The SCs who numbered 34 and who scored 68.23 in class VIII had scored 73.35, had recorded a relative increase of 7.50. Likewise the STs who numbered (8) who had scored 65.62 in class VIII had a performance level of 73.25 in class X which signifies a relative increase of 11.63.

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28. Thus it can be concluded that the relative percentage increase has been generally (with the exception of BC B which had scored slightly less) more in the case of the backward sections of the society then in the case of FC students. It gets established that the candidates from backward sections from the society progressively narrow down the initial differences in the academic levels when they are put in a residential schools.

29. Further, Chapter 5-C is titled Caste Level and Performance During the stay at Residential Junior College, Nagarjunasagar. The said institution was meant for the entire State unlike the residential schools which were defined to cater to the requirements of students hailing from a particular caste or communities (rural/urban) or sub-regional background. Since single public residential junior college was started in the entire state, obviously, there has been a tough competition for admission into such institution and the students with higher levels of achievement alone, both in open competition and reservation category, were able to secure admissions. The students thus selected live for two years in the same residential background and are exposed to the same socio academic milieu. They are therefore invariably away from their multiple home backgrounds, which possibly could but be different in content and quality.

30. The objective of the investigation under report was to find out the affect of such co-living for two academic years on the academic performance of the students who come from various castes and academic levels. The particular interest of the researcher was to find out if the initial differences at the academic levels (marks) with which the students get admitted in this college because of caste-based reservations remain intact, widen, or narrow down.

31. After examination of the said research it could be conclusively established that the BC's the SCs and the STs' who get selected even with lower levels of achievement because of reservations narrow down the initial level of differences. In some case they even exceed the final performance levels of the FC's.

32. Chapter 5-D titled Caste levels and Performance During Medical Training. Is a study undertaken with the objective of finding out the relationships between the following sets of variables.

- The caste-sub-caste levels of medicos and their pre entry level academic achievements.
- The changing level of performance of various castes/sub-castes groups during their professional training.

The sample consisted of all the candidates admitted into Osmania Medical College Hyderabad during the academic year 1973-1974

Based on the results obtained the following conclusions were arrived at

a. The achievement level of medicos at pre entry level and during the medical training correspond with caste hierarchy

b. The entry level disparity in the achievement of the caste group have narrowed down over a period of time, the progress being negative for the higher caste and positive for the lower caste.

33. The relevant chapters from the study are attached herewith.

34. Further still in exercise of the powers conferred by Section 3 of the APCBC Act No. 20 of 1993 the AP Commission for Backward Classes which was constituted vide GOMs No. 9 SW (P2) Deptt. dated 26-1-1994 started functioning w.e.f.

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31-3-1994 with the mandate of bringing the backward classes socially, educationally and economically on par with other socially advanced communities and to achieve a just and egalitarian society. The department inter alia aims at ensuring better opportunities for the poor belonging to the Backward classes to utilise educational facilities, eradicating poverty against them and eliminating current inequalities that prevent them from realising their potential. After a closer examination of the Departments budget for the year 2007-2008 it can be seen that the Department runs many programs for the backward class people in order to increase access to education, provide quality education to meritorious backward class students, promote higher education and in part quality education on par with the students from the general category. It further reimburses tuition fees , provide scholarships to lakhs of backward class students and also to provide coaching facilities for various competitive examination. To reaffirm this point, in the year 2006-2007 over 5 lakh students were provided post Matriculation scholarships and tuition fees for over 2,38,000 were reimbursed. The department also maintains 1103 hostels for boys and 326 hostels for girls, including 14 for de notified tribe's hostels. The said hostels provide free boarding and lodging for poor backward class student (3rd to 10th class). Special coaching is arranged for 9th and 10th class boarders as a result of which the results of the 10th Class examinations for backward classes is generally better than the state average.

35. In addition to the backward class hostels, the department has 30 residential schools, 19 for boys and 11 for girls from these schools in March 2007, 2190 appeared for 10th class examinations (SCC) out which 2180 passed, with 2145 in first class. The pass percentage was 99.54% against the state average of 71.65%. Some of the other schemes for backward classes include stipends for ITI students and fellowships for M. Phil and PhD students. For the current year 2007-2008 it has been decided inter alia that all eligible backward class students would be provided with post Matriculation scholarships. Accordingly the budgetary provisions of the department has been enhanced very substantially in the current year.

36. In addition to these land distribution to the poor and deserving in a large scale and various other programs for their economic development have also accorded top priority by the Government.

37. All these would indicate that the Government of Andhra Pradesh has over the decades been placing maximum emphasis on the welfare of the weaker sections (SC, ST, OBC, and women). The proactive state intervention has resulted in all round and inclusive growth of the State. It may be noted that many students from Andhra Pradesh belonging to OBC category were selected to the All India and general services over the years including Shri R. Muthyala Raju who topped the list of selected candidates for the IAS and other services bases on Civil Services examination in 2006.

38. It is further submitted that the reservation policies of the State have provided a strong edifice for a socially balanced and educated society. The proof for the same was demonstrated in February 2007 when the State of Andhra Pradesh was among the toppers Composite Education Development Index to track the progress of States towards providing universal elementary education. The report has been prepared by the National University of Educational Planning and Administration (NUEPA).

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XV. Ms Indira Jaising, Senior Advocate, for the State of Andhra Pradesh *(contd.)*

VII. REPORT OF THE NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION

39. It has been argued by the Petitions that no real review has been made of the strategy of reservations for a long time. This is incorrect.

40. It is submitted that in the year 2001 the report of the National Commission to review the working of the Constitution was formulated and published. The said Commission was chaired by the former Chief Justice of India, Justice Shri M.N Venkatchaliah and had three more prominent Justices on the commission, Justice Jeevan Reddy, Justice Sarkaria and Justice Kottapalli Punnaya. The Commission also had on its panel prominent jurists like Shri Soli Sorobjee and Shri K Parasaran. Further still the granddaughter of Gandhiji; Smt Sumitra G. Kulkarni was on the panel.

41. The main function of the Commission among others was to review the provisions of the Constitution dealing with Parts III and IV, inter alia the fundamental rights and the fundamental duties of the state.

42. Chapter 3, Volume I of the report is dedicated to fundamental rights, directive principles and the fundamental duties of the state. While reviewing Articles 15 and 16 of the Constitution in the context of reservation for minorities the Commission held that "there was a plea on behalf of some minority communities for an express provision for reservations in favour of minorities both in Articles 15(4) and 16(4). The Commission, upon due consideration of the representation, felt that no special provision was necessary in as much as, under the existing provision of Articles 14, 15 and 16, it was open to the State to make reservations if it is of the opinion that such reservation is necessary and justified". "The Commission noted that the ultimate aim of affirmative action of reservations should be to raise the levels of capabilities of people of the disadvantaged sections and to bring them at par with the other sections of society".

43. Further still the Commission drafted and tabled a constitutional paper titled 'Pace of Socio Economic Change under the Constitution'. The Constitution paper was prepared by the Secretariat of the National Commission to review the working of the Constitution under the guidance of the Hon'ble Chairperson, Justice Shri Venkatachaliah.

44. Chapter 9 of the paper is titled issues of Social Justice: Scheduled Castes and Scheduled Tribes and Other Backward Classes—An unfinished agenda. The paper points out "In the years since independence and particularly after the adoption of the Constitution, efforts made to promote and protect the rights of Scheduled Castes, Scheduled Tribes and Backward Classes and to secure their development and welfare have yielded only limited results. Improvements no doubt, have been achieved in a number of areas but wide gaps with Scheduled Castes, Scheduled Tribes and Backward classes on one hand and the others on the other hand continue to prevail in almost all areas even to this day. The representation of the Scheduled Castes the Schedule Tribes and the backward classes in top scientific and bureaucratic echelons is believed to be meagre though the precise statistical data in this regard are not available. Depleting land and forest resources of tribals and vanishing of traditional employment opportunities for backward classes is leading to worsening of conditions of these people.

45. It recognises the facts that the despite the Constitutional mandates and concerns of the Constitution, the objectives for securing upliftment of these classes

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have not been fully achieved and whatever has been done has been done hesitatingly, half heartedly and as a measure of concession forgetting that the special provisions so provided are constitutional rights and not mere concessions to these classes.

46. It further states "the legal regime also confronts us with paradoxes. While the legal text is explicit in seeking remedies the implementation appears to evade performance. In implementation of laws and the working of the legal system several trends emerge. Laws and legal processes are not self-executing; they depend on the players such as the administrative structure and its processes, the judiciary with the anticipation that social attitudes are driven by enlightened notions: equality, social justice, fair-play. However the responses of the players in the implementation of the laws protecting the weak, the oppressed, the women and children and socially disadvantaged have over the years become increasingly indifferent. The injustices have been allowed to persist and the system has failed to provide for self-correction. In implementation and interpretation of the Constitution and the law distortion and denial of the rights have crept in.

47. The paper categorically recognises that goals of equality and the socio-economic and educational development of the SCs, STs and the OBCs is still a distant dream, there is a lot that needs to be achieved to attain these goals as envisaged by the framers of our Constitution. It therefore recommends measures to fulfil the constitutional mandate and states as under:

> "*The wrongs suffered by these classes can be remedied by only a combination of measures. Free compulsory elementary education, indeed quality education is the most important. Facilities need to be provided to ensure that talented children belonging to these communities achieve their full potential and grow to become top professionals and administrators.*"

XVI. Mr Rakesh Dwivedi, Senior Advocate, for the State of Bihar

PART I

USE OF CASTE

1. The use of non obstante clauses in Articles 15(3), (4) and (5) vis-à-vis Article 15(1) shows that the prohibition against use of only caste as a ground of discrimination qua any citizen is lifted in so far as making of a special provision for advancement of prescribed categories are concerned. Hence such special provisions cannot be questioned on the ground of use of caste. See

(*i*) *Shin-Etsu Chemical Co. Ltd.* v. *Aksh Optifibre Ltd.*[1]

(*ii*) *Iridium India Telecom Ltd.* v. *Motorola Inc.*[2]

(*iii*) *Union of India* v. *G.M. Kokil*[3]

(*iv*) *Parayankandiyal Eravath Kanapravan Kalliani Amma* v. *K. Devi*[4]

2. Article 29(2) is a specie of the genus contained in Article 15(1) and once the genus is overridden in the field of admissions the specie can not stand out as a bar preventing use of caste.

1 (2005) 7 SCC 234 at p. 253
2 (2005) 2 SCC 145, para 33
3 1984 Supp SCC 196 at p. 203
4 (1996) 4 SCC 76

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3. Moreover there is a conjointness and interconnection in operation between Articles 15(4) and 15(5) and there is no scope for any repugnance. All special provisions under sub-article (5) are also special provisions within the scope of sub-article (4). Hence, such provisions are protected from challenges based on Articles 15(1), 19(1)(*g*) and 29(2).

4. Further, Article 29(2) uses the expression "only". This bar therefore does not apply to Article 15(5) which is based on backwardness so far as SEBC are concerned. When reservation is based on backwardness it is not "only" on caste and hence bar of Article 29(2) is not attracted.

5. In *T.M.A. Pai*[5] it was noted that Article 29(2) with Article 30 was considered in *St. Stephen's*[6]. (Para 125 of *T.M.A. Pai*[5]). This Court harmonised the two competing articles. (Paras 132-133). While holding that minorities are covered by Article 29(2), this Court held that "Denying admission to non-minorities for the purpose of accommodating minority students to a reasonable extent will not be "only" on grounds of religion, etc., but is primarily meant to preserve the minority character of the institution and to effectuate the guarantee under Article 30(1). The best possible way is to hold that as long as the minority educational institutions permits admission of citizens belonging to non-minority class to a reasonable extent based upon merit, it will not be an infraction of Article 29(2) even though the institution admits students of the minority group of its own choice for whom the institution was meant."

6. It follows the Act is not unconstitutional on account of use of caste for only a reasonable extent of reservations, not crossing 50%, have been made and, as in the minorities case of *T.M.A. Pai*[5], here also Articles 15(5) and 29(2) have to be balanced.

BASIC STRUCTURE

7. Breach of basic structure against Article 15(5) is alleged

(*i*) because minority educational institutions are excluded hence secularism is affected.

(*ii*) Executive power of states under Article 162 to make reservation orders is denied by the expression "by law" in Article 15(5) which is a breach of Federalism.

(*iii*) Overrides *T.M.A. Pai*[5] judgment and hence affects Judicial Independence.

8. In the evolution of basic structure doctrine two aspects have been overlooked and that presents a real danger of over bloating the doctrine and eroding the amending power beyond what was envisaged in *Kesavananda Bharati case*[7].

(*i*) While basic structure doctrine was propounded with a 7-6 vote, the judgment in *Golak Nath*[8] was overruled almost unanimously, though three Judges did not feel it necessary to examine its correctness. Thus

5 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481

6 *St. Stephen's College* v. *University of Delhi*, (1992) 1 SCC 558

7 *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225

8 *I.C. Golak Nath* v. *State of Punjab*, AIR 1967 SC 1643 : (1967) 2 SCR 762

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Kesavananda Bharati[7] Overturned the idea that Constitutional Amendment was an ordinary law requiring Part III compliance.

(*ii*) By 9-4 it was held that Article 368 has within its reach all the articles including fundamental rights and had only one rider that it could not be used to *abrogate or emasculate* basic feature.

Hegde, J. observed fundamental rights could be abridged, (para 634) short of emasculating basic features (para 666). Jaganmohan Reddy, J. observed that though Amendment power was wide and covers fundamental rights it was "not as wide as" to permit total abrogation or emasculation of fundamental rights (paras 1159-60). Khanna, J. more clearly observed "If framers of the Constitution had intended that provisions relating to fundamental rights in Part III be not amended it is inconceivable that they would not have inserted a provisions to that effect in Article 368 or elsewhere" (paras 1358, 1360, 1383, 1394, 1395, 1397-1399, 1421, 1434-35, 1464 and 1508).

Thus along with six dissenting judges the majority view is that Article 368 can be used to abridge or take away fundamental rights as long as the basic structure of the Constitution is not destroyed. Significantly Article 31-C has been upheld with the exclusion of proviso (paras 1518, 1524-1526).

9. In *Indira Gandhi case*[9] Khanna, J. clarified his views: See SCC p. 114, para 251.

10. Having examined various cases dealing with basic structure doctrine a larger bench in *I.R. Coelho*[10] (paras 49, 82, 106, 143 and 151) held that "Part III is amendable subject to basic structure doctrine" and the impact test was approved from testing the validity of the Constitutional Amendment which abridges or abrogates the fundamental rights.

11. By ignoring the aforesaid there is a grave danger of restoration of *Golak Nath*[8] or creating a Super *Golak Nath*[8] by making Article 368 more restrictive than *Golak Nath*[8] did.

12. Even the basic features are not untouchables for Article 368. It is only their abrogation, emasculation or destruction which is prescribed by the doctrine of basic structure. To illustrate alteration of entries in the 3 lists or Chapter 1 of Part XI of Constitution is expressly envisaged by resort to a special ratificatory procedure of Article 368. Every such change touches upon or may abridge federalism and may pro tanto enhance central power. But that is not destruction or emasculation of Federalism which is a basic feature per *S.R. Bommai*[10a].

13. As it is none of the fundamental rights are absolute and are designed to suffer reasonable restrictions, and classifications. Therefore their abridgement by Constitutional Amendment is clearly permissible, as long as the invasion does not amount to total elimination or emasculation.

14. Within the domain of Equality there is a distinction between formal equality and real equality or equality in fact, both are comprehended in Article 14 and both are part of a basic feature. There is an element of conflict between two aspects of this

9 *Indira Nehru Gandhi* v. *Raj Narain*, 1975 Supp SCC 1

10 *I.R. Coelho* v. *State of T.N.*, (2007) 2 SCC 1

10a *S.R. Bommai* v. *Union of India*, (1994) 3 SCC 1

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basic feature and one aspect may suffer abridgement on account of activation of the other. If, to achieve equality in fact or equality before law or social economic and political justice envisaged by directive principles of State policy and Preamble a Constitutional Amendment is made certainly the equality clause would be abridged to some extent but that by itself would not mean destruction or emasculation of Article 14.

15. Article 15(5) is like Articles 15(3), 15(4) and 16(4)/(4-A) a Constitutional expressions of classification. In fact, in *Indra Sawhney*[11] this Court has held that reservation for SC/ST/SEBC could be done under Article 15(4) as a special provision. Article 15(5) does no more than what is already inhering in Article 15(4) and merely gives overriding effect qua Article 19(1)(*g*) in view of *T.M.A. Pai*[5].

16. As for Act, 162, it only makes executive power of States coextensive with its legislative field. But it does not say that fundamental rights could be regulated by executive power not backed by law. None of the fundamental rights in Article 19 could be infringed by mere executive power. Articles 19(2) to (6) envisages law imposing reasonable restrictions and Article 15(5) is in the same lines. It does not alter Article 162 at all. By requiring law making Parliamentary democracy, which is also a basic feature, is strengthened. The states legislative power in the field of education remains intact. Article 15(5) at best touches upon federalism but does not abrogate it.

17. Exclusion of minority educational institutions from Article 15(5) is only because these institutions are entitled as of fundamental rights to maintain their minority characters under Article 30. *T.M.A. Pai*[5] placed majority educational institutions at par in all respects except this. *T.M.A. Pai*[5] never granted complete parity. Pro tanto minority educational institutions were treated differently under our Constitution from the beginning. This distinct treatment is part of our secularism.

Moreover, per *T.M.A. Pai*[5] even minority educational institutions can be required to abide by same reservation policy by virtue of aid conditions in view of Article 15(4) with the rider that fundamental rights under Article 30 is not nullified and eroded. Again all religious minorities are given similar treatment by Article 15(5) and that clearly respects the concept of secularism. But in any case this does not destroy or emasculate the basic feature of secularism and only touches upon that principle.

18. Likewise, there is no destructions of the principles of Independence of Judiciary. Validation principles are settled by this Court and it is always open to legislature to cure defects pointed out and validate measures. That has never been considered as abrogating Independence of Judiciary.

19. In the case of Article 15(5) no validation is involved. It simply takes note of the new dimension added by *T.M.A. Pai*[5] by recognition added by *T.M.A. Pai*[5] by recognition of fundamental rights of majority to establish educational institutions under Article 19(1)(*g*) and seeks to protect the special provisions from the onslaughts based on it.

11 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217

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PART II

RELIANCE ON AMERICAN JUDGMENTS MISPLACED

20. The petitioners seek to introduce the judicial review ideas of suspect classification, strict scrutiny, compelling state interest and narrow tailoring for race based measures propounded by the US Supreme Court into the domain of judicial review pertaining to reservation under the Indian Constitution. It is therefore necessary to examine whether these ideas could be imported.

21. Before examining the matter on first principles, it is worth noting that in various areas under the Indian Constitution this Court has consistently taken the view that the judgment of the American Supreme Court do not afford safe guidance on account of the structure of the provisions under the two constitution being different and the conditions in the two countries being different.

(1) *Article 13:*

Bhikaji Narain Dhakras v. *State of M.P.*[12] (See SCR pp. 599-600)

(2) *Articles 19(2) to (6) and Due Process:*

(*i*) *A.S. Krishna* v. *State of Madras*[13] (SCR p. 412)

(*ii*) *Collector of Customs* v. *Nathella Sampathu Chetty*[14] (SCR p. 816)

(*iii*) *C.K. Daphtary* v. *O.P. Gupta*[15] (SCC p. 639, para 51)

(*iv*) *Pathumma* v. *State of Kerala*[16] (SCC p. 15, para 23)

(3) *Article 19(1)(a):*

(*i*) *Kameshwar Prasad* v. *State of Bihar*[17] (SCR at p. 378)

(*ii*) *State of Bombay* v. *R.M.D. Chamarbaugwala*[18] (SCR at p. 918)

(*iii*) *Automobile Transport Ltd.* v. *State of Rajasthan*[19] (SCR pp. 509-10)

(4) *Legislative Entries'* :

(*i*) *Chhotabhai Jethabhai Patel and Co.* v. *Union of India*[20] (SCR pp. 16-17)

(*ii*) *Godfrey Phillips India Ltd.* v. *State of U.P.*[21] (SCC p. 539, para 43)

(*iii*) *Uday Ram Sharma* v. *Union of India*[22], at SCR at p. 67

(5) *Advisory Jurisdiction (Article 143)'* :

(*i*) *Special Courts Bill, 1978, In re*[23], at SCC p. 408, para 38

12 (1955) 2 SCR 589
13 1957 SCR 399
14 (1962) 3 SCR 786
15 (1971) 1 SCC 626
16 (1978) 2 SCC 1
17 1962 Supp (3) SCR 369
18 1957 SCR 874
19 (1963) 1 SCR 491
20 1962 Supp (2) SCR 1
21 (2005) 2 SCC 515
22 (1968) 3 SCR 41
23 (1979) 1 SCC 380

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(6) *Articles 14, 15 and 16'* :

(*i*) *Air India* v. *Nergesh Meerza*[24], (SCC pp. 369-70, paras 86-87)

(*ii*) *Indra Sawhney* v. *Union of India*[11], (SCC pp. 686 and 695, paras 733 and 745)

(7) *Article 368'* :

Kesavananda Bharati v. *State of Kerala*[7] : Sikri, C.J. : (SCC p. 374, para 326); Shelat and Grover, JJ. : (SCC pp. 418-19, para 505); Hegde and Mukherjee, JJ. (SCC pp. 483-84, para 659); Ray, J. : (SCC pp. 572-73, 614-15, paras 981 and 1107-08); Jaganmohan Reddy, J. : (SCC pp. 617-18, para 1113); and Chandrachud, J. : (SCC pp. 966-67, para 2011).

STRUCTURAL DIFFERENCE

22. Fifth and Fourteenth Amendments of the US Constitution are as below:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself not be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

"All persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property *without due process of law*; nor *deny to any person within its jurisdiction the equal protection of the laws*."

23. Additionally Civil Rights Act of 1964 had been enforced and the same was amended in the year 1972.

Title III carries the caption "Desegregation of Public Facilities".

Title IV carries the caption "Desegregation of Public Education".

Title VI prohibits discrimination in Federally assisted programs.

Title VII carries the caption "Equal employment opportunity".

Taken together these titles and the sections contained thereunder prohibit discrimination on the ground of race, colour, or national origin.

24. The development relating to Civil Rights Act, 1964 has been discussed in "*American Jurisprudence*", Second Edition, Vol. 15, pp. 489-95.

25. A comparison of the Fourteenth Amendment of US Constitution read with the Civil Rights Act, 1964 on the one hand and the fasciculus of equality provision in the Constitution of India i.e. Articles 14 to 18 on the other shows that the equality provision of our Constitution are not only differently structured but it contains express provisions for making special provision for the advancement of SEBC and SC/ST. Our Constitution additionally enshrines directive principles of State Policy in Part IV of the Constitution requiring the State to strive to promote justice social,

24 (1981) 4 SCC 335

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economic and political and to minimise the inequalities in income and endeavour inequalities in status, facilities and opportunities (Article 38). In view of the structural difference and positive mandate emanating from Articles 15(3), 15(4), 15(5) and 16(4) as well as the directive principles, the judgments of US Supreme Court pertaining to the Fourteenth Amendment of US Constitution read with the Civil Rights Act, 1964 cannot be applied. These provisions do not exist in US Constitution. However as has been noted in *Indra Sawhney case*[11], despite absence of the mandate to make special provisions for advancement and the prohibition contained in the Civil Rights Act, 1964 the American Supreme Court has not completely ruled out affirmative action based on race.

NAMIBIA AND SOUTH AFRICA

26. Interestingly one finds a positive mandate for affirmative action for the advancement of the socially, economically and educationally disadvantaged in the Constitution of the Republic of Namibia and Constitution of South Africa.

Articles 10 and 23 of Namibian Constitution are as below:

Article 10: Equality and Freedom from Discrimination

(1) All persons shall be *equal before the law*.

(2) *No persons maybe discriminated* against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.

Article 23: Apartheid and Affirmative Action

(1) The practice of racial discrimination and the practice and ideology of apartheid *from which the majority of the people of Namibia have suffered* for so long shall be prohibited and by Act of Parliament such practices, and the propagation of such practices, may be *rendered criminally punishable* by the ordinary Courts by means of such punishment as Parliament deems necessary for the purposes of expressing the revulsion of the Namibian people at such practices.

(2) Nothing contained in *Article 10* shall prevent Parliament from enacting legislation *providing directly or indirectly* for the *advancement of persons within Namibia* who have been *socially, economically or educationally disadvantaged by past discriminatory laws or practices*, or for the implementation of policies and programmes aimed at *redressing social, economic or educational imbalances* in the Namibian society *arising out of past discriminatory laws or practices*, or for achieving a balanced structuring of the public service, the police force, the defence force, and the prison service.

(3) In the enactment of legislation and the application of any policies and practices contemplated by para (2), it shall be permissible to have regard to the fact that women in Namibia have traditionally suffered special discrimination and that they need to be encouraged and enabled to play a full, equal and effective role in the political, social economic and cultural life of the nation.

Similarly Section 9 of South African Constitution is as below:

"*Equality*

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equally includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed

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to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of sub-section (3), National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in sub-section (3) is unfair unless it is established that the discrimination is fair."

(Extracted from "*Constitutions of the World*" Second Edition by M.V. Pylee)

Judicial Review and Strict Scrutiny

27. The application of *strict scrutiny test*, as applied in America, involving aspects of compelling State interest, narrow tailoring, and suspect classifications, are really matters pertaining to the standard of judicial review. The question is whether they can be adopted by Indian Courts under the Indian Constitutional system, particularly in matters of reservation or making of special provisions.

28. The expression "strict scrutiny" by itself does not indicate much unless the content of the strict scrutiny becomes clear. For instance, the twin test of classification expounded by our courts in *R.K. Dalmia*[25] and *Special Courts Bill*[23] are applied identically with respect to the challenges based on Article 14 in different spheres, except that in the field of tax and economics our courts are liberal and allow a wider latitude. (See *R.K. Garg case*[26]). In other fields, the courts may be less liberal or relatively stricter but the twin test remains the same.

Again in matters pertaining to a challenge based on Article 19(1), the scrutiny in matters of freedom of speech and expression, the freedom to peacefully assemble without arms and the freedom to form associations or unions are given a stricter scrutiny. But that is on account of the narrow heads of reasonable restrictions permitted by Articles 19(2)(3) and (4). Thus the Constitution itself delineates a stricter regime. However, the scope of the expression "reasonable restrictions" remains the same and the tests are always as laid down in the classical case of *V.G. Row*[27] and *Pathumma*[28].

29. In United States the strict scrutiny test has acquired a specific legal connotation. Under the Fifth and Fourteenth Amendment, the US courts apply different standards in different areas depending upon whether the classification is suspect or not. If the classification is suspect, then the strict scrutiny would involve a close enquiry of whether there exists a compelling state of interest and whether the law is narrowly tailored. If the classification is not suspect, then the scrutiny is liberal. The courts have used different expressions like "intermediate scrutiny" and "heightened scrutiny".

25 *R.K. Dalmia* v. *Delhi Admn.*, (1963) 1 SCR 263
26 *R.K. Garg* v. *Union of India*, (1981) 4 SCC 675
27 *State of Madras* v. *V.G. Row*, 1952 SCR 597
28 *Pathumma* v. *State of Kerala*, (1978) 2 SCC 1

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SUSPECT CLASSIFICATION

30. There are 4 aspects involved in the Fourteenth amendment. First, all persons born or naturalised in the US are citizens of the US and of the States wherein they reside. Second, there is an injunction that State shall not make or enforce any law which shall abridge the privileges and immunities of the citizen. Third, the States are injuncted against depriving any person of life, liberty or property *without due process of law*. Fourth, there is an injunction against denial of equal protection of laws. In view of this peculiar combination of entitlements, the US courts have exercised Due Process powers within the field of Equal Protection of Laws. Accordingly, the US courts make value judgments as to whether a particular legislation is suspect and whether it touches certain interests which are fundamental. This involves an a priori determination and application of a scale of values judicially determined depending upon significance of the field or interest touched by the legislative classification. The interests stand judicially classified as fundamental, less fundamental or not fundamental. Upon this operates theory of suspect classification.

31. Initially, the US Courts considered discriminations against classes which have been historically subjected to unequal treatments or which were in a politically powerless position as cases of suspect classification. The underlying rational of the suspect classification theory is that where legislation affects discreet & insular minorities, the presumption of constitutionality fades because traditional political process may have broken up. See *Donald E. Johnson* v. *William Robert Robison*[29]. Subsequently, this theory was extended to all classification based on race, religion, sex and some other categories. It was said that Fourteenth Amendment commands the elimination of the racial barriers, not their creation in order to satisfy our theory as to how society ought to be organised. See *De Funis* v. *Charles Odegaard*[30].

32. An important input for holding that classifications based on race as suspect was the enactment of the Civil Rights Act, 1964. It prohibits discriminatory preference for any group whether in minority or majority i.e. irrespective of whether they are black or white. (See *American Jurisprudence*, IInd Vol. 15, pp. 717 to 720). It is akin to Article 15(1) of our Constitution, but does not contain other sub-articles.

33. It is significant that even the US Supreme Court has not gone as far as to characterise any Constitutional Amendment as suspect classification. As already submitted by the Solicitor General (SG), Articles 15(3), 15(4), 15(5) and 16(4) are nothing but an emphatic expression of valid classification done by the Constitution itself. This is based on the verdict of Indra Sawhney. The legislations made thereunder only carry out the constitutional mandate. Since the constitution itself makes the classification, the theory of suspect classification applied to legislations in America is wholly inapplicable.

34. Our courts refrain from making value judgments and categorizing legislations on the basis of the significance of the subject-matter, independent of the Constitutional determination. It recognises that there is no due process clause in the Indian Constitution and the framers of the Constitution deliberately avoided such an expression. Even after the new dimension elaborated in *Maneka Gandhi*[30a], Article

29 (1973) 39 L Ed 2d 389

30 40 L Ed 2d 164 : 416 US 312 (1974)

30a *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248

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14 does not stand at par with the Fourteenth Amendment and does not involve any Due Process. Hence also theory of suspect classification is inapplicable.

35. As already submitted by the learned Solicitor General, based on the case of *Saurabh Chaudri*[31], our jurisprudence is based on the presumption of constitutionality of legislation and this presumption does not fade in view of the importance of the subject-matter. This is another reason for inapplicability of suspect classification.

NARROW TAILORING

36. The United States Supreme Court has devised the idea of narrow tailoring as part of strict scrutiny test. This concept means that the legislature must consider all alternative ways to achieve the determined goal which should be legitimate and it must adopt that reasonable way to achieve the goal which imposes lesser burden on constitutionally protected activity. The State should not chose the way of greater interference but must chose less drastic means.

Thus the US Supreme Court while exercising the power of judicial review, based on strict scrutiny, examines various alternative means or ways available for achieving the legitimate goal chosen by the State and then decides whether the chosen means or way is the least drastic one. In this way, the US Supreme Court enters into the domain of policy determination. Narrow tailoring therefore, involves weighing of one policy method against the others which are available for achieving the goal and then deciding whether state has selected that which one imposes the least burden.

The concept of narrow tailoring again flows on account of the combination of due process with equal protection in the Fourteenth Amendment. In the area of race, it becomes coupled with the prescription imposed by the Civil Rights Act, 1964.

37. The Indian courts have scrupulously refrained from entering into the domain of policy determination or policy evaluation while exercising the power of judicial review. This Court has emphasised that it does not sit in appeal over a policy decision and does not substitute nor does it examine the wisdom of the policy choice. It interferes with policy decision only when it finds the policy to be palpably arbitrary, mala fide or discriminatory. Therefore, the concept of narrow tailoring can not be injected into the judicial review under our Constitution. See *Dhampur Sugar (Kashipur) Ltd.* v. *State of Uttaranchal*[32].

38. When Articles 15(4), 15(5) and Article 16(4) confer a power to make "any provision", they expressly leave the choice of the provision to the State. In para 742, p. 694 of *Indra Sawhney case*[11], this Court has recognised this authority of State. Since the Constitution expressly vests the power of selecting the special provision in the State, therefore, it would not be permissible under the Indian Constitution for extending the judicial review through narrow tailoring and examination of the policy choices. See SCC para 846, p. 756 of *Indra Sawhney*[11].

COMPELLING STATE INTEREST

39. The petitioners conceded that in view of Articles 15(4), 15(5) and 16(4) it may not be necessary to inquire into this as these provisions amount to a constitutional determination that the special provisions are to be made for the

31 *Saurabh Chaudri* v. *Union of India*, (2003) 11 SCC 146

32 (2007) 8 SCC 418

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advancement of SEBC and SC/ST and therefore the compelling State of interest is self-evident. Thus the petitioner desires to apply the strict scrutiny test devised by the US Supreme Court in a truncated form. It is submitted that firstly, since Article 14 unlike Fourteenth amendment of US Constitution, uses two expressions, viz. "equality before the law" & "equal protection of laws", therefore, the State is enjoined to eliminate inequalities. Articles 14 to 18 constitutes a positive charter to promote the interests of the weaker sections. (See paras 643 and 644 of *Indra Sawhney*[11]). This is also coupled with mandate of the directive principles of State policy, particularly Article 38. In view of this positive constitution mandate, the concept of "compelling State interest" is not applicable to our Constitution.

In view of the aforesaid, the American system of judicial review is inapplicable.

AMERICAN EVOLUTIONARY GRAPH

40. American Constitutional history and development is also important to note. The US Constitution was framed in 1789 (w.e.f. 4-3-1789) with the avowed object of 'establishing justice, promoting general welfare and securing liberty to "ourselves and our posterity" and a Republican form of Government'. Articles 3 and 4 prescribed for privileges and immunities of citizens in the several states and expounded judicial power qua citizens and states. The American Declaration of Independence stated "all men are equal". But still US Supreme Court ruled in *Dred Scott* v. *Sandford*[33], that Blacks have been inferior, subjugated and treated like chattels and hence not citizens. *This was happening 70 years after the Constitution* Debate over slavery had begun and there resulted a North-South divide. South had large slave plantations and North was abolitionist as it had small firms based on free labour. Abraham Lincoln was elected President in late 1861 as a candidate of anti slavery Republican Party, and 11 Southern states seceded under a Confederacy over issues of slavery, trade and tariff. During 1861-1865 there was a Civil War with large casualties. Union emerged victorious with surrender of Southern Army in April 1865. Lincoln had already issued the Emancipation Proclamation in September 1862. Thirteenth Amendment abolishing slavery was passed in 1865. This was followed by the enactment of the Civil Rights Act, 1866 (9-4-1866), abolishing slavery and declaring *all born* in US to be citizens, with *similar rights as the white citizens*. Fourteenth Amendment of US Constitution was also enacted in 1868.

41. This did not dissuade the US Supreme Court from holding that official segregation was consistent with the equality clause which does not debar the idea of "separate but equal". See *Plessy* v. *Ferguson*[34] and *Berea College*[35]. In *Plessy*[34] see the observations of the majority per *Brown, J.* at L Ed p. 258. *Harlan, J. dissented*, saying that there was no superior, dominant ruling class of citizens in US and in respect of civil rights all citizens were equal. Strongly castigating the majority, he said this judgment would prove "quite as pernicious as the decision made by this tribunal in the *Dred Scott Case*[33]". He said separation of highway is a badge of servitude, and "sixty millions of whites are in no danger from the presence here of eight millions of blacks."

33 15 L Ed 691 : 16 US (19 How) 393 (1857)
34 163 US 537 : 41 L Ed 256 (1896)
35 (1908) 53 L Ed 81

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42. Thus 40 years down the line from the birth of thirteenth and Fourteenth Amendment in 1868, the US Supreme Court was still reeling under a spell of racist mindset and was enforcing the doctrine of "separate but equal". As a consequence segregation, hitherto confined to trains and schools, was expanded with the help of "Jim Crow laws" to residential areas, parks, hospitals, theatres, phone booths, etc. (p. 835). This went on till 1954 when this pernicious doctrine was interred. (in the field of public education) in *Brown* v. *Board of Education*[36]. This could happen only post World War II after the World War compulsions broke down segregation in Army. After 58 years Harlan, J.'s dissent became the unanimous view of the Court. But its implementation faced hurdles from white reaction and in 1955 the US Supreme Court exercised equity powers to relax implementation time-frame *Brown*[37]. As a fall out the governor and legislature of the State of Arkansas came out in opposition and prevented Brown's implementation in Little Rock School by even deploying National Guards. In *Cooper* v. *Aaron*[38], the US Supreme Court held that (L Ed 2d p. 15). "The Constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and legislatures". So much so, in *Alexander* v. *Homes Country*[39], the US Supreme Court continued to thwart evasive attempts by directing the Court of Appeal to refuse additional time. (See Brennan, J. dissent p. 794). Thus, it took 100 years, a full century, for Fourteenth Amendment to spring back to life, and clear the decks for Affirmative action to demolish segregation.

43. In the meantime following the "*I have a dream*" speech of Martin Luther King, (1963) and message sent by late President John F. Kennedy (Soon after sending message in June 1963 he was assassinated in November 1963) and late President Johnson, the Bill of Rights Act, 1964 was enacted proscribing all discrimination based on inter alia, race. It was a comprehensive legislation. Challenge to Title II was rejected in *Heart of Atlanta Motel, Inc.* v. *United States*[40]. Importantly Martin Luther King was also assassinated in 1968.

44. Then comes along Reagents of *University of California* v. *Bakke*[41] where a special admission programme of University reserving a specified number of seats for minorities, which, inter alia, included Blacks was challenged. While quashing this reservation Court majority (5-4) made following salient observations:

(*i*) Title VI of Civil Rights Act, 1964 prescribes only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment (p. 769) (Journal page).

(*ii*) The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another colour. (pp. 770-71).

36 347 US 483 : 48 L Ed 873 (1954)
37 *Brown* v. *Board of Education*, 349 US 294 : 99 L Ed 1083 (1955)
38 358 US 1 : 3 L Ed 2d 5 (1958)
39 (1969) 24 L Ed 2d 19
40 379 US 241 : 13 L Ed 2d 258 (1964)
41 57 L Ed 2d 750 : 438 US 265 (1978)

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(*iii*) Distinctions based on ancestry are by their very nature odious to a free people, and, therefore, racial and ethnic distinctions of any sort are inherently suspect, and call for the most exacting judicial examination. (p. 771). *This perception is rooted in our Nation's constitutional and demographic history.*

(*iv*) The Court notes that *the Equal Protection clause, however, was virtually strangled in infancy by post-civil-war judicial reactionism.* It was relegated to decades of relative desuetude while the Due Process Clause of the Fourteenth Amendment, after a short germinal period, flourished as a cornerstone in the Courts' defence of property and liberty of contract. (p. 772).

(*v*) "During the dormancy of the Equal Protection clause, the US had become a Nation of Minorities. Each had to struggle—and to some extent struggle still—to overcome the prejudices *not of a monolithic majority*, but of a "majority" composed of various minority groups." most of which can lay claim to a history of prior discrimination at the hands of state and private individuals. Therefore when during the Great Economic Depression, when Fourteenth Amendment began gaining vitality, it was not possible to peg its guarantees to the struggle for equality of one racial minority. (pp. 772-74).

(*vi*) Fourteenth Amendment was framed in universal terms without reference to colour, ethnic origin or condition of prior servitude,—though many framers perceived its primary function as bridging the vast distance between members of the Negro race and the white majority. [Thus, the framers perception was buried]. (p. 773).

(*vii*) Distinguishing gender based classification cases, court observed that "the perception of racial classifications as inherently odious stems from a lengthy and tragic history that gender based classifications do not share". (p. 779).

(*viii*) Goal of correcting specific instances of discrimination is "more focussed than the remedying of the effects of societal discrimination *an amorphous concept of injury* that may be ageless in its reach into the past". (p. 782).

(*ix*) State interest in diversity is not an interest in simple ethnic diversity having a specified reservation of seats but one which encompasses "a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. The petitioner's special admissions programme, focussed *solely* on ethnic diversity, *would hinder rather than further* attainment of genuine diversity." (p. 787).

45. Four judges dissented with main part of the ruling. *Brennan, J. observes* that Equal Protection Clause of Fourteenth Amendment "was largely moribund..... *Worse than desuetude, the clause was early turned against those whom it was intended to set free*, condemning them to a 'separate but equal' status before the law, a status always separate but seldom equal. (p. 694). He held that 'colour-blindness' can only be an aspiration in this background and race conscious discrimination for advancement of Negros is justified to correct societal discrimination. (pp. 812, 816, 837). *Says Marshall, J.*, Reconstruction Acts of Congress were also short-lived "and, with *the assistance of this Court, the Negro was rapidly stripped of his new civil rights*. In the words of C. Vanu Woodward; 'By narrow and ingenious interpretation (the SC's) decisions over a period of years had whittled away a great part of the

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authority presumably given to the Government for protection of civil rights. "In the notorious *Civil Rights cases*[42], the Court strangled Congress' efforts to have powers to promote racial equality by invalidating sections of the Civil Rights Act, 1875".

46. The findings of majority shows that complete "colour blindness" theory was not accepted, and though rigid quota was rejected race conscious affirmative action was recognised subject to strict scrutiny. Given racial prejudices against Black minority and history of judicial reaction the hesitating and restricted approach to race conscious affirmative action is comprehensible.

47. Until "Brown" the US SC was colour conscious and discrimination against Blacks was not perceived as odious. But once segregation went out thanks to World War II and "Brown" the doors of affirmative action were conservatively opened by the doctrine of substantial colour blindness and strict scrutiny. Due process thus continued to rule over Equal Protection.

LATER CASES: DISAPPEARANCE OF DISTINCTION BETWEEN CONGRESS AND STATES

48. In *Fullilove*[43], 3 learned Judges upheld grant of 10% federal funds to MBE, absent an administrative waiver where not feasible, on the test of strict scrutiny saying it was a limited use of racial and ethnic criteria (p. 921). They rejected the contention that Congress must act in a wholly colour blind fashion. (pp. 926-27). They, however, subjected the measure to a searching enquiry. (p. 945) *Powell, J., also noted, that in Bakke*[41] *powers of a University were considered, but in this case powers of congress were in issue*, and Congress has been given a unique constitutional role in the enforcement of the post—Civil War Amendments." Marshall, J., speaking for 2 other judges, went by his view in *Bakke case*[41] that conventional strict scrutiny does not apply to racial classifications to provide benefits to minorities based on past racial discrimination. (p. 950). The dissenters agree with Marshall, J. about history of discrimination but say that such remedies are as pernicious as Plessy.

49. *Wygant*[44], again, like *Bakke*, was not a Congressional Act but of a government unit. US Supreme Court held, by majority, that societal discrimination would not suffice and *the findings must concern prior discrimination by the government unit. Richmond* v. *Croson*[45], involved a MBE plan of Richmond city Council requiring prime contractors to set aside 30% of dollar amount for subcontracting to MBE. *The Court observed that the Council ignores "that Congress, unlike any State or political sub-division, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment.* The power to 'enforce' may at times also include the power to define situations which congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations. "*It said that the fact that Congress may identify and redress the effects of society-wide discrimination does not mean that, a fortiori, the States and their political sub-divisions are free to decide that such remedies are appropriate.* (pp. 879-880 and 892). It was noted that Richmond was a black majority. (p. 883). In this way the court held that past discrimination, though true, *standing alone* cannot

42 109 US 3 : 27 L Ed 835 (1883)

43 *H. Earl Fullilove* v. *Philip M. Klutznick*, 448 US 448 : 65 L Ed 2d 902 (1980)

44 *Wendy Wygant* v. *Jackson Board of Education*, 476 US 267 : 90 L Ed 2d 260 (1986)

45 488 US 469 : 102 L Ed 2d 854 (1989)

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justify a *rigid racial quota* in award of public contracts." (p. 885). Marshall, J., along with two others, dissented, saying this was a retreat from Fullilove and is a cramped vision of Fourteenth Amendment (p. 926).

50. *Metro Broadcasting*[46] involved a *Congressionally backed benign racial classification* and US Supreme Court applied "intermediate scrutiny" test. But, in *Adarand Constructors*[47], the 5-4 majority of Court disagreed with it and held that though "unlike the Fourteenth Amendment, the Fifth Amendment contains no equal protection clause...." yet the "reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of Fourteenth" (pp. 173 and 175). *Thus, narrow tailoring was extended to Congress.* (p. 188). Thomas, J. held that "there is a 'moral and constitutional equivalence' between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality" (p. 190). Stevens, J. dissented saying there is no such equivalence (p. 192) and "Remedial race based preferences reflect the apposite impulse; a desire to foster equality in society." (pp. 192-93). He also castigates extension of strict scrutiny to Congress. (p. 198). Souter, Ginsberg and Breyer, JJ., followed Fullilove. *Ginsberg, J. observes "I see today's' decision as one that allows our precedent to evolve, still to be informed by and responsive to changing conditions".* (p. 213).

51. *Now Fullilove*[43], *Metro*[46] and *Adarand*[47] stand in one class as they deal with Congress Powers as per Fifth Amendment where equal protection has been judicially injected through Due Process. *Adarand*[47] only extends strict scrutiny to congressional measures but does not overturn *Fullilove*[43] and *Metro*[46] on societal discrimination of past.

52. *Barbara Grutter* v. *Lee Bollinger*[48] involved a Law Universities admission programme seeking to establish diversity by considering race as one factor amongst others. O' Connor, J., for majority, upheld it. However, following Adarand, it was observed that Fourteenth Amendment "*protects persons, not groups*" and hence all governmental action based on race—a group classification long recognised as in most circumstances irrelevant and therefore prohibited should be subjected to a detailed enquiry to ensure that the *personal right* to equal protection of the laws has not been infringed. (p. 330) It was said that "strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced" by the government for the use of race (p. 334). While finding that there is compelling interest in diversity the Court proceeded to calibrate narrow tailoring enquiry. Court said this rules out quota which is insular, per Bakke, but race can be considered as a "plus", ensuring that candidates are evaluated as an individual. (pp. 336-337). Further, while narrow tailoring does not require "exhaustion of every conceivable race-neutral alternative", it does require "serious good faith consideration of workable race neutral alternatives that will achieve the diversity the University seeks". (p. 339) It requires that program should not "unduly harm members of any racial group" and that programme is "subjected to continuing oversight to assure that it will work the least harm". (p. 340) Then Court says that since object of Fourteenth Amendment is to do away all race conscious discrimination. "Accordingly, race conscious admissions must be limited in time"

46 *Metro Broadcasting Inc.* v. *Federal Communications Commission*, (1990) 111 L Ed 2d 445

47 *Adarand Constructors Inc.* v. *Pena*, (1995) 132 L Ed 2d 158

48 (2003) 156 L Ed 2d 304

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and race programs must have a logical end point, and in higher education there should be a sunset clause. (p. 341). This flows from narrow tailoring. *Ginsberg and Breyer*, JJ., concurred but noted that though "logical end point" requirement accords with international understanding (??) yet considering current reality "From today's vantage point, *one may hope, but not firmly forecast that over the next generation's span*, progress toward non-discrimination and genuine equal opportunity will *make it safe to sunset affirmative action*. (p. 344) *Scalia and two other* JJ. prefer a 25-year sunset, (p. 347). They feel there are other ways to "better" the education of law students—" (p. 349). And marginal improvement does not justify racial discrimination. (p. 353) C.J. Rehnquist spoke in favour of temporary duration. (pp. 369-70).

53. Aforesaid view was reiterated in the other decision delivered simultaneously in *Gratz* v. *Lee Bollinger*[49]. Here, majority struck down the admission program of University as not providing for a meaningful individualised review of applicants. Stevens, Souter and Ginsberg, JJ. dissented.

54. Thus, Grutter-Gratz double along with Adarand results in Subjection of Congress to strict scrutiny like State, and expansion of narrow tailoring dimension by introduction of durational limits and emphasis on ensuring individualized consideration even while considering race as plus. This meant a further squeeze on affirmative action all made possible by the Due Process Power.

CONCLUSION

55. The fundamental premise of strict scrutiny in America is the absence of a Constitutional determination that affirmative action has to be undertaken and the concomitant enablement to make "any special provision" covering reservations/Quota, as in our Constitution. From this the US SC draws the principle of equal operation of Equal Protection Clause of Fourteenth Amendment for all irrespective of race and makes all race conscious measures a suspect classification requiring strict scrutiny.

56. The second major premise is the conjunction of due process in Fourteenth Amendment which enabled a value laden judicial review involving compelling state interest and narrow tailoring. Fourteenth Amendment applies qua States but US SC injects this equal protection through Due Process in Fifth Amendment which applies to Congress. *Mathews* v. *De Castro*[50]. This is not so with Article 14 of our Constitution. Our *Framers rejected due process, and did not leave affirmative action for deduction from Article 14*.

57. The third major premise is that Fourteenth Amendment protects persons and not groups and race is a group based classification, which is prohibited and hence searching strict scrutiny is required to ensure that personal right of equal protection is not affected. This is inapplicable in India. See *Indra Sawhney*[11] at SCC p. 633, para 643. Earlier in *R.K. Dalmia*[25] (at SCR p. 298) this Court, analysing Article 14 said thus Article 14 is not only an individual right but also a group concept. This is coupled with Article 38 and 46 which focus on groups.

58. The reactionary approach of US SC with respect to equalisation of blacks went hand in hand with legislative and executive reaction for more than a century

49 (2003) 156 L Ed 2d 257
50 (1976) 50 L Ed 2d 389

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and a half even after the advent of American Constitution, and about a century after Fourteenth Amendment. In India the judiciary always had a progressive and balancing approach and it rarely came in the way of reservations. It is the executive which has faltered in implementation. Initially reservations posts for SC/ST were not filled up and posts used to be converted to the general category. The special selection drives and carry forward had to be mandated. [Dealt with in *Akhil Bharatiya Soshit Karamchari Sangh (Rly.)* v. *Union of India*[51]; *SBI SC/ST Employees' Welfare Assn.* v. *SBI*[52] (para 11); and *State of Punjab* v. *G.S. Gill*[53] (para 7)]. *Indra Sawhney*[11] merely imposed a limit of 50% reservation a year to balance the rights of general category under Article 14. This case also excluded creamy layer from employment reservations with a view to ensure that "backward class" is a homogenous class and employment benefits flow to the truly backward. However, so far as SEBC are concerned the employment reservation came only in 1990's and in educational institutions, it has come now.

59. Compelling State Interest is a concept evolved from theory of Police power where under most laws are made in US. And it is on account of Due Process that "Compelling" qualification was introduced by US SC where fundamental interests are affected by classifications on prohibited grounds of race, etc. In India there is neither Due Process nor Police Power. See *Synthetics & Chemicals Ltd.* v. *State of U.P.*[54]

60. Para 3 (Pandian, J.), paras 415, 419-421 (Sawant, J.) and paras 640 to 644 of *Indra Sawhney*[11] judgment shows that past societal discrimination is a valid basis of classification under the Constitution of India and the special provisions like Articles 15(3), (4) and (5) and 16(4) as well as reservation in election are based on it. In US many judges treat societal discrimination as an "amorphous concept" which is not available to States and its sub-divisions.

REPLY TO SUBMISSION OF DR. RAJEEV DHAVAN

61. On the basis of *Bakke*[41], *Grutter*[48] and *Gratz*[49] Mr Rajeev Dhavan, Senior Counsel, submitted that past discrimination is relevant only to the extent they perpetrate present conduct and continue the wrong. Firstly, he relies on abovesaid 3 cases dealing with University measures and Universities power is not at par with Congress. Secondly, *Fullilove*[43], *Wygant*[44], *Metro*[46] and *Adarand*[47] show that Congress has a specific Constitutional mandate to enforce the dictates of Fourteenth Amendment by adopting prophylactic rules though subject to strict scrutiny—a la Adarand. Thirdly, to equalise in fact or to bring about real equality the effects of past discrimination have to be removed by resort to special measures including quota. What is important is effect of past and not continuing present conduct of general category which stands legally prescribed (Articles 15(2) and 17, etc.).

51 (1981) 1 SCC 246
52 (1996) 4 SCC 119
53 (1997) 6 SCC 129
54 (1990) 1 SCC 109

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62. Our courts approach is not of American strict scrutiny but one of numerical balance. *Balaji*[55], *Akhil Bharatiya*[51] and *Thomas*[56] and Indra Sawhney draw the line for reservations at 50%. This cut-off percentage emerges from a proper balance of Articles 15(4), 15(5), 16(4) and 14, or a balance between formal equality and real equality. This cut-off balance is the principle of non-discrimination and as long as this Laxman Rekha is not crossed the Courts would not sit in Review of allocated percentages.

AFFIRMATIVE ACTION IS MORE THAN COMPENSATORY: PRIMARILY FOR DEVELOPMENT OF NATION AND SOCIAL DEMOCRACY.

63. Article 15(5) along with Articles 15(3), (4), 16(4), 14(4-A) 330, 332, 243-D and 243-T are certainly part of a Constitutional Scheme intended to compensate for past discriminations, denials and deprivations. But primarily and more importantly they are meant to bring forward the vast sections of downtrodden weaker sections including SEBC and women, who together constitute an overwhelming majority of our nation, so that with their contributions the nation rises higher and with rapidity-for today it is not enough that we move forward it is significant that we do so swiftly.

64. The framers knew that unless special provisions are made to ensure social, economic and political justice to the vast majority our nation would neither be in a position to claim being civilised nor it would be able to develop rapidly and there would be no social democracy. No nation can so develop by walking on half a leg. Both legs must be made supple and therefore they designed the above provisions.

65. In the Preamble itself our Framers enshrined the idea of justice, Liberty, Equality and Fraternity under a Republic. This is to be "*secured to all its citizens*". There can be no doubt that these ideas are not merely reparatory or compensatory but have been put in the forefront as without them India cannot develop into a mighty nation.

66. Not resting content with the statement of objective in the Preamble they made the "Securing and protecting" of a "social order in which justice, social, economic and political" informs all the institutions of national life, fundamental to the governance of the country and the application of these principle a duty. So also *elimination of inequalities* in status, facilities and opportunities was made fundamental to governance. (Articles 37 and 38). Lest measures designed to achieve above be questioned on the basis of fundamental rights by status quoists Part III was so formulated as to protect special provisions of equalisation or of affirmative action. *Aforementioned* special provisions were inserted to enable reservations and other measures geared to equalise. This quadruple of Preamble, Part III, Part IV and Part XIV are the very soul of the constitution and they purport to create and unleash the entire human energy so that the nation develops rapidly for the benefit of all.

67. If one looks narrowly at Articles 15(2) and 17, which provide access to wells, bathing ghats roads, shops, hotels, etc. and also prohibit the practise of untouchability, one would conclude that they merely eliminate some wrong social practise. But a broader view would suggest that they purport to instil and secure

55 *M.R. Balaji* v. *State of Mysore*, AIR 1963 SC 649

56 *State of Kerala* v. *N.M. Thomas*, (1976) 2 SCC 310

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dignity among those who have been treated sub-humanly, for very long, for without this sense of dignity there can be no liberty or equality or fraternity and unfurling of the potential of the downtrodden. No nation can claim to be civilised and developed while continuing the banished practises.

68. Article 23 bans beggar and forced labour. A broad view would suggest that it not merely bars a slavery practise but purports to free human labour so that they enjoy all privileges of citizenship and are able to develop their faculties and potential.

69. *Dr. Amartya Sen* has in his book "*Development as Freedom*" explained the interconnection between Freedom and Development. He says "But freedoms depend also on other determinants, such as social and economic arrangements' (for example, facilities for education and health care) as well as political and civil rights (for example, the liberty to participate in public discussion and scrutiny)", and that "Development requires the removal of major sources of unfreedom: poverty as well as tyranny, poor economic opportunities *as well as systematic* social deprivation, neglect of public facilities as well as intolerance or over activity of repressive states." (p. 3). He says "what people can positively achieve is influenced by economic opportunities, political liberties, social powers, and the enabling conditions of good health, basic education, and the encouragement and cultivation of initiatives," and "In the light of the more foundational view of development as freedom, this way of posing the question tends to miss the important understanding that *these substantive freedoms* (that is the liberty of political participation or the opportunity to receive basic education on health care) are among the *constituent components of development*." (p. 5). In the concluding remark of Introduction chapter he says "*Freedoms are not only the primary ends of development, they are also among its principal means*. In addition to acknowledging foundationally, the evaluative importance of freedom, we also have to understand the remarkable empirical connection that links freedoms of different kinds with one another (Mine : *Maneka Gandhi's case*). Political freedoms (in the form of free speech and election) help to promote economic security. Social opportunities (in the form of education and health facilities) facilitate economic participation, Economic facilities (in the form of opportunities for participation in trade and production) can help to generate personal abundance as well as public resources for social facilities. Freedoms of different kinds can strengthen one another". (pp. 10-11). He adds "with adequate social opportunities, individuals can effectively shape their own destiny and help each other. They need not be seen primarily as passive recipients of the benefits of ensuing development programs." He again says "*Greater freedom enhances the ability of people to help themselves and also to influence the world, and these matters are central to the process of development*." (p. 18). And in the concluding remarks he adds that "On the evaluative side, this involves the need to assess the requirements of development in terms of removing the unfreedoms from which the members of society may suffer." (p. 33). He further states (at p. 36).

> "The approach of this book is much more compatible with the latter approach than with the former. It is mainly an attempt to see development as a process of expanding the real freedoms that people enjoy. In this approach, expansion of freedom is viewed as both (1) the primary end and (2) the principal means of development. They can be called respectively the 'constitutive role'

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and the 'instrumental role' of freedom in development. The constitutive role of freedom relates to the importance of substantive freedom in enriching human life. The substantive freedoms include elementary capabilities like being able to avoid such deprivations as starvation, under nourishment, escapable morbidity and premature mortality, as well as the freedoms that are associated with being literate and numerate, enjoying political participation and uncensored speech and so on. In this constitutive perspective, development involves expansion of these and other basic freedoms. Development, in this view, is the process of expanding human freedoms, and the assessment of development has to be informed by this consideration."

70. In his concluding speech in the Constituent Assembly Dr. B.R. Ambedkar emphasised the need for making our political democracy a social democracy as well where liberty, equality and fraternity are the principles of life. *He said they are not separate items but form a union of trinity*. He stressed they must be established in all spheres of life and that would be better for country, for maintenance of its independence and continuance of democracy. (pp. 979-980, CAD, Vol. X-XII). (Copy enclosed).

71. Sri Alladi Krishnaswami Ayyar referred to special provisions for backward classes and said "In this connection it may be interesting to note that there is no such declaration in similar terms even in the Constitution of the USA. The Fourteenth Amendment in the US Constitution which was intended to remove the disability of Negroes, has not, as experience has shown, served the purpose in the United States and the Fifteenth Amendment deals only with the right to vote. Therefore, we may well claim that our *Constitution is much more democratic, much more rooted in the principles of democracy than even the advanced constitution of America.....*" (p. 835, supra). He further says that principles of social policy (directive principles) has their basis in the Preamble and the Objectives Resolution. (p. 838 supra).

72. Thus for both the leaders the making of special provisions comprises the very essence of democracy, and a recipe for national development. The framers conceived the Constitution of India as a charter for national development through democratic path and provisions pertaining to distributive and social justice are the propelling motors of development and democracy.

XVII. Prof. Ravivarma Kumar, Senior Advocate, for the respondents

1. CREAMY LAYER

"I want to be the White man's brother,
not his brother-in-law"

—Martin Luther King

1.1. Creamy Layer is a much insisted upon phenomenon to malign the whole policy of reservation. If we keep the goal of reservation policy clear in our mind, much of the dust and din that has been raised against the provision, particularly for not importing the theory of creamy layer will be cleared. May be, we have to unlearn some of the misgivings about reservation. They are:

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(*a*) Reservation is not a poverty alleviation programme. Poverty will have to be removed by rigorously implementing Articles 38, 39, 41 and 46 of the Constitution.

(*b*) Reservation is also not a programme to eradicate unemployment. Aforesaid Articles are the only provisions under which those problems will have to be addressed.

(*c*) Is reservation a policy of removing illiteracy? The answer to this question is no. Illiteracy of the masses is a question which has to be addressed under Article 45 of the Constitution, read with Article 46 thereof. That is clearly not the object of reservation contemplated under Clause (4) of Article 15.

(*d*) Is it a programme to educate all the Backward Classes? The answer to this question also should be in the negative. Reservation is a very small but an effective instrument which is not designed to educate all the Scheduled Castes and Scheduled Tribes or all the Backward Classes of citizens. Education of the Scheduled Castes and Scheduled Tribes is to be addressed under Article 21-A and Article 41 of the Constitution of India, read with Article 46 thereof. This is not to be confused with the reservation contemplated under Article 15(4). Whereas Article 41 is designed to make effective provisions to educate all, Article 46 is designed to promote educational and economical interests of the Scheduled Castes and Scheduled Tribes as also the Backward Classes. More importantly the newly added Article 29-A is specifically designed to achieve en mass literacy and education for all. That is not a factor to be addressed under Clauses (4) and (5) of Article 15.

1.2. Object of reservation: The one and the only goal of the reservation policy under Clauses (4) and (5) of Article 15 of the Constitution is to bring about equality among various castes. Castes cannot be eradicated unless all the castes are brought to one level playing field. The vertical hierarchy of the castes as high and low should be destroyed before we enable any two castes to sit together, dine together and socially mix together. Without destroying the social hierarchy we cannot destroy caste inequality. Therefore, what is to be first destroyed is the "Caste of castes" i.e. concept of high and low among the castes. It is to destroy this caste of the castes that Article 15(4) provides for making provisions for advancement. Reservation is one such provision.

1.3. Clauses (4) and (5) of Article 15 contemplate a measure to achieve unity in diversity. Realising that caste cannot be destroyed overnight, it provides for removal of inequality between castes so that the castes will come together. They come together only if they can sit together in the same classroom or in the same office. Unless they come together educationally they cannot come together socially. Therefore, to bring them together socially the best from each caste, as nearly as possible, should be brought together by putting them in one classroom, one institution or one university. This is the object sought to be achieved by Clauses (4) and (5) of Article 15 of the Constitution.

1.4. To put it in other words both Articles 16(4) and 15(4) are not provisions to bring-about unity of the illiterates of different castes, unskilled labour of different

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castes or the entire people in different castes. These provisions are designed to bring together the leaders of each caste and community together. That can be achieved only if the best teachers, the best administrators, the best doctors, the best engineers and the best lawyers are brought together. To achieve unity among castes, you should bring about unity among their leaders or the elite. It is only when we achieve the unity of the elite that the castes will be able to shed their inferiority or superiority in the social hierarchy. It is only when that is accomplished that we can think of achieving unity in diversity ultimately sowing the seeds of a casteless society. As long as the gap in education persists between castes, the castes will not come together. It is only when each backward caste is permitted to advance educationally to meet the educational level of upper castes that there can be a real egalitarian society. It is precisely for this reason that Clause (2) of Article 38 seeks of eliminating inequality in status, facilities and opportunities, not only among individuals, but also among groups of people. People belonging to different castes are people pursuing different vocations traditionally, socially and historically. Therefore, it is to provide for such equality in status, facilities and opportunities that reservation is contemplated to those castes which are Socially and Educationally below other castes. If the best from the lower castes are deprived of these facilities and opportunities in the name of "creamy layer", it will be counter productive and frustrate the very object of reservation, namely to achieve equality in status, facilities and opportunities.

1.5. In fact the best illustration about the object of reservation in educational institutions is given by none other than Dr. B.R. Ambedkar himself. It is not too well known that Dr. B.R. Ambedkar appeared before the Kaka Kalelkar Commission and gave his statement. The Commission examined him on the object of reservation policy. There is no reference to this examination of Dr. B.R. Ambedkar in the main report of the said Commission. Even Acharya Kaka Kalelkar, who took a somersault in his covering letter and elaborately wrote against his own report, did not bother to refer to the examination of Dr. B.R. Ambedkar in the Main Report. The nation would have lost a very valuable contribution of Dr. B.R. Ambedkar if things had been left as they were with the Commission and its Chairman. However, one Mr S.D.S. Chaurasiya who was also a member of this Commission refers to this examination of Dr. B.R. Ambedkar and quotes from the same extensively. This Minute of Dissent of Mr S.D.S. Chaurasiya is found at p. 17 of Vol. III of the Report of Backward Classes Commission (1955). The relevant extract reads as under:

> "The extracts of a few questions and answers during examination of Dr. Ambedkar appear to be very important and I would like them to be reproduced verbatim here so as to make the reader follow clearly the reason why higher education is very essential for Backward Classes.
>
> Q. 1—What according to you, constitutes backwardness as it applies to the situation in India?
>
> Dr. Ambedkar: Supposing I am left in the situation to do something for the betterment and advancement of India, I would look at the social status of the community. Here in India people have got different status—some are in the highest position, some are in the middle, some are still less and some are at the bottom. Our problem is not so much to distribute wealth in order to make

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everybody happy, our problem is that different status should disappear. It can disappear only by advancement of education, when all the communities are brought to the same level in the matter of education not everybody but the community as such. If there are 10 barristers, 20 doctors, 30 engineers, etc. in a community, I regard that community as rich, although everyone of them is not educated. Take for instance, Chamars, you look upon this community with hatred, but if there are some lawyers, doctors and educated persons among them, you cannot put your hand upon them and you will not do that, although everyone of them is not so highly educated. Today the valley among the advanced classes and lower classes is so great, what we call *naphrat*. You will say he is a Bhangi but suppose there are educated persons among them, you will respect them. We want that all communities should come up to the same level and one class should have the same respect for the other as the other class has got for it.

Q. 2—All help given to the Scheduled Castes, Scheduled Tribes and Other Backward Classes, inevitably reaches the city people and the rural people are left high and dry. What remedy would you suggest to see that the village people get the help first and are not robbed of their share?

Dr. Ambedkar: Here I may point out that we should raise the status of the Backward Classes as a whole, not individually. If we produce a certain number of lawyers, doctors and professionals among them, no body will look down upon them. That being my views, I think that the means that have to be adopted for the purpose of bringing these people up are not that we should have primary schools and secondary schools for those people. Out of 100 boys 20 remain and 80 go away. My idea is something fantastic. I would suggest that schools should be opened for them in their own locality or some central place. I would suggest to collect the best boys from the primary schools and give them food, shelter and education in that very place, away from their parents. Up to the Matriculation Examination you give them education there. As soon as they pass the Matriculation Examination, send them in a college and give them tuition fee. After that select a number of students from amongst them and send them to Europe, Germany, France, America and similar other foreign countries where they can get the best of education.

Q. 3—Chairman: You mean to say that after independence we are not to get the best of education in our own country.

Dr. Ambedkar: After that give them service in the Government Department. I would be quite prepared to spend one crore of rupees for the Backward Classes, one crore of rupees for the Scheduled Castes and one crore for the Scheduled Tribes for 10 years and probably the Scheduled Caste problem may end much sooner. The Scheduled Castes are becoming vocal now. Thus you will create a few people with higher qualification and place them in high posts. That will be 2000 times better than the 2000 boys educated in Marathi or Gujarati.

Q. 4—Chairman : There are two views. If there is a primary, secondary and higher education in a particular community, it takes the shapes of a hill but if you take a few selected persons and take them up to the very top, it takes the shape of a tower. The tower will fall down and the hill will always remain.

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Dr. Ambedkar: You go to Burma. There everything has been abolished. I had a talk about this with the Viceroy when I was the member of the Executive Council. I wrote a memorandum—it might be here. The Government of India was going to give 3 lakhs of rupees to the Benaras Hindu University where Hindu students were admitted at that time. They were also giving 3 lakhs of rupees to the Aligarh Muslim University. I raised the question why should they not give three lakhs of rupees to the Scheduled Castes? That was also accepted but how to use it was the question. Some Departments stressed for the opening of the girls schools, some emphasised the distribution of the prizes among the students. I put my foot down. The Viceroy appreciated the suggestion put forward by the other Departments. One day I went to him and asked him "Would you not mind if I ask some question? He said "No".

My first question was whether I as an individual was better than 100 University graduates, to which he replied 'Yes'. He said, "I am afraid I have to admit that you are good for 100 graduates". I said, "Why"? He said, "I don't know but the fact is there". I said "I am one of those highly qualified and educated persons who are on Marke Ki Jagah" (Key post). I can control any wrong being done. I said there are only a few persons who can occupy such places". He at once wrote that three lakhs of rupees should be spent on foreign education. When I came out, my friend, Mr Rajagopalachari, mixed up every thing. At that time we managed to send 26 candidates to foreign countries.

Q. 5—What remedy would you suggest for the speedy removal of the backwardness of so many communities in India that are suffering from age-old social backwardness and educational apathy ?

Dr. Ambedkar: I have suggested that if you produce big people from amongst them, the backwardness would go. The backwardness is only a sort of inferiority complex."

1.6. A perusal of the above statement of Dr. B.R. Ambedkar conclusively establishes that the concept of "creamy layer" cannot be imported for purposes of reservation in educational institutions. Therefore, the whole argument on "creamy layer" is intended to frustrate the very object of bringing out equality among castes and hence it is impermissible.

1.7. The Creamy Layer elimination will only perpetuate caste inequalities. The only hope of bringing various castes to a level playing field will be totally frustrated by this theory. It enables the advanced castes to eliminate any challenge or competition to their leadership in the professions and services. They will also gain by eliminating all possible beneficiaries of reservation in the name of creamy layer especially in the institutions of higher learning because it is only those who can afford higher education will reach there. Therefore creamy layer is discriminatory and anti equalisation measure.

1.8. The analogy of Creamy Layer applied in reservations to jobs cannot be applied in reservations to educational institutions of higher learning. Essentially there are two differences.

1.8.1. A person who gets employment by virtue of reservation will get a source of livelihood and start earning. He will not be required to incur any more expenditure

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towards his educational qualifications or require eligibility for himself. He ceases to incur expenditure on education and will also be able to provide succour to his parents and their dependents. Therefore, it may be justifiable to apply the principle of Creamy Layer for reservation in services. The position of a student getting admission to an institution of higher learning is totally different and can never be compared to that of a Backward Class person to get a job by virtue of reservation. Study in any educational institution of higher learning is very expensive. Studying in premier institutions like National Law Schools, IITs, IIMs, IISc, NITs, IIITs will cost a student anywhere around Rs 5 lakhs per annum if not more Which non-Creamy Layer Backward Class parent cannot afford his son or his daughter incurring such a huge expenditure? All those who can afford such huge fees will definitely come under the definition of Creamy Layer. Eliminating them in the name of Creamy Layer will frustrate the very object of providing reservation in these institutions. If the parent has one more son or daughter to be educated, the problem will be further compounded and even if a seat is given, the Backward Class parent will be forced to withdraw his son or his daughter from such institution. Therefore, it is wholly impracticable and highly counterproductive to import the policy of Creamy Layer for reservation in these institutions.

1.8.2. There is one more essential difference between services and education. Under the purview of this Act, anywhere around Rs 3 lakh seats would be filled up every year. Those seats become vacant every year, thereby, providing more and more opportunities to the Backward Class students for equitable distribution among themselves, year after year. On the other hand the jobs are limited in number and they will not become vacant year after year. Taking the normal tenure of a government servant lasting anywhere between 30 and 35 years, it is only at the end of that period that the post occupied by a Backward Class candidate by reservation would be made over to another Backward Class candidate. Therefore, opportunities made available under reservations in admissions to educational institutions can never be compared with the opportunities made available through reservations in services. Therefore, the argument that may be available for applying Creamy Layer principle for reservation in jobs cannot be applied to reservation in educational institutions. Hence, the whole argument to the contrary is misconceived.

1.9. *Categorisation*:

1.9.1. It is true that grouping of all castes together may enable a less backward caste among the Backward Classes to corner more seats than it deserves. It is even possible that a more backward caste cannot afford to compete with a less backward caste. That is a problem that cannot be solved by applying the Creamy Layer principle. The only way to solve the said problem is by categorisation of Backward Classes and subclassifying them so as to ensure that under each category only similarly circumstanced castes are grouped together. Categorisation thus ensures guarantee to each caste a fair competition and fixed quota preventing less backward section among them from cornering the opportunities to the detriment of more backward castes.

1.9.2. In fact categorisation has very successfully worked in a good number of States, to which reservation in educational opportunities are provided for under Clause (4) of Article 15. For example:

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(*a*) In Tamil Nadu, reservation is provided as follows: Most Backward Classes—20% reservation—108 Most backward castes and denotified tribes are grouped together.

Backward Classes—30% reservation—94 backward castes/communities are grouped together.

(*b*) In Karnataka Backward Classes are divided into 5 categories.

(*i*) Category I: 4% reservation—groups together backward denotified, nomadic and semi-nomadic tribes numbering 95.

(*ii*) Category IIA: 15% reservation—groups together service communities, artisan communities, weaver, farmer and other castes which employ manual labour in their occupations. 102 such castes are grouped together under this category.

(*iii*) Category IIB : 4% reservation—Muslims.

(*iv*) Category IIIA : 4% reservation—groups together 3 castes.

(*v*) Category IIIB : 5% reservation—groups together 6 castes.

(*c*) *Andhra Pradesh*:

The Backward Classes in Andhra Pradesh are categorised into four sub-groups:

(*i*) Category BC-A :7% reservation—14 nomadic and denotified tribes.

(*ii*) Category BC-B : 10% reservation—40 service/artisan castes.

(*iii*) Category BC-C : 1% reservation—SC converted to Christianity.

(*iv*) Category BC-D : 7% reservation—20 backward castes.

2. REVISION OF THE LIST

2.1. At the outset, the argument advanced by the petitioners for invalidating the list for the alleged non-revision of the list is unsustainable. There are as many as 2175 castes included in the Central List of other Backward Classes. The petitioners have not given any empirical data to show that any one of these castes has ceased to be backward. Their allegation against the list is as vague as vagueness could be. For example so far as Karnataka is concerned, an argument was advanced that Lingayats are not backward and on that ground they wanted to invalidate the list of OBCs. The Central List of OBCs consist of 184 castes from Karnataka classified as Backward Classes. Lingayat community as a whole has not been included in any one of these entries. Only the backward sub-castes of Lingayat find a place in these entries. That too where their non-Lingayat counterpart/occupational group is also included (see Entries 55, 92, 156, 161, 163). Likewise, much argument was advanced against the inclusion of Vokkaligas. At Entry 156, it is only the rural Vokkaligas who have been included in the OBC list and not the entire community. Therefore, the arguments advanced on the basis of such claim are contrary to facts and therefore the contention is liable to be rejected.

2.2. The revision of the list contemplated, cannot be a revision of the whole list. In view of the meagre benefits that accrue under the reservation scheme, it is only the top few castes which come under the scanner. Majority of the castes do not require a revision because no substantial progress has been made by them. It is only such top castes among OBCs who require a re-look and not all castes included in the list.

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2.3. The provision for reservation in Central services has come into operation only in the year 1993. An estimation of the total number of posts so far filled up after the reservation policy was introduced clearly reveals that there is no perceptible benefit in favour of any caste or tribe in the list. Hardly 14 years have elapsed after the reservation policy was implemented. This period is too short a period to assume that any caste or community has benefited to such an extent so as to cease to be backward.

2.4. Even if the argument of the petitioners is accepted in their entirety it would only vaguely indicate that one or two castes, at the most, a handful of castes may come under the scanner. In a huge list of 2175 castes, the claim to invalidate the whole list on the ground that one or two castes have ceased to be backward cannot hold water. The fact remains that the castes in the List are yet to receive any perceptible benefit under the reservation policy and, therefore, they have not been able to make any advancement worth the name so as to shed their backwardness overnight. Indeed, a substantial number of castes included in the list of Central OBCs Lists are yet to receive any benefit under the Central Government Scheme.

2.5. It is also necessary to mention here that while British rulers were objectively collecting the data caste-wise during the census operation, soon after independence the said practice has been discontinued. As a result of this, from the year 1951 caste data is not collected through the census. This decision to discontinue collection of data in the census is a decision taken not by the SC/ST or Other Backward Classes. It is a decision taken by the upper caste rulers who came to power after independence. The collection of caste data has been deliberately discontinued so as to suppress empirical data which would clearly show the extent of upper caste monopoly and their preponderance in cornering the educational opportunities and jobs to the total elimination of the SC/ST and the Backward Classes. This is particularly high in the private sector where no reservation is allowed. The Backward Classes are in no way responsible for the discontinuance of collection of caste data in the census. Therefore it is not open to the advanced castes, who discontinued the practice, to take advantage of their own misrule to deprive educational opportunities to the Backward Classes. Indeed, it is the absence of this data that has come in the way of a thorough revision of the list. It is not open to the petitioners to take advantage of this situation. Backward Classes cannot be subjected to the double jeopardy of being denied the caste data in the census operation and then denying reservation on the ground that census does not show the caste details. In these circumstances, the arguments advanced by the petitioners to the contrary deserve to be rejected outright.

2.6. The argument advanced on behalf of the petitioners trying to invalidate the list of Socially and Educationally Backward Classes on the ground that the list has not been revised is too premature to be accepted. In view of the fact that in the educational institutions established and administered by the Union of India, so far, no reservations have been made in favour of Backward Classes under Clause (4) of Article 15, the question of finding out whether any community is benefited by such reservation or has ceased to be backward does not really arise. It is only after reservation is implemented for a reasonable period that a situation may arise for revising the list for purposes of Articles 15(4) and 15(5). Hence this argument is liable to be rejected in limine as premature.

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2.7. Section 11 of the National Commission for Backward Classes Act, 1993, provides for periodic revision of the list. None of the petitioners has availed this remedy. No representation has ever been made seeking revision of the list. It is not open to the petitioners to take advantage of their own lapse. It is even now open to the petitioners to approach the Central Government to revise the list if they have any material to show that any caste now included has ceased to be a backward class. Since they have not availed that remedy before the Central Government, it is not open to them to press the said point before this Hon'ble Court to invalidate the list of Backward Classes.

2.8. Under Section 9 of the abovesaid Act, the National Commission for Backward Classes is empowered to entertain complaints against over inclusion in the list of Backward Classes. If the petitioners are of the opinion that any caste has ceased to be backward, they have further to make out a case before the National Commission for availing the remedy under Section 9. Till this date, not a single complaint has been filed before the National Commission to delete any caste from the list on the ground it has ceased to be a backward class. Therefore the petitioners cannot be heard to say that the list is bad for not revising the list.

3. TIME-LIMIT ON RESERVATION

This proposal is premature. Even before the impugned Act and the impugned amendment to the Constitution are given effect, this question is being asked. Therefore, this argument is liable to be rejected at the threshold as it is premature.

3.1. Reservation is a constitutional device to usher in an egalitarian society in the light of the pernicious caste system that has vertically divided the society into high and low. Nearly 5000 castes have been enumerated. Of them, no two castes are of equal rank. Every caste is either above others or below some others. It is to destroy this graded inequality and bring about a blood less revolution by Constitutional means that reservation has been accepted as a compromise between conflicting claims of separate electorate and caste inequality (Poona Pact, 1934). This is a policy accepted by the Constitution to prevent social and ethnic conflicts in the society. It is, therefore, only for the Constitution to specify as to how long it should operate. Since no such time-limit is put under Articles 16(4), 15(4) or 15(5), it is not open to the petitioners to suggest a time-limit to these provisions and bring about their repeal through judicial review. The petitioners demand, if granted, results in repeal of enacted provisions of the Constitution. It is for the legislature and not the Courts to decide this issue pertaining to reservations.

> "The length of the leap to be provided depends upon the gap to be covered" (*State of Punjab* v. *Hira Lal*[1], SCC p. 572, para 8)

3.2. "There appear no symptoms of early demise of this dangerous disease of caste system or getting away from the caste factor in spite of the fact that many reformatory measures have been taken by the Government. Unless this caste system, unknown to other parts of the world, is completely eradicated and all the Socially and Educationally Backward Classes to whichever religion they belong inclusive of Scheduled Castes and Scheduled Tribes are brought up and placed on par with the advanced section of the people, the caste label among Hindus will continue to serve

1 (1970) 3 SCC 567

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as a preliminary indicator of its social backwardness." (*Indra Sawhney* v. *Union of India*[2] at SCC p. 389, para 101 per Pandian, J.)

3.3. "… Nor did the Constitution makers restrict the period of its continuance as was done for Anglo Indians by Article 336. As an enlightened progressive State, a responsible Government of a welfare country must decide itself periodically on prevalent social and economic conditions and not political consideration or extraneous compulsion if the protective umbrella has to be kept opened, for whom and for how long" (Ibid at SCC p. 582, para 564; per Sahai, J.)

3.4. Except a small area of State services and educational institutions, no reservation policy, much less, other provisions for advancement of 'Backward Classes' have been made. Particularly, at the Centre, the interest of 'Backward Classes' has been totally neglected, if not forgotten altogether. It is only after two Commissions gave Reports (1955 & 1980), for the first time, a provision was made for reservation in the Central Services in the year 1990. Even that was implementation of only one of the several recommendations made by Mandal Commission. Kaka Kalelkar Commission had recommended 70% reservation in Central Education Institutions. This was not implemented. Mandal Commission had recommended 27% reservation. Even this is not implemented. It is for the first time, that too after Parliament made it mandatory to implement the reservation, that the Government of India is contemplating a provision for reservation in the Central Educational Institutions. Efforts of the Government to implement the Constitutional provisions in Articles 15(4) and 46 are half-hearted, lacklustre and very reluctant measures. This being the position, the need of the hour is to direct the Union of India to proceed and take all permissible measures under Clause (4) of Article 15 including reservation in education institutions, both government and private, as also aided and unaided. Exclusion of private educational institutions from the purview of the Act and the minority educational institutions from the purview of Article 15(5) is itself a clear testimony to the reluctance on behalf of the Government of India. In the circumstances, this is no time to ask the question as to how long the reservation should continue.

3.5. Caste hierarchy and consequent inequality is a deep-rooted social evil. For a man who quits Hindu religion and again re-converts himself (*S. Anbalagan* v. *B. Devarajan*[3], SCC p. 119, para 13).

3.6. The mighty Buddhism which threatened the caste system itself was wiped out from India. Even Jainism failed to make any dent on the social hierarchy among Hindus. Veershaivisim, though initially succeeded in small pockets, only resulted in further stratification of all Hindu castes into Veerashaiva sub-castes. The heroic efforts of the Sikh religion, the Brahmo Samaj, Arya Samaj and Prarthana Samaj have also been successfully digested by the hierarchical Hindu caste system. However, the revolutionary contributions of Babasaheb Ambedkar, Jotiba Phule in Maharashtra, Periyar Ramaswamy in Tamil Nadu and Narayan Guru in Kerala have succeeded in the enactment of the Constitutional provisions to lay the foundation for bloodless social change. Mere 50 years' operation of these provisions, only to an

2 1992 Supp (3) SCC 217
3 (1984) 2 SCC 112

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extent of 50%, that too in bits and pieces, cannot wipe out 5000 years of stratification ordained by the Hindu religion and sanctioned, protected and enforced by the Manu Smriti and other religious rules. Therefore, to ask a question, "How long reservation is to continue?", is definitely premature and irrelevant at this point in time.

3.7. Of the several provisions contemplated in favour of the "Backward Classes" of citizens, no time-limit was put on most of the measures except for three. The following provisions have been enacted without imposing any time-limit:

(*a*) Abolition of untouchability under Article 17.

(*b*) Reservation of posts and appointments under Clause (4) of Article 16.

(*c*) Similar reservations in promotions in Article 16(4-A).

(*d*) Special provisions, including reservation, under Clause (4) of Article 15.

3.8. Whereas a specific time-limit was put in respect of the following provisions:

(*a*) Article 334 imposes a time-limit of 60 years in the operation of the provisions relating to:

(*i*) the reservation of seats for the Scheduled Castes and the Scheduled Tribes in the Central and State Legislatures.

(*ii*) the representation of the Anglo-Indian community in the Central and State Legislatures.

(*b*) Proviso to Article 336(1) puts an end to all reservations in favour of Anglo-Indian Community at the end of ten years.

(*c*) First proviso to Article 337 directs that the special concession to the Anglo—Indian community shall cease.

No other reservation provisions are limited in time.

3.9. *Constituent Assembly Debates on Time-Limit:*

3.9.1. A careful reading of the Constituent Assembly debates reveals that the move to impose a time-limit on reservation was rejected by the Constituent Assembly. Pandith Hirday Nath Kunzru (United Provinces: General) moved an amendment to impose a 10-year limitation on the operation of Clause (3) of the draft Article 10 which corresponds to Clause (4) of Article 16. His motion read as follows:

"That under Clause (3) of the Article 10, for the words "shall prevent state from making any provision for the reservation" the words "shall, during a period to 10 years after the commencement of this Constitution, prevent the State from making any reservation be substituted" (CAD, Vol. VII, p. 679).

3.9.2. This move was opposed by Shri T. Chinnaya who insisted that the reservation should continue for 150 years.

3.9.3. Likewise Shri Santanu Kumar Dass (Orissa: General) opposed the proposed amendment in the following words:

"There is one thing more: It has been said that reservation should be kept for 10 years. Why only for 10 years? If we get equal rights within two years all would be on the same level after that period and there would be no need for reservations. With these words I support the Article." (CAD, Vol. VII, p. 691)

The amendment proposed by Shri Kunzru was put to vote and the motion was negatived (CAD, Vol. VII, p. 704).

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3.9.4. Thus, the Constituent Assembly in its wisdom refused to impose any time-limit on the operation of the policy of reservation. Therefore it is not open to the petitioners to insist on such limitation being imposed through the process of this Hon'ble Court.

3.10. It is indeed very strange that the petitioners should demand a period of limitation of such an important measure for social advancement and social equalisation. It is very respectfully submitted that this argument is an argument to perpetuate inequality between castes. This demand is unjust and unfair. The more appropriate question to ask is how long you allow untouchability, illiteracy, poverty, social backwardness. Notwithstanding abolition of untouchability on 26-1-1950, untouchability continues to be practiced unabated. The untouchables still live in the segregated hamlets which supply labourers to the main villages. In Karnataka there are about 30,000 such exclusive ethnic hamlets which operate as labour camps for about 29,000 villages. Though the Five Year Plans, plan after plan, pledged to eradicate manual scavenging which is at the root of the practice of untouchability. Till this day, manual scavenging has not been abolished. No two castes are brought to the same level playing field so as to destroy the hierarchical inequality between them. In no social sphere has the caste system been eradicated. Therefore, the most appropriate time-limit that has to be put is to put an end to the social evils and not this constitutional instrument to achieve equality.

4. TRADITIONAL OCCUPATION

Arguments have been advanced to claim that the backward castes have ceased to carry on their traditional occupation and, hence, they are no longer backward. This is totally a false claim not supported by any empirical data. The claim deserves to be rejected for the following reasons:

4.1. It is not true to say that the backward castes have given up their traditional occupation and therefore they have ceased to be backward. In the first place, it should be noticed that the link between the caste and its occupation is an unbreakable bondage to which the caste system has condemned the Backward Classes. Whether a backward caste man carries on his traditional occupation or not, he continues to be socially identified with the said occupation. The link between the caste and the occupation has not severed for thousands of years. It cannot be broken by arguments and theories. The ground reality is, every caste in every village is identified by its traditional occupation. All the service communities continue to discharge their traditional occupation. Throughout the country, in 6.5 lakh villages, it is the Barber communities and Barber communities alone, which carry on the traditional occupation of hair cuttings. No other community has taken up the said occupation. Majority of the hair cutting saloons in the villages do not have a shelter. They carry on business under the open sky, rain or shine. The Barbers continue to labour without any social security whatsoever. Majority of them work on the pavements and sleep on the road side. Even if one or two beauty parlours came into existence in the metros, the actual work of hair cutting is still done by the members of the traditional Barber castes only. Indeed these beauty parlours are good examples of how even modernisation has been appropriated by the caste system by exploiting the traditional Barbers. Be that it may, one swallow does not make a summer. The same is true of all other castes and communities and no caste has been promoted to a superior

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occupational group or caste and it continues to be identified by its traditional occupation to be considered as high or low.

4.2. Some castes are experiencing difficulties to continue with their traditional occupation. Fishing is no longer remunerative to traditional fishermen. They are finding it extremely difficult, if not impossible, to compete with mechanised trawlers. Those fishermen who are deprived of their traditional source of livelihood are still called by their caste names and continue to be treated as low in the hierarchy. Pottery as an industry is totally ruined. But it is not because Potters have moved on to take up some other lucrative occupation. On the contrary having lost their traditional source of livelihood they are unable to employ their skills. Majority of those who were thrown out of the industry have become unskilled labourers in agricultural fields. Globalisation has only added to their woe subjecting them to untold misery and exploitation. Likewise, the Indian weavers who were the best in the world before the British destroyed their source of livelihood by importing textiles from Lancashire. Handloom Industry provided the second biggest employment opportunity to weavers. Today the traditional weaver castes are thrown out of their occupation. They do not get any alternate employment. They have resorted to suicide because of loss of their only source of livelihood. They have lost whatever they had to fall back upon. It is a great irony that the petitioners are trying to encash on this misery on the ground that they are no longer carrying on their traditional occupation. They are still called by their weaver community/caste names. Also, the traditional farming communities have also been vitally affected by the indiscriminate eviction from their lands in the name of development. The large scale land acquisitions, the neo-colonialism in the name of SEZs and the continued un-remunerative prices for their produce have driven them to a state of starvation and vagrancy. This has driven them to large scale suicides. Similar is the situation of other occupational castes. Worse is the case of artisans. Pastoral communities are deprived of their traditional pasturage.

4.3. Thus, wherever a backward caste man has been thrown out of his traditional occupation, it has only worsened his situation by driving him to greater backwardness than the one suffered prior to loss of occupation. What is very significant to be noticed and taken judicial note of is that there is no vertical mobilisation of any caste thrown out of its traditional occupation. If at all, there is only a deterioration of its socio-educational status for want of alternative source of livelihood. Therefore the arguments to the contrary are imaginary and fantastic claims unsupported by any empirical data and totally contrary to the ground realities existing amongst the backward castes of India.

4.4. In fact it is not open to urge this imaginary cleavage between caste and occupation in view of the authoritative pronouncement of this Hon'ble Court, see *Indra Sawhney* v. *Union of India*[2], SCC p. 716, para 782.

5. CASTE ENUMERATION IN CENSUS

5.1. The last six decennial censuses have eschewed recording of caste particulars. The three National Commissions and scores of State Commissions have found these Census data useless in identification of Backward Classes. Every time census is taken, this vital data is suppressed rendering the decennial census useless to

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the welfare of 70 to 80% of the population of Backward Classes necessitating a review of policy to eschew caste enumeration.

Historical

5.2. Census operation in India has been hailed as the world's biggest administrative exercise. India has a very long history for conducting census. Kautilya's "Arthasasthra" refers to the practice of conducting census in India. The village statistics would inter alia, reveal the exact population of the Brahmins, Kshatriyas, Vaishyas and Shudras separately, besides giving statistics of agriculturists, cowherds, artisans, labourers, slaves and merchants. Abul Fazal, a Minister in Akbar's cabinet and a well-known historian, in his book *Ain-I-Akbari*, has referred to the census operations in India which were being carried out on a scientific basis, extensively and systematically, during the 16th and 17th centuries. The modern census in India was started in 1872. But on a scientific and extensive basis nationwide census was done from 1881. These censuses collected full details of the entire population in the country not only religion-wise and language-wise, but also caste-wise.

United Nations Directive

5.3. The United Nations has stipulated norms for conducting census. It has specified the details to be collected at the census operations. While admitting regional variations, the United Nations has insisted compulsory collection of details of about 17 items of which Item 13 pertains to collection of comprehensive details about the communities and citizenship characters.

India—A Union of Castes

5.4. India is not only a union of States, it is also a union of castes, tribes and communities. The Constitution of India has recognised and continued the personal laws, of each and every caste, community or tribe, that were in force prior to the coming into force of the Constitution of India. We also have matriarchal and patriarchal systems. Even the communities which believe in equality by birth, unlike the graded caste system, have come to be divided on the lines comparable to the caste divisions. In India, the caste system represents not only a social division, but also a political and occupational division of the society. Therefore, for planning and development, collection of details about each and every caste and tribe in the country is a must. This position was recognised by the Government of India itself in the household schedule pertaining to the Social Demographic study of villages. The interviewer was told: "As you know that in India, especially among the Hindus the society is arranged in a hierarchical order. In the past there had been some restrictions imposed on some communities. For instance some castes were not allowed to draw water from village common wells, some were not allowed entry into temples visited by the high caste Hindus. Today significant changes are observed in these spheres all over the country. In the following questions, I would like to focus on these issues."

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Ambedkar's Comment

5.5. Dr. Babasaheb Ambedkar also lamented in his classic work "Who were the Shudras".

"If people have no idea of the magnitude of the problem (of the Shudras) it is because they have not cared to know what the population of Shudras is. Unfortunately, the census does not show their population separately. But there is no doubt that excluding the untouchables, the Shudras form 75 to 80% of the population of Hindus." (Ambedkar, 1946:9)

Backward Classes Commissions' Experiences

5.6. Right from the first National Commission, appointed in 1953, all the Backward Classes Commissions appointed for purposes of identifying the Backward Classes have experienced genuine difficulty for want of caste particulars in the census figures. The Commission's Reports have devoted chapters after chapters to this question and have expressed deep anguish over the matter. Unanimously, all the Commissions, have strongly recommended collection of this data in Census. These recommendations are not considered till this day but are deliberately suppressed. (Kaka Kalelkar, 1956; Havanur. 1975; Mandal, 1980)

The Strongest Condemnation from Havanur

5.7. "… Perhaps those who want to preserve the status quo of social disabilities, distinctions and injustice are frightened that revealing of those particulars will make the Backward Classes 'conscious of their backwardness' and the inequalities from which they are suffering. To prevent the Backward Classes claiming adequate share in the national wealth these excuses appear to have been put forth by the advanced sections…. If caste particulars are not enumerated in the Census Reports the mentioning of other particulars relating to religion, etc., could be challenged as being discriminatory, and the omission of caste as being actuated by mala fides. If the Central Government declines to adopt the old method of enumerating caste particulars in the Census Report, it is no wonder the backward Hindu castes may prefer to embrace Islam or Christianity which do not recognise caste system. The increase in the population of Muslims and Christians, who now number about 13% of the State population, should be an eye opener to the advanced sections amongst Hindus." (Havanur, 1975:336)

Caste Census And Identification of Backward Classes

5.8.1. Under Article 15(4) of the Constitution of India special provisions could be made for the advancement of Socially and Educationally Backward Classes. It is under this provision that reservations are provided in professional courses to the Backward Classes. In order to identify these Backward Classes it is of utmost importance to first ascertain the population of a caste in each State so as to compare their educational level with the State average. The following facts could be ascertained through Census:

% of Population
% of Literates
% of Graduate
% of Doctors
% of Engineers
% of Other Professionals
% of Government Servants

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5.8.2. These percentages can be obtained only if the population figures are available along with the above data. Percentage of population cannot be ascertained through any other mode except a comprehensive door to door survey/census. Without this data the social and educational level of a caste cannot be compared with the State's average in order to identify whether a caste or a tribe is backward or not.

5.8.3. Likewise under Article 16(4) of the Constitution reservation is provided to Backward Classes not adequately represented in the State's services. Adequacy means representation in State's services proportionate to the population of that caste. For this purpose also collection of caste particulars in the census is an essential requirement. Without this it cannot be stated with certainty whether a caste is adequately represented in the State's services or not. It is needless to point out here that for want of caste population figures Backward Classes Commissions have resorted to other methods to ascertain the population figures and such exercises have often resulted in the judiciary finding fault with the methodology and invalidating the classification. (*Ramakrishna Singh case*[4])

Review of lists of Backward Classes

5.9.1. Almost all the commissions which have identified the Backward Classes and prepared lists have recommended that their lists should be periodically revised with a view to exclude from such lists those classes which have ceased to be Backward Classes or for including in such lists new Backward Classes.

5.9.2. The National Commission for the Backward Classes Act, 1993 has been promulgated constituting the National Commission for Backward Classes. Section 11 of the said Act may be referred to.

5.9.3. Similarly, Karnataka State Commission for the Backward Classes Act, 1995 has constituted the Karnataka State Commission for Backward Classes. Section 11 of this Act is in pari materia with the abovequoted provision of the Central Act. Similar provisions are contained in all the State Acts that have constituted the Backward Classes Commission.

5.9.4. In order to carry out the aforesaid revision of the lists, comprehensive data about each and every caste included in the list of Backward Classes must be secured. Such data should reflect the population of each caste, educational attainment in each caste and the representation secured by members of such castes in the service of the state. This data can be obtained on a national scale only through the decennial census. Without such data, it is impossible to delete any caste from the list of Backward Classes which has ceased to be a Backward Class. It is therefore now a condition precedent to collect such data to exercise the statutory function of conducting periodical revision of the list.

Unfounded Apprehension

5.10.1. There is a vigorous campaign against collection of caste particulars in the Census. Principal ground for opposing this exercise is that it will increase casteism in the society. This is a baseless apprehension. Eschewing collection of caste particulars over the last 60 years has not brought about any transformation of society into a casteless society much less has the society become more cosmopolitan than it was 60 years ago. On the other hand not only casteism even communalism has

4 *Ramakrishna Singh Ram Singh* v. *State of Mysore*, AIR 1960 Mys 338

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taken a strangle hold on the Indian society and the Indian polity over the period. This experience itself should expose the hollowness of the campaign against the collection of caste particulars.

5.10.2. Likewise, the controversy about creating cleavages on the basis of caste in society is also unfounded. Over the last 60 years though collection of caste particulars in the Census Reports was eschewed not one caste has ceased to exist much less the rigour of the caste inequality has come down.

Caste Enumeration Will Spur Unexpected Demand?

5.11. One of the apprehensions repeatedly aired is that caste enumeration in the census will spur unexpected demands on the basis of caste population. A question to be asked here is who is afraid of such a demand. It is only a caste which has hitherto held a monopoly of national wealth and other resources, including education and services, that is afraid of such demands being raised. Indeed it is with that specific object of reducing monopoly of any caste over the resources and to enable equitable and proportionate distribution of such resources there is a necessity to collect caste particulars in the census. Apprehensions raised to the contrary are necessarily by those vested interest who have hitherto held a monopoly and want to maintain the status quo of such monopoly over educational opportunities and the services of the State. It may not be out of place to mention here the warning administered by the Havanur Commission in this behalf: "when at a time India was inhabited by hundred per cent Hindus the microscopic minority of Muslims coming from outside India ruled the whole country. When India was inhabited by Hindus and Muslims, a still considerable minority community of Christians coming from the distant West ruled both Hindus and Muslims. The majority of the present Muslims and Christians were the original Hindus. If the advanced sections amongst Hindus consider that abolition of caste particulars in the Census Reports would eliminate caste groups, we would say that the backward Hindus are likely to achieve it by leaving Hinduism." (Havanur, 1975:337)

Invidious Discrimination

5.12.1. The Constitution prohibits the State from making discrimination on certain grounds. It prohibits discrimination on grounds of religion, race, caste, sex, place of birth, descent, language and residence. One of the assertions made is that it is because of this prohibition, caste enumeration in the census is impressible by virtue of the prohibition imposed under Articles 15, 16 and 29(2) of the Constitution. This assertion has been convincingly met by the Havanur Commission in the following words:

> "... We have got to examine the correctness or the bona fides of such an assertion. It is to be noted that Articles 15, 16 and 29(2) prohibit the State from making discrimination against any citizen on grounds not only of caste, but also religion, race, sex, place of birth, descent, residence and language. Have the religions, castes, races, languages etc. ceased to exist because of prohibition of discrimination? One fails to understand the logic of the contention that the abolition of caste particulars in Census was right, when other particulars relating to religion, race, sex, place of birth, descent and language are enumerated in the Census. The logic or the reason that is applied in the abolition of caste particulars would also have been applied in matters relating to religion, race, sex, place of birth, descent and language. What is the justification in the

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enumeration of males and females? What is the justification in the enumeration of people on the ground of their place or residence in urban and rural areas? What is the justification in the enumeration of people belonging to different racial groups like Scheduled Castes and Scheduled Tribes? What is the justification in the enumeration of people of their peculiar descent like Anglo-Indians? Further what is the justification to mention the similarly prohibited aspects of religion, race, sex, place of birth, residence and descent in the Birth and Death Registers, in the Admission Registers of Schools and Colleges and the Service Registers of government servants? Have they not made people conscious of their religion, sex, race and language? Is it not discriminatory against Hindu castes if particulars of castes are not enumerated." (Havanur, 1975 : 334)

5.12.2. Though the Census Operation have not collected caste particulars over the last 60 years in respect of all the castes they continue to collect caste particulars in respect of all the tribes and castes which are scheduled under Articles 341 and 342 of the Constitution. For collection of demographic figures uniform parameters are required to be applied to all castes and tribes. If caste is anathema for census of Hindu castes it is so even for Scheduled Castes and Scheduled Tribes. No such discrimination is permissible in collection of census data. It is therefore clear that non collection of caste particulars in respect of Hindu castes and tribes while collecting such particulars in respect of Scheduled Castes and Scheduled Tribes is a clear act of discrimination violating the guarantee of equality under Articles 14, 15 and 16 of the Constitution. The other Hindu castes are denied information about their actual population, their social position, their economic conditions, their educational level and their representation in State services.

No Extra Burden

5.13. It is indeed not a very difficult matter to collect caste details in the census operations. As a matter of fact, the necessary columns are already there and no structural alterations are required in the forms and schedules. For example, in the 1991 census operations, in the household schedule of the social demographic study of villages, Column 2.2 in Section 2; general characteristics of the household, it reads:

"2. To which caste/community does the head of the household belong.

Name.....

(Register Code in case of SC/ST)"

If the note which requires entry of this column only in case of SC or ST is deleted or amended to read "Register code in case of SC/ST/Backward Classes" it would be sufficient. In the various other schedules and forms, it is only such marginal changes, alterations or additions that are required to be made.

5.14. Late Shri Madhu Limaye, respected Socialist Leader of India had applied to this Hon'ble Court, when the *Indra Sawhney case*[2] was being heard before the Constitution Bench, to direct caste enumeration in the Census 2001. The said application was not entertained as there was not enough time to introduce necessary changes in the household Schedule which was already printed by that time.

5.15. Prof. A. Laxmisagar a former Law Minister of Karnataka and the practicing advocate of Bangalore along with Shri J. Chandrasekharaia, retired District Judge preferred WP No. 22881 of 1999 in the High Court of Karnataka for

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necessary directions in this behalf. However, the writ petition was disposed of with a direction to approach the Union of India. The representation given pursuant to the said order was also not fruitful.

5.16. Sri E.C. Vidya Sagar, Advocate preferred Writ Petition (Civil) No. 332 of 2000 before this Hon'ble Court seeking a direction to the Union of India to collect caste/community-wise data in the 2001 Census. The said writ petition was dismissed as withdrawn by an Order dated 19-2-2001.

5.17. In this behalf, the then Chairman of the Karnataka State Commission for Backward Classes had also addressed a letter to the Government of India in early 2000 in this regard. However, no response was received for the same.

5.18. There is absolutely no justification for refusing to take the caste details at the decennial census operation. A massive exercise is rendered useless for the all important work of implementing social justice policies. The Backward Classes are denied their legitimate right to know the socio-educational status of each caste thereby violating their fundamental rights to receive information under Article 19(*a*) of the Constitution of India.

5.19. Wherefore, it is respectfully prayed that a direction be issued to the Union of India to collect comprehensive caste/community data in the decennial Census 2011 and promptly publish the said data at the earliest in the interest of justice and equity.

6. 1931 CENSUS IS NOT THE BASIS OF IDENTIFICATION:

6.1. It has been very vociferously argued on behalf of the petitioners that the entire identification of the Backward Classes has been done on the basis of the 1931 Census data. This is wholly incorrect. The identification of the Backward Classes has never been based on the 1931 Census data. In each State, the identification of Backward Classes has been done on the basis of criteria evolved by the State Commissions on social, educational and economic parameters. Each State has adopted its own methodology. The identification of Backward Classes is essentially done at the State level on a very objective criteria and a scientific methodology. Therefore, it is wholly incorrect to say that the identification is based on the 1931 Census data. Even for purposes of ascertaining the population figures, the respective Commissions have adopted separate methodology. For example the Karnataka Third Backward Class Commission, more popularly known as Justice Chinnappa Reddy Commission adopted the following methodology:

> "First, the population of the different religious groups in 1971 and 1981 was ascertained from the respective Census reports of 1971 and 1981. The rate of growth of population of each religious group was separately ascertained. In regard to the Hindu religious group this exercise was done separately for Scheduled Castes and Scheduled Tribes and non-Scheduled Castes and Scheduled Tribes. Thereafter the population of the respective groups in 1988 was estimated. The population figures of the different Hindu caste groups and the total population figures of the religious groups in 1984 were taken from the Venkataswamy Report. Making use of those figures the percentage of population of each Hindu caste to the total 1984 estimated Hindu population was calculated (excluding Scheduled Castes and Scheduled Tribes). Using those percentages the population of each caste in 1988 was calculated by applying the percentage

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to the total Hindu (excluding Scheduled Castes and Scheduled Tribes) population in 1988 as estimated aforesaid. Thereafter the percentage of the estimated population of each of the castes was also calculated with reference to the total estimated population of the State in 1988. We thus have the estimated population of each caste in 1988 as well as the percentage of the population of such castes to the total population of the State. In the case of Muslims, Christians, Jains and Scheduled Castes and Scheduled Tribes, this elaborate exercise became unnecessary as the estimates could be made directly from 1981 Census and applying the growth rate as obtained from 1971 and 1981 Census. From the estimated percentages of population it will be noticed that in the case of all castes (non-Scheduled Castes and Scheduled Tribes), the percentage of population of the castes to the population of the State has shown a downward trend. It is not because the population has decreased, but because the rate of growth of population of the Hindu religious groups (non-Scheduled Castes and Scheduled Tribes) is lower than the rate of growth of Muslims and Scheduled Castes and Scheduled Tribes. The higher rate of growth of Muslims and Scheduled Castes and Scheduled Tribes has resulted in the rate of growth of total population of the State being higher than the rate of growth of the Hindu population. That is the reason why the percentage of population of the various Hindu castes to the total population the State appears to show a downward trend."

6.2. Likewise, other Commissions have also adopted their own methodology to estimate the population figures of the Backward Class, mainly to recommend the quantum of reservation in favour of the Backward Classes. In view of the fact that in the Census Reports comprehensive population data is available religion-wise after deducting the population of the Scheduled Castes and Scheduled Tribes what remains among Hindus will be the population of the Hindu castes and tribes, other than Scheduled Castes and Scheduled Tribes. It is only after identifying the Backward Classes, the population of the castes which are so included in the list will have to be ascertained for purposes of deciding the quantum of reservations to be recommended in their favour.

6.3. See observations of this Hon'ble Court in *Indra Sawhney* v. *Union of India*[2] at SCC p. 398, para 134.

6.4. Be that as it may, the quantum of reservations recommended in the instant case is only 27%, while the Mandal Commission had estimated the population of Backward Classes at 54%. The petitioners have not shown that the population of the Backward Classes is lower than 27%. If at all population of Backward Classes has increased it is because of their backwardness itself which is a contributing factor for population growth. Whatever being the methodology for estimating the population of the Backward Classes, it is always remained well over the quantum of reservation recommended in their favour. Therefore, 27% reservation in favour of Backward Classes is not case of 'robbing Peter to pay Paul' as the Backward Classes have never been given reservation even proportionate to their estimated population. There is absolutely no substance in the arguments advanced by the petitioners, therefore, it is liable to be rejected in limine.

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7. MEANING OF THE TERM CLASSES OF CITIZENS

7.0. Much of the arguments on behalf of the petitioners stem from the understanding of the term "classes of citizens" found in Clause (4) of Article 15. Indeed, the majority of the issues that arise for consideration in this case can be conclusively answered, provided, we ascertain the true meaning of the term "classes of citizens". It is, therefore, necessary to ascertain its true meaning. This can be correctly done by:

(*a*) analysing the relevant constitutional provisions;

(*b*) ascertaining the true meaning of the term by looking at the Constituent Assembly Debates;

(*c*) ascertaining the historical meaning and the origin of the term and;

(*d*) applying the appropriate rules of interpretation.

7.1. *Analysis of the Constitutional Provisions:*

7.1.1. Clause (4) of Article 15 was introduced by an amendment made in the year 1951. It is, therefore, necessary for us to look into the pertinent provisions of the Constitution as enacted before the said amendment.

- Clause (4) of Article 16 uses the term "class of citizens".
- Clause (1) of Article 340 uses the term "Socially and Educationally Backward Classes."
- Clause (10) of Article 338, which was originally enacted as Clause (3) of Article 338, corresponds to Article 301 of the Draft Constitution and reads as under:

Article 338(10)

7.1.2. This is the key provision to ascertain the meaning of the term "*classes of citizens*" and it is truly the interpretative clause.

7.1.3. The terms "Anglo-Indian Community", "Scheduled Castes" and "Scheduled Tribes" are defined in the Constitution.

Article 366

7.1.4. Part XVI of the Constitution, which contains special provisions under Articles 330 to 342, has provided for reservation and certain other special provisions.

7.1.5. The heading of this part says "Special Provisions Relating to Certain Classes". It is, therefore, clear that such classes of citizens are those associated with their religion, race or caste.

7.1.6. In all these provisions, the Constitution recognises the factual existence of castes, tribes, races, religious communities and people of particular descent as classes. In Part XVI, each of the group is described as a "class."

7.1.7. It is in this background that, while amending the Constitution and adding Clause (4) to Article 15, the very same term "classes of citizens" was used, meaning thereby, that these classes are nothing but castes and tribes other than those enumerated as Scheduled Castes and Scheduled Tribes.

7.1.8. The Havanur report has very comprehensively analysed the constitutional provisions and has ascertained the true meaning of the term "classes of citizens" as associated with their religion, race or caste (Havanur, I, paras 2 and 3 at pp. 39 to 42).

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7.1.9. From this, it is very clear that Clause (4) of Article 15 does not create new classes. It does not apply to individuals. It applies to pre-existing classes, which are those groups of citizens, classified on the basis of their religion, race or caste and no other consideration. It is precisely for this reason that Clause (4) of Article 15 starts with a non obstante clause both with reference to Article 15 and Clause (2) of Article 29 which prohibit caste as a consideration. Thereby, although, the Constitution prohibited discrimination against the citizen only on the ground of religion, caste, race or descent, it does not prohibit discrimination in favour of Anglo-Indian Community on the ground of their descent, in favour of Scheduled Castes on the ground of their religion and caste and in favour of the Scheduled Tribes on the ground of their race. The reservation of seats for the Scheduled Castes and Scheduled Tribes and Anglo-Indian Communities in Parliament and the State Legislatures and in the government services are such provisions. Thus, the "classes of citizens" contemplated under Clause (4) of Article 15 are none other than such castes or tribes, which are classes already in existence on the day Clause (4) of Article 15 was enacted.

7.2. *Origin of the term "classes of citizens":*

7.2.0. The origin of the term "classes" signifying caste, tribe and community may be traced to the later part of the 19th Century.

7.2.1. In the year 1885, Indian National Congress was founded and the leaders felt that the National Movement should not be exclusively political and that, simultaneously, questions affecting Indian social economy should also be discussed and efforts should be made for vitalising the Hindu Society by removing all social evils and social wrongs.

7.2.3. Dewan Bahadur Raghu Nath Rao (then Rao Bahadur) and Justice M.G. Ranade delivered addresses on the question of untouchability.

7.2.4. In the year 1886, at the Second Session of the Congress (Calcutta), Dada Bhai Naoroji, the President of the Session, opposed the idea of social reform in the following words:

> "There are Mohammadens and Christians of various denominations, Parsis, Sikhs, Brahmins and what not—men indeed of each and all those numerous classes which constitute, in the aggregate, the numerous people of India. How can this gathering of all classes discuss the social reforms needed in each individual class?"

7.2.5. In 1887, Badruddin Tyabji, who presided over the third session of the Congress, in his presidential address, referred to the Hindus, Muslims, Parsis and described them as classes.

7.2.6. In 1917, the Congress passed a resolution that, "This Congress urges upon the people of India, the necessity, the justice and righteousness of removing all disabilities imposed by custom upon the Depressed Classes, the disabilities being of a most vexatious and oppressive character, subjecting those classes to considerable hardship and inconvenience."

7.2.7. From then onwards, the term classes has been interchangeably used with castes, tribes and communities.

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7.2.8. By then, a number of communal organisations also cropped up in India, particularly, in Madras and Bombay presidencies. The untouchable castes formed Depressed Classes Associations or Leagues. On their demand, Montague announced the policy of His Majesty's Government of "gradual development of self-governing institutions with a view to progressive realisation of responsible Government in India as an integral part of British Empire."

7.2.9. Between 1915 and 1919, several reforms were initiated. Of them the constitution of the Franchise Committee was one. Its Chairman was one Lord Southborough. A joint report of His Excellency the Governor General in Council and the Secretary of State was sent to the Franchise Committee. The terms of reference included the question of granting franchise to the Backward Classes by communal electorate and to secure adequate representation of those communities.

7.2.10. Southborough Committee on 22-2-1919 submitted the report recommending representation of the Depressed Classes by nomination of the members of that class.

7.2.11. Lord Chelmsford Committee, to whom Franchise Committee Report was sent, recommended to the Secretary of State prescribing a certain number of seats to be reserved for members of the Depressed Classes.

7.2.12. Major Hills, M.P., moving an amendment in the Imperial Parliament, regarding the Depressed Classes said, "We have enfranchised the lower castes. Surely, what we have done in enfranchising the men of the lower castes is a far bigger shock to the conservative opinion in India than enfranchisement of the women of their own caste."

7.2.13. The Government of India Bill, 1919, was prepared on the basis of the recommendations of the Franchise Committee. The Bill was sent to the Joint Select Committee of the House of Lords and House of Commons for their consideration. The Joint Select Committee not only accepted the recommendations of the Franchise Committee but further suggested for a larger share of the representation for Depressed Classes in both the Council and in the Civil Services. The Joint Committee attached "much importance, however, to the educational advancement of the depressed and the Backward Classes".

7.2.14. Instrument of instructions to the Governor issued by His Majesty, King Emperor of India under the Government of India Act, 1919, directing the Governor of Provinces in the following terms:

> "You shall do all in your power to … promote all measures making for the social and industrial welfare of the people and tending to fit all *classes* of population without distinction to take their due share in the public life and Government of the country. But, in addition to the general responsibility with which you are charged, whether by Statute or under this Instrument, we do hereby specially require and charge you to take care that due provision shall be made for the advancement and social welfare of those *classes*, amongst the people committed to your charge, who, whether on account of their smallness of their numbers or their lack of educational or material advantage or from any other cause, specially rely upon our protection and can, as yet, fully rely for their

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welfare upon joint political action and, that such classes shall not suffer, or have cause to fear, neglect or oppression."

7.2.15. Pursuant to the said directions, Provincial Governments prepared a list of Backward Classes with three parts:

(*a*) Castes, tribes, and their groups described as Depressed Classes.

(*b*) Certain tribes and racial communities described as Aboriginal Tribes.

(*c*) Certain other castes, tribes and groups styled as Other Backward Communities.

7.2.16. Every Province and many Princely States made special provisions in the matter of grant of educational facilities and reservation of posts in Government Services in favour of certain communities and castes. Christians, Anglo-Indians, Europeans, Muslims and Depressed Classes had additional facilities in the political field.

7.2.17. Pursuant to the Instrument of Instructions, all Governments prepared lists of Backward Classes.

7.2.18. Thus, the word "class" was still being used, both in official and non-official documents, by political leaders, social reformers and the like, to apply to castes, tribes and communal groups.

7.2.19. Baba Saheb Ambedkar, in his classic thesis, "Castes in India", described "class" as the father of the institution of "caste" and that "caste and class are next door neighbours". He concluded that "A Caste is an Enclosed Class."

7.2.20. In 1931, Dr. B.R. Ambedkar demanded separate electorate for the *Depressed Classes* at the Round Table Conference.

7.2.21. In 1932, Ramsay MacDonald Commission submitted what is known as the Communal Award, giving separate electorate for the Depressed Classes.

7.2.22. When the news of the Poona Pact was conveyed to Pandit Jawaharlal Nehru, he sent a telegram to Gandhiji stating that "no sacrifice was too great for downtrodden classes."

7.2.23. In 1924, Bahiskrit Hitakarini Sangha, Bombay, was founded to promote the spirit of education and culture amongst the Depressed Classes. C.H. Setalwad was its President. G.K. Nariman, B.G. Kher, V.P. Chavan, Solicitor Rustomji and Meyer Nissim were its Vice-Presidents. Dr. B.R. Ambedkar was the Chairman of the Managing Committee. This organisation also used the word classes denoting castes, tribes and their parts and groups.

7.2.24. Castes, sub-castes, tribes, tribal communities, groups known as Depressed Classes and Backward Classes before 1919, came to be officially recognised as such classes (Depressed Classes) or Aboriginal Tribes and other Backward Communities after the passing of the Government of India Act, 1919.

7.2.25. The Government of India Act, 1935, defined those classes as Scheduled Castes and Other Backward Tribes in its First and Fifth Schedules. The Act defines the two groups as under:

Scheduled Castes means, "such castes, races or tribes or parts or groups within castes, races, tribes, parts or groups which appear to the Governor General to

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correspond to the classes of persons known as the Depressed Classes as the Governor General may, by order, specify."

Backward Tribes means, "such tribes as the Governor General may, from time to time, by order declare to be tribes to which a special system of representation is more appropriate."

7.2.26. Objective Resolution of 13-12-1946 was introduced by the then Prime Minister Jawaharlal Nehru who declared that:

> "This Assembly declares its firm and solemn resolve to proclaim India as an Independent Sovereign Republic to draw up for her future governance, a Constitution wherein adequate safeguards shall be provided for minorities, backward and tribal areas and depressed and Backward Classes."

7.2.27. Thus, the assurance of Shri Nehru to depressed classes and other Backward Classes was addressed to classes of persons forming castes and tribes as defined in the Constitution, the statutory enactments in force and as commonly understood.

7.2.28. Dr. B.R. Ambedkar, the Chief Architect of our Constitution, in his Preface to the book, "What Gandhiji and Congress have done to the Untouchables", explains the meaning of the expressions "Depressed Classes" and "Servile Classes" thus:

> "The reader will find that I have used quite promiscuously in the course of this Book, a variety of nomenclature such as Depressed Classes, Scheduled Castes, Harijans and Servile Classes to designate the untouchables. I am aware that this is likely to cause confusion, especially, for those who are not familiar with conditions in India. Nothing could have pleased me better than to have used one uniform nomenclature. Fault is not altogether mine. All those names have been used officially and non-officially at one time or other for the untouchables. The term under the Government of India Act is "Scheduled Caste" but that came into use after 1935. Before that, they were called Harijans by Mr Gandhi and Depressed Classes by Government. In a flowing situation like that, it is not possible to fix upon one name which may be correct designation at one stage and incorrect at another. The reader will overcome all difficulties if he will remember that these terms are synonymous and represent the same class." (p. 61).

7.2.29. Thus, Dr. B.R. Ambedkar has used the word class as synonymous with castes and communities. He has also referred to the speeches of Indian leaders like Mahatma Gandhi, Jawaharlal Nehru, Asaf Ali, Justice M.G. Ranade and Rama Iyer, to resolutions and correspondences of the Congress organisation, to Government communication, to the Press Reports and Editorials, to reports of various committees and the like where one finds that the word "classes" was used as a synonym for castes and communities.

7.2.30. Even Section 153-A of the Penal Code, 1860 has used the word classes. The meaning of the term has also been judicially interpreted and accepted as a reference to caste and communities. Hence, the classes of citizens referred to in Articles 15(4) and (5), 16(4) are nothing but groups of people associated with their religion, race or caste.

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Justice Miller Committee (1918):

7.2.31. The then Princely State of Mysore having noticed the large preponderance of Brahmin community in the public services wanted to ensure that other communities in the State should be adequately represented therein. Accordingly, under the Chairmanship of Chief Justice Shri Leslie C. Miller Kt., a Committee was appointed to investigate and report on the question as to what steps should be taken in that behalf with the following terms of reference:

(1) Changes needed, if any, in the existing rules of recruitment in the public services.

(2) Special facilities to encourage higher and professional education amongst members of the Backward Communities.

(3) Any other special measures which may be taken to increase the representation of the Backward Communities in the public services, without materially affecting efficiency, due regard being paid also to the general good accruing to the State by wider diffusion of education and a feeling of increased status which, it is expected, will thereby be produced in the Backward Communities.

7.2.32. The Committee defined the expression "Backward Classes" to mean all communities other than Brahmins, Europeans and Anglo-Indians. 'Depressed Classes' is generally included in the term of 'Backward Classes', unless they are particularly referred to as such.

7.2.33. The Miller Committee is the first known official body to have been constituted in any part of the country to go into a question relating to the "Backward Classes". It is very significant that the Committee has extensively used the term 'Backward Classes' to refer to all castes, tribes and communities other than the three communities mentioned above. Thus, it is clear that, by then, it was fairly well established that all those castes, communities and tribes which deserved special consideration were generally referred to as 'Backward Classes'. This position continued till the framing of the Constitution and it is in this historical context that the meaning of the term 'Backward Classes' will have to be ascertained.

7.3. *The Constituent Assembly Debates:*

Debate on Draft Article 9 (present Article 15)

7.3.1. Prof. K. T. Shah moved an amendment in the following terms:

"That at the end of Clause (2) of Article 9, the following be added:

'or for Scheduled castes or backward tribes, for their advantage, safeguard or betterment'."

He referred to the SCs and Backward Tribes as "classes of our society which, owing to an unfortunate legacy of the past, suffer from liabilities or handicaps" and wanted special treatment and special facilities for some time so that real equality of citizen be established. (CAD, Vol. VII, pp. 655, 656)

7.3.2. Dr. B.R. Ambedkar apprehended that the SCs and STs may be segregated and the proposed amendment would be counter productive. He also referred to SCs as the "unfortunate class" entitled to the same privileges as members of the other communities. (ibid, pp. 660-61)

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7.3.3. *Debates on Draft Article 10(3) [present Article 16(4)]*

Shri Damodar Swarup Seth (U.P. : General) wanted the deletion of this clause because it will give rise to casteism. (ibid, p. 679)

7.3.4. Pandit Kunzru (U.P.: General) opposed the provision. Referring to backward class, he said that it may not include minorities and that no community or class might be tempted to claim special advantages for itself. (ibid, p. 681)

7.3.5. Shri, K.M. Munshi cleared all doubts about the meaning of the term by stating:

> "Article 301 makes it clear that there will be a Commission appointed for the purpose of investigating what are Backward Classes. Some reference has been made to Madras. I may point out that in the province of Bombay for several years now, there has been a definition of Backward Classes which includes not only Scheduled Castes and Scheduled Tribes but also other Backward Classes who are economically, educationally and socially backward. We need not, therefore, define or restrict the scope of the word 'backward' to a particular community. Whoever is backward will be covered by it and I think the apprehensions of the Hon'ble Members are not justified."

7.3.6. He, therefore, made it clear that Backward Classes include not only SCs and STs but other Backward Classes who are economically, educationally and socially backward as already existing in Madras and Bombay provinces. The definition in Bombay is set out at pp. 107-08 of Havanur Report. The Madras GOMs No. 3437, dated 21-11-1947 indicates who are backward Hindus. Dr. B.R. Ambedkar finally concluded the debate in the following words:

> "Now, Sir, to come to the other question which has been agitating the members of this House, viz., the word "backward" in Clause (3) of Article 10, I should like to begin by making some general observations so that members might be in a position to understand the exact import, the significance and the necessity for using the word "backward" in this particular clause. If members were to try and exchange their views on this subject, they will find that there are three points of view which it is necessary for us to reconcile if we are to produce a workable proposition which will be accepted by all. Of the three points of view, the first is that there shall be equality of opportunity for all citizens. It is the desire of many Members of this House that every individual who is qualified for a particular post should be free to apply for that post, to sit for examinations and to have his qualifications tested so as to determine whether he is fit for the post or not and that there ought to be no limitations, there ought to be no hindrance in the operation of this principle of equality of opportunity. Another view mostly shared by a section of the House is that, if this principle is to be operative and it ought to be operative in their judgment to its fullest extent—there ought to be no reservations of any sort for any class or community at all, that all citizens, if they are qualified, should be placed on the same footing of equality so far as the public services are concerned. That is the second point of view we have. 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

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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. If Hon'ble Members will bear these facts in mind—the three principles, we had to reconcile—they will see 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. At the same time, as I said, we had to reconcile this formula with the demand made by certain communities that the administration which has now—for historical reasons—been controlled by one community or a few communities, that situation should disappear and that the others also must have an opportunity of getting into the public services. Supposing, for instance, we were 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. Let me give an illustration. Supposing, for instance, reservations were made for a community or a collection of communities, the total of which came to something like 70 per cent of the total posts under the State and only 30 per cent are retained as the unreserved. Could anybody say that the reservation of 30 per cent as open to general competition would be satisfactory from the point of view of giving effect to the first principle, namely, that there shall be equality of opportunity? It cannot be in my judgment. Therefore the seats to be reserved, if the reservation is to be consistent with sub-clause (1) of Article 10, must be confined to a minority of seats. It is then only that the first principle could find its place in the Constitution and effective in operation. If Hon'ble Members understand this position that we have to safeguard two things namely, the principle of equality of opportunity and at the same time satisfy the demand of communities which have not had so far representation in the State, then, 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. But I think Hon'ble Members will realise that the Drafting Committee which has been ridiculed on more than one ground for producing sometimes a loose draft, sometimes something which is not appropriate and so on, might have opened itself to further attack that they produced a Draft Constitution in which the exception was so large, that it left no room for the rule to operate. I think this is sufficient to justify why the word 'backward' has been used.

With regard to the minorities, there is a special reference to that in Article 296, where it has been laid down that some provision will be made with regard to the minorities. Of course, we did not lay down any proportion. That is quite clear from the section itself, but we have not altogether omitted the minorities from consideration. Somebody asked me: "What is a backward community"?

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Well, I think any one who reads the language of the draft itself will find that we have left it to be determined by each local Government. A backward community is a community which is backward in the opinion of the Government. My Hon'ble friend, Mr T.T. Krishnamachari asked me whether this rule will be justiciable. It is rather difficult to give a dogmatic answer. Personally I think it would be a justiciable matter. If the local Government included in this category of reservations such a large number of seats; I think one could very well go to the Federal Court and the Supreme Court and say that the reservation is of such a magnitude that the rule regarding equality of opportunity has been destroyed and the court will then come to the conclusion whether the local Government or the State Government has acted in a reasonable and prudent manner. Mr Krishnamachari asked: "Who is a reasonable man and who is a prudent man? These are matters of litigation". Of course, they are matters of litigation, but my Hon'ble Friend, Mr Krishnamachari will understand that the words " reasonable persons and prudent persons" have been used in very many laws and if he will refer only to the Transfer of Property Act, he will find that in very many cases the words "a reasonable person and a prudent person" have very well been defined and the court will not find any difficulty in defining it. I hope, therefore that the amendments which I have accepted, will be accepted by the House."

(Ibid, p. 697)

7.4. *Parliamentary Debates:*

7.4.1. Explaining the reason for using the term Socially and Educationally Backward Classes, Prime Minister stated thus:

"… because they (Socially and Educationally Backward Classes) occur in Article 340 and it wanted to bring the bodily from there"

(Parliamentary Debates, Vol. XII (Part II) at Col.9830)

7.4.2. Dr. B.R. Ambedkar concluded emphatically stating that:

"What are called Backward Classes are nothing else but a collection of certain castes" (ibid)

7.4.3. From these debates it is clear that the only intention of the Constituent Assembly was to provide for reservation in favour of Backward Classes which are nothing but a collection certain castes which are Socially and Educationally backward.

8. THE CONSTITUTION AND CASTELESS SOCIETY

8.0. It has been repeatedly argued that building up a casteless society is the goal of the Constitution. It is, therefore, contended that caste should not be considered for any purpose whatsoever, much less, could it be considered for classifying the 'Backward Classes'.

8.1. What the Constitution aims at is the removal of some disabilities imposed on certain castes on the ground of their status, position or rank in society. Caste system and structural units of castes are not disturbed. Constitution says no further. In every conceivable activity of private life, caste plays an all-important role. There are hundreds of communal hostels and educational institutions owned and managed by certain communities. Some castes and communities have communal Clubs, Associations, Cooperatives, Banks, etc. Their membership and admission is confined

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to a particular caste or community. Even the carrying of the caste names is the guaranteed right of every citizen. There is nothing in Constitution to prohibit a person from discriminating on the ground only of caste or community in matters relating to marriage, electing a candidate to political position, in employing a person in one's own trade or business, in permitting entry into mutt or temple, etc.

8.2. Every community which is a religious minority has a fundamental right to establish and administer any educational institution of its choice under Clause (1) of Article 30 of the Constitution. While this was a guaranteed fundamental right of the religious minorities with the acceptance of a similar right, even in non-minority communities under Articles 19(1)(*g*) and 26, the legal position now is that every community has a fundamental right to establish and administer educational institution of its choice, after the declaration of law in *T.M.A. Pai case*[5]. Most of the Professional Colleges, like Medical, Dental and Engineering Colleges are established and administered by a body of persons exclusively belonging to a caste or a community. This is now recognised as a fundamental right. How could such a situation be permitted if use of caste was prohibited under the Constitution of India?

8.3. It is also necessary to mention here that Dr. B.R. Ambedkar intended to abolish caste by abolishing all the privileges and disabilities arising on the basis of caste. It may be recalled that on 24-3-1947, as a Member of the Sub-Committee on Fundamental Rights, he presented a memorandum titled "Memorandum and Draft Articles on the rights of States and Minorities." In Article II Section I of the said memorandum, it is stated as follows:

* * *

> 1. All persons born or naturalised within its territories are citizens of United States of India and of the wherein they reside. Any privilege or disability arising out of rank, birth, person, family, religion or religious usage and custom is abolished. (Article II, Section I (1) at p. 86)
>
> * * *
>
> 16. No person shall incur any penalties of any kind whatsoever by reason of his caste, creed or redligion nor shall any person be permitted to refuse to fulfil any obligation of citizenship on the ground of caste, creed or religion. (Article II, Section I (16) at p. 87)
>
> (Framing of India's Constitution, Select documents Shiv Rao, Vol. II pp. 85-87).

8.4. If it was the intention of the Constitution to abolish caste, this proposal of Dr. B.R. Ambedkar should have been accepted. On the contrary, at the Sub Committee level itself, this proposal was nipped in the bud in preference to Shri K.M. Munshi's proposal in his memorandum of the same date. The proposal contained in his Draft Article 3(4) stated:

> "Untouchability is abolished and its practice there, of is punishable by the law of the Union".

It was this proposal, which was accepted after rejecting Dr. B.R. Ambedkar's proposal while enacting the present Article 17 abolishing untouchability. Therefore

5 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481

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annihilation of caste, so dear to Dr. Ambedkar, was never written into the Constitution.

8.5. Indeed, the Constitution never prohibits the practice of caste and casteism. Even to this day, every activity in Hindu Society, from cradle to grave is carried on solely on the basis of one's caste. In fact, even after death, a Hindu is not allowed to be buried in the cemetery which is maintained for the exclusive use of some other caste or community. Dalits are not permitted to be buried in graves where upper caste people bury their dead. Christians have their own graveyards. Muslims are not allowed to be buried in the Hindu graveyards and vice versa. Thus, caste rules the root in the life of a Hindu and even after his death. In such circumstances, it is entirely fallacious to advance this argument on the ground that the Constitution has prohibited the use of caste. What the Constitution aims at is achievement of equality between the castes and not elimination of castes. Indeed, the Constitutional provisions under Article 17, Articles 15(1) and (2), Article 29(2) read with Article 15(4) and Article 16(4) are intended to bring about equality among all castes. This is evident from Prime Minister Nehru's speech:

> "We talk about casteism, we condemn it as we should. But the fact remains that half a dozen or may be 10 so-called superior castes dominate the Indian scene among the Hindus. There is no doubt about it and, if I talk about removal of casteism, do not understand by that, that I want to perpetuate the present classification, some people at the top and the other people at the bottom. If we do not equalise, or tend to equalise, undoubtedly the casteism will flourish in a most dangerous way."
>
> (quoted in the Kaka Kalelkar Commission Report, Vol. 1 p. 138).

8.6. As a matter of fact, it will be utopian to expect that by ignoring caste, castes will perish. Take for example, our experience with the Census. By deleting the caste column from the census, the Union of India has done the greatest disservice to the "Backward Classes" by denying them their legitimate rights, and even a legitimate data, about their correct population. This was specifically used to support its own inaction on the Report of the First Backward Classes Commission. Unless we bridge the gap between the castes Socially and Educationally, we cannot dream of abolition of the castes.

8.7. Therefore, there is no substance in the petitioners' argument based on casteless society. Ignoring caste will perpetuate casteism. If caste is not taken as the unit for classification, it only perpetuates the existing social and educational inequality in the society and strengthens the roots of social inequality and the structure or the caste system as a whole. Both Articles 15(4) and 16(4) were designed solely to enable lower castes to Socially and Educationally advance so as to reach a level playing field with the advanced castes. Every caste which has a higher percentage of representation, more than its proportion of the population in the society, is an advanced caste. It may be in the services, professions, or in education. Both Articles 15(4) and 16(4) apply only to existing castes if they are identified as backward. Some of these advanced castes not only had representation disproportionate to their known share of population in society but even enjoyed a monopoly in the professions, services and education, prompting the Governments to step in to arrest the same. Justice Miller Committee was constituted for the purpose of bringing down the monopoly of Brahmins, in the then Madras Presidency.

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8.8. If caste is not the unit of measurement, the whole object of reservation would be frustrated. The disaster that could ensue is evident if we look at the working of the Mysore Government order since 1963. After the Supreme Court struck down reservation in favour of the Socially and Educationally Backward Classes of citizens, specified on the basis of Nagana Gowda Committee Report, the then Government of Mysore was quick to give up the backward castes altogether. In reaction to judicial invalidation, it switched over to an income-cum-occupation test; the 'Backward Classes' were identified as those families who had annual income of less than Rs 1200 and pursued the following occupations:

- Actual cultivator;
- Artisan;
- Petty businessman;
- Inferior service (i.e. Class IV in government service and corresponding class or service in private employment including casual labourer);
- Any other occupation involving manual labour;

8.9. This criteria enabled the forward caste to monopolise and maintain their strangle hold on the admissions to professional colleges. Even the Mysore High Court found that:

> "There is hardly any doubt that the scheme has not helped the really 'Backward Classes' amongst the Hindus."

The court substantiates this with some details from the 1963 selection for Mysore engineering colleges, which tend to suggest that the more advanced a group was educationally, the more it benefited from the application of the income-cum-occupation test. Prof. Marc Galanter has tabulated the data as under:

RELATIVE SUCCESS OF SELECTED CASTES ON MERIT AND ON SELECTION BY INCOME-CUM-OCCUPATION TEST IN MYSORE ENGINEERING COLLEGES, 1963

Group	*% of popln. of State*	*No. of seats gained on merit*	*No. of merit Seats*	*Ratio of % of merit seats won to % of popln.*	*No. of seats won in reserved Pool*	*% of reserved seats won*	*Ratio of % seats won to % of popln.*	*Classification by Nagan Gowda Committee*
Brahmins	4.28	285	35.9	8.40:1	22	15.5	3.6:1	Forward
Lingayats	15.57	111	13.9	0.89:1	35	24.6	1.6:1	Borderline
Vokkaligas	12.98	32	4.0	0.31:1	35	24.6	1.9:1	Backward
Kurubas	6.88	6	0.75	0.11:1	2	1.4	0.2:1	More Backward
Bedars	4.74	3	0.38	0.08:1	1	0.7	0.15:1	More Backward
Total		794			142			

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Source: Calculated from data provided in *D.G. Viswanath* v. *Chief Secy. to the Govt. of Mysore*[6], AIR 132 at pp. 137, 139.

(*a*) Mysore Backward Classes Committee 1961, Statement 9.

(*b*) Classified as forward by the Committee, backward by State Government.

(See Competing Equalities: 1984 : Marc Galanter, pp. 270-71)

8.10. Caste is a deep-rooted phenomenon. It conditions everyone's mind. Dr. B.R. Ambedkar said that there is no Hindu without a caste. That being the position, it is extremely difficult to get an objective and impartial analysis of the Constitutional and legal provisions on the issue of 'Backward Classes' in India. However, Prof. Marc Galanter, Professor of Law School, University of Wisconsin and presently a visiting Professor at the National Law School of India, University, Bangalore, is the author of a book titled 'Competing Equalities'—Law and the Backward Classes in India. This book is, by far, the most objective and impartial commentary on the subject. It has been widely quoted all over the world particularly, where affirmative action is in practice. He makes out a strong case to demonstrate that a caste is a class. It is noteworthy that Prof. Galanter has come out with a declaration, after extensive research and analysis. It is worth quoting him:

> "The Constitution names as the permissible recipients of preferences, not backward individuals or families, nor backward castes, religious communities, occupational or regional groups, but backward "classes" of citizens. These "classes" are restricted neither to economic classes nor to classes in the senses familiar to modern social science. The term seems to be used in the broad connotation of any group of persons having certain common characteristics. In particular, it would seem to include, though it is not confined to, those classifications otherwise forbidden in Articles 15, 16 and 29(2)—e.g. racial, religious, and caste groups. This is so because Articles 15(4) and 16(4) are exceptions or provisos to these Articles, limiting the operation of their provisions. If the proviso that "nothing in this article" shall prevent the State from making preferences for Backward Classes is not broad enough to authorise the use of the forbidden classifications, then it was unnecessary to have any proviso at all, since other classifications would be permissible without it. Furthermore, the history of Articles 15(4) and 16(4) indicates that they were included for this purpose. The entire debate on Article 16(4) in the Constituent Assembly revolved around the question of which "communities" were intended to be included. The addition of Article 15(4) by amendment was for the specific purpose of permitting preferences for caste groups.
>
> In a discussion of the use of caste in designating Backward Classes, there are two related and easily confused but distinguishable questions. First, may castes or communities be used as the units or classes that are designated as backward? Second, may the rank, standing, or prestige of a caste group be used as a measure or criterion of its backwardness? The latter points to "caste" as the measuring rod; the former points to "castes" as the things to be measured.
>
> This distinction, emphasised here for purposes of clarity, introduces an unavoidable element of artificiality into our analysis of the cases to the extent

6 AIR 1964 Mys 132

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that courts, along with the other participants, continually discuss the "caste test" or "caste criterion" as a unit. As the passages quoted in the ensuing discussion indicate, usually it is either caste as a unit or caste as a status that is meant. But there are instances in which both meanings are fused. That the courts have succeeded in clarifying the distinction only partially and after a long conceptual struggle, points to the significance of this fusion; even a body so detached and devoted to analytical distinctions as the judiciary has found it difficult to envision even momentarily a caste group abstracted from its status in a ranked order of groups. (Ibid, pp. 189-90.)

The law set forth in these High Court cases has remained essentially unchanged. But a series of notable Supreme Court cases refined it and widely conveyed a notion of substantial change. In *M.R. Balaji* v. *State of Mysore*[7] the Supreme Court for the first time explicitly dealt with the question of the permissibility of the use of caste as a unit. There are a number of places, in its opinion, where the Court is critical of the use of caste as a criterion of backwardness. But it is quite clear on close inspection that the Court puts forward no constitutional objection to the use of caste or community as a unit of designation, although it deplores this use on policy grounds. In its examination of the state's classification of educationally backward communities, the Court clearly accepts the use of "communities"—including caste groups—as the units whose backwardness is to be determined. It concludes that "only those communities which are well below the State average (of literacy) can properly be regarded as educationally Backward Classes of citizens." The Court takes strenuous objection to the exclusive reliance of Mysore on caste (i.e. on the sense of rank or standing) as a criterion of social backwardness and notes that occupations and places of habitation are also relevant to determination of the backwardness of "a community of persons."

(*Balaji*[7], AIR at p. 664, para 36)" The communities that may be used appear to be broader than castes in the narrow sense, but include all communities—for one of the Court's objections to emphasis on caste is its inapplicability to non-Hindu groups.

In short, Balaji seems to leave intact caste or communal units as the things to be measured, while confining the role of caste as the measuring rod. However, the failure to make clear the distinction between castes as units and caste rank as a measure of backwardness put both uses of caste in some disrepute and encouraged the notion that "caste" was in all respects eliminated from the selection of Backward Classes" (Ibid, pp. 191-92).

8.11. In fact, Prof. Marc Galanter has extensively referred to the Havanur Report. He has approved and appreciated the work of the Commission in the following words:

"The Havanur Report, the most comprehensive and thoughtful of the Backward Classes report is marked by a conceptual mastery of the subject that has so far as evaded the Courts. The Commission moved beyond the confusions imparted by the inability to separate caste as a unit and caste as a status. It set a challenging agenda for conceptualisation and measurement of backwardness that

7 AIR 1963 SC 649 : 1963 Supp (1) SCR 439

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may help to address the real and perplexing questions of whether, how and at what cost disparities among communities can be dispelled." (Ibid p. 240)

8.12. It is therefore, necessary to find out what Havanur said on this aspect of the matter. In Chapter X, under the heading the 'Caste of Caste', it is stated as follows:

"12. The word caste could be used in two senses, one on the concrete and the other in the abstract. In the concrete sense 'a caste' means a group of persons or families. In the abstract sense the caste means status or rank or position it occupies. The Hindu Society consists of graded groups. Every caste knows its status in the hierarchy of castes. It is either below or above some. The Harijans or the Panchamas occupied the lowest rung in the social ladder (In a sense they were not given any status at all). Because of the lowest status, they were not even touched by the caste—Hindus. They were subjected to all forms of exploitation and social injustice. I refrain from writing on caste, for the topic is not material at this juncture. A few of the disabilities certain castes have been subjected to are intended to be removed by the Untouchability (Offences) Act, 1955. The social backwardness with those castes was due to the social disabilities imposed on them. The disabilities were imposed because of their caste, that is to say, low status.

13. In the present context of our society and the constitutional provisions caste-compartments are bund to continue. Constitution by Article 17 abolishes "Untouchability". But it does not abolish caste-groups. When the Indian mind is yet conservative and when there are no provisions in the Constitution for the removal of caste-groups there can be no legislation in that behalf, and Hindus are bound to maintain the caste-groups. The Directive Principles of State Policy are intended for taking certain measures such as prohibiting consumption of alcohol, providing for free and compulsory education, removing English as the medium of instruction, organising village panchayats, etc. But there is no policy for the eradication of castes. As the Preamble goes, the people of India in giving to themselves the Constitution in the present form did not think that abolition of caste-compartments was a function of the State. This omission in the Constitution is one that makes our country a secular democratic welfare State. What the Constitution intends doing is the abolition of differences in 'status' on the ground of caste, and removal of disabilities that are attended with low status. The hither to unknown belief that some castes are above and some below is intended to be done away with. The division of society into various groups in the graded order should go. But he divisions could be on equal footing or status. This is exactly what Mahatma Gandhi said about the removal of castes.

He said:

"I have frequently said that I do not believe in caste in the modern sense. It is an excrescence and a hardship on progress. Assumption of superiority by any person over any other is a personal sin against God and man. The caste, in so far as it connotes distinctions in status, is an evil".

Bharatan Kumarappan while editing some of the writings of Mahatma Gandhi says that:

"Gandhiji here uses the word caste in the same sense as varna. When he condemns caste he condemns only the idea of superiority and inferiority which it

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came later to acquire and not the principle of following hereditary occupations which he calls varna, and of which he thoroughly approves." a

Varna is that which describes the position of a person in society; that which envelopes or covers him.

(Havanur, I, Chapter X, pp. 72-73)

8.13. It is therefore clear that the Constitution has not abolished the caste system much less has it prohibited its use. The arguments advanced to the contrary are clearly misconceived. b

9. THE GREAT LEAP FORWARD

9.1. The constitutional amendment, the impugned Act and the 27% reservation in favour of Backward Classes is an unprecedented leap taking the higher education in the country forward, without depriving a single seat to the forward castes. The advanced castes, with a population of less than 20% will still be able to corner up to c 50% seats in the name of merit disproportionate to their known proportion of population. It is only that they cannot take away all the 77.5% seats as they had been doing till now. A whole new infrastructure is being added to increase the present intake by another 54%. With the added infrastructure the number of admissions every year in these institutions will be over 3 lakhs. This will provide a great impetus for the nation to stand head and shoulder above other nations in providing qualified d professionals and trained manpower in the vital areas of human development. The measure not only opens opportunities to the Backward Classes for the first time and provide access to the institutions of higher learning, it also enables the most disadvantaged sections of the society, particularly those from rural India to shed their backwardness and become partners with the upper castes in taking the nation forward. It is therefore against the public interest and national interest to stop this march forward for whatever reason. In these circumstances, far from being a public e interest litigation, these litigations are motivated and designed to keep the Backward Classes out of the institution of the higher education and on that account alone this petition is liable to be dismissed in limine.

9.2. Without the advancement of the SCs, STs and OBCs, constituting over 80% population mainly living in rural India, it will not be possible to take the nation forward. It is now well established that given access to institutes of higher learning f students from these sections utilise the opportunities and have proved that they are not lacking in talent and ability. Studies have also shown that they have out beaten the so called merit students. Students admitted under the reserved quota have performed much better than the students admitted on the basis of so-called merit. (See Caste Reservations and Performance : research findings: Prof. Parmaji and Veerappa Moily Report, Annexure X: Case studies from four States). India is named as the second least globalised nation and ranked at a lowly 71 in a survey of 72 g countries in 2007. In 2006 it has earned 61st place among 62 nations surveyed. The country's services export and the total trade rising by more than a third, being a premier off shoring destination with a booming economy masks the fact that 70 per cent of its population still lives in rural areas which is responsible for this lowly position. (Joint report by A.T. Kearney and U.S. based magazine quoted in a news paper under the heading "Globalisation Index: India still unplugged from world" h Hindustan Times, 26-10-2007).

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The Judgments† of the Court were delivered by

K.G. BALAKRISHNAN, C.J.— Reservation for admission in educational institutions or for public employment has been a matter of challenge in various litigations in this Court as well as in the High Courts. Diverse opinions have been expressed in regard to the need for reservation. Though several grounds have been raised to oppose any form of reservation, few in independent India have voiced disagreement with the proposition that the disadvantaged sections of the population deserve and need "special help". But there has been considerable disagreement as to which category of disadvantaged sections deserve such help, about the form this help ought to take and about the efficacy and propriety of what the Government has done in this regard.

2. Pandit Jawaharlal Nehru, who presided over the Congress Expert Committee emphasised before the Constituent Assembly that the removal of socio-economic inequalities was the highest priority. He believed that only this could make India a casteless and classless society, without which the Constitution will become useless and purposeless.[1] The Founding Fathers of the Constitution were thus aware of the ripples of inequality present in society, decried the notion of caste and ensured that the constitutional framework contained adequate safeguards that would ensure the upliftment of the socially and educationally backward classes of citizens, thus creating a society of equals. The interpretation of the term "socially and educationally backward", and its constituent classes, was left for future generations to decide.

3. Regarding equality, Dr. Ambedkar stated in the Constituent Assembly[2]:

> "... We must begin by acknowledging the fact that there is complete absence of two things in Indian society. One of these is equality. On the social plane, we have in India a society based on the principle of graded inequality which means elevation for some and degradation for others. On the economic plane, we have a society in which there are some who have immense wealth as against many who live in abject poverty."

4. Judge Lauterpacht of the International Court of Justice, writing in 1945, described the importance of the principle of equality in the following words:

> "The claim to equality before the law is in a substantial sense the most fundamental of the rights of man. It occupies the first place in most written constitutions. It is the starting point of all other liberties."[3]

† Four opinions were delivered: K.G. Balakrishnan, C.J. (for himself), Arijit Pasayat, J. (for himself and C.K. Thakker, J.), R.V. Raveendran, J. (for himself) and Dalveer Bhandari, J. (for himself).

1 IInd Constituent Assembly Debates, 317 (Wednesday, 22-1-1947)

2 XIth Constituent Assembly Debates, 979 (Friday, 25-11-1949)

3 Lauterpacht, "An International Bill of the Rights of the Man" (New York, Columbia University Press, 1945)

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5. Equality has also been enshrined in various international instruments, such as the Universal Declaration of Human Rights, 1948. Its Preamble speaks of "the equal and inalienable rights of all members of the human family" and of "the equal rights of men and women".[4]

6. Reservation is one of the many tools that are used to preserve and promote the essence of equality, so that disadvantaged groups can be brought to the forefront of civil life. It is also the duty of the State to promote positive measures to remove barriers of inequality and enable diverse communities to enjoy the freedoms and share the benefits guaranteed by the Constitution. In the context of education, any measure that promotes the sharing of knowledge, information and ideas, and encourages and improves learning, among India's vastly diverse classes deserves encouragement. To cope with the modern world and its complexities and turbulent problems, education is a must and it cannot remain cloistered for the benefit of a privileged few. Reservations provide that extra advantage to those persons who, without such support, can forever only dream of university education, without ever being able to realise it. This advantage is necessary. In the words of President Lyndon Johnson,

> "You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line and then say, 'You are free to compete with all the others....' "[5]

7. Dr. Rajendra Prasad, at the concluding address of the Constituent Assembly, stated in the following words:

> "... To all we give the assurance that it will be our endeavour to end poverty and squalor and its companions, hunger and disease; to abolish distinction and exploitation and to ensure decent conditions of living.
>
> We are embarking on a great task. We hope that in this we shall have the unstinted service and cooperation of all our people and the sympathy and support of all the communities."[6]

8. It must also be borne in mind that many other democracies face similar problems and grapple with issues of discrimination, in their own societal context. Though their social structure may be markedly different from ours, the problem of inequality in the larger context and the tools used to combat it may be common. As stated by Justice Ruth Bader Ginsburg at the Fifty-first Cardozo Memorial Lecture in 1999:

> "In my view, comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights. We are losers if we neglect what others can tell us about endeavours to eradicate bias against women, minorities and other disadvantaged groups. For

4 Universal Declaration of Human Rights, Preamble, G.A. Res. 217-A, UN GAOR, 3rd Session, Part 1, at 71, UN Doc A/810 (1948)

5 President Lyndon B. Johnson, Harvard University Commencement Address, "To Fulfill These Rights", 4-6-1965

6 Vth Constituent Assembly Debates, 2 (Thursday, 14-8-1947)

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irrational prejudice and rank discrimination are infectious in our world. In this, reality, as well as the determination to counter it, we all share."

9. We are conscious of the fact that any reservation or preference shall not lead to reverse discrimination. The Constitution (Ninety-third Amendment) Act, 2005 and the enactment of Act 5 of 2007 giving reservation to Other Backward Classes (OBCs), Scheduled Castes (SCs) and Scheduled Tribes (STs) created mixed reactions in the society. Though the reservation in favour of SCs and STs is not opposed by the petitioners, the reservation of 27% in favour of Other Backward Classes/Socially and Educationally Backward Classes is strongly opposed by various petitioners in these cases. Eminent counsel appeared both for the petitioners and the respondents. The learned Solicitor General and the Additional Solicitor General appeared and expressed their views. We have tried to address, with utmost care and attention, the various arguments advanced by the learned counsel and we are greatly beholden to all of them for the manner in which they have analysed and presented the case before us which is of great importance, affecting large sections of the community.

10. By the Constitution (Ninety-third Amendment) Act, 2005, Clause (5) was inserted in Article 15 of the Constitution which reads as under:

> "15. (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 insofar as such special provisions relate to their admission to the 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."

11. In *Unni Krishnan, J.P.* v. *State of A.P.*[7] it was held that right to establish educational institutions can neither be a trade or business nor can it be a profession within the meaning of Article 19(1)(*g*). This was overruled in *T.M.A. Pai Foundation* v. *State of Karnataka*[8] wherein it was held that all citizens have the fundamental right to establish and administer educational institutions under Article 19(1)(*g*) and the term "occupation" in Article 19(1)(*g*) comprehends the establishment and running of educational institutions and State regulation of admissions in such institutions would not be regarded as an unreasonable restriction on the fundamental right to carry on business under Article 19(6) of the Constitution.

12. Education is primarily the responsibility of the State Governments. The Union Government also has certain responsibility specified in the Constitution on matters relating to institutions of national importance and certain other specified institutions of higher education and promotion of educational opportunities for the weaker sections of society. Parliament introduced Article 15(5) by the Constitution (Ninety-third Amendment) Act,

7 (1993) 1 SCC 645
8 (2002) 8 SCC 481

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2005 to enable the State to make such provision for the advancement of SC, ST and Socially and Educationally Backward Classes (SEBC) of citizens in relation to a specific subject, namely, admission to educational institutions including private educational institutions whether aided or unaided by the State notwithstanding the provisions of Article 19(1)(*g*). In the Statement of Objects and Reasons of the Constitution (Ninety-third Amendment) Act, 2005 it has been stated that:

> "At present, the number of seats available in aided or State-maintained institutions, particularly in respect of professional education, is limited in comparison to those in private unaided institutions.
>
> To promote the educational advancement of the socially and educationally backward classes of citizens i.e. the OBCs or the Scheduled Castes and Scheduled Tribes in matters of admission of students belonging to these categories in unaided educational institutions other than the Minority Educational Institutions referred to in Clause (1) of Article 30 of the Constitution, it is proposed to amplify Article 15. The new Clause (5) shall enable Parliament as well as the State Legislatures to make appropriate laws for the purposes mentioned above."

13. After the above Constitution (Ninety-third Amendment) Act, 2005, Parliament passed the Central Educational Institutions (Reservation in Admission) Act, 2006 (5 of 2007) (hereinafter referred to as "Act 5 of 2007").

14. Section 3 of Act 5 of 2007 provides for reservation of 15% seats for Scheduled Castes, 7½% seats for Scheduled Tribes and 27% for Other Backward Classes in Central Educational Institutions. The said section is extracted below:

> "3. *Reservation of seats in Central Educational Institutions*.—The reservation of seats in admission and its extent in a Central Educational Institution shall be provided in the following manner, namely:
>
> (*i*) out of the annual permitted strength in each branch of study or faculty, fifteen per cent seats shall be reserved for the Scheduled Castes;
>
> (*ii*) out of the annual permitted strength in each branch of study or faculty, seven and one-half per cent seats shall be reserved for the Scheduled Tribes;
>
> (*iii*) out of the annual permitted strength in each branch of study or faculty, twenty-seven per cent seats shall be reserved for the Other Backward Classes."

15. "Central Educational Institution" has been defined under Section 2(*d*) of the Act as follows:

> "2. (*d*) 'Central Educational Institution' means—
>
> (*i*) a university established or incorporated by or under a Central Act;
>
> (*ii*) an institution of national importance set up by an Act of Parliament;

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(*iii*) an institution, declared as a deemed university under Section 3 of the University Grants Commission Act, 1956 (3 of 1956), and maintained by or receiving aid from the Central Government;

(*iv*) an institution maintained by or receiving aid from the Central Government, whether directly or indirectly, and affiliated to an institution referred to in Clause (*i*) or Clause (*ii*), or a constituent unit of an institution, referred to in Clause (*iii*);

(*v*) an educational institution set up by the Central Government under the Societies Registration Act, 1860 (21 of 1860);"

16. The percentage of reservation to various groups such as Scheduled Castes, Scheduled Tribes and Other Backward Classes are with reference to the annual permitted strength of the Central Educational Institutions and the "annual permitted strength" is defined under Section 2(*b*) of the Act as follows:

"2. (*b*) 'annual permitted strength' means the number of seats, in a course or programme for teaching or instruction in each branch of study or faculty authorised by an appropriate authority for admission of students to a Central Educational Institution;"

17. Section 4 of the Act specifically says that the provisions of Section 3 shall (*sic* not) apply to certain institutions. Section 4 reads as under:

"4. *Act not to apply in certain cases.*—The provisions of Section 3 of this Act shall not apply to—

(*a*) a Central Educational Institution established in the tribal areas referred to in the Sixth Schedule to the Constitution;

(*b*) the institutions of excellence, research institutions, institutions of national and strategic importance specified in the Schedule to this Act:

Provided that the Central Government may, as and when considered necessary, by notification in the Official Gazette, amend the Schedule;

(*c*) a Minority Educational Institution as defined in this Act;

(*d*) a course or programme at high levels of specialisation, including at the post-doctoral level, within any branch or study or faculty, which the Central Government may, in consultation with the appropriate authority, specify."

18. "Minority Educational Institution" is defined in Section 2(*f*) of the Act as follows:

"2. (*f*) 'Minority Educational Institution' means an institution established and administered by the minorities under Clause (1) of Article 30 of the Constitution and so declared by an Act of Parliament or by the Central Government or declared as a Minority Educational Institution under the National Commission for Minority Educational Institutions Act, 2004 (2 of 2005);"

19. Section 2(*g*) defines "Other Backward Classes" as under:

"2. (*g*) 'Other Backward Classes' means the class or classes of citizens who are socially and educationally backward, and are so determined by the Central Government;"

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20. Clause 2(*h*) defines "Scheduled Castes" and Clause 2(*i*) defines "Scheduled Tribes" as under:

"2. (*h*) 'Scheduled Castes' means the Scheduled Castes notified under Article 341 of the Constitution;

'Scheduled Tribes' means the Scheduled Tribes notified under Article 342 of the Constitution;"

21. Section 5 of the Act mandates the increase of seats in the Central Educational Institutions by providing reservation to Scheduled Castes, Scheduled Tribes and Other Backward Classes. Section 5 reads as follows:

"5. *Mandatory increase of seats.*—(1) Notwithstanding anything contained in Clause (*iii*) of Section 3 and in any other law for the time being in force, every Central Educational Institution shall, with the prior approval of the appropriate authority, increase the number of seats in a branch of study or faculty over and above its annual permitted strength so that the number of seats, excluding those reserved for the persons belonging to the Scheduled Castes, the Scheduled Tribes and the Other Backward Classes, is not less than the number of such seats available for the academic session immediately preceding the date of the coming into force of this Act.

(2) Where, on a representation by any Central Educational Institution, the Central Government, in consultation with the appropriate authority, is satisfied that for reasons of financial, physical or academic limitations or in order to maintain the standards of education, the annual permitted strength in any branch of study or faculty of such institution cannot be increased for the academic session following the commencement of this Act, it may permit by notification in the Official Gazette, such institution to increase the annual permitted strength over a maximum period of three years beginning with the academic session following the commencement of this Act; and then, the extent of reservation for the Other Backward Classes as provided in Clause (*iii*) of Section 3 shall be limited for that academic session in such manner that the number of seats available to the Other Backward Classes for each academic session are commensurate with the increase in the permitted strength for each year."

22. By virtue of definition of "Central Educational Institutions" under Clause (*d*)(*iv*) of Section 2 of the Act, all institutions maintained by or receiving aid from the Central Government whether directly or indirectly, and affiliated to any university or deemed university or institution of national importance, in addition to universities which are established or incorporated under a Central Act, institutions of national importance set up by Acts of Parliament, deemed universities maintained or receiving aid from the Central Government and institutions set up by the Central Government under the Societies Registration Act, 1860, are brought under the purview of reservation under Section 3 of the Act. The object of the Act is to introduce reservation in only such institutions which are defined as "Central Educational Institutions" and not any other private unaided institutions.

23. The Statement of Objects and Reasons for the Act gives the object of the Act thus:

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"Greater access to higher education including professional education, to a large number of students belonging to the socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes, has been a matter of major concern. The reservation of seats for the Scheduled Castes, the Scheduled Tribes and the Other Backward Classes of citizens (OBCs) in admission to educational institutions is derived from the provisions of Clause (4) of Article 15. At present, the number of seats available in aided or State-maintained institutions, particularly in respect of professional education, is limited in comparison to those in private unaided institutions.

2. It is laid down in Article 46, as a directive principle of State policy, that the State shall promote with special care the educational and economic interests of the weaker sections of the people and protect them from social injustice. Access to education is important in order to ensure advancement of persons belonging to the Scheduled Castes, the Scheduled Tribes and the socially and educationally backward classes also referred to as the OBCs.

3. Clause (1) of Article 30 provides the right to all minorities to establish and administer educational institutions of their choice. It is essential that the rights available to minorities are protected in regard to institutions established and administered by them. Accordingly, institutions declared by the State to be minority institutions under Clause (1) of Article 30 are omitted from the operation of the proposal.

4. To promote the educational advancement of the socially and educationally backward classes of citizens i.e. the OBCs or of the Scheduled Castes and Scheduled Tribes in matters of admission of students belonging to these categories in unaided educational institutions, other than the Minority Educational Institutions referred to in Clause (1) of Article 30 of the Constitution, it is proposed to amplify Article 15. The new Clause (5) shall enable Parliament as well as the State Legislatures to make appropriate laws for the purposes mentioned above.

5. The Bill seeks to achieve the above objects."

24. The Constitution (Ninety-third Amendment) Act, 2005, by which Article 15(5) was inserted in the Constitution, is challenged in these petitions, on various grounds. In some of the writ petitions which have been filed after the passing of Act 5 of 2007, the challenge is directed against the various provisions of Act 5 of 2007. Initially, these writ petitions were heard by a Bench of two Judges. Considering the constitutional importance of these questions, all these writ petitions were referred to a Constitution Bench.

25. We have heard learned counsel appearing for the various petitioners. The learned Senior Counsel, Shri Harish Salve, Shri F.S. Nariman, Shri K.K. Venugopal, Shri P.P. Rao and Dr. Rajeev Dhavan and learned counsel Shri Sushil Kumar Jain addressed the main arguments on behalf of the petitioners. Shri Ashoka Kumar Thakur appeared in person. Supporting the Constitution (Ninety-third Amendment) Act, 2005 and the provisions of the said Act,

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learned Senior Counsel Shri K. Parasaran, appearing for the Union of India, learned Solicitor General Shri G.E. Vahanvati and learned Additional Solicitor General Shri Gopal Subramanium submitted arguments. We have also heard learned Senior Counsel Shri Ram Jethmalani, Shri T.R. Andhyarujina, Ms Indra Jaising, Shri Rakesh Dwivedi and Shri Ravi Varma Kumar. We also had the advantage of the written submissions made by these counsel.

26. The arguments advanced against the Constitution (Ninety-third Amendment) Act, 2005 and Act 5 of 2007 can be summarised as follows:

It was contended by Shri Harish Salve, learned Senior Counsel, who confined his arguments to the constitutionality of the provisions of the Act, especially sub-clause (III) of Section 3 of the Act which deals with the reservation to the extent of 27% of the total number of seats for the "socially and educationally backward classes of citizens". According to him, the admission to educational institutions should be based purely on merit and to allow the State to prefer a student with lesser merit over those who would have otherwise got admission, is ex facie discriminatory. It is submitted that all obviously discriminatory laws are violative of the rule of equality and it is for the State to maintain the principles of equality and to establish the need for such laws as well as their validity.

27. It was further argued that Article 15(5) does not protect the validity of the Act and that the provision in the Act for preferential admission solely on the basis of caste would violate Article 29(2) of the Constitution, as has been laid down in *State of Madras* v. *Champakam Dorairajan*[9]. It was also argued that Article 15(5) could be construed as an exception to Article 15(1) and affirmative action, if excessive, is bound to result in reverse discrimination which is not permissible. According to the learned Senior Counsel, this is not a genuine social engineering measure but vote bank politics and would create permanent fissures in society.

28. It was argued that the provisions of the Act are facially violative of Article 14 and it could only be justified on the basis of compelling State necessity. A greater degree of compulsion is necessary to establish a compelling State necessity than what is ordinarily required to be shown in the case of economic legislation.

29. The learned Senior Counsel dealt in detail with the argument that backward classes cannot be defined solely on the basis of caste and reference was made to various decisions of this Court. The learned Senior Counsel particularly referred to various decisions of the Supreme Court of the United States and contended that this kind of legislation, that is, the impugned Act, attempting affirmative action is to be treated as "suspect legislation" and it has to undergo the tests of "strict scrutiny" and "compelling State necessity". Finally, the learned counsel argued that non-exclusion of creamy layer is per se illegal and contrary to what has been laid down by this Court in *Indra Sawhney* v. *Union of India*[10].

9 AIR 1951 SC 226 : 1951 SCR 525

10 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

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30. The validity of the Constitution (Ninety-third Amendment) Act, 2005 was seriously challenged by arguing that the amendment is destructive of basic structure of the Constitution. The learned counsel was of the view that both the Act as well as the Constitution (Ninety-third Amendment) Act, 2005 have to be declared ultra vires the Constitution.

31. Dr. Rajeev Dhavan, learned Senior Counsel appearing for the petitioners in Writ Petition No. 53 of 2007 contended that the affirmative action scheme under Articles 15(4), 15(5) and 16(4) has to comply with the mandate of Articles 14, 15(1) and 16(1) of the Constitution. It was argued that these are only enabling provisions and not part of the fundamental rights. "Notwithstanding", as used in Articles 15(3), 15(4) and 15(5) cannot be construed as "notwithstanding the declaration of equality principle". In view of the decision of this Court in *Champakam Dorairajan*[9] admission quotas are impermissible on any ground based solely on religion, race, caste or any one of them. It was argued that there is a lack of criteria for identification of Other Backward Classes (OBCs) and Socially and Educationally Backward Classes (SEBCs). The concept of creamy layer is applicable to Article 15 and Article 16 and non-exclusion of creamy layer in the Act is illegal. Further, it was argued that quota should not be a punishment for unreserved categories and there should not be any reverse discrimination.

32. The learned Senior Counsel further challenged the constitutional validity of the Constitution (Ninety-third Amendment) Act, 2005 and contended that it is against the basic structure of the Constitution. The procedure laid down under Article 368 has not been followed. It was contended that the proviso to Article 368 of the Constitution requires ratification of the Constitution (Ninety-third Amendment) Act, 2005 by one-half of the States. The amendment seeks to nationalise the private educational institutions which is unreasonable and impermissible and reference was made in this regard to *T.M.A. Pai Foundation*[8]. It was argued that Act 5 of 2007 is unreasonable, arbitrary, capricious and contrary to Articles 14 and 21 of the Constitution. He elaborated his arguments on the basis of the tests laid down in *M. Nagaraj* v. *Union of India*[11] and *I.R. Coelho* v. *State of T.N.*[12] cases and lastly, submitted that both Act 5 of 2007 and the Constitution (Ninety-third Amendment) Act, 2005 are liable to be declared as ultra vires the Constitution.

33. Dr. Rajeev Dhavan elaborately argued that perusal of the history of the reservations from 1880 to 2007 for OBCs and SEBCs showed that there was no emphasis on communities by the British regime and community-based criteria were held to be illegal in *Champakam Dorairajan*[9]. From 1950 to 1970, there was no proper inquiry for ascertaining OBCs or

9 *State of Madras* v. *Champakam Dorairajan*, AIR 1951 SC 226 : 1951 SCR 525
8 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481
11 (2006) 8 SCC 212
12 (2007) 2 SCC 1

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SEBCs. The learned counsel emphasised that in *Indra Sawhney case*[10] caste was excluded as a criterion and the identification of SEBCs or OBCs based on caste could not operate for both Articles 15(4) and 16(4). According to the learned Senior Counsel, the criteria for identifying SEBCs should be based on the atrocities inflicted on that class, discriminatory patterns followed against that class, disadvantage suffered by that class and disempowerment in respect of the power of the State and political non-representation. The class should also be relatively homogeneous in nature.

34. According to the learned Senior Counsel, there is a lack of criteria for fixing SEBCs or OBCs and this case is being taken to excite vote banks. It was argued that 27% of reservation under the Act of 2007 was based on criteria which did not exist. It was contended that the creamy layer principle is applicable to OBCs and also to SCs and STs. It was argued that historic discrimination is not a valid criterion for determining the beneficiaries of affirmative action and the correct approach is to look at the continuing wrong and not past discrimination and that the quotas should not be a punishment for the non-reserved category resulting in reverse discrimination.

35. The learned Senior Counsel contended that the Ninety-third Amendment is against the basic structure of the Constitution. It was argued that the doctrine of equality is adversely affected by giving a wide and untrammelled enabling power to the Union Legislature that may affect the rights of non-OBCs, SCs and STs. It was argued that the balance between what was referred to as the "Golden Triangle" in *Minerva Mills Ltd.* v. *Union of India*[13] has been totally nullified by the Ninety-third Amendment. It was argued that the legislative declarations of facts are not beyond judicial scrutiny and the court can tear the veil to decide the real nature of the statute and decide the constitutional validity. It was argued that Act 5 of 2007 is subject to judicial review on the ground that its unreasonable and clear criteria have not been laid down to identify OBCs and there was no compelling necessity other than political patronage.

36. Shri K.K. Venugopal, learned Senior Counsel appearing in WP (Civil) No. 598 of 2006 contended that Articles 15(4) and 15(5) are mutually exclusive with the former concerning admissions to aided institutions and the latter concerning admissions to unaided institutions. Article 15(5) expressly used the phrase "whether aided or unaided", making it clear that it is not merely restricting itself to unaided institutions. Therefore, it is argued that from the very inception of the Constitution, Article 15(4) was a provision and was the source of legislative power for the purpose of making reservation for the Scheduled Castes, Scheduled Tribes as well as the Socially and Educationally Backward Classes of citizens in aided minority educational institutions. On the other hand, Article 15(5), which provides reservation of seats for SCs and STs as well as SEBCs in aided educational institutions

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

13 (1980) 3 SCC 625 : AIR 1980 SC 1789

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expressly excludes such reservation being made at all in minority educational institutions covered by Article 30(1) of the Constitution. According to him, it would take away the valuable rights of OBCs, SCs and STs given by the State under Article 15(4) of the Constitution and this would result in annulling the endeavour of the Founding Fathers of the Constitution and would result in exclusion of SCs and STs from the mainstream of the society and stall their development for centuries to come.

37. According to the learned counsel for the petitioners, the argument of the Union of India that Articles 15(4) and 15(5) are both enabling provisions and both will stand together and both can be complied with is incorrect. It was argued that Article 15(4) operates with a qualification that nothing in Article 15 or in Article 29(2) of the Constitution shall prevent the State from making special provision for SCs and STs as well as SEBCs while Article 15(5) operates with a qualification that "nothing in Article 15 or Article 19(1)(*g*)" shall prevent the State from making such special provisions for SCs and STs as well as SEBCs. The qualifying words in Article 15(4) do not have any real meaning or effect for the reason that both Article 15(1) as well as Article 29(2) prohibit discrimination on grounds only of religion and/or of caste. Therefore, it is argued that there is a direct conflict between Articles 15(4) and 15(5) as both articles contain an exclusionary clause excluding the operation of the rest of Article 15.

38*. It was contended that the Constitution (Ninety-third Amendment) Act, 2005 is violative of the basic structure as it breaches the central character of the Constitution by placing the minority educational institutions based on religion on a special footing and exempting them from bearing the common burden of reservation for SCs, STs and SEBCs. It was argued that such exclusion of minority institutions is not severable from Article 15(5). As regards the validity of Act 5 of 2007, it failed to exclude the "creamy layer" from the caste which would render the identification of the "caste" as "Backward Class" which is unconstitutional and void. Their inclusion would result in unequals being treated as equals and result in giving the benefit of reservation to the advanced sections in that caste. The consequences would be that the inclusion of the caste for the benefit of reservations would be purely on the basis of caste only thus violating Article 15(1) and Article 29(2) of the Constitution. The doctrine of severability does not apply and, therefore, Act 5 of 2007 is unconstitutional and void to the extent that it does not provide exclusion of "creamy layer" from SEBCs. Therefore, it was prayed that both the Constitution (Ninety-third Amendment) Act, 2005 as well as Act 5 of 2007 be struck down as unconstitutional.

39. Shri F.S. Nariman, learned Senior Counsel appearing for the petitioners in WP (Civil) No. 35 of 2007, contended that caste cannot be the sole criterion for determining the socially and educationally backward classes under Articles 15(4) and 15(5) of the Constitution and the test for Article 15(5) has to be "occupation-cum-income" where caste may or may not be

* **Ed.**: Para 38 corrected vide Official Corrigendum No. F.3/Ed.B.J./33/2008 dated 15-4-2008.

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one of the many considerations having a nebulous weightage, and alternatively without conceding if caste at all is taken as one of the many considerations then it can only be those castes which satisfy the test of similarity with Scheduled Castes/Scheduled Tribes. It was argued that the decision of this Court in *R. Chitralekha* v. *State of Mysore*[14] still occupies the field for the purpose of Article 15 and the decision in *R. Chitralekha case*[14] was affirmed by the Bench in *Indra Sawhney case*[10].

40*. It was argued that OBCs are already educationally forward and no reservation in higher education is justified. The learned Senior Counsel relied on the literacy rate by age groups as quoted in the Sachar Committee Report. It was contended that in data given in *Indra Sawhney case*[10] OBCs were not taken as educationally backward. According to the learned Senior Counsel for the petitioners, there can only be presumption of forwardness of OBCs and they are not backward. The burden is on the Government to provide that the intended beneficiaries are really backward citizens. OBCs have not suffered social inequalities or oppression that had been inflicted on Scheduled Castes and Scheduled Tribes by the society and, according to the learned Senior Counsel, the caste-occupation nexus barely survives today and is a misleading guide. The caste-based occupation association has been rapidly disappearing from the Indian society. For Articles 15(4) and 15(5), economic consideration has to be the dominant criterion. The non-exclusion of "creamy layer" is illegal and it was intended to safeguard the really deprived and backward people among the so-called OBCs. It was contended that the Government has not published the list of OBCs for Article 15(5) and the Union of India has not been able to produce the list or the criteria for determining SEBCs. No time-frame has been fixed for such reservation. Therefore, Act 5 of 2007 is violative of Article 14 of the Constitution of India and is thus unconstitutional.

41. Appearing for the writ petitioner in WP (Civil) No. 231 of 2007 filed by the Citizens for Equality, the learned Senior Counsel Shri P.P. Rao contended that the mandate of Article 45 to provide free and compulsory education for all children until they complete the age of 14 years has not been complied with by the Government and, therefore, there is clear violation of Article 20 of the Constitution. Although the Sarva Shiksha Abhiyan (SSA) Project was introduced with certain objectives, these objectives were not fulfilled. The Constitution seeks to achieve a casteless and classless society. Therefore, identification of socially and educationally backward classes should be based on such criteria which facilitate the eradication of the caste system. The educational backwardness of the backward classes and SEBCs should be removed and once this educational backwardness is removed, Clauses (4) and (5) of Article 15 will become redundant and unnecessary. It was argued that without ensuring that every child belonging to a backward

14 AIR 1964 SC 1823 : (1964) 6 SCR 368

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

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class is provided free and compulsory education up to 10+2 level any reservation provided in higher education is discriminatory inter se between members of the backward classes themselves and violative of Articles 14 and 15 of the Constitution. Education up to secondary school level should be the measure for determining educational backwardness. The social and educational backwardness referred to in Article 15(4) requires separate identification of SEBCs. Agricultural labourers, rickshaw pullers/drivers, street hawkers, etc. may well qualify for being designated as "backward classes". According to the petitioner's learned Senior Counsel, a rational basis would be to identify backward classes through occupations traditionally considered to be inferior, yielding low income. It was argued that in any event, the "creamy layer" among the socially and educationally backward classes is liable to be excluded.

42. Shri Sushil Kumar Jain, learned counsel appearing in WP (Civil) No. 598 of 2006, elaborately argued the issues involved in this case. The main contention of the petitioner's counsel is that the "affirmative action" policy of the Government of India is discriminatory and against general public interest. The policy is intended to "uplift" the so-called socially and educationally backward sections of the society by the process of positive discrimination. It was argued that the Constitution (Ninety-third Amendment) is destructive of the basic structure of the Constitution as it destroys the delicate balance of the various fundamental rights that the citizens of the country enjoy. The provision of Article 15(5) was inserted as a proviso to Article 19(6) which has been held to be unreasonable and against the constitutional scheme. Article 15(5) makes an exception for the minority institutions covered under Article 30 and therefore treats them differently from other private institutions. The Central Education Institution (Reservation in Admission) Act, 2007 which has been enacted in purported exercise of the said powers, is in excess of the said powers. Since the target beneficiaries of Article 15(5) have not been identified with a necessary degree of specificity, Act 5 of 2007 is illegal. There ought to be a quantitative correlation between the benefits conferred and the extent of the "problem" sought to be remedied, the correlation being "reasonable" and not "proportionate". Act 5 of 2007 does not provide the manner or the principles on which the identification of OBC is to be made. Therefore, it lacks the necessary nexus with the ultimate objects sought to be achieved. The reservation of seats for the "beneficiaries" for many years to come without any provision for review gives rigidity and permanency to such measures. This would result in excessive reservation and thereby cause reverse discrimination. The 100% quota in the additional seats that will be created in the educational institutions is facially discriminatory. Identification of SEBCs on the basis of caste creates vested interest in backwardness. Therefore, the measures and means chosen by the Government are therefore unethical to the constitutional goals. Failure to exclude "creamy layer" allows conferment of benefits on undeserving persons. The action of the State Governments lacks in the basic details of the

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extent of the measure. The exact social malaise sought to be remedied is not clear.

43. The learned counsel for the petitioner further contended that the Constitution (Ninety-third Amendment) violates the basic structure of the Constitution. This Court clarified the rights of the private educational institutions in terms of Article 19(1)(*g*) of the Constitution in *T.M.A. Pai Foundation case*[8] as explained in *P.A. Inamdar* v. *State of Maharashtra*[15]. It was held in that case that fixation of quotas and reservation of seats in private educational institutions amounts to "nationalisation of education". The Constitution (Ninety-third Amendment) is thus an unreasonable action of the legislature. It was argued that the impugned amendment alters supremacy of the Constitution and there was only limited constituent power to amend Article 368. Article 15(5) would enable the State to make the law to provide reservation to private educational institutions which has been held to be an unreasonable encroachment on the fundamental rights and this amendment would alter the balance between Parts III and IV of the Constitution. Reliance was placed on various decisions by the petitioner's learned counsel. The impugned amendment specifically excludes the application of Article 19(1)(*g*), whereas the institutions governed by Article 26 and the minority institutions governed by Article 30(1) have been left out. This, according to the petitioner's counsel, is discriminatory and illegal and that there was no justification for this differential treatment.

44. The petitioner's learned counsel also challenged the quantum of reservations provided under Act 5 of 2007. Any determination of the extent of reservation without considering the future impact of the reservation would be unjust, arbitrary and unreasonable. Caste-based reservation would not be in the larger interest of the national unity and integrity. The benefits could be given only to those communities which are not adequately represented and not to those which are socially and educationally advanced. Reservation in the form of quota is illegal and if some classes are to be given some benefit and to be equalised with the general category they could be awarded some additional marks like it is being given to the women candidates seeking admission in colleges. Many of the castes included in SEBCs are not really backward classes and some of them were even rulers of erstwhile States for a number of years. The benefits and privileges which are given to SCs/STs should not be extended to OBCs. The members of the OBC communities are capable of competing with the general category candidates and the increase in seats would entail a corresponding increase in infrastructure, and it is submitted that an increase in infrastructure would, therefore, be financed through tax collections and, therefore, every member of the public (including the general category) is entitled to be considered for admission in the said increase.

8 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481
15 (2005) 6 SCC 537

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45. The learned counsel also strongly objected to "caste" being taken as a means of classification and identification of SEBCs and OBCs. It is contended that it is in complete derogation of provisions of Article 15(1) and, according to the petitioner's learned counsel, many of the castes which have been included in SEBCs are really not SEBCs and thus past historical discrimination is entirely irrelevant for conferment of benefits in the present times. It was also contended that there are no traditional occupations now. It is submitted that the identification of castes as a "class" to justify the same as being occupations on a presumption that the persons belonging to a particular caste continue to follow a particular occupation especially in the present constitutional scheme which gives freedom to choose any business, occupation or profession is entirely fallacious. The learned counsel for the petitioner also contended that the non-exclusion of creamy layer is illegal and relied on *Indra Sawhney case*[10] and *Indra Sawhney* v. *Union of India*[16].

46. Shri Ashoka Kumar Thakur, who appeared in person, supported all the contentions raised by various learned counsel and urged that the Ninety-third Constitution Amendment as well as Act 5 of 2007 are unconstitutional and they are liable to be struck down.

47. On behalf of the respondents, several Senior Counsel appeared and contended that the contentions of the petitioners challenging the Constitution (Ninety-third Amendment) and Act 5 of 2007 are without any merit and are liable to be dismissed. The contentions raised by the petitioners' counsel were refuted by the respondents' counsel by raising the plea that affirmative action is needed for promoting educational and economic interest of weaker sections of society. Shri K. Parasaran, learned Senior Counsel appearing for the Union of India, submitted that the Constitution is to be interpreted as an integral, logical whole, and while construing one part, regard must be had to the provisions of the other parts, rendering no portion as unnecessary or redundant. It was argued that when constitutional provisions are interpreted, it has to be borne in mind that the interpretation is such as to further the object of their incorporation and they cannot be interpreted in a manner that renders another provision redundant.

48. It was argued that the constitutional provision must not be construed in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take into account the changing conditions and purposes so that the constitutional provision does not get fossilised but remains flexible enough to meet the newly emerging problems and challenges of this age. Reference was made to various decisions rendered by this Court regarding the interpretations of constitutional provisions. It was pointed out that when social welfare measures are sought to be implemented and the Constitution has to be interpreted in such context, it has to be kept in mind that the

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

16 (2000) 1 SCC 168 : 2000 SCC (L&S) 1

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Preamble is the text which sets out the goal that is to be attained; and that Part III is the texture into which is woven a pattern of rights.

49. Fundamental rights and directive principles are both complementary and supplementary to each other. Preamble is a part of the Constitution and the edifice of our Constitution is built upon the concepts crystallised in the Preamble. Reference was made to the observations made by Sikri, C.J. in *Kesavananda Bharati* v. *State of Kerala*[17], wherein it was argued that the Constitution should be read and interpreted in the light of the grand and noble vision expressed in the Preamble. The Preamble secures and assures to all citizens justice, social, economic and political and it assures the equality of status and of opportunity. Education and the economic well-being of an individual give a status in society. When a large number of OBCs, SCs and STs get better educated and get into Parliament, legislative assemblies, public employment, professions and into other walks of public life, the attitude that they are inferior will disappear. This will promote fraternity assuring the dignity of the individual and the unity and integrity of the nation. The single most powerful tool for the upliftment and progress of such diverse communities is education.

50. The fundamental rights in Part III are not to be read in isolation. All rights conferred in Part III of the Constitution are subject to at least other provisions of the said Part III. The directive principles of State policy in Part IV of the Constitution are equally as important as fundamental rights. Part IV is made not enforceable by court for the reason inter alia as to financial implications and priorities. Principles of Part IV have to be gradually transformed into fundamental rights depending upon the economic capacity of the State. Article 45 is being transformed into a fundamental right by the Eighty-sixth Amendment of the Constitution by inserting Article 21-A. Clause (2) of Article 38 says that:

> "38. (2) *The State shall, in particular, strive to minimise the inequalities in income and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations*."
>
> (emphasis supplied)

Under Article 46,

> "*[t]he State shall promote with special care the educational and economic interests of the weaker sections of the people and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation*" (emphasis supplied)

51. It is submitted that the Constitution (Ninety-third Amendment) was brought into force to bring about economic and social regeneration of the teeming millions who are steeped in poverty, ignorance and social backwardness.

52. Shri K. Parasaran, learned Senior Counsel, contended that the concept of basic structure is not a vague concept and it was illustrated in

17 (1973) 4 SCC 225 : 1973 Supp SCR 1

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Kesavananda Bharati case[17]. It was pointed out that the supremacy of the Constitution, republican and democratic form of Government and sovereignty of the country, secular and federal character of the Constitution, demarcation of power between the legislature, the executive and the judiciary, the dignity of the individual (secured by the various freedoms and basic rights in Part III and the mandate to build a welfare State contained in Part IV), the unity and the integrity of the nation are some of the principles of basic structure of the Constitution. It was contended that when the constitutional validity of a statute is considered, the cardinal rule to be followed is to look at the Preamble to the Constitution as the guiding light and the directive principles of State policy as a book of interpretation. On a harmonious reading of the Preamble, Part III and Part IV, it is manifest that there is a constitutional promise to the weaker sections/SEBCs and this solemn duty has to be fulfilled.

53. It was pointed out that the observations in *Champakam Dorairajan*[9] that the directive principles are subordinate to the fundamental rights is no longer good law after the decision of *Kesavananda Bharati*[17] and other decisions of this Court. It was pointed out that the de facto inequalities which exist in the society are to be taken into account and affirmative action by way of giving preference to the socially and economically disadvantaged persons or inflicting handicaps on those more advantageously placed is to be made in order to bring about real equality. It is submitted that special provision for advancement of any socially and educationally backward citizens may be made by determining the socially and educationally backward classes on the basis of caste. Article 15(4) neutralised the decision in *Champakam Dorairajan case*[9]. It was enacted by the Provisional Parliament which consisted of the very same Members who constituted the Constituent Assembly. Our Constitution is not caste blind and the Constitution prohibits discrimination based "only on caste" and not "caste and something else".

54. In *Unni Krishnan case*[7] it was held that Article 19(1)(*g*) is not attracted for establishing and running educational institutions. But this decision was overruled in *T.M.A. Pai Foundation*[8] and it was held that establishing and running an educational institution is an "occupation" within the meaning of Article 19(1)(*g*). In *P.A. Inamdar case*[15] it was held that the private educational institutions, including minority institutions, are free to admit students of their own choice and the State by regulatory measures cannot control the admission. It was held that the State cannot impose reservation policy on unaided institutions. The above ruling disabled the State to resort to its enabling power under Article 15(4) of the Constitution. It was argued by Shri Parasaran that the above rulings necessitated the

17 *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225
9 *State of Madras* v. *Champakam Dorairajan*, AIR 1951 SC 226 : 1951 SCR 525
7 *Unni Krishnan, J.P.* v. *State of A.P.*, (1993) 1 SCC 645
8 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481
15 *P.A. Inamdar* v. *State of Maharashtra*, (2005) 6 SCC 537

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enactment of the Constitution (Ninety-third Amendment) Act, 2005 by inserting Article 15(5) through which enabling power was conferred on Parliament and the State Legislatures, so that they would have the legislative competence to pass a law providing for reservation in educational institutions which will not be hit by Article 19(1)(*g*). But rights of minorities under Article 30 are not touched by Article 15(5).

55. In *Kesavananda Bharati*[17] it was held that the fundamental rights may not be abrogated but they can be abridged. The validity of the Twenty-fourth Amendment of the Constitution abridging the fundamental rights was upheld by the Court. The right under Article 19(1)(*f*) has been completely abrogated by the Forty-fourth Amendment of the Constitution which is permissible for the constituent power to abridge the fundamental rights especially for reaching the goal of the Preamble of the Constitution. It is an instance of transforming the principles of Part IV into Part III whereby it becomes enforceable. All rights conferred in Part III of the Constitution are subject to other provisions in the same Part. Article 15(4) introduced by the First Amendment to the Constitution is a similar instance of abridging of fundamental rights of the general category of citizens to ensure the fundamental rights of OBCs, SCs and STs. Article 15(5) is a similar provision and is well within the constituent power of amendment. Article 15(5) is an enabling provision and vests power in Parliament and the State Legislatures.

56. There is vital distinction between the vesting of a power and the exercise of power and the manner of its exercise. It would only enable Parliament and the State Legislatures to make special provisions by law for enforcement of any socially and educationally backward class of citizens or for Scheduled Castes and Scheduled Tribes relating to their admission to educational institutions including private educational institutions.

57. As regards exemption of minority educational institutions in Article 15(5), it was contended that this was done to conform with the constitutional mandate of additional protection for minorities under Article 30. It was argued that Article 15(5) does not override Article 15(4). They have to be read together as supplementary to each other and Article 15(5) being an additional provision, there is no conflict between Article 15(4) and Article 15(5). Articles 15(4), 15(5), 29(2), 30(1), and 30(2) all together constitute a code in relation to admission to educational institutions. They have to be harmoniously construed in the light of the Preamble and Part IV of the Constitution. It was also contended that Article 15(5) does not interfere with the executive power of the State and there is no violation of the proviso to Article 368.

58. The Constitution (Ninety-third Amendment) does not specifically or impliedly make any change in Article 162. Article 15(5) does not seek to make any change in Article 162 either directly or indirectly. The field of legislation as to "education" was in Entry 11 of List II. By virtue of the

17 *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225

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Forty-second Amendment of the Constitution, "education", which was in Entry 11 in List II, was deleted and inserted as Entry 25 in List III. The executive power of the State is not touched by the present constitutional amendment.

59. Article 15(5) does not abrogate the fundamental right enshrined under Article 19(1)(*g*). If at all there is an abridgement of fundamental right, it is in a limited area of admission to educational institutions and such abridgement does not violate the basic structure of the Constitution. In any way, constitutional amendments giving effect to directive principles of State policy would not offend the basic structure of the Constitution.

60. The right to equality enshrined in our Constitution is not merely a formal right or a vacuous declaration. Affirmative action though apparently discriminatory is calculated to produce equality on a broader basis. By eliminating de facto inequalities and placing the weaker sections of the community on a footing of equality with the stronger and more powerful sections so that each member of the community whatever is his birth, occupation or social position may be, enjoys equal opportunity of using to the full, his natural endowments of physique, of character and of intelligence.

61. Shri Parasaran, learned Senior Counsel, further contended that Act 5 of 2007 is a constitutionally valid piece of legislation. Under Section 2(*g*) of Act 5 of 2007, there is no excessive delegation. The plea of the petitioners that Parliament itself should have determined OBCs and that Act 5 of 2007 suffers from excessive delegation or lack of guidelines is not tenable. The backward classes of citizens have to be identified on the materials and evidence and therefore Parliament necessarily has to leave it to the executive. The determination of OBCs is a long-drawn process which would cause enormous delay. Therefore, it was appropriate to leave the identification to the executive. Such determination of each class as backward class would be open to judicial review. And the scope of judicial review would be wider if the same is made by the executive rather than by Parliament.

62. It is also contended that merely because no time-limit is fixed, Act 5 of 2007 cannot be rendered invalid. Parliament has got the power to review periodically and either make modifications in the Act or repeal the Act. It is for the first time that certain special provisions are being made in favour of socially and educationally backward classes of citizens, SCs and STs for reservation of seats in Central Educational Institutions after 56 years of coming into force of the Constitution. At its very commencement, a time-limit may not be anticipated and fixed. Over a period of time depending upon the result of the measures taken and improvements in the status and educational advancement of SCs, STs and SEBCs, the matter could always be reviewed. The Act cannot be struck down at the very commencement on the ground that no time-limit for its operation has been fixed.

63. It was also submitted that the quantum of reservation provided under the Act is valid. The ratio of population is a relevant consideration in fixing the quantum of reservation. Reservation in favour of OBCs is 27% and by

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adding the percentage of reservation for SCs and STs, the total quantum of reservation does not exceed 50%. It is indisputable that the population of OBCs exceeds 27% and SCs and STs constitute more than 22½%. The quantum of reservation within 50% has been determined by Parliament based on facts considered by legislature and they are conclusive and the courts do not exercise the power of judicial review by examining those facts.

64. The learned Senior Counsel also contended that the contention of the petitioners that special provisions can only be made up to 10+2 stage is untenable. If this plea is accepted, it would result in higher education being the privilege of the higher classes only and it would be a distortion of the concept of social advancement of the downtrodden and the negation of the goal envisaged by the Preamble. It was also contended that the principle of reverse discrimination is not applicable. The doctrine of strict scrutiny and narrow tailoring are not applicable in India as they are American doctrines which operate under different facts and circumstances. This Court on earlier occasion had rejected these pleas, when dealing with admission to postgraduate medical courses, when 75% of seats were being reserved on the basis of institutional preference.

65. The learned Senior Counsel further contended that the exclusion of creamy layer has no application to SCs and STs in regard to employment and education. Articles 341, 342, 366(24) and 366(25) of the Constitution would militate against such course of action.

66. It was held in *E.V. Chinnaiah* v. *State of A.P.*[18] that the SCs and STs form a single class. The observations in *Nagaraj case*[11] cannot be construed as requiring exclusion of creamy layer in SCs and STs. Creamy layer principle was applied for the identification of backward classes of citizens. And it was specifically held in *Indra Sawhney case*[10] that the above discussion was confined to Other Backward Classes and has no relevance in the case of Scheduled Tribes and Scheduled Castes. The observations of the Supreme Court in *Nagaraj case*[11] should not be read as conflicting with the decision in *Indra Sawhney case*[10]. The observations in *Nagaraj case*[11] as regards SCs and STs are obiter. In regard to SCs and STs, there can be no concept of creamy layer.

67. Once the President of India has determined the list of Scheduled Castes and Scheduled Tribes, it is only by a law made by Parliament that there can be exclusion from the list of Scheduled Castes or Scheduled Tribes. As far as OBCs are concerned, the principle of exclusion of creamy layer is applicable only for Article 16(4). It has no application to Articles 15(4) or 15(5) as education stands on a different footing.

68. Equality of opportunity of education is a must for every citizen and the doctrine of "creamy layer" is inapplicable and inappropriate in the context of giving opportunity for education. In the matter of education there

18 (2005) 1 SCC 394

11 *M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

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cannot be any exclusion on the ground of creamy layer. Such exclusion would only be counterproductive and would retard the development and progress of the groups and communities and their eventual integration with the rest of the society.

69. It was further argued that Articles 15(4) and 15(5) are provisions of power coupled with duty. It is the constitutional duty to apply these principles in the governance of the country and in making law for the reason that it is a constitutional promise of social justice which has to be redeemed.

70. It was strongly contended by the learned Senior Counsel Shri Parasaran that the validity of the constitutional amendment and the validity of plenary legislation have to be decided purely on the basis of constitutional law. And the submission, as it was contended that the amendment has a vote-catching mechanism is inappropriate. The contention that the Constitution (Ninety-third Amendment) is against the Universal Declaration of Human Rights is also not tenable. Right to equality of opportunity operates at every level and it is being provided for a particular level either by a legislative or an executive action. The merit has to be interpreted in the context of egalitarian equality and not formal equality.

71. It was also submitted that the speeches in Parliament, constitutional debates, textbooks of authors and views expressed in articles do not normally constitute evidence before the court to determine the constitutional validity of the legislations.

72. Shri G.E. Vahanvati, learned Solicitor General of India appearing on behalf of the Union of India, submitted that the argument of Shri Harish Salve, learned Senior Counsel that the American doctrine of "strict scrutiny" should be applied to the affirmative action envisaged under Article 15(5) is not correct. It was argued that the impugned legislation is not ex facie discriminatory and, therefore, it cannot be classified as a "suspect legislation". It was argued that right from *GM, Southern Railway* v. *Rangachari*[19] Article 16(4) is an exception to Article 16(1) and this reasoning was followed in *M.R. Balaji* v. *State of Mysore*[20] by a five-Judge Bench. Thereafter, the same view prevailed in *T. Devadasan* v. *Union of India*[21]. But Subba Rao, J. (as he then was) said that: (AIR p. 190, para 23)

> "*23. … The expression 'nothing in this article' is a legislative device to express its intention in a most emphatic way that the power conferred thereunder is not limited in any way by the main provision but falls outside it.*" (emphasis supplied)

73. The view that Articles 15(4) and 16(4) are exceptions to Articles 15(1) and 16(1) respectively was again reiterated in *Triloki Nath Tiku* v. *State of J&K*[22] and in *State of A.P.* v. *U.S.V. Balram*[23]. The learned Solicitor

19 AIR 1962 SC 36 : (1962) 2 SCR 586
20 AIR 1963 SC 649 : 1963 Supp (1) SCR 439
21 AIR 1964 SC 179 : (1964) 4 SCR 680
22 AIR 1969 SC 1 : (1969) 1 SCR 103
23 (1972) 1 SCC 660

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General further pointed out that in *State of Kerala* v. *N.M. Thomas*[24] the majority opinion held that Articles 14, 15 and 16 are parts of the scheme of equality and that Articles 15(4) and 16(4) are not exceptions to Articles 15(1) and 16(1) respectively. The said change in *N.M. Thomas case*[24] was noticed by Chinnappa Reddy, J. in *K.C. Vasanth Kumar* v. *State of Karnataka*[25] and the same view was upheld in *Indra Sawhney case*[10]. The learned Solicitor General further contended that once it is accepted that Articles 15(4) and 16(4) are not exceptions to Articles 15(1) and 16(1) respectively, then there is no question of treating the social welfare measure as being "facially discriminatory" or "ex facie" violative of the rule of equality. It was argued that it is not simply a matter of legal equality. De jure equality must ultimately find its raison d'être in de facto equality. The State must, therefore, resort to compensatory State action for the purpose of uplifting people who are factually unequal in their wealth, education or social environment.

74. Relying on the observations of Subba Rao, J. in *T. Devadasan case*[21] it was argued that centuries of calculated oppression and habitual submission has reduced a considerable section of our community to a life of serfdom and it would be well-nigh impossible to raise their standards if the doctrine of equal opportunity was strictly enforced in their case and they would not have any change 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. Laying reliance on the observations made in *N.M. Thomas case*[24] and also in *Indra Sawhney case*[10] the learned Solicitor General argued that under Articles 15(4) and 16(4) the State is obliged to remove inequalities and backwardness from society.

75. It was further submitted that the American doctrine of "strict scrutiny" had been expressly rejected by this Court in *Saurabh Chaudri* v. *Union of India*[26]. As regards identification of Backward Classes, the learned Solicitor General contended that while dealing with the aspect of identification of backwardness for socially and educationally backward classes, it cannot be denied that there is backwardness in this country; that large sections of the country are socially and educationally backward; that this problem is not new but is age-old; that such backwardness arose because of certain peculiarities of the caste system which proceeded on the assumption that the choice of occupation of members of a caste was predetermined in many castes; and that members of particular castes were prohibited from engaging themselves in occupations other than those certain occupations which were considered to be degrading and impure and considered fit only for those castes.

24 (1976) 2 SCC 310 : 1976 SCC (L&S) 227

25 1985 Supp SCC 714

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

21 *T. Devadasan* v. *Union of India*, AIR 1964 SC 179 : (1964) 4 SCR 680

26 (2003) 11 SCC 146

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76. It was pointed out that Wanchoo, C.J. in *C.A. Rajendran* v. *Union of India*[27] held that the main criterion for inclusion in the list is social and educational backwardness of the castes based on the occupation pursued by those castes. Reference was made to various decisions rendered by this Court on this issue, especially *A. Peeriakaruppan (Minor)* v. *State of T.N.*[28]; *U.S.V. Balram*[23] and *K.C. Vasanth Kumar*[25] referred to earlier.

77. The learned Solicitor General also pointed out that in *B. Venkataramana* v. *State of Madras*[29] the list of backward classes as mentioned in Schedule 3 to the Madras Provincial and Subordinate Services Rules, 1942 was approved and which was also noticed in *Indra Sawhney case*[10]. Reference was also made to the debates in Parliament where Dr. Ambedkar stated that "*the backward classes are nothing but collection of certain castes*".

78. It was further contended that it is incorrect to say that the majority in *Indra Sawhney case*[10] did not accept or approve the Mandal Commission Report. That Report was referred to in several places in that judgment and the criterion adopted by the Mandal Commission to classify the Backward Classes was more or less accepted.

79. The learned Solicitor General also pointed out that it is not correct to say that the State lists are defective and that they ought not to have been accepted by the Central Government. It is pointed out that the Central list has been operating for 14 years for the purposes of reservations of posts and not a single person has challenged any inclusion in the Central list as being void or illegal; that the State lists have also been operating both for the purposes of Articles 16(4) and 15(4) and there has been no challenge at all in any High Court or in the Supreme Court with regard to the State list and that there has not been a single complaint made before the State Government or the National Commission with regard to overinclusion of any caste or community.

80. The learned Solicitor General pointed out that the allegations in relation to the working of the National Commission for the Backward Classes are not true. The National Commission has framed elaborate guidelines for consideration of request for inclusion and complaints of non-inclusion in the Central list for other backward classes. The guidelines have been framed after studying the criteria/indicators framed by the Mandal Commission and the commissions set up in the past by different State Governments. The National Commission held 236 public hearings at various places since its inception. The National Commission had also prepared an

27 AIR 1968 SC 507 : (1968) 1 SCR 721
28 (1971) 1 SCC 38
23 *State of A.P.* v. *U.S.V. Balram*, (1972) 1 SCC 660
25 *K.C. Vasanth Kumar* v. *State of Karnataka*, 1985 Supp SCC 714
29 AIR 1951 SC 229 : (1951) 1 MLJ 625
10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

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elaborate questionnaire for considering classes for inclusion in the State lists. Detailed data was required to be submitted with regard to social, educational and economic criteria of the communities that were considered. It is pointed out that during the period of its functioning the National Commission recommended 297 requests for inclusion and at the same time rejected 288 requests for inclusion of main castes. It was further pointed out that the National Commission has not mechanically allowed all applications for inclusion in the Central list. The National Commission while examining the applications had taken note of the ethnographic history of the castes/ sub-groups/communities concerned and it has also taken note of the recommendations of the various State Commissions. It was also submitted that the contention that the inclusion of the caste in OBCs was motivated by political considerations is erroneous and the National Commission had emphatically rejected politically dominant castes such as the Marathas from being included in the Central list and several other castes were thus excluded from OBCs list.

81. The learned Solicitor General also contended that the plea that reservation under Article 15(5) with reference to Article 29(2) would render Article 15(5) constitutionally violative is incorrect. Article 29(2) is a protection given by the Constitution against denial of admission to educational institutions on the grounds of religion, race, caste, language or any of them. It does not apply if provision is made for backward classes when the basis for classification is not solely on these grounds.

82. It was argued further that the American doctrines and tests relating to "strict scrutiny", "compelling State necessity" and "narrow tailoring" are tests which are not applicable to India at all. There is a presumption of constitutionality of the legislations passed by Parliament. The Indian Constitution specifically provides provisions like Articles 15(4) and 16(4) which permit special provisions for backward classes.

83. It was also contended that it is incorrect to suggest that there have been no efforts on the part of successive Governments to concentrate on elementary education towards universal elementary education. "Sarva Shiksha Abhiyan" (SSA) had been launched by the Government in 2001-2002. The learned Solicitor General also pointed out that it is incorrect to say that there has been no proper consideration of the Bill in Parliament, particularly in relation to financial memorandum. It is pointed out that debates in Parliament are not usually relevant for construction of the provisions of an Act.

84. The learned Solicitor General also submitted that it cannot seriously be disputed that large sections of the population are socially and educationally backward and it is nobody's case that the total population of OBCs in this country is less than 27%. Even on the basis of the facts relied on by the petitioners, namely, National Sample Survey Organisation (NSSO), the total population of OBCs in India is around 36%. NSSO had conducted this survey for the preparation of its 61st round of survey which was

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published in October 2006. This survey indicated that the total number of OBCs in India is around 41%. 27% reservation in relation to admission had been upheld in *Indra Sawhney case*[10] and Parliament has taken special care to see that this reservation does not affect seats in the general category.

85. The learned Solicitor General also pointed out that the policy of reservation flows from the mandate of equality till the time the constitutional objective of real equality is achieved. Moreover, the policy of reservation has been introduced for the first time after 56 years of coming into force of the Constitution. The learned Solicitor General also pointed out that meticulous care has been taken for the inclusion of certain castes in the OBCs list and reference was made to cases in Rajasthan, Karnataka and Kerala.

86. Shri Gopal Subramanium, the learned Additional Solicitor General, supported the Constitution (Ninety-third Amendment) Act, 2005 and also the provisions of Act 5 of 2007. The learned Additional Solicitor General submitted that the American doctrines are not applicable to India. In this regard, the observations of this Court in *A.K. Roy* v. *Union of India*[30], that "we cannot transplant, in the Indian context and conditions, principles which took birth in other soils, without a careful examination of their relevance to the interpretation of our Constitution" were cited.

87. It is pointed out by the learned Additional Solicitor General that propositions enunciated in the decisions of the United States Supreme Court in *Regents of the University of California* v. *Bakke*[31], *Grutter* v. *Bollinger*[32] and *Gratz* v. *Bollinger*[33], and *Parents Involved in Community Schools* v. *Seattle School District*[34] that the Court will apply the standard of strict scrutiny while reviewing legislation involving suspect classification; that such legislation would be effected if two conditions are met, namely, (*i*) there is a compelling governmental interest in making the classification, and (*ii*) the legislation has been narrowly tailored to meet that classification; that the classification based on race is a suspect classification and that accordingly while race can be a factor in admission policies of educational institutions, it cannot be the sole factor and it cannot lead to the imposition of quotas, which are per se unconstitutional—each of these propositions has been rejected in Indian law and the Indian Constitution neither admits "suspect classification" nor "strict scrutiny". The constitutionality of quotas has been repeatedly affirmed and reliance by the petitioners on the United States' "affirmative action" judgments is wholly misconceived. The learned Additional Solicitor General has made special reference to various American decisions on the doctrine of "affirmative action".

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385
30 (1982) 1 SCC 271 : 1982 SCC (Cri) 152
31 57 L Ed 2d 750 : 438 US 265 (1978)
32 156 L Ed 2d 304 : 539 US 306 (2003)
33 156 L Ed 2d 257 : 539 US 244 (2003)
34 168 L Ed 2d 508 : 127 S Ct 2738 (2007)

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88. The learned Additional Solicitor General has also referred to the decisions of this Court in *N.M. Thomas case*[24] and *K.C. Vasanth Kumar case*[25] and other decisions to contend that Articles 16(4) and 15(4) are not exceptions to Articles 16(1) and 15(1) respectively and these provisions have to be read together with the principles of governance set out in Part IV of the Constitution and it is beyond doubt that underlying constitutional obligations are towards socially and educationally backward classes and there is a positive obligation on the State to take steps to eradicate their backwardness.

89. The learned Additional Solicitor General also refuted the contentions advanced by Shri P.P. Rao, learned Senior Counsel, and contended that all efforts have been made by the Government to improve primary and upper primary education in India. The learned Additional Solicitor General also contended that the argument advanced by Dr. Rajeev Dhavan is not correct. He relied upon Arjun Sen Gupta's Report[35] wherein it is stated:

> "... Education can be a liberating capability but access to it is made difficult, if not impossible, by such inherited characteristics as lower social status, rural origin, informal work status and gender or a combination of these."

90. Shri Ram Jethmalani, learned Senior Counsel appearing for the intervener, Rashtriya Janata Dal in WP No. 313 of 2007 and WP No. 335 of 2007, contended that the attempt of the petitioners in these writ petitions is to offset the decision of the nine-Judge Bench in *Indra Sawhney case*[10]. It is pointed out that the equality of citizens is the basic feature of the Indian Constitution but by "equality" is meant not "formal or technical equality" but "real and substantial equality". The word "only" used in Articles 15(1) and 16(2) is decisive. Even if reservations are made for castes, the classification will become invalid if it is only on the basis of caste and if some other additional requirement is imposed, that case would be considered to be outside the prohibition of Article 15(1). Reference is made to *B. Venkataramana case*[29]. It was contended that a statute cannot be declared ultra vires merely because backwardness is a complex concept and no precise definition is possible. The Court is bound to assume that a state of facts existed at the time of the enactment of the statute which would validate that statute and when the Constitution of the United States came into effect it did not contain the constitutional right of equality. Even the Fifth Amendment of 1971 of the Constitution of the United States of America did not introduce this concept. The Fourteenth Amendment of 1868 provided that the "State shall not deny to any person the equal protection of the laws". Even after this injunction, the United States Supreme Court delivered the judgment in *Plessy*

24 *State of Kerala* v. *N.M. Thomas*, (1976) 2 SCC 310 : 1976 SCC (L&S) 227

25 *K.C. Vasanth Kumar* v. *State of Karnataka*, 1985 Supp SCC 714

35 Arjun Sen Gupta Report on "Conditions of Work and Promotion of Livelihood in the Unorganised Sector" (July 2007).

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

29 *B. Venkataramana* v. *State of Madras*, AIR 1951 SC 229 : (1951) 1 MLJ 625

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v. *Ferguson*[36] which laid down the doctrine of "equal but separate". This doctrine was in force till it was reversed in 1954. The learned Senior Counsel also contended that the policy of reservation is not destructive of merit and that Symbiosis University is not covered by the statute.

91. Shri T.R. Andhyarujina, the learned Senior Counsel appearing for the respondents in WP No. 265 of 2006, contended that Articles 15(4) and 16(4) operate in different fields and Article 15(4) enables the State Government to make special provisions for Backward Classes, SCs and STs which can be done both by law or by executive order. The special provision in Article 15(4) is not restricted to advancement of SEBCs, SCs and STs in educational institutions only and enables the State to make several kinds of positive action programmes in addition to reservations. As a condition for giving aid, the State can make reservations for SEBCs, SCs and STs in educational institutions which are State owned or State aided. The State, however, cannot make such reservations in private unaided educational institutions, as held by this Court in *T.M.A. Pai Foundation*[8] and *P.A. Inamdar*[15]. This disability was because of *T.M.A. Pai Foundation*[8] which provided that private unaided educational institutions had a fundamental right to "occupation" of carrying on education under Article 19(1)(*g*). Therefore, Parliament introduced Article 15(5) by the Constitution (Ninety-third Amendment) Act to enable the State to make special provisions for the advancement of SCs, STs and SEBCs in relation to a specific subject, namely, admission in educational institutions including private educational institutions, whether aided or unaided, by the State notwithstanding the provisions of Article 19(1)(*g*). However, Article 15(5) excluded private educational institutions which are minority educational institutions referred to in Clause (1) of Article 30. The saving for minority educational institutions in Article 15(5) is really *ex abundanti cautela* as Minority Educational Institutions were constitutionally protected and at all times considered different from other private educational institutions.

92. Article 15(5) does not take away the "basic structure" of the Constitution. The "basic structure" of the Constitution should not be trivialised to mean other features of the Constitution. Reference was made to the observations made by Khanna, J. in *Kesavananda Bharati case*[17]. It was also submitted that Article 15(5) does not amend Entry 25 List III to the extent that the State can no more make laws for reservation of seats in Minority Educational Institutions and, therefore, it is incorrect to say that the amendment in Article 15(5) required ratification under Article 368(2). The State's power to legislate under Article 245 is always subject to the other provisions of the Constitution, including fundamental rights. Article 15(4) does not take away the power of the State to make reservations in its own

36 41 L Ed 256 : 163 US 537 (1895)
8 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481
15 *P.A. Inamdar* v. *State of Maharashtra*, (2005) 6 SCC 537
17 *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225

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institutions by an executive action under Article 162. Right to carry on business is not a part of the basic structure of the Constitution.

93. On behalf of the respondent, State of Bihar in Writ Petition (Civil) No. 269 of 2007, learned Senior Counsel Shri Rakesh Dwivedi submitted that the use of non obstante clauses in Articles 15(3), (4) and (5) vis-à-vis Article 15(1) shows that the prohibition against use of only caste as a ground for discrimination qua any citizen is there insofar as making of a special provision for advancement of prescribed categories is concerned. There is no repugnancy between Articles 15(4) and 15(5). It was contended that in *Kesavananda Bharati case*[17] it was held that "Part III of the Constitution could be amended subject to the basic structure doctrine". The view which was held in *Golak Nath* v. *State of Punjab*[37] making Article 368 more restrictive, had been overruled in *Kesavananda Bharati case*[17]. The fundamental rights are not absolute and are designed to suffer reasonable restrictions and classifications. Any sort of abridgement by constitutional amendment is clearly permissible so long as the invasion does not amount to total elimination or emasculation. Within the domain of equality there is distinction between formal equality and real equality or equality in fact and both are comprehended in Article 14 and both are part of the basic structure.

94. The learned Senior Counsel also contended that the judicial review ideas of "suspect classification", "strict scrutiny", "compelling State interest" and "narrow tailoring", which are measures propounded by the US Supreme Court are not applicable and the Supreme Court of India has consistently taken a view that the judgments of the US Supreme Court do not afford safe guidance on account of differing structure of the provisions under the two Constitutions and the social conditions in these two countries being different.

95. Reference was made to the various decisions of this Court and it was argued that the comparison of the Fourteenth Amendment of the US Supreme Court read with the Civil Rights Act, 1964 on the one hand and the fascicules of equality provisions in the Constitution of India i.e. Articles 14 to 18 on the other hand shows that the equality provisions of our Constitution are not only differently structured but they contain provisions for making special provisions for the advancement of SEBCs and SCs/STs. It is pointed out that our Constitution additionally enshrines directive principles of State policy in Part IV of the Constitution requiring the State to strive to promote justice, social, economic and political and to minimise the inequalities in income and endeavour to remove inequalities in status, facilities and opportunities (Article 38).

96. Shri Ravi Varma Kumar, learned Senior Counsel appearing for Pattali Makkal Katchi, contended that the creamy layer principle shall not be invoked for the purpose of Article 15(5). According to the counsel, reservation in educational institutions is not a poverty alleviation programme nor is it a programme to eradicate unemployment. Reservation under Article

17 *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225
37 AIR 1967 SC 1643 : (1967) 2 SCR 762

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15(5) is not even a programme to educate all the backward classes. According to the counsel the one and only goal of the reservation policy under Clauses (4) and (5) of Article 15 of the Constitution is to bring about equality among various castes and unless all the castes are brought to one level playing field, the caste system cannot be eradicated. It is intended for removal of inequality between castes so that the castes will come together. These provisions are designed to bring together the leaders of each caste and community together and the same can be achieved only if the best teachers, the best administrators, the best doctors, the best engineers and the best lawyers are brought together. And so long as the gap in education persists between castes, the castes will not come together. It is only when each backward caste is permitted to advance educationally to meet the educational level of upper castes, can there be a real egalitarian society. According to the counsel, it is precisely for this reason that Clause (2) of Article 38 seeks to eliminate inequality in status, facilities and opportunities, not only among individuals, but also among groups of people. Therefore, it is to provide for such equality in status, facilities and opportunities, that reservation is contemplated to those castes which are socially and educationally below other castes. If the best from the lower caste are deprived of these facilities and opportunities in the name of "creamy layer", it will be counterproductive and frustrate the very object of reservation, namely, to achieve equality in status, facilities and opportunities.

97. The counsel also contended that the question of prescribing prior time-limit for reservation under the impugned Act is immature and should not be considered at this stage.

98. The link between "caste" and its occupation is an unbreakable bondage to which the caste system has condemned the backward classes. Whether a backward caste man carries on his traditional occupation or not, he continues to be socially identified with the said occupation. This link between the caste and the occupation has not been severed for thousands of years and it cannot be broken by arguments and theories. The ground reality is that every caste in every village is identified by its traditional occupation. And all the service communities continue to discharge their traditional occupation. It is pointed out that throughout the country in 6.5 lakh villages, it is the barber community and barber community alone, which carries on the traditional occupation of haircutting and no other community has taken up the said occupation. And they continue to labour without any social security or whatsoever.

99. The counsel pointed out that the last six decennial censuses have eschewed recording of caste particulars, the three National Commissions and scores of State Commissions have found these census data useless in identification of backward classes.

100. The learned counsel submitted that there is no justification for not collecting details of caste identity at the decennial census operation.

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According to the counsel a massive exercise is rendered useless for the all important work of identification of backward classes.

101*. It is further submitted that the entire identification of backward classes has not been done on the basis of the 1931 Census data. In each State the identification of Backward Classes has been done on the basis of criteria evolved by the State Commissions on social, educational and economic parameters. Each State has adopted its own methodology. The identification of backward classes is essentially done at the State level on very objective criteria and a scientific methodology. According to the counsel, origin of the term "classes of citizens" may be traced to the later part of the 19th century. Quite often classes have been interchangeably used with castes, tribes and communities. Some of the earlier committee reports referred to Depressed Classes. Under the 1919 Act, Governors of the provinces gave instruction to take measures for the social and industrial welfare of the people and tending to fit all classes of population. And the Provincial Governments prepared a list of Backward Classes with three parts, namely, Depressed Classes, Aboriginal Tribes and Backward Communities. Dr. Ambedkar demanded separate electorate for the Depressed Classes at the Round Table Conference.

102. The counsel also pointed out that the building of a casteless society is not the goal of the Constitution. And that it is futile to contend that caste should not be considered for any purpose whatsoever. In every conceivable activity of private life caste system plays an important role. There are hundreds of communal hostels and educational institutions owned and managed by certain communities. Some castes and communities have communal clubs, associations, cooperatives, banks, etc. Their membership and admission are confined to a particular caste or community. Even carrying of the caste names is the guaranteed right of every citizen. There is nothing in the Constitution to prohibit a person from discriminating on the ground only of caste or community in matters relating to marriage, electing candidates to political position, etc. Most of the professional colleges like medical, dental and engineering colleges are established and administered by a body of persons exclusively belonging to a class or a community. Though Dr. Ambedkar intended to abolish caste system by abolishing all the privileges and disabilities of the forward classes, the plea was opposed by Shri K.M. Munshi and Draft Article 3(4) stated:

> "Untouchability is abolished and its practice thereof is punishable by the law of the Union."

103. The Constitution never prohibits the practice of caste and casteism. Every activity in Hindu society, from cradle to grave is carried on solely on the basis of one's caste. Even after death, a Hindu is not allowed to be cremated in the crematorium which is maintained for the exclusive use of the other caste or community. Dalits are not permitted to be buried in graves or cremated in crematoriums where upper caste people bury or cremate their dead. Christians have their own graveyards. Muslims are not allowed to be

* **Ed.**: Para 101 corrected vide Official Corrigendum No. F.3/Ed.B.J./33/2008 dated 15-4-2008.

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buried in the Hindu crematoriums and vice versa. Thus, caste rules the roost in the life of a Hindu and even after his death. In such circumstances, it is entirely fallacious to advance this argument on the ground that the Constitution has prohibited the use of caste. It was argued what the Constitution aims at is achievement of equality between the castes and not elimination of castes.

104. The learned Senior Counsel points out that it would be utopian to expect that by ignoring caste, the castes will perish. And the counsel contended that the Constitution has not abolished the caste system much less has it prohibited its use. The counsel pointed out that the constitutional amendment under the impugned Act in favour of backward classes is an unprecedented leap taking the higher education in the country forward, without depriving a single seat to the forward castes. And the advanced castes, with a population of less than 20% would still be able to get 50% of the seats in the name of merit disproportionate to their known proportion of their population. It is contended that without the advancement of SCs, STs and OBCs constituting over 80% population and mainly living in rural areas, it will not be possible to take the nation forward. And the students who are admitted under the reserved quota have performed much better than the students admitted on the basis of merit. The learned counsel also placed reliance on Moily Report—Case studies from four States.

105. The main challenge in these writ petitions is the constitutional validity of Act 5 of 2007. This legislation was passed by Parliament consequent upon the Constitution (Ninety-third Amendment) Act, 2005, by which Clause (5) was inserted in Article 15 of the Constitution. The constitutionality of this amendment has also been challenged in the various writ petitions filed by the petitioners. As the Act itself is based on the Constitution (Ninety-third Amendment) Act, 2005, the validity of the Act depends on the fact whether the Constitution (Ninety-third Amendment) Act, 2005 itself is valid or not. Article 15 of the Constitution, after the Constitution (Ninety-third Amendment) Act, 2005, reads as follows:

> "15. *Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.*—(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.

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(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 sub-clause (*g*) of Clause (1) of Article 19 shall prevent the State from making any provision, by law, for the advancement of any socially and educationally backward classes of citizens or the Scheduled Castes or the Scheduled Tribes insofar as such special provision relates to their admission to the 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."

106. *T.M.A. Pai Foundation*[8] held that a private unaided educational institution has the fundamental right under Article 19(1)(*g*) of the Constitution as the running of an educational institution was treated as an "occupation" and further that the State's regulation in such institutions would not be regarded as a reasonable (*sic* unreasonable) restriction on that fundamental right to carry on business under Article 19(6). This decision necessitated the Ninety-third Amendment to the Constitution since as a result of *T.M.A. Pai Foundation*[8] the State would not be in a position to control or regulate the admission in private educational institutions. At the outset, it may have to be stated that no educational institution has come up to challenge the Constitution (Ninety-third Amendment) Act, 2005. The challenge about the constitutionality of the Constitution (Ninety-third Amendment) Act, 2005 has been advanced by the petitioners, who based their contentions on the equality principles enunciated in Articles 14, 15 and 16 of the Constitution.

107. The Constitution (Ninety-third Amendment) Act, 2005 is challenged on many grounds. The first ground of attack is that if the Constitution (Ninety-third Amendment) Act, 2005 is allowed to stand it would be against the "basic structure" of the Constitution itself and this amendment seriously abridges the equality principles guaranteed under Article 15 and other provisions of the Constitution. Another contention raised by the petitioners' counsel is that the Golden Triangle of Articles 14, 19 and 21 is not to be altered and the balance and structure of these constitutional provisions have been ousted by the Constitution (Ninety-third Amendment) Act, 2005. Yet another contention urged by Shri K.K. Venugopal, learned Senior Counsel, is that Articles 15(4) and 15(5) are mutually exclusive and under Article 15(5) the minority educational institutions are excluded. According to him, this is a clear contravention of the secular and equality principles. The learned Senior Counsel also pointed out that minority institutions are not severable from the purview of Article 15(5) and, therefore, the whole Constitution (Ninety-third Amendment) Act, 2005 is to be declared illegal. Another argument advanced by the learned Senior Counsel is that there is inconsistency between Articles 15(4) and 15(5) and by virtue of the Constitution (Ninety-third Amendment) Act, 2005, the States are devoid of their wide power under Article 15(5) to

8 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481

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make reservation in minority educational institutions which are getting aid from the States and thus it is violative of the very essence of equality. He further argued that the Constitution (Ninety-third Amendment) Act, 2005 could control the legislative and executive power of the State and, therefore, it is not constitutionally valid. The learned counsel had further challenged the validity of Act 5 of 2007, with which we will deal separately.

1. Whether the Ninety-third Amendment of the Constitution is against the "basic structure" of the Constitution?

108. The Constitution (Ninety-third Amendment) Act, 2005, by which Clause (5) was added to Article 15 of the Constitution, is an enabling provision which states that nothing in Article 15 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 insofar as such special provisions relate to their admission to the educational institutions including private educational institutions, whether aided or unaided by the State. Of course, minority educational institutions referred to in Clause (1) of Article 30 are excluded. Thus, the newly added Clause (5) of Article 15 is sought to be applied to educational institutions whether aided or unaided. In other words, this newly added constitutional provision would enable the State to make any special provision by law for admission in private educational institutions whether aided or unaided.

109. In all the petitions which have been filed before us the main challenge is against Act 5 of 2007. Act 5 of 2007 has been enacted to provide reservation of seats for Scheduled Castes, Scheduled Tribes and SEBCs of citizens in Central Educational Institutions. The "Central Educational Institution" has been defined under Section 2(*d*) of the Act. They are institutions established or incorporated by or under the Central Act or set up by an Act of Parliament or deemed universities maintained by or receiving aid from the Central Government or institutions maintained by or receiving aid from the Central Government or educational institutions set up by the Central Government under the Societies Registration Act, 1860. Act 5 of 2007 is not intended to provide reservation in "private unaided" educational institutions. None of the private unaided educational institutions have filed petitions before us challenging the Constitution (Ninety-third Amendment). Though the learned counsel appearing for the petitioners have challenged the Constitution (Ninety-third Amendment) on various grounds, they were vis-à-vis the challenge to Act 5 of 2007. The counter to the challenge by the learned Solicitor General as well as by Shri K. Parasaran, learned Senior Counsel was also in that context.

110. We do not want to enter a finding as to whether the Constitution (Ninety-third Amendment) is violative of the "basic structure" of the Constitution so far as it relates to "private unaided" educational institutions. In the absence of challenge by private unaided educational institutions, it would not be proper to pronounce upon the constitutional validity of that part

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of the constitutional amendment. As the main challenge in these various petitions was only regarding the provisions of Act 5 of 2007, which related to State maintained institutions, the challenge to the Constitution (Ninety-third Amendment) so far as it relates to private unaided educational institutions, does not strictly arise in these proceedings. In the absence of challenge by private unaided institutions, it may not be proper for this Court to decide whether the Constitution (Ninety-third Amendment) is violative of the "basic structure" of the Constitution so far as it relates to private unaided educational institutions merely because we are considering its validity in the context of Act 5 of 2007.

111. We feel that such questions could be decided as the main questions that are involved in these petitions are specific regarding Act 5 of 2007; we leave open the question as to whether the Ninety-third Amendment to the Constitution by which Clause (5) was inserted is violative of the basic structure doctrine or not so far as it relates to "private unaided" educational institutions to be decided in other appropriate cases. We deal only with the question of whether the Constitution (Ninety-third Amendment) is constitutionally valid so far as it relates to the State maintained institutions and aided educational institutions.

112*. Several contentions have been advanced by the petitioners' counsel challenging the constitutional validity of the Constitution (Ninety-third Amendment) Act, 2005. The main argument was on the ground that this amendment is against the "basic structure" of the Constitution. In order to appreciate the contention of the petitioners' counsel, it is necessary to understand the "basic structure" theory that has been propounded in the celebrated case of *Kesavananda Bharati*[17]. This case was a decision of a thirteen-Judge Bench of this Court. Though the Judges were not unanimous about what the "basic structure" of the Constitution be, however, Shelat, J. in his judgment had indicated the following basic features of the Constitution: (SCC p. 454, para 582 : SCR p. 280)

> "*582*. The basic structure of the Constitution is not a vague concept and the apprehensions expressed on behalf of the respondents that neither the citizen nor Parliament would be able to understand it are unfounded. If the historical background, the Preamble, the entire scheme of the Constitution, the relevant provisions thereof including Article 368 are kept in mind there can be no difficulty in discerning that the following can be regarded as the basic elements of the constitutional structure. (These cannot be catalogued but can only be illustrated):
>
> (*1*) The supremacy of the Constitution.
>
> (*2*) Republican and democratic form of Government and sovereignty of the country.
>
> (*3*) Secular and federal character of the Constitution.

* **Ed.**: Para 112 corrected vide Official Corrigendum No. F.3/Ed.B.J./33/2008 dated 15-4-2008.

17 *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225

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(*4*) Demarcation of power between the legislature, the executive and the judiciary.

(*5*) The dignity of the individual secured by the various freedoms and basic rights in Part III and the mandate to build a welfare State contained in Part IV.

(*6*) The unity and the integrity of the nation."

Sikri, C.J. held that: (SCC p. 366, para 292 : SCR pp. 165-66)

"*292*. … The true position is that every provision of the Constitution can be amended provided in the result the basic foundation and structure of the Constitution remains the same. The basic structure may be said to consist of the following features:

(*1*) *Supremacy of the Constitution*;

(*2*) *Republican and Democratic form of Government*;

(*3*) *Secular character of the Constitution*;

(*4*) *Separation of powers between the legislature, the executive and the judiciary*;

(*5*) *Federal character of the Constitution*."

(emphasis in original)

113. The power of Parliament to amend the Constitution was also dealt with in detail and majority of the Judges held that the fundamental rights can be amended, altered or abridged. The majority decision in *Kesavananda Bharati case*[17] overruled the decision in *Golak Nath* v. *State of Punjab*[37]. *Kesavananda Bharati*[17] indicates the extent to which amendment of the Constitution could be carried out and lays down that the legality of an amendment is no more open to attack than the Constitution itself. It was held that the validity of an ordinary law can be questioned and when it is questioned it must be justified by reference to a higher law. In the case of the Constitution the validity is inherent and lies within itself. The Constitution generates its own validity. The validity of the Constitution lies in the social fact of its acceptance by the community. There is a clear demarcation between an ordinary law made in exercise of the legislative power and the constituent law made in exercise of constitutional power. Therefore, the power to amend the Constitution is different from the power to amend ordinary law. The distinction between the legislative power and the constitutional power is vital in a rigid or controlled Constitution because it is that distinction which brings in the doctrine that a law ultra vires the Constitution is void. When Parliament is engaged in the amending process it is not legislating, it is exercising a particular power bestowed upon it sui generis by the amending clause in the Constitution. Sikri, C.J., held that the expression "amendment of this Constitution" does not enable Parliament to abrogate or take away fundamental rights or to completely change the fundamental features of the Constitution so as to destroy its identity. Within

17 *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225

37 AIR 1967 SC 1643 : (1967) 2 SCR 762

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these limits Parliament can amend every article. Shelat and Grover, JJ. concluded that: (SCC p. 462, para 608 : SCR p. 291)

> "*608.* (*2*)(*b*) though the power to amend cannot be narrowly construed and extends to all the articles it is not unlimited so as to include the power to abrogate or change the identity of the Constitution or its basic features;"

Hegde and Mukherjee, JJ. finally concluded that: (SCC pp. 511-12, para 744 : SCR p. 355)

> "*744.* (*1*) The power to amend the Constitution under Article 368 as it stood before its amendment empowered Parliament by following the form and manner laid down in that article, to amend each and every article and each and every Part of the Constitution.
>
> * * *
>
> (*3*) Though the power to amend the Constitution under Article 368 is a very wide power, it does not yet include the power to destroy or emasculate the basic elements or the fundamental features of the Constitution."

Ray, J. (as he then was) held that: (SCC p. 593, para 1064 : SCR p. 461)

> "*1064.* … The Constitution is the supreme law. Third, an amendment of the Constitution is an exercise of the constituent power. The majority view in *Golak Nath case*[37] is with respect wrong. Fourth, there are no express limitations to the power of amendment. Fifth, there are no implied and inherent limitations on the power of amendment. Neither the Preamble nor Article 13(2) is at all a limitation on the power of amendment. Sixth, the power to amend is wide and unlimited. The power to amend means the power to add, alter or repeal any provision of the Constitution. There can be or is no distinction between essential and inessential features of the Constitution to raise any impediment to amendment of alleged essential features."

Palekar, J. concluded that: (SCC p. 726, para 1333 : SCR p. 632)

> "*1333.* (*1*) The power and the procedure for the amendment of the Constitution were contained in the unamended Article 368. An amendment of the Constitution in accordance with the procedure prescribed in that Article is not a 'law' within the meaning of Article 13. An amendment of the Constitution abridging or taking away a fundamental right conferred by Part III of the Constitution is not void as contravening the provisions of Article 13(2).
>
> (2) There were no implied or inherent limitations on the amending power under the unamended Article 368 in its operation over the fundamental rights. There can be none after its amendment."

Khanna, J. concluded that: (SCC p. 824, para 1537 : SCR pp. 758-59)

> "*1537.* (*vii*) The power to amendment under Article 368 does not include power to abrogate the Constitution nor does it include the power

37 *Golak Nath* v. *State of Punjab*, AIR 1967 SC 1643 : (1967) 2 SCR 762

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to alter the basic structure or framework of the Constitution. Subject to the retention of the basic structure or framework of the Constitution, the power of amendment is plenary and includes within itself the power to amend the various articles of the Constitution, including those relating to fundamental rights as well as those which may be said to relate to essential features. No part of a fundamental right can claim immunity from amendatory process by being described as the essence or core of that right. The power of amendment would also include within itself the power to add, alter or repeal the various articles."

Mathew, J. held that: (SCC p. 897, para 1784 : SCR p. 857)

"*1784.* ... The only limitation is that the Constitution cannot be repealed or abrogated in the exercise of the power of amendment without substituting a mechanism by which the State is constituted and organised. That limitation flows from the language of the article itself."

Beg, J. held that: (SCC p. 919, para 1857 : SCR p. 886)

"*1857.* (*1*) The majority view in *Golak Nath case*[37] holding that Article 13 operated as a limitation upon the powers of constitutional amendment found in Article 368, was erroneous."

He upheld the Twenty-fourth Amendment Act and the Twenty-fifth Amendment Act including addition of Article 31-C.

Dwivedi, J. finally concluded that: (SCC p. 959, para 1995)

"*1995.* (*2*) The word 'amendment' in Article 368 is broad enough to authorise the varying or abridging each and every provision of the Constitution, including Part III.

(*3*) There are no inherent and implied limitations of the amendment power in Article 368."

Finally, Chandrachud, J. held that: (SCC p. 1005, para 2142 : SCR p. 1000)

"*2142.* (*4*) The power of amendment of the Constitution conferred by the then Article 368 was wide and unfettered. It reached every part and provision of the Constitution."

114. A survey of the conclusions reached by the learned Judges in *Kesavananda Bharati case*[17] clearly shows that the power of amendment was very wide and even the fundamental rights could be amended or altered. It is also important to note that the decision in *Berubari Union and Exchange of Enclaves, Reference under Article 143(1) of the Constitution of India, In re*[38] to the effect that the Preamble to the Constitution was not part of the Constitution was disapproved in *Kesavananda Bharati case*[17] and it was held that it is a part of the Constitution and the Preamble to the Constitution is of extreme importance and the Constitution should be read and interpreted in the light of the grand and noble visions envisaged in the Preamble. A close

37 *Golak Nath* v. *State of Punjab*, AIR 1967 SC 1643 : (1967) 2 SCR 762
17 *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225
38 AIR 1960 SC 845 : (1960) 3 SCR 250

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analysis of the opinions in *Kesavananda Bharati case*[17] shows that all the provisions of the Constitution, including the fundamental rights, could be amended or altered and the only limitation placed is that the basic structure of the Constitution shall not be altered. The judgment in *Kesavananda Bharati case*[17] clearly indicates what is the basic structure of the Constitution. It is not any single idea or principle like equality or any other constitutional principles that are subject to variation, but the principles of equality cannot be completely taken away so as to leave the citizens in this country in a state of lawlessness. But the facets of the principle of equality could always be altered especially to carry out the directive principles of the State policy envisaged in Part IV of the Constitution. The Constitution (Ninety-third Amendment) Act, 2005 is to be examined in the light of the above position.

115. The basic structure of the Constitution is to be taken as a larger principle on which the Constitution itself is framed and some of the illustrations given as to what constitutes the basic structure of the Constitution would show that they are not confined to the alteration or modification of any of the fundamental rights alone or any of the provisions of the Constitution. Of course, if any of the basic rights enshrined in the Constitution are completely taken out, it may be argued that it amounts to alteration of the basic structure of the Constitution. For example, the federal character of the Constitution is considered to be the basic structure of the Constitution. There are large number of provisions in the Constitution dealing with the federal character of the Constitution. If any one of the provisions is altered or modified, that does not amount to the alteration of the basic structure of the Constitution. Various fundamental rights are given in the Constitution dealing with various aspects of human life. The Constitution itself sets out principles for an expanding future and is obligated to endure for future ages to come and consequently it has to be adapted to the various changes that may take place in human affairs.

116. For determining whether a particular feature of the Constitution is part of the basic structure or not, it has to be examined in each individual case keeping in mind the scheme of the Constitution, its objects and purpose and the integrity of the Constitution as a fundamental instrument for the country's governance. It may be noticed that it is not open to challenge the ordinary legislations on the basis of the basic structure principle. State legislation can be challenged on the question whether it is violative of the provisions of the Constitution. But as regards constitutional amendments, if any challenge is made on the basis of basic structure, it has to be examined based on the basic features of the Constitution.

117. It may be noticed that the majority in *Kesavananda Bharati case*[17] did not hold that all facets of Article 14 or any of the fundamental rights would form part of the basic structure of the Constitution. The majority upheld the validity of the first part of Article 31-C which would show that the

17 *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225

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constitutional amendment which takes away or abridges the right to challenge the validity of an arbitrary law or violating a fundamental right under that article would not destroy or damage the basic structure.

118. Equality is a multicoloured concept incapable of a single definition as is also the fundamental right under Article 19(1)(*g*). The principle of equality is a delicate, vulnerable and supremely precious concept for our society. It is true that it has embraced a critical and essential component of constitutional identity. The larger principles of equality as stated in Articles 14, 15 and 16 may be understood as an element of the "basic structure" of the Constitution and may not be subject to amendment, although, these provisions, intended to configure these rights in a particular way, may be changed within the constraints of the broader principle. The variability of changing conditions may necessitate the modifications in the structure and design of these rights, but the transient characters of formal arrangements must reflect the larger purpose and principles that are the continuous and unalterable thread of constitutional identity. It is not the introduction of significant and far-reaching change that is objectionable, rather it is the content of this change insofar as it implicates the question of constitutional identity.

119. The observations made by Mathew, J. in *Indira Nehru Gandhi* v. *Raj Narain*[39] are significant in this regard†:

> "*83.* … 'To be a basic structure it must be a terrestrial concept having its habitat within the four corners of the Constitution.' (*Indira Nehru case*[39], SCC p. 137, para 341)
>
> What constitutes basic structure is not like 'a twinkling star up above the Constitution'. It does not consist of any abstract ideals to be found outside the provisions of the Constitution. The Preamble no doubt enumerates great concepts embodying the ideological aspirations of the people but these concepts are particularised and their essential features delineated in the various provisions of the Constitution. It is these specific provisions in the body of the Constitution which determine the type of democracy which the founders of that instrument established; the quality and nature of justice, political, social and economic which they aimed to realise, the content of liberty of thought and expression which they entrenched in that document and the scope of equality of status and of opportunity which they enshrined in it. These specific provisions enacted in the Constitution alone can determine the basic structure of the Constitution. These specific provisions, either separately or in combination, determine the content of the great concepts set out in the Preamble. It is impossible to spin out any concrete concept of basic structure out of the gossamer concepts set out in the Preamble. The specific provisions of the Constitution are the stuff from which

39 1975 Supp SCC 1 : AIR 1975 SC 2299 : (1976) 2 SCR 347

† **Ed.**: Quoted and paraphrased in *Minerva Mills Ltd.* v. *Union of India*, (1980) 3 SCC 625, p. 673, para 83.

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the basic structure has to be woven. (*Indira Nehru case*[39], SCC p. 138, para 345)"

120. If any constitutional amendment is made which moderately abridges or alters the equality principle or the principles under Article 19(1)(*g*), it cannot be said that it violates the basic structure of the Constitution. If such a principle is (*sic* not) accepted, our Constitution would not be able to adapt itself to the changing conditions of a dynamic human society. Therefore, the plea raised by the petitioners' counsel that the present Constitution (Ninety-third Amendment) Act, 2005 alters the basic structure of the Constitution is of no force. Moreover, the interpretation of the Constitution shall not be in a narrow pedantic way. The observations made by the Constitution Bench in *Nagaraj case*[11] at p. 240 are relevant: (SCC para 19)

"*19.* The Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adapted to the various crises of human affairs. Therefore, a purposive rather than a strict literal approach to the interpretation should be adopted. A constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that constitutional provision does not get fossilised but remains flexible enough to meet the newly emerging problems and challenges."

121. It has been held in many decisions that when a constitutional provision is interpreted, the cardinal rule is to look to the Preamble to the Constitution as the guiding star and the directive principles of State policy as the "book of interpretation". The Preamble embodies the hopes and aspirations of the people and directive principles set out the proximate grounds in the governance of this country.

122. Therefore, we hold that the Ninety-third Amendment to the Constitution does not violate the "basic structure" of the Constitution so far as it relates to aided educational institutions. Question whether reservation could be made for SCs, STs or SEBCs in private unaided educational institutions on the basis of the Constitution (Ninety-third Amendment); or whether reservation could be given in such institutions; or whether any such legislation would be violative of Article 19(1)(*g*) or Article 14 of the Constitution; or whether the Constitution (Ninety-third Amendment) which enables the State Legislatures or Parliament to make such legislation are all questions to be decided in a properly constituted lis between the affected parties and others who support such legislation.

2. Whether Articles 15(4) and 15(5) are mutually contradictory, hence Article 15(5) is to be held ultra vires?

123. The next contention raised by the petitioners' counsel is that Articles 15(4) and 15(5) are mutually exclusive and contradictory. The counsel for the petitioners, particularly the petitioner in Writ Petition (C) No. 598 of 2006,

39 *Indira Nehru Gandhi* v. *Raj Narain*, 1975 Supp SCC 1 : AIR 1975 SC 2299 : (1976) 2 SCR 347
11 *M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212

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submitted that Article 15(4) was a provision and a source of legislative power for the purpose of making reservation for the Scheduled Castes (SCs) and the Scheduled Tribes (STs) as well as for the Socially and Educationally Backward Classes (SEBCs) of citizens in aided minority educational institutions. And Article 15(4) was inserted after the decision of this Court in *Champakam Dorairajan*[9] and Article 15(5) provides for reservation of seats for SCs, STs and SEBCs in aided or unaided educational institutions but expressly excludes all such reservation being made in minority educational institutions covered by Article 30(1) of the Constitution. This, according to the petitioner's learned counsel, will lead to a situation where the State would not be in a position to give reservation to SCs, STs and SEBCs even in aided minority institutions which have got protection under Article 30(1) of the Constitution. It is argued that in view of the express provision contained in Article 15(5), the State would no more be able to give the reservation and this according to the petitioner's counsel would result in annulling the endeavour of the Founding Fathers and the various provisions for neutralising the exclusion of SCs and STs from the mainstream of society and development for centuries.

124. It is argued by the petitioners' learned counsel that Articles 15(4) and 15(5) both commence with an exclusionary clause excluding the operation of the rest of Article 15, and hence would result in a conflict to the extent of inconsistency. According to the petitioners' counsel, Article 15(5) is a special provision relating to educational institutions and being a later amendment, it would prevail over Article 15(4), thus in substance and effect resulting in an amendment of Article 15(4) of the Constitution. According to the petitioners' counsel, "nothing in this article" in Article 15(5) would include Article 15(4) also and in view of this inconsistent provision, Article 15(5) has to be held to be inconsistent with Article 15(4) and thus non-operative.

125. Both Articles 15(4) and 15(5) are enabling provisions. Article 15(4) was introduced when the "Communal G.O." in the State of Madras was struck down by this Court in *Champakam Dorairajan case*[9]. In *Unni Krishnan*[7] this Court held that Article 19(1)(*g*) is not attracted for establishing and running educational institutions. However, in *T.M.A. Pai Foundation case*[8] it was held that the right to establish and run educational institutions is an occupation within the meaning of Article 19(1)(*g*). The scope of the decision in *T.M.A. Pai Foundation case*[8] was later explained in *P.A. Inamdar case*[15]. It was held that as regards unaided institutions, the State has no control and such institutions are free to admit students of their own choice. The said decision necessitated the enactment of the Constitution (Ninety-third Amendment) Act, 2005. Thus, both Articles 15(4) and 15(5) operate in different areas. The "nothing in this article" [mentioned at the

9 *State of Madras* v. *Champakam Dorairajan*, AIR 1951 SC 226 : 1951 SCR 525
7 *Unni Krishnan, J.P.* v. *State of A.P.*, (1993) 1 SCC 645
8 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481
15 *P.A. Inamdar* v. *State of Maharashtra*, (2005) 6 SCC 537

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beginning of Article 15(5)] would only mean that the nothing in this article which prohibits the State on grounds which are mentioned in Article 15(1) alone be given importance. Article 15(5) does not exclude Article 15(4) of the Constitution.

126. It is a well-settled principle of constitutional interpretation that while interpreting the provisions of the Constitution, effect shall be given to all the provisions of the Constitution and no provision shall be interpreted in a manner as to make any other provision in the Constitution inoperative or otiose. If the intention of Parliament was to exclude Article 15(4), they could have very well deleted Article 15(4) of the Constitution. Minority institutions are also entitled to the exercise of fundamental rights under Article 19(1)(*g*) of the Constitution, whether they be aided or unaided. But in the case of Article 15(5), the minority educational institutions, whether aided or unaided, are excluded from the purview of Article 15(5) of the Constitution. Both, being enabling provisions, would operate in their own field and the validity of any legislation made on the basis of Article 15(4) or 15(5) has to be examined on the basis of provisions contained in such legislation or the special provision that may be made under Article 15(4) or 15(5). It may also be noticed that no educational institution or any aggrieved party has come before us challenging the constitutional amendment on these grounds. The challenge is made by the petitioners objecting to the reservations made under Act 5 of 2007. Therefore, the plea that Articles 15(4) and 15(5) are mutually contradictory and, therefore, Article 15(5) is not constitutionally valid cannot be accepted. As has been held in *N.M. Thomas case*[24] and *Indra Sawhney case*[10] Articles 15(4) and 16(4) are not exceptions to Articles 15(1) and 16(1) but independent enabling provisions. Article 15(5) is also to be taken as an enabling provision to carry out certain constitutional mandate and thus it is constitutionally valid and the contentions raised on these grounds are rejected.

3. Whether exclusion of minority educational institutions from Article 15(5) is violative of Article 14 of the Constitution?

127. Another contention raised by the petitioners' counsel is that the exclusion of minority institutions under Article 15(5) itself is violative of Article 14 of the Constitution. It was contended that the exclusion by itself is not severable from the rest of the provision. This plea also is not tenable because the minority institutions have been given a separate treatment in view of Article 30 of the Constitution. Such classification has been held to be in accordance with the provisions of the Constitution. The exemption of minority educational institutions has been allowed to conform Article 15(5) with the mandate of Article 30 of the Constitution. Moreover, both Articles 15(4) and 15(5) are operative and the plea of non-severability is not applicable.

24 *State of Kerala* v. *N.M. Thomas*, (1976) 2 SCC 310 : 1976 SCC (L&S) 227

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

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128. The learned Senior Counsel Dr. Rajeev Dhavan and learned counsel Shri Sushil Kumar Jain appearing for the petitioners contended that the Constitution (Ninety-third Amendment) would violate the equality principles enshrined in Articles 14, 19 and 21 and thereby the "Golden Triangle" of these three articles could be seriously violated. The learned counsel also contended that exclusion of minorities from the operation of Article 15(5) is also violative of Article 14 of the Constitution. We do not find much force in this contention. It has been held that Article 15(4) and Article 16(4) are not exceptions to Article 15(1) and Article 16(1) respectively. It may also be noted that if at all there is any violation of Article 14 or any other equality principle, the affected educational institution should have approached this Court to vindicate their rights. No such petition has been filed before this Court. Therefore, we hold that the exclusion of minority educational institutions from Article 15(5) is not violative of Article 14 of the Constitution as the minority educational institutions, by themselves, are a separate class and their rights are protected by other constitutional provisions.

4. Whether the Constitution amendment followed the procedure prescribed under Article 368 of the Constitution?

129. Another contention raised by the petitioners' counsel is that the Constitution (Ninety-third Amendment) is invalid as it violates the proviso to Article 368 of the Constitution. According to the petitioners' counsel, the procedure prescribed under the proviso to Article 368 was not followed in the case of the Ninety-third Amendment. According to the petitioners' counsel, Article 15(5) of the Constitution interferes with the executive power of the States as it impliedly takes away the power of the State Government under Article 162 of the Constitution. This contention of the petitioners' counsel has no force.

130. The powers of Parliament and the State Legislatures to legislate are provided for under Articles 245-255 of the Constitution. Under the proviso to Article 162, any matter with respect to which the legislature of the State and Parliament have power to make laws, the executive power of the State shall be subject to and limited by the executive power expressly conferred by the Constitution or by any law made by Parliament upon the Union authorities thereof. The Constitution (Ninety-third Amendment) does not expressly or impliedly take away any such power conferred by Article 162.

131. It may also be noticed that by virtue of the Forty-second Amendment to the Constitution, "education" which was previously in Entry 11 in List II was deleted and inserted in List III as Entry 25 as the field of legislation in List III. Article 245 will operate and by reasons of proviso to Article 162, the executive power of the State be subject to, limited by, the executive power expressly conferred by the Constitution or by any law made by Parliament upon the Union authorities thereof. Subject to restrictions imposed under the Constitution, it has been in existence. Such power of the State is not limited or curtailed by the Constitution (Ninety-third

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Amendment) as it does not interfere with the power of the State under Article 162. The Constitution (Ninety-third Amendment) does not fall within the scope of proviso to Article 368. Therefore, the plea raised by the petitioners' counsel that the Constitution (Ninety-third Amendment) did not follow the prescribed procedure of Article 368 is not correct and the plea is only to be rejected.

5. Whether Act 5 of 2007 is constitutionally invalid in view of definition of "Backward Class" and whether the identification of such "Backward Class" based on "caste" is constitutionally valid?

132. The next important plea raised by the petitioners' counsel is regarding the validity of Act 5 of 2007. Several contentions have been raised regarding the validity of Act 5 of 2007. The first contention which was raised by the petitioners' counsel was that this Act is ex facie unconstitutional and is a suspect legislation and violative of Articles 14, 15 and 19(1)(*g*) of the Constitution. The main attack against the Act was that the socially and educationally backward classes of citizens were not properly identified and the delegation of power to identify the socially and educationally backward classes of citizens to the Central Government itself is illegal and the delegation of such powers by itself without laying down any guidelines is arbitrarily illegal. Elaborate arguments were made by the petitioners' counsel and the first and foremost contention was that "caste" is the sole basis on which the socially and educationally backward classes of citizens were determined. And this, according to the petitioners' counsel, is illegal. Reference was made to a series of decisions of this Court on this issue.

133. There is a long jurisprudential history as to whether caste can play any role in determining the socially and educationally backward classes of citizens. In *Indra Sawhney case*[10] which is a nine-Judge Bench decision, it was held that the "caste" could be a beginning point and a determinative factor in identifying the socially and educationally backward classes of citizens. But nevertheless, a brief survey of various decisions on this question would give a history of the jurisprudential development on this subject.

134. Reference to the earlier decisions is necessary because serious doubt has been raised as to whether "caste" could be the basis for recognising backwardness. Some of the earlier decisions have stated that caste should not be a basis for recognising backwardness and gradually there was a shift in the views and finally, in *Indra Sawhney case*[10] it was held that caste could be the starting point for determining the socially and educationally backward classes of citizens.

135. In *Champakam Dorairajan*[9] this Court struck down the classification made in the Communal G.O. of the then State of Madras. The G.O. was founded on the basis of religion and castes and was struck down on the ground that it was opposed to the Constitution and was in violation of the

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

9 *State of Madras* v. *Champakam Dorairajan*, AIR 1951 SC 226 : 1951 SCR 525

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fundamental rights guaranteed to the citizens. The Court held that Article 46 cannot override the provisions of Article 29(2) because of the directive principles of State policy which were then taken subsidiary to fundamental rights. This decision led to the First Constitution Amendment by which Article 15(4) was added to the Constitution.

136. The next important case is *M.R. Balaji* v. *State of Mysore*[20]. In this case, the State of Mysore issued an order that all the communities except the Brahmin community would fall within the definition of socially and educationally backward class and the Scheduled Castes and the Scheduled Tribes and 75% of the seats in educational institutions were reserved for them. It was observed that though caste in relation to Hindus may be a relevant factor to consider while determining social backwardness of groups or classes of citizens, it cannot be made the sole or dominant test. It was held that the classes of citizens who are deplorably poor automatically become socially backward. Moreover, the occupation of citizens and the place of their habitation also result in social backwardness. The problem of determining who are socially backward classes is undoubtedly very complex, but the classification of socially backward citizens on the basis of their caste alone is not permissible under Article 15(4). The learned Senior Counsel Shri Harish Salve drew our attention to the various passages in the judgment. Gajendragadkar, J. speaking for the majority of the Judges, said: (*M.R. Balaji case*[20], AIR p. 659, para 24)

> "*24.* ... The problem of determining who are socially backward classes is undoubtedly very complex. Sociological, social and economic considerations come into play in solving the problem and evolving proper criteria for determining which classes are socially backward is obviously a very difficult task; it will need an elaborate investigation and collection of data and examining the said data in a rational and scientific way. That is the function of the State which purports to act under Article 15(4)."

The Court drew a clear distinction between "caste" and "class" and tried to make an attempt to find a new basis for ascertaining social and educational backwardness in place of caste and in this decision a majority of Judges held that in a broad way, a special provision of reservation should be less than 50%; how much less than 50% would depend upon the relevant and prevailing circumstances in each case.

137. In *R. Chitralekha case*[14] the Government of Mysore, by an order defining backward classes directed that 30% of the seats in professional and technical colleges and institutions shall be reserved for them and 18% to SCs and STs. It was laid down that classification of socially and educationally backward classes should be made on the basis of economic condition and occupation. Subba Rao, J. (as he then was), speaking for the majority, held that a classification of backward classes based on economic conditions and

20 AIR 1963 SC 649 : 1963 Supp (1) SCR 439

14 *R. Chitralekha* v. *State of Mysore*, AIR 1964 SC 1823 : (1964) 6 SCR 368

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occupations is not bad in law and does not offend Article 15(4). The caste of a group of citizens may be a relevant circumstance in ascertaining their social backwardness and though it is a relevant factor to determine social backwardness of a class, it cannot be the sole or dominant test in that behalf. If, in a given situation, caste is excluded in ascertaining a class within the meaning of Article 15(4), it does not vitiate the classification if it satisfies other tests. The Court observed that various provisions of the Constitution which recognised the factual existence of backwardness in the country and which make a sincere attempt to promote the welfare of the weaker sections thereof should be construed to effectuate that policy and not to give weightage to progressive sections of the society under the false colour of caste to which they happen to belong. The Court held that under no circumstance can a "class" be equated to a "caste" though the caste of an individual or group of individuals may be a relevant factor in putting him in a particular class.

138. *P. Rajendran (Minor)* v. *State of Madras*[40] is another Constitution Bench decision wherein the order of the State Government providing reservation of seats for various categories of candidates, namely, Scheduled Tribes, Scheduled Castes and SEBCs was challenged on various grounds. The main challenge was that the reservation was based entirely on consideration of caste and therefore it violates Article 15. Wanchoo, J., held that: (AIR pp. 1014-15, para 7)

> "*7.* … Now if the reservation in question had been based only on caste and had not taken into account the social and educational backwardness of the castes in question, it would be violative of Article 15(1). *But it must not be forgotten that a caste is also a class of citizens and if the caste as a whole is socially and educationally backward reservation can be made in favour of such a caste on the ground that it is a socially and educationally backward class of citizens within the meaning of Article 15(4).* Reference in this connection may be made to the observations of this Court in *M.R. Balaji* v. *State of Mysore*[20] to the effect that it was not irrelevant to consider the caste of a class of citizens in determining their social and educational backwardness. It was further observed that though the caste of a class of citizens may be relevant its importance should not be exaggerated; and if classification of backward classes of citizens was based solely on the caste of the citizen, it might be open to objection." (emphasis supplied)

It may be noticed that the list prepared by the State showed certain castes, and members of those castes according to the State were really classes of socially and educationally backward citizens. It was observed in that case that the petitioners therein did not make any attempt to show that any caste mentioned in the list of educationally and socially backward classes of citizens was not educationally and socially backward and the list based on

40 AIR 1968 SC 1012 : (1968) 2 SCR 786
20 AIR 1963 SC 649 : 1963 Supp (1) SCR 439

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caste was upheld by the Constitution Bench and held to be not violative of Article 15(1).

139. In *Triloki Nath Tiku* v. *State of J&K*[41] 50% of the gazetted posts were to be filled up by promotion in favour of the Muslims of Jammu and Kashmir. The Court held that inadequate representation in State services would not be decisive for determining the backwardness of a section. The Court accordingly gave directions for collecting further material relevant to the subject. And in a subsequent decision, *Triloki Nath*[22] the Court observed that the expression "backward class" is not used as synonymous with "backward caste".

140. In *A. Peeriakaruppan (Minor)* v. *State of T.N.*[28] this Court made reference to the earlier decisions especially in *M.R. Balaji case*[20] and *R. Chitralekha case*[14]. Hegde, J. at para 29, observed: (*A. Peeriakaruppan case*[28], SCC p. 49)

> "*29.* ... There is no gainsaying the fact that there are numerous castes in this country which are socially and educationally backward. To ignore their existence is to ignore the facts of life. Hence we are unable to uphold the contention that the impugned reservation is not in accordance with Article 15(4). But all the same the Government should not proceed on the basis that once a class is considered as a backward class it should continue to be backward class for all times. Such an approach would defeat the very purpose of the reservation because once a class reaches a stage of progress which some modern writers call as take-off stage then competition is necessary for their future progress. The Government should always keep under review the question of reservation of seats and only the classes which are really socially and educationally backward should be allowed to have the benefit of reservation."

141. The learned counsel for the petitioners also made reference to *State of U.P.* v. *Pradip Tandon*[42] wherein Ray, C.J. observed at para 14: (SCC p. 273)

> "*14.* ... socially and educationally backward classes of citizens in Article 15(4) could not be equated with castes. In *M.R. Balaji* v. *State of Mysore*[20] and *State of A.P.* v. *P. Sagar*[43] this Court held that classification of backwardness on the basis of castes would violate both Articles 15(1) and 15(4)."

142. Another important decision is that of *State of Kerala* v. *N.M. Thomas*[24] wherein the constitutional validity of Rule 13-AA of the Kerala

41 AIR 1967 SC 1283 : (1967) 2 SCR 265
22 *Triloki Nath Tiku* v. *State of J&K*, AIR 1969 SC 1 : (1969) 1 SCR 103
28 (1971) 1 SCC 38
20 *M.R. Balaji* v. *State of Mysore*, AIR 1963 SC 649 : 1963 Supp (1) SCR 439
14 *R. Chitralekha* v. *State of Mysore*, AIR 1964 SC 1823 : (1964) 6 SCR 368
42 (1975) 1 SCC 267
43 AIR 1968 SC 1379 : (1968) 3 SCR 595
24 (1976) 2 SCC 310 : 1976 SCC (L&S) 227

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State and Subordinate Services Rules was under challenge. The rule gave exemption of two years to members belonging to the Scheduled Castes and the Scheduled Tribes in services, from passing the departmental test. The High Court of Kerala struck down the rule and in an appeal by the State the question of reservation was elaborately considered. Mathew, J. in his concurring judgment, held that in order to give equality of opportunity for employment to the members of the Scheduled Castes and the Scheduled Tribes, it is necessary to take note of their social, educational and economic backwardness. Not only is the directive principle embodied in Article 46 binding on the law-makers as ordinarily understood, but it should equally inform and illuminate the approach of the court when it makes a decision, as the court is also "State" within the meaning of Article 12 and makes law even though interstitially. Existence of equality depends not merely on the absence of disabilities but on the presence of disabilities. To achieve it, differential treatment of persons who are unequal is permissible. This is what is styled as compensatory discrimination or affirmative action.

143. In *K.C. Vasanth Kumar* v. *State of Karnataka*[25] the question of identifying socially and educationally backward class came up for consideration. Desai, J. elaborately considered this question in para 20 and observed: (SCC p. 729)

> "*20.* … By its existence over thousands of years, more or less it was assumed that caste should be the criterion for determining social and educational backwardness. In other words, it was said, look at the caste, its traditional functions, its position in relation to upper castes by the standard of purity and pollution, pure and not so pure occupation, once these questions are satisfactorily answered without anything more, those who belong to that caste must be labelled socially and educationally backward. This oversimplified approach ignored a very realistic situation existing in each caste that in every such caste whose members claim to be socially and educationally backward, had an economically well-placed segments."

144. Chinnappa Reddy, J. also dealt with the question elaborately and observed: (*Vasanth Kumar case*[25], SCC p. 742, para 39)

> "*39.* … However we look at the question of 'backwardness', whether from the angle of class, status or power, we find the economic factor at the bottom of it all and we find poverty, the culprit-cause and the dominant characteristic. Poverty, the economic factor brands all backwardness just as the erect posture brands the Homo Sapiens and distinguishes him from all other animals, in the eyes of the beholder from Mars. But, whether his racial stock is Caucasian, Mongoloid, Negroid, etc., further investigation will have to be made. So too the further question of social and educational backwardness requires further scrutiny. In India, the matter is further aggravated, complicated and pitilessly tyrannised by the ubiquitous caste system, a unique and

25 *K.C. Vasanth Kumar* v. *State of Karnataka*, 1985 Supp SCC 714

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devastating system of gradation and degradation which has divided the entire Indian and particularly Hindu society horizontally into such distinct layers as to be destructive of mobility, a system which has penetrated and corrupted the mind and soul of every Indian citizen. It is a notorious fact that there is an upper crust of rural society consisting of the superior castes, generally the priestly, the landlord and the merchant castes, there is a bottom strata consisting of the 'outcastes' of Indian rural society, namely, the Scheduled Castes, and, in between the highest and the lowest, there are large segments of population who because of the low gradation of the caste to which they belong in the rural society hierarchy, because of the humble occupation which they pursue, because of their poverty and ignorance are also condemned to backwardness, social and educational, backwardness which prevents them from competing on equal terms to catch up with the upper crust."

145. Reference was also made to other decisions, namely, *State of A.P.* v. *P. Sagar*[43] and *T. Devadasan* v. *Union of India*[21]. The earlier decisions took the view that caste shall not be a basis for determining the socially and educationally backward class of citizens. But from the later decisions, we find a slight shift in the approach of the court. If the classification of SEBCs is done exclusively on the basis of caste, it would fly in the face of Article 15(1) of the Constitution as it expressly prohibits any discrimination on the grounds of religion, race, caste, sex, place of birth or any of them.

146. After a careful examination of the various previous decisions of this Court, in *Indra Sawhney*[10] while examining the validity of the "Backward Class List" prepared by the Mandal Commission, Jeevan Reddy, J. speaking for the majority, held as under: (SCC pp. 688-89, para 705)

> "*705*. During the years 1968 to 1971, this Court had to consider the validity of identification of backward classes made by Madras and Andhra Pradesh Governments. *P. Rajendran (Minor)* v. *State of Madras*[40] related to specification of socially and educationally backward classes with reference to castes. The question was whether such an identification infringes Article 15. Wanchoo, C.J., speaking for the Constitution Bench dealt with the contention in the following words: (SCR pp. 790-91)
>
> > 'The contention is that the list of socially and educationally backward classes for whom reservation is made under Rule 5 is nothing but a list of certain castes. Therefore, reservation in favour of certain castes based only on caste considerations violates Article 15(1), which prohibits discrimination on the ground of caste only. Now if the reservation in question had been based only on caste and had not taken into account the social and educational backwardness

43 AIR 1968 SC 1379 : (1968) 3 SCR 595

21 AIR 1964 SC 179 : (1964) 4 SCR 680

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

40 AIR 1968 SC 1012 : (1968) 2 SCR 786

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of the caste in question, it would be violative of Article 15(1). But it must not be forgotten that a caste is also a class of citizens and if the caste as a whole is socially and educationally backward reservation can be made in favour of such a caste on the ground that is a socially and educationally backward class of citizens within the meaning of Article 15(4) ... It is true that in the present cases the list of socially and educationally backward classes has been specified by caste. But that does not necessarily mean that caste was the sole consideration and that persons belonging to these castes are also not a class of socially and educationally backward citizens ... As it was found that members of these castes as a whole were educationally and socially backward, the list which had been coming on from as far back as 1906 was finally adopted for purposes of Article 15(4)....

In view however of the explanation given by the State of Madras, which has not been controverted by any rejoinder, it must be accepted that though the list shows certain castes, the members of those castes are really classes of educationally and socially backward citizens. No attempt was made on behalf of the appellant-petitioners to show that any caste mentioned in this list was not educationally and socially backward. In this state of the pleadings, we must come to the conclusion that though the list is prepared caste-wise, the castes included therein are as a whole educationally and socially backward and therefore the list is not violative of Article 15. The challenge to Rule 5 must therefore fail."

In that decision it was further held that "Backward Class" in Article 16(4) cannot be read as "Backward Caste". And under Article 340 of the Constitution, the President may by order appoint a commission consisting of such persons as he thinks fit to investigate the conditions of socially and educationally backward classes of citizens within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove the difficulties and to improve their condition. The object of this provision is to empower the President to appoint a commission to ascertain the difficulties and problems of socially and educationally backward classes of citizens. And in *Indra Sawhney case*[10] the majority held that the ideal and wise method would be to mark out various occupations which on the lower level in many cases amongst Hindus would be their caste itself and find out their social acceptability and educational standard, weigh them in the balance of economic conditions and, the result would be backward class of citizens needing a genuine protective umbrella. And after having adopted occupation as the starting point, the next point should be to ascertain their social acceptability. A person carrying on scavenging becomes an untouchable whereas others who were as low in the social strata as untouchables became

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depressed. The Court has cautioned that the backwardness should be traditional. Mere educational or social backwardness would not have been sufficient as it would enlarge the field thus frustrating the very purpose of the constitutional goal. It was pointed out that after applying these tests, the economic criteria or the means test should be applied since poverty is the prime cause of all backwardness as it generates social and educational backwardness.

147. The learned counsel for the petitioner contended that caste cannot be used even as one of the criteria for identifying SEBCs as many persons have shifted their traditional occupations and have become doctors, engineers and lawyers. But these are only a few cases and even such persons continue to suffer social segregation based on caste. In *Pradip Tandon case*[42**] it was held at para 17 that: (SCC p. 274)

> "*17.* The expression 'classes of citizens' indicates a homogenous section of the people who are grouped together because of certain likenesses and common traits and who are identifiable by some common attributes. The homogeneity of the class of citizens is social and educational backwardness. Neither caste nor religion nor place of birth will be the uniform element of common attributes to make them a class of citizens."

The above statement is not fully correct. Caste plays an important role in determining the backwardness of the individual. In society, social status and standing depend upon the nature of the occupation followed.

148. In para 779 of *Indra Sawhney case*[10], it is stated: (SCC p. 714)

> "*779.* … Lowlier the occupation, lowlier the social standing of the class in the graded hierarchy. In rural India, occupation-caste nexus is true even today. A few members may have gone to cities or even abroad but when they return—they do, barring a few exceptions—they go into the same fold again. It does not matter if he has earned money. He may not follow that particular occupation. Still, the label remains. His identity is not changed for the purpose of marriage, death and all other social functions, it is his social class—the caste—that is relevant."

149. "Caste" is often used interchangeably with "class" and can be called as the basic unit in social stratification. The most characteristic thing about a caste group is its autonomy in caste related matters. One of the universal codes enforced by all castes is the requirement of endogamy. Other rules have to do with the regulations pertaining to religious purity or cleanliness. Sometimes it restricts occupational choices as well. It is not necessary that these rules be enforced in particular classes as well, and as such a "class" may be distinguished from the broader realm of "caste" on these grounds. Castes were often rated, on a purity scale, and not on a social scale.

42 *State of U.P.* v. *Pradip Tandon*, (1975) 1 SCC 267

** *Pradip Tandon*, (1975) 1 SCC 267 is a three-Judge Bench decision.

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150. The observations made by Venkataramaiah, J. in *K.C. Vasanth Kumar case*[25] are relevant in this regard: (SCC p. 786, para 110)

> "*110.* We are aware of the meanings of the words caste, race, or tribe or religious minorities in India. A caste is an association of families which practise the custom of endogamy i.e. which permits marriages amongst the members belonging to such families only. Caste rules prohibit its members from marrying outside their caste. There are sub-groups amongst the castes which sometimes intermarry and sometimes do not. A caste is based on various factors, sometimes it may be a class, a race or a racial unit. A caste has nothing to do with wealth. The caste of a person is governed by his birth in a family. Certain ideas of ceremonial purity are peculiar to each caste. Sometimes caste practices even led to segregation of same castes in the villages. Even the choice of occupation of members of castes was predetermined in many cases, and the members of a particular caste were prohibited from engaging themselves in other types of callings, professions or occupations. Certain occupations were considered to be degrading or impure. A certain amount of rigidity developed in several matters and many who belonged to castes which were lower in social order were made to suffer many restrictions, privations and humiliations. Untouchability was practised against members belonging to certain castes. Inter-dining was prohibited in some cases. None of these rules governing a caste had anything to do with either the individual merit of a person or his capacity. The wealth owned by him would not save him from many social discriminations practised by members belonging to higher castes. Children who grew in this caste-ridden atmosphere naturally suffered from many social disadvantages apart from the denial of opportunity to live in the same kind of environment in which persons of higher castes lived. Many social reformers have tried in the last two centuries to remove the stigma of caste from which people born in lower castes were suffering. Many laws were also passed prohibiting some of the inhuman caste practices."

151. Rivers, the leading anthropologist, criticises the use of the terms "caste" and "class" as synonyms[44]. However, many others, such as Lowie[45] and Kimball Young[46], use these terms as though they were identical.

152. Very common is the use of the word caste to indicate hereditary status. Cecil Clare North[47], the noted sociologist, accepts the point of view that degrees of rigidity mark the difference between class and caste systems. His definition reads:

25 *K.C. Vasanth Kumar* v. *State of Karnataka*, 1985 Supp SCC 714

44 W.H.R. Rivers, *Social Organization* (New York, 1924), p. 143.

45 Robert H. Lowie, *The Origin of the State* (New York, 1927), p. 21; Lowie, *An Introduction to Cultural Anthropology* (New York, 1940), p. 268.

46 Kimball Young, *An Introductory Sociology* (New York, 1924).

47 Cecil Clare North, *Social Differentiation* (Chapel Hill, 1926), p. 254.

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"A group in which status, occupation, and culture have become hereditary is known as a caste. As a matter of fact, however, the distinction between a society based upon caste and one in which open classes prevail is simply one of degree."

North concludes by saying that the term "caste" applies to classes that have become fixed, and that all such classes tend to become castes.

153. MacIver[48], another leading authority in the field of social class theory, also identifies caste with hereditary status. He attempts to tie his interpretation with the situation in India, a procedure not often followed by the other sociologists. He writes thus:

"*Caste as unchangeable status.*—The feudal order approximated to a caste system. When status is wholly predetermined, so that men are born to their lot in life without hope of changing it, then class takes the extreme form of caste. This is the situation in Hindu society. 'Every Hindu necessarily belongs to the caste of his parents, and in that caste he inevitably remains. No accumulation of wealth and no exercise of talents can alter his caste status; and marriage outside his caste is prohibited or severely discouraged.' Caste is a complete barrier to the mobility of class."

Therefore, a class always enjoys certain privileges or at least certain advantages over others in society. When it is more or less rigorously closed, or enjoys hereditary privileges, it is called a "caste".

154. However, there are other sociologists who are of the opinion that the caste system has a hereditary function also. Charles Horton Cooley opines that[49]:

"if the transmission of function from father to son has become established, a caste spirit, a sentiment in favour of such transmission and opposed to the passage from one class to another, may arise and be shared even by the unprivileged classes. The individual then thinks of himself and his family as identified with his caste...."

Therefore, according to the early sociological theories, the term "caste" has been used to mean "class", hereditary or rigid status, and hereditary occupation.

155. Mysore Census of 1901 is quoted, in this connection, as follows[50]:

"In any one of the linguistic divisions of India there are as many as two hundred castes which can be grouped in classes whose gradation is largely acknowledged by all. But the order of social precedence amongst the individual castes of any class cannot be made definite, because not only is there no ungrudging acceptance of such rank but also the ideas of

48 R.N. MacIver, *Society: A Textbook of Sociology* (New York 1937), p. 171.9.

49 Charles Horton Cooley, *Social Organization* (New York, 1909), p. 215.

50 G.S. Ghurye, *Caste and Race in India* (Bombay, 1979), p. 6: quoting from *Mysore Census, 1901*, p. 400.

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the people on this point are very nebulous and uncertain. The following observations vividly bring out this state of things.

* * *

... Excepting the Brahmin at one end and the admittedly degraded castes like the Holeyas at the other, the members of a large proportion of the immediate castes think or profess to think that their caste is better than their neighbours', and should be ranked accordingly."

156. On the other hand, it is possible that within a caste group there is a marked inequality of status, opportunity, or social standing—which then defines the "class" within that particular "caste" system. For example, all the Brahmins are not engaged in highly respectable employment, nor are all very wealthy. It may even be that some Brahmins may be servants of members of a lower caste, or it may also be so that the personal servant of a rich Brahmin may be a poor Brahmin. Hence, there is every reason to believe that within a single caste group there are some classes or groups of people to whom good fortune or perseverance has brought more dignity, social influence and social esteem than it has to others.

157. In India, caste, in a socio-organisational manner would mean that it is not characterised merely by the physical or occupational characteristics of the individuals who make it up; rather, it is characterised by its codes and its close-knit social controls. In the case of classes, however, there may not exist such close-knit unit social controls, and there may exist great disparity in occupational characteristics.

158. A social class is therefore a homogeneous unit from the point of view of status and mutual recognition; whereas a caste is a homogeneous unit from the point of view of common ancestry, religious rites and strict organisational control. Thus the manner in which the caste is closed both in the organisational and biological sense causes it to differ from social class. Moreover, its emphasis upon ritual and regulations pertaining to cleanliness and purity differs radically from the secular nature and informality of social class rules. In a social class, the exclusiveness would be based primarily on status. Social classes divide homogeneous populations into layers of prestige and esteem, and the members of each layer are able to circulate freely with it.

159. In a caste, however, the social distance between members is due to the fact that they belong to entirely different organisations. It may be said, therefore, that a caste is a horizontal division and a class, a vertical division.

160. The Solicitor General, Mr G.E. Vahanvati, pointed out that for the purpose of reservation under Article 16(4) of the Constitution, the Central list has been in operation for the past 14 years and not a single person has challenged any inclusion in the Central list as void or illegal.

161. It was pointed out that the National Commission for the Backward Classes and the State Commission for Backward Classes have prepared a list based on elaborate guidelines and these guidelines have been framed after studying the criteria/indicators framed by the Mandal Commission and the Commissions set up in the past by different State Governments. Various

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Commissions held public hearings at various places and the National Commission held 236 public hearings before it finalised the list. It is also pointed out that during the period of its functioning, the National Commission had recommended 297 requests for inclusion and at the same time rejected 288 requests for inclusion of the main castes. It is further pointed out that the Commission took into consideration detailed data with regard to social, educational and economic criteria. The Commission has also looked into whether there has been any improvement or deterioration in the condition of the caste or community being considered for inclusion during the past twenty years.

162. It is pointed out that an elaborate questionnaire was prepared by the Commission and the answers in this questionnaire were considered in detail for inclusion/rejection in the list. It is clear that the lists of socially and educationally backward classes of citizens are being prepared not solely on the basis of the caste and if caste and other considerations are taken into account for determining backwardness, it cannot be said that it would be violative of Article 15(1) of the Constitution.

163. We hold that the determination of SEBCs is done not solely based on caste and hence, the identification of SEBCs is not violative of Article 15(1) of the Constitution.

6. Whether creamy layer is to be excluded from SEBCs?

164. SEBCs have been identified by applying various criteria. Though for the purpose of convenience, the list is based on caste, it cannot be said that "Backward Class" has been identified solely on the basis of caste. All the castes which suffered the social and educational backwardness have been included in the list. Therefore, it is not violative of Article 15(1). The only possible objection that could be agitated is that in many of the castes included in this list, there may be an affluent section (creamy layer) which cannot be included in the list of SEBCs.

165. When socially and educationally backward classes are determined by giving importance to caste, it shall not be forgotten that a segment of that caste is economically advanced and they do not require the protection of reservation. It was argued on behalf of the petitioners that the principle of "creamy layer" should be strictly applied to SEBCs while giving affirmative action and the principles of exclusion of "creamy layer" applied in *Indra Sawhney case*[10] should be equally applied to any of the legislations that may be passed as per Article 15(5) of the Constitution. The counsel for the petitioners submitted that SEBCs have been defined under Section 2(*g*) of the Act and the Central Government has been delegated with the power to determine Other Backward Classes. The counsel for the petitioners have pointed out that the definition given in Section 2(*g*) of the Act should be judicially interpreted. That the Backward Class so stated therein should mean to exclude the "creamy layer". The learned Senior Counsel appearing for

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Pattali Makkal Katchi (PMK) stated that exclusion of "creamy layer" shall not apply for reservation in educational institutions. He pointed out that in case the "creamy layer" is excluded, the other members of the backward class community would not be in a position to avail the benefit of reservation and the fee structure in many of these Centrally administered institutions is exorbitantly high and the ordinary citizen would not be in a position to afford the payment of fees and thus the very purpose of the reservation would be frustrated.

166. According to the learned counsel for the respondents, the creamy layer elimination will only perpetuate caste inequalities. It would enable the advanced castes to eliminate any challenge or competition to their leadership in the professions and services and that they will gain by eliminating all possible beneficiaries of reservation in the name of creamy layer especially in the institutions of higher learning. It was argued that the analogy of creamy layer applied in reservations to jobs cannot be applied in reservations to educational institutions of higher learning. The position of a student getting admission to an institution of higher learning is totally different and can never be compared to that of backward class person to get a job by virtue of reservation. The study in any educational institution of higher learning is very expensive and the non-creamy layer backward class parents cannot afford his son or his daughter incurring such a huge expenditure. Eliminating them from the creamy layer will frustrate the very object of providing reservation. Therefore, it is wholly impracticable and highly counterproductive to import the policy of creamy layer for reservation in these institutions. And according to the learned counsel there is a difference between services and education and that under the purview of Act 5 of 2007, around 3 lakh seats would be filled up every year. Whereas the jobs are limited and they will not become vacant every year.

167. The learned counsel pointed out that grouping of all castes together may enable a less backward caste among the backward classes to corner more seats than it deserves. It is also possible that more backward classes cannot afford to compete with the less backward classes. The only way to solve the said problem is by categorisation of Backward Classes and subclassifying them so as to ensure that under each category only similarly circumstanced castes are grouped together. The categorisation of backward class has successfully worked in the State of Tamil Nadu where most backward class is provided 20% reservation and the most backward castes and denotified tribes are grouped together and the backward classes are provided 30% reservation. In the State of Karnataka, backward classes are divided into five categories and separate reservations have been provided. And in the State of Andhra Pradesh, backward classes have been divided into four divisions and separate percentage of reservation has been provided.

168. As noticed earlier, determination of backward class cannot be exclusively based on caste. Poverty, social backwardness, economic backwardness, all are criteria for determination of backwardness. It has been

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noticed in *Indra Sawhney case*[10] that among the backward class, a section of the backward class is a member of the affluent section of society. They do not deserve any sort of reservation for further progress in life. They are socially and educationally advanced enough to compete for the general seats along with other candidates.

169. In *Indra Sawhney case*[10] Jeevan Reddy, J. has observed: (SCC p. 724, para 792)

> "*792*. In our opinion, it is not a question of permissibility or desirability of such test but one of proper and more appropriate identification of a class—a backward class. The very concept of a class denotes a number of persons having certain common traits which distinguish them from the others. In a backward class under Clause (4) of Article 16, if the connecting link is the social backwardness, it should broadly be the same in a given class. If some of the members are far too advanced socially (which in the context, necessarily means economically and, may also mean educationally) the connecting thread between them and the remaining class snaps. They would be misfits in the class. After excluding them alone, would the class be a compact class. In fact, such exclusion benefits the truly backward."

170. It is to be understood that "creamy layer" principle is introduced merely to exclude a section of a particular caste on the ground that they are economically advanced or educationally forward. They are excluded because unless this segment of caste is excluded from that caste group, there cannot be proper identification of the backward class. If the "creamy layer" principle is not applied, it could easily be said that all the castes that have been included among the socially and educationally backward classes have been included exclusively on the basis of caste. Identification of SEBC for the purpose of either Articles 15(4), 15(5) or 16(4) solely on the basis of caste is expressly prohibited by various decisions of this Court and it is also against Article 15(1) and Article 16(1) of the Constitution. To fulfil the conditions and to find out truly what is socially and educationally backward class, the exclusion of "creamy layer" is essential.

171*. It may be noted that the "creamy layer" principle is applied not as a general principle of reservation. It is applied for the purpose of identifying the socially and educationally backward class. One of the main criteria for determining SEBC is poverty. If that be so, the principle of exclusion of "creamy layer" is necessary. Moreover, the majority in *Indra Sawhney case*[10] upheld the exclusion of "creamy layer" for the purpose of reservation in Article 16(4). Therefore, we are bound by the larger Bench decision of this Court in *Indra Sawhney case*[10] and it cannot be said that the "creamy layer" principle cannot be applied for identifying SEBCs. Moreover, Articles 15(4) and 15(5) are designed to provide opportunities in education thereby raising educational, social and economical levels of those who are lagging behind

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* **Ed.**: Para 171 corrected vide Official Corrigendum No. F.3/Ed.B.J./33/2008 dated 15-4-2008.

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and once this progress is achieved by this section, any legislation passed thereunder should be deemed to have served its purpose. By excluding those who have already attained economic well-being or educational advancement, the special benefits provided under these clauses cannot be further extended to them and, if done so, it would be unreasonable, discriminatory or arbitrary, resulting in reverse discrimination.

172. Sawant, J. also made observation in *Indra Sawhney case*[10] to ensure removal of "creamy layer". He observed: (SCC p. 553, para 520)

> "*520.* ... at least some individuals and families in the backward classes ... gaining sufficient means to develop their capacities to compete with others in every field. ... Legally, therefore, they are not entitled to be any longer called as part of the backward classes whatever their original birthmark. ... to continue to confer upon such advanced sections from the backward classes the special benefits, would amount to treating equals unequally violating the equality provisions of the Constitution. Secondly, to rank them with the rest of the backward classes would equally violate the right to equality of the rest in those classes, since it would amount to treating the unequals equally. ... it will lead to perverting the objectives of the special constitutional provisions since the forwards among the backward classes will thereby be enabled to lap up all the special benefits to the exclusion and at the cost of the rest in those classes, thus keeping the rest in perpetual backwardness."

173. All these reasonings are equally applicable to the reservation or any special action contemplated under Article 15(5). Therefore, we are unable to agree with the contention raised by the respondent's learned counsel that if "creamy layer" is excluded, there may be practically no representation for a particular backward class in educational institutions because the remaining members, namely, the non-creamy layer, may not have risen to the level or standard necessary to qualify to get admission even within the reserved quota. If the creamy layer is not excluded, the identification of SEBC will not be complete and any SEBC without the exclusion of "creamy layer" may not be in accordance with Article 15(1) of the Constitution.

7. What should be the parameters for determining the "creamy layer" group?

174. After the decision in *Indra Sawhney case*[10] the Government of India, Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training) issued an Office Memorandum dated 8-9-1993 providing for 27% reservation for Other Backward Classes. The memorandum reads as follows:

> "OFFICE MEMORANDUM
>
> *Subject*: Reservation for Other Backward Classes in civil posts and services under the Government of India — regarding.

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The undersigned is directed to refer to this Department's OM No. 36012/31/90-Estt. (SCT) dated the 13th August, 1990 and 25th September, 1991 regarding reservation for Socially and Educationally Backward Classes in civil posts and services under the Government of India and to say that following the Supreme Court judgment in *Indra Sawhney* v. *Union of India*[10] [Writ Petition (Civil) No. 930 of 1990] the Government of India appointed an Expert Committee to recommend the criteria for exclusion of the socially advanced persons/sections from the benefits of reservations for Other Backward Classes in civil posts and services under the Government of India.

2. Consequent to the consideration of the Expert Committee's recommendations this Department's Office Memorandum No. 36012/31/90-Estt. (SCT) dated 13-8-1990 referred to in Para 1 above is hereby modified to provide as follows:

(*a*) 27% (twenty-seven per cent) of the vacancies in civil posts and services under the Government of India, to be filled through direct recruitment, shall be reserved for the Other Backward Classes. Detailed instructions relating to the procedure to be followed for enforcing reservation will be issued separately.

(*b*) * * *

(*c*)(*i*) The aforesaid reservation shall not apply to persons/sections mentioned in Column 3 of the Schedule to this office memorandum.

(*ii*) The rule of exclusion will not apply to persons working as artisans or engaged in hereditary occupations, callings. A list of such occupations, callings will be issued separately by the Ministry of Welfare.

(*d*)-(*e*) * * *

* * *

3. * * *

SCHEDULE

	Description of category	*To whom rule of exclusion will apply*
1	2	3
I.	CONSTITUTIONAL POSTS	Son(s) and daughter(s) of (*a*) President of India; (*b*) Vice-President of India; (*c*) Judges of the Supreme Court and of the High Courts; (*d*) Chairman and Members of UPSC and of the State Public Service Commission; Chief Election Commissioner; Comptroller and Auditor General of India;

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		(*e*) persons holding constitutional positions of like nature.
II.	SERVICE CATEGORY	Son(s) and daughter(s) of
A.	Group A/Class I officers of the All-India Central and State Services (Direct Recruits)	(*a*) parents, both of whom are Class I officers; (*b*) parents, either of whom is a Class I officer; (*c*) parents, both of whom are Class I officers, but one of them dies or suffers permanent incapacitation; (*d*) parents, either of whom is a Class I officer and such parent dies or suffers permanent incapacitation and before such death or such incapacitation has had the benefit of employment in any international organisation like UN, IMF, World Bank, etc. for a period of not less than 5 years; (*e*) parents, both of whom are Class I officers die or suffer permanent incapacitation and before such death or such incapacitation of the both, either of them has had the benefit of employment in any international organisation like UN, IMF, World Bank, etc. for a period of not less than 5 years: Provided that the rule of exclusion shall not apply in the following cases: Son(s) and daughter(s) of (*a*) parents either of whom or both of whom are Class I officers and such parent(s) dies/die or suffer permanent incapacitation; (*b*) A lady belonging to OBC category has got married to a Class I officer, and may herself like to apply for a job.
B.	Group B/Class II officers of the Central and State Services (Direct Recruitment)	Son(s) and daughter(s) of (*a*) Parents both of whom are Class II officers; (*b*) parents of whom only the husband is a Class II officer and he gets into Class I at the age of 40 or earlier;

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			(*c*) parents, both of whom are Class II officers and one of them dies or suffers permanent incapacitation and either one of them has had the benefit of employment in any international organisation like UN, IMF, World Bank, etc. for a period of not less than 5 years before such death or permanent incapacitation;
			(*d*) parents of whom the husband is a Class I officer (direct recruit or pre-forty promoted) and the wife is a Class II officer and the wife dies; or suffers permanent incapacitation; and
			(*e*) parents, of whom the wife is a Class I officer (direct recruit or pre-forty promoted) and the husband is a Class II officer and the husband dies or suffers permanent incapacitation:
			Provided that the rule of exclusion shall not apply in the following cases:
			Son(s) and daughter(s) of
			(*a*) parents both of whom are Class II officers and one of them dies or suffers permanent incapacitation;
			(*b*) parents, both of whom are Class II officers and both of them die or suffer permanent incapacitation, even though either of them has had the benefit of employment in any international organisation like UN, IMF, World Bank, etc. for a period of not less than 5 years before their death or permanent incapacitation.
	C.	Employees in Public Sector Undertakings, etc.	The criteria enumerated in A and B above in this category will apply mutatis mutandis to officers holding equivalent or comparable posts in PSUs, banks, insurance organisations, universities, etc. and

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		also to equivalent or comparable posts and positions under private employment, pending the evaluation of the posts on equivalent or comparable basis in these institutions, the criteria specified in Category VI below will apply to the officers in these institutions.
III.	ARMED FORCES INCLUDING PARAMILITARY FORCES (Persons holding civil posts are not included)	Son(s) and daughter(s) of parents either or both of whom is or are in the rank of Colonel and above in the Army and to equivalent posts in the Navy and the Air Force and the Paramilitary Forces: Provided that: (*i*) if the wife of an armed forces officer is herself in the armed forces (i.e. the category under consideration) the rule of exclusion will apply only when she herself has reached the rank of Colonel; (*ii*) the service ranks below Colonel of husband and wife shall not be clubbed together; (*iii*) if the wife of an officer in the armed forces is in civil employment, this will not be taken into account for applying the rule of exclusion unless she falls in the service category under Item II in which case the criteria and conditions enumerated therein will apply to her independently.
IV.	PROFESSIONAL CLASS AND THOSE ENGAGED IN TRADE AND INDUSTRY	
	(*i*) Persons engaged in profession as a doctor, lawyer, chartered accountant, income tax consultant, financial or management consultant, dental surgeon, engineer, architect, computer specialist, film artists	Criteria specified against Category VI will apply—

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	and other film professional, author, playwright, sports person, sports professional, media professional or any other vocations of like status.	
	(*ii*) Persons engaged in trade, business and industry.	Criteria specified against Category VI will apply— *Explanation*: (*i*) Where the husband is in same profession and the wife is in a Class II or lower grade employment, the income/wealth test will apply only on the basis of the husband's income; (*ii*) if the wife is in any profession and the husband is in employment in a Class II or lower rank post, then the income/wealth criterion will apply only on the basis of the wife's income and the husband's income will not be clubbed with it.
V.	PROPERTY OWNERS	
A.	Agricultural holdings	Son(s) and daughter(s) of persons belonging to a family (father, mother and minor children) which owns (*a*) only irrigated land which is equal to or more than 85% of the statutory area; or (*b*) both irrigated and unirrigated land, as follows: (*i*) The rule of exclusion will apply where the precondition exists that the irrigated area (having been brought to a single type under a common denominator) 40% or more of the statutory ceiling limit for irrigated land (this being calculated by excluding the unirrigated portion). If this precondition of not less than 40% exists,

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		then only the area of unirrigated land will be taken into account. This will be done by converting the unirrigated land on the basis of the conversion formula existing, into the irrigated type. The irrigated area so computed from unirrigated land shall be added to the actual area of irrigated land and if after such clubbing together the total area in terms of irrigated land is 80% or more of the statutory ceiling limit for irrigated land, then the rule of exclusion will apply and disentitlement will occur; (*ii*) the rule of exclusion will not apply if the landholding of a family is exclusively unirrigated.
B.	Plantations	
	(*i*) Coffee, tea, rubber, etc. (*ii*) Mango, citrus, apple plantations, etc.	Criteria of income/wealth specified in Category VI below will apply. Deemed as agricultural holding and hence criteria at A above under this category will apply.
C.	Vacant land and/or buildings, in urban areas or urban agglomerations	Criteria specified in Category VI below will apply. *Explanation*.—Building may be used for residential, industrial or commercial purpose and the like two or more such purposes.
VI.	INCOME/WEALTH TEST	Son(s) and daughter(s) of (*a*) persons having gross annual income of Rs 1 lakh or above or possessing wealth above the exemption limit as prescribed in the Wealth Tax Act for a period of

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three consecutive years;

(*b*) persons in Categories I, II, III and V-A who are not disentitled to the benefit of reservation but have income from other sources of wealth which will bring them within the income/wealth criteria mentioned in (*a*) above.

Explanation:

(*i*) Income from salaries or agricultural land shall not be clubbed;

(*ii*) the income criteria in terms of rupee will be modified taking into account the change in its value every three years; If the situation, however, so demands, the interregnum may be less.

Explanation.—Wherever the expression 'permanent incapacitation' occurs in this Schedule, it shall mean incapacitation which results in putting an officer out of service."††

175. We make it clear that same principle of determining the creamy layer for providing 27% reservation for backward classes for appointment need not be strictly followed in case of reservation envisaged under Article 15(5) of the Constitution. As pointed by Shri Ravivarma Kumar, learned Senior Counsel, if a strict income restriction is made for identifying the "creamy layer", those who are left in the particular caste may not be able to have a sufficient number of candidates for getting admission in the Central institutions as per Act 5 of 2007. The Government can make a relaxation to some extent so that sufficient number of candidates may be available for the purpose of filling up the 27% reservation. It is for the Union Government and the State Governments to issue appropriate guidelines to identify the "creamy layer" so that SEBCs are properly determined in accordance with the guidelines given by this Court. If, even by applying this principle, still the candidates are not available, the State can issue appropriate guidelines to effectuate the implementation of the reservation purposefully.

176. As noticed earlier, "backward class" defined in Section 2(*g*) does not exclude "creamy layer". Therefore, we make it clear that backward class as defined in Section 2(*g*) of Act 5 of 2007 must be deemed to have been such backward class by applying the principle of exclusion of "creamy layer".

†† **Ed.**: In *Ashoka Kumar Thakur* v. *State of Bihar*, (1995) 5 SCC 403, p. 417, para 10 it was held that this OM conforms to the law laid down in *Indra Sawhney case*, 1992 Supp (3) SCC 217.

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8. Whether the "creamy layer" principle is applicable to the Scheduled Tribes and Scheduled Castes?

177. The learned Senior Counsel Dr. Rajeev Dhavan submitted that "creamy layer" principle is to be applied to SCs and STs. He drew inspiration from the observations made by Krishna Iyer, J. in *N.M. Thomas case*[24] and also from the observations made in *Nagaraj case*[11] and reference was made to paras 80, 110 and 120 to 123 of *Nagaraj case*[11].

178. *N.M. Thomas case*[24] does not state that "creamy layer" principle should apply to SCs and STs. In *K.C. Vasanth Kumar case*[25] the "creamy layer" was used in the case of backward caste or class. In *K.C. Vasanth Kumar*[25] Desai, J. quoted from *N.M. Thomas*[24] as follows: (*Vasanth Kumar case*[25], SCC p. 733, para 24)

> "*24.* … In the light of experience, here and elsewhere, the danger of 'reservation', it seems to me, is threefold. Its benefits, by and large, are snatched away by the top creamy layer of the 'backward' caste or class, thus keeping the weakest among the weak always weak and leave the fortunate layers to consume the whole cake." (*N.M. Thomas*[24] p. 363, para 124)

179. In *Nagaraj case*[11] in para 80, it is stated that while

> "[a]pplying the 'creamy layer' test, this Court held that if roster-point promotees are given consequential seniority, it will violate the equality principle which is part of the basic structure of the Constitution and in which even Article 16(4-A) cannot be of any help to the reserved category candidates."

This was with reference to the observations made in *Indra Sawhney case*[10] and earlier in *M.G. Badappanavar* v. *State of Karnataka*[51], *Ajit Singh (II)* v. *State of Punjab*[52] and *Union of India* v. *Virpal Singh Chauhan*[53].

180. *Virpal Singh Chauhan case*[53] dealt with reservation of railway employees wherein it was held that once the number of posts reserved for being filled by reserved category candidates in a cadre, category or grade (unit for application of rule of reservation) are filled by the operation of roster, the object of the rule of reservation should be deemed to have been achieved.

181. *Ajit Singh (II) case*[52] dealt with consequential seniority on promotion and held that roster points fixed at Level 1 are not intended to determine any seniority at Level 1 between general candidates and the reserved candidates and the roster point merely becomes operative whenever a vacancy reserved at Level 2 becomes available. Thereby holding that if

24 *State of Kerala* v. *N.M. Thomas*, (1976) 2 SCC 310 : 1976 SCC (L&S) 227

25 *K.C. Vasanth Kumar* v. *State of Karnataka*, 1985 Supp SCC 714

11 *M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

51 (2001) 2 SCC 666 : 2001 SCC (L&S) 489

52 (1999) 7 SCC 209 : 1999 SCC (L&S) 1239

53 (1995) 6 SCC 684 : 1996 SCC (L&S) 1 : (1995) 31 ATC 813

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promotion is obtained by way of reservation, the consequential seniority will not be counted. *M.G. Badappanavar case*[51] followed *Ajit Singh (II)*[52] and *Virpal Singh*[53].

182. In none of these decisions it is stated that the "creamy layer" principle would apply to SCs and STs. In *Indra Sawhney case*[10] it is specifically stated that the "creamy layer" principle will not apply to STs and SCs. In *Nagaraj case*[11] in paras 110 and 120 and finally in paras 121, 122 and 123, it is only stated that when considering questions of affirmative action, the larger principle of equality such as 50% ceiling (quantitative limitation) and "creamy layer" (quantitative exclusion) may be kept in mind. In *Nagaraj case*[11] it has not been discussed or decided that the creamy layer principle would be applicable to SCs/STs. Therefore, it cannot be said that the observations made in *Nagaraj case*[11] are contrary to the decision in *Indra Sawhney case*[10].

183. Moreover, the "creamy layer" principle is not yet applied as a principle of equality or as a general principle to apply for all affirmative actions. The observations made by Chinnappa Reddy, J. in *K.C. Vasanth Kumar case*[25] are relevant in this regard. The learned Judge observed as under: (SCC p. 763, para 72)

> "72. … One cannot quarrel with the statement that social science research and not judicial impressionism should form the basis of examination, by courts, of the sensitive question of reservation for backward classes. Earlier we mentioned how the assumption that efficiency will be impaired if reservation exceeds 50%, if reservation is extended to promotional posts or if the carry forward rule is adopted, is not based on any scientific data. One must, however, enter a caveat to the criticism that the benefits of reservation are often snatched away by the top creamy layer of backward class or caste. That a few of the seats and posts reserved for backward classes are snatched away by the more fortunate among them is not to say that reservation is not necessary. This is bound to happen in a competitive society such as ours. Are not the unreserved seats and posts snatched away, in the same way, by the top creamy layer of society itself? Seats reserved for the backward classes are taken away by the top layers amongst them on the same principle of merit on which the unreserved seats are taken away by the top layers of society."

184. So far, this Court has not applied the "creamy layer" principle to the general principle of equality for the purpose of reservation. The "creamy layer" so far has been applied only to identify the backward class, as it

51 *M.G. Badappanavar* v. *State of Karnataka*, (2001) 2 SCC 666 : 2001 SCC (L&S) 489

52 *Ajit Singh (II)* v. *State of Punjab*, (1999) 7 SCC 209 : 1999 SCC (L&S) 1239

53 *Union of India* v. *Virpal Singh Chauhan*, (1995) 6 SCC 684 : 1996 SCC (L&S) 1 : (1995) 31 ATC 813

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

11 *M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212

25 *K.C. Vasanth Kumar* v. *State of Karnataka*, 1985 Supp SCC 714

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required certain parameters to determine the backward classes. "Creamy layer" principle is one of the parameters to identify backward classes. Therefore, principally, the "creamy layer" principle cannot be applied to STs and SCs, as SCs and STs are separate classes by themselves. Ray, C.J., in an earlier decision, stated that "Scheduled Castes and Scheduled Tribes are not a caste within the ordinary meaning of caste". And they are so identified by virtue of the notification issued by the President of India under Articles 341 and 342 of the Constitution. The President may, after consultation with the Governor, by public notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which for the purpose of the Constitution shall be deemed to be Scheduled Castes or Scheduled Tribes. Once the notification is issued, they are deemed to be the members of Scheduled Castes or Scheduled Tribes, whichever is applicable. In *E.V. Chinnaiah*[18] concurring with the majority judgment, S.B. Sinha, J. said: (SCC p. 403)

> "The Scheduled Castes and Scheduled Tribes occupy a special place in our Constitution. The President of India is the sole repository of the power to specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of the Constitution be deemed to be Scheduled Castes. The Constitution (Scheduled Castes) Order, 1950 made in terms of Article 341(1) is exhaustive. The object of Articles 341 and 342 is to provide for grant of protection to the backward class of citizens who are specified in the Scheduled Castes Order and Scheduled Tribes Order having regard to the economic and education backwardness wherefrom they suffer. *Any legislation which would bring them out of the purview thereof or tinker with the order issued by the President of India would be unconstitutional.* (Paras 52, 111 and 84) (emphasis supplied)

185. A plea was raised by the respondent State that categorisation of Scheduled Castes could be justified by applying the "creamy layer" test as used in *Indra Sawhney case*[10] which was specifically rejected in para 96 of *E.V. Chinnaiah case*[18]. It is observed: (SCC p. 430, para 96)

> "*96.* But we must state that whenever such a situation arises in respect of Scheduled Caste, it will be Parliament alone to take the necessary legislative steps in terms of Clause (2) of Article 341 of the Constitution. The States concededly do not have the legislative competence therefor."

186. Moreover, right from the beginning, the Scheduled Castes and Scheduled Tribes were treated as a separate category and nobody ever disputed identification of such classes. So long as "creamy layer" is not applied as one of the principles of equality, it cannot be applied to the Scheduled Castes and Scheduled Tribes. So far, it is applied only to identify the socially and educationally backward classes. We make it clear that for the

18 *E.V. Chinnaiah* v. *State of A.P.*, (2005) 1 SCC 394

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

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purpose of reservation, the principles of "creamy layer" are not applicable for Scheduled Castes and Scheduled Tribes.

9. Whether the principles laid down by the United States Supreme Court for affirmative action such as "suspect legislation", "strict scrutiny" and "compelling State necessity" are applicable to principles of reservation or other affirmative action contemplated under Article 15(5) of the Constitution of India?

187. Based on the Constitution (Ninety-third Amendment) Act, Act 5 of 2007 has been enacted. According to the petitioner's counsel, this is a "suspect legislation" and, therefore, it is to be subjected to "strict scrutiny" as laid by the United States Supreme Court and only by passing this test of "strict scrutiny", such legislation could be put into practice.

188. At the outset, it must be stated that the decisions of the United States Supreme Court were not applied in the Indian context as it was felt that the structure of the provisions under the two Constitutions and the social conditions as well as other factors are widely different in both the countries. Reference may be made to *Bhikaji Narain Dhakras* v. *State of M.P.*[54] and *A.S. Krishna* v. *State of Madras*[55] wherein this Court specifically held that the due process clause in the Constitution of the United States of America is not applicable to India. While considering the scope and applicability of Article 19(1)(*g*) in *Kameshwar Prasad* v. *State of Bihar*[56] it was observed: (AIR p. 1169, para 8)

> "*8*. As regards these decisions of the American courts, it should be borne in mind that though the First Amendment to the Constitution of the United States reading 'Congress shall make no law … abridging the freedom of speech …' appears to confer no power on the Congress to impose any restriction on the exercise of the guaranteed right, still it has always been understood that the freedom guaranteed is subject to the police power—the scope of which however has not been defined with precision or uniformly."

189. In *Kesavananda Bharati case*[17] also, while considering the extent and scope of the power of amendment under Article 368 of the Constitution of India, the Constitution of the United States of America was extensively referred to and Ray, J., held: (SCC p. 615, para 1108)

> "*1108*. The American decisions which have been copiously cited before us, were rendered in the context of the history of the struggle against colonialism of the American people, sovereignty of several States which came together to form a Confederation, the strains and pressures which induced them to frame a Constitution for a Federal Government and the underlying concepts of law and judicial approach over a period of

54 AIR 1955 SC 781 : (1955) 2 SCR 589
55 AIR 1957 SC 297 : 1957 SCR 399
56 AIR 1962 SC 1166 : 1962 Supp (3) SCR 369
17 *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225

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nearly 200 years, cannot be used to persuade this Court to apply their approach in determining the cases arising under our Constitution."

190. It may also be noticed that there are structural differences in the Constitution of India and the Constitution of the United States of America. Reference may be made to the Fourteenth Amendment to the US Constitution. Some of the relevant portions thereof are as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

Whereas in India, Articles 14 and 18 are differently structured and contain express provisions for special provision for the advancement of SEBCs, STs and SCs. Moreover, in our Constitution there is a specific provision under the directive principles of State policy in Part IV of the Constitution requiring the State to strive for justice—social, economic and political—and to minimise the inequalities of income and endeavour to eliminate inequalities in status, facilities and opportunities (Article 38). Earlier, there was a view that Articles 16(4) and 15(5) are exceptions to Articles 16(1) and 15(1) respectively. This view was held in *GM, Southern Railway* v. *Rangachari*[19] and *M.R. Balaji* v. *State of Mysore*[20].

191. In *T. Devadasan*[21] Subba Rao, J., gave a dissenting opinion wherein he held that Article 16(4) was not an exception to Article 16(1). He observed: (AIR p. 190, para 23)

> "*23.* ... The expression 'nothing in this article' is a legislative device to express its intention in a most emphatic way that the power conferred thereunder is not limited in any way by the main provision but falls outside it. It has not really carved out an exception, but has preserved a power untrammelled by the other provisions of the Article."

192. In two other subsequent decisions i.e. in *Triloki Nath*[41] and *T. Devadasan case*[21] it was held that Articles 15(4) and 16(4) are exceptions to Articles 15(1) and 16(1) respectively. But a seven-Judge Bench in *State of Kerala* v. *N.M. Thomas*[24] held that Articles 15(4) and 16(4) are not exceptions to Articles 15(1) and 16(1) respectively. Fazal Ali, J., said: (SCC p. 385, para 184)

> "*184.* ... This form of classification which is referred to as reservation, is in my opinion, clearly covered by Article 16(4) of the

19 AIR 1962 SC 36 : (1962) 2 SCR 586
20 AIR 1963 SC 649 : 1963 Supp (1) SCR 439
21 *T. Devadasan* v. *Union of India*, AIR 1964 SC 179 : (1964) 4 SCR 680
41 *Triloki Nath Tiku* v. *State of J&K*, AIR 1967 SC 1283 : (1967) 2 SCR 265
24 (1976) 2 SCC 310 : 1976 SCC (L&S) 227

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Constitution which is completely exhaustive on this point. That is to say Clause (4) of Article 16 is not an exception to Article 14 in the sense that whatever classification can be made, can be done only through Clause (4) of Article 16. Clause (4) of Article 16, however, is an explanation containing an exhaustive and exclusive provision regarding reservation which is one of the forms of classification."

193. This brought out a drastic change in the view of this Court. In *K.C. Vasanth Kumar* v. *State of Karnataka*[25] Venkataramiah, J. observed: (SCC p. 800, para 131)

"*131.* Article 14 of the Constitution consists of two parts. It asks the State not to deny to any person equality before law. It also asks the State not to deny the equal protection of the laws. Equality before law connotes absence of any discrimination in law. The concept of equal protection required the State to mete out differential treatment to persons in different situations in order to establish an equilibrium amongst all. This is the basis of the rule that equals should be treated equally and unequals must be treated unequally if the doctrine of equality which is one of the cornerstones of our Constitution is to be duly implemented. In order to do justice amongst unequals, the State has to resort to compensatory or protective discrimination. Article 15(4) and Article 16(4) of the Constitution were enacted as measures of compensatory or protective discrimination to grant relief to persons belonging to socially oppressed castes and minorities."

194. The amendment to Article 15 by inserting Article 15(5) and the new Act (Act 5 of 2007) are to be viewed in the background of these constitutional provisions. It may also be recalled that the Preamble to the Constitution and the directive principles of State policy give a positive mandate to the State and the State is obliged to remove inequalities and backwardness from society. While considering the constitutionality of a social justice legislation, it is worthwhile to note the objectives which have been incorporated by the Constitution makers in the Preamble of the Constitution and how they are sought to be secured by enacting fundamental rights in Part III and directives principles of State policy in Part IV of the Constitution. The fundamental rights represent the civil and political rights and the directive principles embody social and economic rights. Together they are intended to carry out the objectives set out in the Preamble of the Constitution. Granville Austin, in his book[57], states:

"Both types of rights have developed as a common demand, products of the national and social revolutions, of their almost inseparable intertwining, and of the character of Indian politics itself."

195. From the constitutional history of India, it can be seen that from the point of view of importance and significance, no distinction can be made between the two sets of rights, namely, fundamental rights which are made

25 1985 Supp SCC 714

57 Granville Austin: *The Indian Constitution: Cornerstone of a Nation*, p. 52

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justiciable and the directive principles which are made non-justiciable. The directive principles of State policy are made non-justiciable for the reason that the implementation of many of these rights would depend on the financial capability of the State. Non-justiciable clause was provided for the reason that an infant State shall not be made accountable immediately for not fulfilling these obligations. Merely because the directive principles are non-justiciable by the judicial process does not mean that they are of subordinate importance. In *Champakam Dorairajan case*[9] it was observed that "the Directive Principles have to conform to and run subsidiary to the Chapter of Fundamental Rights". But this view did not hold for a long time and was later changed in a series of subsequent decisions. (See *Kerala Education Bill, 1957, In re*[58]; *Minerva Mills*[13].)

196. In *Minerva Mills*[13] Bhagwati, J. observed: (SCC p. 705, para 107)

> "*107.* … The fundamental rights are no doubt important and valuable in a democracy, but there can be no real democracy without social and economic justice to the common man and to create socio-economic conditions in which there can be social and economic justice to everyone, is the theme of the directive principles. It is the directive principles which nourish the roots of our democracy, provide strength and vigour to it and attempt to make it a real participatory democracy which does not remain merely a political democracy with fundamental rights available to all irrespective of their power, position or wealth. The dynamic provisions of the directive principles fertilise the static provisions of the fundamental rights. The object of the fundamental rights is to protect individual liberty, but can individual liberty be considered in isolation from the socio-economic structure in which it is to operate. There is a real connection between individual liberty and the shape and form of the social and economic structure of the society. Can there be any individual liberty at all for the large masses of people who are suffering from want and privation and who are cheated out of their individual rights by the exploitative economic system? Would their individual liberty not come in conflict with the liberty of the socially and economically more powerful class and in the process, get mutilated or destroyed? It is axiomatic that the real controversies in the present day society are not between power and freedom but between one form of liberty and another. Under the present socio-economic system, it is the liberty of the few which is in conflict with the liberty of the many. The Directive Principles therefore, impose an obligation on the State to take positive action for creating socio-economic conditions in which there will be an egalitarian social order with social and economic justice to all, so that individual liberty will become a cherished value and the dignity of the individual a living reality, not only for a few privileged persons but for the entire people of

9 *State of Madras* v. *Champakam Dorairajan*, AIR 1951 SC 226 : 1951 SCR 525
58 AIR 1958 SC 956 : 1959 SCR 995
13 *Minerva Mills Ltd.* v. *Union of India*, (1980) 3 SCC 625

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the country. It will thus be seen that the directive principles enjoy a very high place in the constitutional scheme and it is only in the framework of the socio-economic structure envisaged in the directive principles that the fundamental rights are intended to operate, for it is only then they can become meaningful and significant for the millions of our poor and deprived people who do not have been the bare necessities of life and who are living below the poverty level."

197. Article 46 enjoins upon the State to promote with special care the educational and economic interests of the weaker sections of the people and to protect them from social injustice and all forms of exploitation whereas under the Constitution of the United States of America, we get an entirely different picture. Though equality was one of the solemn affirmations of the American Declaration of Independence, slavery continued unabatedly and it was, to some extent, legally recognised.

198. In *Dred Scott* v. *Sandford*[59] wherein Taney, C.J. held that [African-Americans] were not entitled to get citizenship. He was of the view that "once a slave always a slave", and one slave never would become the citizen of America. This view held by Taney, C.J. continued for a long time and after the Civil War, the Fourteenth Amendment was enacted in 1868 and this amendment gave equal protection of laws to all persons.

199. In *Plessy* v. *Ferguson*[36] which involved a challenge to a Louisiana statute that provided for equal but separate accommodations for black and white passengers in trains, the United States Supreme Court was of the view that racial segregation was a reasonable exercise of State police power for the promotion of the public good and upheld the law.

200. Several affirmative actions were challenged and the landmark decision of *Brown* v. *Board of Education*[60] was delivered in 1954. In many cases, the strict scrutiny doctrine was being applied to all laws of racial classifications. The learned counsel for the petitioner made reference to *Gratz* v. *Bollinger*[33] and some of the earlier decisions of the United States Supreme Court. During the past two decades, the Court has become sceptical of race-based affirmative action practised or ordered by the State. The Supreme Court of the US is of the view that affirmative action plans must rest upon a sufficient showing or predicate of past discrimination which must go beyond the effects of societal discrimination.

201. The Fourteenth Amendment to the Constitution of the United States of America and Title VI of the 1964 Civil Rights Act, prohibit universities to discriminate on the basis of classifications such as race, colour, national origin and the like in all their operations. In a number of decisions of the United States Supreme Court spanning decades of jurisprudence, a heavy burden has been placed on institutions whose affirmative action programmes

59 15 L Ed 691 : 60 US 393 (1856)
36 41 L Ed 256 : 163 US 537 (1895)
60 98 L Ed 873 : 347 US 483 (1953)
33 156 L Ed 2d 257 : 539 US 244 (2003)

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are challenged before the United States Supreme Court on grounds that have been recognised as suspect or unconstitutional. According to the United States Supreme Court, all such programmes are inherently suspect since they rely on suspect forms of classification (such as race). Therefore, because such forms of classification are inherently suspect, the courts have subjected all affirmative action programmes relying on them to a very high standard of scrutiny, wherein those practising these affirmative action programmes have to adhere to a very high standard of proof, which we know as the "strict scrutiny" test.

202*. *Regents of the University of California* v. *Bakke*[31] provided a starting point and from this case onwards, affirmative action programmes can be justified only on two distinct grounds, and only these grounds have been recognised as compelling enough so as to satisfy the "strict scrutiny" test, as developed by the United States Supreme Court. The two grounds are as follows:

1. *Remedial justification.*—All efforts aimed at remedying past injustices against certain identified groups of people, who were unlawfully discriminated against in the past, serve as adequate justifications and all affirmative action programmes that are implemented with this aim serve the compelling institutional interest in removing all vestiges of discrimination that occurred in the past. In *City of Richmond* v. *J.A. Croson Co.*[61] the United States Supreme Court held that if a university is able to show "some showing of prior discrimination" in its existing affirmative action programme furthering racial exclusion then the university may take "affirmative steps to dismantle such a system". However, it is to be noted that the US Supreme Court also attached a warning with the above observation. While scrutinising such programmes, it was held that the Court would make "searching judicial inquiry into the justification for such race-based measures ... [and to] identify that discrimination ... with some specificity before they may use race-conscious relief". (*Croson case*[61])

2. *Diversity.*—All affirmative action programmes aimed at bringing about racial diversity among the scholarship of the institution(s) may be said to be in furtherance of compelling institutional interest. The starting point for this ground is Powell, J.'s detailed opinion regarding the issue of diversity in *Regents of the University of California* v. *Bakke*[31]. In this case, according to Powell, J. "[t]he attainment of a diverse student body is clearly a constitutionally permissible goal for an institution of higher education". He quoted from two of the Supreme Court's decisions regarding academic freedom (*Sweezy* v. *New Hampshire*[62] and *Keyishian* v. *Board of Regents*[63]) and observed:

* **Ed.**: Para 202 corrected vide Official Corrigendum No. F.3/Ed.B.J./33/2008 dated 15-4-2008.

31 57 L Ed 2d 750 : 438 US 265 (1978)

61 488 US 469 (1989)

62 1 L Ed 2d 1311 : 354 US 234 (1956)

63 17 L Ed 2d 629 : 385 US 589 (1966)

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"[I]t is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation ... The atmosphere of speculation, experiment and creation—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body.... [I]t is not too much to say that the nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this nation of many peoples."

203. The other part of the "strict scrutiny" test is the "narrow tailoring" test. The university, whose affirmative action programme is in question before the United States Supreme Court, is required to prove that its affirmative action programme has been designed in the narrowest possible manner, in order to benefit only those specific people who are to be benefited, thus serving the "compelling purposes" of the affirmative action programme. The programme cannot be made in a broad manner to encompass a large group of people, and it has to serve the minimum possible requirement, in order to achieve its goal. Otherwise, it may be possible that the rights of other people may be infringed upon, which would make the affirmative action programme unconstitutional.

204. Thus, the first limb of the strict scrutiny test that elucidates the "compelling institutional interest" is focused on the objectives that affirmative action programmes are designed to achieve. The second limb, that of "narrow tailoring", focuses on the details of specific affirmative action programmes and on the specific people it aims to benefit.

205. The United States Supreme Court has held that race may be one of the many factors that can be taken into account while structuring an affirmative action programme. At this stage, an analogy may be drawn with the Indian situation wherein the Supreme Court of India, in various cases, has held that caste may be one of the factors that can be taken into account, while providing for reservations for the socially and educationally backward classes. However, caste cannot be the "only" factor, just as race alone cannot be the only factor in the United States, while structuring reservation or affirmative action programmes .

206. Furthermore, the courts, both in India as well as in the United States of America, have looked with extreme caution and care at any legislation that aims to discriminate on the basis of race in the US and caste in India. As the US Supreme Court elucidated in *Grutter* v. *Bollinger*[32], "Because the Fourteenth Amendment protect[s] persons, not groups", all governmental action based on race ought to be subjected to a very detailed and careful judicial inquiry and scrutiny so as to ensure that the personal right to equal protection of the laws has not been infringed. (See *Adarand Constructors, Inc.* v. *Pena*[64].)

32 156 L Ed 2d 304 : 539 US 306 (2003)
64 132 L Ed 2d 158 : 515 US 200 (1995)

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207. It, therefore, follows that the Government may treat people differently because of their race but only for those reasons that serve what is known as "compelling government interest".

208. Furthermore, for any affirmative action programme to survive the strict standard of judicial scrutiny, the courts want "compelling evidence", that proves without any doubt that the affirmative action programme is narrowly tailored and serves only the most compelling of interests. Thus, the bar for the State or institution that practises affirmative action programmes based on suspect classifications has been effectively raised. Therefore, in cases where a compelling interest is found, race-based methods may be used only after all other methods have been considered and found deficient, and that too only to that limited extent which is required to remedy a discrimination that has been identified, and only when it has been shown that the identified beneficiaries have suffered previously in the past, and lastly, only if all undue burdens that may impinge upon the rights of other non-beneficiaries are avoided.

209. The aforesaid principles applied by the Supreme Court of the United States of America cannot be applied directly to India as the gamut of affirmative action in India is fully supported by constitutional provisions and we have not applied the principles of "suspect legislation" and we have been following the doctrine that every legislation passed by Parliament is presumed to be constitutionally valid unless otherwise proved. We have repeatedly held that the American decisions are not strictly applicable to us and the very same principles of strict scrutiny and suspect legislation were sought to be applied and this Court rejected the same in *Saurabh Chaudri* v. *Union of India*[26]. Speaking for the Bench, V.N. Khare, C.J., said: (SCC p. 164, para 36)

> "*36.* The strict scrutiny test or the intermediate scrutiny test applicable in the United States of America as argued by Shri Salve cannot be applied in this case. Such a test is not applied in Indian courts. In any event, such a test may be applied in a case where a legislation ex facie is found to be unreasonable. Such a test may also be applied in a case where by reason of a statute the life and liberty of a citizen is put in jeopardy. This Court since its inception apart from a few cases where the legislation was found to be ex facie wholly unreasonable proceeded on the doctrine that constitutionality of a statute is to be presumed and the burden to prove contra is on him who asserts the same."

210. Learned counsel Shri Sushil Kumar Jain contended that the classification of OBCs was not properly done and it is not clear as to whose benefit the legislation itself is made, therefore, it is a suspect legislation. This contention cannot be accepted. We are of the view that the challenge of Act 5 of 2007 on the ground that it does not stand the "strict scrutiny" test and there was no "compelling State necessity" to enact this legislation cannot be accepted.

26 (2003) 11 SCC 146

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10. Whether delegation of power to the Union Government to determine as to who shall be the Backward Class is constitutionally valid?

211. The learned counsel for the petitioners contended that though "Backward Class" is defined under Section 2(*g*) of Act 5 of 2007, it is not stated in the Act how the "Backward Class" would be identified and the delegation of such power to the Union of India to determine as to who shall be the "Backward Class" without there being proper guidelines is illegal as it amounts to excessive delegation. According to the learned counsel for the petitioners, Parliament itself should have laid down the guidelines and decided that who shall be included in the Backward Class as defined under Section 2(*g*) of Act 5 of 2007.

212. "Backward class" is not a new word. Going by the Constitution, there are sufficient constitutional provisions to have an idea as to what "backward class" is. Article 340 of the Constitution specifically empowers the President of India to appoint a commission to investigate the conditions of the socially and educationally backward classes within the territory of India. Socially and educationally backward classes of citizens are mentioned in Article 15(4) of the Constitution, which formed the First Amendment to the Constitution. Backward class citizens are also mentioned in Article 16(4) of the Constitution. It is only for the purpose of Act 5 of 2007 that the Union of India has been entrusted with the task of determining the backward class. There is already a National Commission and also various State Commissions dealing with the affairs of the backward class of citizens in this country. For the purpose of enforcement of the legislation passed under Article 16(4), the backward class of citizens have already been identified and has been in practice since the past 14 years. It is in this background that the Union of India has been given the task of determining the backward classes. The determination of Backward Classes itself is a laborious task and Parliament cannot do it by itself. It is incorrect to say that there are no sufficient guidelines to determine the backward classes. Various parameters have been used and it may also be noticed that if any undeserving caste or group of persons are included in the backward class, it is open to any person to challenge the same through judicial review. Therefore, it is incorrect to say that the Union of India has been given wide powers to determine the Backward Classes. The challenge of Act 5 of 2007 on that ground fails.

11. Whether the Act is invalid as there is no time-limit prescribed for its operation and no periodical review is contemplated?

213. The learned counsel for the petitioners contended that the reservation of 27% provided for the Backward Classes in the educational institutions contemplated under the Act does not prescribe any time-limit and this is opposed to the principle of equality. According to learned counsel for the petitioners, this affirmative action that is to bring about equality is calculated to produce equality on a broader basis by eliminating de facto inequalities and placing the weaker sections of the community on a footing of equality with the stronger and more powerful section so that each member

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of the community, whatever is his birth, occupation or social position may enjoy equal opportunity of using to the full, his natural endowments of physique, of character and of intelligence. This compensatory State action can be continued only for a period till that inequality is wiped off. Therefore, the petitioners have contended that unless the period is prescribed, this affirmative action will continue for an indefinite period and would ultimately result in reverse discrimination. It is true that there is some force in the contention advanced by the learned counsel for the petitioners but that may happen in future if the reservation policy as contemplated under the Act is successfully implemented. But at the outset, it may not be possible to fix a time-limit or a period of time.

214. Depending upon the result of the measures and improvements that have taken place in the status and educational advancement of the socially and educationally backward classes of citizens, the matter could be examined by Parliament at a future time but that cannot be a ground for striking down a legislation. After some period, if it so happens that any section of the community gets an undue advantage of the affirmative action, then such community can very well be excluded from such affirmative action programme. Parliament can certainly review the situation and even though a specific class of citizens is in the legislation, it is the constitutional duty of Parliament to review such affirmative action as and when the social conditions are required. There is also the safeguard of judicial review and the court can exercise its powers of judicial review and say that the affirmative action has carried out its mission and is thus no longer required. In the case of reservation of 27% for backward classes, there could be a periodic review after a period of 10 years and Parliament could examine whether the reservation has worked for the good of the country. Therefore, the legislation cannot be held to be invalid on that ground but a review can be made after a period of 10 years.

12. What shall be the educational standard to be prescribed to find out whether any class is educationally backward?

215. Learned Senior Counsel Shri P.P. Rao contended that under Article 15(5) of the Constitution, the reservation or any other affirmative action could be made for the advancement of only socially and educationally backward classes of citizens or the Scheduled Castes or Scheduled Tribes and the educational standard to be assessed shall be matriculation or 10+2 and not more than that. It was argued that many castes included in the backward class list have got a fairly good number of members who have passed 10+2 and thus such castes are to be treated as educationally forward and the present legislation, namely, Act 5 of 2007, is intended to give reservation to students in higher institutions of learning and the same is not permissible under Article 15(5) of the Constitution. He contended that Parliament should not have made this legislation for reservation in the higher institutions of learning as it is not part of the duty of the State under Article 46 of the Constitution. According to the learned counsel, education contemplated

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under Article 46 is only giving education up to the standard of 10+2. The learned counsel argued that this was the desire of the Founding Fathers of the Constitution. The learned counsel contended further that the State is not taking adequate steps to improve primary education.

216. In reply to Shri P.P. Rao's arguments, learned Solicitor General Shri G.E. Vahanvati drew our attention to various steps taken by the Union Government to improve the primary school education and also the upper primary school education. It is incorrect to suggest that there have been no efforts on the part of successive Governments to concentrate on level of education towards universal elementary education. "Sarva Shiksha Abhiyan" (SSA) had been launched by the Government in 2001-2002. The major components of SSA include opening of new schools, distribution of teaching equipments, school grant for teachers and maintenance for schools, community participation and training, carrying out civil works in school buildings, additional class rooms, distribution of free textbooks for ST students and girls. It was pointed out that in the year 2006-2007, nearly Rs 15,000 crores had been spent for such education. The Integrated Child Development Services (ICDS) Scheme was started in 1975. Latest figures show that progress has been made in the field of education. It is pointed out that the primary school coverage has increased from 86.96% (2002) to 96% and that of upper primary school has increased from 78.11% to 85.3% with the opening of 1.34 lakh primary schools and 1.01 lakh upper primary schools. The gross enrolment has also increased at the primary as well as upper primary stage. Dropout rate has fallen by 11.3%. It is also pointed out that girls' enrolment has increased from 43.7% (2001) to 46.7% (2004) at primary and from 40.9% to 44% at upper primary stage. The Union of India has granted funds to various States for the purpose of meeting the education requirements. The entire details were furnished to the Court and we do not think it necessary to go into these details.

217. Though at the time of attaining Independence, the basic idea was to improve primary and secondary level education, but now, after a period of more than 50 years, it is idle to contend that the backward classes shall be determined on the basis of their attaining education only to the level of 10+2 stage. In India there are a large number of arts, science and professional colleges and in the field of education, it is anachronistic to contend that primary education or secondary education shall be the index for fixing backward class of citizens. We find no force in the contention advanced by the learned counsel for the petitioners and it is only to be rejected.

13. Whether the quantum of reservation provided for in the Act is valid and whether 27% of seats for SEBC was required to be reserved?

218. The main contention of the petitioners' counsel, especially that of Shri Sushil Kumar Jain is that the entire Act is liable to be set aside as there was no necessity to provide any reservation to socially and educationally backward classes and according to him most of the castes included in the list which is prepared in accordance with the Mandal Commission are

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educationally very much advanced and the population of such group is not scientifically collected and the population ratio of backward classes is projected only on the basis of the 1931 Census and the entire legislation is an attempt to please a section of the society as part of a vote catching mechanism.

219. A legislation passed by Parliament can be challenged only on constitutionally recognised grounds. Ordinarily, grounds of attack of a legislation is whether the legislature has legislative competence or whether the legislation is ultra vires the provisions of the Constitution. If any of the provisions of the legislation violates fundamental rights or any other provisions of the Constitution, it could certainly be a valid ground to set aside the legislation by invoking the power of judicial review. A legislation could also be challenged as unreasonable if it violates the principles of equality adumbrated in our Constitution or it unreasonably restricts the fundamental rights under Article 19 of the Constitution. A legislation cannot be challenged simply on the ground of unreasonableness because that by itself does not constitute a ground. The validity of a constitutional amendment and the validity of plenary legislation have to be decided purely as questions of constitutional law. This Court in *State of Rajasthan* v. *Union of India*[65] said: (SCC p. 660, para 149)

> "*149.* … if a question brought before the court is purely a political question not involving determination of any legal or constitutional right or obligation, the court would not entertain it, since the court is concerned only with adjudication of legal rights and liabilities."

Therefore, the plea of the petitioner that the legislation itself was intended to please a section of the community as part of the vote catching mechanism is not a legally acceptable plea and it is only to be rejected.

220. The quantum of reservation provided under Act 5 of 2007 is based on the detailed facts available with Parliament. Various commissions have been in operation determining as to who shall form SEBCs. Though a castewise census is not available, several other data and statistics are available. In *Indra Sawhney*[10] the Mandal Commission was accepted in principle though the details and findings of the Commission were not fully accepted by this Court. 27% of reservation in the matter of employment was accepted by this Court. The petitioners have not produced any documents to show that the backward class citizens are less than 27% vis-à-vis the total population of this country or that there was no requirement of 27% reservation for them. Parliament is invested with the power of legislation and must be deemed to have taken into consideration all relevant circumstances when passing a legislation of this nature. It is futile to contend whether Parliament was not aware of the statistical details of the population of this country and, therefore, we do not think that 27% reservation provided in the Act is illegal or on that account, the Act itself is liable to be struck down.

65 (1977) 3 SCC 592

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

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Questions

1. Whether the Ninety-third Amendment of the Constitution is against the "basic structure" of the Constitution?

221. The Constitution (Ninety-third Amendment) Act, 2005 does not violate the "basic structure" of the Constitution so far as it relates to the State maintained institutions and aided educational institutions. Question whether the Constitution (Ninety-third Amendment) Act, 2005 would be constitutionally valid or not so far as "private unaided" educational institutions are concerned, is left open to be decided in an appropriate case. (Paras 120 to 122 and 108 to 111)

2. Whether Articles 15(4) and 15(5) are mutually contradictory, hence Article 15(5) is to be held ultra vires?

222. Article 15(5) is constitutionally valid and Articles 15(4) and 15(5) are not mutually contradictory. (Paras 125 and 126)

3. Whether exclusion of minority educational institutions from Article 15(5) is violative of Article 14 of the Constitution?

223. Exclusion of the minority educational institutions from Article 15(5) is not violative of Article 14 of the Constitution as the minority educational institutions, by themselves, are a separate class and their rights are protected by other constitutional provisions. (Paras 127 and 128)

4. Whether the constitutional amendment followed the procedure prescribed under Article 368 of the Constitution?

224. The Ninety-third Amendment of the Constitution does not affect the executive power of the State under Article 162 of the Constitution and hence, procedure prescribed under proviso to Article 368(2) is not required to be followed. (Paras 129 to 131)

5. Whether Act 5 of 2007 is constitutionally invalid in view of definition of "Backward Class" and whether the identification of such "Backward Class" based on "caste" is constitutionally valid?

225. Identification of "Backward Class" is not done solely based on caste. Other parameters are followed in identifying the Backward Class. Therefore, Act 5 of 2007 is not invalid for this reason. (Para 163)

6. Whether "creamy layer" is to be excluded from SEBCs?

226. "Creamy layer" is to be excluded from SEBCs. The identification of SEBCs will not be complete and without the exclusion of "creamy layer" such identification may not be valid under Article 15(1) of the Constitution. (Para 173)

7. What should be the parameters for determining the "creamy layer" group?

227. The parameters contained in the Office Memorandum issued by the Government of India, Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training) on 8-9-1993 may be applied. And

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the definition of "Other Backward Classes" under Section 2(*g*) of Act 5 of 2007 should be deemed to mean class or classes of citizens who are socially and educationally backward, and so determined by the Central Government; and if the determination is with reference to caste, then the backward class shall be after excluding the creamy layer. (Paras 174 to 176)

8. Whether the "creamy layer" principle is applicable to the Scheduled Tribes and Scheduled Castes?

228. "Creamy layer" principle is not applicable to the Scheduled Castes and Scheduled Tribes. (Para 186)

9. Whether the principles laid down by the United States Supreme Court for affirmative action such as "suspect legislation", "strict scrutiny" and "compelling State necessity" are applicable to principles of reservation or other affirmative action contemplated under Article 15(5) of the Constitution?

229. The principles laid down by the United States Supreme Court such as "suspect legislation", "strict scrutiny" and "compelling State necessity" are not applicable for challenging the validity of Act 5 of 2007 or reservations or other affirmative action contemplated under Article 15(5) of the Constitution. (Paras 209 and 210)

10. Whether delegation of power to the Union Government to determine as to who shall be the Backward Class is constitutionally valid?

230. The delegation of power to the Union Government to determine as to who shall be the "Other Backward Classes" is not excessive delegation. Such delegation is constitutionally valid. (Paras 211 and 212)

11. Whether the Act is invalid as there is no time-limit prescribed for its operation and no periodical review is contemplated?

231. Act 5 of 2007 is not invalid for the reason that there is no time-limit prescribed for its operation, but a review can be made after a period of 10 years. (Paras 213, 214 and 215)

12. What shall be the educational standard to be prescribed to find out whether any class is educationally backward?

232. The contention that educational standard of matriculation or (10+2) should be the benchmark to find out whether any class is educationally backward is rejected. (Paras 216 and 217)

13. Whether the quantum of reservation provided for in the Act is valid and whether 27% of seats for SEBC was required to be reserved?

233. 27% of seats for Other Backward Classes is not illegal and Parliament must be deemed to have taken into consideration all relevant circumstances when fixing the 27% reservation. (Para 220)

234. These writ petitions are disposed of in light of the above findings, and the "Other Backward Classes" defined in Section 2(*g*) of Act 5 of 2007 is to be read as "Socially and Educationally Backward Classes" other than

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Scheduled Castes and Scheduled Tribes, determined as "Other Backward Classes" by the Central Government and if such determination is with reference to caste, it shall exclude "creamy layer" from among such caste. In Contempt Petition (Civil) No. 112 of 2007 in Writ Petition (C) No. 265 of 2006, no orders are required. It is dismissed.

DR. ARIJIT PASAYAT, J. (*for himself and C.K. Thakker, J.*)— The issues involved in the present writ petitions have far-reaching consequences and in essence pose several questions of seminal importance. In essence, they raise questions which have no easy answers. The complexity can be gauged from the fact that on one hand the petitioners have questioned the logic of providing reservations/quotas for a class of people whom they described as "unidentifiable" or "undetermined" while the respondents justify their action by labelling them as measures taken for upliftment of vast majority of people who have suffered social humiliation and sneer for the social backwardness. Complex questions like whether the expressions "class" and "castes" are synonyms, whether reservations provide the only solution for social empowerment measures, alleged lack of concern for the economically weaker group of citizens are some of the basic issues which need to be addressed.

236. It has been emphatically highlighted by the petitioners that when the ultimate objective is classless and casteless Indian democracy, there is no question of unendingly providing the reservation and that too without any definite data regarding backwardness. In essence, they contend that these measures perpetuate backwardness and do not remove them. In the epicentre of challenge is the Central Educational Institutions (Reservation in Admission) Act, 2006 (in short "the Act") and the Ninety-third Amendment to the Constitution of India. Interestingly, both the petitioners and the respondents rely strongly on certain observations made by this Court in *Indra Sawhney* v. *Union of India*[10] [commonly known as *Indra Sawhney (1)*].

237. When the writ petitions were placed before a Bench of two Judges†, considering the importance of the matter they were referred to be heard by a larger Bench and certain questions which arise for consideration were formulated. That is how these cases are before this Bench.

238. Arguments have been advanced by both the sides as to whether the Constitution contemplates casteless society. While the respondents submit that the Constitution really does not think of a casteless society, it prohibits untouchability in the background of Article 17. It has to be noted that both in Articles 15 and 16 the stress is on non-discrimination on the ground of caste. The Preamble of the Constitution also throws light on this aspect. Ultimately, if the social status of a man goes in the higher direction because of his education, the difference in status gets obliterated. Education is a great leveller. In that sense, the ultimate object is that every Indian citizen should

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

† *Ashoka Kumar Thakur (9)* v. *Union of India*, (2007) 4 SCC 397

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have the social status which is not inferior to another and that would be obliteration of the difference in status. The ultimate objective is to see that no person gets discriminated because of his caste. If that be so, it would not be right to say that the ultimate objective is not the casteless society.

239. Various articles of the Constitution of India and the Preamble provide an insight to the monumental document i.e. the Constitution of India. Article 14 guarantees equality before the law in addition to equal protection of law. Article 15(1) mandates that there shall not be any discrimination against any citizen on the grounds of religion, caste, sex, race, or place of birth. Article 16(1) makes the fundamental right of equality specific relating to job opportunities. Article 16(2) significantly speaks of government employment by providing that no citizen shall be ineligible only on the grounds of religion, race, caste, sex, descent, place of birth or any of them or discriminated against in respect of any employment or office under the State. Article 16(4) is an important provision which empowers the State permitting the provision for the reservation of appointments and posts in favour of any backward class of citizens which in the opinion of the State is not adequately represented in the services of the State. The stress is on backwardness of the citizens and inadequate representation in the services under the State.

240. If one takes a walk on the pathway relating to the views expressed by this Court in the matter of reservation or quotas for the Other Backward Classes one comes across many milestones. Some of them were noted extensively in *Indra Sawhney (1)*[10]. They are, *State of Madras* v. *Champakam Dorairajan*[9], *A. Peeriakaruppan (Minor)* v. *State of T.N.*[28], *State of A.P.* v. *U.S.V. Balram*[23], *Janki Prasad Parimoo* v. *State of J&K*[66], *State of U.P.* v. *Pradip Tandon*[42], *State of Kerala* v. *N.M. Thomas*[24], *K.S. Jayasree* v. *State of Kerala*[67], *K.C. Vasanth Kumar* v. *State of Karnataka*[25] and *Indra Sawhney* v. *Union of India*[16] [known as *Indra Sawhney (2)*].

241. Two recent decisions have also been highlighted by the parties. They are *M. Nagaraj* v. *Union of India*[11] and *Nair Service Society* v. *State of Kerala*[68]. It is to be noted that some of the arguments which have been raised relate to broad principles of law and the jurisprudential approach. They are

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385
9 AIR 1951 SC 226 : 1951 SCR 525
28 (1971) 1 SCC 38
23 (1972) 1 SCC 660
66 (1973) 1 SCC 420 : 1973 SCC (L&S) 217
42 (1975) 1 SCC 267
24 (1976) 2 SCC 310 : 1976 SCC (L&S) 227
67 (1976) 3 SCC 730
25 1985 Supp SCC 714
16 (2000) 1 SCC 168, at 202 (para 65)
11 (2006) 8 SCC 212
68 (2007) 4 SCC 1

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the applicability of the foreign decisions, more particularly, the decisions of the American courts. They relate to the principles of strict scrutiny and narrow tailoring.

242. Learned counsel for the petitioners have stressed on these decisions to show as to what should be the approach in matters relating to social empowerment. Learned counsel for the respondents have however submitted that the approach is to be different because the problems before the American courts essentially related to individual rights while the Indian courts are more concerned with group rights i.e. rights of class of citizens. We shall deal with this in some length later.

243. The other issue which was hotly contested related to the exclusion of the creamy layer.

244. One of the major challenges raised by the petitioners is based on the allegation that there is no acceptable data for fixing the percentage of Other Backward Classes. This has been highlighted to show that there is no rational basis for fixing the percentage of reservation at 27% for the Other Backward Classes. It is pointed out that the figures appear to have been culled out from some survey done more than seven decades back i.e. 1931 to be precise. Thereafter, there seems to be no definite data to know the actual percentage.

245. It is pointed out that in *Indra Sawhney (1)*[10] this Court had laid considerable stress on having a commission to identify and determine the criteria for determining the socially and educationally backward classes. Very little appears to have been done. It is surprising, it was contended, that there has been not even a single case of exclusion but on the other hand more than 250 new castes/sub-castes have been added. This shows that there is really no serious attempt to identify the Other Backward Classes. On the other hand, there has been overzealous anxiety to include more number of people so that they can get the benefits of reservations/quotas and this has been termed as "vote bank politics". It is highlighted that even when a serious matter relating to adoption of the Act was under consideration there was hardly any discussion and every political party was exhibiting its anxiety to get the statute passed. Crocodile tears were shed to show lip sympathy for the backwardness of the people. In reality, the object was to give a wrong impression to the people that they were concerned about the backwardness of the people and they were the "Messiahs" of the poor and the downtrodden. In reality, in their hearts the ultimate object was to grab more votes. The lack of seriousness of the debate exhibits that the debate was nothing but a red herring to divert attention from the sinister, politically motivated design masked by the "tearful" faces of the people masquerading as champions of the poor and downtrodden.

246. It is pointed out that contrary to what was being projected by the parties when the discussions were going on, in an impassioned speech by late Rajiv Gandhi who was the leader of opposition at an earlier point of time, the

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

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fallacies in adopting the Mandal Report were highlighted. It is surprising, it is submitted, that those very people who were the champions of anti-reservation and anti-quota as members of the Opposition, have done a "somersault" and were saying just the opposite. It is pointed out that when one member Shri P.C. Alexander exhibited real courage and highlighted the fallacies in the stand taken, his view appears to have been lightly brushed aside and the statute hustled through.

247. It is also submitted that the objectivity and sanctity of the report submitted in Parliament commonly known as "Oversight Committee Report" has been lightly brushed aside. This only indicates that there was no serious debate about the consequences. The foresight of late Rajiv Gandhi in saying that the country will be divided on caste basis and that would lead to disaster has been prophetically proved to be correct and it is a reality. It is submitted that the enactment has created a sharp divide amongst the citizens of the country and it has not even an iota of good results flowing from it. On the contrary, the country will be divided sharply leading to social unrest and caste wars. It is pointed out that in the recent past such caste wars have resulted in large-scale loss of life and destruction of public properties.

248. The relevance of the parliamentary debate or the speech of the Minister has been highlighted by this Court in many cases. It is a settled position in law that there can be only limited use of the parliamentary debate. The courts should not normally critically analyse the proceedings of Parliament. This flows from a very fundamental aspect i.e. mutual respect of Parliament and the judiciary for each other. Each of these great institutions in a democracy operates in different fields. It is not expected that one wing of democracy would criticise the manner of functioning of another wing. That would be against the basic desirability of mutual respect. Any opinion or comment or criticism about the manner of functioning of one by the other would not only be undesirable but imperatively avoidable. The citizens of this country expect a great deal from Parliament and the judiciary. It is but natural that the people of this country would be disappointed and disheartened and their hopes will be shattered if instead of showing respect for each other, there is mudslinging, unwanted criticism or impermissible criticism about the manner of functioning or the rationale of a decision or a view taken. In this context, it would be relevant to take note of what this Court said in *Builders Assn. of India* v. *Union of India*[69] and *K. Nagaraj* v. *State of A.P.*[70]

249. In *State of Mysore* v. *R.V. Bidap*[71] it was observed as follows: (SCC pp. 339-41, para 5)

> "5. Anglo-American jurisprudence, unlike other systems, has generally frowned upon the use of parliamentary debates and press discussions as throwing light upon the meaning of statutory provisions.

69 1995 Supp (1) SCC 41
70 (1985) 1 SCC 523 : 1985 SCC (L&S) 280
71 (1974) 1 SCC 337 : 1973 SCC (L&S) 538

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Willes, J., in *Millar* v. *Taylor*[72] stated that the sense and meaning of an Act of Parliament must be collected from what it says when passed into law, and not from the history of changes it underwent in the House where it took its rise. That history is not known to the other House or to the Sovereign. In *Assam Railways and Trading Co. Ltd.* v. *IRC*[73] (AC at p. 458) Lord Wright in the Privy Council said: (All ER p. 655 H-I)

> '... It is clear that the language of a Minister of the Crown in proposing in Parliament a measure which eventually becomes law is inadmissible, and the report of Commissioners is even more removed from value as evidence of intention, because it does not follow that their recommendations were accepted.'

The rule of grammatical construction has been accepted in India before and after Independence. In *State of Travancore-Cochin* v. *Bombay Co. Ltd.*[74], Chief Justice Patanjali Sastri delivering the judgment of the Court, said: (AIR pp. 368-69, para 16)

> '*16.* It remains only to point out that the use made by the learned Judges below of the speeches made by the members of the Constituent Assembly in the course of the debates on the Draft Constitution is unwarranted. That this form of extrinsic aid to the interpretation of statutes is not admissible has been generally accepted in England, and the same rule has been observed in the construction of Indian statutes—see *Administrator General of Bengal* v. *Prem Lal Mullick*[75], IA at p. 118. The reason behind the rule was explained by one of us in *A.K. Gopalan* v. *State of Madras*[76] thus: (AIR p. 73, para 112)
>
> > "*112.* ... A speech made in the course of the debate on a Bill could at best be indicative of the subjective intent of the Speaker, but it could not reflect the inarticulate mental processes lying behind the majority vote which carried the Bill. Nor is it reasonable to assume that the minds of all those legislators were in accord." '

Or, as it is more tersely put in an American case:

> 'Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other. *United States* v. *Trans-Missouri Freight Assn.*[77], US at p. 318 (sic).

This rule of exclusion has not always been adhered to in America, and sometimes distinction is made between using such material to ascertain the purpose of a statute and using it for ascertaining its meaning. It would seem that the rule is adopted in

72 (1558-1774) All ER Rep 119 : 98 ER 201 : (1769) 4 Burr 2303
73 1935 AC 445 : 1934 All ER Rep 646 (HL)
74 AIR 1952 SC 366
75 (1894-95) 22 IA 107 : ILR 22 Cal 788 (PC)
76 AIR 1950 SC 27 : 1950 SCR 88
77 41 L Ed 1007 : 166 US 290 (1896)

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Canada and Australia—see *Craies on Statute Law*, 5th Edn., p. 122 (pp. 368-9).'

In the American jurisdiction, a more natural note has sometimes been struck. Mr Justice Frankfurter was of the view that*:

> 'If the purpose of construction is the ascertainment of meaning, nothing that is logically relevant should be excluded, and yet, the rule of exclusion, which is generally followed in England, insists that, in interpreting statutes, the proceedings in the legislatures, including speeches delivered when the statute was discussed and adopted, cannot be cited in courts.'

Crawford on Statutory Construction at p. 388 notes that:

> 'The judicial opinion on this point is certainly not quite uniform and there are American decisions to the effect that the general history of a statute and the various steps leading up to an enactment including amendments or modifications of the original Bill and reports of Legislative Committees can be looked at for ascertaining the intention of the legislature where it is in doubt; but they hold definitely that the legislative history is inadmissible when there is no obscurity in the meaning of the statute.'

The rule of exclusion has been criticised by jurists as artificial. The trend of academic opinion and the practice in the European system suggest that interpretation of a statute being an exercise in the ascertainment of meaning, everything which is logically relevant should be admissible. Recently, an eminent Indian jurist has reviewed the legal position and expressed his agreement with Julius Stone and Justice Frankfurter**. Of course, nobody suggests that such extrinsic materials should be decisive but they must be admissible. Authorship and interpretation must mutually illumine and interact. There is authority for the proposition that resort may be had to these sources with great caution and only when incongruities and ambiguities are to be resolved. (*A.K. Gopalan* v. *State of Madras*[76].) There is a strong case for whittling down the rule of exclusion followed in the British courts and for less apologetic reference to legislative proceedings and like materials to read the meaning of the words of a statute. Where it is plain, the language prevails, but where there is obscurity or lack of harmony with other provisions and in other special circumstances, it may be legitimate to take external assistance such as the object of the provisions, the mischief sought to be remedied, the social context, the words of the authors and other allied matters. The law of statutory construction is a strategic branch of jurisprudence which must, it may be felt, respond to the great social changes but a conclusive pronouncement on the particular point arising here need not detain us because nothing decisive as between the alternative interpretations flows

* See reference in *The Indian Parliament and the Fundamental Rights — Tagore Law Lectures*, Chapter VI, p. 141.

** *Ibid.*, p. 142.

76 AIR 1950 SC 27 : 1950 SCR 88

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from a reliance on the Constituent Assembly proceedings or the broad purposes of the statutory scheme."

250. One thing however needs to be noted here that mere short length of debate cannot and does not become a ground for invalidity of the decision and the reverse is also not true.

251. Elaborate arguments have been advanced about the applicability of the foreign decisions, more particularly, the American courts. It is to be noted that the American cases which have been highlighted by the petitioners relate essentially to strict classification, strict scrutiny and narrow tailoring. This issue is of considerable importance when so much debate is taking place about respect being shown by courts of a country to a decision of another country. The factual scenario and the basic issues involved in the cases sometimes throw light on the controversy.

252. It has been rightly contended by Mr Vahanvati and Mr Gopal Subramanium that there is a conceptual difference between the cases decided by the American Supreme Court and the cases at hand. In *Saurabh Chaudri* v. *Union of India*[26] it was held that the logic of strict classification and strict scrutiny does not have much relevance in the cases of the nature at hand. If one looks at the different statutes in India, Article 14 of the Constitution is conceptually different from the Fourteenth Amendment to the American Constitution as was noted in *State of W.B.* v. *Anwar Ali Sarkar*[78] and *State of Bombay* v. *F.N. Balsara*[79]. In *Anwar Ali case*[78], SCR at pp. 363-64 it was noted as follows: (AIR pp. 103-04, paras 85-87)

> "*85*. I find it impossible to read these portions of the Constitution without regard to the background out of which they arose. I cannot blot out their history and omit from consideration the brooding spirit of the times. They are not just dull, lifeless words static and hidebound as in some mummified manuscript, but living flames intended to give life to a great nation and order its being, tongues of dynamic fire potent to mould the future as well as guide the present. The Constitution must, in my judgment, be left elastic enough to meet from time to time the altering conditions of a changing world with its shifting emphasis and differing needs. I feel therefore that in each case Judges must look straight into the heart of things and regard the facts of each case concretely much as a jury would do; and yet, not quite as a jury, for we are considering here a matter of law and not just one of fact. Do these 'laws' which have been called in question offend a still greater law before which even they must bow?
>
> *86*. Doing that what is the history of these provisions? They arose out of the fight for freedom in this land and are but the endeavour to compress into a few pregnant phrases some of the main attributes of the sovereign democratic republic as seen through Indian eyes. There was

26 (2003) 11 SCC 146
78 AIR 1952 SC 75 : 1952 SCR 284
79 AIR 1951 SC 318 : 1951 SCR 682

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present to the collective mind of the Constituent Assembly, reflecting the mood of the peoples of India, the memory of grim trials by hastily constituted tribunals with novel forms of procedure set forth in ordinance promulgated in haste because of what was then felt to be the urgent necessities of the moment. Without casting the slightest reflection on the Judges and the courts so constituted, the fact remains that when these tribunals were declared invalid and the same persons were retried in the ordinary courts, many were acquitted, many who had been sentenced to death were absolved. That was not the fault of the Judges but of the imperfect tools with which they were compelled to work. The whole proceedings were repugnant to the peoples of this land and, to my mind, Article 14 is but a reflex of this mood.

87. What I am concerned to see is not whether there is absolute equality in any academical sense of the term but whether the collective conscience of a sovereign democratic republic can regard the impugned law, contrasted with the ordinary law of the land, as the sort of substantially equal treatment which men of resolute minds and unbiased views can regard as right and proper in a democracy of the kind we have proclaimed ourselves to be. Such views must take into consideration the practical necessities of Government, the right to alter the laws and many other facts, but in the forefront must remain the freedom of the individual from unjust and unequal treatment, unequal in the broad sense in which a democracy would view it. In my opinion, 'law' as used in Article 14 does not mean the 'legal precepts which are actually recognised and applied in the tribunals of a given time and place' but 'the more general body of doctrine and tradition from which those precepts are chiefly drawn, and by which we criticise, them'."

253. It needs no emphasis that the formal equality concept came to be recognised in USA after about 10 years of its inception. In the first phase of the US constitutional law there was only affirmative action but in the Indian Constitution right from the beginning affirmative action has been provided, for example, provisions made for the Scheduled Castes and Scheduled Tribes. A distinction has been noted in para 640 of *Indra Sawhney (1)*[10]. Articles 38(1) and 38(2) read with Article 46 of the Constitution make the position clear that the State is charged with the duty to secure interests of the weaker sections of the people and minimise the inequalities in income. The Constitution from its inception contained Article 17 which abolishes untouchability.

254. In this context the following paras need to be noted:

In *Minerva Mills Ltd.* v. *Union of India*[13] in para 63 it was held as follows: (SCC pp. 656-57)

"*63.* The learned Attorney General argues that the State is under an obligation to take steps for promoting the welfare of the people by

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

13 (1980) 3 SCC 625

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bringing about a social order in which social, economic and political justice shall inform all the institutions of the national life. He says that the deprivation of some of the fundamental rights for the purpose of achieving this goal cannot possibly amount to a destruction of the basic structure of the Constitution. We are unable to accept this contention. The principles enunciated in Part IV are not the proclaimed monopoly of democracies alone. They are common to all polities, democratic or authoritarian. Every State is goal-oriented and claims to strive for securing the welfare of its people. The distinction between the different forms of Government consists in that a real democracy will endeavour to achieve its objectives through the discipline of fundamental freedoms like those conferred by Articles 14 and 19. Those are the most elementary freedoms without which a free democracy is impossible and which must therefore be preserved at all costs. Besides, as observed by Brandies, J., the need to protect liberty is the greatest when government's purposes are beneficent. If the discipline of Article 14 is withdrawn and if immunity from the operation of that article is conferred, not only on laws passed by Parliament but on laws passed by the State Legislatures also, the political pressures exercised by numerically large groups can tear the country asunder by leaving it to the legislature to pick and choose favoured areas and favourite classes for preferential treatment."

255. In *Kesavananda Bharati* v. *State of Kerala*[17] it was held as under: (SCC p. 427, paras 531-32)

"*531*. According to Mr Palkhivala, the test of the true width of a power is not how probable it is that it may be exercised but what can possibly be done under it; that the abuse or misuse of power is entirely irrelevant; that the question of the extent of the power cannot be mixed up with the question of its exercise and that when the real question is as to the width of the power, expectation that it will never be used is as wholly irrelevant as an imminent danger of its use. The court does not decide what is the best and what is the worst. It merely decides what can possibly be done under a power if the words conferring it are so construed as to have an unbounded and limitless width, as claimed on behalf of the respondents.

532. It is difficult to accede to the submission on behalf of the respondents that while considering the consequences with reference to the width of an amending power contained in a Constitution any question of its abuse is involved. It is not for the courts to enter into the wisdom or policy of a particular provision in a Constitution or a statute. That is for the Constitution makers or for Parliament or the legislature. But that the real consequences can be taken into account while judging the width of the power is well settled. The court cannot ignore the consequences to which a particular construction can lead while ascertaining the limits of the provisions granting the power. According to the learned Attorney

17 (1973) 4 SCC 225

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General, the declaration in the Preamble to our Constitution about the resolve of the People of India to constitute it into a sovereign democratic republic is only a declaration of an intention which was made in 1947 and it is open to the amending body now under Article 368 to change the sovereign democratic republic into some other kind of polity. This by itself shows the consequence of accepting the construction sought to be put on the material words in that article for finding out the ambit and width of the power conferred by it."

256. In *Sajjan Singh* v. *State of Rajasthan*[80] it was held as follows: (AIR pp. 851-52 & 853, paras 6, 8-9 & 14)

"*6*. It is obvious that the fundamental rights enshrined in Part III are not included in the proviso, and so, if Parliament intends to amend any of the provisions contained in Articles 12 to 35 which are included in Part III, it is not necessary to take recourse to the proviso and to satisfy the additional requirements prescribed by it. Thus far, there is no difficulty. But in considering the scope of Article 368, it is necessary to remember that Article 226, which is included in Chapter V of Part VI of the Constitution, is one of the constitutional provisions which fall under Clause (*b*) of the proviso; and so, it is clear that if Parliament intends to amend the provisions of Article 226, the Bill proposing to make such an amendment must satisfy the requirements of the proviso. The question which calls for our decision is: what would be the requirement about making an amendment in a constitutional provision contained in Part III, if as a result of the said amendment, the powers conferred on the High Courts under Article 226 are likely to be affected? The petitioners contend that since it appears that the powers prescribed by Article 226 are likely to be affected by the intended amendment of the provisions contained in Part III, the Bill introduced for the purpose of making such an amendment, must attract the proviso, and as the impugned Act has admittedly not gone through the procedure prescribed by the proviso, it is invalid; and that raises the question about the construction of the provisions contained in Article 368 and the relation between the substantive part of Article 368 with its proviso.

* * *

8. On the other hand, if the substantive part of Article 368 is very liberally and generously construed and it is held that even substantial modification of the fundamental rights which may make a very serious and substantial inroad on the powers of the High Courts under Article 226 can be made without invoking the proviso, it may deprive Clause (*b*) of the proviso of its substance. In other words, in construing both the parts of Article 368, the rule of harmonious construction requires that if the direct effect of the amendment of fundamental rights is to make a substantial inroad on the High Courts' powers under Article 226, it would become necessary to consider whether the proviso would cover such a

80 AIR 1965 SC 845

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case or not. If the effect of the amendment made in the fundamental rights on the powers of the High Courts prescribed by Article 226, is indirect, incidental, or is otherwise of an insignificant order, it may be that the proviso will not apply. The proviso would apply where the amendment in question seeks to make any change, inter alia, in Article 226, and the question in such a case would be: does the amendment seek to make a change in the provisions of Article 226? The answer to this question would depend upon the effect of the amendment made in the fundamental rights.

9. In dealing with constitutional questions of this character, courts generally adopt a test which is described as the pith and substance test. In *Attorney General for Ontario* v. *Reciprocal Insurers*[81] the Privy Council was called upon to consider the validity of the Reciprocal Insurance Act, 1922 (12 and 13 Geo. 5, Ont., c. 62) and Section 508*c* which had been added to the Criminal Code of Canada by Sections 7 and 8 Geo. 5, c. 29 Dom. Mr Justice Duff, who spoke for the Privy Council, observed that in an enquiry like the one with which the Privy Council was concerned in that case, 'it has been formally laid down in judgments of this Board, that in such an inquiry the courts must ascertain the "true nature and character" of the enactment': *Citizens Insurance Co. of Canada* v. *Parsons*[82], its 'pith and substance': *Union Colliery Co. of British Columbia Ltd.* v. *Bryden*[83]; and it is the result of this investigation, not the form alone, which the statute may have assumed under the hand of the draughtsman, that will determine within which of the categories of subject-matters mentioned in Sections 91 and 92 the legislation falls; and for this purpose the legislation must be 'scrutinised in its entirety': *Great West Saddlery Co.* v. *R.*[84], AC at p. 117. It is not necessary to multiply authorities in support of the proposition that in considering the constitutional validity of the impugned Act, it would be relevant to inquire what the pith and substance of the impugned Act is. This legal position can be taken to be established by the decisions of this Court which have consistently adopted the view expressed by Justice Duff, to which we have just referred.

* * *

14. Thus, it would be seen that the genesis of the amendments made by Parliament in 1951 by adding Articles 31-A and 31-B to the Constitution, clearly is to assist the State Legislatures in this country to give effect to the economic policy in which the party in power passionately believes to bring about much needed agrarian reform. It is with the same object that the second amendment was made by Parliament in 1955, and as we have just indicated, the object underlying the

81 1924 AC 328
82 (1881) 7 AC 96 : (1881-85) All ER Rep 1179
83 1899 AC 580 (PC)
84 (1921) 2 AC 91 : 1921 All ER Rep 605 (PC)

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amendment made by the impugned Act is also the same. Parliament desires that agrarian reform in a broad and comprehensive sense must be introduced in the interests of a very large section of Indian citizens who live in villages and whose financial prospects are integrally connected with the pursuit of progressive agrarian policy. Thus, if the pith and substance test is applied to the amendment made by the impugned Act, it would be clear that Parliament is seeking to amend fundamental rights solely with the object of removing any possible obstacle in the fulfilment of the socio-economic policy in which the party in power believes. If that be so, the effect of the amendment on the area over which the High Courts' powers prescribed by Article 226 operate, is incidental and in the present case can be described as of an insignificant order. The impugned Act does not purport to change the provisions of Article 226 and it cannot be said even to have that effect directly or in any appreciable measure. That is why we think that the argument that the impugned Act falls under the proviso, cannot be sustained. It is an Act the object of which is to amend the relevant articles in Part III which confer fundamental rights on citizens and as such it falls under the substantive part of Article 368 and does not attract the provisions of Clause (*b*) of the proviso. If the effect of the amendment made in the fundamental rights on Article 226 is direct and not incidental and is of a very significant order, different considerations may perhaps arise. But in the present case, there is no occasion to entertain or weigh the said considerations. Therefore, the main contention raised by the petitioners and the interveners against the validity of the impugned Act must be rejected."

257. In *Kihoto Hollohan* v. *Zachillhu*[85] it was observed as follows: (SCC pp. 691-92, paras 61-62)

"*61*. The propositions that fell for consideration in *Shankari Prasad Singh*[86] and *Sajjan Singh*[80] cases are indeed different. There the jurisdiction and power of the courts under Articles 136 and 226 were not sought to be taken away nor was there any change brought about in those provisions either 'in terms or in effect', since the very rights which could be adjudicated under and enforced by the courts were themselves taken away by the Constitution. The result was that there was no area for the jurisdiction of the courts to operate upon. Matters are entirely different in the context of Para 7. Indeed the aforesaid cases, by necessary implication support the point urged for the petitioners. The changes in Chapter IV of Part V and Chapter V of Part VI envisaged by the proviso need not be direct. The change could be either 'in terms of or in effect'. It is not necessary to change the language of Articles 136 and 226 of the Constitution to attract the proviso. If in effect these articles are rendered ineffective and made inapplicable where these articles could otherwise

85 1992 Supp (2) SCC 651
86 *Shankari Prasad Singh Deo* v. *Union of India*, AIR 1951 SC 458 : 1952 SCR 89
80 *Sajjan Singh* v. *State of Rajasthan*, AIR 1965 SC 845

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have been invoked or would, but for Para 7, have operated there is 'in effect' a change in those provisions attracting the proviso. Indeed this position was recognised in *Sajjan Singh case*[80] where it was observed: (AIR p. 853, para 14)

> '*14.* ... If the effect of the amendment made in the fundamental rights on Article 226 is direct and not incidental and is of a very significant order, different considerations may perhaps arise.'

62. In the present case, though the amendment does not bring in any change directly in the language of Articles 136, 226 and 227 of the Constitution, however, in effect Para 7 curtails the operation of those articles respecting matters falling under the Tenth Schedule. There is a change in the effect in Articles 136, 226 and 227 within the meaning of Clause (*b*) of the proviso to Article 368(2). Para 7, therefore, attracts the proviso and ratification was necessary. Accordingly, on Point B, we hold:

> 'That having regard to the background and evolution of the principles underlying the Constitution (Fifty-second Amendment) Act, 1985, insofar as it seeks to introduce the Tenth Schedule in the Constitution of India, the provisions of Para 7 of the Tenth Schedule of the Constitution in terms and in effect bring about a change in the operation and effect of Articles 136, 226 and 227 of the Constitution of India and, therefore, the amendment would require to be ratified in accordance with the proviso to Clause (2) of Article 368 of the Constitution of India.' "

258. In *Sarwan Singh* v. *Kasturi Lal*[87] it was observed as follows: (SCC pp. 760-61, paras 20-21 & 23)

> "*20.* Speaking generally, the object and purpose of a legislation assume greater relevance if the language of the law is obscure and ambiguous. But, it must be stated that we have referred to the object of the provisions newly introduced into the Delhi Rent Act in 1975 not for seeking light from it for resolving an ambiguity, for there is none, but for a different purpose altogether. When two or more laws operate in the same field and each contains a non obstante clause stating that its provisions will override those of any other law, stimulating and incisive problems of interpretation arise. Since statutory interpretation has no conventional protocol, cases of such conflict have to be decided in reference to the object and purpose of the laws under consideration. A piquant situation, like the one before us, arose in *Ram Narain* v. *Simla Banking & Industrial Co. Ltd.*[88], the competing statutes being the Banking Companies Act, 1949 as amended by Act 52 of 1953, and the Displaced Persons (Debts Adjustment) Act, 1951. Section 45-A of the Banking Companies Act, which was introduced by the amending Act of

80 *Sajjan Singh* v. *State of Rajasthan*, AIR 1965 SC 845
87 (1977) 1 SCC 750
88 AIR 1956 SC 614

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1953, and Section 3 of the Displaced Persons Act, 1951 contained each a non obstante clause, providing that certain provisions would have effect 'notwithstanding anything inconsistent therewith contained in any other law for the time being in force …'. This Court resolved the conflict by considering the object and purpose of the two laws and giving precedence to the Banking Companies Act by observing: (AIR p. 622, para 7)

> '*7.* … It is, therefore, desirable to determine the overriding effect of one or the other of the relevant provisions in these two Acts, in a given case, on much broader considerations of the purpose and policy underlying the two Acts and the clear intendment conveyed by the language of the relevant provisions therein.'

As indicated by us, the special and specific purpose which motivated the enactment of Section 14-A and Chapter III-A of the Delhi Rent Act would be wholly frustrated if the provisions of the Slum Clearance Act requiring permission of the competent authority were to prevail over them. Therefore, the newly introduced provisions of the Delhi Rent Act must hold the field and be given full effect despite anything to the contrary contained in the Slum Clearance Act.

21. For resolving such inter se conflicts, one other test may also be applied though the persuasive force of such a test is but one of the factors which combine to give a fair meaning to the language of the law. That test is that the later enactment must prevail over the earlier one. Section 14-A and Chapter III-A having been enacted with effect from 1-12-1975 are later enactments in reference to Section 19 of the Slum Clearance Act which, in its present form, was placed on the statute book with effect from 28-2-1965 and in reference to Section 39 of the same Act, which came into force in 1956 when the Act itself was passed. The legislature gave overriding effect to Section 14-A and Chapter III-A with the knowledge that Sections 19 and 39 of the Slum Clearance Act contained non obstante clauses of equal efficacy. Therefore the later enactment must prevail over the former. The same test was mentioned with approval by this Court in *Ram Narain case*[88] at p. 622.

* * *

23. The argument of implied repeal has also no substance in it because our reason for according priority to the provisions of the Delhi Rent Act is not that the Slum Clearance Act stands impliedly repealed *pro tanto*. Bearing in mind the language of the two laws, their object and purpose, and the fact that one of them is later in point of time and was enacted with the knowledge of the non obstante clauses in the earlier law, we have come to the conclusion that the provisions of Section 14-A and Chapter III-A of the Rent Control Act must prevail over those contained in Sections 19 and 39 of the Slum Clearance Act."

88 *Ram Narain* v. *Simla Banking & Industrial Co. Ltd.*, AIR 1956 SC 614

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259. In *J.K. Cotton Spg. and Wvg. Mills Co. Ltd.* v. *State of U.P.*[89] it was observed as under: (AIR p. 1174, para 9)

"*9*. There will be complete harmony however if we hold instead that Clause 5(*a*) will apply in all other cases of proposed dismissal or discharge except where an inquiry is pending within the meaning of Clause 23. We reach the same result by applying another well-known rule of construction that general provisions yield to special provisions. The learned Attorney General seemed to suggest that while this rule of construction is applicable to resolve the conflict between the general provision in one Act and the special provision in another Act, the rule cannot apply in resolving a conflict between general and special provisions in the same legislative instrument. This suggestion does not find support in either principle or authority. The rule that general provisions should yield to specific provisions is not an arbitrary principle made by lawyers and Judges but springs from the common understanding of men and women that when the same person gives two directions one covering a large number of matters in general and another to only some of them his intention is that these latter directions should prevail as regards these while as regards all the rest the earlier direction should have effect. In *Pretty* v. *Solly*[90] (quoted in *Craies on Statute Law* at p. 206, 6th Edn.) Romilly, M.R., mentioned the rule thus: (ER p. 1034)

> '... The rule is, that wherever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply.'

The rule has been applied as between different provisions of the same statute in numerous cases some of which only need be mentioned: *De Winton* v. *Brecon Corpn.*[91], *Churchill* v. *Crease*[92], *United States* v. *Chase*[93] and *Carroll* v. *Greenwich Insurance Co.*[94]"

260. In *R.M.D. Chamarbaugwalla* v. *Union of India*[95] it was held as under: (AIR pp. 633 & 636-37, paras 12 & 21-22)

"*12*. The question whether a statute which is void in part is to be treated as void *in toto*, or whether it is capable of enforcement as to that part which is valid is one which can arise only with reference to laws enacted by bodies which do not possess unlimited powers of legislation, as, for example, the legislatures in a Federal Union. The limitation on

89 AIR 1961 SC 1170 : (1961) 3 SCR 185
90 53 ER 1032 : (1859) 26 Beav 606
91 (1859) 28 LJ Ch 598
92 (1828) 5 Bing 177
93 34 L Ed 117 : 135 US 255 (1889)
94 50 L Ed 246 : 199 US 401 (1905)
95 AIR 1957 SC 628 : 1957 SCR 930

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their powers may be of two kinds: it may be with reference to the subject-matter on which they could legislate, as, for example, the topics enumerated in the Lists in the Seventh Schedule in the Indian Constitution, Sections 91 and 92 of the Canadian Constitution, and Section 51 of the Australian Constitution; or it may be with reference to the character of the legislation which they could enact in respect of subjects assigned to them, as for example, in relation to the fundamental rights guaranteed in Part III of the Constitution and similar constitutionally protected rights in the American and other Constitutions. When a legislature whose authority is subject to limitations aforesaid enacts a law which is wholly in excess of its powers, it is entirely void and must be completely ignored. But where the legislation falls in part within the area allotted to it and in part outside it, it is undoubtedly void as to the latter; but does it on that account become necessarily void in its entirety? The answer to this question must depend on whether what is valid could be separated from what is invalid, and that is a question which has to be decided by the court on a consideration of the provisions of the Act. This is a principle well established in American jurisprudence, vide *Cooley's Constitutional Limitations*, Vol. I, Chap. VII, *Crawford on Statutory Construction*, Ch. 16 and *Sutherland on Statutory Construction*, 3rd Edn., Vol. 2, Ch. 24. It has also been applied by the Privy Council in deciding on the validity of laws enacted by the legislatures of Australia and Canada, vide *Attorney General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co. Ltd.*[96] and *Attorney General for Alberta* v. *Attorney General for Canada*[97]. It was approved by the Federal Court in *Hindu Women's Rights to Property Act, In re*[98] and adopted by this Court in *State of Bombay* v. *F.N. Balsara*[79] and *State of Bombay* v. *United Motors (India) Ltd.*[99] These decisions are relied on by Mr Seervai as being decisive in his favour. Mr Palkhivala disputes this position, and maintains that on the decision of the Privy Council in *Punjab Province* v. *Daulat Singh*[100] and of the decisions of this Court in *Romesh Thappar* v. *State of Madras*[101] and *Chintaman Rao* v. *State of M.P.*[102] the question must be answered in his favour. We must now examine the precise scope of these decisions.

* * *

21. ... The resulting position may thus be stated: when a statute is in part void, it will be enforced as regards the rest, if that is severable from what is invalid. It is immaterial for the purpose of this rule whether the

96 1914 AC 237 (PC)
97 1947 AC 503 (PC)
98 1941 FCR 12
79 AIR 1951 SC 318 : 1951 SCR 682
99 AIR 1953 SC 252 : 1953 SCR 1069
100 1946 FCR 1
101 AIR 1950 SC 124 : 1950 SCR 594
102 AIR 1951 SC 118 : 1950 SCR 759

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invalidity of the statute arises by reason of its subject-matter being outside the competence of the legislature or by reason of its provision contravening constitutional prohibitions.

22. That being the position in law, it is now necessary to consider whether the impugned provisions are severable in their application to competitions of a gambling character, assuming of course that the definition of 'prize competition' in Section 2(*d*) is wide enough to include also competitions involving skill to a substantial degree. It will be useful for the determination of this question to refer to certain rules of construction laid down by the American courts, where the question of severability has been the subject of consideration in numerous authorities. They may be summarised as follows:

1. In determining whether the valid parts of a statute are separable from the invalid parts thereof, it is the intention of the legislature that is the determining factor. The test to be applied is whether the legislature would have enacted the valid part if it had known that the rest of the statute was invalid. Vide *Corpus Juris Secundum*, Vol. 82, p. 156; *Sutherland on Statutory Construction*, Vol. 2, pp. 176-77.

2. If the valid and invalid provisions are so inextricably mixed up that they cannot be separated from one another, then the invalidity of a portion must result in the invalidity of the Act in its entirety. On the other hand, if they are so distinct and separate that after striking out what is invalid, what remains is in itself a complete code independent of the rest, then it will be upheld notwithstanding that the rest has become unenforceable. Vide *Cooley's Constitutional Limitations*, Vol. 1 at pp. 360-61; *Crawford on Statutory Construction*, pp. 217-18.

3. Even when the provisions which are valid are distinct and separate from those which are invalid, if they all form part of a single scheme which is intended to be operative as a whole, then also the invalidity of a part will result in the failure of the whole. Vide *Crawford on Statutory Construction*, pp. 218-19.

4. Likewise, when the valid and invalid parts of a statute are independent and do not form part of a scheme but what is left after omitting the invalid portion is so thin and truncated as to be in substance different from what it was when it emerged out of the legislature, then also it will be rejected in its entirety.

5. The separability of the valid and invalid provisions of a statute does not depend on whether the law is enacted in the same section or different sections; (Vide *Cooley's Constitutional Limitations*, Vol. 1, pp. 361-62); it is not the form, but the substance of the matter that is material, and that has to be ascertained on an examination of the Act as a whole and of the setting of the relevant provision therein.

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6. If after the invalid portion is expunged from the statute what remains cannot be enforced without making alterations and modifications therein, then the whole of it must be struck down as void, as otherwise it will amount to judicial legislation. Vide *Sutherland on Statutory Construction*, Vol. 2, p. 194.

7. In determining the legislative intent on the question of separability, it will be legitimate to take into account the history of the legislation, its object, the title and the preamble to it. Vide *Sutherland on Statutory Construction*, Vol. 2, pp. 177-78."

261. In *AIIMS Students' Union* v. *AIIMS*[103] it was observed as follows: (SCC p. 449, para 35)

"*35*. The principle of institutional continuity while seeking admission to higher levels of study as propounded by the learned counsel for the appellants though argued at length does not have much room available for innovative judicial zeal to play, for the ground already stands almost occupied by a set of precedents, more so when we are dealing with professional or technical courses of study. It would suffice to have a brief résumé thereof noticing the details wherever necessary."

It was again highlighted in para 44 as follows: (SCC p. 453)

"*44*. When protective discrimination for promotion of equalisation is pleaded, the burden is on the party who seeks to justify the ex facie deviation from equality. The basic rule is equality of opportunity for every person in the country, which is a constitutional guarantee. A candidate who gets more marks than another is entitled to preference for admission. Merit must be the test when choosing the best, according to this rule of equal chance for equal marks. This proposition has greater importance when we reach the higher levels and education like postgraduate courses. Reservation, as an exception, may be justified subject to discharging the burden of proving justification in favour of the class which must be educationally handicapped—the reservation geared up to getting over the handicap. The rationale of reservation in the case of medical students must be removal of regional or class inadequacy or like disadvantage. Even there the quantum of reservation should not be excessive or societally injurious. The higher the level of the speciality the lesser the role of reservation."

262. A bare reading of the provision goes to show that the burden is on the person who justifies deviation from equality.

263. Even then, this doctrine was upheld by the Supreme Court of USA in *Plessy* v. *Ferguson*[36]. This case involved a challenge to a Louisiana statute that provided for equal but separate accommodations for black and white passengers in trains. The Court rejected the challenge. Brown, J. famously observed:

103 (2002) 1 SCC 428
36 41 L Ed 256 : 163 US 537 (1895)

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> "... If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane." (US at p. 552)

He held that racial segregation was a reasonable exercise of State police power for the promotion of the public good and upheld the law. Thus, even in this second phase, affirmative action was never truly initiated—the country was still struggling to establish even a formally equal society.

264. At the same time, another very important development in its constitutional law was taking place, which would later have a serious impact on affirmative action programmes . This was the birth of the doctrine of strict scrutiny.

265. "Strict scrutiny" is one of the three standards for judicial review of legislative and administrative action developed in the United States, the other being "rational basis" and "intermediate scrutiny".

266. The origin of this standard can be traced to the decision in *United States* v. *Carolene Products*[104]. The question before the Court was whether the Filled Milk Act, 1923 which prohibited the shipment in inter-State commerce of skimmed milk compounded with any fat or oil other than milk fat, so as to resemble milk or cream, transcended the power of Congress to regulate inter-State commerce or infringed the Fifth Amendment. Harlan Stone, J. writing the opinion for the Court, upheld the law, holding that the existence of facts supporting the legislative judgment was to be presumed, for regulatory legislation affecting ordinary commercial transactions was not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it was of such a character as to preclude the assumption that it rested upon some rational basis within the knowledge and experience of the legislators. However, he added what has been described as "the most celebrated footnote in constitutional law": (L Ed p. 1241)

> "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth."

What the Court was saying was that economic legislation would be judged by a standard of "rational basis"—so long as the law was a rational way of furthering a legitimate governmental purpose, it was valid. However, where the legislation "on its face" appeared to be violating any of the fundamental rights, a more exacting standard would be applied.

267. The precise term "strict scrutiny" was used by the Court for the first time in *Skinner* v. *Oklahoma*[105]. The Oklahoma Habitual Criminal Sterilisation Act provided for vasectomy to be performed on any person convicted two or more times for crimes amounting to "felonies involving moral turpitude". Douglas, J., giving the opinion of the Court, described the

104 82 L Ed 1234 : 304 US 144 (1937)
105 86 L Ed 1655 : 316 US 535 (1941)

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statute as violating the right to have offspring—"a right which is basic to the perpetuation of a race". The question before the Court was whether this statute violated the Fourteenth Amendment. Holding that it did, Douglas, J. observed: (US p. 541)

> "... strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws."

268. In India there has to be collective commitment for upliftment of those who needed it. In that sense, the question again comes back to the basic issue as to whether the action taken by the Government can be upheld after making judicial scrutiny. Much assistance is not available to the petitioners from the American decisions.

269. It is to be noted that the doctrine of separation as is prevalent in the American society is not of much consequence in the Indian scenario. It needs to be clarified that the expression "strict scrutiny" has also been used by the Indian courts in *Narendra Kumar* v. *Union of India*[106] but it appears to have been used in different context. What really appears to be the intention for the use of the expression is "careful and deeper scrutiny" and not in the sense of strict scrutiny of the provisions as is prevalent in the American jurisprudence. It is used in different sense. The application appears to be in technical sense in the American courts, for example, *Regents of University of California* v. *Allan Bakke*[31].

270. Some of the judgments of American courts throwing light on the controversy need to be noted.

271. In *Bakke case*[31] it was held as follows:

> "Hence, the purpose of helping certain groups whom the faculty of Davis Medical School perceived as victims of 'societal discrimination' does not justify a classification that imposes disadvantages upon persons like the respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions."
>
> * * *
>
> "The fatal flaw in petitioner's preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment. *Shelley* v. *Kraemer*[107], US at 22. Such rights are not absolute. But when a State's distribution of benefits or imposition of burdens hinges on ancestry or the color of a person's skin or ancestry, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial State interest. The petitioner has failed to carry this burden."

106 AIR 1960 SC 430 : (1960) 2 SCR 375
31 57 L Ed 2d 750 : 438 US 265 (1978)
107 92 L Ed 1161 : 334 US 1 : 68 S Ct 836 : 3 ALR 2d 441 (1947)

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272. In *Grutter* v. *Bollinger*[32] it was held as follows:

"[21, 22a] We acknowledge that 'there are serious problems of justice connected with the idea of preference itself'. *Bakke*[31], US at 298 (opinion of Powell, J.). Narrow tailoring, therefore, requires that a race-conscious admissions program not unduly harm members of any racial group. Even remedial race-based governmental action generally 'remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit'. Id., at 308. To be narrowly tailored, a race-conscious admissions program must not 'unduly burden individuals who are not members of the favored racial and ethnic groups'. *Metro Broadcasting, Inc.* v. *FCC*[108] (O'Connor, J., dissenting).

[22b, 23] We are satisfied that the Law School's admissions program does not. Because the Law School considers 'all pertinent elements of diversity', it can (and does) select non-minority applicants who have greater potential to enhance student body diversity over underrepresented minority applicants. See *Bakke*[31] (opinion of Powell, J.). As Justice Powell recognized in *Bakke*[31], so long as a race-conscious admissions program uses race as a 'plus' factor in the context of individualized consideration, a rejected applicant 'will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname ... His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment'. *Regents of the University of California* v. *Allan Bakke*[31].

[13f, 22C] We agree that, in the context of its individualized inquiry into the possible diversity contributions of all applicants, the Law School's race-conscious admissions program does not unduly harm non-minority applicants.

[24, 25a, 26] We are mindful, however, that '[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race' *Palmore* v. *Sidoti*[109]. Accordingly, race-conscious admissions policies must be limited in time. This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle. We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point. The Law School, too, concedes that all 'race-conscious programs

32 156 L Ed 2d 304 : 539 US 306 (2003)
31 *Regents of the University of California* v. *Allan Bakke*, 57 L Ed 2d 750 : 438 US 265 (1978)
108 111 L Ed 2d 445 : 497 US 547 : 110 S Ct 2997 (1990)
109 80 L Ed 2d 421 : 466 US 429 : 104 S Ct 1879 (1984)

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must have reasonable durational limits'. Brief for respondent Bollinger et al. 32.

[25b] In the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity. Universities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by State law, are currently engaged in experimenting with a wide variety of alternative approaches. Universities in other States can and should draw on the most promising aspects of these race-neutral alternatives as they develop. Cf. *United States* v. *Lopez*[110] (Kennedy, J., concurring) ("[T]he States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear"). The requirement that all race-conscious admissions programs have a termination point "assure[s] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself". *Richmond* v. *J.A. Croson Co.*[61], US at 510 (plurality opinion); *see also* Nathanson & Bartnik. The Constitutionality of Preferential Treatment for Minority Applicants to Professional Schools, *58 Chicago Bar Rec. 282, 293* (May-June 1977) ("It would be a sad day indeed, were America to become a quota-ridden society, with each identifiable minority assigned proportional representation in every desirable walk of life. But that is not the rationale for programs of preferential treatment; the acid test of their justification will be their efficacy in eliminating the need for any racial or ethnic preferences at all.").

273. The provisions of the American Constitution in the United States relating to formal equality concept do not appear to have operated from the beginning of the American Constitution.

274. Although even under the 1919 and 1935 Government of India Acts the rights of certain class of people like the Scheduled Castes, Scheduled Tribes and the deprived classes have been recognised, in America, the rights have been conferred on individuals and (*sic* not) so much on the groups. The freedoms contemplated by the Indian Constitution originally related to seven categories which presently stand at six after the property rights were deleted. The stand of Mr Vahanvati and Mr Gopal Subramanium is that the logic of strict scrutiny, compelling the Government and narrow tailoring do not have relevance so far as the present case is concerned.

275. In *Thomas case*[24] it was clearly noticed by this Court that American conditions do not apply adequately to the Indian scenario. Unlike USA, the targeted beneficiaries are alien to our Constitution. In India cognizance has

110 514 US 549 : 131 L Ed 2d 626 : 115 S Ct 1624 (1995)
61 488 US 469 (1989)
24 *State of Kerala* v. *N.M. Thomas*, (1976) 2 SCC 310 : 1976 SCC (L&S) 227

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been taken constitutionally. The victims of untouchability, identifying social and economic backwardness have been accepted as permissible measures. However, the question how long they can be continued is another aspect which shall be dealt with separately. Rationality in that sense is a measure for the special provisions. But the question that still needs to be addressed is whether these groups are really identifiable. While formulating the policy all factors need not be specifically expressed but there must be some criteria to identify social and educational backwardness.

276. In *A.K. Roy* v. *Union of India*[30] it was noted as follows: (SCC p. 288, para 8)

> "*8*. We are not, as we cannot be, unmindful of the danger to people's liberties which comes in any community from what is called the tyranny of the majority. Uncontrolled power in the executive is a great enemy of freedom and therefore, eternal vigilance is necessary in the realm of liberty. But we cannot transplant, in the Indian context and conditions, principles which took birth in other soils, without a careful examination of their relevance to the interpretation of our Constitution. No two Constitutions are alike, for it is not mere words that make a Constitution. It is the history of a people which lends colour and meaning to its Constitution. We must therefore turn inevitably to the historical origin of the ordinance-making power conferred by our Constitution and consider the scope of that power in the light of the restraints by which that power is hedged. Neither in England nor in the United States of America does the executive enjoy anything like the power to issue ordinances. In India, that power has a historical origin and the executive, at all times, has resorted to it freely as and when it considered it necessary to do so. One of the larger States in India has manifested its addiction to that power by making an overgenerous use of it—so generous indeed, that ordinances which lapsed by efflux of time were renewed successively by a chain of kindred creatures, one after another. And, the ordinances embrace everything under the sun, from prince to pauper and crimes to contracts. The Union Government too, so we are informed passed about 200 ordinances between 1960 and 1980, out of which 19 were passed in 1980."

277. One of the grey areas focused on by learned counsel for the petitioners and the respondents is the ever perplexing question "how long". The respondents say that so long as the problems of backwardness exist they can be continued. The petitioners have highlighted that notwithstanding the concerns shown in *Indra Sawhney (1)*[10] and in a large number of cases that the reservations are not meant to be a permanent feature there is a case for concern. Admittedly, there is no deletion from the list of Other Backward Classes. It goes on increasing. Learned counsel for the respondents have

30 (1982) 1 SCC 271 : 1982 SCC (Cri) 152

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

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stated that in large number of cases where applications were made for inclusion they have been turned down. But that is no answer to the question as to why and how there has been no exclusion. Is it that backwardness has increased instead of decreasing? If the answer is "yes", as contended by the respondents, then one is bound to raise eyebrows as to the effectiveness of providing reservations or quotas.

278. The ultimate object is to bring those who are disadvantaged to a level where they no longer continue to be disadvantaged. It needs no emphasis that individual rights are superior to the social rights. All fundamental rights are to be read together. The inequalities are to be removed. Yet the fact that there has been no exclusion raises a doubt about the real concern to remove inequality.

279. The ultimate objective is to bring people to a particular level so that there can be equality of opportunity. In that context, one has to keep in view the justice and redress principles. There should not be mere equality in law but equality in fact.

280. The necessary ingredients of equality essentially involve equalisation of unequals. Linked with this question the problem posed by the petitioners is whether reservation is the only way to equalise unequals? There are several methods and modes. If reservation really does not work as contended by the petitioners, then the alternative methods can be adopted. It is the stand of the respondents that not only reservations but other incentives like free lodging and boarding facilities have been provided in some States.

281. Learned counsel for the respondents have stated that the measures under challenge are nothing but a much needed leap towards attainment of the objectives. If it is true, the leap has to end somewhere. It cannot hang in the air as there is nothing immortal in this world; much less, a progressive measure purportedly intended to benefit the Other Backward Classes. If after nearly six decades the objectives have not been achieved, necessarily the need for its continuance warrants deliberations. It is to be noted that some of the provisions were intended to be replaced after a decade but have continued. It indirectly shows that backwardness appears to have purportedly increased and not diminished. It would therefore be rational and logical to restrict operation of the impugned statute for a period of 10 years from its inception.

282. At this juncture, Report of the Oversight Committee throws considerable light on the controversy. Some parts of the Report need to be noted:

> "This Report seeks to expand the provision of higher education while at the same time ensuring social inclusion and academic excellence. A society which excludes a significant section of its population from access to higher education cannot be said to be providing equality of opportunity. Equally, if academic excellence gets compromised in the process of expansion, it would lose its competitive edge in the emerging

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knowledge society—an edge which can propel India into a position of global leadership.

Pages x and xi of the Report

A simpler way of implementing reservations was to steamroll our way through, in the name of social equity, regardless of its impact on quality and excellence. We have deliberately chosen the more difficult way which delivers equity in a manner that enhances excellence i.e. by making concomitant investments in faculty and infrastructure and by bringing much needed governance related reforms involving institutional, financial and administrative autonomy and process re-engineering in our higher educational governance system. It is easy to equalise by 'mindlessly levelling everyone down to lowest common denominator'. Our effort has been to create an upward moving equalisation process where the disabilities are overcome by the erstwhile excluded sections and the system brings out the best in them.

Besides the many out of the box innovative ideas concerning faculty and infrastructure related issues, I believe three of our recommendations, which cut horizontally across the five groups, are critical to the establishment of the goal of an 'inclusive society, in pursuit of excellence'. These four programmes are considered by the Oversight Committee to be integral to the above vision and should be considered to be an inseverable part of our core recommendations. (p. *x*)

We have to acknowledge that the challenges facing us in the entire education sector are enormous and in the tertiary education sector these can be met, only if both public and private funding to educational institutions increased several fold. The need for private participation in this mammoth task cannot be overemphasised but market forces themselves cannot deliver justice. The relative importance of public versus private funding is brought out very strongly by Joseph Stiglitz when he opined, 'I had studied the failures of both markets and governments, and was not so naive to think that the Government could remedy every failure. Neither was I so foolish as to believe that markets by themselves solved every societal problem. Inequality, unemployment, pollution: these are all important issues in which Government has to take an important role.'

'Expansion, inclusion and excellence' has been our credo. They have remained the abiding theme guiding all our deliberations. I will be failing in my duty if the Oversight Committee does not acknowledge the source of inspiration for our deliberations. It is the Prime Minister's speech giving the overpowering vision of the 'need to create the second wave of nation building' which has inspired us in our thoughts and deliberations. I would also like to express my gratitude to Hon'ble HRD Minister, Shri Arjun Singhji for his affection and guidance right through. (p. *xi*)

* * *

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Chapter IV—Treatment of the creamy layer (Report of the Oversight Committee, Vol. I)

4.2(*b*) The true benefit of reservations will be realised only when the High School enrolment of OBCs, especially in rural areas, increases significantly. Attention will need to be paid to this issue in the coming years.

* * *

Chapter VI—Estimate of resources required for the expansion

6.1. In overall terms, the total estimated expenditure on the expansion has now been assessed by the five sub-groups in their final reports at Rs 18,197.83 crores, as compared to the amount of Rs 16,563.34 crores, that was included by the Oversight Committee in its interim report. The summary statement of additional student strength, faculty required and estimates of recurring and non-recurring expenditure that have been projected by the groups are as at Table 6.1 and the year wise break up is at Table 6.2.

* * *

6.3. The Committee in its discussions with the individual groups, had stressed the need to estimate the additional infrastructure and manpower that would be required after taking into account the slack, if any, in the existing facilities as also the scope for using IT as a resource multiplier. While the groups seems to have accepted this in principle, their expenditure projections, and the norms on which they are based seem to have just extrapolated past trends. The Committee has had some input regarding global trends and the best practices being followed in the world's leading institutions. Based on this, and in consultation with experts, the Committee has developed a plan for a 'Gyan Vahini' Project, as has been explained in an earlier chapter in this Report. The total expenditure on this component of the expansion and upgradation project would be Rs 1752 crores in 5 years. Apart from significantly enhancing the quality of instruction and learning, and brining it close to the best levels in the world, this investment will certainly contribute to efficiency and to reducing the conventional costs of the higher education system.

SUMMARY STATEMENT OF EXPENDITURE REQUIREMENTS

(as given in the final reports of the groups)

Sector	*No. of institutions*	*Existing student intake*	*Annual addl. student intake*	*Addl. faculty required*	*Non-recurring expenses*	*Recurring expenses (5 yrs)*	*Total expenses in 5 yrs*
Agriculture	5	825	454	187	102.75	92.71	195.46
Central Universities	17	92,011	49,689	6609	2702.11	2455.92	5158.0+ +3
Management	7	1791	966	139	511.32	177.48	688.80
Medical	11	993	565	NA	1783.98	1027.69	2811.67
Engineering	38	29,671	16,440	4919	5503.83	3840.04	9343.87
Grand total		1,25,291	68,114	11,854	10,603.99	7593.84	18,197.83

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* * *

Chapter VII—The way forward

7.1. As indicated earlier in this Report, this opportunity for expansion, inclusion and excellence should only be the beginning of a larger process, which is to build a knowledge society in India and allow the country to take its rightful place in the comity of nations. Our recent economic growth and the values of knowledge and education carried forward by a billion diverse people, point to India's potential future as a knowledge society. Other countries that visualise a similar future have planned massive investments in order to enhance both the quality and quantity of higher education and research. China, for example, has made substantial increase in its allocation of resources of higher education. In the first phase, China has provided a grant of US $125 million to each of the 10 leading universities and US $225 million to Beijing and Tsinghua Universities. In the second phase, China proposes to provide additional grants to 30 universities, with the objective of having 100 high quality universities in China in the 21st century and with 15% of the citizens in the age group 18-22 receiving tertiary education.

7.2. India has suffered in the past because of severe underinvestment in higher education. This has been caused partly by the thinking that looks at primary and higher education in an either or manner. It is very clear however that large public investment is needed in both sectors. As Prime Minister Dr. Manmohan Singh said, while launching the Knowledge Commission, 'At the bottom of the knowledge pyramid, the challenge is one of improving access to primary education. At the top of the pyramid there is need to make our institutions of higher education and research world class. The time has come for India to embark on a second wave of nation building. Denied this investment, the youth will become a social and economic liability.' "

283. It was emphasised by learned counsel for the petitioners that the massive financial burden question finds no place in the parliamentary debate. In response, Mr Vahanvati has submitted that before the Parliamentary Standing Committee, the Report of the Oversight Committee was available. When the Oversight Committee's Report was discussed in detail, needless to say the financial aspect was also considered.

284. It has been highlighted by Mr P.P. Rao that unmindful of the duty to focus on primary and elementary education, large sums of money are intended to be used for implementation of statute. Various figures and data have been highlighted to show that there is really no concern for the primary and elementary education. Repelling these contentions Mr Vahanvati has highlighted that there is no laxity so far as primary and elementary education is concerned. He has referred to voluminous details relating to Sarva Shiksha Abhiyan. It is contended that uniform policy of elementary education and the progress made up to 31-3-2007 shows the concern of the Government to translate into reality the constitutional objective of providing adequate

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education to all citizens. It is true that there has been considerable effort in this regard. But one question still remains to be answered. There has to be balancing of priorities. Mr Vahanvati has said that this balancing is prerogative of the Government. It is true that the Government has a large area of discretion in choosing its priorities. But one factor cannot be lost sight of. The fundamental stress has to be on elementary education. If that is done, as a consequence there would be reduction in the need for spending more money on higher education. Stress on primary and elementary education would be a leap forward towards higher education. There has been considerable number of dropouts in the higher classes. This is a reality in spite of all steps which the Government claims to have adopted to ensure that every child of a particular age group has education as warranted by the Constitution as a fundamental right.

285. *Unni Krishnan, J.P.* v. *State of A.P.*[7] emphasised the importance of education in the following words: (SCC pp. 730-31, paras 166 & 168)

> "*166.* In *Bandhua Mukti Morcha*[111] this Court held that the right to life guaranteed by Article 21 does take in 'educational facilities'. (The relevant portion has been quoted hereinbefore.) Having regard to the fundamental significance of education to the life of an individual and the nation, and adopting the reasoning and logic adopted in the earlier decisions of this Court referred to hereinbefore, we hold, agreeing with the statement in *Bandhua Mukti Morcha*[111] that right to education is implicit in and flows from the right to life guaranteed by Article 21. That the right to education has been treated as one of transcendental importance in the life of an individual has been recognised not only in this country since thousands of years, but all over the world. In *Mohini Jain*[112] the importance of education has been duly and rightly stressed. The relevant observations have already been set out in para 7 hereinbefore. In particular, we agree with the observation that without education being provided to the citizens of this country, the objectives set forth in the Preamble to the Constitution cannot be achieved. The Constitution would fail. We do not think that the importance of education could have been better emphasised than in the above words. The importance of education was emphasised in the *Neethishatakam* by Bhartruhari (First Century BC) in the following words:
>
> '*Translation*
>
> Education is the special manifestation of man;
>
> Education is the treasure which can be preserved without the fear of loss;
>
> Education secures material pleasure, happiness and fame;
>
> Education is the teacher of the teacher;

7 (1993) 1 SCC 645

111 *Bandhua Mukti Morcha* v. *Union of India*, (1984) 3 SCC 161 : 1984 SCC (L&S) 389

112 *Mohini Jain* v. *State of Karnataka*, (1992) 3 SCC 666

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Education is God incarnate;

Education secures honour at the hands of the State, not money.

A man without education is equal to animal.'

* * *

168. In *Brown* v. *Board of Education*[60] Earl Warren, C.J., speaking for the US Supreme Court emphasised the right to education in the following words: (US p. 493)

> 'Today, education is perhaps the most important function of State and local Governments. ... It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.' "

286. Observations of this Court in *AIIMS Students' Union case*[103] highlight the importance of higher education and the modalities to be adopted for ensuring excellence in the following words: (SCC pp. 458-59, para 58)

> "*58.* The Preamble to the Constitution of India secures, as one of its objects, fraternity assuring the dignity of the individual and the unity and integrity of the nation to 'We the People of India'. Reservation unless protected by the Constitution itself, as given to us by the Founding Fathers and as adopted by the People of India, is subversion of fraternity, unity and integrity and dignity of the individual. While dealing with the directive principles of State policy, Article 46 is taken note of often by overlooking Articles 41 and 47. Article 41 obliges the State inter alia to make effective provision for securing the right to work and right to education. Any reservation in favour of one, to the extent of reservation is an inroad on the right of others to work and to learn. Article 47 recognises the improvement of public health as one of the primary duties of the State. Public health can be improved by having the best of doctors, specialists and superspecialists. Undergraduate level is a primary or basic level of education in medical sciences wherein reservation can be understood as the fulfilment of societal obligation of the State towards the weaker segments of the society. Beyond this, a reservation is a reversion or diversion from the performance of primary duty of the State. Permissible reservation at the lowest or primary rung is a step in the direction of assimilating the lesser fortunates in the mainstream of society by bringing them to the level of others which they cannot achieve unless protectively pushed. Once that is done the protection needs to be

60 98 L Ed 873 : 347 US 483 (1953)
103 (2002) 1 SCC 428

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withdrawn in the own interest of protectees so that they develop strength and feel confident of stepping on higher rungs on their own legs shedding the crutches. Pushing the protection of reservation beyond the primary level betrays the bigwigs' desire to keep the crippled crippled for ever. Rabindra Nath Tagore's vision of a free India cannot be complete unless 'knowledge is free' and 'tireless striving stretches its arms towards perfection'. Almost a quarter century after the People of India have given the Constitution unto themselves, a chapter on fundamental duties came to be incorporated in the Constitution. Fundamental duties, as defined in Article 51-A, are not made enforceable by a writ of court just as the fundamental rights are, but it cannot be lost sight of that 'duties' in Part IV-A Article 51-A are prefixed by the same word 'fundamental' which was prefixed by the Founding Fathers of the Constitution to 'rights' in Part III. Every citizen of India is fundamentally obligated to develop a scientific temper and humanism. He is fundamentally duty-bound to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievements. State is, all the citizens placed together and hence though Article 51-A does not expressly cast any fundamental duty on the State, the fact remains that the duty of every citizen of India is the collective duty of the State. Any reservation, apart from being sustainable on the constitutional anvil, must also be reasonable to be permissible. In assessing the reasonability, one of the factors to be taken into consideration would be—whether the character and quantum of reservation would stall or accelerate achieving the ultimate goal of excellence enabling the nation constantly rising to higher levels. In the era of globalisation, where the nation as a whole has to compete with other nations of the world so as to survive, excellence cannot be given an unreasonable go-by and certainly not compromised in its entirety. Fundamental duties, though not enforceable by a writ of the court, yet provide a valuable guide and aid to interpretation of constitutional and legal issues. In case of doubt or choice, people's wish as manifested through Article 51-A, can serve as a guide not only for resolving the issue but also for constructing or moulding the relief to be given by the courts. Constitutional enactment of fundamental duties, if it has to have any meaning, must be used by courts as a tool to tab, even a taboo, on State action drifting away from constitutional values."

287. The respondents have vehemently contended that the concept of creamy layer may have relevance for the purpose of Article 16(4), but is really inconsequential so far as Articles 15(4) and 15(5) are concerned. It is submitted that Article 16(4) is relatable to inadequate representation in government services and in that context the well-to-do in the socially and educationally backward classes have to be excluded in view of the decisions of this Court. But that logic cannot apply to the present dispute which relates to admissions to educational institutions. Before considering the question as

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to the desirability of excluding "creamy layer" the concept of creamy layer needs to be focused upon. Observations of this Court in various cases on this concept need to be noted.

288. In *N.M. Thomas case*[24] it was inter alia observed as follows: (SCC pp. 363 & 369, paras 124 & 139)

> "*124.* A word of sociological caution. In the light of experience, here and elsewhere, the danger of 'reservation', it seems to me, is threefold. Its benefits, by and large, are snatched away by the top creamy layer of the 'backward' caste or class, thus keeping the weakest among the weak always weak and leaving the fortunate layers to consume the whole cake. Secondly, this claim is overplayed extravagantly in democracy by large and vocal groups whose burden of backwardness has been substantially lightened by the march of time and measures of better education and more opportunities of employment, but wish to wear the 'weaker section' label as a means to score over their near-equals formally categorised as the upper brackets. Lastly, a lasting solution to the problem comes only from improvement of social environment, added educational facilities and cross-fertilisation of castes by inter-caste and inter-class marriages sponsored as a massive State programme, and this solution is calculatedly hidden from view by the higher 'backward' groups with a vested interest in the plums of backwardism. But social science research, not judicial impressionism, will alone tell the whole truth and a constant process of objective re-evaluation of progress registered by the 'underdog' categories is essential lest a once deserving 'reservation' should be degraded into 'reverse discrimination'. Innovations in administrative strategy to help the really untouched, *most backward* classes also emerge from such socio-legal studies and audit exercises, if dispassionately made. In fact, research conducted by the A.N. Sinha Institute of Social Studies, Patna, has revealed a dual society among Harijans, a tiny elite gobbling up the benefits and the darker layers sleeping distances away from the special concessions. For them, Articles 46 and 335 remain a 'noble romance'[a], the bonanza going to the 'higher' Harijans. I mention this in the present case because lower division clerks are likely to be drawn from the lowest levels of Harijan humanity and promotion prospects being accelerated by withdrawing, for a time, 'test' qualifications for this category may perhaps delve deeper. An equalitarian breakthrough in a hierarchical structure has to use many weapons and Rule 13-AA perhaps is one.
>
> * * *
>
> *139.* It is platitudinous constitutional law that Articles 14 to 16 are a common code of guaranteed equality, the first laying down the broad doctrine, the other two applying it to sensitive areas historically

24 *State of Kerala* v. *N.M. Thomas*, (1976) 2 SCC 310 : 1976 SCC (L&S) 227

a As Huxley called it in "Administrative Nihilism" (Methods and Results, Vol. 4 of Collected Essays).

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important and politically polemical in a climate of communalism and jobbery." (emphasis in original)

289. In *Vasanth Kumar case*[25] the view was reiterated in the following words: (SCC pp. 731-35, paras 24-25 & 28)

"*24.* In order to appreciate the viewpoint advanced by Mr Desai which appeals to me both for its in depth study of the problem, and a fresh outlook on this vexed problem, at the outset let me take a look at the futuristic view of the Indian society as envisaged in the Constitution. No one is left in any doubt that the future Indian society was to be casteless and classless. Pandit Jawaharlal Nehru, the first Prime Minister of India said that Mahatma Gandhi has shaken the foundations of caste and the masses have been powerfully affected. But an even greater power than Gandhi is at work, the conditions of modern life—and it seems at last this hoary and tenacious relic of past times must die[b]. Mahatma Gandhi, the Father of the Nation said, 'the caste system as we know is an anachronism. It must go if both Hinduism and India are to live and grow from day to day'. In its onward march towards realising the constitutional goal, every attempt has to be made to destroy caste stratification. Article 38(2) enjoins the State to strive to minimise the inequality in income and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations. Article 46 enjoins duty to promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Castes and Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation. Continued retention of the division of the society into various castes simultaneously introduces inequality of status. And this inequality in status is largely responsible for retaining inequality in facilities and opportunities, ultimately resulting in bringing into existence an economically depressed class far transcending caste structure and caste barrier. The society, therefore, was to be classless casteless society. In order to set up such a society, steps have to be taken to weaken and progressively eliminate caste structure. Unfortunately, the movement is in the reverse gear. Caste stratification has become more rigid to some extent, and where concessions and preferred treatment schemes are introduced for economically disadvantaged classes, identifiable by caste label, the caste structure unfortunately received a fresh lease of life. In fact there is a mad rush for being recognised as belonging to a caste which by its nomenclature would be included in the list of socially and educationally backward classes. To illustrate: Bakshi Commission in Gujarat recognised as many as 82 castes as being socially and educationally backward. On the publication of its Report, Government of Gujarat received representations by members of those

25 *K.C. Vasanth Kumar* v. *State of Karnataka*, 1985 Supp SCC 714

b *Discovery of India* by Pandit Nehru, Ch. VI, p. 234.

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castes who had not made any representation to the Bakshi Commission for treating them as socially and educationally backward. This phenomenon was noticed by the Mandal Commission when it observed: 'Whereas the Commission has tried to make the State wise lists of OBCs as comprehensive as possible, it is quite likely that several synonymy of the castes listed as backward have been left out. Certain castes are known by a number of synonymy which vary from one region to the other and their complete coverage is almost impossible.' The Mandal Commission found a way out by recommending that if a particular caste has been listed as backward then all its synonyms whether mentioned in the State lists or not should also be treated as backward[c]. The Gujarat Government was forced to appoint a second commission known as Rane Commission. The Rane Commission took note of the fact that there was an organised effort for being considered socially and educationally backward castes. The Rane Commission recalled the observations in *Balaji case*[20] that 'social backwardness is on the ultimate analysis the result of poverty to a very large extent'. The Commission noticed that some of the castes just for the sake of being considered as socially and educationally backward, have degraded themselves to such an extent that, they had no hesitation in attributing different types of vices to and associating other factors indicative of backwardness, with their castes. The Commission noted that the malaise requires to be remedied. The Commission, therefore, devised a method for determining socially and educationally backward classes without reference to caste, beneficial to all sections of people irrespective of the caste to which they belong. The Commission came to an irrefutable conclusion that amongst certain castes and communities or class of people, only lower income groups amongst them are socially and educationally backward. We may recall here a trite observation in *N.M. Thomas*[24] which reads as under: (SCC p. 363, para 124)

> '*124*. A word of sociological caution. In the light of experience, here and elsewhere, the danger of "reservation", it seems to me, is threefold. Its benefits, by and large, are snatched away by the top creamy layer of the "backward" caste or class, thus keeping the weakest among the weak always weak and leaving the fortunate layers to consume the whole cake. Secondly, this claim is overplayed extravagantly in democracy by large and vocal groups whose burden of backwardness has been substantially lightened by the march of time and measures of better education and more opportunities of employment, but wish to wear the "weaker section" label as a means to score over their near-equals formally categorised as the upper brackets.'

c *Mandal Commission Report*, Vol. 1, Ch. XII, p. 55.

20 AIR 1963 SC 649 : 1963 Supp (1) SCR 439

24 *State of Kerala* v. *N.M. Thomas*, (1976) 2 SCC 310 : 1976 SCC (L&S) 227

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25. A few other aspects for rejecting caste as the basis for identifying social and educational backwardness may be briefly noted. If State patronage for preferred treatment accepts caste as the only insignia for determining social and educational backwardness, the danger looms large that this approach alone would legitimise and perpetuate caste system. It does not go well with our proclaimed secular character as enshrined in the Preamble to the Constitution. The assumption that all members of same caste are equally socially and educationally backward is not well founded. Such an approach provides an oversimplification of a complex problem of identifying the social and educational backwardness. The Chairman of the Backward Classes Commission, set up in 1953, after having finalised the report, concluded that 'it would have been better if we could determine the criteria of backwardness on principles other than caste'[d]. Lastly it is recognised without dissent that the caste-based reservation has been usurped by the economically well-placed section in the same caste. To illustrate, it may be pointed that some years ago, I came across a petition for special leave against the decision of the Punjab and Haryana High Court in which the reservation of 2½% for admission to medical and engineering colleges in favour of Majhabi Sikhs was challenged by none other than the upper crust of the members of the Scheduled Castes amongst Sikhs in Punjab, proving that the labelled weak exploits the really weaker. Add to this, the findings of the Research Planning Scheme of sociologists assisting the Mandal Commission when it observed 'while determining the criteria of socially and educationally backward classes, social backwardness should be considered to be the critical element and educational backwardness to be the linked element though not necessarily derived from the former'[e]. The team ultimately concluded that 'social backwardness refers to ascribed status, and it considered social backwardness as the critical element and educational backwardness to be the linked though not derived element'. The attempt is to identify socially and educationally backward classes of citizens. The caste, as is understood in Hindu society, is unknown to Muslims, Christians, Parsis, Jews, etc. Caste criterion would not furnish a reliable yardstick to identify socially and educationally backward group in the aforementioned communities though economic backwardness would.

* * *

28. Reservation in one or other form has been there for decades. If a survey is made with reference to families in various castes considered to be socially and educationally backward, about the benefits of preferred treatment, it would unmistakably show that the benefits of reservations are snatched away by the top creamy layer of the backward castes. This has to be avoided at any cost."

d *Backward Classes Commission Report*, Vol. I, Ch. XIV.

e Part 3, Appendix XIII, p. 99 of the Report of the Team.

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290. Significantly in *Indra Sawhney (1)*[10] it was emphatically noted as follows:

> "*520.* Society does not remain static. The industrialisation and the urbanisation which necessarily followed in its wake, the advance on political, social and economic fronts made particularly after the commencement of the Constitution, the social reform movements of the last several decades, the spread of education and the advantages of the special provisions including reservations secured so far, have all undoubtedly seen at least some individuals and families in the backward classes, however small in number, gaining sufficient means to develop their capacities to compete with others in every field. That is an undeniable fact. Legally, therefore, they are not entitled to be any longer called as part of the backward classes whatever their original birthmark. It can further hardly be argued that once a backward class, always a backward class. That would defeat the very purpose of the special provisions made in the Constitution for the advancement of the backward classes, and for enabling them to come to the level of and to compete with the forward classes, as equal citizens. On the other hand, to continue to confer upon such advanced sections from the backward classes the special benefits, would amount to treating equals unequally violating the equality provisions of the Constitution. Secondly, to rank them with the rest of the backward classes would equally violate the right to equality of the rest in those classes, since it would amount to treating the unequals equally. What is more, it will lead to perverting the objectives of the special constitutional provisions since the forwards among the backward classes will thereby be enabled to lap up all the special benefits to the exclusion and at the cost of the rest in those classes, thus keeping the rest in perpetual backwardness. The object of the special constitutional provisions is not to uplift a few individuals and families in the backward classes but to ensure the advancement of the backward classes as a whole. Hence, taking out the forwards from among the backward classes is not only permissible but obligatory under the Constitution. However, it is necessary to add that just as the backwardness of the backward groups cannot be measured in terms of the forwardness of the forward groups, so also the forwardness of the forwards among the backward classes cannot be measured in terms of the backwardness of the backward sections of the said classes. It has to be judged on the basis of the social capacities gained by them to compete with the forward classes. So long as the individuals belonging to the backward classes do not develop sufficient capacities of their own to compete with others, they can hardly be classified as forward. … (SCC p. 553, para 520)

* * *

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

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629. More backward and backward is an illusion. No constitutional exercise is called for it. What is required is practical approach to the problem. The collectivity or the group may be backward class but the individuals from that class may have achieved the social status or economic affluence. Disentitle them from claiming reservation. Therefore, while reserving posts for backward classes, the departments should make a condition precedent that every candidate must disclose the annual income of the parents beyond which one could not be considered to be backward. What should be that limit can be determined by the appropriate State. Income apart, provision should be made that wards of those backward classes of persons who have achieved a particular status in society either political or social or economic or if their parents are in higher services then such individuals should be precluded to avoid monopolisation of the services reserved for backward classes by a few. Creamy layer, thus, shall stand eliminated. And once a group or collectivity itself is found to have achieved the constitutional objective then it should be excluded from the list of backward class. Therefore,

(*1*) no reservation can be made on economic criteria;

(*2*) it may be under Article 16(4) if such class satisfies the test of inadequate representation;

(*3*) exclusion of creamy layer is a social purpose. Any legislative or executive action to remove such persons individually or collectively cannot be constitutionally invalid. (SCC pp. 626-27, para 629)

* * *

790. 'Means test' in this discussion signifies imposition of an income limit, for the purpose of excluding persons (from the backward class) whose income is above the said limit. This submission is very often referred to as the 'creamy layer' argument. Petitioners submit that some members of the designated backward classes are highly advanced socially as well as economically and educationally. It is submitted that they constitute the forward section of that particular backward class—as forward as any other forward class member—and that they are lapping up all the benefits of reservations meant for that class, without allowing the benefits to reach the truly backward members of that class. These persons are by no means backward and with them a class cannot be treated as backward. It is pointed out that since *Jayasree*[67] almost every decision has accepted the validity of this submission.

791. On the other hand, the learned counsel for the States of Bihar, Tamil Nadu, Kerala and other counsel for respondents strongly oppose any such distinction. It is submitted that once a class is identified as a backward class after applying the relevant criteria including the economic one, it is not permissible to apply the economic criteria once again and sub-divide a backward class into two sub-categories. Counsel

67 *K.S. Jayasree* v. *State of Kerala*, (1976) 3 SCC 730

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for the State of Tamil Nadu submitted further that at one stage (in July 1979) the State of Tamil Nadu did indeed prescribe such an income limit but had to delete it in view of the practical difficulties encountered and also in view of the representations received. In this behalf, the learned counsel invited our attention to Chapter 7-H (pages 60 to 62) of the Ambashankar Commission (Tamil Nadu Second Backward Classes Commission) Report. According to the respondents the argument of 'creamy layer' is but a mere ruse, a trick, to deprive the backward classes of the benefit of reservations. It is submitted that no member of backward class has come forward with this plea and that it ill becomes the members of forward classes to raise this point. Strong reliance is placed upon the observations of Chinnappa Reddy, J. in *Vasanth Kumar*[25] to the following effect: (SCC p. 763, para 72)

> '*72*. … One must, however, enter a caveat to the criticism that the benefits of reservation are often snatched away by the top creamy layer of backward class or caste. That a few of the seats and posts reserved for backward classes are snatched away by the more fortunate among them is not to say that reservation is not necessary. This is bound to happen in a competitive society such as ours. Are not the unreserved seats and posts snatched away, in the same way, by the top creamy layer of society itself? Seats reserved for the backward classes are taken away by the top layers amongst them on the same principle of merit on which the unreserved seats are taken away by the top layers of society. How can it be bad if reserved seats and posts are snatched away by the creamy layer of backward classes, if such snatching away of unreserved posts by the top creamy layer of society itself is not bad?'

792. In our opinion, it is not a question of permissibility or desirability of such test but one of proper and more appropriate identification of a class—a backward class. The very concept of a class denotes a number of persons having certain common traits which distinguish them from the others. In a backward class under Clause (4) of Article 16, if the connecting link is the social backwardness, it should broadly be the same in a given class. If some of the members are far too advanced socially (which in the context, necessarily means economically and, may also mean educationally) the connecting thread between them and the remaining class snaps. They would be misfits in the class. After excluding them alone, would the class be a compact class. In fact, such exclusion benefits the truly backward. Difficulty, however, really lies in drawing the line—how and where to draw the line? For, while drawing the line, it should be ensured that it does not result in taking away with one hand what is given by the other. The basis of exclusion should not merely be economic, unless, of course, the economic advancement is so high that it necessarily means social advancement. Let us illustrate the

25 *K.C. Vasanth Kumar* v. *State of Karnataka*, 1985 Supp SCC 714

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point. A member of backward class, say a member of carpenter caste, goes to Middle East and works there as a carpenter. If you take his annual income in rupees, it would be fairly high from the Indian standard. Is he to be excluded from the backward class? Are his children in India to be deprived of the benefit of Article 16(4)? Situation may, however, be different, if he rises so high economically as to become—say a factory owner himself. In such a situation, his social status also rises. He himself would be in a position to provide employment to others. In such a case, his income is merely a measure of his social status. Even otherwise there are several practical difficulties too in imposing an income ceiling. For example, annual income of Rs 36,000 may not count for much in a city like Bombay, Delhi or Calcutta whereas it may be a handsome income in rural India anywhere. The line to be drawn must be a realistic one. Another question would be, should such a line be uniform for the entire country or a given State or should it differ from rural to urban areas and so on. Further, income from agriculture may be difficult to assess and, therefore, in the case of agriculturists, the line may have to be drawn with reference to the extent of holding. While the income of a person can be taken as a *measure* of his social advancement, the limit to be prescribed should not be such as to result in taking away with one hand what is given with the other. The income limit must be such as to mean and signify social advancement. At the same time, it must be recognised that there are certain positions, the occupants of which can be treated as socially advanced without any further enquiry. For example, if a member of a designated backward class becomes a member of IAS or IPS or any other all-India service, his status in society (social status) rises; he is no longer socially disadvantaged. His children get full opportunity to realise their potential. They are in no way handicapped in the race of life. …

(emphasis in original)

793. Keeping in mind all these considerations, we direct the Government of India to specify the basis of exclusion—whether on the basis of income, extent of holding or otherwise—of 'creamy layer'. This shall be done as early as possible, but not exceeding four months. On such specification persons falling within the net of exclusionary rule shall cease to be the members of the Other Backward Classes (covered by the expression 'backward class of citizens') for the purpose of Article 16(4). The impugned Office Memorandums dated 13-8-1990 and 25-9-1991 shall be implemented subject only to such specification and exclusion of socially advanced persons from the backward classes contemplated by the said OM. In other words, after the expiry of four months from today, the implementation of the said OM shall be subject to the exclusion of the 'creamy layer' in accordance with the criteria to be specified by the Government of India and not otherwise.

(SCC pp. 722-25, paras 790-93)"

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291. In *Indra Sawhney* v. *Union of India*[113] it was noted as follows: (SCC pp. 508 & 509, paras 3 & 5-6)

"*3.* Thereafter the matter again came up before the Court on 20-3-1995. Finding that the State of Kerala has not taken any steps, this Court issued notice to show cause why action should not be taken for non-compliance of this Court's order. Again the matter came up on 10-7-1995[114]. Even on that date no report of compliance was submitted to the Court; instead an affidavit sworn to by the Chief Secretary to the State was handed over explaining the circumstances why the implementation of the judgment was delayed. …

* * *

5. In the circumstances, out of sheer exhaustion and having regard to the fact that the constitutionality of the Kerala Act 16 of 1995 is pending disposal before this Court, we have decided to get the information ourselves regarding 'creamy layer' issue through a High-Level Committee.

6. Accordingly, we request the learned Chief Justice of the Kerala High Court to appoint a retired Judge of the High Court to be the Chairman of the High-Level Committee who will induct not more than 4 members from various walks of life to identify the 'creamy layer' among 'the designated Other Backward Classes' in Kerala State in the light of the ruling of this Court in *Mandal case*[10] and forward the report to this Court within 3 months from the date of receipt of this order."

292. In *Indra Sawhney (2)*[16] it was observed as follows:

"*7.* Our Constitution is wedded to the concept of equality and equality is a basic feature. Under Article 15(2), there is a prohibition that the State shall not discriminate against any citizen on the grounds only of religion, race, caste, sex and place of birth or any of them. It is equally true that ours is a caste-ridden society. Still, it is a constitutional mandate not to discriminate on the basis of caste alone. Provisions can be made for the upliftment of socially and educationally backward classes, Scheduled Castes or Scheduled Tribes or for women and children. Article 16(4) empowers the States for making any provision for reservation in 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. Reservation is permissible (*i*) in favour of any backward class of citizens; and (*ii*) if it is not adequately represented in services under the State.

8. Caste only cannot be the basis for reservation. Reservation can be for a backward class citizen of a particular caste. Therefore, from that caste, the creamy layer and the non-backward class of citizens are to be

113 (1996) 6 SCC 506 : 1996 SCC (L&S) 1477

114 *Indra Sawhney* v. *Union of India*, (1995) 5 SCC 429

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

16 *Indra Sawhney* v. *Union of India*, (2000) 1 SCC 168, at 202 (para 65)

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excluded. If the caste is to be taken into consideration then for finding out the socially and economically backward class, the creamy layer of the caste is to be eliminated for granting benefit of reservation, because that creamy layer cannot be termed as socially and economically backward. These questions are exhaustively dealt with by a nine-Judge Bench of this Court in *Indra Sawhney* v. *Union of India*[10] and it has been specially held that 'only caste' cannot be the basis for reservation.

9. Inclusion of castes in the list of backward classes cannot be mechanical and cannot be done without adequate relevant data. Nor can it be done for extraneous reasons. … Likewise, periodic examination of a backward class could lead to its exclusion if it ceases to be socially backward or if it is adequately represented in the services. Once backward, always backward is not acceptable. In any case, the 'creamy layer' has no place in the reservation system.

10. If forward classes are mechanically included in the list of backward classes or if the creamy layer among backward classes is not excluded, then the benefits of reservation will not reach the really backward among the backward classes. Most of the benefits will then be knocked away by the forward castes and the creamy layer. That will leave the truly backward, backward forever. …

(SCC pp. 183-85, paras 7-10)

* * *

13. In *Indra Sawhney*[10] 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. (SCC p. 185, para 13)

* * *

22. As appears from the judgments of six out of the eight Judges viz. Jeevan Reddy, J. (for himself and three others), Sawant and Sahai, JJ.—(i.e. six learned Judges out of nine),—they specifically refer to those in higher services like IAS, IPS and all-India services or nearabout as persons who have reached a higher level of social advancement and economic status and therefore as a matter of law, such persons are declared not entitled to be treated as backward. They are to be treated as creamy layer 'without further inquiry'. Likewise, persons living in sufficient affluence who are able to provide employment to others are to be treated as having reached a higher social status on account of their affluence, and therefore outside the backward class. Those holding higher levels of agricultural landholdings or getting income from property, beyond a limit, have to be excluded from the backward classes. This, in our opinion, is a judicial '*declaration*' made by this Court.

(SCC p. 188, para 22)

* * *

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

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27. As the 'creamy layer' in the backward class is to be treated 'on a 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. These twin aspects of discrimination are specifically elucidated in the judgment of Sawant, J. where the learned Judge stated as follows: (SCC p. 553, para 520)

> '*520*. … to continue to confer upon such advanced sections … special benefits, would amount to treating *equals unequally*. … Secondly, to rank them with the rest of the backward classes would … amount to treating the *unequals equally*.'

Thus, any executive or legislative action refusing to exclude the creamy layer from the benefits of reservation will be violative of Articles 14 and 16(1) and also of Article 16(4). We shall examine the validity of Sections 3, 4 and 6 in the light of the above principle. (SCC p. 190, para 27)

* * *

64. The Preamble to the Constitution of India emphasises the principle of equality as basic to our Constitution. In *Kesavananda Bharati* v. *State of Kerala*[17] it was ruled that even constitutional amendments which offended the basic structure of the Constitution would be ultra vires the basic structure. Sikri, C.J. laid stress on the basic features enumerated in the Preamble to the Constitution and said that there were other basic features too which could be gathered from the constitutional scheme (para 506-A of SCC). Equality was one of the basic features referred to in the Preamble to our Constitution. Shelat and Grover, JJ. also referred to the basic rights referred to in the Preamble. They specifically referred to equality (paras 520 and 535-A of SCC). Hegde and Shelat, JJ. also referred to the Preamble (paras 648, 652). Ray, J. (as he then was) also did so (para 886). Jaganmohan Reddy, J. too referred to the Preamble and the equality doctrine (para 1159). Khanna, J. accepted this position (para 1471). Mathew, J. referred to equality as a basic feature (para 1621). Dwivedi, J. (paras 1882, 1883) and Chandrachud, J. (as he then was) (see para 2086) accepted this position.

65. What we mean to say is that Parliament and the legislature in this country cannot transgress the basic feature of the Constitution, namely, the principle of equality enshrined in Article 14 of which Article 16(1) is a facet. *Whether the creamy layer is not excluded or whether forward castes get included in the list of backward classes*, the position will be

17 *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225

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the same, namely, that there will be a breach not only of Article 14 but of the basic structure of the Constitution. The *non-exclusion of the creamy layer or the inclusion of forward castes in the list of backward classes* will, therefore, be totally illegal. Such an illegality offending the root of the Constitution of India cannot be allowed to be perpetuated even by constitutional amendment. The Kerala Legislature is, therefore, least competent to perpetuate such an illegal discrimination. What even Parliament cannot do, the Kerala Legislature cannot achieve.

(SCC p. 202, paras 64-65)"

(emphasis in original)

293. Though in *M. Nagaraj case*[11] some observations of general nature have been made so far as the applicability of the principles to the Scheduled Castes and Scheduled Tribes are concerned, really that case did not concern with the Scheduled Castes and Scheduled Tribes. Similar is the position here. The focus on the identity test in *M. Nagaraj case*[11] is unexceptionable. At paras 80 and 110, it was noted as follows: (SCC pp. 259-60 & 272)

"*80.* Before concluding, we may refer to the judgment of this Court in *M.G. Badappanavar*[51]. In that case the facts were as follows: the appellants were general candidates. They contended that when they and the reserved candidates were appointed at Level 1 and junior reserved candidates got promoted earlier on the basis of roster points to Level 2 and again by way of roster points to Level 3, and when the senior general candidate got promoted to Level 3, then the general candidate would become senior to the reserved candidate at Level 3. At Level 3, the reserved candidate should have been considered along with the senior general candidate for promotion to Level 4. In support of their contention, the appellants relied upon the judgment of the Constitution Bench in *Ajit Singh (II)*[52]. The above contentions raised by the appellants were rejected by the Tribunal. Therefore, the general candidates came to this Court in appeal. This Court found on the facts that the service rule concerned did not contemplate computation of seniority in respect of roster promotions. Placing reliance on the judgments of this Court in *Ajit Singh (I)*[115] and in *Virpal Singh*[53] this Court held that roster promotions were meant only for the limited purpose of due representation of backward classes at various levels of service and, therefore, such roster promotions did not confer consequential seniority to the roster-point

11 *M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212

51 *M.G. Badappanavar* v. *State of Karnataka*, (2001) 2 SCC 666 : 2001 SCC (L&S) 489

52 *Ajit Singh (II)* v. *State of Punjab*, (1999) 7 SCC 209 : 1999 SCC (L&S) 1239

115 *Ajit Singh Januja* v. *State of Punjab*, (1996) 2 SCC 715 : 1996 SCC (L&S) 540 : (1996) 33 ATC 239

53 *Union of India* v. *Virpal Singh Chauhan*, (1995) 6 SCC 684 : 1996 SCC (L&S) 1 : (1995) 31 ATC 813

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promotee. In *Ajit Singh (II)*[52] the circular which gave seniority to the roster-point promotees was held to be violative of Articles 14 and 16. It was further held in *M.G. Badappanavar*[51] that equality is the basic feature of the Constitution and any treatment of equals as unequals or any treatment of unequals as equals violated the basic structure of the Constitution. For this proposition, this Court placed reliance on the judgment in *Indra Sawhney*[10] while holding that if creamy layer among backward classes were given some benefits as backward classes, it will amount to equals being treated unequals. Applying the creamy layer test, this Court held that if roster-point promotees are given consequential seniority, it will violate the equality principle which is part of the basic structure of the Constitution and in which event, even Article 16(4-A) cannot be of any help to the reserved category candidates. This is the only judgment of this Court delivered by a three-Judge Bench saying that if roster-point promotees are given the benefit of consequential seniority, it will result in violation of equality principle which is a part of the basic structure of the Constitution. Accordingly, the judgment of the Tribunal was set aside.

* * *

110. As stated above, the boundaries of the width of the power, namely, the ceiling limit of 50% (the numerical benchmark), the principle of creamy layer, the compelling reasons, namely, backwardness, inadequacy of representation and the overall administrative efficiency are not obliterated by the impugned amendments. At the appropriate time, we have to consider the law as enacted by various States providing for reservation if challenged. At that time we have to see whether limitations on the exercise of power are violated. The State is free to exercise its discretion of providing for reservation subject to limitation, namely, that there must exist compelling reasons of backwardness, inadequacy of representation in a class of post(s) keeping in mind the overall administrative efficiency. It is made clear that even if the State has reasons to make reservation, as stated above, if the impugned law violates any of the above substantive limits on the width of the power the same would be liable to be set aside."

294. There is an interesting article by an author dealing with affirmative action which reads as follows:

"In his much referred to speech on 26-11-1949, Dr. Ambedkar said that India was wanting in its recognition of the principle of fraternity. What does fraternity mean? Fraternity means a sense of common brotherhood of all Indians—of India being one people. The virtues of liberty by themselves do not create fraternity. This is why several liberal theorists are unsure about whether or not State interventions should be

52 *Ajit Singh (II)* v. *State of Punjab*, (1999) 7 SCC 209 : 1999 SCC (L&S) 1239

51 *M.G. Badappanavar* v. *State of Karnataka*, (2001) 2 SCC 666 : 2001 SCC (L&S) 489

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

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allowed for when the issue of overcoming disprivileges are concerned. The central concern then is how to inculcate a sense of 'common brotherhood' among people with divergent histories and who occupy vastly different positions in the economic and social structure of a society.

Before we go further on discussing the specifics of caste and reservations in India it is worth recording that liberty and equality can sometimes be contradictorily positioned. This is why it is important for democracy to redress these community-based grievances within a framework that does not violate liberal principles. While the individual needs to be protected, there are individuals in certain groups and communities that need safeguards and support as well. After all it must be remembered that communities do not create citizens, but that there are citizens within communities. Also, while it is rather risky to say that communities have rights, there is no doubt at all that within liberal democracies, individuals have rights. Indeed, these rights were secured historically so that individuals did not have to be burdened by community and ascriptive pressures on them.

The rationale behind affirmative action is that it releases suppressed talents and expands the pool of social assets in society for the general good. If today we are looking for a justification for affirmative action in this fashion, several decades ago it was precisely this enlarging of the social pool of talents that recommended equal treatment for women. As L.T. Hobhouse argued then that when women are repressed then there is a loss of all the elements in the common stock which the free play of the woman's mind would contribute. By increasing the sum of realised talents in society individuals can actually gain greater inter-subjectivity in their everyday lives. As the *set of resemblances* between them is now so much larger, they can practise, *pace* Rawls, the moral precept of participating in one another's fate. In this process, fraternal values of citizenship gain materiality and fulfilment. It should be recognised that fraternity can only come about through a basic set of resemblances between citizens. This conception of resemblances is about citizens being equally able to avail of institutional facilities that ensure their acquisition of those skills that are considered to be *socially valuable*. In other words, social opportunities exist for individual self-expansion, and it is only individuals now who can exclude themselves. If grinding poverty comes in the way of acquiring such socially valuable skills, then those blocks should be met by developmental interventions such as the anti-poverty programmes. But on no account should the removal of poverty be made synonymous with reservations. Reservations are only meant to create a measure of confidence and dignity among those who didn't dare dream of an alternative life. But that alone cannot create structural conditions that address the root causes of poverty.

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If quality education and the imparting of socially valuable skills are provided across the board through reservations, then that would take care of the complaint that affirmative action is largely about the equality of results. Rawls' principle of justice as fairness only says that offices should be open to all. But what if people do not qualify for these offices because their potentialities have remained unrealised on account of inadequate qualifications arising from a history of discrimination compounded by poverty, or, indeed, because of substandard education? Does it mean that, through positive discrimination and reservations, they should be given these jobs anyway regardless of the welfare of institutions? In this connection, Andre Beteille's warning that affirmative action should be sensitive to institutional well-being as well needs to be recalled. Beteille sifted between the various imperatives that different organisations are subsumed under and accordingly advised a careful calibration of reservations such that these provisions of performance do not undermine efficiency of performance. The resemblances that are being advocated in the context of affirmative action should not be interpreted in terms of homogeneous 'sameness'. Sameness is what medieval religious fundamentalists aim for. On the other hand, the set of resemblances in a constitutional democracy enhances equality and not sameness by providing identical opportunities to all for self-expression and development. Citizenship is not about the sameness of lifestyles or of income. Marshall's notion of citizenship as a status that tends towards equality should be interpreted in this light. According to Marshall, the equality that citizenship guarantees should be the foundation on which other kinds of differences can develop.

It will no doubt be the case that differences will exist even after a minimum set of resemblances is established. But these will no longer be outcomes of the accidents of birth. When diversity exists outside of choice then that is not a state of affairs that a democratic society can rejoice in. Affirmative action is instrumental in enlarging the scope of difference and diversity, but it succeeds in doing so by first ensuring that citizens resemble one another at a very critical level, namely, in their ability to acquire socially valuable skills.

Affirmative action gets somewhat complicated in India on account of caste politics.

Undeniably, India is the most stratified society in the world. Over and above caste differentiations there are huge income disparities, religious and community differences that are deeply engraved into everyday social relations. No doubt, the nature of caste and community interactions has changed over time, but considerations along ascriptive lines still remain important markers, both at the public and private domains.

Not only are we now confronted by identity assertions of earthy peasant castes, that were earlier ranked as lowly Shudras (or menials),

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but also, of those who, till recently, were called 'untouchables'. Now we also know that none of these castes had ever ideologically accepted their degraded status. Yet they lived out their humble lives quietly for generations for fear of offending the privileged strata.

We now know more of their origin tales that boast of the elevated positions they once held before an unsuspected chicanery, a lost war, or a mercurial god, demoted them to lowly rungs in popular perceptions. Today these tales are an important source of symbolic energy for caste mobilisations and identity assertions. Now that the Mandal recommendations are in place, reservations are not just for the Scheduled Castes and Tribes, but for the so-called other backward castes as well. While there are a large number of castes listed as backward, the demand for reservations for this category has been spearheaded by the class of owner-cultivators, or peasant-proprietors. Before we assess Mandal reforms it would be useful to know how these peasant castes emerged.

After the zamindari abolition came into effect, adult franchise and land-to-the-tiller programme together forced the earlier landed castes slowly to cede ground in the villages. Soon, however, traditional peasant castes such as the Ahirs, Kurmis, Koeris, Lodhs, Rajputs and Jats began to dominate the political scape of northern India. In the southern State of Tamil Nadu, the Vanniyars and Thevars have become assertive, and in Karnataka control was wrested in the mid-1950s from the traditional rural elite within the Congress Party by the Vokkaligas and Lingayats.

* * *

In pursuance of Article 340 of the Constitution, the Kalelkar Commission was set up in 1955 but it could not come to any satisfactory conclusion about who should be legitimately considered as OBCs. The Mandal Commission came into existence in 1980 and it promptly came up with a long list of 3743 backward castes on the basis of social, economic and educational backwardness. The Mandal Commission's recommendations were implemented in 1990 by the then Prime Minister V.P. Singh. This meant that a further 29% of seats in educational institutions and government jobs would now be reserved for OBCs.

The implementation of reservations for OBCs set off a furore of protests, including a few suicides, all over the country by those who are considered to be members of forward castes. Many felt that reservations for OBCs were not warranted for two reasons. First, this would make India a caste society by law; and, second, because many of those who are considered as OBCs are really quite powerful and dominant in rural India. The obvious reference was to Jats and Yadavs. A majority of social anthropologists wrote against reservations for OBCs primarily on these grounds. Andre Beteille's criticism of the Mandal Commission recommendations was widely commented upon. He distinguishes between reservations for OBCs following Mandal recommendations and the reservations that were already granted in the Constitution for

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Scheduled Castes and Tribes. While provisions for Scheduled Castes and Tribes were with the intention of reaching towards greater equality, reservations for OBCs were really to bring about a balance of power on the calculus of caste. The kind of deprivations that ex-untouchables (Scheduled Castes) and Adivasis (Scheduled Tribes) encountered for centuries can in no way be compared to the traditional condition of OBCs. Besides, many OBCs are quite powerful in rural India, both economically and politically. In fact, the Mandal Commission recommendations were actually giving in to a powerful rural lobby that did not really care for equality of opportunities as much as it did for equality of results.

* * *

There are two considerations that escape many uncritical applications of affirmative action. First, affirmative action must resist any tendency whereby its beneficiaries become vested interests. And secondly, it must eventually seek its own dissolution. While the second may be far away, it is by paying attention to the first issue that it is possible for affirmative action to eventually annihilate itself. Paradoxical as it may appear, but when this happens it is then that positive discrimination has finally triumphed.

Affirmative action fails to reach this final destination when it is inconsistently applied, or when its beneficiaries form vested interest bloc within a democratic electoral system on the basis of ascriptive identity alone. The latter poses a stronger practical and intellectual challenge to the policy of affirmative action. As long as historical disprivileges and economic backwardness go together and the relationship between them is statistically very strong, colour or caste membership can act as ready reckoners for targeting beneficiaries of affirmative action. This, however, does not mean that membership in these communities should advantage individuals in perpetuity once they are able to develop the minimum set of resemblances. Therefore, as and when those who belong to targeted categories for affirmative action acquire socially useful talents and attributes, they should contribute them to the society as a whole, and not employ them only for sectional advantages.

Consequently, those who benefit from this policy owe it to society to put their newly acquired social talents back into the collective social pool. This would mean that they would automatically fall outside the scope of affirmative action programme in the future. The net would no longer cover them as they already have socially useful assets. Indeed the society will be richer and better endowed on account of it as the beneficiaries of affirmative action will now begin to contribute to the social pool of talents. This would both release and add to social and material resources required for continuing with the policy aimed at the enhancement of resemblances. As a result, society will progressively acquire a higher strike rate with the policy of affirmative action by

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reaching out to those who have thus far fallen outside its ambit. By increasing the number of those who possess the minimum set of resemblances, the society has now a larger wealth of talents in a variety of fields and specialities than it had before. This is how affirmative action, which is aimed at the historically most disadvantaged sections, ultimately improves the lot of everybody in society. If, on the other hand, either colour or race, which are only ready reckoners, become permanent considerations, without taking into account biographical profiles of actual and potential beneficiaries, then that would inhibit fraternity and sow seeds of permanent divisions in society.

Affirmative action begins by placing the assets of the better off in a collective pool, not for redistribution, but to create the infrastructure that is needed to enhance the minimum set of resemblances necessary for substantive citizenship. With the help of this capital, socially valuable assets are now created in sites where there were none. This measure has a strong practical dimension for out of this collective pooling new assets are being created. The creation of such new assets is possible because the initial pooling of assets of the privileged section allows the society to underwrite the expenses incurred for the establishment of certain baseline similarities in society as a whole. As the most important feature in this case is not one's ascriptive badge, but the creation of socially valuable assets, it is expected that those who have been the beneficiaries of the scheme will gradually slip out of the net. They will cease to receive from the collective pool and instead will begin to contribute to it. As far as public policy is concerned they are no long members of certain designated castes or communities. They are now simply citizens.

In passing it is worth putting in perspective that the difference between reservations in India and affirmative action in America is that the former talks about extirpating caste whereas the latter is interested primarily in representing races. If the accent is on representation then the ascriptive factor becomes a permanent badge that can never be overcome. Again, Americans believe in race representation, not in quotas, and in not sacrificing standards for social justice. But the great similarity between the two forms of preferential policy is that in both cases it is the public sector where positive discrimination is effectively realised. In America, the State encourages private sector units to employ people of diverse backgrounds without specifying quotas for different races. If these enterprises can show a fair racial mix then they can get preferential contracts from the Government. The State cannot force any private sector unit to implement affirmative action. It is a combination of goodwill and rewards that takes affirmative action forward in the private sector of America. For example, Bob Jones University does not receive any public money and, therefore, it refuses to accept affirmative action, even of the most muted kind. It is only when organisations depend on State funding, or when they want to be rewarded by the State, that policy of affirmative action comes to life."

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295. It has been rightly observed in *Indra Sawhney (2)*[16] "*whether creamy layer is not excluded or whether forward castes get included in the list of backward classes,* the position would be the same and there will be breach not only of Article 14 but of the basic structure of the Constitution". As was rightly observed in the said case, "*non-exclusion of the creamy layer or inclusion of forward castes in the lists of backward classes* will be totally illegal". The illegality offends the roots and foundation of the Constitution and cannot be allowed to be perpetuated. (emphasis in original)

296. In *Nair Service Society case*[68] this Court observed as follows: (SCC p. 28, para 54)

> "*54.* This Court, thus, has categorically laid down the law that determination of creamy layer is a part of the constitutional scheme."

297. In our view, even non-exclusion of the creamy layer for the purpose of admission to the educational institutions cannot be countenanced. It is inconceivable that a person who belongs to the creamy layer is socially and educationally backward. The backward status vanishes when somebody becomes part of the creamy layer.

298. In *Vasanth Kumar case*[25] it was aptly described that the benefits of reservation are snatched away by the top creamy layer of the backward classes and this has to be avoided at any cost. By inclusion of the creamy layer or in other words non-inclusion thereof a fresh lease of life to those who should have been left out is given. Their continuance would mean keeping weakest amongst the weak always weak and leaving the fortunate ones to enjoy the benefits. If the ultimate aim is a casteless and classless society in line with the dream of the Constitution-framers that has to be chewed out. As Father of the Nation had once said if the caste system as we know is an anachronism, then it must go. There is a feeling and it cannot be said without reason that reservation hits at the root of this belief and instead of its obliteration there is perceivable perpetuation. It is true that obliteration cannot be done immediately or within a short span of time but that is no answer to the lack of seriousness in seeking obliteration.

299. In *Indra Sawhney (1)*[10] the following observations on the question of giving priority over reservation are of significance. It was held:

> "*293. Preference without reservation may be adopted in favour of the chosen classes of citizens by prescribing for them a longer period for passing a test or by awarding additional marks or granting other advantages like relaxation of age or other minimum requirements.* (See the preferential treatment in *State of Kerala* v. *N.M. Thomas*[24].) Furthermore, it would be within the discretion of the State to provide

16 *Indra Sawhney* v. *Union of India*,, (2000) 1 SCC 168, at p. 202 (para 65)

68 *Nair Service Society* v. *State of Kerala*, (2007) 4 SCC 1

25 *K.C. Vasanth Kumar* v. *State of Karnataka*, 1985 Supp SCC 714

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

24 (1976) 2 SCC 310 : 1976 SCC (L&S) 227

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financial assistance to such persons by way of grant, scholarships, fee concessions, etc. Such preferences or advantages are like temporary crutches for additional support to enable the members of the backward and other disadvantaged classes to march forward and compete with the rest of the people. These preferences are extended to them because of their inability otherwise to compete effectively in open selections on the basis of merits for appointment to posts in public services and the like or for selection to academic courses. Such preferences can be extended to all disadvantaged classes of citizens, whether or not they are victims of prior discrimination. What qualifies persons for preference is backwardness or disadvantage of any kind which the State has a responsibility to ameliorate. The blind and the deaf, the dumb and the maimed, and other handicapped persons qualify for preference. So do all other classes of citizens who are at a comparative disadvantage for whatever reason, and whether or not they are victims of prior discrimination. All these persons may be beneficiaries of preferences short of reservation. Any such preference, although discriminatory on its face, may be justified as a benign classification for affirmative action warranted by a compelling State interest.

294. In addition to such preferences, quotas may be provided exclusively reserving posts in public services or seats in academic institutions for backward people entitled to such protection. *Reservation is intended to redress backwardness of a higher degree. Reservation prima facie is the very antithesis of a free and open selection. It is a discriminatory exclusion of the disfavoured classes of meritorious candidates*: *M.R. Balaji*[20]. It is not a case of merely providing an advantage or a concession or preference in favour of the backward classes and other disadvantaged groups. It is not even a handicap to disadvantage the forward classes so as to attain a measure of qualitative or relative equality between the two groups. Reservation which excludes from consideration all those persons falling outside the specially favoured groups, irrespective of merits and qualifications, is much more positive and drastic a discrimination—albeit to achieve the same end of qualitative equality—but unless strictly and narrowly tailored to a compelling constitutional mandate, it is unlikely to qualify as a benign discrimination. *Unlike in the case of other affirmative action programmes, backwardness by itself is not sufficient to warrant reservation.* What qualifies for reservation is backwardness which is the result of identified past discrimination and which is comparable to that of the Scheduled Castes and the Scheduled Tribes. Reservation is a remedial action specially addressed to the ill-effects stemming from historical discrimination. To ignore this vital distinction between affirmative action short of reservation and reservation by a predetermined quota as a remedy for past inequities is to ignore the special characteristic of the

20 *M.R. Balaji* v. *State of Mysore*, AIR 1963 SC 649 : 1963 Supp (1) SCR 439

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constitutional grant of power specially addressed to the constitutionally recognised backwardness. (SCC pp. 453-54, paras 293-94)

* * *

319. Reservation should be avoided except in extreme cases of acute backwardness resulting from prior discrimination as in the case of the Scheduled Castes and the Scheduled Tribes and other classes of persons in comparable positions. In all other cases, preferential treatment short of reservation can be adopted. Any such action, though in some respects discriminatory, is permissible on the basis of a legitimate classification rationally related to the attainment of equality in all its aspects.

(SCC p. 461, para 319)

* * *

323. (16) In the final analysis, poverty which is the ultimate result of inequities and which is the immediate cause and effect of backwardness has to be eradicated not merely by reservation as aforesaid, but by free medical aid, free elementary education, scholarships for higher education and other financial support, free housing, self-employment and settlement schemes, effective implementation of land reforms, strict and impartial operation of the law-enforcing machinery, industrialisation, construction of roads, bridges, culverts, canals, markets, introduction of transport, free supply of water, electricity and other ameliorative measures particularly in areas densely populated by backward classes of citizens. [SCC pp. 464-65, para 323(16)]"

(underlined[f] for emphasis)

300. Following observations in *M.R. Balaji* v. *State of Mysore*[20] are also relevant: (AIR pp. 662-64, paras 32-37)

"*32.* In this connection, it is necessary to remember that the reservation made by the impugned order is in regard to admission in the seats of higher education in the State. It is well known that as a result of the awakening caused by political freedom, all classes of citizens are showing a growing desire to give their children higher university education and so, the universities are called upon to face the challenge of this growing demand. *While it is necessary that the demand for higher education which is thus increasing from year to year must be adequately met and properly channelised, we cannot overlook the fact that in meeting that demand standards of higher education in universities must not be lowered.* The large demand for education may be met by starting larger number of educational institutions, vocational schools and polytechnics. *But, it would be against the national interest to exclude from the portals of our universities qualified and competent students on the ground that all the seats in the universities are reserved for weaker*

f **Ed.**: Herein italicised.

20 AIR 1963 SC 649 : 1963 Supp (1) SCR 439

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elements in society. As has been observed by the University Education Commission,

> 'he indeed must be blind who does not see that mighty as are the political changes, far deeper are the fundamental questions which will be decided by what happens in the universities' (p. 32).

Therefore in considering the question about the propriety of the reservation made by the impugned order, we cannot lose sight of the fact that the reservation is made in respect of higher university education. The demand for technicians, scientists, doctors, economists, engineers and experts for the further economic advancement of the country is so great that it would cause grave prejudice to national interests if considerations of merit are completely excluded by wholesale reservation of seat in all technical, medical or engineering colleges or institutions of that kind. Therefore, considerations of national interest and the interests of the community or society as a whole cannot be ignored in determining the question as to whether the special provision contemplated by Article 15(4) can be special provision which excludes the rest of the society altogether. In this connection, it would be relevant to mention that the University Education Commission which considered the problem of the assistance to backward communities, has observed that the percentage of reservation shall not exceed a third of the total number of seats, and it has added that the principle of reservation may be adopted for a period of ten years. (p. 53)

33. We have already noticed that the Central Government in its communication to the State has suggested that reservation for backward classes, Scheduled Castes and Scheduled Tribes may be up to 25% with marginal adjustments not exceeding 10% in exceptional cases.

34. The learned Advocate General has suggested that reservation of a large number of seats for the weaker sections of the society would not affect either the depth or efficiency of scholarship at all, and in support of this argument, he has relied on the observations made by the Backward Classes Commission that it found no complaint in the States of Madras, Andhra, Travancore-Cochin and Mysore where the system of recruiting candidates from Other Backward Classes to the reserve quota has been in vogue for several decades. The Committee further observed that the representatives of the upper classes did not complain about any lack of efficiency in the offices recruited by reservation (p. 135). This opinion, however, is plainly inconsistent with what is bound to be the inevitable consequence of reservation in higher university education. If admission to professional and technical colleges is unduly liberalised, it would be idle to contend that the quality of our graduates will not suffer. That is not to say that reservation should not be adopted; reservation should and must be adopted to advance the prospects of the weaker sections of society, but in providing for special measures in that behalf care should be taken not to exclude admission to higher educational centres to

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deserving and qualified candidates of other communities. A special provision contemplated by Article 15(4) like reservation of posts and appointments contemplated by Article 16(4) must be within reasonable limits. The interests of weaker sections of society which are a first charge on the States and the Centre have to be adjusted with the interests of the community as a whole. The adjustment of these competing claims is undoubtedly a difficult matter, but if under the guise of making a special provision, a State reserves practically all the seats available in all the colleges, that clearly would be subverting the object of Article 15(4). In this matter again, we are reluctant to say definitely what would be a proper provision to make. *Speaking generally and in a broad way, a special provision should be less than 50%; how much less than 50% would depend upon the relevant prevailing circumstances in each case.* In this particular case it is remarkable that when the State issued its order on 10-7-1961, it emphatically expressed its opinion that the reservation of 68% recommended by the Nagan Gowda Committee would not be in the larger interests of the State. What happened between 10-7-1961, and 31-7-1962, does not appear on the record. But the State changed its mind and adopted the recommendation of the Committee ignoring its earlier decision that the said recommendation was contrary to the larger interests of the State. In our opinion, when the State makes a special provision for the advancement of the weaker sections of society specified in Article 15(4) it has to approach its task objectively and in a rational manner. Undoubtedly, it has to take reasonable and even generous steps to help the advancement of weaker elements; the extent of the problem must be weighed, the requirements of the community at large must be borne in mind and a formula must be evolved which would strike a reasonable balance between the several relevant considerations. Therefore, we are satisfied that the reservation of 68% directed by the impugned order is plainly inconsistent with Article 15(4).

35. The petitioners contend that having regard to the infirmities in the impugned order, action of the State in issuing the said order amounts to a fraud on the constitutional power conferred on the State by Article 15(4). This argument is well founded, and must be upheld. When it is said about an executive action that it is a fraud on the Constitution, it does not necessarily mean that the action is actuated by mala fides. An executive action which is patently and plainly outside the limits of the constitutional authority conferred on the State in that behalf is struck down as being ultra vires the State's authority. If, on the other hand, the executive action does not patently or overtly transgress the authority conferred on it by the Constitution, but the transgression is covert or latent, the said action is struck down as being a fraud on the relevant constitutional power. It is in this connection that courts often consider the substance of the matter and not its form and in ascertaining the substance of the matter, the appearance or the cloak, or the veil of the executive action is carefully scrutinised and if it appears that notwithstanding the

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appearance, the cloak or the veil of the executive action, in substance and in truth the constitutional power has been transgressed, the impugned action is struck down as a fraud on the Constitution. We have already noticed that the impugned order in the present case has categorised the backward classes on the sole basis of caste which, in our opinion, is not permitted by Article 15(4); and we have also held that the reservation of 68% made by the impugned order is plainly inconsistent with the concept of the special provision authorised by Article 15(4). Therefore, it follows that the impugned order is a fraud on the constitutional power conferred on the State by Article 15(4).

36. The learned Advocate General has made an earnest and strong plea before us that we should not strike down the order, but should strike down only such portions of the order which appear to us to be unconstitutional on the doctrine of severability. He has urged that since 1958, the State has had to make five orders to deal with the problems of advancing the lot of the backward classes and the State is anxious that the implementation of the impugned order should not be completely prohibited or stopped. We do not see how it would be possible to sever the invalid provisions of the impugned order. If the categorisation of the backward classes is invalid, this Court cannot and would not attempt the task of enumerating the said categories; and if the percentage of reservation is improper and outside Article 15(4), this Court would not attempt to lay down definitely and in an inflexible manner as to what would be the proper percentage to reserve. In this connection, it may be relevant to refer to one fact on which the petitioners have strongly relied. It is urged for them that the method adopted by the Government of Maharashtra in exercising its powers under Article 15(4) is a proper method to adopt. It appears that the Maharashtra Government has decided to afford financial assistance, and make monetary grants to students seeking higher education where it is shown that the annual income of their families is below a prescribed minimum. The said scheme is not before us and we are not called upon to express any opinion on it. However, we may observe that if any State adopts such a measure, it may afford relief to and assist the advancement of the backward classes in the State, because backwardness, social and educational, is ultimately and primarily due to poverty. An attempt can also be made to start newer and more educational institutions, polytechnics, vocational institutions and even rural universities and thereby create more opportunities for higher education. This dual attack on the problem posed by the weakness of backward communities can claim to proceed on a rational, broad and scientific approach which is consistent with, and true to, the noble ideal of a secular welfare democratic State set up by the Constitution of this country. Such an approach can be supplemented, if necessary by providing special provision by way of reservation to aid the backward classes and Scheduled Castes and Tribes. It may well be that there may be other

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ways and means of achieving the same result. In our country where social and economic conditions differ from State to State, it would be idle to expect absolute uniformity of approach; but in taking executive action to implement the policy of Article 15(4), it is necessary for the States to remember that the policy which is intended to be implemented is the policy which has been declared by Article 46 and the Preamble of the Constitution. It is for the attainment of social and economic justice that Article 15(4) authorises the making of special provisions for the advancement of the communities there contemplated even if such provisions may be inconsistent with the fundamental rights guaranteed under Article 15 or Article 29(2). The context, therefore, requires that the executive action taken by the State must be based on an objective approach free from all extraneous pressures. The said action is intended to do social and economic justice and must be taken in a manner that justice is and should be done.

37. Whilst we are dealing with this question, it would be relevant to add that the provisions of Article 15(4) are similar to those of Article 16(4) which fell to be considered in *GM, Southern Railway* v. *Rangachari*[19]. In that case, the majority decision of this Court held that the power of reservation which is conferred on the State under Article 16(4) can be exercised by the State in a proper case not only by providing for reservation of appointments, but also by providing for reservation of selection posts. This conclusion was reached on the basis that it served to give effect to the intention of the Constitution makers to make adequate safeguards for the advancement of backward classes and to secure their adequate representation in the services. The judgment shows that the only point which was raised for the decision of this Court in that case was whether the reservation made was outside Article 16(4) and that posed the bare question about the construction of Article 16(4). The propriety, the reasonableness or the wisdom of the impugned order was not questioned because it was not the respondent's case that if the order was justified under Article 16(4), it was a fraud on the Constitution. Even so, it was pointed out in the judgment that the efficiency of administration is of such a paramount importance that it would be unwise and impermissible to make any reservation at the cost of efficiency of administration; that, it was stated, was undoubtedly the effect of Article 335. Therefore, what is true in regard to Article 15(4) is equally true in regard to Article 16(4). There can be no doubt that the Constitution makers assumed, as they were entitled to, that while making adequate reservation under Article 16(4), care would be taken not to provide for unreasonable, excessive or extravagant reservation, for that would, by eliminating general competition in a large field and by creating widespread dissatisfaction amongst the employees, materially affect efficiency. Therefore, like the special provision improperly made under Article 15(4), reservation made under Article 16(4) beyond the

19 AIR 1962 SC 36 : (1962) 2 SCR 586

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permissible and legitimate limits would be liable to be challenged as a fraud on the Constitution. In this connection it is necessary to emphasise that Article 15(4) like Article 16(4) is an enabling provision; it does not impose an obligation, but merely leaves it to the discretion of the appropriate Government to take suitable action, if necessary."

(emphasis supplied)

301. To similar effect is the view expressed in *K.C. Vasanth Kumar case*[25] at para 150: (SCC pp. 810-11)

"*150.* At this stage it should be made clear that if on a fresh determination some castes or communities have to go out of the list of backward classes prepared for Article 15(4) and Article 16(4), the Government may still pursue the policy of amelioration of weaker sections of the population amongst them in accordance with the directive principle contained in Article 46 of the Constitution. There are in all castes and communities poor people who if they are given adequate opportunity and training may be able to compete successfully with persons belonging to richer classes. The Government may provide for them liberal grants of scholarships, free studentships, free boarding and lodging facilities, free uniforms, free mid-day meals, etc. to make the life of poor students comfortable. The Government may also provide extra tutorial facilities, stationery and books free of cost and library facilities. These and other steps should be taken in the lower classes so that by the time a student appears for the qualifying examination he may be able to attain a high degree of proficiency in his studies."

It has also been noted as follows: (SCC p. 772, para 88)

"*88.* I wish to add that the doctrine of protective discrimination embodied in Articles 15(4) and 16(4) and the mandate of Article 29(2) cannot be stretched beyond a particular limit. The State exists to serve its people. There are some services where expertise and skill are of the essence. For example, a hospital run by the State serves the ailing members of the public who need medical aid. Medical services directly affect and deal with the health and life of the populace. *Professional expertise, born of knowledge and experience, of a high degree of technical knowledge and operational skill is required of pilots and aviation engineers. The lives of citizens depend on such persons. There are other similar fields of governmental activity where professional, technological, scientific or other special skill is called for. In such services or posts under the Union or States, we think there can be no room for reservation of posts; merit alone must be the sole and decisive consideration for appointments.*" (underlined[f] for emphasis)

302. Lengthy arguments have been advanced as to the seriousness in identifying the backward classes. On the basis of *Indra Sawhney (1)*[10] judgment, the Government of India issued orders in respect of reservations of

25 *K.C. Vasanth Kumar* v. *State of Karnataka*, 1985 Supp SCC 714

f **Ed.**: Herein italicised.

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

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appointments or on posts under the Government of India in favour of backward classes of citizens. It was the subject-matter of challenge in *Indra Sawhney (1)*[10]. In its judgment dated 16-11-1992[10] this Court directed the Government to constitute a permanent body by 15-3-1993 for entertaining and examining and recommending upon requests made for inclusion or complaints of overinclusion and underinclusion in the lists of backward classes of citizens.

303. Constituent Assembly Debates, 1951 have also relevance for adjudicating the controversy. The following portion needs to be extracted: (*sic*)

304. The Parliamentary Standing Committee Report at Paras 36, 37 and 46 read as follows:

"*36.* The Committee notes that there is a major limitation on data about the social, economic and educational profile of our population in general and about OBCs in particular. The last caste-based census in India was done in 1931. Accordingly there are no periodic data available on the demographic spread of OBCs and their access to amenities. Even the Mandal Commission had used the 1931 Census data. Whatever limited data are available, pertain to surveys conducted by NSSO from 1998-1999 onwards, which are only 'sample surveys'.

37. The Committee found that there exists no accepted mechanism/ criteria to group the people into different categories. As a result, existing list of backward castes/communities are termed in some cases, as inaccurate. Besides, any regular process of review is also not in place. Such a review implies both 'inclusion' and 'exclusion'. The Committee, therefore, emphasises the need for taking urgent measures/steps for identifying and removing all such lacunae and removing all such lacunae and problems by putting in place scientific and objective mechanism/ benchmarks for this purpose.

* * *

46. There have been suggestions/counter-suggestions on the issue of exclusion of the creamy layer amongst OBCs in the proposed legislation. On the one hand, it was argued that the concept of creamy layer did not apply in the case of reservation in admission. It was pointed out that the debate on the exclusion of the creamy layer was misplaced as the Supreme Court's observation regarding the exclusion of the creamy layer within the SCs and STs from the purview of reservation was only for public employment and promotion. The other view in this regard was that the inclusion of the creamy layer in reservation would defeat the very purpose of providing reservation to the backward classes. It was also stated that the exclusion of the creamy layer would ensure that the intended benefits of the reservation reach to the really deserving among the backward classes. It was further stated that this in itself would not

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

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suffice and should be supplemented by categorisation of the backward classes in various groups depending upon their degree of backwardness and apportioning of appropriate percentage of reservation to each group. It was also brought to the Committee that similar experiments in States of Andhra Pradesh, Kerala, Karnataka, Tamil Nadu, Maharashtra, etc. have, in fact, stood the test of time and yielded the desired results."

305. One of the petitioners, Youth for Equality had filed a representation before the Parliamentary Committee giving certain important data. Relevant portions read as follows:

"TOP WITHOUT BASE

The condition of infrastructure and staff at the primary and secondary level is of some concern and the Government—especially the Ministry for Human Resource and Development which has proposed increased reservations, should work towards improvement in this area for 'real' affirmative action. According to the National Institute of Educational Planning and Administration (in 2003) the state of affairs at the primary level was as under:

(*i*) 62,996 schools in the country do not have school building and are operating in tents or under the trees.

(*ii*) In 70,739 primary schools—no classroom.

(*iii*) In 95,003 primary schools—single classroom.

(*iv*) In 8269 primary schools—no teacher.

(*v*) In 1,15,267 primary schools—single teacher.

(*vi*) In more than 60,000 schools the pupil:teacher ratio is greater than 100:1 while the acceptable ratio is less than 40:1.

(*vii*) In 84,848 schools—no blackboard.

(*viii*) In more than 1,00,000 schools—no electricity.

Apart from the above, according to NCERT (in 1998), only 34.6% of government schools had safe drinking water, 13.2% had urinals and 4.9% had urinals for girls and only 6.0% had a lavatory. While the Government promises a spending of about 6% of GDP for the development of education, the reality has been to the contrary. The Government spending in the years was as under:

2000-2001	4.1%
2001-2002	4.3%
2002-2004	3.8%
2004-2005	3.5%"

306. The National Commission for Backward Classes Act, 1993 (in short "the Backward Classes Act") was accordingly enacted. Few provisions of this Act need to be noted.

307. Section 2(*c*) defines lists as follows:

"2. (*c*) 'lists' means lists prepared by the Government of India from time to time for purposes of making provision for the reservation of appointments

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or posts in favour of backward classes of citizens which, in the opinion of that Government, are not adequately represented in the services under the Government of India and any local or other authority within the territory of India or under the control of the Government of India;

* * *"

308. Important provisions are Sections 9 and 10 which read as follows:

"9. *Functions of the Commission.*—(1) The Commission shall examine requests for inclusion of any class of citizens as a backward class in the lists and hear complaints of overinclusion or underinclusion of any backward class in such lists and tender such advice to the Central Government as it deems appropriate.

(2) The advice of the Commission shall ordinarily be binding upon the Central Government.

10. *Powers of the Commission.*—The Commission shall, while performing its functions under sub-section (1) of Section 9, have all the powers of a civil court trying a suit and in particular, in respect of the following matters, namely—

(*a*) summoning and enforcing the attendance of any person from any part of India and examining him on oath;

(*b*) requiring the discovery and production of any document;

(*c*) receiving evidence on affidavits;

(*d*) requisitioning any public record or copy thereof from any court or office;

(*e*) issuing commissions for the examination of witnesses and documents; and

(*f*) any other matter which may be prescribed."

309. A periodic revision of the lists by the Central Government is a statutory mandate. The petitioners have highlighted that there is no exclusion and on the other hand there has been inclusion. On the question of castes enumeration it is emphasised that the 1931 Census was not the basis for identification of Other Backward Classes. In fact the Central OBC list is not drawn up on the basis of the 1931 Census. Each State has different modalities for identification. Only for the purpose of quantum the population provides a foundation.

310. It needs no emphasis that if ultimately and indisputably the constitutional goal is the casteless and classless society, there has to be more effective implementation of the Backward Classes Act. The exercise required to be undertaken under Section 11 of the said Act is not intended to be a routine exercise and also not an exercise in futility. It has to be not only effective but also result oriented. The petitioners have highlighted the lack of seriousness of the Government in carrying out the exercise. Voluminous data have been brought on record in this regard. With reference to the Reports of the Commission, learned counsel for the respondents on the other hand have stressed the fact that the Commission has been working with all sincerity and with the object of effectively implementing the Backward Classes Act. One thing needs to be noted here. Concrete data about the number of backward

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classes in the country does not appear to be available. The survey conducted by the National Sample Survey reveals that the percentage is not 52% as is highlighted by the respondents.

311. Section 2(*g*) of the Act is relevant in this regard. It reads as follows:

> "2. (*g*) 'Other Backward Classes' means the class or classes of citizens who are socially and educationally backward, and are so determined by the Central Government;
>
> * * *"

312. At this juncture, it is to be noted that the Backward Classes Act in order to be wholly functional mandates determination by the Central Government of the backward classes for whom the statute is intended. Undisputedly, such determination has not been done. The plea is that for more than half a century enough attention has not been given for the benefit of the Other Backward Classes in the matter of admissions to higher educational institutions. That cannot be a ground to act with hurry and with undetermined data. It may be as rightly contended by learned counsel for the respondents that the percentage can certainly be not less than 27%. But that is no answer to the important question as to the identity test. In the background loom the socially and economically backward class of citizens. Poverty knows no caste. Poor has no caste. It is an unfortunate class. It is a matter of common knowledge that the institution of caste is a peculiarity of Indian institution when there is considerable controversy amongst the scholars as to how the caste system originated in this country. Originally, there were four main castes known as *varnas*. But gradually castes and sub-castes multiplied as the social fabric expanded with the absorption of different groups of people who belong to various cults and professing different religious faiths. The caste system in its earlier stage was quite elastic but in course of time it gradually hardened into a rigid framework based upon heredity. The inevitable result was social inequality. At some point of time occupation was the background for determination of castes. Maybe, at some point of time it depended on the income of the individual. But it appears to have taken disastrous turn with difference of status of various castes. But passage of time shows that the occupational label has lost much of its significance. But at the same time, the poor and downtrodden who belong to the caste of their own were the founders of poor. In *Indra Sawhney (I)*[10] this factor was noticed.

313. It is said that one must take life in one's stride, let today embrace the past with remembrance and the future with longing.

314. Don't look for the path far away, the path exists under your feet.

315. What is past and what cannot be prevented should not be grieved for.

316. With reference to the Office Memorandum which provides for preference in favour of "poorer sections" over other members of the

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

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backward classes, the expression was held to be relatable to those who are socially and economically more backward. The use of the word "poorer" in the context was held to be a measure of the social backwardness. It is therefore unmistakably recognised that economic backwardness is a factor which can never be lost sight of. There are only two families in the world; the haves and the have nots, said Miguel de Cervantes' Don Quixote de la Mancha. Tolstoy has emphatically said, "We will do anything for the poor man anything but get off his back" (quoted in Huntington Philanthropy and Morality).

317. William Cobbett had said "to be poor and independent is very nearly an impossibility". (See his book *Advice to Young Men*.) We cannot turn a Nelson eye to the poor, those covered by all encompassing expression "economically backward classes". Should this class of people be kept out of the mainstream of governmental priorities and policies because they belong to a particular caste? As noted above, the poor have no caste. A person belonging to a higher caste should not be made to suffer for what his forefathers had done several generations back.

318. Franklin D. Roosevelt in a speech in 1940 had said, "It is an unfortunate human failing that a full pocket book often groans more loudly than an empty stomach."

319. The haves and the have nots have to coexist. If the creamy layer has to be excluded the economically backward classes have to be included. That would be social balancing and that would be giving true meaning to the objectives of the Constitution. Social empowerment cannot be and is certainly not a measure for only socially and educationally backward classes. It also has to be for the socially and economically backward classes. Unless this balance, which is very delicate, is maintained the system inevitably will develop a crack and this crack may after a certain point of time be difficult to be joined. Instead of lightening the society from castes or classes it will be overburdened and a point of time may come when we shall not be able to bear the burden any further. Timely steps in this regard will save the Indian society and democracy from a catastrophe of collapse because of something which the Constitution wants to obliterate.

320. On the question of time period for the reservation, it is submitted that length of the leap to be provided depends upon the gap to be filled. It is fairly accepted by learned counsel for the respondents that as and when castes reach a higher level they are to be excluded from the zone of consideration. It is further submitted that traditional occupation is being pursued by persons belonging to some castes and the system still subsists and has not broken down. In the absence of alternative occupation which may not be lucrative, the persons who used to previously carry on the traditional occupation find it difficult to take up any other occupation.

321. It has been averred that consequent to several efforts, India has made enormous progress in terms of increase in institutions, teachers and

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students in elementary education. But despite all the efforts large population of the children in the country still remain out of school.

322. One of the contentions is that by passage of time prolonged reservation becomes illicit. In *Motor General Traders* v. *State of A.P.*[116] following observations were made: (SCC p. 232)

> "*16*. What may be unobjectionable as a transitional or temporary measure at an initial stage can still become discriminatory and hence violative of Article 14 of the Constitution if it is persisted in over a long period without any justification. The trend of decisions of this Court on the above question may be traced thus: in *Bhaiyalal Shukla* v. *State of M.P.*[117] one of the contentions urged was that the levy of sales tax in the area which was formerly known as Vindhya Pradesh (a Part 'C' State) on building materials used in a works contract was discriminatory after the merger of that area in the new State of Madhya Pradesh which was formed on 1-11-1956 under the States Reorganisation Act, 1956 as the sale of building materials in a works contract was not subject to any levy of sales tax in another part of the same new State namely the area which was formerly part of the area known as State of Madhya Pradesh (the Central Provinces and Berar area). That contention was rejected by this Court with the following observations at SCR pp. 274-75: (AIR p. 988, para 18)
>
> > '*18*. The laws in different portions of the new State of Madhya Pradesh were enacted by different legislatures, and under Section 119 of the States Reorganisation Act, all laws in force are to continue until repealed or altered by the appropriate legislature. We have already held that the sales tax law in Vindhya Pradesh was validly enacted, and it brought its validity with it under Section 119 of the States Reorganisation Act, when it became a part of the State of Madhya Pradesh. Thereafter, the different laws in different parts of Madhya Pradesh can be sustained on the ground that the differentiation arises from historical reasons, and a geographical classification based on historical reasons has been upheld by this Court in *M.K. Prithi Rajji* v. *State of Rajasthan*[118] and again in *State of M.P.* v. *Gwalior Sugar Co. Ltd.*[119] The latter case is important, because the sugarcane cess levied in the former Gwalior State but not in the rest of Madhya Bharat of which it formed a part, was challenged on the same ground as here, but was upheld as not affected by Article14. We, therefore, reject this argument.' "

116 (1984) 1 SCC 222
117 AIR 1962 SC 981 : 1962 Supp (2) SCR 257
118 Civil Appeal No. 327 of 1956 decided on 2-11-1960.
119 Civil Appeals Nos. 98 & 99 of 1957 decided on 30-11-1960.

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323. In *N.M. Thomas case*[24] the parameters of various clauses of Article 16 were highlighted as follows:

> "*37*. The rule of equality within Articles 14 and 16(1) will not be violated by a rule which will ensure equality of representation in the services for unrepresented classes after satisfying the basic needs of efficiency of administration. Article 16(2) rules out some basis of classification including race, caste, descent, place of birth, etc. Article 16(4) clarifies and explains that classification on the basis of backwardness does not fall within Article 16(2) and is legitimate for the purposes of Article 16(1). If preference shall be given to a particular under represented community other than a backward class or under represented State in an all-India service such a rule will contravene Article 16(2). A similar rule giving preference to an under-represented backward community is valid and will not contravene Articles 14, 16(1) and 16(2). Article 16(4) removes any doubt in this respect.
>
> (SCC p. 335, para 37)
>
> * * *
>
> *44*. Our Constitution aims at equality of status and opportunity for all citizens including those who are socially, economically and educationally backward. The claims of members of backward classes require adequate representation in legislative and executive bodies. If members of Scheduled Castes and Tribes, who are said by this Court to be backward classes, can maintain minimum necessary requirement of administrative efficiency, not only representation but also preference may be given to them to enforce equality and to eliminate inequality. Articles 15(4) and 16(4) bring out the position of backward classes to merit equality. Special provisions are made for the advancement of backward classes and reservations of appointments and posts for them to secure adequate representation. These provisions will bring out the content of equality guaranteed by Articles 14, 15(1) and 16(1). The basic concept of equality is equality of opportunity for appointment. Preferential treatment for members of backward classes with due regard to administrative efficiency alone can mean equality of opportunity for all citizens. Equality under Article 16 could not have a different content from equality under Article 14. Equality of opportunity for unequals can only mean aggravation of inequality. Equality of opportunity admits discrimination with reason and prohibits discrimination without reason. Discrimination with reasons means rational classification for differential treatment having nexus to the constitutionally permissible object. Preferential representation for the backward classes in services with due regard to administrative efficiency is permissible object and backward classes are a rational classification recognised by our Constitution. Therefore, differential treatment in standards of selection are within the concept of equality. (SCC pp. 337-38, para 44)

24 *State of Kerala* v. *N.M. Thomas*, (1976) 2 SCC 310 : 1976 SCC (L&S) 227

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* * *

56. If we are all to be treated in the same manner, this must carry with it the important requirement that none of us should be better or worse in upbringing, education, than anyone else which is an unattainable ideal for human beings of anything like the sort we now see. Some people maintain that the concept of equality of opportunity is an unsatisfactory concept. For, a complete formulation of it renders it incompatible with any form of human society. Take for instance, the case of equality of opportunity for education. This equality cannot start in schools and hence requires uniform treatment in families which is an evident impossibility. To remedy this, all children might be brought up in State nurseries, but, to achieve the purpose, the nurseries would have to be run on vigorously uniform lines. Could we guarantee equality of opportunity to the young even in those circumstances? The idea is well expressed by Laski:

> 'Equality means, in the second place, that adequate opportunities are laid open to all. By adequate opportunities we cannot imply equal opportunities in a sense that implies identity of original chance. The native endowments of men are by no means equal. Children who are brought up in an atmosphere where things of the mind are accounted highly are bound to start the race of life with advantages no legislation can secure. Parental character will inevitably affect profoundly the equality of the children whom it touches. So long, therefore, as the family endures—and there seems little reason to anticipate or to desire its disappearance—the varying environments it will create make the notion of equal opportunities a fantastic one.'[g]
>
> (SCC p. 341, para 56)

* * *

60. Bernard A.O. Williams, in his article 'The Idea of Equality' (supra) gives an illustration of the working of the principle of equality of opportunity:

> 'Suppose that in a certain society great prestige is attached to membership of a warrior class, the duties of which require great physical strength. This class has in the past been recruited from certain wealthy families only; but egalitarian reformers achieve a change in the rules, by which warriors are recruited from all sections of the society, on the result of a suitable competition. The effect of this, however, is that the wealthy families still provide virtually all the warriors, because the rest of the populace is so undernourished by reason of poverty that their physical strength is inferior to that of the wealthy and well nourished. The reformers protest that equality of opportunity has not really been achieved; the wealthy reply that in fact it has, and that the poor now have the opportunity of becoming

g "Liberty and Equality" in *Special Problems and Public Policy: Inequality and Justice*, Ed. Lee Rainwater, pp. 26-31.

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warriors—it is just bad luck that their characteristics are such that they do not pass the test. "We are not", they might say, "excluding anyone for being poor; we exclude people for being weak, and it is unfortunate that those who are poor are also weak." '

(SCC p. 342, para 60)

* * *

67. Today, the political theory which acknowledges the obligation of Government under Part IV of the Constitution to provide jobs, medical care, old age pension, etc. extends to human rights and imposes an affirmative obligation to promote equality and liberty. The force of the idea of a State with obligation to help the weaker sections of its members seems to have increasing influence in constitutional law. The idea finds expression in a number of cases in America involving social discrimination and also in the decisions requiring the State to offset the effects of poverty by providing counsel, transcript of appeal, expert witnesses, etc. Today, the sense that Government has affirmative responsibility for elimination of inequalities, social, economic or otherwise, is one of the dominant forces in constitutional law. While special concessions for the underprivileged have been easily permitted, they have not traditionally been required. Decisions in the areas of criminal procedure, voting rights and education in America suggest that the traditional approach may not be completely adequate. In these areas, the inquiry whether equality has been achieved no longer ends with numerical equality; rather the equality clause has been held to require resort to a standard of proportional equality which requires the State, in framing legislation, to take into account the private inequalities of wealth, of education and other circumstances.[h] (SCC p. 344, para 67)

* * *

89. The ultimate reason for the demand of equality for the members of backward classes is a moral perspective which affirms the intrinsic value of all human beings and calls for a society which provides these conditions of life which men need for development of their varying capacities. It is an assertion of human equality in the sense that it manifests an equal concern for the well-being of all men. On the one hand it involves a demand for the removal of those obstacles and impediments which stand in the way of the development of human capacities—that is, it is a call for the abolition of unjustifiable inequalities. On the other hand, the demand itself gets its sense and moral driving force from the recognition that 'the poorest he that is in England hath a life to live, as the greatest he'[i]. (SCC pp. 349-50, para 89)"

324. "Equality" and "excellence" are two conflicting claims difficult to be reconciled. The Constitution, in order to ensure true equality provides for special treatment to socially and educationally backward classes of citizens

h See *Developments — Equal Protection*, 82.

i See John Raes, *Equality*, p. 123.

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which is obviously desirable for providing social justice, though at the cost of merit. However, the Constitution does not provide at all for "institutional reservation". Therefore, its constitutionality is to be judged on the touchstone of Article 14. A large number of cases cropped up in this area concerning the institutional preference for admission into postgraduate medical education and superspecialities. The judiciary came forward and laid down detailed principles covering the need of such preference and to limit the extent of such reservation in view of the importance of merit in the context of national interest and international importance of universal excellence in superspecialities.

325. It is to be noted that the foundation for fixing 27% appears to be the view that 52% of the population belong to OBC. There is no supportable data for this proposition. In fact, different commissions at different points of time have different figures. It is the stand of the respondents that no commission has fixed the percentage below 52% and, therefore, there is nothing wrong in fixing the percentage at 27%. This is not the correct approach. It may be that in no case the percentage of persons belonging to OBC is less than 27% but supposing in a given case considering the fact that the actual percentage is 40% a figure less than 27% should have been fixed. The Commission set out pursuant to the directions of this Court seems to have acted somewhat on the petitions filed by the people claiming exclusion or inclusion. That was not the real purpose of this Court's decision to direct appointment of Commission. The very purpose was to identify the classes. This was the exercise which was to be undertaken apart from considering the applications for inclusion or exclusion as the case may be. As has been conceded at the beginning of the case affirmative action is not under challenge. Affirmative action is nothing but a crucial component of social justice in the constitutional dispensation but at the same time it has to be kept in view that the same does not infringe the principles of equality of which it is a part and/or unreasonably restraint or restrict other fundamental freedoms and that it does not violate the basic structure of the Constitution.

326. It needs no emphasis that Articles 15(4), 15(5) and 16(4) have to comply with the requirements of Article 14 and the discipline imposed in several other provisions like Articles 15(4)(*a*) [*sic* (2)(*a*)] and 15(4)(*b*) [*sic* (2)(*b*)], though, they form a part of the equality concept, each of which is so found in our Constitution.

327. "*19.* It is a well-settled principle in law that the court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. Words and phrases are symbols that stimulate mental references to referents. The object of interpreting a statute is to ascertain the intention of the legislature enacting it. (See *Institute of Chartered Accountants of India* v. *Price Waterhouse*[120].) The intention of the legislature is primarily to be

120 (1997) 6 SCC 312 : AIR 1998 SC 74

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gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. As a consequence, a construction which requires for its support, addition or substitution of words or which results in rejection of words as meaningless has to be avoided. As observed in *Crawford* v. *Spooner*[121] courts cannot aid the legislatures' defective phrasing of an Act, we cannot add or mend, and by construction make up deficiencies which are left there. (See *State of Gujarat* v. *Dilipbhai Nathjibhai Patel*[122].) It is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so. [See *Stock* v. *Frank Jones (Tipton) Ltd.*[123]] Rules of interpretation do not permit courts to do so, unless the provision as it stands is meaningless or of a doubtful meaning. Courts are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself. (Per Lord Loreburn, L.C. in *Vickers Sons and Maxim Ltd.* v. *Evans*[124], quoted in *Jumma Masjid* v. *Kodimaniandra Deviah*[125].)

20. The question is not what may be supposed and has been intended but what has been said. 'Statutes should be construed not as theorems of Euclid' Judge Learned Hand said, 'but words must be construed with some imagination of the purposes which lie behind them.' (See *Lenigh Valley Coal Co.* v. *Yensavage*[126].) The view was reiterated in *Union of India* v. *Filip Tiago De Gama of Vedem Vasco De Gama*[127].

21. In *D.R. Venkatachalam* v. *Dy. Transport Commr.*[128] it was observed that courts must avoid the danger of a priori determination of the meaning of a provision based on their own preconceived notions of ideological structure or scheme into which the provision to be interpreted is somewhat fitted. They are not entitled to usurp legislative function under the disguise of interpretation.

22. While interpreting a provision the court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary. (See *CST* v. *Popular Trading Co.*[129]) The legislative casus omissus cannot be supplied by judicial interpretative process.

23. Two principles of construction—one relating to casus omissus and the other in regard to reading the statute as a whole—appear to be

121 (1846) 6 Moo PC 1
122 (1998) 3 SCC 234 : 1988 SCC (Cri) 737
123 (1978) 1 WLR 231 : (1978) 1 All ER 948 (HL)
124 1910 AC 444 (HL)
125 AIR 1962 SC 847
126 218 FR 547
127 (1990) 1 SCC 277 : AIR 1990 SC 981
128 (1977) 2 SCC 273 : AIR 1977 SC 842
129 (2000) 5 SCC 511

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well settled. Under the first principle a casus omissus cannot be supplied by the court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself but at the same time a casus omissus should not be readily inferred and for that purpose all the parts of a statute or section must be construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular provision makes a consistent enactment of the whole statute. This would be more so if literal construction of a particular clause leads to manifestly absurd or anomalous results which could not have been intended by the legislature. 'An intention to produce an unreasonable result', said Danckwerts, L.J. in *Artemiou* v. *Procopiou*[130] (All ER p. 544 I), 'is not to be imputed to a statute if there is some other construction available.' Where to apply words literally would 'defeat the obvious intention of the legislation and produce a wholly unreasonable result' we must 'do some violence to the words' and so achieve that obvious intention and produce a rational construction. Per Lord Reid in *Luke* v. *IRC*[131] where at AC p. 577 (All ER p. 664 I) he also observed: 'This is not a new problem, though our standard of drafting is such that it rarely emerges.'

24. It is then true that,

> 'when the words of a law extend not to an inconvenience rarely happening, but due to those which often happen, it is good reason not to strain the words further than they reach, by saying it is casus omissus, and that the law intended *quae fraquentius accidunt*'.

'But', on the other hand,

> 'it is no reason, when the words of a law do enough extend to an inconvenience seldom happening, that they should not extend to it as well as if it happened more frequently, because it happens but seldom' (see *Fenton* v. *Hampton*[132]).

A casus omissus ought not to be created by interpretation, save in some case of strong necessity. Where, however, a casus omissus does really occur, either through the inadvertence of the legislature, or on the principle *quod semel aut bis existit proetereunt legislatores* [legislators may pass over that which happens only once or twice], the rule is that the particular case, thus left unprovided for, must be disposed of according to the law as it existed before such statute—*casus omissus et oblivioni datus dispositioni juris communis relinquitur*; 'a casus omissus', observed Buller, J. in *Jones* v. *Smart*[133], 'can in no case be supplied by a court of law, for that would be to make laws'.

25. The golden rule for construing wills, statutes, and in fact, all written instruments has been thus stated:

130 (1966) 1 QB 878 : (1965) 3 WLR 1011 : (1965) 3 All ER 539 (CA)
131 1963 AC 557 : (1963) 2 WLR 559 : (1963) 1 All ER 655 (HL)
132 (1858) 11 Moo PCC 347
133 (1785) 1 TR 44

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'The grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further' (see *Grey* v. *Pearson*[134]).

The latter part of this 'golden rule' must, however, be applied with much caution. 'If', remarked Jervis, C.J.,

'the precise words used are plain and unambiguous in our judgment, we are bound to construe them in their ordinary sense, even though it lead, in our view of the case, to an absurdity or manifest injustice. Words may be modified or varied, where their import is doubtful or obscure. But we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to their literal meaning' (see *Abley* v. *Dale*[135], ER p. 525)."[j]

328. Classifications on the basis of castes in the long run has tendency of inherently becoming pernicious. Therefore, the test of reasonableness has to apply. When the object is elimination of castes and not perpetuation to achieve the goal of casteless society and a society free from discrimination of caste, judicial review within the permissible limits is not ruled out. But at the same time compelling State interest can be considered while assessing backwardness. The impact of poverty on backwardness cannot be lost sight of. Economic liberation and freedom are also important. In *Nagaraj case*[11] it was inter alia observed as follows:

"*44*. The above three concepts are independent variable concepts. The application of these concepts in public employment depends upon quantifiable data in each case. Equality in law is different from equality in fact. When we construe Article 16(4), it is equality in fact which plays the dominant role. Backward classes seek justice. General class in public employment seeks equity. The difficulty comes in when the third variable comes in, namely, efficiency in service. In the issue of reservation, we are being asked to find a stable equilibrium between justice to the backwards, equity for the forwards and efficiency for the entire system. Equity and justice in the above context are hard concepts. However, if you add efficiency to equity and justice, the problem arises in the context of the reservation. This problem has to be examined, therefore, on the facts of each case. Therefore, Article 16(4) has to be construed in the light of Article 335 of the Constitution. Inadequacy in representation and

134 (1843-60) All ER Rep 21 : (1857) 6 HL Cas 61

135 (1851) 11 CB 378

j **Ed.**: Quoting from *Shiv Shakti Coop. Housing Society* v. *Swaraj Developers*, (2003) 6 SCC 659, pp. 669-72, paras 19-25.

11 *M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212

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backwardness of the Scheduled Castes and Scheduled Tribes are circumstances which enable the State Government to act under Article 16(4) of the Constitution. However, as held by this Court the limitations on the discretion of the Government in the matter of reservation under Article 16(4) as well as Article 16(4-A) come in the form of Article 335 of the Constitution. (SCC pp. 248-49, para 44)

* * *

46. The point which we are emphasising is that ultimately the present controversy is regarding the exercise of the power by the State Government depending upon the fact situation in each case. Therefore, 'vesting of the power' by an enabling provision may be constitutionally valid and yet 'exercise of the power' by the State in a given case may be arbitrary, particularly, if the State fails to identify and measure backwardness and inadequacy keeping in mind the efficiency of service as required under Article 335. (SCC p. 249, para 46)

* * *

48. It is the equality 'in fact' which has to be decided looking at the ground reality. Balancing comes in where the question concerns the extent of reservation. If the extent of reservation goes beyond cut-off point then it results in reverse discrimination. Anti-discrimination legislation has a tendency of pushing towards de facto reservation. Therefore, a numerical benchmark is the surest immunity against charges of discrimination.

49. Reservation is necessary for transcending caste and not for perpetuating it. Reservation has to be used in a limited sense otherwise it will perpetuate casteism in the country. Reservation is underwritten by a special justification. Equality in Article 16(1) is individual-specific whereas reservation in Article 16(4) and Article 16(4-A) is enabling. The discretion of the State is, however, subject to the existence of 'backwardness' and 'inadequacy of representation' in public employment. Backwardness has to be based on objective factors whereas inadequacy has to factually exist. This is where judicial review comes in. However, whether reservation in a given case is desirable or not, as a policy, is not for us to decide as long as the parameters mentioned in Articles 16(4) and 16(4-A) are maintained. As stated above, equity, justice and merit (Article 335)/efficiency are variables which can only be identified and measured by the State. Therefore, in each case, a contextual case has to be made out depending upon different circumstances which may exist State wise. (SCC p. 250, paras 48-49)

* * *

102. In the matter of application of the principle of basic structure, twin tests have to be satisfied, namely, the 'width test' and the test of 'identity'. As stated hereinabove, the concept of the 'catch-up' rule and 'consequential seniority' are not constitutional requirements. They are not implicit in Clauses (1) and (4) of Article 16. They are not

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constitutional limitations. They are concepts derived from service jurisprudence. They are not constitutional principles. They are not axioms like secularism, federalism, etc. Obliteration of these concepts or insertion of these concepts does not change the equality code indicated by Articles 14, 15 and 16 of the Constitution. Clause (1) of Article 16 cannot prevent the State from taking cognizance of the compelling interests of backward classes in the society. Clauses (1) and (4) of Article 16 are restatements of the principle of equality under Article 14. Clause (4) of Article 16 refers to affirmative action by way of reservation. Clause (4) of Article 16, however, states that the appropriate Government is free to provide for reservation in cases where it is satisfied on the basis of quantifiable data that backward class is inadequately represented in the services. Therefore, in every case where the State decides to provide for reservation there must exist two circumstances, namely, 'backwardness' and 'inadequacy of representation'. As stated above, equity, justice and efficiency are variable factors. These factors are context-specific. There is no fixed yardstick to identify and measure these three factors, it will depend on the facts and circumstances of each case. These are the limitations on the mode of the exercise of power by the State. None of these limitations have been removed by the impugned amendments. If the State concerned fails to identify and measure backwardness, inadequacy and overall administrative efficiency then in that event the provision for reservation would be invalid. These amendments do not alter the structure of Articles 14, 15 and 16 (equity code). The parameters mentioned in Article 16(4) are retained. Clause (4-A) is derived from Clause (4) of Article 16. Clause (4-A) is confined to SCs and STs alone. Therefore, the present case does not change the identity of the Constitution. The word 'amendment' connotes change. The question is—whether the impugned amendments discard the original Constitution. It was vehemently urged on behalf of the petitioners that the Statement of Objects and Reasons indicates that the impugned amendments have been promulgated by Parliament to overrule the decisions of this Court. We do not find any merit in this argument. Under Article 141 of the Constitution the pronouncement of this Court is the law of the land. The judgments of this Court in *Virpal Singh*[53], *Ajit Singh (I)*[115], *Ajit Singh (II)*[52] and *Indra Sawhney*[10] were judgments delivered by this Court which enunciated the law of the land. It is that law which is sought to be changed by the impugned constitutional amendments. The impugned constitutional amendments are enabling in nature. They leave

53 *Union of India* v. *Virpal Singh Chauhan*, (1995) 6 SCC 684 : 1996 SCC (L&S) 1 : (1995) 31 ATC 813

115 *Ajit Singh Januja (I)* v. *State of Punjab*, (1996) 2 SCC 715 : 1996 SCC (L&S) 540 : (1996) 33 ATC 239

52 *Ajit Singh (II)* v. *State of Punjab*, (1999) 7 SCC 209 : 1999 SCC (L&S) 1239

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

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it to the States to provide for reservation. It is well settled that Parliament while enacting a law does not provide content to the 'right'. The content is provided by the judgments of the Supreme Court. If the appropriate Government enacts a law providing for reservation without keeping in mind the parameters in Article 16(4) and Article 335 then this Court will certainly set aside and strike down such legislation. Applying the 'width test', we do not find obliteration of any of the constitutional limitations. Applying the test of 'identity', we do not find any alteration in the existing structure of the equality code. As stated above, none of the axioms like secularism, federalism, etc. which are overarching principles have been violated by the impugned constitutional amendments. Equality has two facets—'formal equality' and 'proportional equality'. Proportional equality is equality 'in fact' whereas formal equality is equality 'in law'. Formal equality exists in the rule of law. In the case of proportional equality the State is expected to take affirmative steps in favour of disadvantaged sections of the society within the framework of liberal democracy. Egalitarian equality is proportional equality.

(SCC pp. 268-69, para 102)

* * *

107. It is important to bear in mind the nature of constitutional amendments. They are curative by nature. Article 16(4) provides for reservation for backward classes in cases of inadequate representation in public employment. Article 16(4) is enacted as a remedy for the past historical discriminations against a social class. The object in enacting the enabling provisions like Articles 16(4), 16(4-A) and 16(4-B) is that the State is empowered to identify and recognise the compelling interests. If the State has quantifiable data to show backwardness and inadequacy then the State can make reservations in promotions keeping in mind maintenance of efficiency which is held to be a constitutional limitation on the discretion of the State in making reservation as indicated by Article 335. As stated above, the concepts of efficiency, backwardness, inadequacy of representation are required to be identified and measured. That exercise depends on availability of data. That exercise depends on numerous factors. It is for this reason that enabling provisions are required to be made because each competing claim seeks to achieve certain goals. How best one should optimise these conflicting claims can only be done by the administration in the context of local prevailing conditions in public employment. This is amply demonstrated by the various decisions of this Court discussed hereinabove. Therefore, there is a basic difference between 'equality in law' and 'equality in fact' (see *Affirmative Action* by William Darity). If Articles 16(4-A) and 16(4-B) flow from Article 16(4) and if Article 16(4) is an enabling provision then Articles 16(4-A) and 16(4-B) are also enabling provisions. As long as the boundaries mentioned in Article 16(4), namely, backwardness, inadequacy and efficiency of administration are retained in Articles 16(4-A) and 16(4-B) as controlling factors, we cannot

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attribute constitutional invalidity to these enabling provisions. However, when the State fails to identify and implement the controlling factors then excessiveness comes in, which is to be decided on the facts of each case. In a given case, where excessiveness results in reverse discrimination, this Court has to examine individual cases and decide the matter in accordance with law. This is the theory of 'guided power'. We may once again repeat that equality is not violated by mere conferment of power but it is breached by arbitrary exercise of the power conferred.

(SCC pp. 270-71, para 107)"

329. In *Minerva Mills Ltd.* v. *Union of India*[13] it was observed as follows: (SCC p. 654, para 57)

"*57.* This is not mere semantics. The edifice of our Constitution is built upon the concepts crystallised in the Preamble. We resolved to constitute ourselves into a socialist State which carried with it the obligation to secure to our people justice—social, economic and political. We, therefore, put Part IV into our Constitution containing directive principles of State policy which specify the socialistic goal to be achieved. We promised to our people a democratic polity which carries with it the obligation of securing to the people liberty of thought, expression, belief, faith and worship; equality of status and of opportunity and the assurance that the dignity of the individual will at all costs be preserved. We, therefore, put Part III in our Constitution conferring those rights on the people. Those rights are not an end in themselves but are the means to an end. The end is specified in Part IV. Therefore, the rights conferred by Part III are subject to reasonable restrictions and the Constitution provides that enforcement of some of them may, in stated uncommon circumstances, be suspended. But just as the rights conferred by Part III would be without a radar and a compass if they were not geared to an ideal, in the same manner the attainment of the ideals set out in Part IV would become a pretence for tyranny if the price to be paid for achieving that ideal is human freedoms. One of the faiths of our Founding Fathers was the purity of means. Indeed, under our law, even a dacoit who has committed a murder cannot be put to death in the exercise of right of self-defence after he has made good his escape. So great is the insistence of civilised laws on the purity of means. The goals set out in Part IV have, therefore, to be achieved without the abrogation of the means provided for by Part III. It is in this sense that Parts III and IV together constitute the core of our Constitution and combine to form its conscience. Anything that destroys the balance between the two parts will ipso facto destroy an essential element of the basic structure of our Constitution."

13 (1980) 3 SCC 625

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The view was affirmed in *T.M.A. Pai Foundation* v. *State of Karnataka*[8].

330. It has been highlighted that Articles 15(4) and 15(5) are irreconcilable. It is pointed out that Article 30 is not intended to pamper any class of people, but is intended to assure minorities regarding the right to establish. In that sense, Article 19(1)(*g*) is applicable. The said right is an inalienable and sacrosanct right. According to Mr Venugopal, Article 15(5) carved out an area from Article 15(4). Article 29(2) has to be read into Article 15(5) as Articles 15(4) and 15(5) operated side by side. As a result of Article 15(5) by special provision minorities' unaided rights are excluded. Article 30 does not relate to any special right for protection against majority and it cannot be termed to be any higher right and, therefore, Article 19(1)(*g*) restriction is not there. The object is not to create inequality.

331. It is pointed out that both Articles 15(4) and 15(5) begin with non obstante provision. Article 15(5) is a later introduction. It is stated that Article 15(1) has to prevail over Article 15(4) and the right given to certain class of people in Article 15(4) gets eliminated because of Article 15(5).

332. Provisions of the Constitution have to be read harmoniously and no part can be treated to be redundant. In our considered view both the provisions operate in different areas though there may be some amount of overlapping but that does not in any way lead to the conclusion that Article 15(5) takes away what is provided in Article 15(4).

333. "*14*. A construction which reduces the statute to a futility has to be avoided. A statute or any enacting provision therein must be so construed as to make it effective and operative on the principle expressed in the maxim *ut res magis valeat quam pereat* i.e. a liberal construction should be put upon written instruments, so as to uphold them, if possible, and carry into effect the intention of the parties. [See *Broom's Legal Maxims* (10th Edn.), p. 361, *Craies on Statutes* (7th Edn.), p. 95 and *Maxwell on Statutes* (11th Edn.), p. 221.]

15. A statute is designed to be workable and the interpretation thereof by a court should be to secure that object unless crucial omission or clear direction makes that end unattainable. (See *Whitney* v. *IRC*[136], AC at p. 52 referred to in *CIT* v. *S. Teja Singh*[137] and *Gursahai Saigal* v. *CIT*[138].)

16. The courts will have to reject that construction which will defeat the plain intention of the legislature even though there may be some inexactitude in the language used. (See *Salmon* v. *Duncombe*[139], AC at p. 634, *Curtis* v. *Stovin*[140] referred to in *S. Teja Singh case*[137].)

8 (2002) 8 SCC 481
136 1926 AC 37 (HL)
137 AIR 1959 SC 352
138 AIR 1963 SC 1062
139 (1886) 11 AC 627 (PC)
140 (1889) 22 QBD 513 (CA)
137 AIR 1959 SC 352

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17. If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility, and should rather accept the bolder construction, based on the view that Parliament would legislate only for the purpose of bringing about an effective result. (See *Nokes* v. *Doncaster Amalgamated Collieries Ltd.*[141] referred to in *Pye* v. *Minister for Lands for New South Wales*[142].) The principles indicated in the said cases were reiterated by this Court in *Mohan Kumar Singhania* v. *Union of India*[143].

18. The statute must be read as a whole and one provision of the Act should be construed with reference to other provisions in the same Act so as to make a consistent enactment of the whole statute.

19. The court must ascertain the intention of the legislature by directing its attention not merely to the clauses to be construed but to the entire statute; it must compare the clause with other parts of the law and the setting in which the clause to be interpreted occurs. (See *R.S. Raghunath* v. *State of Karnataka*[144].) Such a construction has the merit of avoiding any inconsistency or repugnancy either within a section or between two different sections or provisions of the same statute. It is the duty of the court to avoid a head-on clash between two sections of the same Act. (See *Sultana Begum* v. *Prem Chand Jain*[145].)

20. Whenever it is possible to do so, it must be done to construe the provisions which appear to conflict so that they harmonise. It should not be lightly assumed that Parliament had given with one hand what it took away with the other.

21. The provisions of one section of the statute cannot be used to defeat those of another unless it is impossible to effect reconciliation between them. Thus a construction that reduces one of the provisions to a 'useless lumber' or 'dead letter' is not a harmonised construction. To harmonise is not to destroy."[k]

334. The Constitution of India is not intended to be static. It is by its very nature dynamic. It is a living and organic thing. It is an instrument which has greatest value to be construed. *Ut res valeat potius quam pereat* (the construction should be preferred which makes the machinery workable). Our Constitution reflects the beliefs and political aspirations of those who had framed it. It is therefore desirable that while considering the question as to whether 27% fixed for the Other Backward Classes is to be maintained without definite data the rights of those who belong to the unfortunate categories of other economic backward classes deserve to be concerned, else

141 1940 AC 1014 : (1940) 3 All ER 549 (HL)
142 (1954) 1 WLR 1410 : (1954) 3 All ER 514 (PC)
143 1992 Supp (1) SCC 594 : 1992 SCC (L&S) 455 : (1992) 19 ATC 881
144 (1992) 1 SCC 335 : 1992 SCC (L&S) 286 : (1992) 19 ATC 507
145 (1997) 1 SCC 373

k **Ed.**: Quoting from *CIT* v. *Hindustan Bulk Carriers*, (2003) 3 SCC 57, pp. 73-74, paras 14-21.

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there shall be no definite determination of number of Other Backward Classes. While fixing the measure for creamy layer it would not be difficult also to fix the norms for the socially and economically backward classes, rather the latter exercise would be easier to undertake.

335. In *Indra Sawhney (1)*[10] the desirability of excluding some posts from the zone of reservation was highlighted. It was also emphasised that periodic review of policy of reservation was imperative. It was inter alia observed as follows:

> "*838*. While on Article 335, we are of the opinion that there are certain services and positions where either on account of the nature of duties attached to them or the level (in the hierarchy) at which they obtain, *merit as explained hereinabove, alone counts*. In such situations, it may not be advisable to provide for reservations. For example, technical posts in research and development organisations/departments/ institutions, in specialities and superspecialities in medicine, engineering and other such courses in physical sciences and mathematics, in defence services and in the establishments connected therewith. Similarly, in the case of posts at the higher echelons e.g. Professors (in education), pilots in Indian Airlines and Air India, scientists and technicians in nuclear and space application, provision for reservation would not be advisable.
>
> (emphasis supplied)
>
> (SCC p. 752, para 838)
>
> * * *
>
> *840*. We may point out that the services/posts enumerated above, on account of their nature and duties attached, are such as call for highest level of intelligence, skill and excellence. Some of them are second-level and third-level posts in the ascending order. Hence, they form a category apart. Reservation therein may not be consistent with 'efficiency of administration' contemplated by Article 335. (SCC p. 753, para 840)
>
> * * *
>
> *859*. We may summarise our answers to the various questions dealt with and answered hereinabove:
>
> (*1*)(*a*) It is not necessary that the 'provision' under Article 16(4) should necessarily be made by Parliament/legislature. Such a provision can be made by the executive also. Local bodies, statutory corporations and other instrumentalities of the State falling under Article 12 of the Constitution are themselves competent to make such a provision, if so advised. (Paras 735-37)
>
> (*b*) An executive order making a provision under Article 16(4) is enforceable the moment it is made and issued. (Paras 738-40)
>
> (*2*)(*a*) Clause (4) of Article 16 is not an exception to Clause (1). It is an instance and an illustration of the classification inherent in Clause (1). (Paras 741-42)

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

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(*b*) Article 16(4) is exhaustive of the subject of reservation in favour of backward class of citizens, as explained in this judgment. (Para 743)

(*c*) Reservations can also be provided under Clause (1) of Article 16. It is not confined to extending of preferences, concessions or exemptions alone. These reservations, if any, made under Clause (1) have to be so adjusted and implemented as not to exceed the level of representation prescribed for 'backward class of citizens'—as explained in this judgment. (Para 745)

(*3*)(*a*) A caste can be and quite often is a social class in India. If it is backward socially, it would be a backward class for the purposes of Article 16(4). Among non-Hindus, there are several occupational groups, sects and denominations, which for historical reasons, are socially backward. They too represent backward social collectivities for the purposes of Article 16(4). (Paras 746-79)

(*b*) Neither the Constitution nor the law prescribes the procedure or method of identification of backward classes. Nor is it possible or advisable for the court to lay down any such procedure or method. It must be left to the authority appointed to identify. It can adopt such method/procedure as it thinks convenient and so long as its survey covers the entire populace, no objection can be taken to it. Identification of the backward classes can certainly be done with reference to castes among, and along with, other occupational groups, classes and sections of people. One can start the process either with occupational groups or with castes or with some other groups. Thus one can start the process with the castes, wherever they are found, apply the criteria (evolved for determining backwardness) and find out whether it satisfies the criteria. If it does—what emerges is a 'backward class of citizens' within the meaning of and for the purposes of Article 16(4). Similar process can be adopted in the case of other occupational groups, communities and classes, so as to cover the entire populace. The central idea and overall objective should be to consider all available groups, sections and classes in society. Since caste represents an existing, identifiable social group/class encompassing an overwhelming minority of the country's population, one can well begin with it and then go to other groups, sections and classes. (Paras 780 and 785)

(*c*) It is not correct to say that the backward class of citizens contemplated in Article 16(4) is the same as the socially and educationally backward classes referred to in Article 15(4). It is much wider. The accent in Article 16(4) is on social backwardness. Of course, social, educational and economic backwardness are closely intertwined in the Indian context. (Paras 786-89)

(*d*) 'Creamy layer' can be, and must be excluded. (Paras 790-93)

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(*e*) It is not necessary for a class to be designated as a backward class that it is situated similarly to the Scheduled Castes/Scheduled Tribes. (Paras 794-97)

(*f*) The adequacy of representation of a particular class in the services under the State is a matter within the subjective satisfaction of the appropriate Government. The judicial scrutiny in that behalf is the same as in other matters within the subjective satisfaction of an authority. (Para 798)

(*4*)(*a*) A backward class of citizens cannot be identified only and exclusively with reference to economic criteria. (Para 799)

(*b*) It is, of course, permissible for the Government or other authority to identify a backward class of citizens on the basis of occupation-cum-income, without reference to caste, if it is so advised. (Para 800)

(*5*) There is no constitutional bar to classify the backward classes of citizens into backward and more backward categories. (Paras 801-03)

(*6*)(*a*) and (*b*) The reservations contemplated in Clause (4) of Article 16 should not exceed 50%. While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. (SCC pp. 766-67, para 859)"

336. In *Vasanth Kumar case*[25] at para 2(4) it was observed as follows: (SCC p. 723)

"*2*. (*4*) The policy of reservations in employment, education and legislative institutions should be reviewed every five years or so. That will at once afford an opportunity (*i*) to the State to rectify distortions arising out of particular facets of the reservation policy and (*ii*) to the people, both backward and non-backward, to ventilate their views in a public debate on the practical impact of the policy of reservations."

337. In *State of A.P.* v. *P. Sagar*[43] at para 8 it was observed as follows: (AIR p. 1384)

"*8*. Article 15 guarantees by the first clause a fundamental right of far-reaching importance to the public generally. Within certain defined limits an exception has been engrafted upon the guarantee of the freedom in Clause (1), but being in the nature of an exception, the conditions which justify departure must be strictly shown to exist. When a dispute is raised before a court that a particular law which is inconsistent with the guarantee against discrimination is valid on the plea that it is permitted under Clause (4) of Article 15 the assertion by the State that the officers of the State had taken into consideration the criteria which had been adopted by the courts for determining who the socially and educationally

25 *K.C. Vasanth Kumar* v. *State of Karnataka*, 1985 Supp SCC 714
43 AIR 1968 SC 1379 : (1968) 3 SCR 595

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backward classes of the society are, or that the authorities had acted in good faith in determining the socially and educationally backward classes of citizens, would not be sufficient to sustain the validity of the claim. The courts of the country are invested with the power to determine the validity of the law which infringes the fundamental rights of citizens and others and when a question arises whether a law which prima facie infringes a guaranteed fundamental right is within an exception, the validity of that law has to be determined by the courts on materials placed before them. By merely asserting that law was made after full consideration of the relevant evidence and criteria which have a bearing thereon, and was within the exception, the jurisdiction of the courts to determine whether by making the law a fundamental right has been infringed is not excluded."

338. Significant observations were made in *K.S. Jayasree* v. *State of Kerala*[67]. At para 22 it was noted as follows: (SCC p. 736)

"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)

67 (1976) 3 SCC 730

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cannot be equated with castes. In *R. Chitralekha* v. *State of Mysore*[14] this Court said that the classification of backward classes based on economic conditions and occupations does not offend Article 15(4)." a

339. Further, in *A. Peeriakaruppan (Minor)* v. *State of T.N.*[28] at para 29 it was observed as follows: (SCC p. 49)

"*29. Rajendran case*[40] is an authority for the proposition that the classification of backward classes on the basis of castes is within the purview of Article 15(4) if those castes are shown to be socially and educationally backward. No further material has been placed before us to b show that the reservation for backward classes with which we are herein concerned is not in accordance with Article 15(4). There is no gainsaying the fact that there are numerous castes in this country which are socially and educationally backward. To ignore their existence is to ignore the facts of life. Hence we are unable to uphold the contention that the impugned reservation is not in accordance with Article 15(4). But all the c same the Government should not proceed on the basis that once a class is considered as a backward class it should continue to be backward class for all times. Such an approach would defeat the very purpose of the reservation because once a class reaches a stage of progress which some modern writers call as take-off stage then competition is necessary for their future progress. The Government should always keep under review d the question of reservation of seats and only the classes which are really socially and educationally backward should be allowed to have the benefit of reservation. Reservation of seats should not be allowed to become a vested interest. The fact that candidates of backward classes have secured about 50% of the seats in the general pool does show that the time has come for a de novo comprehensive examination of the e question. It must be remembered that the Government's decision in this regard is open to judicial review."

340. It has been highlighted that the Act has been made applicable to Central Educational Institutions established, maintained or aided by the Central Government.

341. Central Educational Institutions have been defined in Section 2(*d*) as follows: f

"2. (*d*) 'Central Educational Institution' means—

(*i*) a university established or incorporated by or under a Central Act;

(*ii*) an institution of national importance set up by an Act of g Parliament;

(*iii*) an institution, declared as a deemed university under Section 3 of the University Grants Commission Act, 1956 (3 of 1956), and maintained by or receiving aid from the Central Government;

14 AIR 1964 SC 1823 : (1964) 6 SCR 368 h

28 (1971) 1 SCC 38

40 *P. Rajendran (Minor)* v. *State of Madras*, AIR 1968 SC 1012 : (1968) 2 SCR 786

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(*iv*) an institution maintained by or receiving aid from the Central Government, whether directly or indirectly, and affiliated to an institution referred to in Clause (*i*) or Clause (*ii*), or a constituent unit of an institution referred to in Clause (*iii*);

(*v*) an educational institution set up by the Central Government under the Societies Registration Act, 1860 (21 of 1860);

* * *"

342. It is pointed out that there cannot be any reservations in respect of superspecialities and institutions imparting education of highly complex subjects. The example of All India Institute of Medical Sciences has been given. It has been pointed out that its status as an institution for superspeciality has been judicially recognised.

343. It needs to be noted that in terms of Section 4(*b*) of the Act certain educational institutions have been excluded from the operation of the Act. The Act has been made inapplicable to them. It is to be noted that in the said provision, institutions of research, institutions of excellence, institutions of national and strategic importance have been specified in the Schedule to the Act. The proviso permits the Central Government as and when considered necessary to amend the Schedule. In other words, on an appropriate case being presented and established before the Central Government that the institution is of excellence and/or a research institute and/or an institution of national and strategic importance, the Central Government can amend the Schedule and include such institution in the Schedule. In other words, it is permissible for the petitioners and anybody else to highlight to the Government about the desirability to include an institution in the Schedule of the Act.

344. One of the major issues highlighted by Mr P.P. Rao was that in several cases the matriculation standard of education was considered to be the measure for measuring backwardness. It is, therefore, submitted that when at least half of the persons belonging to a particular caste have reached the matriculation level of education, they cannot be considered to be educationally backward any longer. It is therefore submitted that if that be taken as a yardstick for measuring backwardness then the reservation of seats for technical education or in higher studies cannot be sustained. It has also been highlighted that the shift of emphasis from primary and basic education to higher education is against the constitutional mandate making education compulsory in terms of Article 21-A of the Constitution. It is not correct to contend that in fixing the priorities the Government is the best judge as contended by the respondents. It may be correct in matters relating to simple policy decisions but when the constitutional mandate is under consideration the underlying object has also to be kept in view. In this context reference is made to Article 46 of the Constitution. It is in that background pointed out by learned counsel for the petitioners that what cannot be lost sight of is the fact that it is the foundation for basic, elementary and primary education. The educational backwardness can be obliterated when at least half of the persons belonging to a particular caste come up to a matriculation level.

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345. There is substance in this plea. It is not merely the existence of schemes but the effective implementation of the schemes that is important. It is to be noted that financial constraint cannot be a ground to deny fundamental rights and the provision for the schemes and the utilisation of the funds are also relevant factors. It appears that better coordination between the funds provider and the utiliser is necessary. It is suggested that putting stress on cut-off limit by shifting from matriculation to Class XII level education as a benchmark of gauging educational backwardness will be a step in the right direction. Though as rightly contended by Mr P.P. Rao that in several decisions, for example, *M.R. Balaji case*[20], *Balram case*[23] and *K.S. Jayasree case*[67] the secondary education was taken to be the benchmark, ground reality cannot be lost sight of that with the limited availability of jobs and the spiralling increase in population, secondary or matriculation examination can no longer be considered to be an appropriate benchmark. It has to be at the most graduation. But the question arises whether technical education can be included while considering educational backwardness. A delicate balancing has to be done in this regard. While technical education cannot be the sole criterion for gauging educational backwardness it definitely will form part of 50% norms fixed by this Court. Slightly variable plus or minus would be the appropriate standard to gauge educational backwardness.

346. One of the grey areas which have been highlighted by learned counsel for the petitioners is that caste is not a substitute for class and nevertheless the two terms are not synonyms. Much of the argument in this regard is centred round paras 782 and 783 of *Indra Sawhney (1)*[10]. The same read as under: (SCC pp. 716-17)

> "*782*. Coming back to the question of identification, the fact remains that one has to begin somewhere—with some group, class or section. There is no set or recognised method. There is no law or other statutory instrument prescribing the methodology. The ultimate idea is to survey the entire populace. If so, one can well begin with castes, which represent explicit identifiable social classes/groupings, more particularly when Article 16(4) seeks to ameliorate social backwardness. What is unconstitutional with it, more so when caste, occupational poverty and social backwardness are so closely intertwined in our society? [Individual survey is out of question, since Article 16(4) speaks of class protection and not individual protection.] This does not mean that one can wind up the process of identification with the castes. Besides castes (whether found among Hindus or others) there may be other communities, groups, classes and denominations which may qualify as backward class of citizens. For example, in a particular State, Muslim

20 *M.R. Balaji* v. *State of Mysore*, AIR 1963 SC 649 : 1963 Supp (1) SCR 439

23 *State of A.P.* v. *U.S.V. Balram*, (1972) 1 SCC 660

67 *K.S. Jayasree* v. *State of Kerala*, (1976) 3 SCC 730

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

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community as a whole may be found socially backward. (As a matter of fact, they are so treated in the State of Karnataka as well as in the State of Kerala by their respective State Governments.) Similarly, certain sections and denominations among Christians in Kerala who were included among backward communities notified in the former princely State of Travancore as far back as in 1935 may also be surveyed and so on and so forth. Any authority entrusted with the task of identifying backward classes may well start with the castes. It can take caste 'A', apply the criteria of backwardness evolved by it to that caste and determine whether it qualifies as a backward class or not. If it does qualify, what emerges is a *backward class*, for the purposes of Clause (4) of Article 16. The concept of 'caste' in this behalf is not confined to castes among Hindus. It extends to castes, wherever they obtain as a fact, irrespective of religious sanction for such practice. Having exhausted the castes or simultaneously with it, the authority may take up for consideration other occupational groups, communities and classes. For example, it may take up the Muslim community (after excluding those sections, castes and groups, if any, who have already been considered) and find out whether it can be characterised as a backward class in that State or region, as the case may be. The approach may differ from State to State since the conditions in each State may differ. Nay, even within a State, conditions may differ from region to region. Similarly, Christians may also be considered. If in a given place, like Kerala, there are several denominations, sections or divisions, each of these groups may separately be considered. In this manner, all the classes among the populace will be covered and that is the central idea. The effort should be to consider all the available groups, sections and classes of society in whichever order one proceeds. Since caste represents an existing, identifiable, social group spread over an overwhelming majority of the country's population, we say one may well begin with castes, if one so chooses, and then go to other groups, sections and classes. We may say, at this stage, that we broadly commend the approach and methodology adopted by the Justice O. Chinnappa Reddy Commission in this respect.

783. We do not mean to suggest—we may reiterate—that the procedure indicated hereinabove is the only procedure or method/approach to be adopted. Indeed, there is no such thing as a standard or model procedure/approach. It is for the authority (appointed to identify) to adopt such approach and procedure as it thinks appropriate, and so long as the approach adopted by it is fair and adequate, the court has no say in the matter. The only object of the discussion in the preceding para is to emphasise that if a commission/authority begins its process of identification with castes (among Hindus) and occupational groupings among others, it cannot by that reason alone be said to be constitutionally or legally bad. We must also say that there is no rule of law that a test to be applied for identifying backward classes should be only one and/or uniform. In a

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vast country like India, it is simply not practicable. If the real object is to discover and locate backwardness, and if such backwardness is found in a caste, it can be treated as backward; if it is found in any other group, section or class, they too can be treated as backward."

(emphasis in original)

347. On a closer reading of the paragraphs it appears that this Court took note of the fact that several religions do not have any caste. Therefore, the first sentence of para 782 lays emphasis to begin somewhere—with some group, class or section. It also states that there is no set or recognised method and there is no law or other statutory instrument prescribing the methodology. In this context, it has also been stated that one can well begin with castes which represent explicit identifiable social classes or groupings. Therefore, the emphasis was on beginning with castes which represent explicit identifiable social classes or groupings. Again in para 783, it has been stated that in a vast country like India it is simply not practicable to fix the test for identifying backward classes. In that background it was held that if the real objective is to discover and locate the real backwardness and if such backwardness is found in a caste it can be considered as backward. Similarly if it is found in any other group, section or class they too can be treated as backward. The intention therefore is clear that if caste is found to be backward it can certainly be treated as backward. To give any other meaning would be adding or subtracting to what has been specifically stated in the decision.

348. It is also relevant to take note of certain earlier decisions referred to in *Indra Sawhney (1) case*[10] which throw a beacon of light on the issue. They are as under:

348.1. ***M.R. Balaji*** v. ***State of Mysore***[20], AIR pp. 658-59, paras 20 & 22-23

"*20.* Article 15(4) authorises the State to make a special provision for the advancement of any socially and educationally backward classes of citizens, as distinguished from the Scheduled Castes and Scheduled Tribes. No doubt, special provision can be made for both categories of citizens, but in specifying the categories, the first category is distinguished from the second. Clauses (24) and (25) of Article 366 define Scheduled Castes and Scheduled Tribes respectively, but there is no clause defining socially and educationally backward classes of citizens, and so, in determining the question as to whether a particular provision has been validly made under Article 15(4) or not, the first question which falls to be determined is whether the State has validly determined who should be included in these backward classes. It seems fairly clear that the backward classes of citizens for whom special provision is authorised to be made are, by Article 15(4) itself, treated as

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

20 AIR 1963 SC 649 : 1963 Supp (1) SCR 439

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being similar to the Scheduled Castes and Scheduled Tribes. Scheduled Castes and Scheduled Tribes which have been defined were known to be backward and the Constitution makers felt no doubt that special provision had to be made for their advancement. It was realised that in the Indian society there were other classes of citizens who were equally, or may be somewhat less, backward than the Scheduled Castes and Tribes and it was thought that some special provision ought to be made even for them. ...

* * *

22. Let us take the question of social backwardness first. By what test should it be decided whether a particular class is socially backward or not? The group of citizens to whom Article 15(4) applies are described as 'classes of citizens', not as castes of citizens. A class, according to the dictionary meaning, shows division of society according to status, rank or caste. In the Hindu social structure, caste unfortunately plays an important part in determining the status of the citizen. Though according to sociologists and Vedic scholars, the caste system may have originally begun on occupational or functional basis, in course of time, it became rigid and inflexible. The history of the growth of caste system shows that its original functional and occupational basis was later overburdened with considerations of purity based on ritual concepts, and that led to its ramifications which introduced inflexibility and rigidity. This artificial growth inevitably tended to create a feeling of superiority and inferiority, and to foster narrow caste loyalties. Therefore, 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. In this connection it is, however, necessary to bear in mind that the 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 of backward classes of citizens was based solely on the caste of the citizen, it may not always be logical and may perhaps contain the vice of perpetuating the castes themselves.

23. Besides, if the caste of the group of citizens was made the sole basis for determining the social backwardness of the said group, that test would inevitably break down in relation to many sections of Indian society which do not recognise castes in the conventional sense known to Hindu society. How is one going to decide whether Muslims, Christians or Jains, or even Lingayats are socially backward or not? The test of castes would be inapplicable to those groups, but that would hardly justify the exclusion of these groups in toto from the operation of Article 15(4). It is not unlikely that in some States some Muslims or Christians or Jains forming groups may be socially backward. That is why we think that though castes in relation to Hindus may be a relevant factor to consider in determining the social backwardness of groups or classes of citizens, it cannot be made the sole or the dominant test in that behalf.

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Social backwardness is on the ultimate analysis the result of poverty to a very large extent. The classes of citizens who are deplorably poor automatically become socially backward. They do not enjoy a status in society and have, therefore, to be content to take a backward seat. It is true that social backwardness which results from poverty is likely to be aggravated by considerations of caste to which the poor citizens may belong, but that only shows the relevance of both caste and poverty in determining the backwardness of citizens."

348.2. *R. Chitralekha* v. *State of Mysore*[14]

Subba Rao, J. referred to the observations in *M.R. Balaji* v. *State of Mysore*[20] and observed: (*Chitralekha case*[14], AIR pp. 1883-84, paras 15 & 19-21)

"*15.* Two principles stand out prominently from the said observations, namely, (*i*) the caste of a group of citizens may be a relevant circumstance in ascertaining their social backwardness; and (*ii*) though it is a relevant factor to determine the social backwardness of a class of citizens, it cannot be the sole or dominant test in that behalf. The observations extracted in the judgment of the High Court appear to be in conflict with the observations of this Court. While this Court said that caste is only a relevant circumstance and that it cannot be the dominant test in ascertaining the backwardness of a class of citizens, the High Court said that it was an important basis in determining the class of backward Hindus and that the Government should have adopted caste as one of the tests. As the said observations made by the High Court may lead to some confusion in the mind of the authority concerned who may be entrusted with the duty of prescribing the rules for ascertaining the backwardness of classes of citizens within the meaning of Article 15(4) of the Constitution, we would hasten to make it clear that caste is only a relevant circumstance in ascertaining the backwardness of a class and there is nothing in the judgment of this Court which precludes the authority concerned from determining the social backwardness of a group of citizens if it can do so without reference to caste. While this Court has not excluded caste from ascertaining the backwardness of a class of citizens, it has not made it one of the compelling circumstances affording a basis for the ascertainment of backwardness of a class. To put it differently, the authority concerned may take caste into consideration in ascertaining the backwardness of a group of persons; but, if it does not, its order will not be bad on that account, if it can ascertain the backwardness of a group of persons on the basis of other relevant criteria.

* * *

14 AIR 1964 SC 1823 : (1964) 6 SCR 368
20 AIR 1963 SC 649 : 1963 Supp (1) SCR 439

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19. … The important factor to be noticed in Article 15(4) is that it does not speak of castes, but only speaks of classes. If the makers of the Constitution intended to take castes also as units of social and educational backwardness, they would have said so as they have said in the case of the Scheduled Castes and the Scheduled Tribes. Though it may be suggested that the wider expression 'classes' is used in Clause (4) of Article 15 as there are communities without castes, if the intention was to equate classes with castes, nothing prevented the makers of the Constitution to use the expression 'backward classes or castes'. The juxtaposition of the expression 'backward classes' and 'Scheduled Castes' in Article 15(4) also leads to a reasonable inference that the expression 'classes' is not synonymous with castes. It may be that for ascertaining whether a particular citizen or a group of citizens belong to a backward class or not, his or their caste may have some relevance, but it cannot be either the sole or the dominant criterion for ascertaining the class to which he or they belong.

20. This interpretation will carry out the intention of the Constitution expressed in the aforesaid articles. It helps the really backward classes instead of promoting the interests of individuals or groups who, though they belong to a particular caste a majority whereof is socially and educationally backward, really belong to a class which is socially and educationally advanced. To illustrate, take a caste in a State which is numerically the largest therein. It may be that though a majority of the people in that caste are socially and educationally backward, an effective minority may be socially and educationally far more advanced than another small sub-caste the total number of which is far less than the said minority. If we interpret the expression 'classes' as 'castes', the object of the Constitution will be frustrated and the people who do not deserve any adventitious aid may get it to the exclusion of those who really deserve. This anomaly will not arise if, without equating caste with class, caste is taken as only one of the considerations to ascertain whether a person belongs to a backward class or not. On the other hand, if the entire sub-caste, by and large, is backward, it may be included in the Scheduled Castes by following the appropriate procedure laid down by the Constitution.

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 emphasise 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

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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."

348.3. ***P. Rajendran (Minor)*** v. ***State of Madras***[40], AIR pp. 1014-15, paras 7-8

"*7.* The first challenge is to Rule 5 on the ground that it violates Article 15 of the Constitution. Article 15 forbids discrimination against any citizen on the grounds only of religion, race, caste, sex, place of birth or any of them. At the same time Article 15(4) inter alia permits the State to make any special provision for the advancement of any socially and educationally backward classes of citizens. The contention is that the list of socially and educationally backward classes for whom reservation is made under Rule 5 is nothing but a list of certain castes. Therefore, reservation in favour of certain castes based only on caste considerations violates Article 15(1), which prohibits discrimination on the ground of caste only. Now if the reservation in question had been based only on caste and had not taken into account the social and educational backwardness of the caste in question, it would be violative of Article 15(1). But it must not be forgotten that a caste is also a class of citizens and if the caste as a whole is socially and educationally backward reservation can be made in favour of such a caste on the ground that it is a socially and educationally backward class of citizens within the meaning of Article 15(4). Reference in this connection may be made to the observations of this Court in *M.R. Balaji* v. *State of Mysore*[20], SCR at pp. 459-60 (AIR at p. 659) to the effect that it was not irrelevant to consider the caste of a class of citizens in determining their social and educational backwardness. It was further observed that though the caste of a class of citizens may be relevant its importance should not be exaggerated; and if classification of backward classes of citizens was based solely on the caste of the citizen, it might be open to objection. It is true that in the present cases the list of socially and educationally backward classes has been specified by caste. But that does not necessarily mean that caste was the sole consideration and that persons belonging to these castes are also not a class of socially and educationally backward citizens. In its reply, the State of Madras has given the history as to how this list of backward classes was made, starting from the year 1906 and how the list has been kept up to date and necessary amendments made therein. It has also been stated that the main criterion for inclusion in the list was the social and educational backwardness of the caste based on occupations pursued by these castes. Because the members of the caste as a whole were found to be socially and educationally backward, they were put in the list. The matter was finally examined after the Constitution came into force in the light of the

40 AIR 1968 SC 1012 : (1968) 2 SCR 786
20 AIR 1963 SC 649 : 1963 Supp (1) SCR 439

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provisions contained in Article 15(4). As it was found that members of these castes as a whole were educationally and socially backward, the list which had been coming on from as far back as 1906 was finally adopted for purposes of Article 15(4). In short the case of the State of Madras is that the castes included in the list are only a compendious indication of the class of people in those castes and these classes of people had been put in the list for the purpose of Article 15(4) because they had been found to be socially and educationally backward.

8. This is the position as explained in the affidavit filed on behalf of the State of Madras. On the other hand the only thing stated in the petitions is that as the list is based on caste alone it is violative of Article 15(1). In view however of the explanation given by the State of Madras, which has not been controverted by any rejoinder, it must be accepted that though the list shows certain castes, the members of those castes are really classes of educationally and socially backward citizens. No attempt was made on behalf of the appellant-petitioners to show that any caste mentioned in this list was not educationally and socially backward. No such averment was made in the affidavit in support of their cases, nor was any attempt made to traverse the case put forward on behalf of the State of Madras by filing a rejoinder-affidavit to show that even one of the castes included in the list was not educationally and socially backward. In this state of the pleadings, we must come to the conclusion that though the list is prepared castewise, the castes included therein are as a whole educationally and socially backward and therefore the list is not violative of Article 15. The challenge to Rule 5 must therefore fail."

348.4. ***State of A.P.*** v. ***P. Sagar***[43], AIR p. 1382, para 6

"*6*. In the context in which it occurs the expression 'class' means a homogeneous section of the people grouped together because of certain likenesses or common traits and who are identifiable by some common attributes such as status, rank, occupation, residence in a locality, race, religion and the like. In determining whether a particular section forms a class, caste cannot be excluded altogether. But in the determination of a class a test solely based upon the caste or community cannot also be accepted. By Clause (1), Article 15 prohibits the State from discriminating against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. By Clause (3) of Article 15 the State is, notwithstanding the provision contained in Clause (1), permitted to make special provision for women and children. By Clause (4) a special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes is outside the purview of Clause (1). But Clause (4) is an exception to Clause (1). Being an exception, it cannot be extended so as in effect to destroy the guarantee of Clause (1). Parliament has by enacting Clause (4) attempted to balance as against the right of equality

43 AIR 1968 SC 1379 : (1968) 3 SCR 595

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of citizens the special necessities of the weaker sections of the people by allowing a provision to be made for their advancement. In order that effect may be given to Clause (4), it must appear that the beneficiaries of the special provision are classes which are backward socially and educationally and they are other than the Scheduled Castes and Scheduled Tribes, and that the provision made is for their advancement."

348.5. ***A. Peeriakaruppan (Minor)*** v. ***State of T.N.***[28], SCC pp. 48-49, paras 25-29

"*25*. A caste has always been recognised as a class. In construing the expression 'classes of His Majesty's subject' found in Section 153-A of the Penal Code, Wassoodew, J., observed in *Narayan Vasudev Phadke* v. *Emperor*[146]: (AIR p. 381)

> '... In my opinion, the expression "classes of His Majesty's subjects" in Section 153-A of the Code is used in a restrictive sense as denoting a collection of individuals or groups bearing a common and exclusive designation and also possessing common and exclusive characteristics which may be associated with their origin, race or religion, and that the term "class" within that section carries with it the idea of numerical strength so large as could be grouped in a single homogeneous community.'

26. In Para 10, Chapter V of the Backward Classes Commission's Report, it is observed:

> 'We tried to avoid caste but we find it difficult to ignore caste in the present prevailing conditions. We wish it were easy to dissociate caste from social backwardness at the present juncture. In modern time anybody can take to any profession. The Brahman taking to tailoring, does not become a tailor by caste, nor is his social status lowered as a Brahman. A Brahman may be a seller of boots and shoes, and yet his social status is not lowered thereby. Social backwardness, therefore, is not today due to the particular profession of a person, but we cannot escape caste in considering the social backwardness in India.'

In Para 11 of that Report it is stated:

> 'It is not wrong to assume that social backwardness has largely contributed to the educational backwardness of a large number of social groups.'

27. Finally in Para 13, the Commission concludes with following observations:

> 'All this goes to prove that social backwardness is mainly based on racial, tribal, caste and denominational differences.'

28 (1971) 1 SCC 38
146 AIR 1940 Bom 379

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28. The validity of the impugned list of backward classes came up for consideration before this Court in *Rajendran case*[40] and this is what this Court observed therein: (AIR pp. 1014-15, para 7)

> '*7.* ... The contention is that the list of socially and educationally backward classes for whom reservation is made under Rule 5 is nothing but a list of certain castes. Therefore, reservation in favour of certain castes based only on caste considerations violates Article 15(1), which prohibits discrimination on the ground of caste only. Now if the reservation in question had been based only on caste and had not taken into account the social and educational backwardness of the caste in question, it would be violative of Article 15(1). But it must not be forgotten that a caste is also a class of citizens and if the caste as a whole is socially and educationally backward reservation can be made in favour of such a caste on the ground that it is a socially and educationally backward class of citizens within the meaning of Article 15(4).'

29. Rajendran case[40] is an authority for the proposition that the classification of backward classes on the basis of castes is within the purview of Article 15(4) if those castes are shown to be socially and educationally backward. No further material has been placed before us to show that the reservation for backward classes with which we are herein concerned is not in accordance with Article 15(4). There is no gainsaying the fact that there are numerous castes in this country which are socially and educationally backward. To ignore their existence is to ignore the facts of life. Hence we are unable to uphold the contention that the impugned reservation is not in accordance with Article 15(4). But all the same the Government should not proceed on the basis that once a class is considered as a backward class it should continue to be backward class for all times. Such an approach would defeat the very purpose of the reservation because once a class reaches a stage of progress which some modern writers call as take-off stage then competition is necessary for their future progress. The Government should always keep under review the question of reservation of seats and only the classes which are really socially and educationally backward should be allowed to have the benefit of reservation. Reservation of seats should not be allowed to become a vested interest. The fact that candidates of backward classes have secured about 50% of the seats in the general pool does show that the time has come for a de novo comprehensive examination of the question. It must be remembered that the Government's decision in this regard is open to judicial review."

348.6. ***State of A.P.*** v. ***U.S.V. Balram***[23], SCC at pp. 685 & 689, paras 82 & 94

> "*82.* ... In the determination of a class to be grouped as backward, a test solely based upon caste or community cannot be accepted as valid.

40 *P. Rajendran (Minor)* v. *State of Madras*, AIR 1968 SC 1012 : (1968) 2 SCR 786
23 (1972) 1 SCC 660

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But, in our opinion, though directive principles contained in Article 46 cannot be enforced by courts, Article 15(4) will have to be given effect to in order to assist the weaker sections of the citizens, as the State has been charged with such a duty. No doubt, we are aware that any provision made under this clause must be within the well-defined limits and should not be on the basis of caste alone. But it should not also be missed that a caste is also a class of citizens and that a caste as such may be socially and educationally backward. If after collecting the necessary data, it is found that the caste as a whole is socially and educationally backward, in our opinion, the reservation made of such persons will have to be upheld notwithstanding the fact that a few individuals in that group may be both socially and educationally above the general average. There is no gainsaying the fact that there are numerous castes in the country, which are socially and educationally backward and therefore a suitable provision will have to be made by the State, as charged in Article 15(4) to safeguard their interest.

* * *

94. To conclude, though prima facie the list of backward classes which is under attack before us may be considered to be on the basis of caste, a closer examination will clearly show that it is only a description of the group following the particular occupations or professions, exhaustively referred to by the Commission. Even on the assumption that the list is based exclusively on caste, it is clear from the materials before the Commission and the reasons given by it in its Report that the entire caste is socially and educationally backward and therefore their inclusion in the list of backward classes is warranted by Article 15(4). The groups mentioned therein have been included in the list of backward classes as they satisfy the various tests, which have been laid down by this Court for ascertaining the social and educational backwardness of a class."

348.7. ***Janki Prasad Parimoo*** v. ***State of J&K***[66], SCC at pp. 432-35, paras 22 & 24-25

"*22*. Article 15(4) speaks about 'socially and educationally backward classes of citizens' while Article 16(4) speaks only of 'any backward class citizens'. However, it is now settled that the expression 'backward class of citizens' in Article 16(4) means the same thing as the expression 'any socially and educationally backward class of citizens' in Article 15(4). In order to qualify for being called a 'backward class citizen' he must be a member of a socially and educationally backward class. It is social and educational backwardness of a class which is material for the purposes of both Articles 15(4) and 16(4).

* * *

24. It is not merely the educational backwardness or the social backwardness which makes a class of citizens backward; the class identified as a class as above must be both educationally and socially

66 (1973) 1 SCC 420 : 1973 SCC (L&S) 217

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backward. In India social and educational backwardness is further associated with economic backwardness and it is observed in *Balaji case*[20] referred to above that backwardness, socially and educationally, is ultimately and primarily due to poverty. But if poverty 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 being socially and educationally backward.

25. ... Indeed all sectors in the rural areas deserve encouragement but whereas the former by their enthusiasm for education can get on without special treatment, the latter require to be goaded into the social stream by positive efforts by the State. That accounts for the raison d'être of the principle explained in *Balaji case*[20] which pointed out that backward classes for whose improvement special provision was contemplated by Article 15(4) must be comparable to Scheduled Castes and Scheduled Tribes who are standing examples of backwardness socially and educationally. If those examples are steadily kept before the mind the difficulty in determining which other classes should be ranked as backward classes will be considerably eased."

348.8. ***State of Kerala*** v. ***N.M. Thomas***[24], SCC at pp. 367-68, para 135

"*135.* We may clear the clog of Article 16(2) as it stems from a confusion about *caste* in the terminology of Scheduled Castes and Scheduled Tribes. This latter expression has been defined in Articles 341 and 342. A bare reading brings out the quintessential concept that they (sic there) are no castes in the Hindu fold but an amalgam of castes, races, groups, tribes, communities or parts thereof found on investigation to be the lowliest and in need of massive State aid and notified as such by the President. To confuse this backwardmost social composition with

20 AIR 1963 SC 649 : 1963 Supp (1) SCR 439

24 *State of Kerala* v. *N.M. Thomas*, (1976) 2 SCC 310 : 1976 SCC (L&S) 227

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castes is to commit a constitutional error, misled by a compendious appellation. So that, to protect Harijans is not to prejudice any *caste* but to promote citizen solidarity. Article 16(2) is out of the way and to extend protective discrimination to this mixed bag of tribes, races, groups, communities and non-castes outside the fourfold Hindu division is not to compromise with the acceleration of castelessness enshrined in the sub-article. The discerning sense of the Indian Corpus Juris has generally regarded Scheduled Castes and Scheduled Tribes, not as caste but as a large backward group deserving of societal compassion."

(emphasis in original)

348.9. ***State of U.P.*** v. ***Pradip Tandon***[42], SCC at pp. 273-74, paras 14-17

"*14*. Article 15(4) speaks of socially and educationally backward classes of citizens. The State described the rural, hill and Uttarakhand areas as socially and educationally backward areas. The Constitution does not enable the State to bring socially and educationally backward areas within the protection of Article 15(4). The Attorney General however submitted that the affidavit evidence established the rural, hill and Uttarakhand areas to have socially and educationally backward classes of citizens. The backwardness contemplated under Article 15(4) is both social and educational. Article 15(4) speaks of backwardness of classes of citizens. 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) could not be equated with castes. In *M.R. Balaji* v. *State of Mysore*[20] and *State of A.P.* v. *P. Sagar*[43] this Court held that classification of backwardness on the basis of castes would violate both Articles 15(1) and 15(4).

15. Broadly stated, neither caste nor race nor religion can be made the basis of classification for the purposes of determining social and educational backwardness within the meaning of Article 15(4). When Article 15(1) forbids discrimination on grounds only of religion, race, caste, caste cannot be made one of the criteria for determining social and educational backwardness. If caste or religion is recognised as a criterion of social and educational backwardness Article 15(4) will stultify Article 15(1). It is true that Article 15(1) forbids discrimination only on the ground of religion, race, caste, but when a classification takes recourse to caste as one of the criteria in determining socially and educationally backward classes the expression 'classes' in that case violates the rule of *expressio unius est exclusio alterius*. The socially and educationally backward classes of citizens are groups other than groups based on caste.

16. The expression 'socially and educationally backward classes' in Article 15(4) was explained in *Balaji case*[20] to be comparable to Scheduled Castes and Scheduled Tribes. The reason is that the Scheduled

42 (1975) 1 SCC 267
20 AIR 1963 SC 649 : 1963 Supp (1) SCR 439
43 AIR 1968 SC 1379 : (1968) 3 SCR 595

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Castes and Scheduled Tribes illustrated social and educational backwardness. It is difficult to define the expression 'socially and educationally backward classes of citizens'. The traditional unchanging occupations of citizens may contribute to social and educational backwardness. The place of habitation and its environment is also a determining factor in judging the social and educational backwardness.

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. The homogeneity of the class of citizens is social and educational backwardness. Neither caste nor religion nor place of birth will be the uniform element of common attributes to make them a class of citizens."

348.10. ***K.S. Jayasree*** v. ***State of Kerala***[67], SCC at pp. 733 & 735, paras 13 & 21

"*13.* Backward classes for whose improvement special provisions are contemplated by Article 15(4) are in the matter of their backwardness comparable to Scheduled Castes and Scheduled Tribes. This Court has emphasised in decisions that the backwardness under Article 15(4) must be both social and educational. In ascertaining social backwardness of a class of citizens, the caste of a citizen cannot be the sole or dominant test. Just as caste is not the sole or dominant test, similarly poverty is not the decisive and determining factor of social backwardness.

* * *

21. In ascertaining social backwardness of a class of citizens it may not be irrelevant to consider the caste of the group of citizens. Caste cannot however be made the sole or dominant test. Social backwardness is in the ultimate analysis the result of poverty to a large extent. Social backwardness which results from poverty is likely to be aggravated by considerations of their caste. This shows the relevance of both caste and poverty in determining the backwardness of citizens. Poverty by itself is not the determining factor of social backwardness. Poverty is relevant in the context of social backwardness. The Commission found that the lower income group constitutes socially and educationally backward classes. The basis of the reservation is not income but social and educational backwardness determined on the basis of relevant criteria. If any classification of backward classes of citizens is based solely on the caste of the citizen it will perpetuate the vice of caste system. Again, if the classification is based solely on poverty it will not be logical. The society is taking steps for uplift of the people. In such a task groups or classes who are socially and educationally backward are helped by the society. That is the philosophy of our Constitution. It is in this context that social backwardness which results from poverty is likely to be magnified by caste considerations. Occupations, place of habitation may

67 (1976) 3 SCC 730

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also be relevant factors in determining who are socially and educationally backward classes. Social and economic considerations come into operation in solving the problem and evolving the proper criteria of determining which classes are socially and educationally backward. That is why our Constitution provided for special consideration of socially and educationally backward classes of citizens as also Scheduled Castes and Tribes. It is only by directing the society and the State to offer them all facilities for social and educational uplift that the problem is solved. It is in that context that the Commission in the present case found that income of the classes of citizens mentioned in Appendix VIII was a relevant factor in determining their social and educational backwardness."

349. In *Chitralekha case*[14] it was stated that the caste is the starting point. This is subject of course to the parameters that if the caste itself satisfies the test of backwardness which is implicit and inherent as noted in para 782 of *Indra Sawhney (1)*[10]. In that case caste becomes the relevant factor. The view expressed in *Chitralekha case*[14] was not dissented from in *Indra Sawhney (1)*[10]. In fact Jeevan Reddy, J. in the majority judgment in *Indra Sawhney (1)*[10] referred to *Chitralekha case*[14] at para 704. As noted above in para 782 of *Indra Sawhney (1)*[10] it has not been held that caste is class. In the said paragraph it has been stated that individual survey is out of question since Article 16(4) speaks of class protection and not individual protection. In that context also it has been said that it does not mean that one can wind up the process of identification for the castes. It has also been emphasised in the said paragraph that having exhausted the castes or simultaneously with it, the authority may take up for consideration other occupational groups, communities and classes. If caste is a substitute for class, the question of any simultaneous consideration of others does not arise. Therefore, the Court observed that one may well begin with castes if one chooses and then go to other groups, sections and classes. If the Court meant to substitute the word caste with class the question of going to other classes would not arise.

350. Reference may also be made to *Akhil Bharatiya Soshit Karamchari Sangh (Railway)* v. *Union of India*[147] where it was noted as follows: (SCC p. 264, para 22)

"22. This is not mere harmonious statutory construction of Article 16(1) and Article 16(4) but insightful perception of our constitutional culture, reflecting the current of resurgent India bent on making, out of a sick and stratified society of inequality and poverty, a brave new Bharat. If freedom, justice and equal opportunity to unfold one's own personality belong alike to *Bhangi* and *Brahmin*, prince and pauper, if the *panchama* proletariat is to *feel* the social transformation Article 16(4) promises, the State must apply equalising techniques which will enlarge their

14 *R. Chitralekha* v. *State of Mysore*, AIR 1964 SC 1823 : (1964) 6 SCR 368

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

147 (1981) 1 SCC 246 : 1981 SCC (L&S) 50

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opportunities and thereby progressively diminish the need for props. The success of State action under Article 16(4) consists in the speed with which result-oriented reservation withers away as no longer a need, not in the everwidening and everlasting operation of an exception [Article 16(4)] as if it were a super-fundamental right to continue backward all the time. To lend immortality to the reservation policy is to defeat its raison d'être, to politicise this provision for communal support and party-ends is to subvert the solemn undertaking of Article 16(1), to casteify 'reservation' even beyond the dismal groups of backwardmost people, euphemistically described as SC & ST, is to run a grave constitutional risk. Caste, ipso facto, is not class in a secular State."

(emphasis in original)

351. Much emphasis has been laid on the use of the word "only". It is to be noted that while the respondents contend that where it is demonstrated that caste is not the only consideration the permissible provision will operate. Reference was made to *Venkataramana case*[29]. As has been rightly contended by learned counsel for the petitioners the true effect of the word "only" has been clarified in the decision itself.

352. It is unnecessary to decide as it has been contended by learned counsel for the petitioners whether the concept of strict scrutiny is a measure of judicial scrutiny as highlighted by the conditions in India. It is submitted that label is not relevant.

353. The ultimate object is the eradication of castes and that is the foundation for reservation. While considering the method adopted for eradication by adopting the process of reservation indirectly the facet of strict scrutiny comes in. The strict scrutiny test was applied in the background of Article 19 vis-à-vis compelling State needs. The principle was recognised in *Chintaman Rao* v. *State of M.P.*[102] It was inter alia quoted as follows: (AIR p. 119, paras 6-7)

"*6.* The question for decision is whether the statute under the guise of protecting public interests arbitrarily interferes with private business and imposes unreasonable and unnecessarily restrictive regulations upon lawful occupation; in other words, whether the total prohibition of carrying on the business of manufacture of bidis within the agricultural season amounts to a reasonable restriction on the fundamental rights mentioned in Article 19(1)(*g*) of the Constitution. Unless it is shown that there is a reasonable relation of the provisions of the Act to the purpose in view, the right of freedom of occupation and business cannot be curtailed by it.

7. The phrase 'reasonable restriction' connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word 'reasonable' implies intelligent care and deliberation,

29 *B. Venkataramana* v. *State of Madras*, AIR 1951 SC 229 : (1951) 1 MLJ 625
102 AIR 1951 SC 118 : 1950 SCR 759

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that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Article 19(1)(*g*) and the social control permitted by Clause (6) of Article 19, it must be held to be wanting in that quality."

354. Again in *State of Madras* v. *V.G. Row*[148] it was observed as follows: (AIR p. 199, para 13)

"*13*. Before proceeding to consider this question, we think it right to point out, what is sometimes overlooked, that our Constitution contains express provision for judicial review of legislation as to its conformity with the Constitution, unlike in America where the Supreme Court has assumed extensive powers of reviewing legislative Acts under cover of the widely interpreted 'due process' clause in the Fifth and Fourteenth Amendments. If, then, the courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution. This is especially true as regards the 'fundamental rights' as to which this Court has been assigned the role of a sentinel on the 'qui vive'. While the Court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute. We have ventured on these obvious remarks because it appears to have been suggested in some quarters that the courts in the new set-up are out to seek clashes with the legislatures in the country."

355. At the outset, it may be pointed out that the stand of the petitioners is that the primary consideration in selection of candidates for admission to the higher educational institutions must be merit. The object of any rules, which may be made for regulating admissions to such institutions, therefore, must be to secure the best and most meritorious students. The national interest and the demand of universal excellence may even override the interests of the weaker sections. In this context, Krishna Iyer, J. aptly observed*:

"*44*. … To sympathise mawkishly with the weaker sections by selecting substandard candidates, is to punish society as a whole by denying the prospect of excellence, say in hospital service. Even the poorest, when stricken by critical illness, needs the attention of superskilled specialists, not humdrum second rates."

Thus, the interest of no person, class or region can be higher than that of the nation. The philosophy and pragmatism of universal excellence through equality of opportunity for education and advancement across the nation is part of the constitutional creed. It is, therefore, the best and most meritorious students that must be selected for admission to technical institutions and

148 AIR 1952 SC 196

* **Ed.**: Quoting from *Jagadish Saran (Dr.)* v. *Union of India*, (1980) 2 SCC 768, p. 786, para 44.

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medical colleges and no citizen can be regarded as outsider in the constitutional set-up without serious detriment to the "unity and integrity" of the nation. The Supreme Court has laid down that so far as admissions to postgraduate courses such as MS, MD and the like are concerned, it would be imminently desirable not to provide for any reservation based on residence or institutional preference. However, a certain percentage of seats are allowed to be reserved on the ground of institutional preference. But even in this regard, so far as superspecialities such as neurosurgery and cardiology are concerned there should be no reservation at all even on the basis of institutional preference and admissions should be granted purely on all-India basis. Further, classification made on the basis of superspecialities may serve the interests of the nation better, though interests of individual States may to a small extent, be affected.

356. The need of a region or institution cannot prevail at the highest scale of speciality where the best skill or talent must be hand-picked by selecting them according to capability. At the level of PhD, MD or levels of higher proficiency where international measure of talent is made, where losing one great scientist or technologist in the making is a national loss, the considerations we have expanded upon as important, lose their potency.

357. The inevitable conclusion is that the impugned statute can be operative only after excluding the creamy layer from identifiable OBCs. There has to be periodic review of the classes who can be covered by the statute. The periodicity should be five years. To strike constitutional balance there is need for making provision for suitable percentage for socially and economically backward classes in the 27% fixed.

358. To sum up, the conclusions are as follows:

(*1*) For implementation of the impugned statute creamy layer must be excluded.

(*2*) There must be periodic review as to the desirability of continuing operation of the statute. This shall be done once in every five years.

(*3*) The Central Government shall examine as to the desirability of fixing cut-off marks in respect of the candidates belonging to the Other Backward Classes (OBCs). By way of illustration it can be indicated that five grace marks can be extended to such candidates below the minimum eligibility marks fixed for general categories of students. This would ensure that quality and merit would not suffer. If any seats remain vacant after adopting such norms they shall be filled up by candidates from general categories.

(*4*) So far as determination of backward classes is concerned, a notification should be issued by the Union of India. This can be done only after exclusion of the creamy layer for which necessary data must be obtained by the Central Government from the State Governments and Union Territories. Such notification is open to challenge on the ground of wrongful exclusion or inclusion. Norms must be fixed keeping in view the peculiar features in different States and Union Territories.

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(*5*) There has to be proper identification of Other Backward Classes (OBCs). For identifying backward classes, the Commission set up pursuant to the directions of this Court in *Indra Sawhney (1)*[10] has to work more effectively and not merely decide applications for inclusion or exclusion of castes. While determining backwardness, graduation (not technical graduation) or professional shall be the standard test yardstick for measuring backwardness.

(*6*) To strike the constitutional balance it is necessary and desirable to earmark certain percentage of seats out of permissible limit of 27% for socially and economically backward classes.

(*7*) In the Constitution for the purposes of both Articles 15 and 16, caste is not synonymous with class and this is clear from paras 782 and 783 of *Indra Sawhney (1)*[10]. However, when creamy layer is excluded from the caste, the same becomes an identifiable class for the purpose of Articles 15 and 16.

(*8*) Stress has to be on primary and secondary education so that proper foundation for higher education can be effectively laid.

(*9*) So far as the constitutional amendments are concerned:

(*i*) Articles 16(1) and 16(4) have to be harmoniously construed. The one is not an exception to the other.

(*ii*) Articles 15(4) and 15(5) operate in different fields. Article 15(5) does not render Article 15(4) inactive or inoperative.

(*10*) While interpreting the constitutional provisions, foreign decisions do not have great determinative value. They may provide materials for deciding the question regarding constitutionality. In that sense, the strict scrutiny test is not applicable and in-depth scrutiny has to be made to decide the constitutionality or otherwise, of a statute.

(*11*) If material is shown to the Central Government that the institution deserves to be included in the Schedule, the Central Government must take an appropriate decision on the basis of materials placed and on examining the issues concerned as to whether the institution deserves to be included in the Schedule.

(*12*) Challenge relating to private unaided educational institutions has not been examined because no such institution has laid any challenge. It is to be noted that the petitioners have made submissions in the background of Article 19(6) of the Constitution. Since none of the affected institutions have made any challenge we do not propose to consider it necessary to express any opinion or decide on the question.

359. In view of the abovesaid conclusions, the writ petitions and Contempt Petition (Civil) No. 112 of 2007 in WP (C) No. 265 of 2006 are disposed of.

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 2(2 ATC 385

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DALVEER BHANDARI, J.— The Ninety-third Amendment to the Constitution directly or indirectly affects millions of citizens of this country. It has been challenged in a number of writ petitions. This Court heard these petitions intermittently over the course of several months. Appearing on behalf of the petitioners and the respondents, the country's finest legal minds assisted us.

361. The fundamental question that arises in these writ petitions is: Whether Article 15(5), inserted by the Ninety-third Amendment, is consistent with the other provisions of the Constitution or whether its impact runs contrary to the constitutional aim of achieving a casteless and classless society?

362. On behalf of the petitioners, Senior Advocate Mr F.S. Nariman, eloquently argued that if Article 15(5) is permitted to remain in force, then, instead of achieving the goal of a casteless and classless society, India would be converted into a caste-ridden society. The country would forever remain divided on caste lines. The Government has sought to repudiate this argument. The petitioners' argument, however, echoes the grave concern of our Constitution's original Framers.

363. On careful analysis of the Constituent Assembly and the Parliamentary Debates, one thing is crystal clear: our leaders have always and unanimously proclaimed with one voice that our constitutional goal is to establish a casteless and classless society.

364. Mahatma Gandhi said: "The caste system as we know is an anachronism. It must go if both Hinduism and India are to live and grow from day to day." The first Prime Minister, Pt. Jawahar Lal Nehru, said that "no one should be left in any doubt that the future Indian society was to be casteless and classless". Dr. B.R. Ambedkar called caste "anti-national".

365. After almost four decades of Independence, while participating in the parliamentary debate on the Mandal issue, the then Prime Minister Shri Rajiv Gandhi on 6-9-1990 again reiterated the same sentiments: "I think, nobody in this House will say that the removal of casteism is not part of the national goal, therefore, it would be in the larger interest of the nation to get rid of the castes as early as possible." It is our bounden duty and obligation to examine the validity of the Ninety-third Amendment in the background of the Preamble and the ultimate goal that runs through the pages of the Constitution.

366. To attain an egalitarian society, we have to urgently remove socio-economic inequalities. All the learned counsel for the petitioners asserted that we must deliver the benefits of reservation to only those who really deserve it. This can only be done if we remove the creamy layer. Learned counsel for the Union of India and other respondents opposed this assertion. The principle of creamy layer emanates from the broad doctrine of equality itself. Unless the creamy layer is removed from admissions and service reservation, the benefits would not reach the group in whose name the

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impugned legislation was passed—the poorest of the poor. Therefore, including the creamy layer would be inherently unjust.

367. Creamy layer exclusion, however, is just one of the many issues raised by the parties. I need to examine various facets of this case in order to decide the validity of the Ninety-third Amendment and the Central Educational Institutions (Reservation in Admission) Bill, 2006 (passed as Act 5 of 2007) (hereinafter called "the Reservation Act"). I shall focus my analysis on the following issues:

1-A. Whether the creamy layer be excluded from the Ninety-third Amendment (the Reservation Act)?

1-B. What are the parameters for creamy layer exclusion?

1-C. Is creamy layer exclusion applicable to SC/ST?

2. Can the fundamental right under Article 21-A be accomplished without great emphasis on primary education?

3. Does the Ninety-third Amendment violate the basic structure of the Constitution by imposing reservation on unaided institutions?

4. Whether the use of caste to identify SEBCs runs afoul of the casteless/classless society, in violation of secularism?

5. Are Articles 15(4) and 15(5) mutually contradictory, such that Article 15(5) is unconstitutional?

6. Does Article 15(5)'s exemption of minority institutions from the purview of reservation violate Article 14 of the Constitution?

7. Are the standards of review laid down by the US Supreme Court applicable to our review of affirmative action under Article 15(5) and similar provisions?

8. With respect to OBC identification, was the Reservation Act's delegation of power to the Union Government excessive?

9. Is the impugned legislation invalid as it fails to set a time-limit for caste-based reservation?

10. At what point is a student no longer Educationally Backward and thus no longer eligible for special provisions under Article 15(5)?

11. Would it be reasonable to balance OBC reservation with societal interests by instituting OBC cut-off marks that are slightly lower than that of the general category?

368. I have carefully examined the pleadings and written submissions submitted at length. Admittedly, the provisions of the Constitution and the Preamble lead to the irresistible conclusion that the nation has always wanted to achieve a casteless and classless society. If we permit this impugned legislation to be implemented, I am afraid, instead of a casteless and classless India, we would be left with a caste-ridden society.

369. The first place where caste can be eradicated is the classroom. It all starts with education. In other words, if you belong to a lower caste but are well qualified, hardly anyone would care about your caste. Free and

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compulsory education is now a fundamental right under Article 21-A. The State is duty-bound to implement this article on a priority basis. There has been grave laxity in its implementation. This laxity adversely affects almost every walk of life. In my opinion, nothing is more important for the Union of India than to implement this critical article.

370. I direct the Union of India to set a time-limit within which this article is going to be completely implemented. This time-limit must be set within six months. In case the Union of India fails to fix the time-limit, then perhaps this work will also have to be done by the Court.

371*. The Union of India should appreciate in proper perspective that the root cause of social and educational backwardness is poverty. All efforts have to be made to eradicate this fundamental problem. Unless the creamy layer is removed, the benefit would not reach those who are in need. Reservation sends the wrong message. Everybody is keen to get the benefit of backward class status. If we want to really help the socially, educationally and economically backward classes, we need to earnestly focus on implementing Article 21-A. We must provide educational opportunity from day one. Only then will the casteless/classless society be within our grasp. Once children are of college-going age, it is too late for reservation to have much of an effect. The problem with the Reservation Act is that most of the beneficiaries will belong to the creamy layer, a group for which no benefits are necessary. Only non-creamy layer OBCs can avail of reservations in college admissions, and once they graduate from college they should no longer be eligible for postgraduate reservation. 27% is the upper limit for OBC reservation. The Government need not always provide the maximum limit. Reasonable cut-off marks should be set so that standards of excellence are not greatly affected. The unfilled seats should revert to the general category.

372. These issues first arise out of the text of the impugned amendment. Reservation for Socially and Educationally Backward Classes of citizens (SEBCs) was introduced by the Ninety-third Amendment. Article 15(5) states:

> "15. (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 insofar as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than Minority Educational Institutions referred to in Clause (1) of Article 30."

1-A. EXCLUDING THE CREAMY LAYER FROM RECEIVING SPECIAL BENEFITS

373. Affirmative action is employed to eliminate substantive social and economic inequality by providing opportunities to those who may not otherwise gain admission or employment. Articles 14, 15 and 16 allow for affirmative action. To promote Article 14 egalitarian equality, the State may classify citizens into groups, giving preferential treatment to one over

* **Ed.**: Para 371 corrected vide Official Corrigendum No. F.3/Ed.B.J./53/2011 dated 18-10-2011.

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another. When it classifies, the State must keep those who are unequal out of the same batch to achieve constitutional goal of egalitarian society.

1-A.1 Arguments of the Union of India in regard to the creamy layer

374. Mr G.E. Vahanvati, learned Solicitor General and Mr K. Parasaran, Senior Advocate appearing for the Government contend that creamy layer exclusion is a bad policy. They argue that if you exclude the creamy layer, there would be a shortage of candidates who can afford to pay for higher education. This argument harms rather than helps the Government. It cannot be seriously disputed that most of the college-going OBCs belong to the creamy layer for whom reservations are unnecessary; they have the money to attend good schools, tuitions and coaching courses for entrance exams. Naturally, these advantages result in higher test scores vis-à-vis the non-creamy layer OBCs. The result is that creamy layer OBCs would fill the bulk of the OBC quota, leaving the non-creamy layer no better off than before. If the creamy layer gets most of the benefit, why have reservations in the first place? Learned Senior Counsel for the petitioners, Mr Harish Salve, is justified in arguing that before carrying out constitutional amendments the Union of India must clearly target its beneficiaries. He rightly submitted that we should not make law first and thereafter target the law's beneficiaries. Failure to exclude the creamy layer is but one example of this problem.

375. The Government further submitted that the creamy layer should be included to ensure that enough qualified candidates fill 27% of the seats reserved to OBCs. The Oversight Committee disagreed. The Committee relied on data from Karnataka to disprove the contention that seats go unfilled when the creamy layer is excluded:

> "… the apprehension that seats will not be filled up if the creamy layer is excluded has been comprehensively shown to be unfounded."
>
> (*See* Oversight Committee, Vol. 1, September 2006, p. 69, Para 1.7.)

We shall later review the Oversight Committee opinion in greater detail.

1-A.2. The reasons for which the creamy layer should be excluded

376. At the outset, I note that Parliament rejected the Hindi version of the Reservation Act. The Hindi version of the Reservation Act would have expressly excluded the creamy layer. (See Prof. Rasa Singh Rawat's comments in the parliamentary debate on the Reservation Act, 14-12-2006.)

377. Parliament eventually passed the English version in which the creamy layer is not mentioned, making its intention clear. It wanted to include the creamy layer. For all practical purposes, it did so. Therefore, I will treat it as included. Counsel for the Union of India argued that it is still theoretically possible for the executive to exclude the creamy layer. Much is possible *in theory*. Given the executive's failure to take action since the time the Act was passed, I find this argument unavailing.

378. With Parliament's intention in view, I will deal in some detail with the reasons as to why the creamy layer should be excluded from reservation. I do so because I want to emphasise that the creamy layer must never be

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included in any affirmative action legislation. It also becomes imperative to gather the original Framers' and the Framers' intention. At the outset, we recognise a distinction between the original Framers and the Framers i.e. Members of the First Parliament. Members of the Constituent Assembly and First Parliament were one and the same. But the distinction is necessary to the extent that First Parliament deviated from its constitutional philosophy. By examining the debate on Article 15(4), I may ascertain whether the Framers wanted to exclude the creamy layer.

379. The First Parliament believed that "economic" was included in the "social" portion of "socially and educationally backward". Prime Minister Nehru said as much:

> "One of the main amendments or ideas put forward is in regard to the addition of the word 'economical'. Frankly, the argument put forward, with slight variation, I would accept, but my difficulty is this that when we chose those particular words there, 'for the advancement of any socially and educationally backward classes', we chose them because they occur in Article 340 and we wanted to bring them bodily from there. Otherwise I would have had not the slightest objection to add 'economically'. But if I added 'economically' I would at the same time not make it a kind of cumulative thing but would say that a person who is lacking in any of these things should be helped. 'Socially' is a much wider word including many things and certainly including economically. Therefore, I felt that 'socially and educationally' really cover the ground and at the same time you bring out a phrase used in another part of the Constitution in a slightly similar context." (*See* The Parliamentary Debates on First Amendment Bill, 1-6-1951, p. 9830.)

Had it not been for a desire to achieve symmetry in drafting, "economically" would have been included. Had this been done, the creamy layer would have been excluded *ab initio*.

380. In the Article 15(4) debate, Shri M.A. Ayyangar wanted to add "economic" to ensure that the rich SEBCs would not receive special provisions.

> "I thought 'economic' might be added so that rich men may not take advantage of this provision. In my part of the country there are the Nattukkottai Chettiars who do not care to have English education, *but they are the richest of the lot ... should there be special reservation for them*?" (*See* The Parliamentary Debates on First Amendment Bill, 1-6-1951, p. 9817.) (emphasis added)

This hesitation aside, Shri M.A. Ayyangar was satisfied that the term "economic" was included in the term "social". The Framers were worried about creamy layer inclusion, albeit under a different name. They wanted to ensure that the "richest of the (backward) lot" would not benefit from special provisions. With their sentiment on our side, we are even more confident that we should strike out in the direction that strikes down laws that include the creamy layer.

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1-A.3. Including the creamy layer means unequals are treated as equals in violation of the right to equality under Articles 14, 15 and 16

381. In the present case, Dr. Rajeev Dhavan, the learned Senior Counsel and Mr S.K. Jain, the learned counsel vehemently argued on behalf of the petitioners that it is precisely because equality is at issue that the creamy layer must be removed. The creamy layer has been the subject-matter of a number of celebrated judgments of this Court. In a seven-Judge Bench in *State of Kerala* v. *N.M. Thomas*[24] Mathew, J. in his concurring judgment, dealt with the right to equality in the following words: (SCC p. 343, para 66)

> "*66.* The guarantee of equality before the law or the equal opportunity in matters of employment is a guarantee of something more than what is required by formal equality. *It implies differential treatment of persons who are unequal.* Egalitarian principle has therefore enhanced the growing belief that Government has an affirmative duty to eliminate inequalities and to provide opportunities for the exercise of human rights and claims." (emphasis added)

382. In *Indra Sawhney* v. *Union of India*[10] (hereinafter referred to as "*Sawhney (I)*"), this Court has aptly observed that reservation is given to backward classes until they cease to be backward, and not indefinitely. This Court in para 520 (Sawant, J.) has stated as under: (SCC p. 553)

> "*520. Society does not remain static.* The industrialisation and the urbanisation which necessarily followed in its wake, the advance on political, social and economic fronts made particularly after the commencement of the Constitution, the social reform movements of the last several decades, the spread of education and the advantages of the special provisions including reservations secured so far, have all undoubtedly seen at least some individuals and families in the backward classes, however small in number, gaining sufficient means to develop their capacities to compete with others in every field. That is an undeniable fact. *Legally, therefore, they are not entitled to be any longer called as part of the backward classes whatever their original birthmark. It can further hardly be argued that once a backward class, always a backward class.* That would defeat the very purpose of the special provisions made in the Constitution for the advancement of the backward classes, and for enabling them to come to the level of and to compete with the forward classes, as equal citizens." (emphasis supplied)

383. For our purposes, creamy layer OBCs and non-creamy layer OBCs are not equals when it comes to moving up the socio-economic ladder by means of educational opportunity. Failing to remove the creamy layer treats creamy layer OBCs and non-creamy layer OBCs as equals. In the same paragraph, Sawant, J. stated that (SCC p. 553, para 520)

24 (1976) 2 SCC 310 : 1976 SCC (L&S) 227

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

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"... to rank [the creamy layer] with the rest of the backward classes would ... amount to treating the unequals equally"

violating the equality provisions of the Constitution.

384*. According to the Kerala Legislature, there was no creamy layer in Kerala. The legislation was challenged in *Indra Sawhney* v. *Union of India*[16] [hereinafter referred to as "*Sawhney (II)*"]. The Court struck down the two provisions that barred creamy layer exclusion, concluding that non-exclusion of the creamy layer and inclusion of forward castes in reservation violates the right to equality under Article 14 and the basic structure.

385. In *Sawhney (II)*[16] at para 65, the Court had gone to the extent of observing that not even Parliament, *by constitutional amendment*, could dismantle the basic structure by including the creamy layer in reservation: (SCC p. 202, para 65)

"*65*. What we mean to say is that Parliament and the legislature in this country cannot transgress the basic feature of the Constitution, namely, the principle of equality enshrined in Article 14 of which Article 16(1) is a facet. *Whether the creamy layer is not excluded or whether forward castes get included in the list of backward classes*, the position will be the same, namely, that there will be a breach not only of Article 14 but of the basic structure of the Constitution. The *non-exclusion of the creamy layer or the inclusion of forward castes in the list of backward classes* will, therefore, be totally illegal. Such an illegality offending the root of the Constitution of India cannot be allowed to be perpetuated even by constitutional amendment." (emphasis in original)

386. By definition, the creamy and non-creamy are unequal when it comes to schooling. Relative to their non-creamy counterparts, the creamy have a distinct advantage in gaining admission. While the creamy and non-creamy are given equal opportunity to gain admission in the reserved category, this equality exists in name only. Will the OBC daughter of a Minister, IAS officer or affluent business owner attend better schools than her non-creamy counterpart? Yes. Will she go to private tuitions unaffordable to her non-creamy counterpart? Certainly. And where will she cram for the all-decisive entrance exams? In a coaching centre? Of course. Will she come home from school to find a family member waiting? Probably. And when she seeks help from her parents, are they educated and able to give superior assistance with school work? Most likely.

387. I take judicial notice of these anecdotes, for they flesh out a simple fact: she has all the resources that her non-creamy counterpart lacks. It is no surprise that she will outperform the non-creamy. On average, her lot will take the reserved seats.

388. I cannot consider the OBC Minister's daughter and the non-creamy OBC as equals in terms of their chances at earning a university seat; nor can I allow them to be treated equally. To lump them in the same category is an

* **Ed.**: Para 384 corrected vide Official Corrigendum No. F.3/Ed.B.J./41/2008 dated 6-6-2008

16 (2000) 1 SCC 168

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unreasonable classification. Putting them in head-to-head competition for the same seats violates the right to equality in Articles 14, 15 and 16.

389. In its conclusion at para 122, *M. Nagaraj* v. *Union of India*[11] a Constitution Bench of this Court while dealing with Articles 16(4-A) and 16(4-B) with regard to SC and ST observed as under: (SCC p. 278)

> "*122.* We reiterate that the ceiling limit of 50%, the concept of creamy layer and the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency are all constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse."

It was contended that *Nagaraj*[11] is obiter in regard to creamy layer exclusion. According to *Nagaraj*[11] reservation in promotion for SC/ST is contingent on exclusion of the creamy layer (paras 122, 123 and 124). The contention of the Union of India cannot be accepted. The discussion regarding creamy layer is far from obiter in *Nagaraj*[11]. If the State fails to exclude the SC/ST creamy layer, the reservation must fall. Placing this contingency in the conclusion makes the discussion of creamy layer part of the ratio.

390. In sum, creamy layer inclusion violates the right to equality. That is, non-exclusion of creamy layer and inclusion of forward castes in reservation violates the right to equality in Articles 14, 15 and 16 as well as the basic structure of the Constitution.

1-A.4./1-C. If you belong to the creamy layer, you are not SEBC

391. One of the prominent questions raised in the writ petitions is whether creamy layer OBCs should be considered socially and educationally backward under the provisions of Article 15(5). While interpreting this provision, a basic syllogism must govern our decision. If you belong to the creamy layer, you are socially advanced and cannot be given the benefit of reservation. (See *Sawhney (I)*[10].)

392. Once one is socially advanced, he cannot be socially and educationally backward. He who is socially forward is likely to be educationally forward as well. If either condition (social or educational) goes unmet, one cannot qualify for the benefit of reservation as SEBC. Being socially advanced, the creamy layer is not socially backward pursuant to Articles 15(4) and 15(5) of the Constitution.

393. Even the text of Articles 15(4) and 15(5) provides for creamy layer exclusion. In this sense, one could say that the term "creamy layer" is synonymous with "non-SEBC".

394. Similar interpretation is given to "backward classes" under Article 16(4). Parliament could not reasonably make reservation for non-backwards. Such a Bill on the face of it would violate the Constitution. In *Sawhney (I)*[10], the Government of India issued an OM on 13-8-1990, reserving 27% of

11 (2006) 8 SCC 212

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

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government posts to SEBCs. Writing for the majority, at SCC para 792 of p. 724, Reddy, J. explained that the creamy layer was not SEBC:

> "*792.* ... The very concept of a class denotes a number of persons having certain common traits which distinguish them from the others. In a backward class under Clause (4) of Article 16, if the connecting link is the social backwardness, it should broadly be the same in a given class. If some of the members are far too advanced socially (which in the context, necessarily means economically and, may also mean educationally) the connecting thread between them and the remaining class snaps. They would be misfits in the class. After excluding them alone, would the class be a compact class. In fact, such exclusion benefits the truly backward."

Even though the OM was silent on the issue of creamy layer, Reddy, J. excluded the creamy layer at para 859(3)(*d*). The OM could not go into effect until the creamy layer was excluded. [para 861(*b*)] Exclusion was only in regard to OBC; SC/ST were not touched. (para 792)

395. In *Sawhney (I)*[10] the entire discussion was confined only to Other Backward Classes. Similarly, in the instant case, the entire discussion was confined only to Other Backward Classes. Therefore, I express no opinion with regard to the applicability of exclusion of creamy layer to the Scheduled Castes and Scheduled Tribes.

1-A.5. Creamy layer OBCs are not educationally backward

396. In addition to social backwardness, the text of Article 15(5) demands that recipients are also educationally backward. Even though the creamy layer's status as socially advanced is sufficient to disqualify them for preferential treatment, the creamy layer from any community is usually educated and will want the same for its children. They know that education is the key to success. For most, it made them. People belonging to this group do not require reservation.

1-A.6. Creamy layer inclusion robs the poor and gives to the rich

397. In a number of judgments, the view has been taken that the creamy layer's inclusion takes from the poor and gives to the rich.

398. Our Courts in following cases had taken the same view. [See *N.M. Thomas*[24], para 124 (seven-Judge Bench); *K.C. Vasanth Kumar* v. *State of Karnataka*[25], SCC paras 2, 24 and 28 (five-Judge Bench); *Sawhney (I)*[10], paras 520, 793 and 859(3)(*d*) (nine-Judge Bench); *Ashoka Kumar Thakur* v. *State of Bihar*[149], SCC paras 3, 17 and 18 (two-Judge Bench); *Sawhney (II)*[16], paras 8-10, 27, 48 and 65-66 (three-Judge Bench); *Nagaraj*[11], paras 120-24

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

24 *State of Kerala* v. *N.M. Thomas*, (1976) 2 SCC 310 : 1976 SCC (L&S) 227

25 1985 Supp SCC 714

149 (1995) 5 SCC 403 : 1995 SCC (L&S) 1248 : (1995) 31 ATC 159

16 *Indra Sawhney* v. *Union of India*, (2000) 1 SCC 168, at 202 (para 65)

11 *M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212

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(five-Judge Bench); *Nair Service Society* v. *State of Kerala*[68], SCC paras 31 and 49-54 (two-Judge Bench).]

399. In *Akhil Bharatiya Soshit Karamchari Sangh (Railway)* v. *Union of India*[147] Iyer, J. had this to say about the creamy layer: (SCC pp. 297-98, paras 92 & 94)

> "*92. … Maybe, some of the forward lines of the backward classes have the best of both the worlds and their electoral muscle qua caste scares away even radical parties from talking secularism to them.* We are not concerned with that dubious brand. In the long run, the recipe for backwardness is not creating a vested interest in backward castes but liquidation of handicaps, social and economic, by constructive projects. All this is in another street and we need not walk that way now.
>
> (emphasis supplied)
>
> * * *
>
> *94.* … Nor does the specious plea that because a few *Harijans* are better off, therefore, the bulk at the bottom deserves no jack-up provisions, merit scrutiny. A swallow does not make a summer. Maybe, the State may, when social conditions warrant, justifiably restrict *Harijan* benefits to the *Harijans* among the *Harijans* and forbid the higher *Harijans* from robbing the lowlier brethren."

Creamy layer inclusion was not enough to strike down an entire provision in this case. He suggests that creamy layer exclusion is an issue to be dealt with at a later time. (*Akhil Bhartiya case*[147], SCC pp. 299-300, para 98)

> "*98.* The argument that there are rich and influential *Harijans* who rob all the privileges leaving the serf-level sufferers as suppressed as ever. The Administration may well innovate and classify to weed out the creamy layer of SCs/STs but the court cannot force the State in that behalf."

Thus, Krishna Iyer, J. does not mandate creamy layer exclusion; rather, he leaves the question to the State.

400. Apart from judicial pronouncements, the Oversight Committee suggested that failure to exclude the creamy layer would lead to unfair results. The Committee was cautious to reach a conclusion.

401. In its report, it stated that "… the decision taken was to leave the matter to the Government of India, keeping in mind the fact that the 'creamy layer' is not covered in the Reservation Act, 2006." (*See* Oversight Committee, Vol. 1, pp. 33 and 4.2.)

402. Before "leaving" the matter to the Government, the Committee nevertheless made its recommendation: "*In case it is decided not to exclude the 'creamy layer', the poorest among the OBCs will be placed at a disadvantage*." (emphasis added) (*See* Oversight Committee at Appendix 1 in

68 (2007) 4 SCC 1
147 (1981) 1 SCC 246 : 1981 SCC (L&S) 50

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its report at p. 70, Para 1.13.) At p. 69 of Vol. I of its Report, the Committee offered data to support this conclusion:

> "1.6. Appendix 2 examines in detail the status of the socio-economic development of OBCs in respect of such parameters as relate to poverty, health, education, unemployment, workforce participation, land ownership, etc. *The analysis of the NSS data clearly brings out that inclusion of the creamy layer will result in reserved seats getting pre-empted by the OBCs from the top two deciles at the cost of the poorer income deciles of the OBCs.* Thus, almost all rural OBCs as well as urban OBCs from the northern, central and eastern regions of India will be deprived of the intended benefits of reservation. (emphasis added)
>
> 1.7. On the other hand, it was argued that if the creamy layer of OBCs is denied access to reservation in education pari passu with the principle applied in the case of employment, the reserved seats may not get filled up, again defeating the purpose of bringing in reservation for the OBCs. In a case study from Karnataka (included in Annexure X), it has been clearly shown that the OBC quotas have been utilised without any compromise with academic excellence in a situation where the creamy layer has been excluded. The apprehension that seats will not be filled up if the creamy layer is excluded has been comprehensively shown to be unfounded. The case study shows that the performance of students from below the creamy layer is outstanding and much better than general category students."

403. The Committee could have played it safe. Despite some opposition, the Committee included its opinion on the matter. And that opinion is unequivocal: the creamy must be excluded.

404. What is allegedly for the poor goes to the rich. Is that reasonable? Trumpeted by Parliament as a "… boost to the morale of the downtrodden" and "… in the right direction of ensuring social justice to other backward classes …" and "ensuring social justice to those weaker sections …", Article 15(5) dupes those who actually need preferential treatment. (*See* Prof. Basudeb Barman, M.P., Parliamentary Debates, p. 531, 21-12-2005; Prof. M. Ramadass, M.P., at p. 510; and Shri C.K. Chandrappan, M.P., at p. 494 respectively.) For the poorest of the poor, reservation in college is an empty promise. Few of the financially poor OBCs attend high school, let alone college. Instead of rewarding those that complete Plus 2, the Ninety-third Amendment [Article 15(5)] poses another barrier: they will have to compete with the creamy layer for reserved seats.

405. As explained, the poor lack the resources to compete with the creamy, who "snatch away" those seats. [*N.M. Thomas*[24], para 124 (Iyer, J.)] With the creamy excluded, poor OBCs would compete with poor OBCs—the playing field levelled.

406. As it stands, the amendment and the Act serve one purpose: they provide a windfall of seats to the rich and powerful amongst the OBCs. It is

24 *State of Kerala* v. *N.M. Thomas*, (1976) 2 SCC 310 : 1976 SCC (L&S) 227

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unreasonable to classify rich and poor OBCs as a single entity. As noted, this violates the Article 14 right to equality.

407. Unless the creamy layer is removed, OBCs cannot exercise their group rights. The Union of India and other respondents argued that creamy layer exclusion is wrong because the text of the Ninety-third Amendment bestows a benefit on "classes", not individuals. While it is a group right, the group must contain only those individuals that belong to the group. I first take the entire lot of creamy and non-creamy layer OBCs. I then remove the creamy layer on an individual basis based on their income, property holdings, occupation, etc. What is left is a group that meets constitutional muster. It is a group right that must also belong to individuals, if the right is to have any meaning. If one OBC candidate is denied special provisions that he should have received by law, it is not the group's responsibility to bring a claim. He would be the one to do so. He has a right of action to challenge the ruling that excluded him from the special provisions afforded to OBCs. In this sense, he has an individual right. Group and individual rights need not be mutually exclusive. In this case, it is not one or the other but both that apply to the impugned legislation.

1-A.7. Whether the creamy layer exists outside India?

408. An interesting question arises: does the concept of creamy layer exist outside India? A 2003 study carried out in the United States suggests that it does. The study by William Bowen, former president of Princeton University, found that when you look at students with the *same* scholastic aptitude test (SAT) scores, certain groups have a better chance of being admitted to college. (*The New Affirmative Action*, by David Leonhardt, *New York Times*, 30-9-2007, p. 3.) All things being equal, one's chance of gaining admission is augmented by belonging to one of the preferred groups. Individuals belonging to these groups are given preferential treatment over those who do not.

409. The study demonstrated that Black, Latino and Native Americans with the same SAT scores as White or Asian students had a 28% better chance than the White or Asian students at gaining admission; those whose parents attended the college had a 20% advantage over those whose parents did not; and the poor received no advantage whatsoever over the rich. (See *New York Times* article, p. 3.)

410. The statistics indicate that the failure to exclude the creamy layer ultimately leads to a situation in which deserving students are excluded. When we revert to the Indian scenario, as long as the Government gives handouts to certain groups, the creamy layer therein will "lap" them up. A scheme in which the poor receive no advantage can be remedied by excluding the creamy layer.

411. Even the Mandal Commission, which was established in 1979 with a mandate to identify the socially and educationally backward, admitted that the creamy layer was robbing fellow OBCs of reservation. In reference to Tamil Nadu, it said: "In actual operation, the benefits of reservation have

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gone primarily to the relatively more advanced castes amongst the notified backward classes." (*See* p. 37, para 8.13 of the Report of the Backward Classes Commission, First Part, Vols. 1-2, 1980.) It also stated that: "it is no doubt true that the major benefits of reservation … will be cornered by the more advanced sections...." but reasoned that this was acceptable because reform is presumably slow and should start with the more advanced of the backward. [*See* p. 62, Para 13.7 (recommendations).]

412. In *N.M. Thomas*[24] Krishna Iyer, J. in his concurring judgment in para 124 noted that the research conducted by A.N. Sinha Institute of Social Studies, Patna, had revealed a dual society among Harijans in which a tiny elite gobbles up the benefits.

1-A.8. Severing the creamy layer

413. Technically speaking, I am severing the implied inclusion of the creamy layer. It is severable for two reasons. First, a nine-Judge Bench in *Sawhney (I)*[10] severed a similar provision wherein the creamy layer was not expressly included, upholding the rest of the OM's reservation scheme. Second, because Parliament must have known that *Sawhney (I)*[10] had excluded the creamy layer, it seems likely that Parliament also realised that this Court may do the same. A cursory review of the Parliamentary Debates regarding Article 15(5) clearly reveals that Parliament discussed the *Sawhney (I)*[10] judgment in detail. (*See* for example, comments made by Shri Mohan Singh, p. 474 and Shri Devendra Prasad, pp. 478-79 on 21-12-2005.) Had Parliament insisted on creamy layer inclusion, it could have said as much in the text of Article 15(5). Instead, Parliament left the text of Article 15(5) silent on the issue, delegating the issue of OBC identification to the executive in Section 2(*g*) of the Reservation Act.

414. The test for severability asks a subjective question: had Parliament known its provision would be struck would it still have passed the rest of the legislation? (See *R.M.D. Chamarbaugwalla* v. *Union of India*[95], AIR at p. 637, para 23.) It is never easy to say what Parliament would have done had it known that part of its amendment would be severed. Nevertheless, I find it hard to imagine that Parliament would have said, "if the creamy is excluded, the rest of the OBCs should be denied reservation in education". It seems unlikely that it would have been an all-or-nothing proposition for Parliament, when the very goal of the impugned legislation of promoting OBC educational advancement does not depend on creamy layer inclusion. For these reasons, I sever or exclude the implied inclusion of the creamy layer.

1-B. IDENTIFICATION OF CREAMY LAYER

415. Income as the criterion for creamy layer exclusion is insufficient and runs afoul of *Sawhney (I)*[10]. (*See* p. 724 at para 792.) Identification of the

24 *State of Kerala* v. *N.M. Thomas*, (1976) 2 SCC 310 : 1976 SCC (L&S) 227

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

95 AIR 1957 SC 628 : 1957 SCR 930

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creamy layer has been and should be left to the Government, subject to judicial direction. For a valid method of creamy layer exclusion, the Government may use its post-*Sawhney (I)*[10] criteria as a template. [*See* OM of 8-9-1993, Para 2(*c*)/Column 3, approved by this Court in *Ashoka Kumar Thakur*[149], para 10.] This schedule is a comprehensive attempt to exclude the creamy layer in which income, government posts, occupation and landholdings are taken into account. The Office Memorandum is reproduced hereunder:

"No. 36012/22/93-Estt. (SCT)
Government of India
Ministry of Personnel, Public Grievances & Pension
(Department of Personnel & Training)
New Delhi, the 8th September, 1993

OFFICE MEMORANDUM

Subject: *Reservation for Other Backward Classes in civil posts and services under the Government of India—regarding.*

The undersigned is directed to refer to this Department's OM No. 36012/31/90-Estt. (SCT) dated 13-8-1990 and 25-9-1991 regarding reservation for Socially and Economically Backward Classes in civil posts and services under the Government of India and to say that following the Supreme Court judgment in *Indra Sawhney* v. *Union of India* [Writ Petition (Civil) No. 930 of 1990] the Government of India appointed an Expert Committee to recommend the criteria for exclusion of the socially advanced persons/sections from the benefits of reservation for Other Backward Classes in civil posts and services under the Government of India.

2. Consequent to the consideration of the Expert Committee's recommendation this Department's Office Memorandum No. 36012/31/90-Estt. (SCT) dated 13-8-1990 referred to in para 1 above is hereby modified to provide as follows:

(*a*) 27% (twenty-seven per cent) of the vacancies in civil posts and services under the Government of India, to be filled through direct recruitment, shall be reserved for the Other Backward Classes. Detailed instructions relating to the procedure to be followed for enforcing reservation will be issued separately.

(*b*) Candidates belonging to OBCs recruited on the basis of merit in an open competition on the same standards prescribed for the general candidates shall not be adjusted against the reservation quota of 27%.

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

149 *Ashoka Kumar Thakur* v. *State of Bihar*, (1995) 5 SCC 403 : 1995 SCC (L&S) 1248 : (1995) 31 ATC 159

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(*c*)(*i*) The aforesaid reservation shall not apply to persons/ sections mentioned in Column 3 of the Schedule to this office memorandum.

(*ii*) The rule of exclusion will not apply to persons working as artisans or engaged in hereditary occupations, callings. A list of such occupations, callings will be issued separately by the Ministry of Welfare.

(*d*) The OBCs for the purpose of the aforesaid reservation would comprise, in the first phase, the castes and communities which are common to both the lists in the report of the Mandal Commission and the State Government's lists. A list of such castes and communities is being issued separately by the Ministry of Welfare.

(*e*) The aforesaid reservation shall take immediate effect. However, this will not apply in vacancies where the recruitment process has already been initiated prior to the issue of this order.

3. Similar instructions in respect of public sector undertakings and financial institutions including public sector banks will be issued by the Department of Public Enterprises and by the Ministry of Finance respectively from the date of this office memorandum.

SCHEDULE

	Description of category	*To whom rule of exclusion will apply*
1	*2*	*3*
I.	CONSTITUTIONAL POSTS	Son(s) and daughter(s) of (*a*) President of India; (*b*) Vice-President of India; (*c*) Judges of the Supreme Court and of the High Courts; (*d*) Chairman and Members of UPSC and of the State Public Service Commission; Chief Election Commissioner; Comptroller and Auditor General of India; (*e*) Persons holding constitutional positions of like nature.
II.	SERVICE CATEGORY	Son(s) and daughter(s) of
	A. Group A/Class I officers of the All-India Central and State Services (Direct Recruits)	(*a*) parents, both of whom are Class I officers; (*b*) parents, either of whom is a Class I officer; (*c*) parents, both of whom are Class I officers, but one of them dies or suffers permanent incapacitation; (*d*) parents, either of whom is a Class I officer and such parent dies or suffers permanent incapacitation and before such

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	death or such incapacitation has had the benefit of employment in any international organisation like UN, IMF, World Bank, etc. for a period of not less than 5 years;
	(*e*) parents, both of whom are Class I officers die or suffer permanent incapacitation and before such death or such incapacitation of the both, either of them has had the benefit of employment in any international organisation like UN, IMF, World Bank, etc. for a period of not less than 5 years:
	Provided that the rule of exclusion shall not apply in the following cases:
	(*a*) Son(s) and daughter(s) of parents either of whom or both of whom are Class I officers and such parent(s) dies/die or suffer permanent incapacitation;
	(*b*) A lady belonging to OBC category has got married to a Class I officer, and may herself like to apply for a job.
B. Group B/Class II officers of the Central and State Services (Direct Recruitment)	Son(s) and daughter(s) of
	(*a*) parents both of whom are Class II officers;
	(*b*) parents of whom only the husband is a Class II officer and he gets into Class I at the age of 40 or earlier;
	(*c*) parents, both of whom are Class II officers and one of them dies or suffers permanent incapacitation and either one of them has had the benefit of employment in any international organisation like UN, IMF, World Bank, etc. for a period of not less than 5 years before such death or permanent incapacitation;
	(*d*) parents, of whom the husband is a Class I officer (direct recruit or pre-forty promoted) and the wife is a Class II officer and the wife dies; or suffers permanent incapacitation; and
	(*e*) parents, of whom the wife is a Class I officer (direct recruit or pre-forty promoted) and the husband is a Class II officer and the husband dies or suffers permanent incapacitation:
	Provided that the rule of exclusion shall not apply in the following cases:

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		Son(s) and daughter(s) of (*a*) parents both of whom are Class II officers and one of them dies or suffers permanent incapacitation. (*b*) parents, both of whom are Class II officers and both of them die or suffer permanent incapacitation, even though either of them has had the benefit of employment in any international organisation like UN, IMF, World Bank, etc. for a period of not less than 5 years before their death or permanent incapacitation.
	C. Employees in Public Sector Undertakings, etc.	The criteria enumerated in A and B above in this category will apply mutatis mutandis to officers holding equivalent or comparable posts in PSUs, banks, insurance organisations, universities, etc. and also to equivalent or comparable posts and positions under private employment, pending the evaluation of the posts on equivalent or comparable basis in these institutions, the criteria specified in Category VI below will apply to the officers in these institutions.
III.	ARMED FORCES INCLUDING PARAMILITARY FORCES (Persons holding civil posts are not included)	Son(s) and daughter(s) of parents either or both of whom is or are in the rank of Colonel and above in the army and to equivalent posts in the navy and the air force and the paramilitary forces: Provided that: (*i*) if the wife of an armed forces officer is herself in the armed forces (i.e. the category under consideration) the rule of exclusion will apply only when she herself has reached the rank of Colonel; (*ii*) the services ranks below Colonel of husband and wife shall not be clubbed together; (*iii*) if the wife of an officer in the armed forces is in civil employment, this will not be taken into account for applying the rule of exclusion unless she falls in the service category under Item No. II in which case the criteria and conditions enumerated therein will apply to her independently.

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IV.	PROFESSIONAL CLASS AND THOSE ENGAGED IN TRADE AND INDUSTRY	
	(I) Persons engaged in profession as a doctor, lawyer, chartered accountant, income tax consultant, financial or management consultant, dental surgeon, engineer, architect, computer specialist, film artists and other film professional, author, playwright, sports person, sports professional, media professional or any other vocations of like status.	Criteria specified against Category VI will apply—
	(II) Persons engaged in trade, business and industry.	Criteria specified against Category VI will apply— *Explanation.*—(*i*) Where the husband is in some profession and the wife is in a Class II or lower grade employment, the income/wealth test will apply only on the basis of the husband's income. (*ii*) If the wife is in any profession and the husband is in employment in a Class II or lower rank post, then the income/wealth criterion will apply only on the basis of the wife's income and the husband's income will not be clubbed with it.
V.	PROPERTY OWNERS A. Agricultural holdings	Son(s) and daughter(s) of persons belonging to a family (father, mother and minor children) which owns (*a*) only irrigated land which is equal to or more than 85% of the statutory area; or (*b*) both irrigated and unirrigated land, as follows: (*i*) The rule of exclusion will apply where the precondition exists that the irrigated area (having been brought to a single type under a common denominator) 40% or more of the statutory ceiling, limit for irrigated land (this being, calculated by excluding the unirrigated portion). If this precondition of not less than 40% exists, then only the area of unirrigated land will be taken into account. This will be done by converting the unirrigated

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			land on the basis of the conversion formula existing, into the irrigated type. The irrigated area so computed from unirrigated land shall be added to the actual area of irrigated land and if after such clubbing together the total area in terms of irrigated land is 80% or more of the statutory ceiling limit for irrigated land, then the rule of exclusion will apply and disentitlement will occur. (*ii*) The rule of exclusion will not apply if the landholding of a family is exclusively unirrigated.
		B. Plantations	
		(*i*) Coffee, tea, rubber, etc.	Criteria of income/wealth specified in Category VI below will apply.
		(*ii*) Mango, citrus, apple plantations, etc.	Deemed as agricultural holding and hence criteria at A above under this category will apply.
		C. Vacant land and/or buildings in urban areas or urban agglomerations	Criteria specified in Category VI below will apply. *Explanation*.—Building may be used for residential, industrial or commercial purpose and the like two or more such purposes.
	VI.	INCOME/WEALTH TEST	Son(s) and daughter(s) of (*a*) persons having gross annual income of Rs 1 lakh or above or possessing wealth above the exemption limit as prescribed in the Wealth Tax Act for a period of three years; (*b*) persons in Categories I, II, III and V-A who are not disentitled to the benefit of reservation but have income from other sources of wealth which will bring them within the income/wealth criteria mentioned in (*a*) above. *Explanation*.—(*i*) Income from salaries or agricultural land shall not be clubbed; (*ii*) The income criteria in terms of rupee will be modified taking into account the change in its value every three years. If the situation, however, so demands, the interregnum may be less.

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Explanation.—Wherever the expression 'permanent incapacitation' occur in this Schedule, it shall mean incapacitation which results in putting an officer out of service."†

416. In sum, the Schedule excludes the children of those who hold constitutional posts e.g. the children of the President of India, Supreme Court Judges, Chairman and Members of UPSC and others are excluded. Class 1 officers' children are not eligible for OBC perks either. When both parents are Class II officers, their children are excluded. The same criteria that apply to Class I and II officers apply to children of parents who work at high levels within the private sector. Agricultural owners are excluded when their irrigated holdings are more than or equal to 85% of the statutory ceiling. The OM further excludes persons having a gross annual income of Rs 2.5 lakhs or more. The Government raised the income limit from Rs 1 to Rs 2.5 lakhs on 9-3-2004 vide OM No. 36033/3/2004.

417. The creamy layer schedule of the OM dated 8-9-1993 in my opinion, is not comprehensive. This should be revised periodically—preferably once in every 5 years, in order to ensure that creamy layer criteria take changing circumstances into account.

418. Apart from the people who have been excluded vide the Office Memo, I urge the Government to make it more comprehensive. The Government should consider excluding the children of sitting and former Members of Parliament (MP) and Members of Legislative Assemblies (MLA) from special benefits. If constitutional authorities have been excluded from benefits because of their status or resources, the same should apply to children of former and sitting MPs and MLAs. I hope the judiciary will not have to involve itself in this matter.

2. APPLYING ARTICLE 21-A TO THE RESERVATION ACT

419. On 18-12-2006 in the Rajya Sabha debate on the Reservation Act, Member of Parliament and former Governor, Dr. P.C. Alexander summed up what would become one of the petitioners' arguments. Should Rs 17,000 crores be spent on implementing the Reservation Act for higher education when primary/secondary schooling is in such bad shape? Dr. Alexander stated:

> "Sir, this spending of Rs 17,000 crores or whatever amount is needed for adding seats in the engineering colleges, IIMs and IITs is reversing our priorities. If you have the money for education, spend it on schools. Spend it on the rural areas for primary schools; spend it on the schools, which are poorly starved in the urban areas. Instead of doing that, you spend it by adding to the numbers because you want to appease the so-

† **Ed.**: In *Ashoka Kumar Thakur* v. *State of Bihar*, (1995) 5 SCC 403, p. 417, para 10 it was held that this OM conforms to the law laid down in *Indra Sawhney case*, 1992 Supp (3) SCC 217.

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called poorer sections in the higher castes. So, we have taken care of you and you tell the backward classes we are taking care of all of you. This is where we land ourselves in trouble. We have cash resources. They should be spent where priorities are fixed clearly in our eyes and we don't want to do that."

Spending on higher at the expense of lower education raises the spectre of conflict with Article 21-A. By the Eighty-sixth Amendment, Article 21-A was inserted in our Constitution. Article 21-A reads as follows:

"21-A. *Right to education.*—The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine."

420. Under Article 21-A, it is a mandatory obligation of the State to provide free and compulsory education to all children aged six to fourteen. In order to achieve this constitutional mandate, the State has to place much greater emphasis on allocating more funds for primary and secondary education. There is no corresponding constitutional right to higher education. The entire nation's progress virtually depends upon the proper and effective implementation of Article 21-A.

421. This Court in *Unni Krishnan, J.P.* v. *State of A.P.*[7] held as under: (SCC pp. 730-31, para 166)

"*166.* ...right to education is implicit in and flows from the right to life guaranteed by Article 21. That the right to education has been treated as one of transcendental importance in the life of an individual [and] has been recognised not only in this country since thousands of years, but all over the world. ... without education being provided to citizens of this country, the objectives set forth in the Preamble to the Constitution cannot be achieved. The Constitution would fail."

This observation encouraged Parliament to insert Article 21-A into the Constitution.

422. In *Unni Krishnan*[7], Reddy, J. observed that the quality of education in government schools was extremely poor and that the schools were woefully inadequate to the needs of the children. He noted that many countries spend 6% to 8% of gross domestic product on education. Our expenditure on education is just 4% of GDP.

423. Though an improvement over past performance, the overall education picture leaves much to be desired. The bad news is really bad. Even where we have seen improvement, there is still failure. A survey by Pratham, an NGO, fleshes out the acute problems found in rural schools. (*See* ASER 2007—Rural Annual Status of Education Report for 2007, published on 16-1-2008.) The survey covered 16,000 villages. As Pratham indicates, there are an estimated 140 million children in the age group of 6 to 14 years in primary schools. *Of these 30 million cannot read, 40 million can recognise a few alphabets, 40 million can read some words, and 30 million can read*

7 (1993) 1 SCC 645

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paragraphs. Over 55 million of these children will not complete four years of school, eventually adding to the illiterate population of India. The national literacy rate is 65%.

424. 24 districts with more than 50,000 out of school children means we have failed 24 times over. 71 districts in which there are 60 students per teacher is just as bad, if not worse. According to Pratham (and in-line with the Ministry of HRD's six-month review), the number of out of school children has hovered around 7,50,000. (p. 6) Moreover, it goes without saying that children need proper facilities. Today, just 59% of schools can boast of a usable toilet. (p. 49)

425. The quality of education is equally troubling. For Standards I and II, only 78.3% of students surveyed could recognise letters and read words or more in their own language. (p. 47) In 2006, it was even worse—only 73.1% could do so. It is disheartening to peruse the statistics for Standards III to V, where only 66.4% could read Standard I text or more in their own language in 2007. (p. 47) As Pratham stated at p. 7:

> "What should be more worrying though, is the fact that *in Class 2, only 9 per cent children can read the text appropriate to them*, and 60 per cent cannot even recognise numbers between 10 and 99."

426. In the third to fifth standards, 40% of students surveyed could not subtract. The latest figures indicate that 58.3% children in the fifth standard read at the level appropriate for second standard students. (p. 32) In both 2005 and 2007, only 74.1% of enrolled children were in attendance. (p. 49)

427. The learned Solicitor General, Mr Vahanvati, submitted that the Government has now placed sufficient emphasis on primary education. In 2001-2002, the Government launched Sarva Shiksha Abhiyan (SSA). This national programme's goal is to universalise elementary education. It supplements governmental spending on education. As the Solicitor General explained, it was founded on the idea that education for those between the ages of six to fourteen is a fundamental right. In this way, SSA seeks to fulfil the Government's obligation under Article 21-A to provide free and compulsory education to this age group. Some of the SSA's accomplishments merit mention.

428. By March 2007, 2,03,577 toilets had been constructed or were under construction, covering 87% of the goal; more than six crore free textbooks had been supplied—96% of the goal; 1,93,220 new schools had been completed or were under construction i.e. 80% of the desired mark. The learned Solicitor General further provided that enrolment for all districts in 2004-2005 for Classes I-V was 11,82,96,540. In 2005-2006, the number increased to 12,46,15,546. A similar increase was seen in Classes VI-VII/VIII: from 3,77,17,490 to 4,36,67,786. The total number of teachers increased from 36,67,637 in 2003-2004 to 46,90,176 in 2005-2006.

429. It is the learned Solicitor General's contention that SSA was responsible for many of the gains cited above. This includes the improved

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statistics on the student-teacher ratio, out of school children and enrolment rate for girls.

430. While the Government is on the right track with regard to improving the infrastructure of our system, books and buildings only go so far. They are necessary but not sufficient for achieving the ultimate goals of (*1*) keeping children in school, (*2*) ensuring that they learn how to think critically, and (*3*) ensuring that they learn skills that will help them secure gainful employment. The quality of education provided in the majority of primary schools is woeful. That is why I find it necessary to review government spending on education—especially at the primary/secondary level.

431. Undoubtedly, the Government has allocated more funds of late for education, but we need to have far more allocation of funds and much greater emphasis on free and compulsory education. Anything less would flout Article 21-A's mandate. According to HRD Annual Reports read with the Union of India Budget 2008-2009, we spend roughly seven times as much on the individual college student than the individual primary or secondary student.

Spending per student: Comparing that which is spent on each primary/secondary student versus each higher education student

Year & level of schooling	*Estimated number of enrolled students**	*Total Rs allocated***	*Expenditure per student in Rs*
2006-2007 School education/literacy	21,90,83,879	1,68,97,00,00,000	771
2006-2007 Tertiary education	1,17,77,296	69,12,09,00,000	5868
2007-2008 School education/literacy	21,90,83,879	2,31,91,35,00,000	1059
2007-2008 Tertiary education	1,17,77,296	63,97,36,00,000	5432
2008-2009 School education/literacy	21,90,83,879	2,78,50,00,00,000	1271
2008-2009 Tertiary education	1,17,77,296	1,08,52,87,00,000	9215

432. In a country where only 18% of those in the relevant age group make it to higher education, this is incredible. See NSSO 1999-2000. It is not suggested that higher education needs to be neglected or that higher education should not receive more funds, but there has to be much greater

* Estimated number of students for primary/secondary level is taken from 2004-2005 Annual Report, p. 250 at *http://www.education.nic.in/AR/AR0607-en.pdf*. In the same Annual Report, 1,17,77,296 students were enrolled in higher education in 2004-2005. For consistency's sake, I have used the 2004-2005 estimates. I have found no information that suggests that enrolment for one has significantly outpaced the other.

** Government of India, Expenditure Budget, Vol. 1, 2008-2009, p. 6. Total expenditure of ministries/departments (school education/literacy and higher education have been added).

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emphasis on the primary education. Our priorities have to be changed. Nothing is really more important than to ensure total compliance with Article 21-A. How can a sizeable portion of the population be precluded from realising the benefits of development when almost everyone acknowledges that the children are our future?

433. Education for children up to the age of fourteen years should be free. This has also been suggested in the recommendations of the Kothari Commission on education in 1966. Taking the country's rampant poverty into account, free education up to the age of 14 years is absolutely imperative. There is no other way for the poor to climb their way out of this predicament.

434. Mr P.P. Rao, learned Senior Advocate, rightly submitted that when you lack a school building, teachers, books and proper facilities, your schooling might be "free" but it is not an "education" in any proper sense. Adequate number of schools must be established with proper infrastructure without further delay. In order to achieve the constitutional goal of free and compulsory education, we have to appreciate the reality on the ground. A sizeable section of the country is still so poor that many parents are compelled to send their children to work. The State must carve out innovative policies to ensure that parents send their children to school. The Mid-Day Meal Scheme will go a long way in achieving this goal. But, apart from mid-day meals, the Government should provide financial help to extremely poor parents.

435. In addition to free education and/or other financial assistance, they should also be given books, uniforms and any other necessary benefits so that the object of Article 21-A is achieved. Time and again, this Court, in a number of judgments, has observed that the State cannot avoid its constitutional obligation on the ground of financial inabilities. [See *Hussainara Khatoon (IV)* v. *Home Secy., State of Bihar*[150], SCC p. 107 at para 10.]

436. In *Vasanth Kumar*[25] at para 150, Venkataramiah, J. suggested that the State provide preferential treatment such as tuition, scholarships, free boarding and lodging, etc. According to UNESCO's Education for All, Global Monitoring Report (2008) at p. 115, at least fourteen countries have cash-transfer programmes that target poor households with school-age children. The largest programme is in Brazil, where 46 million people receive an education transfer of up to 44 USD monthly per household in extreme poverty with children below age 16. According to the Report, the programme has reduced dropout rates up to 75% among beneficiaries in its more recent stage.

437. Such a programme is not foreign to India. According to UNICEF, the State of Gujarat put the idea of financial incentives for youth into action:

> "Figures indicate that the school enrolment drive of the State Government supported by incentives like Vidyalaxmi Bond of Rs 1000

150 (1980) 1 SCC 98 : 1980 SCC (Cri) 40

25 *K.C. Vasanth Kumar* v. *State of Karnataka*, 1985 Supp SCC 714

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given to each girl who completes primary education and 60 kg of wheat for tribal girls attending school, has met with significant success. In addition to the various incentives by the Government, many a corporate house and community have also come forward to motivate parents and children by donating school bags, uniforms, stationery, etc. As a result, the dropout rate has come down from 35.31% in 1997-1998 to 3.24% in 2006-2007 in Classes 1-5. In girls, this rate has dropped from 38.95% to 5.97 in the same time period."

438. In January 2008, Haryana Chief Minister Mr Bhupinder Singh Hooda unfurled an incentive scheme for SC students in which students would receive a one-time payment in addition to a monthly stipend for attending school. (*See* "Incentives announced to curb dropout rate", *The Tribune*, 5-1-2008.) The relevant portion is mentioned hereinbelow:

> "Secretary, Education, Rajan Gupta said a one-time allowance of Rs 740 to Rs 1450 would be given to SC students from Classes I to XII. … Under the monthly incentive scheme, boys and girls studying in Classes I to V would be given Rs 100 and Rs 150, respectively, per month and boys and girls of Classes VI to VIII Rs 150 and Rs 200. Similarly, boys and girls of Classes IX to XII would be given Rs 200 and Rs 300, respectively, and boys and girls studying science subjects in Classes XI and XII Rs 300 and Rs 400, respectively. … This monthly incentive to the students would be deposited in their bank accounts to maintain transparency in the scheme, he added."

439. In the name of transparency, students' attendance records could be made available to administrators and parents. Students would be paid to attend school. They would receive a sum for each day of school that they attended. If you only attend 7 out of 10 school days, you would only receive 70% of the stipend.

440. Ultimately, this is the most important aspect of implementing Article 21-A, incentives should be provided to parents so that they are persuaded to send their children to school. More than punishment, creative incentive programmes will go a long way in the implementation of the fundamental right enshrined under Article 21-A.

2.1. Historical perspective on compulsory education

441. Almost two centuries ago, Clause 43 of the Charter Act of 1813 made education a State responsibility. [See *Free and Compulsory Education: Genesis and Execution of Constitutional Philosophy*, Dr. P.L. Mehta and Rakhi Poonga, Deep and Deep Publications, New Delhi (1997), pp. 42-47.] The Hunter Commission (1882-1883) was the first to recommend universal education in India. Thereafter, the Patel Bill, 1917 was the first compulsory education legislation. It proposed to make education compulsory from ages 6 to 11.

442. The Government of India Act, 1935 provided that "education should be made free and compulsory for both boys and girls". Free and compulsory education got a further boost when the Zakir Hussain Commission

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recommended that the State should provide it. The 1944 Sargent Report strongly recommended free and compulsory education for children aged six to fourteen. By 1947, primary education had been made compulsory in 152 urban areas and 4995 rural areas.

443. The State has been making some endeavour to provide free and compulsory education since 1813 in one form or the other. When the original Framers gathered at the Constituent Assembly, their desire to provide free and compulsory education was well established. The real question in the debate was whether the original Framers would make free and compulsory education justiciable or not. They oscillated between the options, first placing it in the fundamental rights and later moving it to the directive principles of State policies under Article 45 of the Constitution.

444. Over 50 years later, Parliament revisited the subject. The parliamentary debate on Article 21-A offers a glimpse into the history of compulsory education in other countries. The then Minister of Human Resource Development, Dr. M.M. Joshi, referred to the speech of Shri Gopal Krishna Gokhale on compulsory education. While debating a bill in the Imperial Legislative Council in 1911, Shri Gokhale said that in most countries:

> "… elementary education is both compulsory and free, and in a few, though the principle of compulsion is not strictly enforced or has not been introduced it is either wholly or for the most part gratuitous, in India alone it is neither compulsory nor free. Thus in Great Britain and Ireland, France, Germany, Switzerland, Austria, Hungary, Italy, Belgium, Norway, Sweden, the United States of America, Canada, Australia and Japan it is compulsory and free. … In Spain, Portugal, Greece, Bulgaria, Serbia and Romania, it is free, and in theory, compulsory, though compulsion is not strictly enforced." [Lok Sabha Debates, 28-11-2001, Vol. 20, p. 476.]

445. In 1948, the United Nations made its own pronouncement on compulsory education. Article 26(1) of the Universal Declaration of Human Rights made free and compulsory education a lofty if not enforceable goal. While many States consider it an authoritative interpretation of the United Nations Charter, the Declaration is not a treaty and is not intended to be legally binding. Article 26(1) states:

> "Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit."

446. Our original Framers put a similar emphasis on the matter, placing free and compulsory education in the directive principles. The unamended Article 45 provided that:

> "45. *Provision for free and compulsory education for children.*—The State shall endeavour to provide, within a period of ten years from the

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commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years."

447. At this juncture, I deem it appropriate to refer to the parliamentary debate on the aspect of free and compulsory education. In the Lok Sabha debate of 28-11-2001 at Vol. 20, Shri M.V.V.S. Murthi, at p. 499, stated:

"Unless the Government makes primary education compulsory, no village can develop. If I say what they are doing in Andhra Pradesh, some Members may again cry foul. In Andhra Pradesh, we are having Education Committees. If there are any dropouts, the Committee will go to the village and find out the reason as to why they have dropped out. It is very important."

448. The Report of the Kothari Commission, 1964-1966, headed by Prof. D.S. Kothari, provided important recommendations on compulsory education. Nevertheless, the circumstances of the day compelled it to soften its suggestions. The nation was relatively poor and could not afford drastic increases in education spending. Some excerpts of this report are reproduced as under:

"5.01. … But in any given society and at a given time, the decisions regarding the type, quantity and quality of educational facilities depend partly upon the resources available and partly upon the social and political philosophy of the people. Poor and traditional societies are unable to develop even a programme of universal primary education. But rich and industrialised societies provide universal secondary education and expanding and broad-based programmes of higher and adult education. *Feudal and aristocratic societies emphasise education for a few*. But democratic and socialistic societies emphasise mass education and equalisation of educational opportunities. The principal problem to be faced in the development of human resources, therefore, is precisely this: How can available resources be best deployed to secure the most beneficial form of educational development? How much education, of what type or level of quality, should society strive to provide and for whom?

* * *

5.03 *Increasing the educational level of citizens.*—In the next two decades the highest priority must be given to programmes aimed at raising the educational level of the average citizen. Such programmes are essential on grounds of social justice, for making democracy viable and for improving the productivity of the average worker in agriculture and industry. The most crucial of these programmes is to provide, as directed by Article 45 of the Constitution, free and compulsory education of good quality to all children up to the age of 14 years. In view of the immense human and physical resources needed, however, the implementation of this programme will have to be phased over a period of time."

449. When Article 21-A was introduced, some Members of Parliament argued that financially poor parents who fail to send their children to school

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should not be punished and that the word "compulsion" in this article should be understood to apply exclusively to the State.

450. Let me examine this argument. The Eighty-sixth Amendment made three changes to the Constitution. It added Articles 21-A and 51-A(*k*) and amended Article 45. I turn my focus to Article 51-A(*k*). In addition to rejecting an amendment that would have neutered compulsory education, Parliament made a positive gesture. Though it never passed legislation seeking to implement compulsory education, it had not completely ignored the subject. From Article 51-A(*k*), it becomes clear that parents would be responsible for sending their children to school. Article 51-A read with Article 51-A(*k*) is reproduced as under:

> "51-A. *It shall be the duty of every citizen of India.*— * * *
>
> (*k*) who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years."

451. Just as Article 51-A(*a*) does not penalise disrespect of the national flag, Article 51-A(*k*) does not penalise parents/guardian for failing to send children to school. There is, of course, legislation that gives teeth to Article 51-A(*a*). (*See* The Prevention of Insults to National Honour Act, 1971, Section 3-A.)

452. Article 51-A(*k*) indicates that it is parents, not the State, who are responsible for making sure children wake up on time and reach school. Thus, Article 21-A read with Article 51-A(*k*) distributes an obligation amongst the State and parents: the State is concerned with free education, parents with compulsory. Notwithstanding parental duty, the State also has a role to play in ensuring that compulsory education is feasible—a topic I will cover below.

453. The Central Government has made some effort to fulfil its obligation under Article 21-A with regard to "free education". Sarva Shiksha Abhiyan is one such example. When it comes to "compulsory education", the Central Government has made no such effort. Parliament has not passed any legislation. The executive has not issued any order. What we have is a patchwork of different State and Union Territory laws. These States/UTs (and NCR) include:

> Assam, Andhra Pradesh, Bihar, Chhattisgarh, Goa, Gujarat, Haryana, Himachal Pradesh, Jammu & Kashmir, Karnataka, Kerala, Madhya Pradesh, Maharashtra, Orissa, Punjab, Rajasthan, Sikkim, Tamil Nadu, Uttar Pradesh, West Bengal, Delhi, Andaman & Nicobar Islands.

454. The majority of the States and Union Territories levy very small fines on parents. I note that these laws do not go into effect with one unexcused absence. Notice is given to the parents, giving them time to remedy the problem. Of course, enforcement is almost always a different story.

455. In contrast to the relatively light aforementioned sentences, the Compulsory Education Bill, 2006 introduced in the Rajya Sabha would

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provide six months' imprisonment as a penalty for those who preclude children from going to school. If this bill becomes law, Section 7 would dictate the following:

> "7. If any person including parents of children prevents any boy or girl child from going to school or causes hindrance or obstruction in any way, he shall be punishable with imprisonment, which may extend to six months."

456. It seems that the Bill simultaneously targets employers and parents. Employers would be punished when they hire a child to work too much or during school hours. Similarly, parents would also be punished for allowing this to happen. The Bill would also provide for scholarships, free hostel facilities and other incentives, "whenever necessary" and "as may be prescribed".

457. In *Bandhua Mukti Morcha* v. *Union of India*[151], SCC at p. 557, para 11, the Court explained why education should be compulsory. In essence, a citizen is only free when he can make a meaningful challenge to his fellow citizens or Government's attempt to curtail his natural freedom. For this to happen, he needs a certain degree of education. This is why Article 21-A may be the most important fundamental right. Without it, a citizen may never come to know of his other rights; nor would he have the resources to adequately enforce them. The relevant passage at para 11 reads as under: (SCC p. 557)

> "*11.* … A free educated citizen could meaningfully exercise his political rights, discharge social responsibilities satisfactorily and develop a spirit of tolerance and reform. Therefore, education is compulsory. Primary education to the children, in particular, to the child from poor, weaker sections, Dalits and Tribes and minorities is mandatory. The basic education and employment-oriented vocational education should be imparted so as to empower the children within these segments of the society to retrieve them from poverty and, thus, develop basic abilities … to live a meaningful life …. Compulsory education, therefore, to these children is one of the principal means and primary duty of the State for stability of the democracy, social integration and to eliminate social tensions."

458. In contrast to Article 51-A(*k*), the State and Union Territory laws and parliamentary intent with regard to Article 21-A, the Court in *Mukti Morcha*[151] was inclined to suggest, not hold, that the State was exclusively responsible for compulsory education. It went on to reaffirm *M.C. Mehta* v. *State of T.N.*[152] (child labour matter). In that case, the Court took up the issue of child labour in hazardous fields when it learnt of an accident in a cracker factory in Sivakasi.

459. The said case at para 28 identified poverty as the root cause of child labour: (*M.C. Mehta case*[152], SCC p. 771)

> "*28.* Of the aforesaid causes, it seems to us that … poverty is basic reason which compels parents of a child, despite their unwillingness, to

151 (1997) 10 SCC 549

152 (1996) 6 SCC 756 : 1997 SCC (L&S) 49

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get it employed. The Survey Report of the Ministry of Labour (supra) had also stated so. Otherwise, no parents, specially no mother, would like that a tender-aged child should toil in a factory in a difficult condition, instead of it enjoying its childhood at home under the paternal gaze."

460. In other words, parents send children to work because parents have no other choice. Food comes first. If the State does not provide extra income so as to remove the incentive to send children to work, it is wasting its time on mere gesture. The Court in para 29 concluded that action must be taken: (*M.C. Mehta case*[152], SCC p. 771)

> "*29.* It may be that [child labour] would be taken care of to some extent by insisting on compulsory education. Indeed, Neera [Burns] thinks that if there is at all a blueprint for tackling the problem of child labour, it is education. Even if it were to be so, the child of a poor parent would not receive education, if per force it has to earn to make the family meet both the ends. Therefore, unless the family is assured of income aliunde, problem of child labour would hardly get solved; and it is this vital question which has remained almost unattended. *We are, however, of the view that till an alternative income is assured to the family, the question of abolition of child labour would really remain will-o'-the-wisp.*" (emphasis added)

461. It is interesting to note that compulsory education has been introduced in one form or the other in various countries. From the historical experience of these nations, we learn that the legislation pertaining to compulsory education has played an important role in improving educational outcomes.

2.2. Compulsory education's roots in the United States

462. Compulsory education has had a long history outside of India. In 1852, the State of Massachusetts enacted the first compulsory attendance law in the United States; though compulsory education laws existed much earlier in many States, the first dating back to 1642 in Massachusetts. *Were Compulsory Attendance and Child Labor Laws Effective*? [*See* An analysis from 1915 to 1939. (2001) at p. 2. Prof. Adriana Lleras-Muney of Princeton University.]

2.3. Reasons from abroad for implementing compulsory education

463. Prof. Lleras-Muney explains that those who advocated for compulsory education believed that universal education was necessary to promote democracy and guarantee a common American culture. (p. 11) Given the influx of immigrants, some of whom came from undemocratic countries, many supporters of legislation viewed compulsory education as an instrument for assimilation.

464. Other reasons cited by compulsory education proponents in the United States included the reduction of crime, racism and inequality. Prof.

152 *M.C. Mehta* v. *State of T.N.*, (1996) 6 SCC 756 : 1997 SCC (L&S) 49

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Oreopoulos of the University of Toronto cites sources that make it appear as though the reasons for adopting compulsory education in Canada mirrored those cited in the United States; the emphasis was on good citizenship and economic development:

> "Archibald Macallum, an Ontario teacher, summarized the latter argument vigorously in an 1875 report favouring the introduction of compulsory schooling in Canada: 'Society has suffered so cruelly from ignorance, that its riddance is a matter of necessity, and by the universal diffusion of knowledge alone can ignorance and crime be banished from our midst; in no other way can the best interests of society be conserved and improved than by this one remedy—the compulsory enforcement of this great boon—the right of every Canadian child to receive that education that will make him a good, loyal subject, prepared to serve his country in the various social functions which he may be called on to fill during his life; and prepare him, through grace, for the life to come' (Annual Report of the Ontario Teachers' Association, 1875, as cited in Prentice and Houston, 1975, 175-6). [*See* The Canadian Journal of Economics, Vol. 39, No. 1, February (2006) *The compelling effects of compulsory schooling: the evidence from Canada*, Prof. Oreopoulos, at p. 23.]"

2.4. Empirical data indicating that compulsory education has a positive effect

465. Prof. Oreopoulos provides data that show the fruits of imposing education on citizens. Crime may be lowered, health improved and civic activity increased. Compulsory education may also lead to a substantial increase in income for individuals. Moreover, compulsory education, if it does not cause, may at least contribute to an increase in bilingualism and employment and a reduction in poverty. The relevant portion is reproduced hereunder:

> "(P. 24) Other papers find evidence of social returns, but for non-pecuniary outcomes. Lochner and Moretti (2002), for example, find that compulsory schooling lowers crime, while Lleras-Muney (2002) finds a correlation with improved health. In studies of the United States and United Kingdom, Dee (2003) and Milligan, Moretti, and Oreopoulos (2003) estimate that tighter restrictions on leaving school early correspond to increased levels of civic activity (like voting and discussing politics). ... My analysis suggests that students compelled to complete an extra grade of school have historically experienced an average increase of 9-15% in annual income.
>
> (P. 48) I find that the introduction of tighter provincial restrictions on leaving school between 1920 and 1990 raised average grade attainment and incomes. Students compelled to attend an extra year of school experienced an average increase in annual income of about 12%. I also find that compulsory schooling is associated with significant benefits in terms of other socio-economic outcome measures ranging from

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bilingualism, employment, and poverty status. These results hold up against many specifications checks and are entirely consistent with previous studies."

466. In addition to increased income, Prof. Lleras-Muney found that legally requiring a child to attend school for one more year increased educational attainment by roughly five percentage points. (P. 8) Educational attainment refers to time spent in school.

2.5. Example of compulsory education statutes

467. The causes of low enrolment, high dropout rates and frequent truancy in US and India differ, but the consequences thereof do not. In either case, citizens who lack education are at an extreme disadvantage. In India, poverty has been identified as the ultimate cause of lacklustre enrolment and attendance rates. Children are compelled to work. In developed countries like the United States or Canada, children rarely fail to attend school because of economic constraints. Instead, a number of different factors may contribute to truancy. High school students may drop out "... because they detest school, lack motivation, or anticipate little reward from graduation." [*See* The Canadian Journal of Economics, "The compelling effects of compulsory schooling: the evidence from Canada", Prof. Oreopoulos, p. 23, (quoting from Eckstein, Zvi, and Kenneth I. Wolpin (1999) "Why youths drop out of high school: the impact of preferences, opportunities, and abilities", Econometrica 67, 1295-339).]

468. As I detail below, students and parents in the United States often face the same fines when students fail to attend school. Fines for students make more sense when low self-control is the reason for which they fail to attend school. At the same time, punishing Indian students who have no choice but to work would make no sense. Such a punishment should not be borrowed from the United States.

469. In many jurisdictions in the United States, the attendance officer is responsible for enforcing compulsory attendance laws for his area or school. Given the overwhelming problem of sub-par enrolment and attendance in India, we doubt that one school official could sufficiently do the work of inspecting places of employment for children who have violated attendance laws.

470. Indeed, existing legislation in India already envisages the employment of attendance officers: the Delhi Primary Education Act, 1960, Section 7. Yet, there is nothing to suggest that these employees have adequately dealt with truancy. As mentioned, this is, in part, due to the economic conditions in which many parents find themselves. Financial assistance or incentives must be given. Only then may the Government actively enforce compulsory attendance legislation.

471. We must also remember that it is not only the child who fails to attend but also the child who fails to enrol that has violated an attendance law.

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472. Before taking issue with the State/Union Territory compulsory education statutes, I note that education has traditionally been reserved for the States. Only in 1976, vide the Forty-second Amendment of the Constitution, did education become a part of Concurrent List of Schedule VII. In its 165th Report, the Law Commission of India has also recommended enactment of Central legislation in this respect. Putting education in the Concurrent List turns out to be a positive development, given the States' failure to provide effective legislation.

473. The States' laws fail on two accounts. First, they are too lenient to have a deterrent effect. Second, the legislation is not adequately enforced, in part, because it does not require police officers to do the job. If we analyse the legislation passed by different States, another conclusion becomes obvious: no State has provided for an adequate punishment whose effect would be to deter citizens from committing a violation.

474. It is necessary to reproduce some of the various compulsory education laws of the States.

475. Under Section 7 of the Tamil Nadu Compulsory Elementary Education Act, 1994:

> "7. Every parent or guardian of a child of school age who fails to discharge his duty under Section 4 (duty of parent to cause child to attend elementary school) shall be punishable with fine which may extend to *one hundred rupees*." (emphasis supplied)

476. Section 18(1) of the Delhi Primary Education Act, 1960 states:

> "18. *Penalty for contravention of Section 13*.—(1) If any parent fails to comply with an attendance order passed under Section 13, he shall be punishable with fine *not exceeding two rupees*, and, in the case of continuing contravention, with an *additional fine not exceeding fifty naye paise* for every day during which such contravention continues after conviction for the first of such contraventions:
>
> Provided that the amount of fine payable by any one person in respect of any child in any one year *shall not exceed fifty rupees*."
>
> (emphasis supplied)

477. Analysis of these State laws reveals that they are weak in character and perhaps have never been implemented. If we compare these laws with their sister statutes in the United States, we realise that the US laws are far stronger.

478. In Wisconsin, parents who fail to send their children to school may have to pay a fine of not more than $500 or face imprisonment for not more than 30 days or both. [Wisconsin Statute Sections 118.15(1)(*a*) and 118.15(5)(*a*)*1.a.*] For a second or subsequent offence, they may face a fine of not more than $1000 or imprisonment for not more than 90 days or both. [Wisconsin Statute Sections 118.15(1)(*a*) and 118.15(5)(*a*)*1.b.*] Alternatively, they may be sentenced to perform community service. [Wisconsin Statute Sections 118.15(1)(*a*) and 118.15(5)(*a*)2.] Unlike Wisconsin, Tamil Nadu and Delhi's laws have no teeth.

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479. The other main problem is implementation of these laws. Neither the State Governments nor their police agencies are at all serious about implementing these compulsory laws. There are hardly any cases where even fines have been imposed. Some form of compulsory education has been on the statute books since 1917. We have seen western countries enforce these laws. Most western countries enjoy almost universal literacy while 35% of our population is illiterate. While a robust financial incentive programme may not have been possible in 1917, it is today. If we wish to develop further, we must educate each and every citizen aged six to fourteen.

480. In order to give effect to the constitutional right under Article 21-A, it is imperative that the Central Government pass suitable legislation. The fine should be suitably increased. Imprisonment should be a sentencing option as well. The current patchwork of State/UT legislation on compulsory education is insufficient. Small monetary fines do not go far enough to ensure the implementation of Article 21-A.

481. A disclaimer is attached to these recommendations. The recommendations for the enforcement of compulsory education are contingent upon the implementation of a financial incentive programme that would make education viable for the poor. The carrot must come before the stick. If there is no financial incentive programme in place, the Government cannot expect the poorest of the poor to send their children to school.

482. Parliament should criminally penalise those parents who receive financial benefits and, despite such payments, send their children to work and penalise those employers who preclude children from attending school or completing homework. It has become necessary that the Government set a realistic target within which it must fully implement Article 21-A regarding free and compulsory education for the entire country. The Government should suitably revise budget allocations for education. The priorities have to be set correctly. The most important fundamental right may be Article 21-A, which, in the larger interest of the nation, must be fully implemented. Without Article 21-A, the other fundamental rights are effectively rendered meaningless. Education stands above other rights, as one's ability to enforce one's fundamental rights flows from one's education. This is ultimately why the judiciary must oversee the Government spending on free and compulsory education.

483. At the same time, spending is an area in which the judiciary must not overstep its constitutional mandate. The power of the purse is found in Part V, Chapter II of the Constitution, which is dedicated to Parliament. (*See* Articles 109 and 117 for "Money Bills".) Nevertheless, it remains within the judiciary's scope to ensure that the fundamental right under Article 21-A of Part III is upheld. In *M.C. Mehta* v. *Union of India*[153] (vehicular pollution) this Court did not ignore the Article 21 right to life when deadly levels of pollution put the right at stake. Nor will this Court ignore the Article 21-A right to education, when a dearth of quality schooling puts it in jeopardy. The

153 (1998) 6 SCC 63

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Government's education programmes and expenditures, wanting in many respects, are an improvement over past performance. They nearly fall short of the constitutional mark. Lacklustre performance in primary/secondary schools is caused in part because the Government places college students on a higher pedestal. Money will not solve all our education woes, but a correction of priorities in step with the Constitution's mandate will go a long way.

2.6. Opposition to compulsory education

484. "Compulsory" connotes enforcement. Parliament rejected an amendment that would have saved parents from penal penalties. If education were not compulsory, who checks in with parents who have sent their children to work? If no authorities inquire, the message is clear: We, the State, do not care if your child goes to school. Taking the opposing view, Shri G.M. Banatwalla wanted to make sure parents were not punished:

> "... this word 'compulsion' needs to be properly defined. The word, 'compulsion' is not to be related to the student or the parents. Parents cannot be penalised for being too poor to send their children to school. The word, 'compulsion' has to be understood in relation to the State and the obligation of the State to provide for free education, p. 523." (*See* The Parliamentary Debates on Article 21-A, p. 523, 28-11-2001 at Vol. 20, Nos. 6-10.)

485. Parliament had the opportunity to accept such a definition of "compulsory". But they chose otherwise. Amendment number four, moved by Shri G.M. Banatwalla at p. 548, stated that:

> "Provided that in making any law to provide for free and compulsory education under this article, the State shall not ... (*b*) enforce any penal sanctions on a parent or guardian."

Of paramount importance, this amendment was "negatived". (See p. 548.) Those who wanted a safe haven from penal sanction for parents lost. From this vote, we know that Parliament intended to allow for future legislation that would impose penal sanctions for violations of legislation under Article 21-A.

2.7. Conclusion on free and compulsory education

486. Given that so many children drop out of, or are absent from, school before they turn fourteen, "free education" alone cannot solve the problem. The current patchwork of laws on compulsory education is insufficient. Monetary fines do not go far enough to ensure that Article 21-A is upheld.

487. A carrot-and-stick approach appears to be the best way to implement Article 21-A. Financial incentive programmes have worked well in other countries. We should follow their lead. Once that is done, the Government should strictly enforce effective compulsory education laws. Such a policy is bound to pay off. In sum, the Central Government should enact legislation that:

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(*a*) provides low income parents/guardians with financial incentives such that they may afford to send their children to school;

(*b*) criminally penalises those who receive financial incentives and despite such payment send their children to work;

(*c*) penalises employers who preclude children from attending school or completing homework;

(*d*) the penalty should include imprisonment; the aforementioned bill would serve as an example. The State is obligated under Article 21-A to implement free and compulsory education in toto;

(*e*) until we have achieved the object of free and compulsory education, the Government should continue to increase the education budget;

(*f*) Parliament should set a deadline by which time free and compulsory education will have reached every child. This must be done within six months.

488. With regard to 487(*a*), the State cannot cite budgetary constraints or lack of resources as an excuse for failing to provide financial assistance/incentives to poor parents. See *Hussainara Khatoon (IV)*[150], SCC at p. 107, para 10.

489. Article 21-A's reference to "education" must mean something. This conclusion is bolstered by Parliament's Statement of Objects and Reasons for Article 21-A:

"The Constitution of India in a directive principle contained in Article 45, has made a provision for free and compulsory education for all children up to the age of fourteen years within ten years of promulgation of the Constitution. We could not achieve this goal even after 50 years of adoption of this provision. The task of providing education to all children in this age group gained momentum after the National Policy of Education (NPE) was announced in 1986. The Government of India, in partnership with the State Governments, has made strenuous efforts to fulfil this mandate and, though significant improvements were seen in various educational indicators, the ultimate goal of providing universal and quality education still remains unfulfilled. In order to fulfil this goal, it is felt that an explicit provision should be made in the part relating to fundamental rights of the Constitution.

2. With a view to making right to free and compulsory education a fundamental right, the Constitution (Eighty-third Amendment) Bill, 1997 was introduced in the Parliament to insert a new article, namely, Article 21-A conferring on all children in the age group of 6 to 14 years the right to free and compulsory education. The said Bill was scrutinised by the Parliament Standing Committee on Human Resource Development and the subject was also dealt with in its 165th Report by the Law Commission of India.

3. After taking into consideration the report of the Law Commission of India and the recommendations of the Standing Committee of the

150 *Hussainara Khatoon (IV)* v. *Home Secy., State of Bihar*, (1980) 1 SCC 98 : 1980 SCC (Cri) 40

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Parliament, the proposed amendments in Part III, Part IV and Part IV-A of the Constitution are being made which are as follows:

* * *

4. The Bill seeks to achieve the above objects."

490. The article seeks to usher in "the ultimate goal of providing universal and *quality* education". (emphasis supplied) Implied within "education" is the idea that it will be quality in nature. Current performance indicates that much improvement needs to be made before we qualify "education" with "quality". Of course, for children who are out of school, even the best education would be irrelevant. It goes without saying that all children aged six to fourteen must attend school and education must be quality in nature. Only upon accomplishing both of these goals, can we say that we have achieved total compliance with Article 21-A.

491. Though progress has been made, Parliament's observation upon passing Article 21-A still applies: the goal of providing universal and quality education "... still remains unfulfilled".

3. DOES THE NINETY-THIRD AMENDMENT VIOLATE THE BASIC STRUCTURE OF THE CONSTITUTION BY IMPOSING RESERVATION ON UNAIDED INSTITUTIONS?

492. Imposing reservation on unaided institutions violates the basic structure by obliterating citizens' Article 19(1)(*g*) right to carry on an occupation. Unaided entities, whether they are educational institutions or private corporations, cannot be regulated out of existence when they are providing a public service like education. That is what reservation would do. That is an unreasonable restriction. When you do not take a single paisa of public money, you cannot be subjected to such restriction. The Ninety-third Amendment's reference to unaided institutions must be severed.

493. No unaided institution filed a writ petition in this case. Had either this Court or the respondents an objection, they could have raised it at any time during the proceedings. We listened to the parties for months. We received voluminous written submissions from the parties, yet no objection was made with regard to the fact that no unaided institution had filed a writ petition. While we would usually implead a party if we felt their presence was necessary to the resolution of the dispute, the facts of this case are peculiar. The best lawyers in the country argued the case for both sides, and a brief from an unaided institution would not have added much if anything to the substance of the arguments. The Government will likely target unaided institutions in the future. At that time, this Court will have to go through this entire exercise de novo to determine if unaided institutions should be subject to reservation. Such an exercise would unnecessarily cause further delay. The fate of lakhs of students and thousands of institutions would remain up in the air. (See *Minerva Mills Ltd.* v. *Union of India*[13].) Therefore, looking to the

13 (1980) 3 SCC 625

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extraordinary facts, I have decided to proceed with this aspect of the matter in the larger public interest.

494. Amendments by their very nature are often enabling provisions. If they clear the way for future legislation that would in fact violate the basic structure, the Court need not wait for a potential violation to become an actual one. It can strike the entire amendment ab initio. The question of potential width was resolved in *Minerva Mills*[13], paras 38-39. The Court acknowledged that it generally does not anticipate constitutional issues before they arise, but it *held* that circumstances required it to act before unconstitutional provisions could be passed under the authority of an unconstitutional amendment.

> "*38.* But, we find it difficult to uphold the preliminary objection because, the question raised by the petitioners as regards constitutionality of Sections 4 and 55 of the Forty-second Amendment is not an academic or a hypothetical question. *The Forty-second Amendment is there for anyone to see* and by its Sections 4 and 55 amendments have been made to Articles 31-C and 368 of the Constitution. An order has been passed against the petitioners under Section 18-A of the Industries (Development and Regulation) Act, 1951, by which the petitioners are aggrieved.
>
> *39.* Besides there are two other relevant considerations which must be taken into account while dealing with the preliminary objection. There is no constitutional or statutory inhibition against the decision of questions before they actually arise for consideration. In view of the importance of *the question raised and in view of the fact that the question has been raised in many a petition, it is expedient in the interest of justice to settle the true position.* Secondly, what we are dealing with is not an ordinary law which may or may not be passed so that it could be said that our jurisdiction is being invoked on the hypothetical consideration that a law may be passed in future which will injure the rights of the petitioners. *We are dealing with a constitutional amendment which has been brought into operation which, of its own force, permits the violation of certain freedoms through laws passed for certain purposes.* We, therefore, overrule the preliminary objection and proceed to determine the point raised by the petitioners." (SCC p. 649, paras 38-39)
>
> (emphasis added)

There is not one precise definition of the width test, however. The test asks if an amendment is so wide that in effect (actual or potential), it goes beyond Parliament's amending power. *Kesavananda*[17], SCC p. 427, para 532:

> "*532.* … But that the real consequences can be taken into account while judging the width of the power is settled. The Court cannot ignore the consequences to which a particular construction can lead …."

13 *Minerva Mills Ltd.* v. *Union of India*, (1980) 3 SCC 625

17 *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225

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To make such a determination, it follows that the Court should ask whether an amendment infringes constitutional limitations as opposed to those evolved from mere common law. (See *Nagaraj*[11], para 103.)

495. As a preliminary matter, I turn to the cases by which the basic structure doctrine has been established. It has been stated that, "*Kesavananda*[17] had propounded the doctrine, *Indira Gandhi Election case*[39] had upheld it, and *Minerva*[13] engraved it on stone". (*See* Granville Austin, "*Working a Democratic Constitution*", at p. 506.)

496. *Kesavananda*[17] and its progeny provide that an amendment to the Constitution must not alter the Constitution's basic structure. To reach a conclusion regarding a basic structure challenge, I employ the following general standard: *an amendment alters the basic structure if its actual or potential effect would be to damage a facet of the basic structure to such an extent that the facet's original identity is compromised.*

497. To determine if legislation infringes constitutional limitations and is thus invalid, we use the Two-Step Effect Test (also known as the impact or rights test). Step One requires us to first ask if legislation affects a facet of the basic structure. If it does, then at Step Two we ask if the effect on the facet of the structure is to such an extent that the facet's original identity has been altered. Applying the effect test is another way of saying that the form of an amendment is irrelevant; it is the consequence thereof that matters. [See *Kesavananda*[17], at para 532 and *I.R. Coelho* v. *State of T.N.*[12], Conclusion (*ii*) at p. 111.]

498. The terms "abridge" and "abrogate" have been employed by this Court to distinguish between acceptable and unacceptable legislation. Whether legislation abridges or abrogates is a question of degree. Using these terms is another way of asking whether the legislation had such an effect that it changed the basic structure of the Constitution. If legislation merely abridges the basic structure, the structure's identity remains. The legislation is upheld. In this sense, Parliament may take away or destroy fundamental rights by amending the Constitution, provided that the basic structure is not altered.

499. If it abrogates the basic structure, the structure and thus the Constitution lose their identities. The legislation must be struck down. This is determined on a case-by-case basis by applying the Effect Test (impact/rights tests). (See *Coelho*[12].) I further note that a total deprivation of fundamental rights, even in one limited area, may amount to an abrogation of the basic structure. (See *Minerva Mills*[13], para 59.)

11 *M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212
17 *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225
39 *Indira Nehru Gandhi* v. *Raj Narain*, 1975 Supp SCC 1
13 *Minerva Mills Ltd.* v. *Union of India*, (1980) 3 SCC 625
12 (2007) 2 SCC 1

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3.1. Step One: Does Article 15(5) affect a facet of the basic structure?

500. In the instant case, Article 15(5) expressly precludes the application of Article 19(1)(*g*). Whenever reservations are implemented under Article 15(5), citizens are stripped of their fundamental rights under Article 19(1)(*g*). By excluding Article 19(1)(*g*), Article 15(5) obviously affects Article 19(1)(*g*), a facet of the basic structure of the Constitution. Step one is therefore cleared. What is more, Article 19(1)(*g*) belongs to the Golden Triangle—Articles 14, 19 and 21 are the three fundamental rights that stand *above the rest.* Writing for the majority in *Minerva Mills*[13], Chandrachud, J. provides an eloquent justification for shielding the Golden Triangle from attack. To achieve a more egalitarian society, individual liberty must be protected: (*Minerva Mills case*[13], SCC p. 660, para 74)

> "*74.* Three Articles of our Constitution, and only three, stand between the heaven of freedom into which Tagore wanted his country to awake and the abyss of unrestrained power. They are Articles 14, 19 and 21. Article 31-C has removed two sides of that Golden Triangle which affords to the people of this country an assurance that the promise held forth by the Preamble will be performed by ushering an egalitarian era through the discipline of fundamental rights, that is, without emasculation of the rights to liberty and equality which alone can help preserve the dignity of the individual."

501. The Golden Triangle's significance becomes clear when we consider that the Government may suspend Articles 14 and 19 rights in order to implement an Emergency. (See Articles 358 and 359) (prior to the Forty-fourth Amendment, all Part III rights could be curtailed during Emergency; this amendment precludes the State from denying Articles 20 and 21 to citizens during Emergency). In a sense, democracy is only restored when the Triangle is returned to the citizens. Without the Triangle, democracy is impossible: (*Minerva Mills case*[13], SCC p. 657, para 63)

> "*63.* … Every State is goal-oriented and claims to strive for securing the welfare of its people. The distinction between the different forms of Government consists in that a real democracy will endeavour to achieve its objectives through the discipline of fundamental freedoms like those conferred by Articles 14 and 19. *Those are the most elementary freedoms without which a free democracy is impossible and which must therefore be preserved at all costs.* Besides, as observed by Brandeis, J., *the need to protect liberty is the greatest when Government's purposes are beneficent.* If the discipline of Article 14 is withdrawn and if immunity from the operation of that article is conferred, not only on laws passed by Parliament but on laws passed by the State Legislatures also, the political pressures exercised by numerically large groups can tear the country asunder by leaving it to the legislature to pick and choose favoured areas and favourite classes for preferential treatment." (emphasis supplied)

13 *Minerva Mills Ltd.* v. *Union of India*, (1980) 3 SCC 625

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502. The United States Supreme Court Justice Brandeis' word of caution is relevant to today's dispute wherein the Government trumpets reservation in higher education as an answer to our age-old problems of poverty and caste. At first blush, it sounds as if reservation in higher education would help the backward help themselves. The road out of poverty is paved with education. However, the "devil is the details". With elementary freedom on the line, I must *carefully* scrutinise those details.

503. The right to freedom under Article 19 has been long recognised as a natural and inalienable right that belongs to all citizens. Indeed, what would Independence mean without it? Sikri, C.J. cites the following passage in *Kesavananda*[17] at para 300: (SCC p. 367)

> "*300.* (*ii*) That article (Article 19) enumerates certain freedoms under the caption 'right to freedom' and deals with those great and basic rights which are recognised and guaranteed as the *natural rights* inherent in the status of a citizen of a free country. (Per Patanjali Sastri, C.J., in *State of W.B.* v. *Subodh Gopal Bose*[154].)" (emphasis in original)

504. With fundamental rights in jeopardy, I shall review the cases in which the basic structure doctrine has been implemented to invalidate constitutional amendments. By looking at these cases synoptically, we get a sense as to how much damage the basic structure can withstand before crumbling. In *Kesavananda*[17], the second part of Article 31-C precluded courts from reviewing whether a law under Article 39(*b*) or (*c*) promoted the policy for which it was enacted. This violated the basic structure. Article 31-C was introduced by the Twenty-fifth Amendment.

505*. In *Indira Nehru Gandhi* v. *Raj Narain*[39] the Court struck down Article 329-A(4) as violative of the basic structure. This provision appropriated the Court's power to adjudicate election laws, encroaching on the judiciary in violation of separation of powers. See Matthew, J.'s opinion at para 325. It was introduced by the Thirty-ninth Amendment. In *Minerva Mills*[13], the Court held Sections 4 and 55 of the Forty-second Amendment as violative of the basic structure. Section 4 sought to expand Article 31-C such that all laws giving effect to directive principles, not just those intended to promote Article 39(*b*) or (*c*), would be immune to an Article 14 or 19 challenge. Section 55 would have barred judicial review of constitutional amendments.

506. In *P. Sambamurthy* v. *State of A.P.*[155] the Court invalidated Article 371-D(5), finding that Parliament had violated the rule of law and consequently the basic structure, by removing judicial review from the High

17 *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225

154 AIR 1954 SC 92 : 1954 SCR 587

* **Ed.**: Para 505 corrected vide Official Corrigendum No. F.3/Ed.B.J./41/2008 dated 6-6-2008.

39 1975 Supp SCC 1

13 *Minerva Mills Ltd.* v. *Union of India*, (1980) 3 SCC 625

155 (1987) 1 SCC 362 : (1987) 2 ATC 502

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Court and placing it in the hands of one of the parties—the State Government.

507. In *L. Chandra Kumar* v. *Union of India*[156] the Court held that Articles 323-A(2)(*d*) and 323-B(3)(*d*) violated the basic structure in that they removed judicial review of the High Courts and the Supreme Court under Articles 226/227 and 32, respectively. These articles were introduced by the Forty-second Amendment to empower Parliament or the State Legislatures to establish tribunals for various substantive areas of law: tax, labour, criminal, etc.

508. Two broad themes surface from these cases. When judicial review is barred, democracy evaporates. And when fundamental rights are at stake, they must be harmonised with, not made subject to, the directive principles. Sections 4 and 55 of the Forty-second Amendment were especially egregious violations of the basic structure. Had Section 4 been upheld, citizens' fundamental rights would have been at the mercy of one organ of the Government. "*If Governments always could be trusted, there would have been no need for fundamental rights.*" Mr Palkhivala in oral arguments in *Kesavananda*[17], quoted from the learned Mr H.M. Seervai, who was opposing counsel in that case. Mr Palkhivala was reading from Seervai, H.M., "Fundamental Rights: A Basic Issue", published in three instalments in *The Times of India*, 14-2-1955, 15-2-1955 and 16-2-1955. (*See* Granville Austin at pp. 263-64 in *Working a Democratic Constitution*.)

509. The Government cannot be trusted; that is precisely why we divide its powers into separate organs. If it could be trusted, there would be no need for co-equal branches in which power is shared. Separation of powers is an axiom of democracy.

510. Had Section 55 of the Forty-second Amendment been upheld, the basic structure of the Constitution could have been destroyed by a single slash. Future constitutional amendments would not have been reviewed. The impugned amendment looks rather mild in comparison to the damage that would have been wrought by the Forty-second Amendment. The impugned legislation limits one fundamental right in one limited circumstance. Yet an amendment need not be as invidious as the Forty-second Amendment for us to invalidate it. If the standard were that high, amendments could destroy the basic structure or the essence of the Constitution by a thousand slashes.

511. Since *Kesavananda*[17] time, many amendments have been passed and many challenges under the basic structure have been made. This Court has used caution and has refrained from using the doctrine, even when it may have been justified. For example, there were grounds for striking the entire Tenth Schedule as violative of the basic structure in *Kihoto Hollohan* v. *Zachillhu*[85]. Rather than resort to the basic structure, this Court made a narrow ruling on procedural grounds. [See S.P. Sathe, *Judicial Activism in*

156 (1997) 3 SCC 261 : 1997 SCC (L&S) 577

17 *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225

85 1992 Supp (2) SCC 651

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India: Transgressing Borders and Enforcing Limits, 2nd Edn., 2002 (Oxford University Press) pp. 92-93.] The Court upheld the Tenth Schedule, only severing a paragraph from the same. I agree that an abundance of caution ought to be taken before employing the basic structure doctrine. The violation must truly abrogate the basic structure. Anything short of this standard must be upheld—the will of the people, through their elected representatives, heard.

512. Before making such a determination, it is prudent to briefly revisit the rulings of two landmark cases: *P.A. Inamdar* v. *State of Maharashtra*[15] and *T.M.A. Pai Foundation* v. *State of Karnataka*[8]. In *Inamdar*[15], paras 26-27 (seven-Judge Bench), unaided (minority and non-minority) professional institutions filed petitions to determine, inter alia, whether the State could impose quotas on unaided (minority and non-minority) institutions. A seven-Judge Bench was constituted such that the *Islamic Academy*[157] clarification of *T.M.A. Pai*[8] could be reviewed. *Islamic Academy*[157] was a five-Judge Bench. Given that *T.M.A. Pai*[8] was an eleven-Judge Bench, *Inamdar*[15] could clarify but not overrule *T.M.A. Pai*[8].

513. At para 124, *Inamdar*[15] held that the State cannot impose quotas on unaided (minority and non-minority) institutions. To do so would nationalise seats, contrary to *T.M.A. Pai*[8]. (See *Inamdar*[15] at para 125.) In a dictum, *T.M.A. Pai*[8] suggested that the State could compel unaided institutions to admit a reasonable percentage of students via reservation. (*T.M.A. Pai*[8], para 68) *Inamdar*[15] clarified this point, stating that *T.M.A. Pai*[8] should be read to mean that the State and unaided institutions may enter into *consensual* agreement regarding reservation. (See *Inamdar*[15] at para 126.) Unaided institutions (minority and non-minority) can admit as they choose, provided their process is fair, transparent, non-exploitative and merit based.

514. *Inamdar*[15] stated: (SCC p. 601, paras 124-25)

> "*124. So far as appropriation of quota* by the State and enforcement of its reservation policy is concerned, *we do not see much of a difference between non-minority and minority unaided educational institutions.* We find great force in the submission made on behalf of the petitioners that the States have no power to insist on seat-sharing in the unaided private professional educational institutions by fixing a quota of seats between the management and the State. *The State cannot insist on private educational institutions which receive no aid from the State to implement State's policy on reservation for granting admission on lesser percentage of marks i.e. on any criterion except merit.*
>
> *125.* As per our understanding, neither in the judgment of *T.M.A. Pai Foundation*[8] nor in the Constitution Bench decision in *Kerala Education*

15 (2005) 6 SCC 537
8 (2002) 8 SCC 481
157 *Islamic Academy of Education* v. *State of Karnataka*, (2003) 6 SCC 697

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Bill[58] which was approved by *Pai Foundation*[8] is there anything which would allow the State to regulate or control admissions in the unaided professional educational institutions so as to compel them to give up a share of the available seats to the candidates chosen by the State, as if it was filling the seats available to be filled up at its discretion in such private institutions. *This would amount to nationalisation of seats which has been specifically disapproved in Pai Foundation*[8]. *Such imposition of quota of State seats or enforcing reservation policy of the State on available seats in unaided professional institutions are acts constituting serious encroachment on the right and autonomy of private professional educational institutions. Such appropriation of seats can also not be held to be a regulatory measure in the interest of minority within the meaning of Article 30(1) or a reasonable restriction within the meaning of Article 19(6) of the Constitution.* Merely because the resources of the State in providing professional education are limited, private educational institutions, which intend to provide better professional education, cannot be forced by the State to make admissions available on the basis of reservation policy to less meritorious candidate. *Unaided institutions, as they are not deriving any aid from State funds, can have their own admissions if fair, transparent, non-exploitative and based on merit.*"

(emphasis supplied)

To the extent that *Islamic Academy*[157] had approved of quotas in unaided institutions, a scheme in which the States could fix quota for seat sharing between management and the State, *Islamic*[157] was overruled. (*Inamdar*[15] at para 130)

515. In *T.M.A. Pai Foundation*[8], para 2 (eleven-Judge Bench), private educational institutions, aided and unaided, filed writ petitions to challenge regulations that impeded their rights. They wanted to establish and administer educational institutions, unfettered by Government interference. (para 2) Reading Articles 29(2) and 30(1) harmoniously, the six-Judge majority held that (*1*) unaided institutions could admit students free of Government interference, as long as their admission process was transparent and merit based; (*2*) minority aided institutions may still admit their own students, contingent upon admitting a reasonable number of non-minority students per the percentage provided by the State Government.

516. For our purposes, it is important to note that education falls within the meaning of "occupation" under Article 19(1)(*g*). This is so because a large number of persons are employed as teachers and administrative staff. For them, education is an occupation. *T.M.A. Pai*[8] stated:

"*20.* Article *19(1)(g)* employs four expressions viz. profession, occupation, trade and business. Their fields may overlap, but each of

58 *Kerala Education Bill, 1957, In re*, AIR 1958 SC 956 : 1959 SCR 995
8 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481
157 *Islamic Academy of Education* v. *State of Karnataka*, (2003) 6 SCC 697
15 *P.A. Inamdar* v. *State of Maharashtra*, (2005) 6 SCC 537

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them does have a content of its own. Education is per se regarded as an activity that is charitable in nature (see *State of Bombay* v. *R.M.D. Chamarbaugwala*[158]). … Education has so far not been regarded as a trade or business where profit is the motive. Even if there is any doubt about whether education is a profession or not, *it does appear that education will fall within the meaning of the expression 'occupation'. Article 19(1)(g) uses the four expressions so as to cover all activities of a citizen in respect of which income or profit is generated, and which can consequently be regulated under Article 19(6).* …

(SCC pp. 533-34, para 20)

* * *

25. The establishment and running of an educational institution where a large number of persons are employed as teachers or administrative staff, and an activity is carried on that results in the imparting of knowledge to the students, must necessarily be regarded as an occupation, even if there is no element of profit generation. It is difficult to comprehend that education, per se, will not fall under any of the four expressions in Article *19(1)(g)*. 'Occupation' would be an activity of a person undertaken as a means of livelihood or a mission in life." (SCC p. 535, para 25)

(emphasis added)

517. Stripping private unaided institutions of their right to select students would be unreasonable: (*T.M.A. Pai case*[8], SCC p. 540, para 40)

"*40. Any system of student selection would be unreasonable if it deprives the private unaided institution of the right of rational selection*, which it devised for itself, subject to the minimum qualification that may be prescribed and to some system of computing the equivalence between different kinds of qualifications, like a common entrance test. Such a system of selection can involve both written and oral tests for selection, based on principle of fairness." (emphasis supplied)

518. Like Article 15(5) in the instant case, *Unni Krishnan*[7] effectively nationalised education. *T.M.A. Pai*[8] overturned *Unni Krishnan*[7]. (See *T.M.A. Pai case*[8] SCC p. 540, para 38):

"*38. The scheme in Unni Krishnan case*[7] *has the effect of nationalising education in respect of important features viz. the right of a private unaided institution to give admission and to fix the fee.* By framing this scheme, which has led to the State Governments legislating in conformity with the scheme the private institutions are indistinguishable from the government institutions; curtailing all the essential features of the right of administration of a private unaided educational institution can neither be called fair or reasonable."

(emphasis supplied)

158 AIR 1957 SC 699

7 *Unni Krishnan, J.P.* v. *State of A.P.*, (1993) 1 SCC 645

8 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481

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519. *T.M.A. Pai*[8] traces the autonomy of institutions back to *Chitralekha*[14] and *Rajendran*[40]. The proposition is simple: he who funds or runs the institution holds the power to select students. The State cannot ask these institutions to abridge this right in exchange for affiliation/recognition. The relevant paragraphs are reproduced hereunder:

> "*36.* The private unaided educational institutions impart education, and that cannot be the reason to take away their choice in matters, inter alia, of selection of students and fixation of fees. Affiliation and recognition has to be available to every institution that fulfils the conditions for grant of such affiliation and recognition. The private institutions are right in submitting that it is not open to the Court to insist that statutory authorities should impose the terms of the scheme as a condition for grant of affiliation or recognition; this completely destroys the institutional autonomy and the very objective of establishment of the institution. (SCC p. 539, para 36)
>
> * * *
>
> *42.* In *R. Chitralekha* v. *State of Mysore*[14] while considering the validity of a viva voce test for admission to a government medical college, it was observed at p. 380 that colleges run by the Government, having regard to financial commitments and other relevant considerations, would only admit a specific number of students. It had devised a method for screening the applicants for admission. While upholding the order so issued, it was observed that: (AIR p. 1830, para 8)
>
> > '*8.* … Once it is conceded, and it is not disputed before us, that the State Government can run medical and engineering colleges, it cannot be denied the power to admit such qualified students as pass the reasonable tests laid down by it. *This is a power which every private owner of a college will have, and the Government which runs its own colleges cannot be denied that power*.'
>
> *43.* Again, in *P. Rajendran (Minor)* v. *State of Madras*[40] …, it was observed at SCR p. 795 that: (AIR p. 1017, para 17)
>
> > '*So far as admission is concerned, it has to be made by those who are in control of the colleges,—in this case the Government, because the medical colleges are government colleges affiliated to the university. In these circumstances, the Government was entitled to frame rules for admission to medical colleges controlled by it subject to the rules of the university as to eligibility and qualifications.*'
>
> The aforesaid observations clearly underscore the right of the colleges to frame rules for admission and to admit students. The only requirement or control is that the rules for admission must be *subject to the rules of the*

8 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481
14 AIR 1964 SC 1823 : (1964) 6 SCR 368
40 AIR 1968 SC 1012 : (1968) 2 SCR 786

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university as to eligibility and qualifications. The Court did not say that the university could provide the manner in which the students were to be selected. (SCC p. 541, paras 42-43)

* * *

61. In the case of unaided private schools, maximum autonomy has to be with the management with regard to administration, including the right of appointment, disciplinary powers, admission of students and the fees to be charged." (SCC p. 546, para 61)

(italics added by *T.M.A. Pai*[8]; underscore is mine)

520. Unaided institutions may admit students of their choice, subject to an objective and rational procedure of selection. They might admit a small percentage of students belonging to the weaker sections of the society by granting those sections freeships or scholarships, if not granted by the Government. (See *T.M.A. Pai*[8] at para 53.) Given a transparent and reasonable selection process, it is up to the institution to define "merit" according to its own values. *T.M.A. Pai*[8] stated: (SCC pp. 548-49, para 65)

"*65*. The reputation of an educational institution is established by the quality of its faculty and students, and the educational and other facilities that the colleges has to offer. *The private educational institutions have a personality of their own, and in order to maintain their atmosphere and traditions, it is but necessary that they must have the right to choose and select the students who can be admitted to their courses of studies*. It is for this reason that in *St. Stephen's College case*[159] this Court upheld the scheme whereby a cut-off percentage was fixed for admission, after which the students were interviewed and thereafter selected. While an educational institution cannot grant admission on its whims and fancies, and must follow some identifiable or reasonable methodology of admitting the students, any scheme, rule or regulation that does not give the institution the right to reject candidates who might otherwise be qualified according to, say, their performance in an entrance test, would be an unreasonable restriction under Article 19(6), though appropriate guidelines/modalities can be prescribed for holding the entrance test in a fair manner. Even when students are required to be selected on the basis of merit, the ultimate decision to grant admission to the students who have otherwise qualified for the grant of admission must be left with the educational institution concerned. However, when the institution rejects such students, such rejection must not be whimsical or for extraneous reasons." (emphasis supplied)

521. The Court distinguishes between reasonable and unreasonable regulations by asking which functions lie at the heart of an institution's autonomy. Regulations that strike at the core of autonomy are unreasonable. For example, prescribing minimum qualifications for teachers is a reasonable

8 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481

159 *St. Stephen's College* v. *University of Delhi*, (1992) 1 SCC 558

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regulation; actually selecting the teachers is not.

(*T.M.A. Pai case*[8], SCC pp. 544-545, para 55)

> "*55.* … But the *essence* of a private educational institution is the autonomy that the institution must have in its management and administration. There, necessarily, has to be a difference in the administration of private unaided institutions and the government-aided institutions. Whereas in the latter case, the Government will have greater say in the administration, including admissions and fixing of fees, in the case of private unaided institutions, maximum autonomy in the day-to-day administration has to be with the private unaided institutions. Bureaucratic or governmental interference in the administration of such an institution will undermine its independence. While an educational institution is not a business, in order to examine the degree of independence that can be given to a recognised educational institution, like any private entity that does not seek aid or assistance from the Government, and that exists by virtue of the funds generated by it, including its loans or borrowings, *it is important to note that the essential ingredients of the management of the private institution include the recruiting students and staff, and the quantum of fee that is to be charged.*" (emphasis supplied)

The same argument was framed in similar terms in *St. Stephen's College* v. *University of Delhi*[159]. In that case, the Court distinguished regulations based on whether they directly or indirectly affected management. Those that indirectly affected management were reasonable; those that directly affected the management of the institution were not. (*T.M.A. Pai*[8] at para 125)

522. In *St. Stephen's*[159] this Court referred to the earlier decisions, and with regard to Article 30(1) observed at SCC p. 596, para 54, as follows:

> "*54.* … But the standards of education are not a part of the management as such. The standard concerns the body politic and is governed by considerations of the advancement of the country and its people. *Such regulations do not bear directly upon management although they may indirectly affect it.* The State, therefore has the right to regulate the standard of education and allied matters." (emphasis supplied)

523. Once a private institution (non-minority) takes aid, it is subject to (*1*) reservation, and (*2*) regulation of administration and maintenance of the institution. *T.M.A. Pai*[8] stated: (SCC p. 550, paras 71-72)

> "*71.* While giving aid to professional institutions, it would be permissible for the authority giving aid to prescribe by rules or regulations, the conditions on the basis of which admission will be granted to different aided colleges by virtue of merit, *coupled with the reservation policy of the State*. …

8 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481

159 (1992) 1 SCC 558

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72. Once aid is granted to a private professional educational institution, the Government or the state agency, as a condition of the grant of aid, can put fetters on the freedom in the matter of administration and management of the institution. The State, which gives aid to an educational institution, can impose such conditions as are necessary for the proper maintenance of the high standards of education as the financial burden is shared by the State." (emphasis supplied)

524. I now query if Parliament may subject Article 19(1)(*g*) to Article 15(5), when this Court has held that reservation in unaided institutions is an unreasonable restriction that cannot be saved by Article 19(6).

525. I answer this question in the affirmative. The structure of our Constitution permits fundamental rights, and even the Golden Triangle of Articles 14, 19 and 21, is to be abridged in limited circumstances. To say that subjecting Articles 19(1)(*g*) to Article 15(5) violates the basic structure *per se* is to ignore the examples in which the most fundamental of rights is limited. Article 16(4) expressly limits the right to formal equality in Article 16(1), a specific facet of Article 14. In this light, *Article 16(4) impliedly limits the general right to formal equality in Article 14.* The right to equality is expressed in the negative in Article 15(1): the State shall not discriminate based on religion, race, caste, etc. In other words, the State shall treat citizens of different religions, races and castes equally. Like Article 16(4), Article 15(4) limits Article 15(1)—another facet of Article 14 formal equality—such that egalitarian equality may be pursued. Generally speaking, Articles 15(3) and (4) and 16(4) allow the State to impose Affirmative Action Programs on the public sector. Such provisions necessarily limit the right to formal equality. If the right to equality, considered by some as a basic postulate of the Constitution, has been limited, *a fortiori* Article 19(1)(*g*) can be too.

526. Along these lines, I could turn to Articles 31-A, 31-B and 31-C for further support. These articles exclude challenges under Articles 14 and 19. In agreement with Dr. Dhavan's submission, I decline to rely on Articles 31-A, 31-B and 31-C for support. As explained in *Minerva Mills*[13], the Court had previously upheld Article 31-A out of concern for *stare decisis.* The Court never approved of the exclusion of Articles 14 and 19 on a principled basis. Nor did it make a ruling as to whether the exclusion violated the basic structure. (See paras 71-72 of *Minerva Mills*[13]. See also para 43 of *Waman Rao*[160].)

527. A basic structure challenge becomes an issue of institutional competence. Is it for the legislature to decide what is a reasonable restriction under Article 19(1)(*g*) read with Article 19(6)? Or is it for the judiciary? It is well established that Parliament, expressing the will of the people, may enact amendments to overrule a judgment of this Court. First Parliament added Article 15(4) to the Constitution to overrule *State of Madras* v. *Champakam*

13 *Minerva Mills Ltd.* v. *Union of India*, (1980) 3 SCC 625
160 *Waman Rao* v. *Union of India*, (1981) 2 SCC 362

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Dorairajan[9]. Other examples include the Seventy-seventh Amendment, which overruled *Sawhney (1)*[10] by adding Article 16(4-A); the Eighty-first Amendment further overruled *Sawhney (1)*[10] by adding Article 16(4-B); the Eighty-second Amendment overruled *S. Vinod Kumar* v. *Union of India*[161] by amending Article 335; and the Eighty-fifth Amendment overruled *Virpal Singh Chauhan*[53] and *Ajit Singh (I)*[115] by amending Article 16(4-A), respectively. Nevertheless, the duty to interpret the content of our fundamental rights has been left to the courts.

> "*21*. The important point to be noted is that the content of a right is defined by the courts. The *final word* on the content of the right is of this Court." (*Nagaraj*[11] at SCC p. 242, para 21) (emphasis added)

While Parliament may amend the Constitution, it cannot alter the Constitution's basic structure. [See *Kesavananda*[17], *Indira Nehru Gandhi (Election Case)*[39], *Minerva Mills*[13], *Sambamurthy*[155], *L. Chandra Kumar*[156] and *I.R. Coelho*[12].)

3.2. Step two: Does Article 15(5) affect Article 19(1)(g) to such an extent that Article 19(1)(g)'s original identity has been altered?

528. In other words, does Article 15(5) *in effect* merely abridge or completely abrogate Article 19(1)(*g*). If the former, Article 15(5) stands. If the latter, it falls. As noted above, *Coelho*[12] directs me to apply the impact/rights test to determine whether the basic structure has been violated. [See *I.R. Coelho*[12], Conclusion (*ii*) at p. 111.] Thus, my query is whether to consider the impact on the entire constitutional framework, or to examine the effect on citizens engaged in *unaided* education as an occupation. I think it is the latter. I am not concerned here with those engaged in education in *aided* institutions. One is naturally subject to greater regulation when one relies on government funding. (See *T.M.A. Pai*[8]/*Inamdar*[15].) Individual liberty and freedom, as protected by the Golden Triangle, must carry greater weight for those who set off on their own and refuse government money.

9 AIR 1951 SC 226 : 1951 SCR 525

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

161 (1996) 6 SCC 580 : 1996 SCC (L&S) 1480

53 *Union of India* v. *Virpal Singh Chauhan*, (1995) 6 SCC 684 : 1996 SCC (L&S) 1 : (1995) 31 ATC 813

115 *Ajit Singh Januja* v. *State of Punjab*, (1996) 2 SCC 715 : 1996 SCC (L&S) 540 : (1996) 33 ATC 239

11 *M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212

17 *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225

39 *Indira Nehru Gandhi* v. *Raj Narain*, 1975 Supp SCC 1

13 *Minerva Mills Ltd.* v. *Union of India*, (1980) 3 SCC 625

155 *P. Sambamurthy* v. *State of A.P.*, (1987) 1 SCC 362 : (1987) 2 ATC 502

156 *L. Chandra Kumar* v. *Union of India*, (1997) 3 SCC 261 : 1997 SCC (L&S) 577

12 *I.R. Coelho* v. *State of T.N.*, (2007) 2 SCC 1

8 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481

15 *P.A. Inamdar* v. *State of Maharashtra*, (2005) 6 SCC 537

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529. This brings me to the question as to how large I should draw the circle when I ask who is affected by reservation in unaided institutions. Chandrachud, J. provides that "[a] total deprivation of fundamental rights, even in a limited area, can amount to abrogation of fundamental right just as a partial deprivation in every area can". (See *Minerva Mills*[13], SCC p. 655, para 59.)

530. Freedom under Article 19 belongs to individual citizens. Article 19(1)(*g*) provides that:

> "19. *Protection of certain rights regarding freedom of speech, etc.*—(1) All citizens shall have the right—
>
> * * *
>
> (*g*) to practise any profession, or to carry on any occupation, trade or business."

The reference to "all citizens" means that each and every individual citizen possesses Article 19 rights. For the impugned legislation to fall, it need not touch every sphere of society. If even one individual's freedom has been curtailed, this Court is duty-bound to entertain his or her claim. It is he or she who possesses the Article 19(1)(*g*) right to carry on an occupation.

531. If Article 15(5) were implemented, the educator in unaided institutions would still have students to educate. I use "educator" in the broadest sense of the term and include teachers, professors, lecturers, faculty, staff, administrators and those who finance institutions. Without one of the aforementioned, the institution cannot function properly.

532. Though affected by reservation, the educator still has a job. His occupation remains intact. Students will come. Classes will commence. Marks will be distributed. The greatest impact on the educator is that neither he nor his institution will choose whom to teach.

533. Almost half of the time (49.5%), the State would decide for them. Selecting students or employees goes to the heart of an organisation's autonomy. The essence of an unaided educational institution is the freedom to manage its affairs, according to *T.M.A. Pai*[8] at SCC p. 545, para 55. That is, "… the essential ingredients of the management of the private institution include the recruiting [of] students and staff…". The same argument was framed in similar terms (at SCC p. 596, para 54) in *St. Stephen's College*[159] [regulations imposing standards of education upheld, because they "… *do not bear directly upon management although they may indirectly affect it* …" (emphasis supplied)]. This Court has stated in *T.M.A. Pai*[8] as clarified by *Inamdar*[15] that subjecting unaided institutions is an *unreasonable* restriction. As noted, Article 19(6) provides no safe haven for reservations.

534. The Government-imposed selection of students in turn has wide-ranging consequences for unaided institutions and their educators. I am

13 *Minerva Mills Ltd.* v. *Union of India*, (1980) 3 SCC 625
8 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481
159 *St. Stephen's College* v. *University of Delhi*, (1992) 1 SCC 558
15 *P.A. Inamdar* v. *State of Maharashtra*, (2005) 6 SCC 537

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required to examine the effect of the impugned Amendment. At least four problems will likely arise:

(*1*) academic standards suffer;

(*2*) attracting and retaining good faculty becomes more difficult;

(*3*) the incentive to establish a first-rate unaided institution is diminished;

(*4*) and ultimately the global reputation of our unaided institutions is severely compromised.

535*. First, once the State tells them whom to teach, standards of excellence will suffer. This is because those institutions will no longer be able to admit the highest-scoring students. As good as some of our institutions are, they do not teach blank slates. The best universities are the best, in part, because they attract the best students. The same can be said for almost any organisation. In the case of higher education, the universities that admit the best will likely churn out the best. The precise extent to which the university made the best so good cannot be qualified. The point is that universities alone cannot produce qualified job candidates. Forced to admit students with lower marks, the university's final product will not be as strong. Once the creamy is excluded, cut-off marks would likely drop considerably in order to fill the 27% quota for non-creamy layer OBCs. When the creamy layer is *not* removed, as in the case of Tamil Nadu, the difference in cut-off marks for the general and backward categories may be insignificant. (See para 408 of *Sawhney (1)*[10].) Of course, the extent to which standards of excellence would suffer would vary by institution. As I mention below, I urge the Government to set OBC cut-off marks no lower than 10 marks below that of the general category. This is only a recommendation.

536. Second, reservations weaken the incentive to establish unaided institutions: if the State usurps the right to select students, would one still spend the time and money to establish an unaided institution? The question is all the more relevant today. Counsel for the petitioners posit that tomorrow's knowledge economy requires a well-educated populace. "Well educated" does not imply a string of degrees from less than taxing institutions. Rather, it means that one will possess the skills, knowledge and creativity to compete globally. Our unaided institutions must remain places where these traits are refined.

537. Third, those inclined to teach the brightest students have even less of a reason to leave private sector jobs for the teaching profession or to join the profession in the first place. "Brightest" would come with an asterisk. They would be the brightest available under the government's reservation scheme. These potential teachers may ask themselves: How will I teach a class in which half the students are advanced relative to the other half? In many institutions, the shortage of top-rate faculty will only get worse.

* **Ed.**: Para 535 corrected vide Official Corrigendum No. F.3/Ed.B.J./41/2008 dated 6-6-2008.

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

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538. Fourth, reservations may have a negative impact on students seeking employment in the burgeoning knowledge economy. Recruiters have begun to trickle into campuses. They hail from domestic as well as international entities, and they too may take note of reservations in unaided institutions. The effect on educators, from the top down, would be felt. For them, little more than a semblance of occupation would remain.

539. Given the dramatic effect that reservations would have on educators, the unaided institutions in which they teach and, consequently, society as a whole, Article 19(1)(*g*) has been more than abridged. When education is effectively nationalised, freedom stands obliterated. The identity of the Constitution is altered when unreasonable restrictions make a fundamental right meaningless. The Ninety-third Amendment's imposition of reservation on unaided institutions has abrogated Article 19(1)(*g*), a basic feature of the Constitution, in violation of our Constitution's basic structure. Therefore, I sever the Ninety-third Amendment's reference to "unaided" institutions as ultra vires the Constitution.

540. The case law on severability asks the following question: Had Parliament known its provision would be severed would it still have passed the rest of the legislation? (See *R.M.D. Chamarbaugwalla*[95].)

541. At p. 943 of *R.M.D. Chamarbaugwalla*[95], the Court relied in part on *State of Bombay* v. *F.N. Balsara*[79] where the question at issue was whether the Bombay Prohibition Act was valid: (AIR p. 634, para 14)

> "*14.* ... Sections 12 and 13 of the Act imposed restrictions on the possession, consumption and sale of liquor, which had been defined in Section 2(24) of the Act as including '(*a*) spirits of wine, methylated spirits, wine, beer, toddy and all liquids consisting of or containing alcohol, and (*b*) any other intoxicating substance which the Provincial Government may, by notification in the Official Gazette, declare to be liquor for the purposes of this Act'. Certain medicinal and toilet preparations had been declared liquor by notification issued by the Government under Section 2(24)(*b*). The Act was attacked in its entirety as violative of the rights protected by Article 19(1)(*f*). But this Court held that the impugned provisions were unreasonable and therefore void insofar as medicinal and toilet preparations were concerned but valid as to the rest. Then, the contention was raised that 'as the law purports to authorise the imposition of a restriction on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right, it is not possible to uphold it even so far as it may be applied within the constitutional limits, as it is not severable'. In rejecting this contention, the Court observed at pp. 717-18 of SCR (at p. 328 of AIR):
>
> > '*25.* ... These items being thus treated separately by the legislature itself and *being severable*, and it is not being contended, in view of the directive principles of State policy regarding

95 *R.M.D. Chamarbaugwalla* v. *Union of India*, AIR 1957 SC 628 : 1957 SCR 930
79 AIR 1951 SC 318 : 1951 SCR 682

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prohibition, that the restrictions imposed upon the right to possess or sell or buy or consume or use those categories of properties are unreasonable, the impugned sections must be held valid so far as these categories are concerned.' (AIR para 25)

(emphasis supplied)

This decision is clear authority that the principle of severability is applicable even when the partial invalidity of the Act arises by reason of its contravention of constitutional limitations."

542. At p. 944, the Court in *R.M.D. Chamarbaugwalla*[95] sought guidance from American case law on severability: (AIR p. 634, para 14)

"*14.* ... In discussing the effect of a severability clause, Brandies, J. observed in *Dorchy* v. *State of Kansas*[162] that it 'provides a rule of construction, which may sometimes aid in determining that intent. But it is an aid merely; not an inexorable command'. The weight to be attached to a classification of subjects made in the statute itself cannot, in our opinion, be greater than that of a severability clause."

543. The Court in *R.M.D. Chamarbaugwalla*[95] went on to cite Patanjali Sastri, C.J., in *State of Bombay* v. *United Motors (India) Ltd.*[99]: (*R.M.D. Chamarbaugwalla case*[95], AIR p. 634, para 15)

"*15.* ... Dealing with the contention that a law authorising the imposition of a tax on sales must be declared to be wholly void because it was bad in part as transgressing constitutional limits, the learned Chief Justice observed: (*United Motors case*[99], AIR p. 263, para 31)

'*31.* ... 'It is a sound rule to extend severability to include separability in enforcement in such cases, and we are of opinion that the principle should be applied in dealing with taxing statutes in this country.' "

544. Here, I believe Parliament would have gone forward without unaided institutions. While some Members of Parliament sought to overrule *T.M.A. Pai*[8] and *Inamdar*[15], Parliament's actions speak louder than its words. Once it had passed Article 15(5), it limited itself to imposing greater reservations on aided institutions. Had unaided institutions been Parliament's priority, it could have included them in the Reservation Act. It seems that Parliament's intent is to pass as much reservation as possible. That would explain why it has gone forward with 27% reservation for OBCs without confirming that at least 27% of the population is OBC. For these reasons, I conclude that had Parliament known that unaided institutions were going to be severed, it would have nevertheless carried out its reservation scheme for aided institutions.

95 *R.M.D. Chamarbaugwalla* v. *Union of India*, AIR 1957 SC 628 : 1957 SCR 930
162 68 L Ed 686 : 264 US 286 (1923)
99 AIR 1953 SC 252 : 1953 SCR 1069
8 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481
15 *P.A. Inamdar* v. *State of Maharashtra*, (2005) 6 SCC 537

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4. THE CASTELESS AND CLASSLESS SOCIETY VERSUS CASTE-BASED RESERVATION

545. The caste system is peculiar to this country. Perhaps the entire society has been divided on the basis of caste. This social problem can be compared to some extent with that of American society. In US, the problem of racial discrimination has existed for centuries. The cases of affirmative action decided in the United States are relevant. They show us how that society has dealt with the problem of racial discrimination. At the outset, I would like to make it clear that decisions of foreign countries are not binding on Indian courts. Indian courts have not adopted American standards of review. But the judgments delivered by US courts on affirmative action have great persuasive value and they may provide broad guidelines as to how we should tackle our prevailing condition. A large number of English laws have been inherited by India and America. English and American cases are frequently cited by our courts. We need to keep our window open and permit the light of knowledge to enter from any source. In this light, I shall refer to some US decisions.

4.1. Affirmative action cases and standards of review from the United States

546. In 1978, *Regents of the University of California* v. *Bakke*[31] put an end to reservation (quotas) in education (reserving 16 out of 100 seats for minorities in medical school deemed unconstitutional). (438 US 265) Powell, J.'s concurring judgment is considered the key opinion in the case.

547. Powell, J. concluded that diversity was a compelling State interest that could withstand strict scrutiny. Relying on *Bakke*[31], the court later reaffirmed preferential treatment in college admissions as a means to ensure diversity in the classroom—racial diversity being just one among many types of diversity ("overcoming personal adversity and family hardship" was another form of diversity), (see *Grutter* v. *Bollinger*[32], US p. 338). *Grutter case*[32] insisted that universities make an individualised evaluation of a student seeking admission, rather than one that mechanically accepted or rejected students on the basis of race. (*Grutter*[32] at p. 337.) Such an evaluation would ensure that race was only considered as one type of diversity, rather than a pretext for achieving racial balance. Quotas could not be covertly installed in the name of diversity. This reasoning led the court to strike down an admission scheme that automatically assigned more points to minority students than to residents of the State or to athletes, for example. (*Gratz* v. *Bollinger*[33], US p. 270)

548. O'Connor, J. for the majority in *Grutter*[32] came to a very significant conclusion. She suggested that there was time-limit on preferential treatment for certain races as a means of promoting diversity. O'Connor, J. stated "we

31 57 L Ed 2d 750 : 438 US 265 (1978)
32 156 L Ed 2d 304 : 539 US 306 (2003)
33 156 L Ed 2d 257 : 539 US 244 (2003)

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expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today".

549. In *Parents Involved in Community Schools* v. *Seattle School District No. 1 et al*[34] school districts used a student's race to assign that student to a particular school within the district. In *Seattle*[34], this was done to achieve racial balance amongst the district's schools. One school should not be overwhelmingly white, another all non-white. Unlike the system approved in *Grutter*[32], race was not just one among many types of diversity that was considered by the district in assigning students. (*Seattle*[34] at p. 525.) Instead, it was, at times, the decisive factor. The court held the programmes unconstitutional. Roberts, C.J. summed up the plurality's view on racial classifications "*the way to stop discrimination on the basis of race is to stop discriminating on the basis of race*".

550. This was far from a complete victory for the plurality. In his concurring opinion, Kennedy, J. found the programmes unconstitutional. However, he would not go so far as to treat all racial balancing as *per se* unconstitutional. He considered the plurality opinion to represent "... an all-too-unyielding insistence that race cannot be a factor in instances, when, in [his] view, it may be taken into account". (*Seattle*[34] at p. 565.)

551. Kennedy, J. found that schools have a compelling interest to prevent racial isolation or achieve a diverse student population. (*Seattle*[34] at p. 572.) Like Powell, J.'s concurring opinion in *Bakke*[31], Kennedy, J.'s concurring opinion leaves the door open for further use of racial classification for so-called benign purposes in school admissions.

552. More important than any one case are the standards by which the Court scrutinised discriminatory legislation. Of course, Indian courts have not accepted the principles of narrow tailoring and strict scrutiny. Nevertheless, we should seek guidance from any corner and permit the light from any quarter.

553. Whenever legislation is challenged as unconstitutional, courts must ask themselves how much deference they will give to the legislature. The answer is that it depends on the nature of the impugned legislation. The United States Supreme Court has evolved three standards of review for government action that treats different people differently. The first is the rational basis standard. When the classification is rationally related to any legitimate government purpose, the Court defers to the State and upholds the classification. This is the most deferential of the three standards. The second standard is intermediate scrutiny, which is less deferential to the Government. Here, the Court asks whether the classification is substantially related to any important government purpose. The third and highest level of review is known as strict scrutiny, whereby the Court requires that the classification is

34 168 L Ed 2d 508 : 127 S Ct 2738 (2007)
32 *Grutter* v. *Bollinger*, 156 L Ed 2d 304 : 539 US 306 (2003)
31 *Regents of the University of California* v. *Bakke*, 57 L Ed 2d 750 : 438 US 265 (1978)

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narrowly tailored to a compelling State interest. Strict scrutiny test is the least deferential to the Government.

554. Of the classifications on which there is case law, the one that most closely resembles caste is race. This is because both are immutable traits. They are used by the powerful, or those seeking power, to justify oppression. Racism and casteism have long haunted both nations. In the United States, race raises red flags. It is often, though not always, reviewed under strict scrutiny: "Government action dividing people by race is inherently suspect because such classifications promote 'notions of racial inferiority and lead to a politics of racial hostility', (*Croson*[61]) and 'racial classifications are simply too pernicious to permit any but the most exact connection between the justification and the classification'." [*Gratz* v. *Bollinger*[33], US p. 270 (quoting J. Stevens' dissent in *Fullilove* v. *Klutznick*[163], US p. 537).]

555. Legislation whose text does not classify based on race is considered facially neutral. When facially neutral legislation has a disproportionate impact on a particular race, American courts ask whether it was passed with an intention to discriminate. If no intention is found, the rational basis test applies. [See *Hernandez* v. *New York*[164] (quoting from *Arlington Heights* v. *Metropolitan Housing Development Corpn.*[165], US p. 464).]:

> "A court addressing this issue must keep in mind the fundamental principle that 'official action will not be held unconstitutional solely because it results in a racially disproportionate impact. ... Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause'."

See also *Washington* v. *Davis*[166], US p. 239. The exception to this rule is *Yick Wo* v. *Hopkins*[167] where extreme disproportionate impact warranted greater scrutiny. Where there is disproportionate impact *and* discriminatory intention, then even facially neutral legislation triggers strict scrutiny. However, in this framework, affirmative action classifies on the face of legislation and automatically gets strict scrutiny treatment.

556. As I have observed, American courts carefully review racial classifications. Given that the Ninety-third Amendment on its face discriminates against general category students, we should give it careful scrutiny. The Article 14 right to formal equality deserves as much. If 49.5% caste-based reservation was upheld in *Sawhney (1)*[10] for government employment, it follows that 49.5% caste-based reservation is permitted in

61 *City of Richmond* v. *J.A. Croson Co.*, 488 US 469 (1989)
33 156 L Ed 2d 257 : 539 US 244 (2003)
163 65 L Ed 2d 902 : 448 US 448 (1980)
164 500 US 352 (1991)
165 50 L Ed 2d 450 : 429 US 252 (1977)
166 48 L Ed 2d 597 : 426 US 229 (1976)
167 30 L Ed 220 : 118 US 356 (1885)
10 *Indra Sawhney (1)* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

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aided educational institutions. While I am compelled by *Sawhney (I)*[10] to hold that the impugned legislation passes careful scrutiny with respect to reservation in aided institutions, its implementation is contingent upon the directions given in this opinion.

4.2. The Framers' ultimate goal: the classless and casteless society

557. Did the original Framers intend to provide caste-based reservation in education to the lower classes? No, the *original* Framers did not. Soon after the Constitution was adopted, the very same Framers acted quickly to permit reservation for SC/ST/SEBCs in education by adding Article 15(4), vide the First Amendment, to the Constitution. In doing so, *they deviated from their own goal*—the casteless society would have to wait. In *Sawhney (I)*[10], the Court upheld this decision and bound us to a certain degree on this point. I have no choice but to uphold the impugned legislation by which the Government may still identify SEBCs, in part, by using caste.

558. Caste-based reservation was initially a temporary measure that was to only last for ten years. The original Framers considered caste-based reservation a necessary evil. Thus, they limited it in time. Extending this time-limit has only exacerbated casteism.

559. The Parliamentary Debates clearly reflect that the ultimate aim of reservation was a casteless and classless society for India. To this end, reservation should only be given for a specific period of time. If these reservations or benefits have to continue perpetually, then the basic goal of achieving casteless and classless society would never be accomplished.

560. The need for caste-based reservation has "worn out" over time. Evidence for the proposition that caste is no longer a valid determinant of one's ability to move up in society is strong. More than the way society judges you based on caste, the relevant question is whether caste precludes you from rising. If caste doesn't, then what does? The answer is simple: money.

561. Income is a much better determinant of educational achievement than caste. The table below was derived from the Reproductive Child and Health Survey, 2002-2004 (6,00,000 households surveyed).

Average years of schooling:

	SC	OBC	Upper caste Hindu
Poorest rural quintile	1.6	1.7	2.2
Richest rural quintile	5.1	5.5	6.1

For the upper caste, caste barely helps. These numbers indicate that it is one's income, not caste, that makes a real difference in determining how much schooling one completes. Therefore, if income be the bar to education, economic criteria should be the means by which we identify beneficiaries of special provisions under Article 15(5).

4.3. No original intent to provide caste-based quotas in education

562. As drafters, the original Framers were prolific. They made our Constitution the world's longest—removing as many doubts as possible and

10 *Indra Sawhney (1)* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

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in that way limiting the court's role. The Constitution contains a number of articles that reserve seats for various groups. The original Framers, however, imposed various limitations on reservation. These limitations provide insight into the original Framers' compromise between formal and substantial/egalitarian equality.

563. Reservation is only provided for certain groups (SC, ST and Backward Classes) in certain areas of the public sector. [*See* Article 16(4) (reservation of posts in government service for Backward Classes), Article 330 (reservation of seats for SC and ST in the Lok Sabha) and Article 332 (reservation of seats for SC and ST in Legislative Assemblies of the States.)] Dr. Ambedkar stated that:

> "The report of the Minorities Committee provided that all minorities should have *two* benefits or privileges, namely, representation in the legislatures and representation in the services." (emphasis added) (See CAD Vol. 9, p. 702, 26-8-1949.)

Given this limitation, we must take extra caution when reviewing the constitutionality of adding additional benefits.

564. Article 334 fixed a 10-year time-limit on the legislative reservations provided in Articles 330 and 332. In the discussion regarding draft Article 292, Sardar Hukam Singh said:

> "We are accepting this reservation of seats [in legislative bodies] as an unavoidable evil for the present, though it is only for the Scheduled Castes and Scheduled Tribes." (See CAD Vol. 9, p. 645, 24-8-1949.)

Shri Singh's comment sums up the limitations on legislative reservation. OBC/SEBCs were excluded, and reservations were limited in time. Unlike the legislative reservations, Article 16(4) contains no fixed time-limit. It does, however, preclude the State from making reservations in government service if the backward classes are adequately represented. The idea is that, at some point in time, the backward classes would no longer need reservations.

565. In discussing draft Article 10 [Article 16(4) of the Constitution], Pandit Hirday Nath Kunzru stated:

> "We are all aware that when the Report of the Minorities Committee was considered by the House, *the entire House was anxious that reservations of whatever kind should be done away with as quickly as possible*. … whatever protection might be considered necessary now, should be granted temporarily only, so that the population of the country might become fully integrated, and no community or class might be tempted to claim special advantage for itself." (CAD Vol. 7, p. 681 dated 30-11-1948) (emphasis supplied)

Instead of moving to remove reservations, Parliament has gone the other way by extending time-limits and adding beneficiaries. Article 15(5) is just the latest example.

566. While the original Framers went out of their way to put SC/STs in Parliament and State Assemblies and SC/ST/Backward Classes in

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government service, they did not reserve a single classroom seat. Instead, Article 29(2) prohibited caste-based discrimination in admissions, and Article 15(2) prohibited caste-based discrimination in general. Education was to remain reservation free.

567. When preferential treatment was given in regard to education, it was limited to educational grants. There was no question of doling out reservations for special groups. Article 337 provided educational grants to Anglo-Indian schools for the benefit of that community. In the spirit of conciliation, the original Framers allowed the grants that were already going to those schools to continue for 10 years. (*See* pp. 936-41 of Constituent Assembly Debates, Vol. 8, 1949.)

568. Rather than advocate for reservation, the original Framers preferred free/compulsory education and scholarships. In the debate on draft Article 294, Shri Brajeshwar Prasad stated that reservation in legislative bodies would fail to uplift SC/STs. Instead, he suggested that:

> "It should be laid down clearly in express terms that … free education shall be imparted to them. … [and] for the tribals and Harijans provision must be made in the constitution that free agricultural lands should be given to them. *If we cannot give any one of these, I am quite clear in my own mind that by giving them a few seats here and there, their economic condition and their educational level will in no way be improved.*" (CAD Vol. 9, pp. 663-64 dated 24-8-1949)
>
> (emphasis supplied)

Shri Prasad's comments are relevant because he recognises the limited effect of reservation. Rather than reserve seats for a few, he advocated for free education for all.

569. In the debate regarding Article 15 of the Constitution, Syed Abdur Rouf summed up the essence of the provision:

> "The intention of this article is to prohibit discrimination against citizens." (See CAD Vol. 7, p. 650, 29-11-1948.)

This intention was only qualified for women and children. In fact, the original Framers rejected an amendment that would have watered down Article 15's prohibition against discrimination.

570. Prof. K.T. Shah sought special protection for SC/STs. He wanted to ensure that Article 15 would allow SC/ST to benefit from affirmative action. To this end, he introduced an amendment that would have altered Article 15(3) to read as follows: "Nothing in this article shall prevent the State from making any special provision for women and children *or for the Scheduled Castes or backward tribes, for their advantage, safeguard or betterment.*" (Shah amendment in italics). Prof. Shah proposed the amendment:

> "… *so that any special discrimination in favour of them may not be regarded as violating the basic principles of equality for all classes of citizens in the country*. They need and must be given, for some time to come at any rate, *special treatment in regard to education*, in regard to

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opportunity for employment, and in many other cases where their present inequality, their present backwardness is only a hindrance to the rapid development of the country.

* * *

... equality is not to be equality of name only or on paper only, but equality of fact." (CAD Vol. 7, pp. 655-56 dated 29-11-1948)

(emphasis supplied)

Relevant to the instant case, he explains that his amendment would allow the State to provide SC/STs special treatment in regard to education. In other words, Prof. Shah effectively wanted the equivalent to Articles 15(4) and 15(5) but did not get it. His amendment was negated (p. 664 of Constituent Assembly Debates, Vol. 7, 29-11-1948).

571. Dr. Ambedkar disagreed with Prof. Shah on the limited ground that it would have given States the green light to segregate SC/STs from general category students:

"The object which all of us have in mind is that the Scheduled Castes and Scheduled Tribes should not be segregated from the general public.

For instance, none of us, I think, would like that a separate school should be established for the Scheduled Castes .... If these words are added, it will probably give a handle for a State to say, 'Well, we are making special provision for the Scheduled Castes'. To my mind they can safely say so by taking shelter under the article if it is amended in the manner the Professor wants it." (CAD Vol. 7, p. 661 dated 29-11-1948)

Dr. Ambedkar did not reject the Shah amendment because it would have allowed the States to implement affirmative action for SC/ST in education. He was concerned that special provisions would lead to negative discriminatory action in the guise of affirmative action. Whether or not this would have happened is unclear, but his concern seems well placed. A similar problem arises today, when the general category looks down upon or questions the qualifications of SC/ST/OBC professionals. Though the individual may have earned admission on marks alone, others may presume that reservation was a factor. Such a belief, regardless of veracity, cannot bode well for the career prospects of SC/ST/SEBCs.

572. Irrespective of the reason for which the Shah amendment was rejected, the original Framers contemplated special provisions for SC/STs that would have included education. At the end of the day, they decided that only women and children should benefit from discriminatory provisions.

573. Article 15(4) and the Shah amendment only differ in that Article 15(4) provides special provisions to SC/STs and SEBC, while Shah only gave the same to SC/STs. Of course, if the original Framers rejected special provisions for SC/STs, they would have done the same with respect to SEBC/SC/ST. In sum, by limiting Article 15(3) to women and children and rejecting an amendment equivalent to Article 15(4), the original Framers' intent was clear: no special provisions for backward classes (SEBC/SC/STs)

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in education were to dilute Article 15(1)'s prohibition against discrimination based on caste.

574. In the instant case, the Union of India argued that Article 15(4), the First Amendment to the Constitution, reflects the intent of the original Framers because it was passed by the same members that drafted the original Constitution. In the Parliamentary Debates in 1951, Prime Minister Nehru argued in favour of amending the Constitution. He and other Framers, as distinguished from the original Framers who had drafted the original Constitution, did not hide their disapproval of *Champakam Dorairajan*[9]. Article 15(4) was to overturn that judgment. To justify Article 15(4), which represented a dramatic departure from equality as envisaged in Articles 15(2), (3) and 29(2), Pandit Nehru said that Article 15(4) would give effect to "what … was really intended or should be intended". Yet, the original Framers, as explained above, had no intention of providing special provisions for SC/STs in education (and *a fortiori* if not for them, nor for SEBCs). What "should be intended" is a far cry from what they specifically enacted and specifically rejected. It follows that Article 15(4) deviated from the original Framers' original intent.

4.4. Limitations on reservation must be seen in the light of providing a casteless society

575. Seeking to remove the blight created by caste, the original Framers were social reformers. "The social revolution meant 'to get (India) out of the medievalism based on birth, religion, custom, and community and reconstruct her social structure on modern foundations of law, individual merit, and secular education'." {See Granville Austin, *Indian Constitution: Cornerstone of a Nation* at p. 26, 1st Edn., 1972, Oxford University press: [quoting from: K. Santhanam (an Assembly Member) in magazine section, *The Hindustan Times*, New Delhi, 8-9-1946].}

576. India's first President Rajendra Prasad assured the nation that the assembly and the Government's aim was to "end poverty and squalor … *to abolish distinction* and exploitation and to ensure decent conditions of living". [*Cornerstone* at p. 27, fn. 5 (quoting from Prasad in CAD Vol. 5, p. 2).] (emphasis supplied) The original Framers took steps to abolish caste-based distinction. For example, they outlawed untouchability in Article 17, promised all equal treatment before the law in Article 14, prohibited discrimination based on caste in Articles 15(1) and 29(2) and selected joint over separate electorates. The legislative reservations for SC/ST were an exception to overarching goal of creating a casteless society; that is why they were set to expire in 1960. With respect to electorates, Granville Austin explains:

> "Desiring above all to promote national unity, members of the Constitutional Assembly rejected these devices by substituting direct elections for indirect in lower houses, by rejecting separate electorates in

9 *State of Madras* v. *Champakam Dorairajan*, AIR 1951 SC 226 : 1951 SCR 525

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favour of joint electorates and *by abolishing … except for Scheduled Castes and Tribes … reserved seats*. The Assembly believed, in Jenning's words, that '*to recognise communal claims … is to strengthen communalism*'." (See Austin, p. 323 of *Cornerstone*.) (emphasis added)

The same can be said today. Reservation based on caste strengthens communalism. Non-SEBCs naturally seek SEBC status so that they may capture SEBC benefits. Upper castes, denied a seat, harbour ill will against lower castes who gain admission (whether it was by merit or not). These feelings are the basis for discriminatory action. On 16-9-2006, *The Hindu* reported: "While medical students at the All-India Institute of Medical Sciences (AIIMS) have complained of caste discrimination, now doctors from the reserved category at the Guru Teg Bahadur Hospital (GTBH) too have written about 'biased attitude towards reserved category junior residents'."

577. Discrimination is not the only problem exacerbated by reservation. Given that reserved category students gain admission with lower marks, it also stands to reason that they would exhibit less confidence in their studies when pitted against the general category. In her work on the unintended consequences of preferential treatment for minorities in college admissions in the United States, Marie Gryphon, a policy analyst for the Cato Institute (Washington, D.C.), writes:

> "… recent research shows that affirmative action impedes academic achievement by undermining minority students' confidence. …
>
> * * *
>
> Preferences harm students' self-images, and this harm has practical costs in terms of grades and graduation rates. Both studies build on earlier work by Stanford University Sociologist Claude Steele, who coined the term 'stereotype threat' to refer to the decline in performance suffered by members of groups who become afraid of confirming negative group stereotypes. Steele tested his theory by giving standardised exams to groups of white and African-American undergraduates at Stanford University.
>
> Testers told some groups that the exam evaluated psychological factors related to testing, and that it was not a measure of ability. They told other groups that the exam measured their intellectual abilities, and in some instances had them indicate their race on the exam. The African-American students who had been implicitly 'threatened' with the stereotype of minority academic inferiority did markedly worse on the exam than black students in the other groups. …
>
> * * *
>
> Even minority students who do not need preferences respond to an environment characterised by the relative academic weakness of minorities by worrying about confirming a negative stereotype. [Researchers] also determined that vulnerability to Claude Steel's stereotype threat is related to lower grades earned by minority students."

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[See pp. 9-10 (internal citations omitted), Executive Summary, No. 540, 6-4-2005, "*The Affirmative Action Myth*".]

The point is that affirmative action produces consequences that may outweigh its supposed benefits.

578. To rid ourselves of reservation and its unintended consequences like casteism, we must focus our efforts on strengthening education at the primary and secondary level. Only then will we achieve the casteless/classless society the original Framers envisaged. And only then will there be reason to scrap reservation altogether. In his speeches to Parliament regarding Article 15(4), Prime Minister Nehru could not have been clearer: "After all *the whole purpose of the Constitution, as proclaimed in the directive principles is to move towards what I may say a casteless and classless society*" … and in an attempt to achieve an egalitarian society, "… we want to put an end to all those infinite divisions that have arisen in our social life; I am referring to the caste system and other religious divisions, call them by whatever name you like". (emphasis added) (Parliamentary Debates on 13-6-1951 and 29-5-1951 respectively.)

4.5. If reservation is allowed, then how can a casteless society still be realised?

579. This raises the issue of how beneficiaries of special provisions are to be classified. As mentioned above, Mr Salve and other learned counsel for the petitioners pleaded that the Government cannot go forward with the Reservation Act when it has yet to identify its beneficiaries. No one can say with certainty what percentage of the population is OBC, yet the Government is content with giving OBCs 27% of the seats in universities. We do not know what proportion of the population is OBC because the census does not count OBCs. It has been the Central Government policy practically since Independence to avoid the question. Eminent American Professor Marc Galanter writes that the absence of caste data was the deliberate policy of Sardar Patel, the Home Minister until 1950. Mr Patel rejected caste tabulation as a device to confirm the British theory that India was a caste-ridden country and as an expedient "to meet the needs of administrative measures dependent on caste division". [See Professor Marc Galanter, (1978) "Who are the OBCs?" An Introduction to a Constitutional Puzzle, 13 *Economic and Political Weekly*, 1812 at p. 1824 at fn 78 (quoting from Mr Patel's 1950 address to the census conference).]

580. Taking an OBC census is horrifying because it encourages the Government to enact policy on the basis of caste. Doing so only furthers the caste divide, contrary to our constitutional aim. This has been recognised since 1950. If the Central Governments have consistently rejected an OBC census because it would promote casteism, how can this Central Government make reservation on the same ground? It is one thing to ask a citizen his caste, it is even worse to grant or reject his college application on that ground. The Government is between a rock and a hard place. The only way out is to use exclusively economic criteria. This would negate the need for a

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caste-based census while ensuring that reservation goes to the poor, the group for which the Reservation Act was purportedly passed. Parliament eventually settled on enabling States to provide provisions for "socially and educationally backward classes": Article 15(4). This Court has interpreted "backward classes" to include caste as one of the criteria of classification under Article 16(4). *Sawhney (1)*[10], para 859(3)(*b*). In other words, caste falls under class according to *Sawhney (1)*[10], para 859(3)(*a*).

4.6. Economic criteria allows for reservation on grounds other than caste

581. Despite the goal of a casteless society, Parliament allowed for caste-based reservation and, consequently, caste-based discrimination. Ultimately, they subjected Article 29(2) and Article 15 to Article 15(4). Dr. Ambedkar saw no choice but to discriminate based on caste, stating that "if you make a reservation in favour of what are called backward classes which are nothing else but collection of certain castes, those who are excluded are persons who belong to certain castes. Therefore, in the circumstances of this country, it is impossible to avoid reservation without excluding some people who have got a caste".

582. In draft Article 10, Dr. Ambedkar tried to reconcile the view of those who were in favour of equality of opportunity with the demand of certain communities who remained neglected and who wanted to have a share in the administration. In doing so, he was clear that the concept of equality, which is the very basis of democracy, should not be violated. Part of his compromise meant that reservation had to remain reasonable. Explaining his views on the matter, he said:

> "Supposing, for instance, we were 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. Let me give an illustration. Supposing, for instance, reservations were made for a community or a collection of communities, the total of which came to something like 70 per cent of the total posts under the State and only 30 per cent are retained as the unreserved. Could anybody say that the reservation of 30 per cent as open to general competition would be satisfactory from the point of view of giving effect to the first principle, namely, that there shall be equality of opportunity? It cannot be in my judgment. Therefore the seats to be reserved, if reservation is to be consistent with sub-clause (1) of Article 10, must be confined to a minority of seats." (CAD Vol. 7, pp. 701-02 dated 30-11-1948)

583. On 17-11-1949, the Constituent Assembly began the third reading of the Constitution Bill. While replying to the debate, Dr. Ambedkar stated:

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

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"This anxiety is deepened by the realisation of the fact that in addition to our old enemies in the form of castes and creeds we are going to have many political parties with diverse and opposing political creeds. *Will Indians place the country above their creed or will they place creed above country*? I do not know. But this much is certain that if the parties place creed above country, our Independence will be put in jeopardy a second time and probably be lost forever. This eventuality we must all resolutely guard against. We must be determined to defend our Independence with the last drop of our blood." (CAD Vol. 10, p. 978 on 25-11-1949) (emphasis supplied)

584. Exhibiting tunnel vision, our First Parliament failed to look beyond caste. Another option was available, an option that adhered to the original Framers' ideals. Contrary to Dr. Ambedkar's view, it was *possible* to provide reservation to backward classes without discriminating based on caste. Economic criteria target the poorest of the poor, irrespective of caste. As noted, these criteria also simultaneously remove the creamy layer.

585. One of the other prominent advocates of reservation later realised that the policy did more harm than good. Prime Minister Nehru wrote the following letter to the Chief Ministers on 27-6-1961:

"I have referred above to efficiency and to our getting out of our traditional ruts. *This necessitates our getting out of the old habit of reservations and particular privileges being given to this caste or that group.* The recent meeting we held here, at which the Chief Ministers were present, to consider national integration, laid down that help should be given on economic considerations and not on caste. It is true that we are tied up with certain rules and conventions about helping Scheduled Castes and Tribes. They deserve help but, even so, I dislike any kind of reservation, more particularly in service. I react strongly against anything which leads to inefficiency and second-rate standards. I want my country to be a first-class country in everything. The moment we encourage the second rate, we are lost.

The only real way to help a backward group is to give opportunities for good education. This includes technical education, which is becoming more and more important. Everything else is provision of some kind of crutches which do not add to the strength or health of the body. *We have made recently two decisions which are very important: one is, universal free elementary education, that is the base*; and the *second is scholarships on a very wide scale at every grade of education to bright boys and girls*, and this applies not merely to literary education, but, much more so, to technical, scientific and medical training. I lay stress on bright and able boys and girls. *I have no doubt that there is a vast reservoir of potential talent in this country if only we can give it opportunity.*

But if we go in for reservations on communal and caste basis, we swamp the bright and able people and remain second rate or third rate. I

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am grieved to learn of how far this business of reservation has gone based on communal consideration. It has amazed me to learn that even promotions are based sometimes on communal and caste considerations. This way lies not only folly, but disaster. *Let's help the backward groups by all means, but never at the cost of efficiency. How are we going to build our public sector or indeed any sector with second-rate people*?"

(emphasis supplied)

4.7. Upon expiry of the time-limit, the criteria for identifying OBCs should only be economic in nature because our ultimate aim is to establish a casteless and classless society

586. I am not the first to propose economic criteria as the exclusive means of identifying SEBCs. In *Vasanth Kumar case*[25], counsel sought an opinion from the Court regarding reservations in employment and education for SC/STs and OBCs. The opinion would guide the Karnataka Government in implementing reservation (para 1). It serves our purposes to review their thorough analysis of the identification issue.

587. The Court in *Vasanth Kumar*[25] observed as under: (*per* D.A. Desai, J.* SCC pp. 731-33, para 24)

"*24. … No one is left in any doubt that the future Indian Society was to be casteless and classless. Pandit Jawaharlal Nehru the first Prime Minister of India said that Mahatma Gandhi has shaken the foundations of caste and the masses have been powerfully affected. But an even greater power than Gandhi is at work, the conditions of modern life—and it seems at last this hoary and tenacious relic of past times must die.* (*Discovery of India* by Pandit Nehru, Ch. VI, p. 234) Mahatma Gandhi, the Father of the Nation said, '*The caste system as we know is an anachronism. It must go if both Hinduism and India are to live and grow from day to day*'. In its onward march towards realising the constitutional goal, every attempt has to be made to destroy caste stratification. Article 38(2) enjoins the State to strive to minimise the inequality in income and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations. Article 46 enjoins duty to promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Castes and Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation. Continued retention of the division of the society into various castes simultaneously introduces inequality of status. And this inequality in status is largely responsible for retaining inequality in facilities and opportunities, ultimately resulting in bringing into existence an economically depressed class far transcending caste structure and caste barrier. The society therefore, was to be classless casteless society. In order to set up such a society, steps have to be taken

25 *K.C. Vasanth Kumar* v. *State of Karnataka*, 1985 Supp SCC 714

* **Ed.**: All five-Judges rendered opinions in *K.C. Vasanth Kumar* case, 1985 Supp SCC 714

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> to weaken and progressively eliminate caste structure. Unfortunately, the movement is in the reverse gear. *Caste stratification has become more rigid to some extent, and where concessions and preferred treatment schemes are introduced for economically disadvantaged classes, identifiable by caste label, the caste structure unfortunately received a fresh lease of life*. In fact there is a mad rush for being recognised as belonging to a caste which by its nomenclature would be included in the list of socially and educationally backward classes. … Rane Commission took note of the fact that there was an organised effort for being considered socially and educationally backward castes. Rane Commission recalled the observations in *Balaji case*[20] that 'Social backwardness is on the ultimate analysis the result of poverty to a very large extent'. … The Commission came to an irrefutable conclusion that amongst certain castes and communities or class of people, only lower income groups amongst them are socially and educationally backward." (emphasis supplied)

In this judgment, this Court further observed that if State patronage for preferred treatment accepts caste as the only insignia for determining social and educational backwardness, the danger looms large that this approach alone would legitimise and perpetuate the caste system. Caste-based reservation does not go well with our secular character as enshrined in the Preamble to the Constitution.

588. That said, the majority in *Sawhney (1)*[10] later sided with Chinnappa Reddy, J.'s view: caste can be a factor in identifying SEBCs. This view should not hold the day forever. Eventually, the words of Desai, J. should be revived.

589. Desai, J. wanted to achieve two goals with one fell swoop of the pen. Had his opinion prevailed (*1*) the creamy layer would have been removed ensuring that the truly deserving get the benefit, and (*2*) the casteless society would have been furthered. To these ends, he would have applied economic criteria to remove the creamy layer and simultaneously rid reservation of caste. He explained that poverty is the bane of Indian society. Given rampant poverty, it comes as no surprise that "[t]he bank balance, the property holding and the money power determine the social status of the individual and guarantee the opportunities to rise to the top echelon". (*Vasanth Kumar*[25] at SCC p. 734, para 27). As a result, the way "… wealth is acquired has lost significance" and "upper caste does not enjoy the status or respect … any more even in rural areas what to speak of highly westernised urban society". Finally, His Lordship recognised that creamy layer exclusion is inherently linked with identification based on economic criteria i.e. "occupation, income and landholdings": (SCC p. 735, para 30)

20 *M.R. Balaji* v. *State of Mysore*, AIR 1963 SC 649 : 1963 Supp (1) SCR 439

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

25 *K.C. Vasanth Kumar* v. *State of Karnataka*, 1985 Supp SCC 714

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"*30.* … If economic criterion for compensatory discrimination or affirmative action is accepted, it would strike at the root cause of social and educational backwardness, and simultaneously take a vital step in the direction of destruction of caste structure which in turn would advance the secular character of the Nation. This approach seeks to translate into reality the twin constitutional goals: one, to strike at the perpetuation of the caste stratification of the Indian Society so as to arrest regressive movement and to take a firm step towards establishing a casteless society; and two, to progressively eliminate poverty by giving an opportunity to the disadvantaged sections of the society to raise their position and be part of the mainstream of life which means eradication of poverty."

590. Economic criteria must include occupation and landholdings because income alone is insufficient. To decrease the likelihood that the undeserving evade identification, it is wise to employ more than one criterion.

591. In *Vasanth Kumar*[25], Chinnappa Reddy, J. departs from Desai, J.'s use of economic criteria as the sole means of identification. Nevertheless, he recognises that "… attainment of economic equality is the final and only solution to the besetting problems". In Chinnappa Reddy, J.'s opinion, it is easier to classify based on caste than economic criteria: (SCC p. 769, para 80)

"*80.* Class poverty, not individual poverty, is therefore the primary test. Other ancillary tests are the way of life, the standard of living, the place in the social hierarchy, the habits and customs, etc. etc. Despite individual exceptions, it may be possible and easy to identify socially backwardness with reference to caste, with reference to residence, with reference to occupation or some other dominant feature. Notwithstanding our antipathy to caste and sub-regionalism, these are facts of life which cannot be wished away. If they reflect poverty which is the primary source of social and educational backwardness, they must be recognised for what they are along with other less primary sources."

It all depends on how one defines "class". Once economic criteria remove the relatively wealthy families (from all castes and communities), a "class" will remain. This "class" is known as "the poor". The class would share the same characteristic, irrespective of caste. They would all lack money.

592. In a number of judgments, this Court has spelt out our constitutional philosophy regarding caste. On numerous occasions, this Court has proclaimed that the cherished goal of the nation is to realise a casteless society. In *V.V. Giri* v. *D. Suri Dora*[168], SCR at p. 442 the Court observed as under: (AIR p. 1327, para 24)

"*24.* … The history of social reform for the last century and more has shown how difficult it is to break or even to relax the rigour of the inflexible and exclusive character of the caste system. It is to be hoped

25 *K.C. Vasanth Kumar* v. *State of Karnataka*, 1985 Supp SCC 714
168 AIR 1959 SC 1318 : (1960) 1 SCR 426

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that this position will change, and in course of time the cherished ideal of casteless society truly based on social equality will be attained under the powerful impact of the doctrine of social justice and equality proclaimed by the Constitution and sought to be implemented by the relevant statutes and as a result of the spread of secular education and the growth of a rational outlook and of proper sense of social values; but at present it would be unrealistic and utopian to ignore the difficulties which a member of the depressed tribe or caste has to face in claiming a higher status amongst his co-religionists. It is in the light of this background that the alternative plea of the appellant must be considered."

593. In *N.M. Thomas*[24], a seven-Judge Bench observed as under: (SCC p. 369, para 141)

"*141.* … This consummation is accomplished only when the utterly depressed groups can claim a fair share in public life and economic activity, including employment under the State, or when a classless and casteless society blossoms as a result of positive State action."

594. In his dissenting opinion, in *Sawhney (1)*[10] Kuldip Singh, J. observed as under: (SCC p. 472, paras 339-40)

"*339.* Secularism is the basic feature of the Indian Constitution. It envisages a cohesive, unified and casteless society. … The prohibition on the ground of caste is total, the mandate is that never again in this country caste shall raise its head. Even access to shops on the ground of caste is prohibited. The progress of India has been from casteism to egalitarianism—from feudalism to freedom.

340. The caste system which has been put in the grave by the Framers of the Constitution is trying to raise its ugly head in various forms. Caste poses a serious threat to the secularism and as a consequence to the integrity of the country. Those who do not learn from the events of history are doomed to suffer again."

595. In *Akhil Bharatiya Soshit Karamchari Sangh (Railway)*[147], it was observed as under: (SCC p. 260, para 14)

"*14.* These forces nurtured the roots of our constitutional values among which must be found the fighting faith in a casteless society, not by obliterating the label but by advancement of the backward, …"

596. Returning to *Vasanth Kumar*[25], one of Reddy, J.'s arguments deals with the level of effort required to identify the poor compared to the effort expended on identifying caste. In the current context, a number of factors, including economic, are measured to determine SEBC status. (*See* the National Commission of Backward Classes Guidelines for considerations of

24 *State of Kerala* v. *N.M. Thomas*, (1976) 2 SCC 310 : 1976 SCC (L&S) 227

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

147 *Akhil Bharatiya Soshit Karamchari Sangh (Railway)* v. *Union of India*, (1981) 1 SCC 246 : 1981 SCC (L&S) 50

25 *K.C. Vasanth Kumar* v. *State of Karnataka*, 1985 Supp SCC 714

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requests for inclusion and complaints of under-inclusion in the Central list of Other Backward Classes.)

597. The National Commission for Backward Classes aside, I have set out to eventually install a system that only takes cognizance of economic criteria. Using purely economic criteria would lighten the identification load, as ascertaining caste would no longer be required. The respondents and others level a common criticism against the exclusive use of economic criteria. Most of the country is poor. Thus, too many people would be eligible for the benefit. This is only a problem if you hand out reservations based on the group's proportion of the total population. Such a reservation would be excessively unreasonable and would likely violate the *Balaji*[20] cap of 50% [see *M.R. Balaji* v. *State of Mysore*[20]]. If economic reservation were limited to a reasonable number, it could be upheld.

598. In addition to the problem of extending the benefit to too many, Reddy, J. cannot contemplate the idea of bestowing reservation on an economically poor Brahmin. "The idea that poor Brahmins may also be eligible for the benefits of Articles 15(4) and 16(4) is too grotesque even to be considered." He says that they are not "socially backward", thus they should not receive the benefit. But can one call a Brahmin sweeper, poor by occupation, socially forward? To do so would be a stretch.

599. The majority in *Sawhney (1)*[10] reiterates Chinnappa Reddy, J.'s message in *Vasanth Kumar*[25]. They rejected the sole use of economic criteria to exclude the creamy layer, deeming it to be just one *measure* of advancement. Jeevan Reddy, J. qualified that sentiment to an extent. If income were extremely high, it could be the sole factor. In such a case, income alone would ensure that one were socially forward. Jeevan Reddy, J. was convinced that caste mattered more than money—especially in rural areas. He makes his point by way of example at para 792: (SCC p. 724)

> "*792.* … A member of backward class, say a member of carpenter caste, goes to Middle East and works there as a carpenter. If you take his annual income in rupees, it would be fairly high from the Indian standard. Is he to be excluded from the Backward Class? Are his children in India to be deprived of the benefit of Article 16(4)?"

Unless the carpenter became a factory owner, where his income would be a reflection of his status, Reddy, J. would answer his own question in the negative. This is where we part ways. Today, the NRI carpenter's children will have likely attended the best schools, tuitions and coaching classes that money can buy. These children do not need special provisions. That is why I am removing the creamy layer, calling for a time-limit on caste-based reservation and urging the Government to use exclusively economic criteria to identify OBCs who may avail of special provisions.

20 AIR 1963 SC 649 : 1963 Supp (1) SCR 439

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

25 *K.C. Vasanth Kumar* v. *State of Karnataka*, 1985 Supp SCC 714

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600. The United States Supreme Court has taken a similar position with regard to setting a time-limit on race-based affirmative action. As mentioned above, Sandra Day O'Connor, J. opined that there may be a time-limit to promoting diversity via preferential treatment for certain races: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." (See *Grutter*[32] at p. 343.)

601*. In our context, one need not look past Parliament's affinity with extending time-limits on reservation to see that only the judiciary can put a stop to caste-based reservation. Article 334 originally said that reservation for SC/ST/Anglo-Indians in the Lok Sabha and State Legislative Assemblies would expire on the Constitution's tenth birthday. Parliament later substituted "ten" for "forty years" vide the Forty-fifth Amendment. When that was to expire, Parliament extended it for another ten years vide the Sixty-second Amendment. When that was to expire, it extended it for another ten years vide the Seventy-ninth Amendment. History has shown that it is not politically feasible for Parliament to say "no" to reservation—especially when caste is involved.

602*. Nevertheless, I have noted that *Sawhney (I)*[10] rejects purely economic criteria (occupation/income/property holdings/or similar measures of economic power) with respect to classification under Article 16(4). [Para 859, 4(*a*)] *Sawhney (I)*[10] (nine-Judge Bench) precludes us from striking down the impugned legislation to the extent that it has not yet ruled out the use of caste-based criteria for identifying SEBC status. It also precludes us from forcing the Government to wean itself off caste-based reservation by a certain date. In order to achieve a casteless and classless society, after a lapse of ten years, special preference or reservation should be granted only on the basis of economic criteria as long as grave disparity and inequality persist.

4.8. Secularism is part of the basic structure

603. To be clear, there is no claim arising out of the goal to promote a casteless society. No right of action exists. The right of action is found in secularism. Though not explicitly found in the unamended Constitution, the original Framers made it clear that India was to be a secular democracy. Discrimination based on religion is prohibited by Articles 14, 15(1) and 15(2), 16(1) and 16(2), 29(2) and 325. The original Framers went out of their way to ensure that minorities would be able to maintain their identity. (See Articles 28, 29 and 30.) Article 27 precludes the State from adopting a State religion, whereas Article 25 grants citizens the right to profess, practise and propagate religion. With rights come responsibilities. One of them is found at Article 51-A(*e*), which instructs citizens "to promote harmony and spirit of brotherhood amongst all people ... transcending religious ... diversities".

32 *Grutter* v. *Bollinger*, 156 L Ed 2d 304 : 539 US 306 (2003)

* **Ed.**: Paras 601 and 602 corrected vide Official Corrigendum No. F.3/Ed.B.J./41/2008 dated 6-6-2008.

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

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604. Relying on these provisions, *Bommai*[169], SCC at p. 233, para 304 declared secularism "… a constitutional goal and a basic feature of the Constitution as affirmed in *Kesavananda Bharati*[17] and *Indira N. Gandhi* v. *Raj Narain*[39]. Any step inconsistent with this constitutional policy is, in plain words, unconstitutional". The Court reasoned that the original Framers adopted Articles 25, 26 and 27 so as to further secularism. [See *Bommai*[169] at para 28 (Ahmadi, J.).] Secularism was very much embedded in their constitutional philosophy [para 29]. During the Constituent Assembly Debates, Pandit Laxmikantha Mitra stated (as quoted at para 28 of *Bommai*[169]): (SCC p. 77)

> "*28.* … By secular State, as I understand it, it is meant that the State is not going to make any discrimination whatsoever on the ground of religion or community against any person professing any particular form of religious faith. ... no citizen ... will have any preferential treatment ... simply on the ground that he professed a particular form of religion."

This is relevant today because quotas are State-sponsored discrimination against those who are not deemed SEBCs—caste being a by-product of religion. Though affirmative action is allowed, there is a point at which it violates secularism. Finally, I note that the Forty-second Amendment, which formally inserted secularism into the Preamble, merely made what was already implicit explicit. (See *Bommai*[169] at para 29.)

4.9. Conclusion on the casteless society

605. In conclusion, the First Parliament, by enacting Article 15(4), deviated from the original Framers' intent. They passed an amendment that strengthens, rather than weakens casteism. If caste-based quotas in education are to stay, they should adhere to a basic tenet of secularism: they should not take caste into account. Instead, exclusively economic criteria should be used. For a period of ten years, other factors such as income, occupation and property holdings, etc. including caste, may be taken into consideration and thereafter only economic criteria should prevail. *Sawhney (I)*[10] has tied our hands. I nevertheless believe that caste matters and will continue to matter as long as we divide society along caste lines. Caste-based discrimination remains. Violence between castes occurs. Caste politics rages on. Where casteism is present, the goal of achieving a casteless society must never be forgotten. Any legislation to the contrary should be discarded.

5. ARE ARTICLES 15(4) AND 15(5) MUTUALLY CONTRADICTORY, SUCH THAT ARTICLE 15(5) IS UNCONSTITUTIONAL?

606. While contradictory, I am able to read them harmoniously. Learned Senior Counsel for the petitioners, Mr K.K. Venugopal, argued that Articles

169 *S.R. Bommai* v. *Union of India*, (1994) 3 SCC 1
17 *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225
39 1975 Supp SCC 1
10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

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15(5) and 15(4) are inconsistent to the extent that Article 15(5) exempts minority institutions from reservation and Article 15(4) incorporates aided minority institutions in the reservation scheme. Because both provisions contain "non-obstante clauses", they render each other void. He further submitted that the Court is in the position of having to choose between them in regard to this inconsistency. He provided three tests of statutory interpretation that give us guidance in resolving such a conflict.

607. First, if the Court cannot harmonise the two provisions, it must invalidate the one that completely destroys the other's purpose. (*Sarwan Singh* v. *Kasturi Lal*[87], SCC pp. 760-61, at para 20). In the instant case, one of the express purposes of Article 15(5) was to exempt minority institutions and thus avoid conflict with Article 30(1). This is found in the text of Article 15(5) itself.

608. With nothing in the text of Article 15(4) to guide us, we turn to its Statement of Objects and Reasons:

> "The Act also amplifies Article 15(3) so as to ensure that any special provisions that the State may make for the educational, economic or social advancement of any backward class citizens may not be challenged on the ground of being discriminatory."

Thus, Article 15(4) was not passed with an express intention to include minority institutions; nor did it arise out of a case in which minority institutions were a party. Then again, it was open to First Parliament to exclude minority institutions from the beginning. Articles 15(4) and 15(5)'s purposes do not necessarily conflict. I find the first test inconclusive and thus turn to the other ones. The second test asks which provision came into effect at a later date (i.e. was "later in time?")? That which is later shall prevail. Here, Article 15(5) was enacted later in time. In *J.K. Cotton Spg. and Wvg. Mills Co. Ltd.* v. *State of U.P.*[89], AIR at p. 1174, para 9, I find the third test; it provides that the specific clause must trump the general. Article 15(5) is specific in that it refers to special provisions that relate to admission in educational institutions, whereas Article 15(4) makes no such reference to the type of entity at which special provisions are to be enjoyed.

609. Because Article 15(5) is later in time and specific to the question presented, it must neutralise Article 15(4) *in regard* to reservation in education. Mr K. Parasaran, learned Senior Counsel for the respondents, correctly pointed out that constitutional articles are to be read harmoniously, not in isolation. (See *T.M.A. Pai*[8] at p. 582, para 148.) Our interpretation is harmonious because Article 15(4) still applies to other areas in which reservation may be passed.

87 (1977) 1 SCC 750

89 AIR 1961 SC 1170 : (1961) 3 SCR 185

8 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481

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6. DOES ARTICLE 15(5)'S EXEMPTION OF MINORITY INSTITUTIONS FROM THE PURVIEW OF RESERVATION VIOLATE ARTICLE 14 OF THE CONSTITUTION?

610. Given the inherent tension between Articles 29(2) and 30(1), I find that the overriding constitutional goal of realising a casteless/classless society should serve as a tie-breaker. We will take a step in the wrong direction if we subject minority institutions (even those that are aided) to reservation.

611. Minority aided institutions were subject to a limited form of reservation. In order to preserve the minority character of the institution, reservation could only be imposed to a reasonable extent. Minority aided institutions could select their own students, contingent upon admitting a reasonable number of non-minority students per the percentage provided by the State Government. This conclusion was derived from two conflicting constitutional articles. Of course, I am only concerned with minority aided institutions because I have already determined that the State shall not impose reservation on unaided institutions (minority or non-minority).

612. Article 30(1) provides that:

> "30. *Right of minorities to establish and administer educational institutions*.—(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice."

Article 29(2) states that:

> "29. (2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them."

In other words, Article 30(1) by itself would allow minority aided institutions to reject all non-minority candidates, and Article 29(2) by itself would preclude the same as discrimination based solely on religion. Yet neither provision exists by itself. Rather than disturb the Constitution, this Court struck a compromise and diluted each provision in order to uphold both. Reading Articles 30(1) and 29(2) harmoniously, *Kerala Education Bill*[58] provided that once minority institutions receive aid, a sprinkling of outsiders must be admitted.

613. "Sprinkling" ensured that the minority character of the institution would not be lost. In regard to the "sprinkled" seats, minority institutions cannot discriminate based on religion in violation of Article 29(2). At the same time, if the State *compelled* aided minority institutions to take too many non-minority students, the institution would be "minority" in name only. But what does "too many" mean? Can "sprinkling" be quantified? Clearing up the ambiguity, *St. Stephen's*[159] held that minority institutions must make 50% of their seats available to outsiders and that admission for the other 50% (its own community) must be done on merit. *T.M.A. Pai*[8] later rejected the rigidity attached to this fixed percentage. Along these lines, *T.M.A. Pai*[8] returned to a more flexible standard, one akin to "sprinkling" in *Kerala*

58 *Kerala Education Bill, 1957, In re*, AIR 1958 SC 956 : 1959 SCR 995
159 *St. Stephen's College* v. *University of Delhi*, (1992) 1 SCC 558
8 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481

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Education Bill[58]: the moment a minority institution takes aid, it has to admit non-minority students to a *reasonable* extent, whereby the character of the institution was maintained and yet citizens' Article 29(2) rights were not subverted. (Also see *T.M.A. Pai*[8] at para 149.)

614. Thus, two admission pools were created for aided minority institutions: minority and non-minority. In the minority pool, merit was to be observed. From the non-minority pool, reservations for the weaker sections may be made while the remaining seats, if any, would be distributed based on merit to non-minority students.

> "*152.* ... It would be open to the State authorities to insist on allocating a certain percentage of seats to those belonging to weaker sections of society, from amongst the non-minority seats." (*T.M.A. Pai*[8] at SCC p. 585, para 152)

With regard to the percentage of reservation, the State Governments were to determine the percentage of non-minority seats according to the needs of that State.

615. As a complement to reservation, aided minority institutions were also subject to regulation of administration and management. *T.M.A. Pai*[8] declared at para 72 as noted above that: (SCC p. 550)

> "*72. Once aid is granted to a private professional educational institution, the Government or the State agency, as a condition of the grant of aid, can put fetters on the freedom in the matter of administration and management of the institution.* The State, which gives aid to an educational institution, can impose such conditions as are necessary for the proper maintenance of the high standards of education as the financial burden is shared by the State." (emphasis supplied)

616. In addition to the general power to impose conditions that seek to maintain high standards or "excellence in education", the State could implement the same under a related but different rationale. That is, the said regulations could be upheld in the name of national interest. (*T.M.A. Pai*[8] at para 107) Yet the Government could not destroy the minority character of an institution. (para 107) Nor could it obliterate the establishment or administration of a minority institution. (para 107) A balance was to be struck between (*a*) maintaining academic quality, and (*b*) preserving the minority right to establish/administer educational institutions. Regulations that embraced these two objectives were considered reasonable. (*T.M.A. Pai*[8] at para 122)

617. A question of great import is whether Article 30 was designed to put minorities on equal or higher footing than non-minorities. This question played out in detail in a debate between Khare, C.J. and Sinha, J. in *Islamic Academy*[157] . Writing for the majority, Khare, C.J. takes issue with *T.M.A. Pai*[8]. The Chief Justice says that *T.M.A. Pai*[8] has wrongly categorised minority rights as equal to those of the non-minority. He has a point.

58 *Kerala Education Bill, 1957, In re*, AIR 1958 SC 956 : 1959 SCR 995
8 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481
157 *Islamic Academy of Education* v. *State of Karnataka*, (2003) 6 SCC 697

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Minorities can establish and administer institutions for their communities as per Article 30; non-minorities cannot. His Lordship observed: (*Islamic Academy case*[157], SCC p. 723, para 9)

> "*9.* ... We do not read these paragraphs to mean that non-minority educational institutions would have the same rights as those conferred on minority educational institutions by Article 30 of the Constitution of India. Non-minority educational institutions do not have the protection of Article 30. Thus, in certain matters they cannot and do not stand on a similar footing as minority educational institutions. Even though the principle behind Article 30 is to ensure that the minorities are protected and are given an equal treatment yet the special right given under Article 30 does give them certain advantages."

Relying on *St. Xavier's case*[170], *T.M.A. Pai*[8] concluded that the object of Article 30 was to ensure minorities of equal treatment and nothing more.

618. It was observed in *St. Xavier's College case*[170], at SCR p. 192, that: (SCC p. 743, para 9)

> "*9.* ... The whole object of conferring the right on minorities under Article 30 is to ensure that there will be equality between the majority and the minority. If the minorities do not have such special protection, they will be denied equality."

The minority institutions must be allowed to do what the non-minority institutions are permitted to do. (*T.M.A. Pai*[8] at para 138)

619. In contrast to the majority in *Islamic*[157], Sinha, J. concludes that Article 30(1) raises minorities to an equal platform and no higher. The relevant portion is reproduced hereinbelow:

> "*105.* The statement of law contained in paras 138 and 139 is absolutely clear and unambiguous and no exception can be taken thereto. The doubt, if any, that the minorities have a higher right in terms of Article 30(1) of the Constitution of India may be dispelled in clearest terms inasmuch as the right of the minorities and non-minorities is equal. *Only certain additional protection has been conferred under Article 30(1) of the Constitution of India to bring the minorities on the same platform as that of non-minorities* as regards the right to establish and administer an educational institution for the purpose of imparting education to members of their own community whether based on religion or language." (See *Islamic Academy*[157] at SCC p. 761, para 105.)
>
> (emphasis supplied)

620. Sinha, J. considers it constitutionally immoral to discriminate against non-minorities in the guise of protecting the constitutional rights of minorities. (See *Islamic Academy*[157] at para 118.) Even in the face of articles that provide preferential treatment to minority or weaker sections e.g. Articles 30(1), 15(4) and 16(4), the right to equality must mean something.

157 *Islamic Academy of Education* v. *State of Karnataka*, (2003) 6 SCC 697

170 *Ahmedabad St. Xavier's College Society* v. *State of Gujarat*, (1974) 1 SCC 717 : (1975) 1 SCR 173

8 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481

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621. Khare, J. (in *T.M.A. Pai*[8]) as he then was, concludes that the original Framers conferred Article 30(1) on minorities in order to instil in them a sense of confidence and security. (*T.M.A. Pai*[8] at p. 615, at para 229.) Their right to establish and administer educational institutions could not be usurped by mere legislation. Khare, J. stated: (*T.M.A. Pai case*[8], SCC pp. 615-16, para 229)

> "*229.* ... Thus, while maintaining the rule of non-discrimination envisaged by Article 29(2), the minorities should have also right to give preference to the students of their own community in the matter of admission in their own institution. Otherwise, there would be no meaningful purpose of Article 30(1) in the Constitution. True, the receipt of State aid makes it obligatory on the minority educational institution to keep the institution open to non-minority students without discrimination on the specified grounds. But, to hold that the receipt of State aid completely disentitles the management of minority educational institutions from admitting students of their community to any extent will be to denude the essence of Article 30 of the Constitution. It is, therefore, necessary that the minority be given preferential rights to admit students of their own community in their own institutions in a reasonable measure otherwise there would be no meaningful purpose of Article 30 in the Constitution."

622. Minorities possess one right or privilege that non-minorities do not: establishing and administering institutions for their community. The right to admit your own students in aided minority institutions was subject to admitting a reasonable number of outsiders. In the instant case, aided minority institutions stand to benefit from the Reservation Act: instead of having to admit a reasonable number of outsiders they would be exempted from reservation. However, their non-minority counterparts would not. Does this elevate their status? While it does to a certain extent, however, we must also keep our constitutional goal and philosophy in mind. Given the ultimate goal of furthering a classless/casteless society, there is no need to go out on a limb and rewrite them into the amendment. Such a ruling would subject even more institutions to caste-based reservation. This would be a step back for the nation, furthering the caste divide. I refuse to go in that direction.

7. ARE THE STANDARDS OF REVIEW LAID DOWN BY THE US SUPREME COURT APPLICABLE TO OUR REVIEW OF AFFIRMATIVE ACTION UNDER ARTICLE 15(5) AND SIMILAR PROVISIONS?

623. As noted above, US law is, of course, *not binding but does have great persuasive value*. This is because their problem of race is akin to our problem of caste. Where others have reviewed similar issues in great detail, it behoves us to learn from their mistakes as well as accomplishments. Mr R. Venkataraman, former President of India in a foreword to a book of eminent constitutional expert Dr. L.M. Singhvi *Democracy and Rule of Law: Foundation and Frontiers*", has aptly observed which reads as under:

8 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481

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"Society progresses only by exchange of thoughts and ideas. Imagine what a sorry state the world would have been in had not thoughts and ideas spread to all corners of the globe. Throughout history, philosophers, reformers, thinkers, and scholars have recorded their thoughts, regardless of whether they were accepted or not in their times, and thus contributed towards progress of humankind. India was the first to encapsulate this seminal global thought. The Rig Veda says:

Ano bhadrah krtavo yantu viswatah

Let noble thought come to us from every side."

8. WITH RESPECT TO OBC IDENTIFICATION, WAS THE RESERVATION ACT'S DELEGATION OF POWER TO THE UNION GOVERNMENT EXCESSIVE?

624. It is not an excessive delegation. I agree with the Chief Justice's reasoning at paras 211 and 212 of his judgment.

9. IS THE IMPUGNED LEGISLATION INVALID AS IT FAILS TO SET A TIME-LIMIT FOR CASTE-BASED RESERVATION?

625. It is not invalid because it fails to set a time-limit. Given Parliament's history of extending time-limits on other reservation schemes, there is much force to the argument that Parliament will forever continue to extend reservations. As noted above, it is consistent with our constitutional goal of achieving a classless/casteless society that a time-limit be set. But I am bound by *Sawhney (1)*[10] and believe that only a larger Bench could make such a ruling. A larger Bench could certainly hold that only economic criteria could be used to identify SEBCs and that it should be done by a certain date.

10. AT WHAT POINT IS A STUDENT NO LONGER EDUCATIONALLY BACKWARD AND THUS NO LONGER ELIGIBLE FOR SPECIAL PROVISIONS UNDER ARTICLE 15(5)?

626. Once a candidate graduates from a university, he must be considered educationally forward. Senior Counsel for petitioners, Mr P.P. Rao, contended that those who have completed Plus 2 should be considered educationally forward. In other words, they would no longer be eligible for reservation in university or postgraduate studies. There is some force in this argument where only 18% in the relevant age-group have completed Plus 2. From this vantage point, this means that they are educationally elite. But the answer to most questions in law is not so simple. The answer often depends on the circumstances surrounding the issue. In the marketplace, a candidate who has completed higher secondary education cannot be considered "forward". The real value of the higher secondary degree is that it is a prerequisite for college admissions. The general quality of education imparted up to Plus 2 is of extremely indifferent quality and apart from that, today some entry-level government positions only accept college graduates. One is educationally backward until the candidate has graduated from a

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

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university. Once he has, he shall no longer enjoy the benefits of reservation. He is then deemed educationally forward. For admission into Master's programmes, such as, Master of Engineering, Master of Laws, Master of Arts, etc. none will be a fortiori eligible for special benefits for admission into postgraduation or any further studies thereafter.

11. WOULD IT BE REASONABLE TO BALANCE OBC RESERVATION WITH SOCIETAL INTERESTS BY INSTITUTING OBC CUT-OFF MARKS THAT ARE SLIGHTLY LOWER THAN THAT OF THE GENERAL CATEGORY?

627. *Balaji*[20] concluded that reservation must be reasonable. The Oversight Committee has made a recommendation that will ensure the same. At p. 34 of Vol. I of its Report, the Oversight Committee recommended that institutions of excellence set their own cut-off marks such that quality is not completely compromised. Cut-offs or admission thresholds as suggested by the Oversight Committee are reproduced:

> "4.4.2. The Committee recognises that those institutions of higher learning which have established a global reputation (e.g. IITs, IIMs, IISc, AIIMS and other such exceptional quality institutions), can only maintain that if the highest quality in both faculty and students is ensured. Therefore, the Committee recommends that the threshold for admission should be determined by the respective institutions alone, as is done today, so that the level of its excellence is not compromised at all.
>
> 4.4.3. As regards 'cut-offs' in institutions other than those mentioned in Para 7, these may be placed somewhere midway between those for SC/ST and the unreserved category, carefully calibrated so that the principles of both equity and excellence can be maintained.
>
> 4.4.4. The Committee strongly feels that the students who currently tend to get excluded must be given every single opportunity to raise their own levels of attainment, so that they can reach their true potential. The Government should invest heavily in creating powerful, well designed and executed remedial preparatory measures to achieve this objective fully."

628. Standards of excellence however should not be limited to the best aided institutions. The nation requires that its citizens have access to quality education. Society as a whole stands to benefit from a rational reservation scheme.

629*. Finding 68% reservation in educational institutions excessive, *Balaji*[20], at SCR pp. 470-71 admonished States that reservation must be reasonable and balanced against other societal interests. States have

> "to take reasonable and even generous steps to help the advancement of weaker elements; the extent of the problem must be weighted, the requirements of the community at large must be borne in mind and a

20 *M.R. Balaji* v. *State of Mysore*, AIR 1963 SC 649 : 1963 Supp (1) SCR 439

* **Ed.**: Para 629 corrected vide Official Corrigendum No. F.3/Ed.B.J./41/2008 dated 6-6-2008.

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formula must be evolved which would strike a reasonable balance between the several relevant considerations" (AIR p. 663, para 34).

To strike such a balance, *Balaji*[20] slashed the impugned reservation from 68% to less than 50%. *Balaji*[20] thus serves as an example in which this Court sought to ensure that reservation would remain reasonable. We heed this example. There should be no case in which the gap of cut-off marks between OBC and general category students is too large. To preclude such a situation, cut-off marks for OBCs should be set no lower than 10 marks below the general category. To this end, the Government shall set up a committee to look into the question of setting the OBC cut-off at not more than 10 marks below that of the general category. Under such a scheme, whenever the non-creamy layer OBCs fail to fill the 27% reservation, the remaining seats would revert to general category students.

SUMMARY OF FINDINGS

1-A. Whether the creamy layer be excluded from the Ninety-third Amendment (Reservation Act)?

630. Yes, it must. The Ninety-third Amendment would be ultra vires and invalid if the creamy layer is not excluded.

See paras 382, 385, 387, 390, 394, 395, 396, 403 and 404.

1-B. What are the parameters for creamy layer exclusion?

631. For a valid method of creamy layer exclusion, the Government may use its post-*Sawhney (1)*[10] criteria as a template. [*See* Office Memorandum dated 8-9-1993, Para 2(*c*)/Column 3.] I urge the Government to periodically revise the OM so that changing circumstances can be taken into consideration while keeping our constitutional goal in view.

632. I further urge the Government to exclude the children of former and present Members of Parliament and Members of Legislative Assemblies and the said OM be amended accordingly.

See paras 416 to 418.

1-C. Is creamy layer exclusion applicable to SC/ST?

633. In *Indra Sawhney (1)*[10], creamy layer exclusion was only in regard to OBC. Reddy, J. speaking for the majority at SCC p. 725, para 792, stated that "[t]his discussion is confined to Other Backward Classes only and has no relevance in the case of Scheduled Tribes and Scheduled Castes". Similarly, in the instant case, the entire discussion was confined only to Other Backward Classes. Therefore, I express no opinion with regard to the applicability of exclusion of creamy layer to the Scheduled Castes and Scheduled Tribes.

See paras 394-395.

20 *M.R. Balaji* v. *State of Mysore*, AIR 1963 SC 649 : 1963 Supp (1) SCR 439

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

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2. Can the fundamental right under Article 21-A be accomplished without great emphasis on primary education?

634. No, it cannot. An inversion in priorities between higher and primary/secondary education would make compliance with Article 21-A extremely difficult. It is not suggested that higher education needs no encouragement or that higher education should not receive more funds, but there has to be much greater emphasis on primary education. Our priorities have to be changed. Nothing is really more important than to ensure total compliance with Article 21-A. Total compliance means good quality education is imparted and all children aged six to fourteen regularly attend schools.

635. I urge the Government to implement the following:

The current patchwork of laws on compulsory education is insufficient. Monetary fines do not go far enough to ensure that Article 21-A is implemented. The Central Government should enact legislation that:

(*a*) provides low income parents/guardians with financial incentives such that they may afford to send their children to schools;

(*b*) criminally penalises those who receive financial incentives and despite such payment send their children to work;

(*c*) penalises employers who preclude children from attending schools;

(*d*) the penalty should include imprisonment; the aforementioned Bill would serve as an example. The State is obligated under Article 21-A to implement free and compulsory education in toto.

(*e*) until we have accomplished for children from six to fourteen years the object of free and compulsory education, the Government should continue to increase the education budget and make earnest efforts to ensure that children go to schools and receive quality education;

(*f*) Parliament should fix a deadline by which time free and compulsory education will have reached every child. This *must* be done within six months, as the right to free and compulsory education is perhaps the most important of all the fundamental rights. For without education, it becomes extremely difficult to exercise other fundamental rights.

See paras 486 to 491.

3. Does the Ninety-third Amendment violate the basic structure of the Constitution by imposing reservation on unaided institutions?

636. Yes, it does. Imposing reservation on unaided institutions violates the basic structure by stripping citizens of their fundamental right under Article 19(1)(*g*) to carry on an occupation. *T.M.A. Pai*[8] and *Inamdar*[15]

8 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481

15 *P.A. Inamdar* v. *State of Maharashtra*, (2005) 6 SCC 537

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affirmed that the establishment and running of an educational institution falls under the right to an occupation. The right to select students on the basis of merit is an essential feature of the right to establish and run an unaided institution. Reservation is an unreasonable restriction that infringes this right by destroying the autonomy and essence of an unaided institution. The effect of the Ninety-third Amendment is such that Article 19 is abrogated, leaving the basic structure altered. To restore the basic structure, I sever the Ninety-third Amendment's reference to "unaided" institutions.

See paras 492 to 544.

4. Whether the use of caste to identify SEBCs runs afoul of the casteless/classless society, in violation of secularism?

637. *Sawhney (1)*[10] compels me to conclude that use of caste is valid. It is said that if reservation in education is to stay, it should adhere to a basic tenet of secularism: it should not take caste into account. As long as caste is a criterion, we will never achieve a casteless society. Exclusively economic criteria should be used. I urge the Government that for a period of ten years caste and other factors such as occupation/income/property holdings or similar measures of economic power may be taken into consideration and thereafter only economic criteria should prevail; otherwise we would not be able to achieve our constitutional goal of casteless and classless India.

See paras 556-57, 588, 602 and 605.

5. Are Articles 15(4) and 15(5) mutually contradictory, such that Article 15(5) is unconstitutional?

638. I am able to read them harmoniously.

See paras 606-09.

6. Does Article 15(5)'s exemption of minority institutions from the purview of reservation violate Article 14 of the Constitution?

639. Given the inherent tension between Articles 29(2) and 30(1), I find that the overriding constitutional goal of realising a casteless/classless society should serve as a tie-breaker. We will take a step in the wrong direction if minority institutions (even those that are aided) are subject to reservation.

See paras 621-22.

7. Are the standards of review laid down by the US Supreme Court applicable to our review of affirmative action under Article 15(5) and similar provisions?

640. The principles enunciated by the American Supreme Court, such as, "suspect legislation", "narrow tailoring", "strict scrutiny" and "compelling State necessity" are not strictly applicable for challenging the impugned legislation.

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

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641. Cases decided by other countries are not binding but do have great persuasive value. Let the path to our constitutional goals be enlightened by experience, learning, knowledge and wisdom from any quarter. In the words of Rig Veda, let noble thoughts come to us from every side.

See paras 545 and 623.

8. With respect to OBC identification, was the Reservation Act's delegation of power to the Union Government excessive?

642. It is not an excessive delegation. With respect to this issue, I agree with the reasoning of the Chief Justice in his judgment.

9. Is the impugned legislation invalid as it fails to set a time-limit for caste-based reservation?

643. It is not invalid because it fails to set a time-limit.

See para 625.

10. At what point is a student no longer educationally backward and thus no longer eligible for special provisions under Article 15(5)?

644. Once a candidate graduates from a university, the said candidate is educationally forward and is ineligible for special benefits under Article 15(5) of the Constitution for postgraduate and any further studies thereafter.

See para 626.

11. Would it be reasonable to balance OBC reservation with societal interests by instituting OBC cut-off marks that are slightly lower than that of the general category?

645. It is reasonable to balance reservation with other societal interests. To maintain standards of excellence, cut-off marks for OBCs should be set not more than 10 marks out of 100 below that of the general category.

See paras 627-29.

646. These writ petitions and contempt petition are accordingly disposed of. In the facts and circumstances, the parties are to bear their own costs.

R.V. RAVEENDRAN, J.— It has been my privilege to read the drafts of the judgments proposed by the learned Chief Justice, learned Brothers Pasayat, J. and Bhandari, J. I respectfully agree with them as indicated below:

A. Validity of the Ninety-third Amendment to the Constitution of India

648. I agree with the learned Chief Justice and Pasayat, J. that Clause (5) of Article 15 is valid with reference to State-maintained educational institutions and aided educational institutions; and that the question whether Article 15(5) would be unconstitutional on the ground that it violates the basic structure of the Constitution by imposing reservation in respect of private unaided educational institutions is left open.

649. I have indicated an additional reason for rejecting the challenge to Article 15(5) on the ground that it renders Article 15(4) inoperative/ ineffective.

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B. Validity of the Central Educational Institutions (Reservation in Admissions) Act, 2006—Act 5 of 2007

650. I agree with the learned Chief Justice and Pasayat, J. that (*i*) identification of other backward classes solely on the basis of caste will be unconstitutional; (*ii*) failure to exclude the "creamy layer" from the benefits of reservation would render the reservation for other backward classes under Act 5 of 2007 unconstitutional; and (*iii*) Act 5 of 2007 providing for reservation for other backward classes will however be valid if the definition of "other backward classes" is clarified to the effect that if the identification of other backward classes is with reference to any caste considered as socially and economically backward, "creamy layer" of such caste should be excluded. I have indicated briefly my reasons for the same.

651. I agree with the decision of the learned Chief Justice that the Act is not invalid merely because no time-limit is prescribed for caste-based reservation, but preferably there should be a review after ten years to take note of the change of circumstances. A genuine measure of reservation may not be open to challenge when made. But during a period of time, if the reservation is continued in spite of achieving the object of reservation, the law which was valid when made, may become invalid.

C. What should be parameters for determining the creamy layer in respect of OBCs?

652. I agree with the learned Chief Justice that the OM dated 8-9-1993 of the Government of India can be applied for such determination.

D. Whether reservation to an extent of 27% in regard to other backward Classes under Act 5 of 2007 is valid?

653. I agree with the decision of the learned Chief Justice that reservation of 27% for other backward classes is not illegal. I would however leave open the question whether members belonging to other backward classes who get selected in the open competition field on the basis of their own merit should be counted against the 27% quota reserved for other backward classes under an enactment enabled by Article 15(5) of the Constitution for consideration in an appropriate case.

654. Let me now briefly add a few words on two of the questions.

Whether Article 15(5) renders Article 15(4) ineffective?

655. This Court has held that Clause (4) of Article 15 is neither an exception nor a proviso to Clause (1) of Article 15. Clause (4) has been considered to be an instance of classification inherent in Clause (1) and an emphatic restatement of the principle implicit in Clause (1) of Article 15 (see *State of Kerala* v. *N.M. Thomas*[24], *K.C. Vasanth Kumar* v. *State of Karnataka*[25] and *Indra Sawhney* v. *Union of India*[10]. Clauses (1) and (2) of

24 *State of Kerala* v. *N.M. Thomas*, (1976) 2 SCC 310 : 1976 SCC (L&S) 227

25 1985 Supp SCC 714

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

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Article 15 bar discrimination. Clause (1) contains a prohibition that the State shall not discriminate against any citizen on grounds only of religion, caste, creed, sex or birth. Clause (2) declares that 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 access to shops, public restaurants, hotels and places of public entertainment, or 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. Clauses (3) to (5) enable the State to make special provisions in specified areas. The words "Nothing in this article" occurring in Clauses (3), (4) and (5) therefore refer to Clauses (1) and (2) of Article 15. When Clause (4) starts with those words, it does not obviously refer to Clause (3). Similarly when Clause (5) starts with those words, it does not refer to Clauses (3) and (4). Clauses (3), (4) and (5) of Article 15 are not to be read as being in conflict with each other, or prevailing over each other. Nor does an exception made under Clause (5) operate as an exception under Clause (4). While Clauses (4) and (5) may operate independently, they have to be read harmoniously.

The need for exclusion of creamy layer

656. Section 3 of Act 5 of 2007 mandates reservation of seats in Central Educational Institutions for other backward classes to an extent of 27%. The term "other backward classes" is defined as meaning the class or classes of citizens who are socially and economically backward, and are so determined by the Central Government. The Act does not define the term "socially and educationally backward classes", nor does it contain any norms or guidelines as to how the Central Government should determine any class or classes as socially and educationally backward, so as to entitle them to the benefit of reservation under the Act. The petitioners contend that the Act vests unguided power in the executive to pick and choose arbitrarily certain classes for the benefit of reservation. The Central Government however intends to proceed on the basis that castes which have been identified for the benefit of reservations under Article 16(4) by the Mandal Commission with the additions thereto made by the National Commission for Backward Classes, from time to time, will constitute the socially and educationally backward classes for the purpose of availing the benefit of 27% reservation under the Act. This again is challenged by the petitioners on the ground that identification of any class of citizens as "backward", for the purpose of Article 16(4), cannot be considered as identification of "socially and educationally backward classes of citizens" under Article 15(5). It is pointed out that the term "backward classes" in Article 16(4) is much wider than "socially and educationally backward classes of citizens" occurring in Articles 15(4) and (5).

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657. Article 15(4) provides that nothing in that 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 class of citizens or for the Scheduled Castes and Scheduled Tribes. Article 29(2) provides that no citizen shall be denied admission into any educational institution managed by the State or receiving aid out of State funds, on grounds only of religion, race, caste, language or any of them. On the other hand, Clause (5) of Article 15 provides that notwithstanding anything contained in that article or in Article 19(1)(*g*), the State may make a special provision for advancement of socially and educationally backward class of citizens or for the Scheduled Castes and Scheduled Tribes by providing for reservation relating to admission in any educational institution either aided or unaided by the State, other than the minority educational institutions referred to in Article 30(1). While Clause (4) excluded the application of Article 29(2), Clause (5) does not exclude Article 29(2). It is therefore contended that in regard to a law made in exercise of power under Article 15(5), the bar of Article 29(2) will apply, and if so, there cannot be any affirmative action by way of reservation on the ground of caste alone.

658. It is submitted on behalf of the petitioners that the Constitution prohibits any kind of special provision including reservation, merely on the ground of caste. The object of the Constitution is to achieve an egalitarian society and any attempt to divide the citizens or the society on the ground of race, religion or caste should be straightaway rejected. It is submitted that the Constitution nowhere recognises or refers to "caste" (except Scheduled Castes and Tribes) as a criterion for conferment of any right or benefit; that both Clauses (4) and (5) of Article 15 refer to socially and educationally backward "classes" and not "castes"; that Constitution has always referred to caste in a negative sense, that is to prohibit any discrimination or affirmative action on the basis of "caste"—[vide Articles 15(1) and (2), 16(2) and 29(2)]; that when Constitution discourages caste, it is paradoxical that caste is sought to be made the criterion by the State for purposes of making a special provision for socially and educationally backward classes. It is submitted that there cannot be any special provision for any group of citizens merely on the ground that they belong to a particular caste or community [except Scheduled Castes and Tribes who are separately mentioned in Articles 15(4), 15(5), 16(4), 335, 341 and 342, etc.].

659. This Court in a series of decisions commencing from *M.R. Balaji* v. *State of Mysore*[20], *R. Chitralekha* v. *State of Mysore*[14], *P. Rajendran (Minor)* v. *State of Madras*[40], *State of A.P.* v. *P. Sagar*[43], *Janki Prasad Parimoo* v. *State of J&K*[66], *State of Kerala* v. *N.M. Thomas*[24] and *K.C. Vasanth Kumar* v.

20 AIR 1963 SC 649 : 1963 Supp (1) SCR 439
14 AIR 1964 SC 1823 : (1964) 6 SCR 368
40 AIR 1968 SC 1012 : (1968) 2 SCR 786
43 AIR 1968 SC 1379 : (1968) 3 SCR 595
66 (1973) 1 SCC 420 : 1973 SCC (L&S) 217
24 *State of Kerala* v. *N.M. Thomas*, (1976) 2 SCC 310 : 1976 SCC (L&S) 227

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State of Karnataka[25] has explained what is social and educational backwardness. All these decisions have laid down the principle that caste cannot be made the sole or dominant test to determine backwardness, and any classification determining backwardness only with reference to caste will be invalid. These decisions recognised the fact that caste is not equated to class and all backwardness, either social or educational, is ultimately and primarily due to poverty or economic conditions.

660. However, in *Rajendran*[40], it was held that if a caste, *as a whole*, is socially and educationally backward then reservation can be made in favour of such a caste on the ground that it is a socially and educationally backward class within the meaning of Article 15(4). The decision followed *Balaji*[20] and therefore proceeded on the basis that where the extent of social and educational backwardness of the caste in question is virtually the same as the social and educational backwardness of the Scheduled Castes and Scheduled Tribes, reservation can be made on the basis of caste itself. In that case, it was found as a question of fact that members of certain castes *as a whole*, were socially and educationally backward, and therefore it was held that the reservation on the basis of caste was permissible in respect of those castes.

661. In *A. Peeriakaruppan (Minor)* v. *State of T.N.*[28] this Court referred to the cases starting from *Balaji*[20] to *Rajendran*[40]. It reiterated the principle stated in *Rajendran*[40] that if a caste as a whole is socially and educationally backward, reservation can be made in favour of such a caste on the ground that it is a socially and educationally backward class of citizens within the meaning of Article 15(4). It also cautioned that the Government should not proceed on the basis that once a class is considered as a backward class, it will continue to be backward class for all times. Therefore neither *Rajendran*[40] nor *Peeriakaruppan*[28] really departed from or diluted the principle laid down in *Balaji*[20]. On the other hand, the principle laid down in *Balaji*[20] was reiterated. *Rajendran*[40] and *Peeriakaruppan*[28] only show that in extreme cases where it is found that the caste under consideration was, as a whole, socially and educationally backward, and therefore akin to a Scheduled Caste, reservation could be made only on the basis of caste alone.

662. *Vasanth Kumar*[25] held that only a caste comparable to the Scheduled Castes and Scheduled Tribes in the matter of backwardness, could be considered to be a socially and educationally backward class in favour of which reservation could be made merely on the basis of caste. *Vasanth Kumar*[25] therefore, reiterated *Balaji*[20]. Then came the decision of nine Judges in *Indra Sawhney* v. *Union of India*[10]. This Court held that the use of the

25 1985 Supp SCC 714
40 *P. Rajendran (Minor)* v. *State of Madras*, AIR 1968 SC 1012 : (1968) 2 SCR 786
28 (1971) 1 SCC 38
25 *K.C. Vasanth Kumar* v. *State of Karnataka*, 1985 Supp SCC 714
20 *M.R. Balaji* v. *State of Mysore*, AIR 1963 SC 649 : 1963 Supp (1) SCR 439
10 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

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word "class" in Article 16(4) refers to social class, and that reservation under Article 16(4) is in favour of a backward class and not a caste. It held that "backward class of citizens" contemplated in Article 16(4) is not the same as "socially and educationally backward classes" referred to in Article 15(4), but much wider. It held that there was no reason to qualify or restrict the meaning of the expression "backward class of citizens" by saying that it means only those other backward classes who are situated similarly to the Scheduled Castes and/or Scheduled Tribes (para 795). This Court held: (*Indra Sawhney case*[10], SCC p. 726, para 795)

> "*795.* … If any group or class is situated similarly to the Scheduled Castes, they may have a case for inclusion in that class but there seems to be no basis either in fact or in principle for holding that other classes/groups must be situated similarly to them for qualifying as backward classes. There is no warrant to import any such *a priori notions* into the concept of Other Backward Classes. At the same time, we think it appropriate to clarify that backwardness, being a relative term, must in the context be judged by the general level of advancement of the entire population of the country or the State, as the case may be. More than this, it is difficult to say." (emphasis in original)

663*. In the context of Article 16(4) this Court also observed that a caste can be and quite often is a social class in India (as in the case of the Scheduled Castes) and if it is backward socially, it would be a "backward class" for the purposes of Article 16(4). It held that the accent in Article 16(4) is on social backwardness, whereas the accent in Article 15(4) is on "social and educational backwardness". Ultimately, this Court held: (*Indra Sawhney case*[10], SCC p. 766, para 859)

> "*859.* (*3*)(*b*) Neither the Constitution nor the law prescribes the procedure or method of identification of backward classes. Nor is it possible or advisable for the court to lay down any such procedure or method. It must be left to the authority appointed to identify. It can adopt such method/procedure as it thinks convenient and so long as its survey covers the entire populace, no objection can be taken to it. Identification of the backward classes can certainly be done with reference to castes among, and along with, other occupational groups, classes and sections of people."

The Court however made it clear that a caste can be the starting point for determining a "backward class of citizens" as it represents an existing, identifiable social group/class; and that if a caste should be designated as "a backward class" then the creamy layer from such caste should be excluded. This Court observed: (*Indra Sawhney case*[10], SCC pp. 724-25, para 792)

> "*792.* … In a backward class under Clause (4) of Article 16, if the connecting link is the social backwardness, it should broadly be the same

* **Ed.**: Para 663 corrected vide Official Corrigendum No. F.3/Ed.B.J./34/2008 dated 23-4-2008.

10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

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in a given class. If some of the members are far too advanced socially (which in the context, necessarily means economically and, may also mean educationally) the connecting thread between them and the remaining class snaps. They would be misfits in the class. After excluding them alone, would the class be a compact class. ... While we agree that Clause (4) aims at group backwardness, we feel that exclusion of such socially advanced members will make the 'class' a truly backward class and would more appropriately serve the purpose and object of Clause (4)."

664. It is thus seen that *Indra Sawhney*[10] certainly went a step further than *Balaji*[20] and other cases in holding that a caste can be the starting point for determination of backwardness. But it is clear from the decision that caste itself is not the final destination, that is, a caste by itself, cannot be determinative of social and educational backwardness. A caste can be identified to be socially and economically backward, only when the creamy layer is removed from the caste and a compact class emerges which can be identified as a socially and educationally backward class. Thus, the determination is not by first identifying a caste as a socially and educationally backward class and, thereafter, to remove or exclude the creamy layer for the purpose of bestowing the benefits flowing to such class. On the other hand, until and unless the creamy layer is removed from a caste, there is no compact class which can be termed as socially and educationally backward class at all. Thus, while the process of identifying socially and educationally backward class can conveniently start with a socially and educationally backward caste, removing the creamy layer therefrom results in the emergence of compact class which can be termed as a socially and educationally backward class. In this sense, it can be said that *Indra Sawhney*[10] is only a development of the principles laid down in *Balaji*[20], *R. Chitralekha*[14] and *Vasanth Kumar*[25], which pointed out that the advanced section of a backward caste constituting the creamy layer is virtually the same as forward class. If the creamy layer is not excluded the benefit of reservation will be appropriated by such advanced sections. Referring to this aspect, *Indra Sawhney*[10] stated: (SCC p. 553, para 520)

> "*520.* ... to continue to confer upon such advanced sections ... special benefits, would amount to treating equals unequally.... Secondly, to rank them with the rest of the backward classes would ... amount to treating the unequals equally."

665. The need for exclusion of creamy layer is reiterated in the subsequent decisions of this Court in *Ashoka Kumar Thakur* v. *State of*

20 *M.R. Balaji* v. *State of Mysore*, AIR 1963 SC 649 : 1963 Supp (1) SCR 439
14 *R. Chitralekha* v. *State of Mysore*, AIR 1964 SC 1823 : (1964) 6 SCR 368
25 *K.C. Vasanth Kumar* v. *State of Karnataka*, 1985 Supp SCC 714
10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

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Bihar[149], *Indra Sawhney* v. *Union of India*[113] and *M. Nagaraj* v. *Union of India*[11]. When *Indra Sawhney*[10] has held that creamy layer should be excluded for purposes of Article 16(4), dealing with "backward class" which is much wider than "socially and educationally backward class" occurring in Articles 15(4) and (5), it goes without saying that without the removal of creamy layer there cannot be a socially and educationally backward class. Therefore, when a caste is identified as a socially and educationally backward caste, it becomes a "socially and educationally backward class" only when it sheds its creamy layer.

666. Caste has divided this country for ages. It has hampered its growth. To have a casteless society will be realisation of a noble dream. To start with, the effect of reservation may appear to perpetuate caste. The immediate effect of caste-based reservation has been rather unfortunate. In the pre-reservation era people wanted to get rid of the backward tag—either social or economical. But post reservation, there is a tendency even among those who are considered as "forward", to seek the "backward" tag, in the hope of enjoying the benefits of reservations. When more and more people aspire for "backwardness" instead of "forwardness" the country itself stagnates. Be that as it may. Reservation as an affirmative action is required only for a limited period to bring forward the socially and educationally backward classes by giving them a gentle supportive push. But if there is no review after a reasonable period and if reservation is continued, the country will become a caste divided society permanently. Instead of developing a united society with diversity, we will end up as a fractured society forever suspicious of each other. While affirmative discrimination is a road to equality, care should be taken that the road does not become a rut in which the vehicle of progress gets entrenched and stuck. Any provision for reservation is a temporary crutch. Such crutch by unnecessary prolonged use, should not become a permanent liability. It is significant that the Constitution does not specifically prescribe a casteless society nor tries to abolish caste. But by barring discrimination in the name of caste and by providing for affirmative action Constitution seeks to remove the difference in status on the basis of caste. When the differences in status among castes are removed, all castes will become equal. That will be a beginning for a casteless egalitarian society.

667. I agree that the petitions shall stand disposed of in the manner stated by the learned Chief Justice.

ORDER OF THE COURT*

668. The Constitution (Ninety-third Amendment) Act, 2005, is valid and does not violate the "basic structure" of the Constitution so far as it relates to the State-maintained institutions and aided educational institutions. Question whether the Constitution (Ninety-third Amendment) Act, 2005 would be

149 (1995) 5 SCC 403 : 1995 SCC (L&S) 1248 : (1995) 31 ATC 159
113 (1996) 6 SCC 506 : 1996 SCC (L&S) 1477
11 (2006) 8 SCC 212
10 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385

* This Order has been signed by all the five Hon'ble Judges constituting the Constitution Bench.

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constitutionally valid or not so far as "private unaided" educational institutions are concerned, is not considered and left open to be decided in an appropriate case. Bhandari, J. in his opinion, has, however, considered the issue and has held that the Constitution (Ninety-third Amendment) Act, 2005 is not constitutionally valid so far as private unaided educational institutions are concerned.

669. Act 5 of 2007 is constitutionally valid subject to the definition of "Other Backward Classes" in Section 2(*g*) of Act 5 of 2007 being clarified as follows: If the determination of "Other Backward Classes" by the Central Government is with reference to a caste, it shall exclude the "creamy layer" among such caste.

670. Quantum of reservation of 27% of seats to Other Backward Classes in the educational institutions provided in the Act is not illegal.

671. Act 5 of 2007 is not invalid for the reason that there is no time-limit prescribed for its operation but majority of the Judges are of the view that the review should be made as to the need for continuance of reservation at the end of 5 years.

672. The writ petitions are disposed of in the light of majority judgment. However, in Contempt Petition No. 112 of 2007 in WP (C) No. 265 of 2006, no orders are required.

(2008) 6 Supreme Court Cases 718

(BEFORE TARUN CHATTERJEE AND H.S. BEDI, JJ.)

ANDHRA BANK THROUGH REGIONAL MANAGER, VISHAKHAPATNAM .. Appellant;

Versus

INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT AND ANOTHER .. Respondents.

Civil Appeal No. 6578 of 2002†, decided on May 9, 2008

Labour Law — Allowances — House Rent Allowance (HRA) — Rates applicable to project area of Vishakhapatnam — Central Govt. Order dated 1-7-1971 declaring Vishakhapatnam as Group 'A' city — Other banks enhancing HRA on the basis of this order but appellant Bank refusing to do so on the ground that HRA could not be enhanced because of awards like Desai Award, Shastri Award and bipartite settlements — Industrial Tribunal awarding enhancement ignoring this plea of appellant Bank, and High Court upholding award of the Tribunal — Matter remitted to the Industrial Tribunal for fresh consideration after taking into account various awards/settlements referred to by the appellant Bank (Paras 7 and 8)

Appeal allowed K-M/37847/CL

† From the Final Judgment and Order dated 30-4-1998 of the High Court of Andhra Pradesh at Hyderabad in WP No. 864 of 1995