

Indra Sawhney

Vs

Union of India and Others

IAS Nos. 35-36 in WPs (C) No. 930 of 1990 with Nos. 699 and 727 of 1995,

IA No. 2 of 1999, IAs Nos. 8 and 9 in WP (C) No. 699 of 1995

(M. Jagannadha Rao, D. P. Wadhwa, M. B. Shah JJ)

13.12.1999

JUDGMENT

M. JAGANNADHA RAO, J.:-

1. The cases in this batch raise common issues relating to the identification of "creamy layer" among the backward classed in the State of Kerala and the implementation of the law declared and directions issued in *Indra Sawhney v. Union of India*¹. The State of Kerala took time for implementation of the directions in *Indra Sawhney*¹ for appointment of a Commission for the purpose of identifying the Commission or to proceed with the implementation. *Indra Sawhney*¹ was decided in 1992. For more than three years the state of Kerala did not implement the judgment. This court by its order dated 10-7-1995 held (in IAS Nos. 35 and 36 filed by the State for extension of time etc.) that the State of Kerala, represented by its Chief Secretary was guilty of contempt but gave a further opportunity to the State to purge the contempt and adjourned the matter to 11-9-1995. It was made clear that if the directions of this court were not complied with, the Chief Secretary would "run the risk of being sentenced". Having sought time for years to appoint a commission, the Kerala Legislature then suddenly came forward with the Kerala State Backward Classes (Reservation of Appointments or Posts in the Services Under the State) Act, 1995 which, in Section 3 declared that "having regard to known facts in existence in the State of Kerala, that there are no socially advanced sections in any backward classes who have acquired *capacity to compete* with forward classes" and that the backward classes in the State were not "*adequately represented*" in the services under the State and they would continue to be entitled to reservation under clause (4) of Article 16 of the constitution. The provisions of Section 4 continued the existing system of reservation which was in force as per rules made in 1958 and Section 6 was incorporated as a validating section with retrospective effect. On the ground that the provisions of this Act of 1995 were discriminatory and violative of Articles 14 and 16 of the Constitution, WP No. 727 of 1995 was filed by one K. Ramaswamy, belonging to Elavami community of Kerala (a backward community) to declare the provisions of the Act as unconstitutional and violative of Articles 14 and 16 of the Constitution of India. Some IAs were filed by intervenes to support one or the other of the rival groups. The Act was passed on 2-9-1995 but was given retrospective effect from 2-10-1992.

2. As the State Government failed to appoint a Commission as directed in *Indra Sawhney*¹ this Court, by an elaborate order dated 4-11-1996 deemed it necessary to appoint a High-Level Committee to gather the necessary information regarding "creamy layer" and requested the Chief Justice, Kerala High court, to appoint a retired Judge of the High court to be the Chairman of the High-Level committee. The chairman of the Committee, it was held, could induct not more than 4 persons as

members from various walks of life "to identify the creamy layer among the designated backward classes" in the State of Kerala in the light of the ruling of this Court in *Indra Sawhney*¹ and forward its report to the Supreme Court within three months. This court directed the State Government to extend cooperation to the above committee. This court also directed that the OM of the Government of India dated 8-9-1993 (Ministry of Personnel, Public Grievances and Pensions) where the Central government laid down guidelines for identification of the creamy layer, be placed before the High Level committee "For use and guidance" in identifying the "creamy layer" among the other backward classes in the State of Kerala.

3. Accordingly, the Chief Justice of the High Court of Kerala nominated Shri Justice K.J. Joseph, as Chairman of the High-Level committee. The other members of the committee were Shri O.C. Vincent, IAS, Shri K.P. Mohammed, Advocate, Shri K. Aravindaksha Menon, retired district and Sessions Judge and Shri K. Asokan, retired Director of Public Relations. The said committee, after a public notification, received evidence and gave opportunity of hearing to various individuals, communities etc. and submitted its Report dated 4-8-1997 to this Court identifying the "*creamy layer*" in the backward classes of Kerala State. Thereafter, objections were filed in this court by various parties to the said Report and that is how the matter has come before us.

4. We do not propose just now to decide further course of action in the sou motu contempt proceedings in which the State of Kerala represented by its chief Secretary was held guilty of contempt and was given time to purge the contempt. We make it clear that that issue is kept pending and the matter will be processed later, on the basis of the judgment in this case and the directions which we propose to issue at the end of this judgment.

5. We have heard arguments of Shri Gopal Subramaniam, learned Senior Counsel as amicus curiae and of Shri K.K. Venugopal, learned Senior Counsel who contended that Kerala Act 16(1) and 16 of 1995 was unconstitutional and violative of Articles 14, 16(1) and 16(4). We heard Shri P. Krishnamoorthi, learned Senior counsel for the State of Kerala and Shri Rajeev Dhavan, learned Senior counsel for the SNDP Yogam, Shri A.N. Rajan Babu, Shri E.M.S. Anam, Ms Lily Thomas and Shri V.J. Francis and others who contended that the Act was a valid piece of legislation Shri K.N. Raval, Additional solicitor General stated that the Central Government stood by the OM already issued.

6. The issues which presently arise before this court are as follows:

- (1) What is the law declared and what are the directions give in *Indra Sawhney*¹ in regard to "creamy layer" in the context of Articles 14 and 16?
- (2) Can the declaration of law in regard to "creamy layer" in the context of Articles 14 and 16 in *Indra sawhney*¹ and in other rulings be containing a statutory declaration whose effect is to say that no "creamy layer" exists in the state of Kerala?
- (3) Are the provision of Sections 3, 4 and 6 of the Kerala State Backward classes (Reservation of Appointments or Posts in the Services) Act (Act 16 of 1995) violative of Articles 14 and 16 of the Constitution of India?
- (4) Whether the violation of Article 14 (and Article 16) amounts to violation of the basic structure of the Constitution of India?
- (5) If the provisions of Sections 3, 4 and 6 of Kerala Act 16 of 1995 are to be struck

down, is the Report of the High-Level committee headed by Justice K.J. Joseph to be accepted and are there any valid objections to the Report?

(6) If Sections 3, 4 and 6 of Kerala Act 16 of 1995 are to be struck down and the High-Level Committee Report of Justice K.J. Joseph is accepted, what further directions are to be issued to the State of Kerala?

7. Our Constitution is wedded to the concept of equality and equality is basic feature. Under Article 15(2), there is a prohibition that the State shall not discriminate against any citizen on the grounds only of religion, race, caste, sex and place of birth or any of them. It is equally true that ours is a caste-ridden society. Still, it is a constitutional mandate not to discriminate on the basis of caste alone. Provisions can be made for the upliftment of socially and educationally backward classes, Scheduled Castes or Scheduled Tribes or for women and children. Article 16(4) empowers the States for making any provision for reservation in appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. Reservation is permissible (i) in favour of any backward class of citizens; and (ii) if it is not adequately represented in services under the State.

8. Caste only cannot be the basis for reservation. Reservation can be for a backward class citizen of a particular caste. Therefore, from that caste, the creamy layer and the non-backward class of citizens are to be excluded. If the caste is to be taken into consideration then for finding out the socially and economically backward class, the creamy layer of the caste is to be eliminated for granting benefit of reservation, because that creamy layer cannot be termed as socially and economically backward. These questions are exhaustively dealt with by a nine-Judge Bench of this Court in *Indra Sawhney v. Union of India*¹ and it has been specially held that "only caste" cannot be the basis for reservation.

9. Inclusion of castes in the list of backward classes cannot be mechanical and cannot be done without adequate relevant data. Nor can it be done for extraneous reasons. Care should be taken that the forward castes do not get included in the backward castes list. In *Indra Sawhney*¹ Pandian, J. observed (SCC p. 408, para 174) that before a conclusion is drawn that a caste is backward or is inadequately represented in the services,

"the existence of circumstances relevant to the formation of opinions is a sine qua non. If the opinion suffers from the vice of non-application of mind or formulation of collateral grounds or beyond the scope of statute, or irrelevant and extraneous material, then that opinion is challengeable"

Sawant, J. (see para 539 of SCC) too pointed out the need for proper application of mind to the facts and circumstances, the field, the post and the extent of existing representation and the need to balance representation. On behalf of himself and three others, Jeevan Reddy, J. pointed out (para 798 SCC) that opinion in regard to backwardness and inadequate representation must be based on relevant material. The scope of Judicial scrutiny even with regard to matters relating to subjective satisfaction are governed by the principles stated in *Barium Chemicals Ltd. V. Company Law Board*², Likewise, periodic examination of a backward class could lead to its exclusion if it ceases to be socially backward or if it is adequately represented in the services. Once backward, always backward is not acceptable in the services. Once backward, always backward is not acceptable. In any case, the "creamy layer" has no place in reservation system.

10. If forward classes are mechanically included in the list of backward classes or if the creamy layer among backward classes is not excluded, then the benefits of reservation will not reach the really backward among the backward classes. Most of the benefits will then be knocked away by the forward castes and creamy layer. That will leave the truly backward, backward forever. Jeevan Reddy, J. while delivering the majority judgment, inter alia, held as under[⊙] SCC pp. 717 and 718, paras 783 and 784)

"If the real object is to discover and locate backwardness, and if such backwardness is found in a caste, it can be treated as backward; if it is found in any other group, section or class, they too can be treated as backwards.

* * *

Reservation is not being made under clause (4) in favour of a ♦ caste ♦ but a backward class. Once a caste satisfies the criteria of backwardness, it becomes a backward class for the purposes of Article 16(4)."

11. In para 796, Jeevan Reddy, J. has summarised the discussion under Question 3 and, inter alia, as under: (SCC p. 727)

"A caste can be and quite often is a social class in India. If it is backward socially, it would be a backward class for the purposes of Article 16(4) ♦ Identification of the backward classes can certainly be done with reference to castes among, and along with other groups, done with reference to castes among, and along with other groups, classes and sections of people. One can start the process with the castes, wherever they are found, apply the criteria (evolved for determining backwardness) and find out whether it satisfies the criteria. If it does- what emerges is a ♦ backward class of citizens within the meaning of and for the purposes of Article 16(4). Similar process can be adopted in the case of other occupational groups, communities and classes so as to cover the entire populace. The central idea and classes in society, Since caste represents an existing, identifiable social group/class encompassing an overwhelming majority of the country ♦s population, one can well begin with it and then go to other groups, sections and classes."

The court further considered in para 800 and held as under[⊙] SCC pp. 728-29)

"While answering Question 3(b), we said that identification of backward classes can be done with reference to castes along with other occupational groups, communities and classes. We did not say that is the only permissible method. Indeed, there may be some groups or classes in whose case caste may not be relevant to all. For example, agricultural labourers, rickshaw-pullers/drivers, street-hawkers etc. May well qualify for being designated as backward classes.

12. We shall next proceed to the question relating to "creamy layer".

13. In *Indra Sawhney*¹ on the question of exclusion to "creamy layer" from the backward classes, there was agreement among eight out of the nine learned Judges of this court. There were five separate judgements in this behalf which required the "creamy layer" to be identified and excluded.

14. The judgment of Jeevan Reddy, J. was rendered for himself and on behalf of three other learned Judges, Kania, C. J. and M. N. Venkatachaliah, A.M. Ahmadi, JJ. (as they then were). The said judgment laid emphasis on the relevance of caste and also stated that upon a member of the backward class reaching an "advanced social level or status", he would no longer belong to the backward class and would have to be weeded out. Similar views were expressed by Sawant, Thommen, Kuldip Singh, and Sahai, JJ. in their separate Judgments.

15. It will be necessary to refer to and summarise briefly the principles laid down in these five separate judgments for that would provide the basis for decision on Points 2 to 5.

16. While considering the concept of "means-test" or "creamy layer" which signifies imposition of an income limit, for the purpose of excluding the persons (from the backward class) whose income is above the said limit, in para 791, the Court has noted that counsel for the States of Bihar, Tamil Nadu, Kerala and other counsel for the respondents strongly opposed any such distinction and submitted that once a class is identified as a backward class after applying the relevant criteria including the economic one, it is not permissible to apply the economic criterion once, it is not permissible to apply the economic criterion once again and sub-divide a backward class into two sub-categories. The Court negated the said contention by holding that exclusion of such (creamy layer) socially advanced members will make the "class" a truly backward class and would more appropriately serve the purpose and object of clause (4).

17. Jeevan Reddy, J. dealt with the "creamy layer" under Question 3(d) (paras 790, 792, 793, of SCC) and under question 10 (paras 843, 844). This what the learned Judge declared: there are sections among the backward classes who are highly advanced, socially and educationally and they constitute the forward section of that community. These advanced sections do not belong to the true backward class. They are (para 790) "as forward as any other forward class member".

"If some of the members are far too advanced Socially (with 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."(SCC p. 724, para 792).

(emphasis supplied)

The learned judge said: (SCC p. 724, para 792)

"After excluding them alone, would the class be a compact class. In fact, such exclusion benefits the truly backward."

(emphasis supplied)

A line has to be drawn, said the learned judge, between the forward in the backward and the rest of the backward but it is to be ensured that what is given with one hand is not taken away the other. The basis of exclusion of the "creamy layer" must *not be merely economic, unless* economic

advancement is so high that it necessarily means social advancement, such as where a member becomes owner of a factory and is himself able to give employment to others. In such a measure of his social status. In the case of agriculturists, the line is to be drawn with reference to the agricultural landholding. While fixing income as a measure, the limit is not to be such as to result in taking away with one hand what is given with the other. The income limit must be such as to mean and signify social advancement. There are again some offices in various walks of life-the occupants of which can be treated as socially advances, *without further inquiry*", such as IAS and IPS officers or others in All India Services. In the case of these persons, their social status in society rises quite high and the person is no longer socially disadvantaged. Their children get full opportunity to realise their potential. They are in no way handicapped in the race of life. Their income is also such that they are above want. It is but logical that children of such persons are not given the benefits of reservation. If the categories or sections above-mentioned are not excluded, the truly disadvantaged members of the backward class to which they belong will be deprived of the benefits of reservation. The Central Government is, therefore, directed (para 793) to identify and notification, the "creamy layer" within the backward class shall :cease" to be covered by the reservations under Article 16(4). Jeevan Reddy, J. finally directed (see Question 10) that the exclusion of the creamy layer must be on the basis of social advancement and not on that basis -the "creamy layer" within a given caste, community or occupational group is to be excluded to arrive at the true backward class. There is to be constituted a body which can go into these questions as follows: SCC p. 757, para 847)

"We direct that such a body be constituted both at Central level and at the level of the States within four months from today ❖❖ There should be a periodic revision of these lists to Exclude those who have ceased to be backward or for inclusion of new classes, as the case may be."

(emphasis supplied)

The creamy layer [see para 859, sub-para (3)(d)] can be, and must be excluded. Creamy layer has to be excluded and "economic criterion" is to be adopted as an indicium or measure of social advancement [para 860, sub-para (5)]. The socially advances aspersions must be excluded [para 861(b)]. That is how Jeevan Reddy, J. Reddy, J. summarised the position.

18. Sawant, J. too accepted (p.553 of SCC) that "at least some individuals and families in the backward classes,- however small in number, - gain sufficient means to develop *capacities to compete* with others in every field. That is an *undeniable fact*".(emphasis supplied) Social advancement is to judged by the "capacity to compete" with forward castes, achieved by the members or sections of the backward classes. Legally, therefore, these persons or sections who reached that level are not entitled any longer to be called as part of the backward class, whatever their original birthmark. Taking out these "forwards" from the "backwards" is "obligatory" as these persons have crosses the Rubicon (pp. 553-54). On the crucial question as to what is meant by "capacity to compete", the learned Judge explained (para 522) that if a person moves from class IV service to Class III that is no indication that he has reached such a stage of social advancement but if the person has successfully competed for "higher level posts" or at least "near those levels", he has reached such a state.

19. Thommen, J. (paras 287, 295, 296, 323) observes that if some members in a backward class acquire the necessary financial strength to raise themselves, the Constitution does not extend to

theme the protection of reservation. The creamy layer has to be "weeded out" and excluded, if it has attained a "certain predetermined economic level".

20. Kuldip Singh, J. (para 385) referred to the "affluent" section of the backward class. Comparatively "such (sic rich) persons in the backward class- thought they may not have acquired a higher level of education-are able to move in the society without being discriminated socially". These persons practice discrimination against others in that group who are comparatively less rich. It must be ensured that these persons do not "chew up" the benefits meant for the true backward class. "Economic ceiling" is to be fixed to cut off these persons from the benefits of reservation. In the result, the "means test" is imperative to skim off the "affluent" sections of backward classes.

21. Sahai, J. (para 629) observed that the individuals among the collectivity or the group who may have achieved a "social Status" or "*economic affluence*", are disentitled to claim reservation. Candidates who apply for selection must be, made to disclose the annual income of their parents which if it is beyond a level, they cannot be allowed to claim to be part of the backward class. What is to be the limit must be decided by the State. Income apart, provision is to be made that wards of those backward classes of persons who have achieved a particular Status in society, be it political or economic or if their parents are in higher services then such individuals must be precluded from availing the benefits of reservation Exclusion of "creamy layer" achieves a social purpose. Any legislative or executive action to remove such persons individually or collectively cannot be constitutionally invalid.

22. As appears from the judgements of six out of the eight judges, viz. Jeevan Reddy (for himself and three others), Sawant and Sahai, JJ. (i.e. six learned judges out of nine), -they specifically refer to those in higher services like IAS, IPS and All India Services or near about as persons who have reached a higher level of social advancement and economic status and therefore as a matter of law, such persons are declared not entitled to be treated as backward. They are to be treated as creamy layer "without further inquiry", Likewise, persons living in sufficient affluence who are able to provide employment to others are to be treated as having reached a higher social status on account of their affluence, and therefore outside the backward class. Those holding higher levels of agricultural landholdings or getting income from property, beyond a limit, have to be excluded from the backward classes. This, in our opinion, is a judicial "*declaration*" made by this Court.

23. The submission of Shri Rajeev Dhavan for the SNDP Yogam that the above separate judgments contain mere illustrations and do not contain any declaration of law cannot, in our opinion, be accepted. Counsel also relied upon observations in the judgment of Jeevan Reddy, J. to the effect that in such a big country as ours, norms may differ from State to State or from region to region. In our view, those observations do not detract from the declaration of law that the above sections belong to the creamy layer and hence are to be kept outside the backward class. We may add that some more categories of persons who can be said to have gone outside the creamy layer are those "broad categories" enumerated in the notification of the central government dated 8-9-1993 pursuant to *Indra Sawhney*¹ and the said broad categorisation has been accepted by this Court in *Ashoka Kumar Thakur v. State of Bihar*³ as valid. With respect, we are in entire agreement with the principles laid down in *Ashoka Kumar Thakur*³.

24. We may point out that the identification of creamy layer in every backward class is in fact based upon horizontal division of every section of the backward class into creamy layer or non-creamy layer. For example, there are a dozen-named backward classes and each have a vertical percentage of quota in the reservation, they can be arranged in a vertical distribution one after the other (see

para 812 of *Indra Sawhney*¹ referring to vertical and horizontal divisions), and the separate and the aggregate quota meant for them can be spelled out. But in each of these named backward classes listed one below the other, it is not difficult to make horizontal divisions of those belonging to (I) constitutional offices, (ii) particular service, (iii) professions, (iv) industry and trade, (v) particular income level, creamy layers in each vertical sub-classification of backward class and say that the children of such persons in these horizontal sub-divisions of the backward classes will be the creamy layer and therefore outside the backward classes. This is not a difficult exercise. It is also important to notice that such a horizontal division based on such norms will be applicable not only to those in the backward classes Presently falling under the norm but the norms or limits so set would also be applicable to those reaching that level in the future. Maybe, as stated in the notification of the Central Government dated 8-9-1993 issued pursuant to *Indra Sawhney*¹ the income levels may have to be reasonable upgraded periodically to set off inflation. Subject to such a reasonable revision in the norms, if any periodically, the norms whether laid down by the Central government or the State Governments must apply not only for the immediate present but also for the future. This, in our view, was the declaration of law made in *Indra Sawhney*¹ and in *Ashoka Kumar Thakur*³ in relation to identification and exclusion of the creamy layer.

25. So far as the directions in *Indra Sawhney*¹ are concerned, they are that the Central and State Governments are obliged to create separate bodies which will identify the creamy layer in the backward classes within a time frame. Point 1 is decided accordingly.

26. These two points are crucial to the case. Under these points, we shall now deal with the validity of the Kerala Act (Act 16 of 1995).

(i) *Equals and unequals, twin aspects*

27. As the "creamy layer" in the backward class is to be treated "on a par" with the forward classes and is not entitled to benefits of reservation, it is obvious that if the "creamy layer" is not excluded, there will be discrimination and violation of Articles 14 and 16(1) inasmuch as equals (forwards and creamy layer of backward Classes) *cannot be treated unequally*. Again, non-exclusion of creamy layer will also be violative of Articles 14(1), 16(1) and 16(4) of the constitution of India since unequals (the creamy layer) *cannot be treated as equals*, that is to say, equal to the rest of the backward class. These twin aspects of discrimination are specifically elucidated in the judgment of Sawant, J. where the learned Judge stated as follows (SCC p. 553, para 520)

"[T]o continue to confer upon such advances sections ❖❖. Special benefits, would amount to treating *equals unequally*❖❖. Secondly, to rank them with the rest of backward classes would ❖.. amount to treating the *unequals equally*. (emphasis supplied)

Thus, any executive or legislative action refusing to exclude the creamy layer from the benefits of reservation will be violative of Articles 14 and 16(1) and also of Article 16(4). We shall examine the validity of Sections, 3, 4 and 6 in the light of the above principle.

(ii) *Validation*.

28. The question of validation arises in the context of Section 6 of the Act. It is true that whenever legislative or executive action is declared as being violative of the provisions of Part III of the Constitution, it will be permissible for the executive or the legislature to remove the defect which is

the cause for discrimination prospectively and which defect has been pointed out by the Court. The defect can be removed retrospectively too by legislative action and the previous actions can also be validated. But where there is a mere validation with retrospective effect, without the defect being legislatively removed with retrospective effect, the legislative action will amount to overruling the judgment of the courts by way of legislative fiat and will be invalid as being contrary to the doctrine of separation of powers.

29. In the context of the law laid down in *Indra Sawhney*¹ and in *Ashoka Kumar Thakur*³ if the legislature of any State does not take steps to remove the defect or to effectively and realistically remove the defect or effectively and realistically remove the defect to exclude the "creamy layer" from the backward classes then the benefits of reservations which are invalidly continued in favour of the "creamy layer" cannot be declared retrospectively valid merely by a legislative declaration that such creamy layer is absent as done by Section 3 of the Kerala Act. Nor can it be done by means of the validating provision contained in Section 6 of that Act. The creamy layer principle laid down in *Indra Sawhney*¹ cannot be ignored as done by Section 6 of the said Act. We shall elaborate these aspects later. If under the guise of elimination of the "creamy layer", the legislature makes a law which is not indeed a true elimination but is seen by the Court to be a mere cloak, then the Court will necessarily strike down such a law as violative of the principle of separation of powers and of Articles 14, 16(1) and Article 16(4).

(iii) *Ashoka Kumar Thakur*³ - a case of unrealistic elimination but Central Government's OM dated 8-9-1993 approved

30. Such a case of unrealistic elimination of the creamy layer came up before this court from Bihar and Uttar Pradesh and we shall refer to the same. This happened in *Ashoka Kumar Thakur v. State of Bihar*³ already referred to. There the position was that unrealistically high levels of income or holding or other conditions were prescribed by the legislatures of Bihar and Uttar Pradesh under the Bihar Reservation of Vacancies in Posts and Services (Amendment) Ordinance, 1995 (5 of 1995) and Scheduled II read with Section 3(b) of the U.P. Public Services Reservation for Scheduled Castes and Scheduled Tribes and Other Backward classes Act, 1994 (Act 4 of 1994) respectively. In that case, so far as Bihar was concerned, Schedule III (except clause I) of the Bihar ordinance and so far as U.P. was concerned, Schedule II read with Section 3(b) of the U.P. Act were therefore quashed by this court, on the ground of discrimination.

31. While dealing with these Acts, this Court referred to the fact that pursuant to *Indra Sawhney*¹ the Government of India had appointed a Commission presided over by a retired judge of the High Court of Patna and on the basis of the Report of the Commission, it had issued an office memorandum dated 8-9-1993 designation

- A. children of holders of *constitutional posts* like
 - a. President of India;
 - b. Vice-President of India;
 - c. Judges of the Supreme Court and High Courts;
 - d. Chairman and Members of UPSC and State Public Service Commission, Chief Election commissioner, comptroller and Auditor General of India;
 - e. Persons holding constitutional positions of like nature;
- A. *service category*: children of
 - a. parents, Group A/Class I officers of All-India Central Services and State Services (direct recruits) where both or one of the parents are Class I officers, subject to

- certain conditions;
- b. children of Group B/Class II officers of the Central and State Services (direct recruitment), subject to certain condition;
 - c. children of employees of public sector undertakings, banks, insurance organisations, universities etc. and comparable posts and positions under private employment;
 - d. children of members of armed forces and paramilitary forces;
 - A. *professional Category*: children of those in professional class or those engaged in trade and industry beyond a particular income limit;
 - B. *property- owners* (agricultural holdings), plantations, vacant land or buildings in urban areas or urban agglomerations holding property beyond a particular extent as being outside the backward classes.

In respect of the above, para VI of the Schedule to the OM dated 8-9-1993 gave the gross annual income limits of rupees 1 lakh and above, subject to upward modification of the limits every 3 years etc. Various other conditions were also imposed. Care was taken by the OM to see that none from the creamy layer could escape the net of exclusion from the backward classes. This Court, in *Ashoka Kumar Thakur*³ after referring to the above guidelines, observed that the criteria fixed in the OM were "in conformity with the law laid down by this court in *Mandla case*¹" and that the Court had no hesitation in approving the said criteria as being reasonable. In the light of the criteria so approved, this Court considered the Validity of the Bihar and U.P. Legislatures were: contrary to the guidelines laid down by this Court in *Mandal Case*¹" as they would not result in the elimination of the creamy layer. It was pointed out that the conditions laid down by the States of Bihar and U.P. had no "nexus" with the object sought to be achieves. Since the conditions were not severable, the criteria laid down in each of the legislation as a whole were struck down. The Court held: (SCC p. 421, para 17)

"The backward class under Article 16(4) means the class which has no element of creamy layer in it. It mandatory under Article 16(4)- as interpreted by this court- that the *State must* identify the creamy layer in a backward class and thereafter by excluding the class which remains after such exclusion." (emphasis supplied)

The Court observed that the States of Bihar and Uttar Pradesh had acted in a wholly arbitrary fashion and in utter violation of the law laid down in *Mandal case*¹. However, the principle of prospective overruling was invoked. The States were directed to lay down fresh criteria and *till then* it was directed that the criteria laid down in the Central Government's OM dated 8-9-1993 were to apply in Bihar and Uttar Pradesh. We are in entire agreement with the views expressed in *Ashoka Kumar Thakur*³.

(iv) *The validity of the Kerala Act*

32. We shall now take up the question as to the validity of the law enacted by the Kerala Legislature. It will be seen that the Kerala Legislature followed a somewhat different rout to allow the creamy layer to continue to unlawfully enjoy the benefits of reservation meant for backward classes. We shall refer initially to provisions contained in the six sections of Kerala Act 16 1995:

"1. *Short title, extent and commencement.* - (1) This Act may be called the Kerala the Kerala State Backward Classes (Reservation of Appointments or Posts in the Service Under the State) Act, 1995.

(2) It extends to the whole of the State of Kerala.

(3) Section 5t of this Act shall be deemed to have come into force on the 12th day of March, 1993 and the remaining provisions of this Act shall be deemed to have come into force on the 2nd day of October, 1992.

2. *Definitions.* - In this Act, unless the context otherwise requires, -

(a) ♦Commission♦ means the Kerala State Commission for Backward Classes constituted under Section 3 the Kerala State Commission for Backward Classes Act, 1993 (11 of 1993).

(b) ♦Backward classes♦ means such backward classes of citizens (other than Scheduled Castes and Schedule Tribes), as specified by the Government from time to time, and included in List III of the Schedule to part I of the Kerala State and Subordinate Services Rules, 1958 framed under Article 309 of the Constitution;

(c) ♦Government♦ means the government of Kerala.

(d) ♦State♦ means the State of Kerala.

3. *Declaration.* - It is hereby declared, having regard to know facts in existence in the State-

- a. that there are no socially advanced sections in any backward classes who have acquire capacity to compete with forward classes; and
- b. that the backward classes in the State are still not adequately represented in the services under the State and they continue to be entitled in the services under the State and they continue to be entitled to reservation under clause (4) of Article 16 the Constitution.

4. *Reservation of appointments or posts in the services under the State.* -

Notwithstanding anything contained in any law or in any judgment, decree or order of any court or other authority having regard to the social and educational backwardness of the backward classes of citizens, the system of reservations as in force on the date of commencement of this Act, as laid down in Rules 14 to 17 of Part II of the Kerala State and Subordinate Services Rules, 1958, in appointments and posts in the services under the State for the backward classes of citizens shall continue as such, for the present.

5. *Additional function of the Commission.* - The Commission shall, in addition to the functions already conferred under the Kerala State Commission for Backward classes Act, 1993 (11 of 1993) evaluate from time tot time the degree of backwardness of the backward classes, and shall submit periodical reports to the legislative Assembly of the State.

6. *Validation.* - Notwithstanding anything contained in any judgment, decree or order of any court or other authority, the reservation of appointments or posts in the services under the state for the backward appointments or posts in the services under

the State for backward classes of citizens made on the basis of the system of reservation as laid down in Rules 14 to 17 of part II of the Kerala state and Subordinate Services Rules, 1958, shall, for all purposes, be deemed to be and to have always been validly made, in accordance with law, as if this Act had been in force at all material times when such reservations had been made."

(v) Events leading to the passing of the Kerala Act of 1995

33. It will be useful to note of events which led to the passing of the above Act. (Some of these events are set out in the long Preamble to the Act.) On account of the inaction of the State of Kerala- in spite of extensions of time in implementing *Indra Sawhney*¹- in appointing a commission to identify the creamy layer, this court felt "vexed" and issued contempt notice on 20-4-1995. Pursuant to that notice on 10-7-1995, the State of Kerala filed an affidavit stating that it had already passed Kerala Act 11 of 1993 on 17-4-1993 appointing a commission which could go into this issue but that the said Commission stated that it had no jurisdiction to go into the question of the "creamy layer" as per the provisions in that Act of 1993. The affidavit then stated that the matter was referred again to the Commission on 13-10-1993, a meeting took place on 10-5-1994, that the Commission again refused to identify the creamy layer, that a Bill was then contemplated to amend Kerala Act 11 of 1993 to confer powers on the said Commission to go into this issue as well, that in the meantime, the State constituted the Justice Khalid Committee on 8-7-1995.

34. In our opinion, these events were set out in the above affidavit filed by the chief Secretary only to ward off any penal action for contempt of this unsatisfactory and this Court held, in its order dated 10-7-1995, that the State of Kerala represented by its chief Secretary had acted in "willful disobedience" of the orders of this court and that it had committed contempt of court. This Court granted time till 11-9-1995 to the State of Kerala to purge itself of the contempt. It appears that there was then a Cabinet meeting on 13-7-1995, that thereafter it was decided on 14-7-1995 that a Standing Committee should go into the question but that instead, it was suddenly, decided on 27-7-1995 that the "existing system be continued". Then Act 16 of 1995 was passed on 31-8-1995 to give effect to that decision. The Act received the assent of the Governor on 2-9-1995 and became effective retrospectively from 2-10-1992, thus allowing existing reservations to continue with full force. In effect no creamy layer was identified. As per clause (a) of Section 3 of the Act it was declared that no section of any backward class in the State of Kerala had acquired capacity "to Compete with forward classes" ♦. As per clause (b), it was stated that backward classes were still not adequately represented in the public services of the State. Section 4, therefore, continued the 1958 scenario of backward classes without excluding the creamy layer and Section 6 spoke of retrospective validation.

(vi) Legislative declaration of facts is amenable to scrutiny by court

35. Before we go into the validity of clauses (a) and (b) of Section 3, it is necessary to find out if the legislative declaration of "known facts" in Section 3 of the Act is amenable to judicial scrutiny.

36. It is now fairly well settled that legislative declarations of facts are not beyond judicial scrutiny in the constitutional context of Articles 14 and 16. In *Kesavananda Bharati v. State of Kerala*⁴ the question arose ♦ in the context of legislative declarations made for purposes of Article 31-C ♦ whether the court was precluded from lifting the veil, examining the facts and holding such legislative declarations as invalid. The said issue was dealt with in various judgments in that case,

e.g. judgements of Ray, J. (as he then was), Palekar, Khanna, Mathew, Dwivedi, JJ., and Beg, J and Chandrachud, J. (as they then Were) (see summary at pp. 304-L to O in SCC). The learned Judges held that the courts could lift the Veil and examine the position in spite of a legislative declaration. Ray, J. (as he then was) observed: (SCC Headnote)

"The court can *tear the veil* to decide the real nature of the statute if the facts and circumstances warrant such a course.

* *

*

A conclusive declaration would not be permissible so as to defeat a fundamental right. (emphasis Supplied)

Palekar, J. said that if the legislation was merely a *pretence* and the object was discrimination, the validity of the statute could be examined by the court notwithstanding the declaration made by the legislature and the learned Judge referred to Charles Russell v. R.⁵ and to *Attorney General v. Queen Insurance Co.*⁶ Khanna, J held that the declaration could not preclude judicial scrutiny. Mathew, J. held that the declaration could not preclude judicial Scrutiny. Mathew, J. held that the declaration were amenable to judicial scrutiny. If the law was passed only "ostensibly" but was in truth and substance, one for accomplishing an unauthorises object, the court, it was held, would be entitled to tear the veil. Beg, J. (as he then was) held that the declaration by the legislature would not preclude a judicial examination. Dwivedi, J. said that the courts retain the power in spite of Article 31-C to determine the correctness of the declaration. Chandrachud, J. (as he than was) held that the declaration could not be utilised as a cloak to evade the law and the declaration would not preclude the jurisdiction of the courts to examine the facts.

37. This being the legal position, this court could certainly examine whether the So-called "known facts" referred to in Section 3 were indeed non-existent.

(vii) Clause (a) of Section 3- did the Kerala Legislature have any facts before it to say in effect that there was no creamy layer

38. Clause (a) of Section 3 states that according to "known facts" the backward classes in the state were not having the capacity to compete with forward classes i.e. in effect, there is no creamy layer in the Kerala State.

39. But Aldous Huxley said:

"Facts do not cease to exist because they are ignored◆."

(A note on Dogmas)

The words in clause (a) of Section 3 are obviously drawn from the judgment of Sawant, J. in *Indra Sawhney*¹ which refers to "capacity to compete with forward classes".

40. We shall, therefore, have to examine whether the legislative declaration in Section 3 of the Act that there is, in effect, no creamy layer in the State of Kerala is one made by ignoring facts which do exist. We shall now refer to various facts and circumstances as they exist to disprove the statement

made in Section 3 of the Act:

(a) Kerala State initially requested this Court for extension of time to appoint a Commission to identify the creamy layer. It, in fact, created a statutory commission by Kerala Act 11 of 1993 and asked the said Commission constituted under that Act to go into the above question. The commission, it is true, refused to go into this question stating that it had no jurisdiction to go into the said question under that Act.

(b) Again, even as late as 8-9-1995, the State of Kerala did feel the need to identify the "creamy layer" and it appointed the Justice Khalid Committee. But within three weeks, suddenly on 27-7-1995, there was a volt face and it was decided "*to continue the existing system*" of reservations with full force without excluding the creamy layer. It is obvious and is not denied that between 8-7-1995 and 27-7-1995, the State gathered no fresh material to compel the State to abandon the idea and to suddenly turn around and declare that there was, in effect, no "creamy layer" in the State of Kerala.

(c) Further, in the Affidavit dated 16-7-1995 filed by the Chief Secretary of Kerala in this Court-a few days before the Act was passed on 31-8-1995-it was more or less *admitted* that there was a "creamy layer" among the backward classes in the State of Kerala. The following paragraph from that affidavit is significant:

"Reservation in appointments for the public service for socially and educationally backward classes has been in operation in this State for the last about 40 years, and all members of the other backward classes, irrespective of the fact *whether individuals among them are socially advanced or not*, are enjoying the benefit"

The underlined words, in our view, contain an admission as to the existence of a creamy layer, to the knowledge of the state Government.

(d) In addition, the doubts, if any, in this behalf are set at rest by the findings contained in the Report of the High-Level Committee headed by Justice K.J. Joseph (to which we shall refer in detail under Points 4 and 5). That Report shows that there is a creamy layer in the backward classes of the State of Kerala and it is not difficult to identify the same.

(e) We may again point out that, as a matter of law, it is clear that six out of nine Judges in *Indra Sawhney*¹ made a *judicial declaration* as stated under Point 1, as to the class of persons who would belong to the creamy layer. This declaration of law made by this Court is clearly applicable to the state of Kerala also. The Kerala Legislature cannot, in our opinion, refuse to accept this declaration of law nor can it declare anything to the contrary.

In the judgment of six learned Judges in *Indra Sawhney*¹ as stated earlier, there is a specific declaration of law that the children of IAS, IPS and other All India services in the backward classes are the creamy layer and this is true "without further inquiry". These persons are to be deemed, in law and, in fact, to have reached such a level of social advancement that they cease to belong to the backward class. The

judgment also refers to a classification of "affluent " sections identified by way of income or property-holding.

(f) Further, in *Ashoka Kumar Thakur*³ it was held as a matter of law that certain broad categories mentioned in the OM of the Central Government dated 8-9-1993 belong to the creamy layer. There was no answer from the State of Kerala as to the creamy layer. There was no answer from the State of Kerala as to why the same categories as mentioned in *Indra Sawhney*¹ or those mentioned in the OM as approved in *Ashoka Kumar Thakur*³ could not be declared as the creamy layer, subject to any realistic modification of the income or holding levels, if need be. It was not the State before us that these categories, which form the vertical divisions of the backward classes, (as pointed out under Point 1) were non-existent so far as Kerala State was concerned. It was not also its case that such a class of persons would not be existent in future in the backward classes of the State.

If the Kerala Government and the Kerala Legislature meant in their declaration in clause (a) Section 3 that there was, in effect, no "creamy layer" in the State of Kerala, among the notified backward classes, then they must go to the length of stating that there was none who had so far been recruited to the aforementioned services of IAS, IPS etc. or none had come within the broad categories listed in the Central Government's OM dated 8-9-1993 (i.e. constitutional functionaries, service personnel, professionals, men in business and industry or holding agriculture or urban land of those levels or nearabout), in Kerala State. In fact when this question was specifically put across to the learned Senior counsel for the State and to learned Senior Counsel for the SNDP Yogam and others, there was no answer and they could not deny the existence of the above horizontal divisions among the backward classes in Kerala.

(g) Further, the broad Categories and norms (of parents belonging to the all-India services etc. or reaching a level of income or holding), referred to above, are valid not merely for the *present* but for the *future* also. As and when, any particular member of the backward classes gets entry to IAS or IPS etc., or reaches the prescribed reasonable level of income of holding, their children will have to be treated as belonging to the creamy layer. Maybe, certain income levels have to be periodically upgraded to keep pace with inflation.

41. Surely, the Kerala Legislature cannot prophesy that none from the backward classes in the State will ever enter these services or reach these economic levels, in the near or distant *future*.

42. It appears to us therefore, from what we have stated above in sub-paras (a) to (g) that the Kerala Act had shut its eyes to realities and facts and it came forward with a declaration in clause (a) of Section 3 which, perhaps, it was mistakenly believed was not amenable to judicial scrutiny. Unfortunately, the law is otherwise.

43. In view of the facts and circumstances referred to above, we hold that the declaration in *clause (a) of Section 3* made by the legislature has no factual basis in spite of the use of the words, "known facts". The facts and circumstances, on the other hand, indicate to the contrary. In our opinion, the declaration is a mere cloak and is unrelated to facts in existence. The declaration in Section 3(a) is, in addition, contrary to the principles laid down by this Court in *Indra Sawhney*¹ and in *Ashoka*

*Kumar Thakur*³. It is, therefore, violative of Articles 14 and 16(1) of the Constitution of India. Clause (a) of Section 3 is, therefore, declared unconstitutional.

(viii) Clause (b) of Section 3- inadequate representation: Section 3(b) mixes up two different concepts

44. Clause (b) of Section 3 states that there is no adequate representation of the backward classes in the service of the State of Kerala. This is given as a reason for not excluding the creamy layer.

45. In our view, the Kerala Act has mixed up two different concepts in this clause (b) of Section 3. Article 16(4), it will be seen, is an enabling provision which permits the State to provide reservation for backward classes if, in the opinion of the state, such reservation is felt necessary and if there is inadequate representation⁷. Lack of adequate representation of a particular backward class may be a factor for consideration by the State for providing reservation. But, the said factor cannot be the sole ground for continuance of the creamy layer in that backward class. The first step no doubt is the identification of the backward class which is inadequately represented. But there is a second step also and that is the elimination of the creamy layer from the backward class. The second step cannot be mixed up with the first step nor can it be forgotten.

46. An argument was advanced by Shri Rajeev Rajeev Dhavan that once the backward class was identified by taking into account the economic criterion, it was not permissible to take that factor into account again a second time for the purpose of identifying the creamy layer. This contention, in our view, is no longer open as it was specifically rejected by Jeevan Reddy, J. In *Indra Swaheny*¹ (see para 791 of SCC) and was accepted by the majority.

(ix) Inadequate representation of backward of backward classes and efficiency of administration

47. The more important submission of Shri Rajeev Dhavan and other counsel, however is, that it may happen that if the creamy layer is eliminated at the second stage mentioned above, there may be practically no representation for a particular backward class in the public services because the remaining members i.e. the *non-creamy* layer, may not have risen to the level or standard necessary to qualify for entrance into the service, even within the reservation quota.

48. We are unable to agree with this contention. Now if the creamy layer is such a class has reached a very large percentage so as to leave only a small part of the non-creamy layer of the backward class concerned to avail the benefit of reservation, then the situation may indeed be one where the backward class concerned may itself have to be denotified. Assuming that the percentage of the creamy layer is not large enough in such a backward class but is small, and if it is the case that after elimination of the creamy layer, the standard of the non-creamy layer is not sufficient to enable its members to enter public services even within the reservation quota, then a larger and more fundamental issue arises.

49. The question is whether assuming that once the creamy layer is excluded from the backward classes the non-creamy layer in that backward class is not able to secure adequate representation even within the quota, in public services because its members are not reaching the prescribed level of qualification or standards for recruitment, -can that be a ground for non- exclusion of the creamy layer as contended by the State.

50. It is true there is no specific constitutional provision in relation to the need for maintenance of

"efficiency of administration" so far as the backward classes are concerned (such as the special provision in Article 335 in the case of Scheduled Castes and Scheduled Tribes). But such a principle of efficiency of administration is, in our opinion, equally paramount and is implied in Articles 14 and 16 of the Constitution even so far as the backward classes are concerned. In *Indra Sawhney*¹ Sawant, J. pointed out (para 434 of SCC) that while Article 16(4) is an enabling provision, Article 335 is in mandatory language, Further though there is no specific provision in regard to backward classes, the same principle underlying Article 335 is applicable to backward classes. Sawant, J. stated: (SCC p. 518, para 434)

"It cannot, however, be doubted that the *same considerations will have to prevail* while making provisions for reservation in favour of all backward classes under Article 16(4). To hold otherwise would not only be irrational but discriminatory between two classes of backward citizens." (emphasis supplied)

i.e. Scheduled Castes/ Schedule Tribes and other Backward Classes. The mere inadequate representation of a particular backward class in public services flowing as a consequence of exclusion of the creamy layer is not legally sufficient to provide or continue reservation to the creamy layer. Reservation even for backward classes can be made only if it will not undermine the efficiency of the administration in the particular department. In our view, the Constitution has not envisaged that inadequately represented backward classes are to be placed on a more favourable footing than inadequately represented Schedule Castes/ Tribes for that would offend Article 14 as between two sets of backward classes- namely the Scheduled Castes and the qualifications, standard and talent necessary for backward classes cannot be relaxed or reduced to a level which may affect the efficiency of administration.

51. In *Ajit Singh (II) v. State of Punjab*⁷ it was decided recently by the Constitution Bench as follows: (SCC p. 233, para 39)

"39. It is necessary to see that the rule of adequate representation in Article 16(4) for the backward classes ♦ do not adversely affect the efficiency in administration thus, in the matter of due representation in service for backward classes ♦..., maintenance of efficiency of administration is of paramount importance."

52. The constitutional principle that equals cannot be treated unequally and unequal cannot be treated equally based on Articles 14 and 16) 1) overrides other considerations. In fact, in *Indra Sawhney*¹ the Supreme Court itself declared that in certain departments, there is to be no reservation whatever even for backward classes.

53. Thus, assuming that, when the creamy layer is excluded, there will be inadequate representation of certain backward classes in services, that cannot be a valid reason for the continued inclusion of the creamy layer in the backward class, after *Indra Sawhney*¹.

54. For all the aforesaid reasons clause (b) of Section 3 does not provide any valid answer for not eliminating the creamy layer and must also be held to be unconstitutional and violative of Article of Articles 14, 16(1) and 16(4) of the Constitution.

55. Thus, clauses (a) and (b) of Section 3 are both declared unconstitutional.

(x) Section 4

56. We next come to Section 4 of the Act. The non obstante clause in Section 4 is obviously intended to get over *Indra Sawhey*¹ and *Ashoka Kumar Thakur*³. The crucial words of the section are "having regard to the social and educational backwardness of the backward classes" in the State of Kerala- as in force on the date of the commencement of the Act (i.e.2-10-1992).

57. Now, "backward Classes" have been defined in the Act as those referred to in Section 2(b) of the Act. That definition in its turn takes us to the enumeration of backward classes made in 1958 in List III of the Schedule to Part I of the Kerala State and subordinate Services Rule, 1958 framed under the proviso to Article 309 of the constitution. In other words, Section 4 provides for the continuance of reservation for the backward classes as they stood in 1958 ignoring the "creamy layer".

58. If indeed such continuance, as specified in Section 4, of these backward classes together with the creamy layer as was in existence in 1958 is based upon the legislative declaration in Section 3, - then once Section 3 is declared unconstitutional, Section 4 is not the basis of section 4, then the continuance of the 1958 scenario or the *pre-Indra Sawhney position*, even as late as 1995 when Section 4 was enacted, - will amount to ignoring the subsequent judgments of this Court in *Indra Sawhey*¹ rendered in 1992 and *Ashoka Kumar Thakur*³ in 1995 to the effect that the creamy layer is necessarily to be eliminated.

59. The non obstante clause in Section 4 too cannot come to the rescue of the State. As already stated, the said clause cannot override the judgements of this court based on Articles 14, 16(1) and 16(4) if the defect is not removed by legislation. Neither Parliament nor the State Legislature can make any law to continue reservation to the creamy layer inasmuch as the above judgments of this Court are based on Articles 14 and 16(1) and 16(4) of the constitution of India, and no law can obviously be made to override the provision of Articles 14 and 16(1).

60. Thus, for the aforesaid reasons, Section 4 of the act along with the non obstante clause is declare unconstitutional and violative of the judgements of this Court and also violative of Articles 14, 16(1) and 16(4) of the Constitution of India.

(xi) Section 6

61. We then come to Section 6 of the Act which deals with retrospective validation. This section again starts with a non obstante clause. Obviously, the Kerala Legislature is having *Indra Swhney*¹ and *Ashoka Kumar Thakur*³ in its mind, when it inserted the non obstante clause. Once Section 3 of the Act is held unconstitutional, the position is that the legislative declaration as to non-existence of the creamy layer goes and the existence of the creamy layer becomes a staring reality. That will mean that under the Act of 1995, the legislature has not eliminated the defect. Nor can Section 4 in this connection be of any help because that provision has also been declared as unconstitutional. Section 6 cannot stand along once Sections 3 and 4 are declared unconstitutional. As long as the creamy layer is not excluded and the defect continues, any validation- without elimination of the defect which is the basic cause of unconstitutionality ♦ is, as already stated, ineffective and will be invalid. Thus, Section 6 is also unconstitutional.

62. For the aforesaid reasons, we declare under Points 2 and 3 that the provisions of Sections 3, 4 and 6 of the Act are unconstitutional and violative of Articles 14, 16(1) and 16(4) and of the law laid down by this court. But with a view to relieve any hardship, we propose to issue certain

directions under points 4 and 5. Our decision on Points 2 and 3 will be subject to what we propose to direct under Points 5 and 6.

63. Points 2 and 3 are decided accordingly.

Point 4

64. The Preamble to the constitution of India emphasises the principle of equality as basic to our Constitution. In *Kesavananda Bharati v. State of Kerala*⁴ it was ruled that even constitutional amendments which offended the basic structure of the Constitution would be ultra vires the basic structure. Sikri, C. J. laid stress on the basic features enumerated in the Preamble to the constitution and said that there were other basic features to which could be gathered from the constitutional scheme (para 506-A of SCC). Equality was one of the basic features referred to in the Preamble to our Constitution. Shelat and Grover, JJ. Also referred to the basic rights referred to in the Preamble. They specifically referred to equality (paras 520 and 535-A of SCC). Hegde and Shelat, JJ. Also referred to the Preamble (paras 648, 652). Ray, J. (as he then was) also did so (paras 886). Jaganmohan Reddy, J. too referred to the Preamble and the equality doctrine (para 1159). Khanna, J. feature (para 1621). Dwivedi, J. (paras 1882, 1883) and Chandrachud, J. (as he then was) (see para 2086) accepted this position.

65. What we mean to say is that Parliament and the legislature in this country cannot transgress the basic feature of the constitution, namely, the principle of equality enshrined in Article 14 of which Article 16(1) is a facet. *Whether the creamy layer is not excluded or whether forward castes get included in the list of backward classes*, the position will be the same. Namely, that there will be a breach not only of Article 14 but of the basic structure of the Constitution. The *non-exclusion of the creamy layer or the inclusion of forward castes in the list of backward classes* will, therefore, be totally illegal. Such an illegality offending the root of the Constitution of India cannot be allowed to be perpetuated even by constitutional amendment. The Kerala Legislature is, therefore, least competent to perpetuate such an illegal discrimination, What even Parliament cannot do, the Kerala Legislature cannot achieve.

66. Unfortunately, in the decision-making process which enables the forwards to get into the list of backward classes or which enables the creamy layer to grab the benefits of reservation, it appears to us that the voice of the really backward, namely, the voice of the non-creamy layer, is nowhere heard. Else there is no reason why the State should decide not to exclude the "creamy layer". Point 4 is decided accordingly.

Points 5 and 6

67. We have already referred to the circumstances under which this Court was compelled to appoint a High-Level committee presided over by Justice K.J. Joseph, for the purpose of identifying the "creamy layer", in the backward classes in the State of Kerala. The Report is a detailed one and runs into 114 pages. The Committee invited suggestions and representations from the public as well as from the organisations representing the backward classes by newspaper publications in December 1996, in English and Malayalam. The Committee also gave personal hearing to various individuals, bodies and organisations. It received 596 representations/suggestions till 15-1-1997 by the due date and 177 representations after the due date. Most of the parties before us had represented before the said committee. The State of Kerala did not file any representation before the High-Level committee, though a request was made on 13-1-1997 to permit it to give suggestions. The State

Government placed the Report of the Subjects committee of the legislature and other committees and organisations which contended that there was no creamy layer in the backward classes in the State relied mostly upon section 3 of the 1995 Act. Organisations which contended that there was a creamy layer pointed out that the declaration made in Section 3 of the Act was contrary to existing facts and that the Government and the legislature had no material before them to declare that there was no creamy layer in the State of Kerala nor to say that "no section of any backward classes reached a successful level of competition with forward classes".

68. We shall initially refer to Part I of the Report briefly. The High-Level committee Summarised *Indra Sawhney*¹ in detail in paras 22,22-A (I) and 22-A (ii) which summary, we may state, correctly reflects the legal position. The facts relating to representation of OBCs in various departments were considered in para 22-B (I) to para 22-B (ii). In para 22-B (xiii) it was stated that from the ranked lists published by the Kerala Public Service Commission it was clear that

"there are sufficient qualified candidates applying for appointment in public services and included in the ranked lists from among the Other Backward communities in the State".

69. It was noticed from the records of the Public Service Commission that the statutory quota of 40% for OBCs ♦ out of a total number 68,893 advised by the Public Service Commission during 1991-96, - came to 27,557, while the actual number of backward class candidates advised was more than 40% i.e. 29,346. The High-Level committee referred to the *Economic Review*, published by the Kerala Government. It then held that

"even if the statutory reservation in favour of any backward class is not satisfied or there is over-representation, the same will not be a justification for giving the benefit of reservation under Article 16(4) in favour of the affluent part of the Other Backward Classes".

70. This view of the Committee is in full conformity with what we have stated under Points 2 and 3 in relation to the validity of clause (b) of Section 3. Para 22-C (I) to (ix) deals with various facts and contentions and concluded by saying that the apprehension that if the creamy layer is excluded, there will not be adequate representation, is not factually correct.

71. In para 22-D (iii), this was reiterated, having regard to the fact that in 1991, literacy in Kerala was 91%. In 1996, it was almost 100%. There were 6728 lower primary schools, 2964 upper primary schools and 2573 high schools. In 1995-96 21.98 lakh students enrolled in lower primary sections, 18.12 lakhs in upper primary sections and 16.16 lakhs in high Schools sections ♦ in all, 56.27 lakhs. During this period, 17,250 were in vocational schools in 1995-96. There were again, 211 colleges in Kerala in 1996. In 1996, 92.304 boys and 1.17 lakh girls were studying in per-degree and 48,635 boys and 79,638 girls in degree classes and 2954 boys and 3206 girls in PG classes. According to the High-Level Committee all these groups in schools and colleges contained backward class candidates. Statistics in engineering and medical colleges and nursing were also given.

72. Thereafter, the committee referred to the Central Government's OM dated 8-9-1993 in para 22-F (v), it was said that as in the said OM, so in Kerala, the rule of exclusion of the creamy layer was not to be applied to artisans or those engaged in hereditary occupations, callings like potters, washermen, barbers etc. The list of such occupations prepared by the Kerala Artisans ♦

Development Corporation Ltd. was accepted. Persons traditionally engaged in fishing operations were also excluded in para 22-F (vii). The committee referred in para 28 to various principles settled in *Indra Sawhney*¹.

73. The Committee considered the OM dated 8-9-1993 as *directed* by this Court in its order. The committee held that increase in the cost of living index between 1992 when *Indra Sawhney*¹ was decided and the position in 1996 was to be kept in mind. There was an increase of 39.06% in the index it was stated. The increase in the consumer price index was also considered and it was held in paras 30, 31, 32 that the income level set in the Central Government's OM of 8-9-1993 was to be modified upwards from one lakh to Rs 3000-5000 of Group A officers/Grade I and of Rs 2500-4000 of Group B. It was observed that the minimum in Central and State Governments in the all-India services category was Rs 2200-4000. The revision proposed in the Fifth Pay Commission was far above these scales. Paras 3, 4 and 5 dealt with agricultural income and productivity. The committee computed these in trade and business and industry. In that basis, the criteria were fixed following the method adopted by the Central Government in its OM. Annexures IX (a) IX (d), IX (e), IX (f), IX (g), of the report give date relating to the over representation of Ezhava/Thiyya, Nadar, converted Christians, Viswakarma and Dheevan communities in various government departments. Annexure IX (I) deals with departments where there is over-representation of some of the backward classes, Other annexures deal with departments where there is under representation.

74. We finally come to Part II of the Report which is important and it deals with the criteria fixed for identifying the "creamy layer" in the backward classes. This runs into 17 pages. Pages 1 to 4 deal with guidelines. Annexure A deals with list of OBCs. Annexures B and C to artisans/persons of hereditary occupations excluded from the creamy layer. Annexure D deals with fishermen community similarly excluded. Annexure E prescribes the certificate. The Schedule at pp. 13-17 deals with the prescribed norms.

75. So far as the guidelines are concerned reference is made to the list of OBCs in the 1958 Service Rules, and to the 40% reservation for OBCs. It was stated rightly that those OBCs coming up on merit basis were to be excluded from 40%. The exclusion of the creamy layer was to apply in the government and public secretors, government companies and autonomous bodies etc.

76. In the Schedule at pp. 13-17, which is the crucial provision, the method adopted is similar to that in the Central government's OM dated 8-9-1993. First, *constitutional posts* referred to. These include among others Judges of the High, Court, Supreme Court, Chief Ministers, Council of Ministers etc., former Chief Ministers and former Council of Ministers as well, These in all, are in 19 categories. Then comes the *Service category*, and the central pattern is followed, referring to "parents both or *either*" being in group I and Group B posts; reference is made to those in *armed forces* and *paramilitary forces* at various higher levels; *professional classes and trade indindustry* were then referred to as follows:

"Persons coming within wealth/means/income group prescribed in Category VI, apart from their social status as prescribed in the respective profession."

And contain sub-categories in paras (i) to (vi). *Income level* is fixed at Rs 1.50lakhas gross for individuals and Rs 20 lakh for company and trusts in a year. *Societies* and chief Executives/Chairpersons of cooperative societies are also included, income of a society fixed at Rs 20 lakhs per annum. Category 5 deals with Property-owners- (A) Agriculture-holding of 5 hectares or more for cardamom or coconut plantation/cultivation and 4hectares for persons/family having

rubber or coffee plantation, (B) refer to vacant land as in Category VI. "Family" includes husband and wife and minor children. Buildings could be residential, industrial or commercial in use etc. Para Vi deals with wealth or income from as follows:

"Person/persons having gross annual income of Rs 1.50 lakhs or above or possessing wealth above the exemption limit as prescribed in the Wealth Tax Act for a period of 3 consecutive years;

Explanation. ♦The income criterion in terms of rupee will be modified/amended suitably taking into account the change in the value of money, every three years."

We are of the view that these guidelines and criteria are on the same lines as those in the central Government's OM dated 8-9-1993 which were accepted in *Ashoka Kumar Thakur*³ as reasonable. In fact, there is now an upward increase of income to Rs 1.50 lakhs. Having regard to *Ashoka Kumar Thakur*³ we are clearly of the view that the above guidelines and criteria fixed by the Justice Joseph Committee are reasonable so far as the State of Kerala is concerned.

77. In fact, in the affidavit dated 16-1-1998 filed by Kerala State through its chief Secretary, it was stated merely that there were few mistakes, namely that there was an omission of 5f communities viz. Kumbarans, Muslims, Thachar, Boyan of Malabar District, Malayan- throughout the State, except Malabar and of 10 sub-castes viz. Peroorkada Chetties, Sadu Mukaya, Bobi Mukayan, Mukaveeran and Valinijiar (Dheevera community), in the list prepared by the Committee. In our view, these would have to be included in the list of backward classes in addition to those mentioned in the Report of the High-Level Committee. The guidelines and criteria fixed by the Committee would be applicable to these communities and sub-castes also. We direct accordingly.

78. We have heard submissions on behalf of the various communities/ intervenes and looked into their objections to the Committee's Report. Our attention was not invited during arguments to anything in particular on law/facts which would fault the Committee's Report. Counsel virtually conceded that no material was placed in any of the objections filed in this court to the guidelines/norms in the Report except to say that the Kerala Act of 1995 was a complete answer to the points raised in the Report in favour of identification of the creamy layer. Some have reissued points which are already covered by what we have said under Points 1,2 and 3. In fact, we may make it very clear that no objection of any substance was placed before us by any counsel to contend that the guidelines or norms fixed by the High-Level Committee were wrong. Arguments of a very general nature saying that the creamy layer ought not be excluded, were advanced. We, therefore, hold that there is nothing in the objections filed by the parties which requires to be specifically dealt with.

79. In the result, we accept the Justice Joseph Committee Report in toto subject to the addition of communities and sub-castes as pointed out in the affidavit of the State dated 16-1-1998, referred to above.

80. The next question is as to the further directions that we have to give.

81. When the State was found guilty of deliberately violating orders of this court and the order was kept in abeyance and subsequently, legislation was passed bypassing all norms of reasonableness, should we allow the State to go scot-free or should we punish the perhaps innocent candidates who between the date of judgment in *Indra Sawhney*¹ and today had got appointments even though they

belonged to the creamy layer? Is there no way of punishing those who are guilty of wilful disobedience - apart from the Chief Secretary? For the present, we do not wish to go into this question.

82. It will be seen that this court has stated, as long back as in 1992 that it is imperative to exclude the creamy layer in the backward classes from the benefits of reservation. The Kerala Government has been already found to have deliberately violated the directions of this Court in that judgment and held guilty of contempt of court. The question of imposing sentence and, if so, on whom was pending when the impugned legislation was passed in 1995 by the state of Kerala. The legislation unfortunately served dual purposes-one to ward off temporarily any sentence being passed in the contempt proceedings and the other for deliberately putting of the exclusion of the creamy layer till this Court could deal with the validity of the Act. Now that the provisions of sections 3, 4 and 6 of the Act have been struck down, it is no longer permissible to allow the State of Kerala to continue to violate the mandate of this court nor can this court allow the state to help the creamy layer to reap the benefits of its non-exclusion. Is it not necessary to see that the benefits trickle down at least now to the non-creamy layer of the backward classes in that state at least from today?

83. We, therefore propose to adopt the principle of prospective overruling and we think it appropriate to put the recommendations in the Report dated 4-8-1997 of the High-Level committee presided over by Justice K.J. Joseph (with the addition of the commentates and sub-castes mentioned in the affidavit of the Chief Secretary dated 16-1-1998) into *Immediate operation from today* prospectively, as stated below. We apply the principle of prospective overruling, as done in *Ashoka Kumar Thokur*³ keeping the suo motu contempt case pending.

84. We therefore, direct as follows:

(1) We direct that the exclusion of the creamy layer as stated in that Report shall not be applicable *from today*, to all cases where appointment orders have not been issued to the members of the backward classes and for all future selection in public service as stated in the Report. (The five communities referred to in the affidavit of the Chief Secretary dated 16-1-1998 shall also be treated as backward subject to the guidelines and norms fixed by the Committee.) It will be obligatory to implement the Report, as so modified, in the government departments of Kerala/organisations/institutions/public sector undertakings/government- owned companies/cooperative societies/autonomous bodies, as stated in the Report, where the principles of reservation embodied in Article 16(4) or Rules 14 to 17 of Part II of the Kerala State and subordinate Services Rules, 1958 are applicable. It shall be necessary for the candidate belonging to the backward classes to file the certificates as envisaged in the Report and satisfy the employer that he or she does not belong to the creamy layer. The income limits and property-holdings as mentioned in the schedule to the said Report will be applicable *from today*. The exclusion of certain occupations/communities etc. shall however be as specified in the Report. Any violation of this direction will make the *appointment or selection made on or after this day*, unconstitutional.

It is made clear that any infraction of this direction will be treated seriously and this Court will also not hesitate to take further fresh action for contempt of court, if need be.

(2) We are of the view that it will be appropriate to allow the State of Kerala one more chance to conform to the rule of law.

We, therefore, permit the State of Kerala to make such provision as it may deem fit for exclusion of the creamy layer among the backward classes in the State of Kerala, in accordance with law and in a manner consistent with the Constitution, the basic structure of the Constitutions, Articles 14 and 16 and the judgements in *Indra Sawhney*¹ and *Ashoka Kumar Thakur*³ and in accordance with the principles laid down in the judgment now rendered by us.

(3) Once such provision is made and published in accordance with law, it shall come into force and the recommendations of the Justice K.J. Joseph committee as accepted by this court shall cease to apply. But as long as the State of Kerala does not bring about any such alternative provisions to exclude the creamy layer, the recommendation of the provisions to exclude the creamy layer, the recommendation of the Justice K.J. Joseph committee shall operate *from today* subject to any further directions which this Court might give in that behalf. Any fresh alternative provision that may be made by the State of Kerala, it is needless to say, will be subject to such further decision of this court, in case the validity thereof is questioned.

(4) In the event of alternative provisions being made by the State of Kerala either by executive order or by legislative measures or by way of rules, no court shall entertain any challenge thereto, and all proceedings in relation thereto shall have to be taken out only in this Court.

85. Before parting with the case, we may state that the unreasonable delay on the part of the Kerala Government and the discriminatory law made by the Kerala Legislature have been in virtual defiance of the rule of law and also an indefensible breach of the equality principle which is a basic feature of the constitution. They are also in open violation of the judgment of this Court which are binding under Article 141 and the fundamental concept of separation of powers which has also been held to be a basic feature of the Constitution. The State has already been held guilty of contempt.

86. This attitude and action of the State of Kerala has unfortunately resulted in allowing the "creamy layer" among the backward classes in the State of Kerala to continue to grab the posts in the services in government, public sectors etc., even after *Indra Swhney*¹ and get away with the same. The result is that the really backward among the backward classes have been deliberately deprived by the State, - of their legitimate right to these posts which would have otherwise obviously gone to them. To us it appears to be rather anomalous that while the Governments declare endlessly that they will see to it that benefits of reservations really reach the needy among the backwards, -the very action of the governments both on the executive side and on the legislative side, deliberately refusing to exclude the creamy layer and in indiscriminately including more castes in the backward classes list are leading to a serious erosion of the reservation programme. The sudden Cabinet decision of the State of Kerala not to appoint a Commission to identify the creamy layer as promised but to pass the impugned law was nothing but an attempt to perpetuate the creamy layer and allow it to knock away the benefits of reservation. Such a decision appears to us to have been taken because the real backwards obviously have no voice in that decision-making process.

87. Unfortunately today, as a matter of political expediency, Governments tend to knowingly violate the rule of law and the Constitution and pass on the buck to the courts to strike down the

unconstitutional provisions. It would then become easy for the Government to blame the courts for striking down the unconstitutional provisions. The case on hand is a typical illustration of such an attitude.

88. In this context, the words of Sir Anthony Mason, Chief Justice of Australia (quoted in para 684 of *Indra Sawhney*¹ by Jeevan Reddy, J.) are extremely appropriate: (SCC p.658)

"There are other reasons, of course, that cause Governments to leave decisions to be made by courts. They are of Expedient political character. The community may be so divided on a particular issue that a Government feels that the safe course for it to pursue is to leave the issue to be resolved by the courts, thereby diminishing the risk it will alienate significant sections of the community." (emphasis supplied)

and conclude: (SCC p. 658, para 684)

"My own feeling is that the people accept the courts as the appropriate means of resolving disputes when *Governments decide not to attempt to solve the disputes by the political process.*"

89. In the present case, the State of Kerala did not care if its Chief Secretary was to go behind the bars. It did not care if the real backwards were left in the lurch, It then took to legislation inasmuch as it would then be difficult for this Court to had the legislature in contempt. It is difficult for us to think that the Kerala Government really believed in the validity of its legislation. It appears to us this it thought it better to leave it to the courts to strike down the act. Years would roll by and in the interregnum the creamy layer could continue to reap the benefits of reservation.

90. When governments unreasonably refuse to eliminate creamy layers from the backward classes or when governments tend to include more and more castes in the list of backward classes without adequate date and inquiry, a stage will be reached soon when the whole system of reservation will become farcical and a negation of the constitutional provisions relating to reservations. The resistance of the creamy layer to get out of the lists is as bad as the clamour for entry into the quota system of various casts whose social status does not conform to the law decided by this court. We earnestly hope that constitutional provisions will not be converted into citadels for unjustified patronage.

91. Krishan Iyer, J. warned in *Akhil Bharatiaya Soshit Karamchhari Sangh (Rly.) v. Union of India*⁸: (SCC at p. 264, para 22)

"[T]o politicise this provision [i.e. Article 16(4)] for communal support and party ends is to subvert the solemn undertaking of Article 16(1)"

92. IAs Nos. 35 and 36 in WP No. 930 of 1990 are disposed of accordingly. WPs (C) Nos. 699 and 727 of 1995 are allowed to the extent indicated above. IAs No. 8 and 9 in WP (C No. 699 of 1995 also stand disposed of, However, the suo motu contempt case stated earlier shall be listed after a period of three months.

93. We thank the learned Amicus Curiae, Shri Subramaniam for his valuable assistance.

