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Court : Supreme Court of India

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Judge : K.G. Balakrishnan,C.J.,; Dr. Arijit Pasayat,; C.K. Thakker,; Dalveer Bhandari and;

Acts : [Constitution of India](#) (Ninety-Third Amendment) Act, 2005 - Article 15(5); ;Central Educational Institutions (Reservation in Admission) Act, 2006 - Sections 2, 2(24), 3, 4, 5, 6, 9, 9(1), 10, 12, 13 and 55; ;[Societies Registration Act, 1960](#); ;Civil Rights Act, 1964; ; [Constitution of India](#) (86th Amendment) Act; [Constitution of India](#) (42nd Amendment) Act; ;Madras Provincial and Subordinate Services Rule, 1942; Kerala State and Subordinate Services Rules - Rules 5 and 13AA; ; [Constitution of India](#) - Articles 3(4), 12 to 35, 38, 38(1), 38(2), 39, 41, 45, 46, 47, 51A, 51A(3), 109, 117, 136, 143(1), 162, 226, 227, 292, 323A2D, 323B3D, 325, 330, 332, 334, 337, 329A(4), 334, 335, 337, 340, 341, 341(1), 342, 358, 359, 366(24), 366(25), 368, 368(2) and 371D(5); Reciprocal Insurance A

Appeal No. : Writ Petition (Civil) Nos. 265, 269 and 598/2006 and 29, 35, 53, 231, 336, 313, 335, 425 and 428/200

Appellant : Ashoka Kumar Thakur

Respondent : Union of India (Uoi) and ors.

Advocate for Pet/Ap. : G.E. Vahanvati, Sol. Gen. of India,; Gopal Subramaniam, ASG.,;

Books referred : "Money Bills", Articles 109 and 117

Affirmative Action by William Darity

American Jurisprudence, Vide Cooley's constitutional Limitations, Vol. I, Chap. VII

Annual Report of the Ontario Teachers' Association, 1875

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Judgement :

K.G. Balakrishnan, C.J.

1. 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 emphasized 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 purposeless¹. 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 Assembly²:

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 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

5. Equality has also been enshrined in various international instruments, such as the 1948 Universal Declaration of Human Rights. 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 realize 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 co-operation 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 51st 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 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 SC and ST 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 respondents. The learned Solicitor General and 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:

Nothing in this article or in Sub-clause (g) of Clause (1) of Article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to 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. and Ors. v. State of Andhra Pradesh and Ors.* 1993 (1) SCC 645, 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 and Ors. v. State of Karnataka and Ors.* : AIR 2003 SC355 , 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 that fundamental right to carry on business under Article 19(6) of the Constitution. 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. The Parliament introduced Article 15(5) by The Constitution (Ninety-Third Amendment) Act, 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 Clause (1) of Article 30 of the Constitution, it is proposed to amplify Article 15. The new Clause (5) shall enable the Parliament as well as the State Legislatures to make appropriate laws for the purposes mentioned above.

12. After the above Constitution (Ninety-Third Amendment) Act, 2005, the Parliament passed The Central Educational Institutions (Reservation in Admission) Act, 2006 (No. 5 of 2007) (hereinafter referred to as 'the Act 5 of 2007').

13. Section 3 of Act 5 of 2007 provides for reservation of 15% seats for Scheduled Castes, 7% seats for Scheduled Tribes and 27% for Other Backward Classes in Central Educational Institutions. The said section is extracted below:

3. 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.

14. '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;

(iii) an institution, declared as a deemed University under section 3 of the University Grants Commission Act, 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.

15. 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 authorized by an appropriate authority for admission of students to a Central Educational

Institution

16. Section 4 of the Act specifically says that the provisions of Section 3 shall apply to certain institutions. Section 4 reads as under:

4. 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 specialization, 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.

17. 'Minority Educational Institution' is defined in Section 2(f) of the Act as follows:

'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

18. Section 2(g) defines 'Other Backward Classes' as under:

'Other Backward Classes' means the class or classes of citizens who are socially and educationally backward, and are so determined by the Central Government

19. Clause 2(h) defines 'Scheduled Castes' and Clause 2(i) defines 'Scheduled Tribes' as under:

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.

20. 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.(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.

21. By virtue of definition of the '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 Central Government and institutions set up by the Central Government with the [Societies Registration Act, 1960](#), 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.

22. The Statement of Objects and Reasons for the Act gives the object of the Act thus:

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 the 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.

23. 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 the 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.

24. 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 Ashok Kumar Thakur appeared in person. Supporting the Constitution (Ninety-Third Amendment) Act, 2005 and the provisions of the said Act, 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 Subramaniam submitted arguments. We have also heard learned Senior Counsel Shri Ram Jethmalani, Shri T.R. Andhyarujina, Ms. Indra Jaisingh, Shri Rakesh Dwivedi and Shri Ravivarma Kumar. We also had the advantage of the written submissions made by these Counsel.

25. The arguments advanced against the Constitution (Ninety- Third Amendment) Act, 2005 and Act 5 of 2007 can be summarized as follows.

26. 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 (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'. 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. 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 *The State of Madras v. Srimathi Champakam Dorairajan* 1951 SCR 525. 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. 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. The learned Senior Counsel dealt in detail with the argument that the 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 and Ors.* 1992 Supp (3) SCC 215.

27. The validity of 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.

28. Dr. Rajeev Dhavan, learned Senior Counsel appearing for the petitioners in Writ Petition No. 53/2007 contended that the affirmative action scheme under Article 15(4), 15(5) and 16(4) has to comply with the mandate of Article 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 Article 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 (supra) 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. The learned Senior Counsel further challenged the constitutional validity of 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 nationalize the private educational institutions which is unreasonable and impermissible and reference was made in this regard to T.M.A. Pai Foundation (supra). 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 the M. Nagaraj and Ors. v. Union of India and Ors. : AIR 2007 SC71 and I.R. Coelho (Dead) by LRS. v. State of T.N. : AIR 2007 SC861 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.

29. 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 was held to be illegal in Champakam Dorairajan (supra). From 1950 to 1970, there was no proper inquiry for ascertaining the OBCs or SEBCs. The learned Counsel emphasized that in Indra Sawhney's case (supra), caste was excluded as a criteria 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.

30. 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 the 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 criteria 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. 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 the non-OBCs, SCs and STs. It was argued that the balance between what was referred to as the 'Golden Triangle' in *Minerva Mills Ltd. and Ors. v. Union of India* and Ors. : [1981]1SCR206 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 the 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.

31. Shri K.K. Venugopal, learned Senior Counsel appearing in W.P. (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 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. According to the learned Counsel for the petitioners, the argument of the Union of India that Article 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 for caste. Therefore, it is argued that there is a direct conflict between Article 15(4) and 15(5). As both Articles contain an exclusionary clause excluding the operation of the rest of Article 15. 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 it from bearing the common burden of reservation for SCs, STs and SEBCs. It was argued that such exclusion of minority institution is not severable from Article 15(5). As regards the validity of the 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, the Act 5 of 2007 is unconstitutional and void to the extent that it does not provide exclusion of 'creamy layer' from the SEBCs. Therefore, it was prayed that both The Constitution (Ninety-Third Amendment) Amendment Act, 2005 as well as the Act 5 of 2007 be struck down as unconstitutional.

32. Shri F.S. Nariman, learned Senior Counsel appearing for the petitioners in W.P. (Civil) No. 35 of 2007, contended that the caste cannot be the sole criteria for determining the socially and educationally backward classes under Article 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 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 and Anr. v. State of Mysore and Ors.* : [1964]6SCR368 still occupies the field for the purpose of Article 15 and the decision in *R. Chitralekha's case* (supra) was affirmed by the Bench in *Indra Sawhney's case* (supra). 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 the judgment in *Indra Sawhney's case* (supra), 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. The 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 the SEBCs. No time frame has been fixed for such reservation. Therefore, the Act 5 of 2007 is violative of Article 14 of the [Constitution of India](#) and is thus unconstitutional.

33. Appearing for the Writ Petitioner in W.P. (Civil) No. 231/2007 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 the SEBCs should be removed and once this educational backwardness is removed, Clause 4 and 5 of Article 15 will become redundant and unnecessary. It was argued that without ensuring that every child belonging to a backward class is provided free and compulsory education upto 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 upto 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 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.

34. Shri Sushil Kumar Jain, learned Counsel appearing in W.P. (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 Ninety-Third Constitutional 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, the 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'. The 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 extent of the measure. The exact social malaise sought to be remedied is not clear.

35. The learned Counsel for the petitioner further contended that the Ninety-Third Constitutional 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 (supra) as explained in P.A. Inamdar and Ors. v. State of Maharashtra and Ors. It was held in that case that fixation of quotas and reservation of seats in private educational institutions amounts to 'Nationalization of Education'. The Ninety-Third Constitutional 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 institution which has been held to be an unreasonable encroachment on the fundamental rights and this amendment would alter the balance between Part 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 to this differential treatment. The petitioner's learned Counsel also challenged the quantum of reservations provided under the 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 equalized 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, to 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. 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's case (supra) and Indra Sawhney (II) v. Union of India and Ors. : AIR 2000 SC498 .

36. 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 the Act 5 of 2007 are unconstitutional and they are liable to be struck down.

37. On behalf of the respondents, several Senior Counsel appeared and contended that the contentions of the petitioners challenging the Ninety-Third Constitutional Amendment and the 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 section 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.

38. 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 fossilized 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 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.

39. 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 crystallized in the Preamble. Reference was made to the observations made by Chief Justice Sikri in His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala : AIR 1973 SC1461 , 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.

40. 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 86th Amendment of the Constitution by inserting Article 21A. Clause 2 of Article 38 says that, 'the State shall, in particular, strive to minimize 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'. 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'. It is submitted that the Ninety-Third Constitutional 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. Shri K. Parasaran, learned Senior Counsel, contended that the concept of basic structure is not a vague concept and it was illustrated in the judgment in Kesavananda Bharati's case (supra). 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.

41. It was pointed out that the observations in Champakam Dorairajan (supra) that the Directive Principles are subordinate to the Fundamental Rights is no longer good law after the decision of the Kesavanda Bharati (supra) case 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) neutralized the decision in Champakam Dorairajan's case (supra). 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'.

42. In Unni Krishnan's case (supra) 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 (supra) 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's case (supra), 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 to 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 enactment of The Constitution (Ninety-Third Amendment) Act, 2005 by inserting Article 15(5) through which enabling power was conferred on the 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).

43. In *Kesavananda Bharati* (supra) it was held that the fundamental rights may not be abrogated but they can be abridged. The validity of the 24th 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 44th 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 1st 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 the Parliament and the State legislatures.

44. 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 the 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.

45. 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). Article 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 the Article 15(5) does not interfere with the executive power of the State and there is no violation of the proviso to Article 368.

46. The Ninety-Third Constitutional 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 42nd 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.

47. 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 the State Policy would not offend the basic structure of the Constitution.

48. 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.

49. Shri Parasaran, learned Senior Counsel, further contended that the 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 the 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 the 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 the Parliament.

50. It is also contended that merely because no time limit is fixed, Act 5 of 2007 cannot be rendered invalid. The 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 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 the SCs, STs and SEBCs, 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.

51. 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 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 22 =%. The quantum of reservation within 50% has been determined by the 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.

52. 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 Post-graduate Medical Courses, when 75% of seats were being reserved on the basis of institutional preference.

53. 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.

54. It was held in *E.V. Chinnaiah v. State of Andhra Pradesh and Ors.* : AIR 2005 SC162, that the SCs and STs form a single class. The observations in Nagaraj's case (supra) 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's case*, (supra) 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's case (supra) should not be read as conflicting with the decision in *Indra Sawhney's case* (supra). The observations in Nagaraj's case (supra) as regards SCs and STs are obiter. In regard to SCs and STs, there can be no concept of creamy layer.

55. Once the President of India has determined the list of Scheduled Castes and Scheduled Tribes, it is only by a law made by the 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 lawyer is applicable only for Article 16(4). It has no application to Article 15(4) or 15(5) as education stands on a different footing.

56. 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 cannot be any exclusion on the ground of creamy layer. Such exclusion would only be counter productive and would retard the development and progress of the groups and communities and their eventual integration with the rest of the society.

57. It was further argued that Article 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.

58. 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 Ninety-Third Constitutional 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.

59. It was also submitted that the speeches in the Parliament, constitutional debates, text books of authors and views expressed in articles do not normally constitute evidence before the Court to determine the Constitutional validity of the legislations.

60. 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 that from the case of *The General Manager Southern Railway v. Rangachari* : (1970) IILLJ289SC , Article 16(4) is an exception to Article 16(1) and this reasoning was followed in *M.R. Balaji and Ors. v. State of Mysore* : AIR 1963 SC649 by a five Judge Bench. Thereafter, the same view prevailed in *T. Devadasan v. The Union of India and Anr.* : (1965) IILLJ560SC But Subba Rao. J. (as he then was) said that 'the expression 'nothing in this article' is a legislative device to express its intention in a most emphatic way that the power conferred there under is not limited in any way by the main provision but falls outside it' . The view that Articles 15(4) and 16(4)

are exceptions to Article 15(1) and 16(1) respectively was again reiterated in *Triloki Nath v. State of Jammu & Kashmir and Ors.* (II) 1969 (1) SCR 103 and in *The State of Andhra Pradesh and Ors. v. U.S.V. Balram, Etc* : [1972]3SCR247 . The learned Solicitor General further pointed out that in *State of Kerala and Anr. v. N.M. Thomas and Ors.* : (1976)ILLJ376SC 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's case (supra) was noticed by Justice Chinnappa Reddy in *K.C. Vasanth Kumar and Anr. v. State of Karnataka* (1985) Supp. SCC 714 and the same view was upheld in *Indra Sawhney's case* (supra). 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'etre* 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. Relying on the observations of Subba Rao, J. in *T. Devadasan's case* (supra), 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's case (supra) and also in *Indra Sawhney's case* (supra), the learned Solicitor General argued that under Articles 15(4) and 16(4) the State is obliged to remove inequalities and backwardness from society. It was further submitted that the American doctrine of 'strict scrutiny' had been expressly rejected by this Court in *Saurabh Chaudri and Ors. v. Union of India and Ors.* : AIR 2004 SC361 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 pre-determined 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. It was pointed out that Chief Justice Wanchoo in *C.A. Rajendran v. Union of India and Ors.* : (1968) ILLJ407SC held that the main criteria 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 *Minor A. Peeriakaruppan and Anr. v. State of Tamil Nadu and Ors.* : [1971]2SCR430 ; *U.S.V. Balram (supra)*; *K.C. Vasanth Kumar (supra)*, referred to earlier. The learned Solicitor General also pointed out that in *B. Venkataramana v. The State of Madras and Anr.* AIR 1951 SC 229 : 1951 1 MLJ 625, the list of backward classes as mentioned in Schedule 3 to the Madras Provincial and Subordinate Services Rule, 1942 was approved and which was also noticed in *Indra Sawhney's case (supra)*. Reference was also made to the debates in Parliament where Dr. Ambedkar stated that 'the backward classes are nothing but collection of certain castes'. It was further contended that it is incorrect to say that the majority in *Indra Sawhney's case (supra)* 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. 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 over-

inclusion of any caste or community. 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 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 concerned castes/sub-groups/communities 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. The learned Solicitor General also contended that the plea that reservation under Article 15(5) with reference to Article 29(2) would render 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 ground 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. 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. 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 that debates in Parliament are not usually relevant for construction of the provisions of an Act. 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%. The NSSO had conducted this survey for the preparation of its 61st Round of survey which was 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's case (supra) and the Parliament has taken special care to see that this reservation does not affect seats in the general category. 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.

61. Shri Gopal Subramaniam, 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 and Ors.* : 1982 CriLJ340, 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. It is pointed 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* 438 US 265 (1978), *Grutter v. Bollinger* 539 US 306 (2003) and *Gratz v. Bollinger* 539 US 244 (2003), and *Parents Involved in Community Schools v. Seattle School District* 127 SC 2738 (2007), that the Court will apply the standard of strict scrutiny while reviewing legislation involving suspect classification; that and 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'. The learned Additional Solicitor General has also referred to the decisions of this Court in *N.M. Thomas'* case (supra) and *K.C. Vasanth kumar's* case (supra) 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. 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 Report⁷ 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.

62. Shri Ram Jethmalani, learned Senior Counsel appearing for the Intervener-Rashtriya Janta Dal Party in W.P. No. 313 of 2007 and W.P. No. 335 of 2007, contended that the attempt of the petitioners in these writ petitions is to off-set the decision of the Nine Judges Bench in Indra Sawhney's case (supra). 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's case (supra). 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 Vth Amendment of 1971 to the Constitution of the United States of America did not introduce this concept. The XIVth 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 v. Ferguson (1896) 163 U.S. 513, 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 the Symbiosis University is not covered by the statute.

63. Shri T.R. Andhyarujina, the learned Senior Counsel appearing for the respondents in W.P. 265/2006, 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 (supra) and P.A. Inamdar (supra). This disability was because of T.M.A. Pai Foundation (supra) which provided that private unaided educational institutions had a fundamental right to 'occupation' of carrying on education under Article 19(1)(g). Therefore, the 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. Article 15(5) does not take away the 'basic structure' of the Constitution. The 'basic structure' of the Constitution should not be trivialized to mean other features of the Constitution. Reference was made to the observations made by Khanna, J. in Kesavananda Bharati's case (supra). 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 institutions by an executive action under Article 162. Right to carry on business is not a part of the basic structure of the Constitution.

64. On behalf of the respondent/State of Bihar in Writ Petition (Civil) No. 269/2007, learned Senior Counsel Shri Rakesh Dwivedi submitted that the use of non-obstante clauses in Article 15(3), (4) and (5) vis-a-vis Article 15 shows that the prohibition against use of only caste as a ground for discrimination qua any citizen

is there in so far as making of a special provision for advancement of prescribed categories is concerned. There is no repugnance between 15(4) and 15(5). It was contended that in Kesavananda Bharati's case (supra), it was held that 'Part III of the Constitution could be amended subject to the basic structure doctrine'. The view which was held in I.C. Golak Nath and Ors. v. State of Punjab and Anr. : [1967]2SCR762 , making Article 368 more restrictive, had been overruled in Kesavananda Bharati's case (supra). 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.

65. The learned Senior Counsel also contended that the judicial review ideas of 'suspect classification', 'strict scrutiny', 'compelling State interest' and 'narrow tailoring' are measures propounded by the U.S. Supreme Court are not applicable and the Supreme Court of India has consistently taken a view that the judgments of the U.S. 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.

66. Reference was made to the various decisions of this Court and it was argued that the comparison of the 14th Amendment of the US Supreme Court read with Civil Rights Act, 1964 on the one hand and the fascicules of equality provisions in the [Constitution of India](#), i.e. Article 14 to 18 on the other hand shows that the equality provisions of our Constitution are not only differently structured but it contains provisions for making special provisions for the advancement of SEBCs & 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 minimize the inequalities in income and endeavour to remove inequalities in status, facilities and opportunities (Article 38).

67. Shri Ravivarma 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 it is a programme to eradicate unemployment. Reservation under Article 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 Clause 4 & 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 counter productive and frustrate the very object of reservation, namely to achieve equality in status, facilities and opportunities.

68. 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.

69. 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 communities and barber communities alone, which carry on the traditional occupation of hair cuttings and no other community has taken up the said occupation. And they continue to labour without any social security or whatsoever.

70. 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.

71. The learned Counsel submitted that there is no justification for not collecting details of caste identity at the decennial census operation. According to the Counsel a massive exercise is rendered useless for the all important work of identification of Backward Classes.

72. It is further submitted that the entire identification of backward classes has not been done on the basis of 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. 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 give 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.

73. 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 the Draft Article 3(4) stated:

Un-touchability is abolished and its practice thereof is punishable by the law of the Union.

74. 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 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.

75. 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 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 the Moily Report - Case studies from four States.

76. The main challenge in these writ petitions is the constitutional validity of the Act 5 of 2007. This legislation was passed by Parliament consequent upon The Constitution (Ninety-Third Amendment) Act, 2005, by which Sub-article (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.

(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 in so far as such special provision relate to their admission to the educational institutions, including private educational institutions whether aided or unaided by the State other minority educational institutions referred to in Clause (1) of Article 30.

77. T.M.A. Pai Foundation (supra) 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 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 (supra) 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.

78. 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 has been ousted by the Constitution (Ninety-Third Amendment) Act, 2005. Yet another contention urged by Shri K.K. Venugopal, learned Senior Counsel, is that Article 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 Article 15(4) and Article 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 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 Ninety-Third Amendment of the Constitution is against the 'basic structure' of the Constitution?

79. 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 in so far 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. 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 Ninety-Third Constitutional Amendment. Though the learned Counsel appearing for the petitioners have challenged the Ninety-Third Constitutional 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. We do not want to enter a finding as to whether the Ninety-Third Constitutional 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 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 Ninety-Third Constitutional 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 Ninety-Third Constitutional 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. 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 Sub-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 Ninety-Third Constitutional Amendment is constitutionally valid so far as it relates to the state maintained institutions and aided educational institutions.

80. 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 (supra). This case was a decision of 13 Judge Bench of this Court. Though the Judges were not unanimous about what the 'basic structure' of the Constitution be, however, Shelat J. (at page 280) in his judgment had indicated the following basic features of the Constitution:

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 the 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.
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.

81. Sikri, CJ (at page 165-166) held that:

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) Republication 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.

82. The power of Parliament to amend the Constitution also was 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's case (supra) overruled the decision in I.C. Golak Nath v. State of Punjab, (supra). Kesavananda Bharati 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 the 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, CJ, 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 these limits Parliament can amend every article. Shelat & Grover JJ. (at p 291) concluded that :

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.

83. Hegde & Mukherjee, JJ. finally concluded (at p 355) that:

The power to amend the Constitution under Article 368 as it stood before its amendment empowered the 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.... 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.

84. Ray J. (as he then was) (at p 461) held that:

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 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 in-essential features of the Constitution to raise any impediment to amendment of alleged essential features.

85. Palekar, J. (at p. 632) concluded that:

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). 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.

86. Khanna, J. (at p. 758, 759) concluded that:

The power to amendment under Article 368 does not include power to abrogate the Constitution nor does it include the power 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.

87. Mathew, J. (at p. 857) held that:

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 organized. That limitation flows from the language of the article itself.

88. Beg, J. (at p. 886) held that:

The majority view in Golak Nath's case (supra), holding that Article 13 operated as a limitation upon the powers of Constitutional amendment found in Article 368, was erroneous.

He upheld the 24th Amendment and the 25th Amendment Act including addition of Article 31C.

89. Dwivedi, J finally concluded that:

The word 'amendment' in Article 368 is broad enough to authorize the varying or abridging each and every provision of the Constitution, including Part III. There are no inherent and implied limitations of the amendment power in Article 368

90. Finally, Chandrachud, J. (at p. 1000) held that:

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.

91. A survey of the conclusions reached by the learned Judges in Kesavananda Bharati's case (supra) 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 RE : The Berubari Union and Exchange of Enclaves, Reference under Article 143(1) of the [Constitution of India](#) : [1960]3SCR250 , to the effect that preamble to the Constitution was not part of the Constitution was disapproved in Kesavananda Bharati's case (supra) 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 analysis of the decisions in Kesavananda Bharati's case (supra) 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's case (supra) 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.

92. 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.

93. 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. It may be noticed that the majority in *Kesavananda Bharati's case* (supra) 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 30(1)(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. Equality is a multi-coloured 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 Article 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 in so far as it implicates the question of constitutional identity.

94. The observations made by Mathew, J in *Smt. Indra Gandhi v. Raj Narain* : [1976]2SCR347 are significant in this regard:

To be a basic structure it must be a terrestrial concept having its habitat within the four corners of the Constitution.' 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 realize, 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 the basic structure has to be woven.

95. 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 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 Constitutional 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's case (supra) at page 240 are relevant:

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 crisis 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 fossilized but remains flexible enough to meet the newly emerging problems and challenges.

96. 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.

97. 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 Ninety-Third Constitutional 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 Ninety-Third Constitutional 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?

98. The next contention raised by the petitioner's Counsel is that Article 15(4) and 15(5) are mutually exclusive and contradictory. The Counsel for the petitioner, particularly the petitioner in Writ Petition (C) No. 598 of 2006, submitted that Article 15(4) was a provision and a source of legislative power for the purpose of making reservation 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. And Article 15(4) was inserted after the decision of this Court in Champakam Dorairajan (supra) 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 neutralizing the exclusion of SCs & STs from the mainstream of society and development for centuries.

99. It is argued by petitioners' learned Counsel that Article 15(4) and 15(5) both commence with an exclusionary clause excluding the operation of the rest of the Article 15, and hence would result in a conflict to the extent of inconsistency. According to the petitioners', 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 petitioner's 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 15(4) and thus non-operative.

100. Both Article 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's case (supra). In Unni Krishnan (supra), 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, (supra), it was held that the right to establish and running educational institutions is an occupation within the meaning of Article 19(1)(g). The scope of the decision in T.M.A. Pai Foundation's case was later explained in P.A. Inamdar's case, (supra). 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 Article 15(4) and 15(5) operate in different areas. The 'nothing in this Article' [mentioned at the beginning of Article 15(5)] would only mean that the nothing in this Article which prohibit the State on grounds which are mentioned in Article 15(1) alone be given importance. Article 15(5) does not exclude 15(4) of the Constitution. It is a well settled principle of constitutional interpretation that while interpreting the provisions of 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 the 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) and 15(5) have to be examined on the basis of provisions contained in such legislation or the special provision that may be made under Article 15(4) and 15(5). It may also be noticed that no educational institutions or any aggrieved party have come before us challenging the constitutional amendment on these grounds. The challenge is made by petitioners objecting to the reservations made under Act 5 of 2007. Therefore, the plea that Article 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 (supra) and Indra Sawhney's case (supra), Article 15(4) and 16(4) are not exceptions to Article 15(1) and Article 16(1) but independent enabling provision. Article 15(5) 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 Constitution?

101. Another contention raised by the petitioner's 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 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 Article 15(4) and 15(5) are operative and the plea of non-severability is not applicable.

102. Learned Senior Counsel Dr. Rajeev Dhavan and learned Counsel Shri Sushil Kumar Jain appearing for the petitioners contended that the Ninety-Third Constitutional 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 Constitutional Amendment followed the procedure prescribed under Article 368 of the Constitution?

103. Another contention raised by the petitioner's Counsel is that the Ninety-Third Constitutional Amendment is invalid as it violates the proviso to Article 368 of the Constitution. According to the petitioner's Counsel, the procedure prescribed under the proviso to Article 368 was not followed in the case of the Ninety-Third Amendment. According to the petitioner's 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.

104. This contention of the petitioner's Counsel has no force. The powers of the Parliament and the State legislatures to legislate are provided for under Article 245-255 of the Constitution. Under the proviso to Article 162, any matter with respect to which the legislature of the State and the 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 Ninety-Third Constitutional Amendment does not expressly or impliedly take away any such power conferred by Article 162. It may also be noticed that by virtue of the 42nd Amendment to the Constitution, 'education' which was previously in Entry No. 11 in List II was deleted and inserted in List III as Entry No. 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 Ninety-Third Constitutional Amendment as it does not interfere with the power of the State under Article 162. The Ninety-Third Constitutional Amendment does not fall within the scope of proviso to Article 368. Therefore, the plea raised by the petitioner's Counsel that the Ninety-Third Constitutional Amendment did not follow the prescribed procedure of Article 368 is not correct and the plea is only to be rejected.

5. Whether the 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?

105. The next important plea raised by the petitioner's Counsel is regarding the validity of the Act 5 of 2007. The several contentions have been raised regarding the validity of the Act 5 of 2007. The first contention which was raised by the petitioner's Counsel that this Act is ex-facie unconstitutional and is a suspect legislation and violative of the Article 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 petitioner's 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 petitioner's Counsel, is illegal. Reference was made to a series of decisions of this Court on this issue.

106. 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's case* (supra), 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.

107. Reference to the earlier decisions is necessary because serious doubt has been raised as to whether 'caste' could be the basis for recognizing backwardness. Some of the earlier decisions have stated that caste should not be a basis for recognizing backwardness and gradually there was a shift in the views and finally, in *Indra Sawhney's* case (supra), it was held that caste could be the starting point for determining the socially and educationally backward classes of citizen.

108. In *Champakam Dorairajan* (supra), 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 is opposed to the Constitution and is in violation of the 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 constitutional amendment by which Article 15(4) was added to the Constitution.

109. The next important case is *M.R. Balaji and Ors. v. State of Mysore* (supra). 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 Scheduled Castes and 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). 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:

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).

110. 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.

111. In R. Chitralekha's case (supra), 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 the 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. Suba Rao, J. (as he then was), speaking for the majority, held that a classification of backward classes based on economic conditions and 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 recognized 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 a 'class' can 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.

112. *Minor P. Rajendran v. State of Madras and Ors.* : [1968]2SCR786 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. Justice Wanchoo, held that:

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* 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)

113. 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 caste was upheld by the

Constitution Bench and held to be not violative of Article 15(1).

114. In *Triloki Nath Tiku v. State of J & K (I)* : (1967)11LLJ271SC , 50% of the gazetted posts were to be filled up by promotion in favour of the Muslims of Jammu & 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(II)* (supra), the court observed that the expression 'backward class' is not used as synonymous with 'backward caste'.

115. In *Minor A. Peerikaruppan v. State of Tamil Nadu and Ors.* (supra), this Court made reference to the earlier decisions especially in *M.R. Balaji* case (supra) and *R. Chitrlekha* case (supra). Hegde, J., at paragraph 29, observed:

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.

116. The learned Counsel for the petitioners also made reference to *State of Uttar Pradesh and Ors. v. Pradip Tandon and Ors.* : [1975]2SCR761 wherein Chief Justice Ray observed at paragraph 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 and State of A.P. v. Sagar* this Court held that classification of backwardness on the basis of castes

would violate both Articles 15(1) and 15(4).

117. Another important decision is that of *State of Kerala and Anr. v. N.M. Thomas and Ors.* (supra), wherein the constitutional validity of Rule 13-AA of the Kerala State & Subordinate Services Rules was under challenge. The Rule gave exemption of 2 years to members belonging to Scheduled Castes and 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 Scheduled Castes and 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 a '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.

118. In *K.C. Vasanth Kumar v. State of Karnataka* (supra) the question of identifying socially and educationally backward class came up for consideration. Desai, J., elaborately considered this question in paragraph 20 and observed:

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 labeled socially and educationally backward. This over- simplified 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.

119. Chinnappa Reddy, J., also dealt with the question elaborately and observed:

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 homosapiens 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 tyrannized by the ubiquitous caste system, a unique and 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 'out-castes' 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.

120. Reference was also made to other decisions, namely, State of Andhra Pradesh and Anr. v. P. Sagar : [1968]3SCR595) and T. Devadasan v. The Union of India and Anr. : (1965)IILLJ560SC . 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. After a careful examination of the various previous decisions

of this Court, in *Indra Sawhney* (supra), while examining the validity of the 'Backward Class List' prepared by the Mandal Commission, Jeevan Reddy. J., speaking for the majority, held as under:

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 v. State of Madras* 3 13 related to specification of socially and educationally backward classes with reference to castes. The question was whether such an identification infringes Article 15. Wanchoo, CJ, speaking for the Constitution Bench dealt with the contention in the following words: (SCR p. 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 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).... 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 petitioners/appellant 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.

121. 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's case* (supra), 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 law 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.

122. The learned Counsel for the petitioner contended that caste cannot be used even as one of the criteria for identifying the 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's case (supra) it was held at para 17 that:

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.

123. 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. In paragraph 779 of Indra Sawhney's case, it is stated:

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.

124. '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.

125. The observations made by Venkataramaiah J. in K.C. Vasanth Kumar case are relevant in this regard:

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 inter-marry 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. (p. 110)

126. Rivers, the leading anthropologist, criticizes the use of the terms 'caste' and 'class' as synonyms⁸. However, many others, such as Lowie⁹ and Kimball Young¹⁰, use these terms as though they were identical.

127. Very common is the use of the word caste to indicate hereditary status. Cecil Clare North¹¹, the noted sociologist, accepts the point of view that degrees of rigidity mark the difference between class and caste systems. His definition reads:

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.

128. North concludes by saying that the term 'caste' applies to classes that have become fixed, and that all such classes tend to become castes.

129. MacIver¹², 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.

130. 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'.

131. However, there are other sociologists who are of the opinion that the Caste system has a hereditary function also. Charles Horton Cooley¹³ opines that:

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

132. Therefore, according to the early sociological theories, the term 'caste' has been used to mean 'class', hereditary or rigid status, and hereditary occupation.

133. The Mysore Census of 1901¹⁴ is quoted, in this connection, as follows:

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 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.

134. 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.

135. 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.

136. In India, caste, in a socio-organizational manner would mean that it is not characterized merely by the physical or occupational characteristics of the individuals who make it up; rather, it is characterized 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.

137. 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 organizational control. Thus the manner in which the caste is closed both in the organizational 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.

138. In a caste, however, the social distance between members is due to the fact that they belong to entirely different organizations. It may be said, therefore, that a caste is a horizontal division and a class, a vertical division.

139. 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.

140. 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 finalized 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.

141. 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.

142. 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?

143. The 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.

144. 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's case 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 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.

145. 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 parent 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 counter productive 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.

146. 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 categorization of Backward Classes and sub classifying them so as to ensure that under each category only similarly circumstanced castes are grouped together. The categorization of backward class has successfully worked in 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 5 categories and separate reservations have been provided. And in the State of Andhra Pradesh, Backward Classes have been divided into 4 divisions and separate percentage of reservation has been provided.

147. 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 noticed in Indra Sawhney's case 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.

148. In Indra Sawhney's case (supra) Jeevan Reddy, J., has observed:

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.

149. 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 Article 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.

150. 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 the SEBC is poverty. If that be so, the principle of exclusion of 'creamy layer' is necessary. Moreover, the majority in Indra Sawhney's case 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's case, 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 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.

151. Sawant, J. also made observation in Indra Sawhney's case to ensure removal of 'creamy layer'. He observed:..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 birth mark - 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 tap up all the special benefits to the exclusion and to the cost of the rest in those classes, thus keeping

the rest in perpetual backwardness.

152. 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 para-meters for determining the 'creamy layer' group

153. After the decision in Indra Sawhney's case (supra), the Government of India, Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training) issued an Office Memorandum dated 08.09.1993 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---

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 the 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 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) xxx xxx xxx(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) xxx xxx xxx3. xxx xxx xxx SCHEDULE

Description of category

I. Constitutional Posts

To whom rule of exclusion will apply

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

A. Group A/Class I Officers of the All India Central and

Son(s) and daughter(s) of

(a) parents, both of whom are Class I Officers;

State Services (Direct Recruits)

(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 five 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 five 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 five 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 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 No. 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 Human management consultant, dental surgeon, engineer, architect, computer specialist, film artists and other film professional, author, playwright, sports persons, 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 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 only irrigated land which is equal to or more than 85 per cent of the statutory Area; or

(a) 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 per cent 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 per cent exists, 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 per cent 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 land holding 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. Criteria specified in Category VI below will apply.

C. Vacant land and/or buildings, in urban areas or urban agglomerations

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 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.

154. 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. 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 SEBC 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.

155. 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'.

8. Whether the 'creamy layer' principle is applicable to Scheduled Tribes and Scheduled Castes ?

156. 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 Justice Krishna Iyer in N.M. Thomas's case (supra) and also from the observations made in Nagaraj's case and reference was made to paragraphs 80, 110 and 120 to 123 of Nagaraj's case (supra).

157. N.M. Thomas's case (supra) does not state that 'creamy layer' principle should apply to SCs and STs. In K.C. Vasanth Kumar's case (supra) the 'creamy layer' was used in the case of backward caste or class. In K.C. Vasanth Kumar (supra) p. 733, Desai J. quoted from N.M. Thomas (supra) as follows:

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 (supra) p. 363, para 124)

158. In Nagaraj's case (supra) in paragraph 80, it is stated that while '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 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's case (supra) and earlier in M.G. Badappanavar and Anr. v. State of Karnataka and Ors. (2001) 2 SCC 666; Ajit Singh and Ors. (II) v. State of Punjab and Ors. : AIR 1999 SC3471 and Union of India and Ors. v. Virpal Singh Chauhan and Ors. : AIR 1996 SC448 Virpal Singh Chauhan's case (supra) dealt with reservation of railway employees wherein it is 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. Ajit Singh II's case (supra) 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 promotion is obtained by way of reservation, the consequential seniority will not be counted. M.G. Badappanavar's case (supra) followed the cases of Ajit Singh II (supra) and Virpal Singh (supra).

159. In none of these decisions it is stated that the 'creamy layer' principle would apply to SCs and STs. In Indra Sawhney's case (supra), it is specifically stated that the 'creamy layer' principle will not apply to STs and SCs. In Nagaraj's case (supra) , in paragraphs 110 and 120 and finally in paragraphs 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's case (supra) 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's case are contrary to the decision in Indra Sawhney's case (supra).

160. 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 are relevant in this regard. The learned Judge observed as under:

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.

161. 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 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 decisions, 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* (supra), concurring with the majority judgment, S.B. Sinha, J. said:

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)

162. A plea was raised by the respondent-State that categorization of Scheduled Castes could be justified by applying the 'creamy layer' test as used in Indra Sawhney's case (supra) which was specifically rejected in paragraph 96 of the E.V. Chinnaiah's case (supra). It is observed:

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.

163. 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 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 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](#)

164. Based on the Ninety-Third Constitutional 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.

165. 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 and Ors. v. The State of Madhya Pradesh and Anr. : [1955]2SCR589 and A.S. Krishna v. State of Madras : 1957 CriLJ409

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 and Ors. v. State of Bihar and Anr.* : (1962)ILLJ294SC , it was observed '-

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.

166. In *Kesavananda Bharati* : AIR 1973 SC1461 case 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:

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 nearly 200 years, cannot be used to persuade this Court to apply their approach in determining the cases arising under our Constitution.

167. 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 14th Amendment to the U.S. 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.

168. 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 minimize 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 Article 16(1) and 15(1) respectively. This view was held in *The General Manager Southern Railways v. Rangachari* (supra) at p. 607 and *M.R. Balaji v. State of Mysore* (supra) at 455.

169. In *T. Devadasan* (supra) at 700 (supra), Subba Rao J., gave a dissenting opinion wherein he held that Article 16(4) was not an exception to Article 16(1). He observed:

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.

170. In two other subsequent decisions, i.e. in *Triloki Nath (I)* (supra) at 104 and *T. Devadasan* case (supra), it was held that article 15(4) and 16(4) are exceptions to Article 15(1) and 16(1) respectively. But a 7-Judge Bench in *State of Kerala v. N.M. Thomas* (supra) held that Article 15(4) and 16(4) are not exceptions to Article 15(1) and 16(1) respectively. Fazal Ali J., said:

This form of classification which is referred to as reservation, is in my opinion, clearly covered by Article 16(4) of the 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.

171. This brought out a drastic change in the view of this Court. In *K.C. Vasanth Kumar v. State of Karnataka* (supra) at 800, Venkatramaiah J. observed:

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 corner-stone 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.

172. 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 Directive 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 book¹⁵, 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.

173. 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. In *Champakam Dorairajan's case* (supra), 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 : *In Re. Kerala Education Bill*, 1957 1959 SCR 995; *Minerva Mills* (supra))

174. In *Minerva Mills* : [1981]1SCR206 (supra) Bhagwati, J observed:

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 every one, 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 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.

175. 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 recognized. In *Dred Scott v. Saunders* 60 US 393 (1856) wherein Chief Justice Taney 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 the Chief Justice Taney continued for a long time and after the Civil War, the 14th amendment was enacted in 1868 and this amendment gave (equal protection of laws to all persons). In *Plessy v. Ferguson* 163 US 537 (1896) 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. Several affirmative actions were challenged and the landmark decision of *Brown v. Board of Education* 347 US 483 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* (supra) 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 practiced 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.

176. The 14th 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 are challenged before the United States Supreme Court on grounds that have been recognized 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 practicing these affirmative action programmes have to adhere to a very high standard of proof, which we know as the 'strict scrutiny' test.

177. The case of *Regents of the University of California v. Bakke* 438 US 265 (1978) 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 recognized 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 the case of *City of Richmond v. J A Croson Co.* 488 U.S. 469 (1989), the United States Supreme Court held that if a university is able to show 'some showing of prior discrimination' in its existing affirmative action program 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 scrutinizing 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's Case(supra) p. 492-93)

2. Diversity- All affirmative action programmes aimed at bringing about racial diversity among the scholarship of the institution(s) may be said to in furtherance of compelling institutional interest. The starting point for this ground is Justice Powell's detailed opinion regarding the issue of diversity in the case of *Regents of the University of California v. Bakke* (supra) at 311-313 (supra). In this case, according to Justice Powell, '[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* (1957) 354 US 234 at 263 and *Keyishian v. Board of Regents* (1967) 385 US 589 at 603] and observed:[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.

178. 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 program 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.

179. 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.

180. 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.

181. 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 the case of *Grutter v. Bollinger* (supra) , '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. Peña* (1995) 515 US 200 at 227).

182. 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'.

183. 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 program is narrowly tailored and serves only the most compelling of interests. Thus, the bar for the State or institution that practices affirmative action programmes based of 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.

184. 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 the 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 Chaudhari v. Union of India* : AIR 2004 SC361 . Speaking for the bench, V.N. Khare, CJI, said:

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.

185. 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 'compellable State necessity' to enact this legislation cannot be accepted.

10. Whether delegation of power to the Union Government to determine as to who shall be the backward class is constitutionally valid?

186. 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 their being proper guidelines is illegal as it amounts to excessive delegation. According to the learned Counsel for the petitioners, the 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 the Act 5 of 2007. '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 the 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?

187. 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 power section so that each member 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. 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 the 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. The Parliament can certainly review the situation and even though a specific class of citizens is in the legislation, it is the constitutional duty of the 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 the 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?

188. 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 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 the 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 under Article 46 is only giving education upto 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.

189. 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 Abhiyanm' (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 & training, carrying out civil works in school buildings, additional class rooms, distribution of free text books 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. Drop out 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. 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?

190. The main contention of the petitioner's 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 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.

191. A legislation passed by the Parliament can be challenged only on constitutionally recognized grounds. Ordinarily, grounds of attack of a legislation is whether the legislature has legislative competence or whether the legislation is ultra vires of 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 and Ors. v. Union of India and Ors.* : [1978]1SCR1 at p. 660 said:

if a question brought before the Court is purely a politically 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.

192. 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.

193. The quantum of reservation provided under the Act 5 of 2007 is based on the detailed facts available with the Parliament. Various commissions have been in operation determining as to who shall form the SEBCs. Though a caste-wise census is not available, several other data and statistics are available. In the case of Indra Sawhney (supra), the Mandal Commission was accepted in principle though the details and findings of the commissions were not fully accepted by this Court. 27% of reservation in the matter of employment was accepted by this Court. 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. The 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.

Questions:

1. Whether the Ninety-Third Amendment of the Constitution is against the 'basic structure' of the Constitution?

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. (Paragraph 79)

2. Whether Articles 15(4) and 15(5) are mutually contradictory, hence Article 15(5) is to be held ultra vires?

Article 15(5) is constitutionally valid and Articles 15(4) and 15(5) are not mutually contradictory.

(Paragraph 100)

3. Whether exclusion of minority educational institutions from Article 15(5) is violative of Article 14 of Constitution?

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.

(Paragraph 102)

4. Whether the Constitutional Amendment followed the procedure prescribed under Article 368 of the Constitution?

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.

(Paragraph 103)

5. Whether the 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?

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.

(Paragraph 142)

6. Whether 'Creamy Layer' is to be excluded from SEBCs?

'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.

(Paragraph 152)

7. What should be the para-meters for determining the 'creamy layer' group?

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 08.09.1993 may be applied. And the definition of 'Other Backward Classes' under Section 2(g) of the 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.

(Paragraphs 153 and 155)

8. Whether the 'creamy layer' principle is applicable to Scheduled Tribes and Scheduled Castes?

'Creamy Layer' principle is not applicable to Scheduled Castes and Scheduled Tribes.

(Paragraph 163)

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?

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.

(Paragraphs 184)

10. Whether delegation of power to the Union Government to determine as to who shall be the backward class is constitutionally valid?

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.

(Paragraph 186)

11. Whether the Act is invalid as there is no time limit prescribed for its operation and no periodical review is contemplated?

The 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.

(Paragraph 187)

12. What shall be the educational standard to be prescribed to find out whether any class is educationally backward?

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.

(Paragraph 189)

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?

27% of seats for other backward classes is not illegal and the Parliament must be deemed to have taken into consideration all relevant circumstances when fixing the 27% reservation.

(Paragraph 193)

These Writ Petitions are disposed off 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 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. 112/2007 in Writ Petition (C) No. 265/2006, no orders are required. It is dismissed.

Dr. Arijit Pasayat and C.K. Thakker, JJ.

1. 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. It has been emphatically highlighted by the petitioners that when the ultimate objective is classless and casteless in 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. On the epicenter of challenge is the Central Educational Institutions (Reservation in Admission) Act 2006 (in short the 'Act') and the 93rd Amendment to the [Constitution of India](#), 1950 (in short the 'Constitution'). Interestingly, both the petitioners and the respondents rely strongly on certain observations made by this Court in *Indra Sawhney v. Union of India* 1992 (Suppl. 3) SCC 217 (commonly known as 'Indra Sawhney No. 1')

2. 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.

3. Arguments have been advanced by both the sides as to whether 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 castes. 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 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.

4. 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 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 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.

5. 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 No. 1. They are: The State of Madras v. Sm. Champakam Dorairajan and Anr. : [1951]2SCR525 , Minor A Peeriakaruppan v. Sobha Joseph : [1971]2SCR430 , The State of Andhra Pradesh and Ors. v. U.S.V. Balram, etc. : [1972]3SCR247 ,

Shri Janki Prasad Parimoo and Ors. v. State of Jammu and Kashmir and Ors. : [1973]3SCR236 , State of Uttar Pradesh and Ors. v. Pradip Tandon and Ors. : [1975]2SCR761 , State of Kerala and Anr. v. N.M. Thomas and Ors. : (1976)ILLJ376SC , Kumari K.S. Jayashree and Anr. v. The State of Kerala and Anr. : [1977]1SCR194 , K.C. Vasanth Kumar and Anr. v. State of Karnataka 1985 (Supp) SCC 714 and Indra Sawhney v. Union of India and Ors. MANU/SC/0771/19 99 (known as Indra Sawhney No. 2).

6. Two recent decisions have also been highlighted by the parties. They are M. Nagaraj and Ors. v. Union of India and Ors. : AIR 2007 SC71 and Nair Service Society v. State of Kerala : AIR 2007 SC2891 . 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 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.

7. 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.

8. The other issue which was hotly contested related to the exclusion of the creamy layer.

9. 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. It is pointed out that in Indra Sawhney No. 1 (supra) 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 over-jealous 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 down trodden. 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 down trodden. 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 Rajeev Gandhi who was the leader of opposition at an earlier point of time, the 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 opposition, have done summersault and were saying just the opposite. It is pointed out that when one member Shri P.C. Alexandar 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. It is also submitted that the objectivity and sanctity of the report submitted in the 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.

10. 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 the 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 criticize 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 be not only undesirable but imperatively avoidable. The citizens of this country expect a great deal from the 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 Association of India v. Union of India and Ors.* : [1994]209ITR877(SC) , and *K. Nagaraj and Ors. v. State of Andhra Pradesh and Anr.* : (1985)ILLJ444SC . In *State of Mysore v. R.V. Bidap* : (1973)ILLJ418SC , it was observed as follows:

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. Willes, J. in *Miller v. Tayler* [1769] 4 Burri, 2303, 2332., 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 Company Ltd. v. I.R.C.* [1935] A.C. 445 at p. 458, Lord Writ in the Privy Council said:

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 the State of Travancore- Cochin and Ors. v. Bombay Company Ltd., Alleppey AIR 1952 S.C. 366, Chief Justice Patanjali Sastri delivering the judgment of the Court, said:

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 22 Ind. Appl. 107 (P.C.) at p. 118. The reason behind the rule was explained by one of us in Gopalan v. State of Madras : 1950 CriLJ1383 thus :

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 process 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 Association (1897) 169 U.S. 290 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 Canada and Australia-see Craies on Statute Law, 5th Edn. p. 122 (pp. 368-9).

11. 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.

12. Crawford on Statutory Construction at page 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* : 1950 CriLJ1383 . 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 from a reliance on the Constituent Assembly proceedings or the broad purposes of the statutory scheme.

13. 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.

14. 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. It has been rightly contended by Mr. Vahanvati and Mr. Gopal Subramaniam that there is a conceptual difference between the cases decided by the American Supreme Court and the cases at hand. In *Saurabh Chaudri and Ors. v. Union of India and Ors.* : AIR 2004 SC361 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 14th Amendment to the American Constitution as was noted in *State of West Bengal v. Anwar Ali Sarkar* : 1952 CriLJ510 and *State of Bombay and Anr. v. F.N. Balsara* 1952 SCR 682. In *Anwar Ali's case* (supra) at pages 363 and 364 it was noted as follows:

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 hide-bound 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?

99. 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 a sovereign democratic republic as seen through Indian eyes. There was 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 Ordinances promulgated in haste because of what was then felt to be the urgent necessities of the moment. Without casting the slightest reflection of the judges and the Courts so constituted, the fact remains that when these tribunals were declared invalid and the same persons were retired 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.

100. 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 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.

15. It needs no emphasis that the formal equality concept came to be recognized in U.S.A. after about 10 years of its inception. In the first phase of the U.S.A. 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 Scheduled Castes and Scheduled Tribes. A distinction has been noted in para 640 of *Indira Sawhney No. 1*. 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 minimize the inequalities in income. The Constitution from its inception contained Article 17 which abolishes untouchability.

16. In this context the following paras need to be noted.

17. In *Minerva Mills Ltd. and Ors. v. Union of India and Ors.* : [1981]1SCR206 in para 63 it was held as follows:

63. The learned Attorney General argues that the State is under an obligation to take steps for promoting the welfare of the people by 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 the 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.

18. In *His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and Anr.* : AIR 1973 SC1461 it was held as under:

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 the 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 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.

19. In *Sajan Singh v. Maharashtra Sugar Mills Ltd.* : [1965]1SCR933 it was held as follows:

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 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* [1924] A.C. 328, the Privy Council was called upon to consider the validity of the Reciprocal Insurance Act, 1922 (12 & 13 Geo. 5, Ont., c. 62) and Section 508c which had been added to the Criminal Code of Canada by Sections 7 & 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* [1881] 7 AC 96; its 'pith and substance' : *Union Colliery Co. of British Columbia Ltd. v. Bryden* [1899] A.C. 580; 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 ss. 91 and 92 the legislation falls; and for this purpose the legislation must be 'scrutinised in its entirety' : '*Great West Saddlery Co. v. The King*' [1921] 2 A.C. 91, 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 31A and 31B 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 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.

20. In *Kihoto Hollohan v. Zachillhu and Ors.* : [1992]1SCR686 it was observed as follows:

61. The propositions that fell for consideration in *Sankari Prasad Singh's* and *Sajjan Singh's* 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 paragraph 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 have been invoked or would, but for Paragraph 7, have operated there is 'in effect' a change in those provisions attracting the proviso. Indeed this position was recognised in Sajjan Singh's case (supra) where it was observed:

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 cases, though the amendment does not bring in any change directly in the language of Article 136, 226 and 227 of the Constitution, however, in effect paragraph 7 curtails the operation of those Articles respecting matters falling under the Tenth Schedule. There is a change in the effect in Article 136, 226 and 227 within the meaning of Clause (b) of the proviso to Article 368(2). Paragraph 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 (52nd Amendment) Act, 1985, in so far as it seeks to introduce the Tenth Schedule in the [Constitution of India](#), the provisions of Paragraph 7 of the Tenth Schedule of the constitution in terms and in effect bring about a change in the operation and effect to 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 Sub-article (2) of Article 368 of the [Constitution of India](#).

21. In *Shri Sarwan Singh and Anr. v. Shri Kasturi Lal* : [1977]2SCR421 it was observed as follows:

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 in 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 *Shri Ram Narain v. Simla Banking & Industrial Co. Ltd.* : [1956]1SCR603 competing statutes being the Banking Companies Act, 1949 as amended by Act 52 of 1953, and the Displaced Persons (Debts Adjustment) Act, 1951. Section 45A of the Banking Companies Act, which was introduced by the amending Act of 1953, and Section 3 of the Displaced Persons Act 1951 contained such 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:

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 14A and Chapter IIIA 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 14A and Chapter IIIA having been enacted with effect from December 1, 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 February 28, 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 14A and Chapter IIIA 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 Shri Ram Narain's case at page 615.

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 *protanto*. 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 14A and Chapter IIIA of the Rent Control Act must prevail over those contained in Sections 19 and 39 of the Slum Clearance Act.

22. In *J.K. Cotton Spinning and weaving co. Ltd. v. State of U.P. and Anr.* : (1961)ILLJ540SC it was observed as under:

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* 1859-53 ER 1032 (quoted in Craies on Statute Law at p. 205, 5th Edition) Romilly, M. R. mentioned the rule thus: 'The rule is, that whenever 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* (1858) 28 L.J. Ch. 598, *Churchill v. Crease* (1828) 5 Bing. 177, *United States v. Chase* (1889) 135 U.S. 255 and *Carroll v. Greenwich Ins. Co.* (1905) 199 U.S. 401.

23. In *R.M.D. Chamarbaugwalla v. UOI* 1957 SCR 930 it was held as under:

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 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, ss. 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, Chap. 16 and Sutherland on Statutory Construction, 3rd Edn, Vol. 2, Chap. 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 Company Limited [1914] A.C. 237 and Attorney-General for Alberta v. Attorney-General for Canada L.R. [1947] A.C. 503. It was approved by the Federal Court in In Re Hindu Women's Rights to Property Act and adopted by this Court in The State of Bombay and Anr. v. F. N. Balsara [1951] S.C.R. 682 and The State of Bombay v. The United Motors (India) Ltd. and Ors. : [1953]4SCR1069 . These decisions are relied on by Mr. Seervai as being decisive in his favour. Mr. Palkhiwala disputes this position, and maintains that on the decision of the Privy Council in Punjab Province v. Daulat Singh and Ors. [1946] F.C.R. 1 and of the decisions of this Court in Romesh Thappar v. State of Madras : 1950 CriLJ1514 and Chintaman Rao v. State of Madhya Pradesh : [1950]1SCR759 , the question must be answered in this favour. We must now examine the precise scope of these decisions.

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 invalidity of the statute arises by reason of its subject-matter being outside the competence of the legislature or by reason of its provisions contravening constitutional prohibitions.

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. 176-177.

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. 360-361; *Crawford on Statutory Construction*, pp. 217-218.

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. 218-219.

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- 362); 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 provisions therein.

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- 178.

24. In *AIIMS Students Union v. AIIMS* : AIR 2001 SC3262 it was observed as follows:

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 resume thereof noticing the details wherever necessary'³.

It was again highlighted in para 44 as follows:

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 post-graduate 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.

25. A bare reading of the provision goes to show that the burden is on the person who justifies deviation from equality.

26. Even then, this doctrine was upheld by the Supreme Court of U.S.A. in *Plessy v. Ferguson* 163 U.S. 537(1896). 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. 163 U.S. at 552

27. He held that racial segregation was a reasonable exercise of State police power for the promotion of the public good and upheld the law.

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 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.

30. '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'.

31. The origin of this standard can be traced to the decision in *United States v. Carolene Products* 304 U.S. 144 (1938). 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. However, he added what has been described as 'the most celebrated footnote in constitutional law'.

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.

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.

33. The precise term 'strict scrutiny' was used by the Court for the first time in *Skinner v. Oklahoma* 316 U.S. 535 (1942). 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'. The question before the Court was whether this statute violated the 14th Amendment. Holding that it did, Justice Douglas observed:

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 guarantee of just and equal laws.

34. 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.

35. 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 and Ors. v. Union of India and Ors.* : [1960]2SCR375 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* 438 U.S. 265.

36. Some of the judgments of American Courts throwing light on the controversy need to be noted:

37. In *Allan Bakke's* case (supra) it was held as follows:

Hence, the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of 'societal discrimination' does not justify a classification that imposes disadvantages upon persons like 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* 334 US, at 22, 92 L Ed 1161, 68 S Ct 836, 3 ALRd 441. 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. Petitioner has failed to carry this burden.

38. In *Grutter v. Bollinger* 539 U.S. 306 it was held as follows:

[21, 22a] 'We acknowledge that 'there are serious problems of justice connected with the idea of preference itself.' *Bakke*, 438 US, at 298, 57 L Ed 2d 750, 98 S Ct 2733 (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, 57 L Ed 2d 750, 98 S Ct 2733. 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* 497 Us 547, 630, 111 L Ed 2d 445, 110 S Ct 2997 (1990) (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*, *supra*, at 317, 57 L Ed 2d 750, 98 S Ct 2733 (opinion of Powell, J). As Justice Powell recognized in *Bakke*, 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...is qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.' 438 US, at 318, 57 L Ed 2d 750, 98 S Ct 2733. [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 nonminority 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* 539 US 342 466 US 429, 432, 80 L Ed 2d, 421, 104 s Ct 1879 (1984). 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 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*, 514 US 549, 581, 131 L Ed 2d 626, 115 S Ct 1624 (1995) (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.* 488 US, at 510, 102 L Ed 2d 854, 109 S Ct 706 (plurality opinion); see also Nathanson & Bartnik. *The Constitutionality of Preferential Treatment for Minority Applicants to Professional Schools*, [539 US 343] 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.

39. 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.

40. Although even under the 1919 and 1935 Government of India Acts the rights of certain class of people like Scheduled Castes, Scheduled Tribes and the deprived classes have been recognized, in America, the rights have been conferred on individuals and 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 Subramaniam 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.

41. In Thomas's case (*supra*) it was clearly noticed by this Court that American conditions do not apply adequately for the Indian scenario. Unlike U.S.A., the targeted beneficiaries are alien to our Constitution. In India cognizance has 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.

42. In *A.K. Roy v. Union of India* : 1982 CriLJ340 it was noted as follows:

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.

43. One of the grey areas focused 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 No. 1 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 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.

44. The ultimate object is to bring those who are disadvantaged to a level where they no longer continue to be dis-advantaged. 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.

45. 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.

46. The necessary ingredients of equality essentially involve equalization of unequals. Linked with this question the problem posed by the petitioners is whether reservation is the only way to equalize 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.

47. Learned Counsel for the respondents have stated that the measures under challenge are nothing but a much

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