SUPREME COURT OF INDIA

Ashok Kumar Thakur

Vs

Union of India

Writ Petition (civil) 265 of 2006

(K.G. Balakrishnan (CJI))

10/04/2008

JUDGMENT

K.G. BALAKRISHNAN, C.J.I.

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

3. Regarding equality, Dr. Ambedkar stated in the Constituent Assembly :

"*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."

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."

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..."

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 endeavor 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..."

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 analyzed 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. & Ors. Vs. State of Andhra Pradesh & Ors. , 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 & Ors. Vs. State of Karnataka & Ors. , 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 ad 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 Section2(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 in 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 Subramanium 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 thevalidity 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 Vs. Srimathi Champakam Dorairajan . 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 Vs. Union of India & Ors. .

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 virus 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 & Ors. Vs. Union of India & Ors. and I.R. Coelho (Dead) by LRS. Vs. State of T.N. 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 untrammeled 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. & Ors. Vs. Union of India & Ors. 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 & Anr. Vs. State of Mysore & Ors. 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 & Ors. Vs. State of Maharashtra & 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) Vs. Union of India & Others .

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 Vs.Stateof Kerala ,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 21 A. 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 (surpa). 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 Vs. State of Andhra Pradesh & Ors. , 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 Vs.Rangachari, Article 16(4) is an exception to Article 16(1) and this reasoning was followed in M.R. Balaji & Others Vs. State of Mysore by a five Judge Bench. Thereafter, the same view prevailed in T. Devadasan Vs. The Union of India & Anr. 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 Vs. State of Jammu & Kashmir & Ors. (II) and in The State of AndhraPradesh & Ors. Vs. U.S.V. Balram, Etc . The learned Solicitor General further pointed out that in State of Kerala & Anr. Vs N.M. Thomas & Ors. 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 & Anr. Vs. State of Karnataka 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" volatile 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 & Ors. Vs. Union of India & Ors. 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 Vs. Union of India & Ors. 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 & Anr. Vs. State of Tamil Nadu & Ors. ; U.S.V. Balram (supra); K.C. Vasanth Kumar (supra), referred to earlier. The learned Solicitor General also pointed out that in B. Venkataramana Vs. The State of Madras & Anr. , 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 Mandalay 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 Subramanium, the learned Additional Solicitor General, supported the Constitution (Ninety-Third Amendment) Act, 2005 and also the provisions of Act 5 of 2007. The learned Additional Solicitor General submitted that the American doctrines are not applicable to India. In this regard, the observations of this Court in A.K. Roy Vs. Union of India & Ors. , 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 prepositions enunciated in the decisions of the United States Supreme Court in Regents of the University of California Vs. Bakke , Grutter Vs. Bollinger and Gratz Vs. Bollinger , and Parents Involved in Community Schools Vs. Seattle School District , 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 Report 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 Vs. Ferguson , 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 rich acutely 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(1) 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 & Ors. Vs. State of Punjab & Anrs, 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. Articles 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-�-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 Vs. 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, Chandra HUD, 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 , 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 Vs. Raj Narain 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 particularized 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 ethereal 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) or 15(5) have to be examined on the basis of provisions contained in such legislation or the special provision that may be made under Article 15(4) or 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 volatile 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 Article 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 & Ors. Vs. 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 Vs. State of Madras & Ors. 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 Vs. State of J & K (I) , 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 Vs. State of Tamil Nadu & Ors. (supra), this Court made reference to the earlier decisions especially in M.R. Balaji case (supra) and R. Chitralekha 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 & Ors.

Vs. Pradip Tandon & Ors. 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 & Anr. Vs N.M. Thomas & 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 Vs. 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 & Anr. Vs. P. Sagar and T. Devadasan Vs. The Union of India & Anr. 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 Commisson, 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 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 synonyms . However, many others, such as Lowie and Kimball Young , use these terms as though they were identical.

127. Very common is the use of the word caste to indicate hereditary status. Cecil Clare North , 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. MacIver , 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 Cooley 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 1901 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." (p. 724)

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 vs. 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) * * *

(c) (i) The aforesaid reservation shall not apply to persons/sections mentioned in Column 3 of the Schedule to this office memorandum.

(ii) The rule of exclusion will not apply to persons working as artisans or engaged in hereditary occupations, callings. A list of such occupations, callings will be issued separately by the Ministry of Welfare.

(d)-(e) * * *

3. SCHEDULE

Description of category	To whom rule of exclusion will apply
I.CONSTITUTIONAL POSTS	

Son(s) and daughter(s) of

(a) President of India;

(b) Vice-President of India;

(c.) Judges of the Supreme Court and of the High Courts;

(d) Chairman & Members of UPSC and of the State Public Service Commission; Chief Election Commissioner; Comptroller and Auditor General of India;

(e) persons holding constitutional positions of like nature.

II.SERVICE CATEGORY

Son(s) and daughter(s) of

A. Group A/Class I Officers of the All India Central and State Services (Direct Recruits)

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

(b) parents, either of whom is a Class I officer;

(c.) parents, both of whom are Class I Officers, but one of them dies or suffers permanent incapacitation;

(d) parents, either of whom is a Class I officer and such parent dies or suffers permanent incapacitation and before such death or such incapacitation has had the benefit of employment in

any International Organisation like UN, IMF, World Bank, etc. for a period of not less than 5 years;

(e) parents, both of whom are Class I officers die or suffer permanent incapacitation and before such death or such incapacitation of the both, either of them has had the benefit of employment in any International Organisation like UN, IMF, World Bank, etc. for a period of not less than 5 years.

Provided that the rule of exclusion shall not apply in the following cases :

(a) Son(s) and daughter(s) of parents either of whom or both of whom are class I officers and such parent(s) dies/die or suffer permanent incapacitation;

(b) A lady belonging to OBC category has got married to a Class I officer, and may herself like to apply for a job.

B. Group B/Class II officers of the Central and State Services (Direct Recruitment)

Son(s) and daughter(s) of

(a) Parents both of whom are Class II officers;

(b) parents of whom only the husband is a Class II officer and he get 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 Organization like UN, IMF, World Bank etc. for a period of not less than 5 years before such death or permanent incapacitation;

(d) parents of whom the husband is a Class I officer (direct recruit or pre-forty promoted) and the wife is a Class II officer and the wife dies; or suffers permanent incapacitation; and

(e) parents, of whom the wife is a Class I officer (direct recruit or pre-forty promoted) and the husband is a Class II officer and the husband dies or suffers permanent in capacitation:

Provided that the rule of exclusion shall not apply in the following cases:

Son(s) and daughter(s) of

(a) parents both of whom are Class II officers and one of them dies or suffers permanent incapacitation;

(b) parents, both of whom are Class II officers and both of them die or suffer permanent incapacitation, even though either of them has had the benefit of employment in any International Organisation like UN, IMF, World Bank etc. for a period of not less than 5 years before their death or permanent incapacitation.

C. Employees in Public Sector Undertakings etc.

The criteria enumerated in A and B above in this category will apply mutatis mutandis to officers holding equivalent or comparable posts in PSUs, Banks, Insurance Organisations, Universities, etc. and 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 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.

(ii) Persons engaged in trade, business and industry.

Criteria specified against Category VI will apply

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

B. Plantations

(i) Coffee, tea, rubber etc.

(ii) Mango, citrus, apple plantations, etc.

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

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% of the statutory area; or

(a) both irrigated and unirrigated land, as follows :

The rule of exclusion will apply where the precondition exists that the irrigated area (having been brought to a single type under a common denominator) 40% or more of the statutory ceiling limit for irrigated land (this being calculated by excluding the unirrigated portion). If this precondition of not less than 40% exists, then only the area of unirrigated land will be taken into account. This will be done by converting the unirrigated land on the basis of the conversion formula existing, into the irrigated type. The irrigated area so computed from unirrigated land shall be added to the actual area of irrigated land and if after such clubbing together the total area in terms of irrigated land is 80% or more of the statutory ceiling limit for irrigated land, then the rule of exclusion will apply and disentitlement will occur;

(ii) The rule of exclusion will not apply if the land holding of a family is exclusively unirrigated.

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.

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), 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 & Anr. Vs. State of Karnataka & Ors. ; Ajit Singh & Ors. (II) vs. State of Punjab & Ors. and Union of India & Ors. Vs. Virpal Singh Chauhan & Ors. . 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." (p. 763)

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, CJ., 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 of 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." (p. 430)

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 & Ors. Vs. The State of Madhya Pradesh & Anr. and A.S. Krishna Vs. State of Madras 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 Others Vs. State of Bihar and Another , 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. " (p. 378)

166. In Kesavananda Bharati 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". (p. 615)

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 Vs. Rangachari and M.R. Balaji Vs. State of Mysore .

169. In T. Devadasan (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 untrammeled by the other provisions of the Article."

170. In two other subsequent decisions, i.e. in Triloki Nath (I) (supra) 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 Vs. 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 Vs. State of Karnataka (supra), 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 Directives Principles of State Policy in Part IV of the Constitution. The Fundamental Rights represent the civil and political rights and the Directive Principles embody social and economic rights. Together they are intended to carry out the objectives set out in the Preamble of the Constitution. Granville Austin, in his book , 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 Directives 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 ; Minerava Mills (supra))

174. In Minerva Mills (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 fertilize 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 exiomatic 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 Vs. Saunders 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 Plassy Vs. Ferguson 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 Vs. Board of Education 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 Vs. 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 Vs. Bakke 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 Vs. J A Croson Co. , 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)

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 Vs. Bakke (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 Vs. New Hampshire and Keyishian Vs. Board of Regents] 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 Vs. 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. Vs. Peqa) .

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 Vs. Union of India . 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 & Ors. Vs. Union of India and Others 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-`-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 Section2(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.

R. V. Raveendran J.

It has been my privilege to read the drafts of the Judgments proposed by the learned Chief Justice, learned brothers Pasayat J. and Bhandari J. I respectfully agree with them as indicated below :

A. Validity of 93rd Amendment to the Constitution of India.

I agree with the learned Chief Justice and Pasayat, J. that clause (5) of Article 15 is valid with reference to state maintained educational institutions and aided educational institutions; and that the question whether Article 15(5) would be unconstitutional on the ground that it violates the basic structure of the Constitution by imposing reservation in respect of private unaided educational institutions is left open. I have indicated an additional reason for rejecting the challenge to Article 15(5) on the ground that it renders Article 15(4) inoperative/ineffective .

B. Validity of Central Educational Institutions (Reservation in Admissions) Act, 2006 Act No.5 of 2007 :

I agree with the learned Chief Justice and Pasayat J. that (i) identification of other backward classes solely on the basis of caste will be unconstitutional; (ii) failure to exclude the 'creamy layer' from the benefits of reservation would render the reservation for other backward classes under Act 5 of 2007 unconstitutional; and (iii) Act 5 of 2007 providing for reservation for other backward classes will however be valid if the definition of 'other backward classes' is clarified to the effect that if the identification of other backward classes is with reference to any caste considered as socially and economically backward, 'creamy layer' of such caste should be excluded. I have indicated briefly my reasons for the same.

I agree with the decision of learned Chief Justice that the Act is not invalid merely because no time limit is prescribed for caste based reservation, but preferably there should be a review after ten years to take note of the change of circumstances. A genuine measure of reservation may not be open to challenge when made. But during a period of time, if the reservation is continued in spite of achieving the object of reservation, the law which was valid when made, may become invalid.

(C). What should be parameters for determining the creamy layer in respect of OBCs?

I agree with the learned Chief Justice that OM dated 8.9.1993 of the Government of India can be applied for such determination.

(D) Whether reservation to an extent of 27% in regard to other backward class under Act 5 of 2007 is valid?

I agree with the decision of learned Chief Justice that reservation of 27% for

other backward classes is not illegal.

I would however leave open the question whether members belonging to other backward classes who get selected in the open competition field on the basis of their own merit should be counted against the 27% quota reserved for other backward classes under an enactment enabled by Article 15(5) of the Constitution, for consideration in an appropriate case.

2. Let me now briefly add a few words on two of the questions.

Whether Article 15(5) renders Article 15(4) ineffective?

3. This Court has held that clause (4) of Article 15 is neither an exception nor a proviso to clause (1) of Article 15. Clause (4) has been considered to be an instance of classification inherent in clause (1) and an emphatic restatement of the principle implicit in clause (1) of Article 15 (see : State of Kerala v. N.M. Thomas - 1976 (2) SCC 310, K.C. Vasanth Kumar v. State of Karnataka - 1985 Supp. SCC 714 and Indra Sawhney v. Union of India - 1992 Supp. (3) SCC 217). Clauses (1) and (2) of Article 15 bar discrimination. Clause (1) contains a prohibition that State shall not discriminate against any citizen on grounds only on religion, caste, creed, sex or birth. Clause (2) declares that no citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them be subject to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels and places of public entertainment, or the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public. Clauses (3) to (5) enable the State to make special provisions in specified areas. While clause (3) is a part of the Article as originally framed, Clause (4) was added by Constitution (First Amendment) Act, 1951. Clause (5) was added by Constitution (Ninety-third Amendment) Act, 2005. Each of these three enabling provisions operate independent of each other. The opening words 'Nothing in this article' occurring in each of these clauses (3), (4) and (5) obviously refer to clauses (1) and (2) of Art. 15 and not to the other enabling clauses. Clauses (3), (4) and (5) of Article 15 are not to be read as being in conflict with each other, or prevailing over each other, but are to be read harmoniously.

The need for exclusion of creamy layer.

4. Section 3 of Act 5 of 2007 mandates reservation of seats in central educational institutions for

other backward classes to an extent of 27%. The term 'other backward classes' is defined as meaning the class or classes of citizens who are socially and economically backward, and are so determined by the centralGovernment. The Act does not define the term 'socially and educationally backward classes', nor does it contain any norms or guidelines as to how the central Government should determine any class or classes as socially and educationally backward, so as to entitle them to the benefit of reservation under the Act. The petitioners contend that the Act vests unguided power in the executive to pick and choose arbitrarily certain classes for the benefit of reservation. The Central Government has however indicated that it intends to proceed on the basis that castes which have already been identified for the benefit of reservations under Article 16(4) by the Mandal Commission with the additions thereto made by the National Commission for Backward Classes, from time to time, will be considered, for the present, to constitute the socially and educationally backward classes for the purpose of availing the benefit of 27% reservation under the Act. This again is challenged by the petitioners on the ground that identification of any class of citizens as 'backward', for the purpose of Article 16(4), cannot be considered as identification of 'socially and educationally backward classes of citizens' under Article 15(5). It is contended that the term 'backward classes' in Article 16(4) is much wider than 'socially and educationally backward classes of citizens' occurring in clauses (4) and (5) of Article 15.

5. Article 15(4) provides that nothing in that Article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward class of citizens or for Scheduled Castes and Scheduled Tribes. Article 29(2) provides that no citizen shall be denied admission into any educational institution managed by the State or receiving aid out of State funds, on grounds only of religion, race, caste, language or any of them. On the other hand, clause (5) of Article 15 provides that notwithstanding anything contained in that Article or in Article 19(1)(g), State may make a special provision for advancement of socially and educationally backward class of citizens or for Scheduled Castes and Scheduled Tribes by providing for reservation relating to admission in any educational institution either aided or unaided by the State, other than the minority educational institutions referred to in Article 30(1). It is submitted that as clause (5) of Article 15 does not override or exclude Article 29(2), any law made in exercise of power under Article 15(5) will be subject to Article 29(2), and consequently there cannot be any affirmative action by way of reservation on the ground of caste alone.

6. It is submitted on behalf of the petitioners that the object of the Constitution is to achieve an egalitarian society and any attempt to divide the citizens or the society on the ground of race, religion or caste should be straightaway rejected. It is further submitted that the Constitution nowhere recognizes or refers to 'caste' (except Scheduled Castes and Tribes) as a criterion for conferment of any right or benefit; that both clauses (4) and (5) of Article 15 refer to 'socially and educationally backward classes' and not 'socially and educationally backward castes'; that Constitution has always referred to caste in a negative sense, that is to prohibit any discrimination or affirmative action on the basis of 'caste' - [Vide Article 15(1) and (2), 16(2) and 29(2)]; and that when Constitution bars discrimination in admissions to educational institutions on ground only of caste, it is surprising that caste is sought to be made the criterion by the State for purposes of making a special provision for socially and educationally backward classes in regard to such admissions. It is submitted that there cannot be any special provision for any group of citizens merely on the ground that they belong to a particular caste or community (except Scheduled Castes

and Tribes who are separately mentioned in Articles 15(4), 15(5), 16(4), 335, 341 and 342 etc.).

7.This Court in a series of decisions commencing from M.R. Balaji v. State of Mysore [1963 Supp. (1) SCR 439], R.Chitralekha v. State of Mysore [1964 (6) SCR 368], State of Andhra Pradesh v. P.Sagar [1968 (3) SCR 595], Janki Prasad Parimoo v. State of Jammu & Kashmir [1973 (1) SCC 420], State of Kerala v. N.M.Thomas [1976 (2) SCC 310] and K.C.Vasanth Kumar v. State of Karnataka [1985 Supp. SCC 714] has explained what is social and educational backwardness. All these decisions have laid down the principle that caste cannot be made the sole or dominant test to determine backwardness, and any classification determining backwardness only with reference to caste will be invalid. These decisions recognized the fact that caste is not equated to class and all backwardness, either social or educational, is ultimately and primarily due to poverty or economic conditions.

8. However, in Minor P.Rajendran v. State of Madras [1968 (2) SCR 786], it was held that if a caste, as a whole, is socially and educationally backward then reservation can be made in favour of such a caste on the ground that it is a socially and educationally backward class within the meaning of Article 15(4). The decision followed Balaji and therefore proceeded on the basis that where the extent of social and educational backwardness of the caste in question is virtually the same as the social and educational backwardness of Scheduled Castes and Scheduled Tribes, reservation can be made on the basis of caste itself. In that case, it was found as a question of fact that members of certain castes as a whole, were socially and educationally backward, and therefore it was held that the reservation the basis of caste was permissible in respect of those castes. In A.Periakaruppan v. Sobha Joseph [1971 (1) SCC 38], this Court referred to the cases starting from Balaji to Rajendran. It reiterated the principle stated in Rajendran that if a caste as a whole is socially and educationally backward, reservation can be made in favour of such a caste on the ground that it is a socially and educationally backward class of citizens within the meaning of Article 15(4). It also cautioned that the Government should not proceed on the basis that once a class is considered as a backward class, it will continue to be backward class for all times. Vasanth Kumar (supra) held that only a caste comparable to the Scheduled Castes and Scheduled Tribes in the matter of backwardness, could be considered to be a socially and educationally backward class in favour of which reservation could be made on the basis of caste. Vasanth Kumar therefore, reiterated Balaji.

9. What requires to be noticed is neither Rajendra nor Periakaruppam nor Vasanth Kumar really departed from or diluted the principle laid down in Balaji. On the other hand, the principle laid down in Balaji was reiterated. Rajendran and Periakaruppam only show that in extreme cases where it is found that the caste under consideration was, as a whole, socially and educationally backward, and therefore akin to a Scheduled Caste, reservation can be made on the basis of caste alone.

10.Then came to the decision of nine Judges in Indra Sawhney v. Union of India [1992 Supp. (3) SCC 217]. This Court held that the use of the word 'class' in Article 16(4) refers to social class, and that reservation under Article 16(4) is in favour of a backward class and not a caste. It held that '

backward class of citizens' contemplated in Article 16(4) is not the same as 'socially and educationally backward classes' referred to in Article 15(4), but much wider. It held that there was no reason to qualify or restrict the meaning of the expression 'backward class of citizens' by saying that it means only those other backward classes who are situated similarly to Scheduled Castes and/or Scheduled Tribes (para 795). This Court held :

"If any group of class is situated similarly to the Scheduled Castes, they may have a case for inclusion in that class but there seems to be no basis either in fact or in principle for holding that other classes/groups must be situated similarly to them for qualifying as backward classes. There is no warrant to import any such a priori notions into the concept of Other Backward Classes. At the same time, we think it appropriate to clarify that backwardness, being a relative term, must in the context be judged by the general level of advancement of the entire population of the country or the State, as the case may be. More than this, it is difficult to say."

In the context of Article 16(4) this Court also observed that a caste can be and quite often is a social class in India and if it is backward socially, it would be a 'backward class' for the purposes of Article 16(4). It held that the accent in Article 16(4) is on social backwardness, whereas the accent in Article 15(4) is on 'social and educational backwardness'. Ultimately, this Court held :

" Neither the Constitution nor the law prescribes the procedure or method of identification of backward classes. Nor is it possible or advisable for the court to lay down any such procedure or method. It must be left to the authority appointed to identify. It can adopt such method/procedure as it thinks convenient and so long as its survey covers the entire populace, no objection can be taken to it. Identification of the backward classes can certainly be done with reference to castes among, and along with, other occupational groups, classes and sections of people.

The Court however made it clear that a caste can be the starting point for determining a 'backward class of citizens' as it represents an existing, identifiable social group/class; and that if a caste should be designated as 'a backward class' then the creamy layer from such caste should be excluded. This Court observed :

"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. .. While we agree that clause (4) aims at group backwardness, we feel that exclusion of such socially advanced members will make the 'class' a truly backward class and would more appropriately serve the purpose and object of clause (4)"

12. It is thus seen that Indra Sawhney certainly went a step further than Balaji and other cases in holding that a caste can be the starting point for determination of backwardness. But it is clear from the decision that caste itself is not the final destination, that is, a caste by itself, cannot be determinative of social and educational backwardness. A caste can be identified to be socially and economically backward, only when the creamy layer is removed from the caste and a compact class emerges which can be identified as a socially and educationally backward class. Thus the determination is not by first identifying a caste as a socially and educationally backward class and, thereafter, remove or exclude the creamy layer for the purpose of bestowing the benefits flowing to such class. On the other hand, until and unless, the creamy layer is removed from a caste, there is no compact class which can be termed as socially and educationally backward class at all. Thus, while the process of identifying socially and educationally backward class can conveniently start with a socially and educationally backward caste, remove the creamy layer therefrom results in the emergence of compact class which can be termed as a socially and educationally backward class. In this sense, it can be said that Indra Sawhney is only a development of the principles laid down in Balaji, R.Chitralekha and Vasanth Kumar, which pointed out that the advanced section of a backward caste constituting the creamy layer is virtually the same as forward class. If the creamy layer is not excluded the benefit of reservation will be appropriated by such advanced sections. Referring to this aspect, Indra Sawhney (supra) stated :

"To continue to confer upon such advanced sections, special benefits, would amount to treating equals unequally. Secondly, to rank them with the rest of the backward classes would amount to treating the unequal equally."

The need for exclusion of creamy layer is reiterated in the subsequent decisions of this Court in Ashoka Kumar Thakur v. State of Bihar 1995 (5) SCC 403, Indra Sawhney v. Union of India (II) 1996 (6) SCC 506, M.Nagaraj v. Union of India 2006 (8) SCC 212. When Indra Sawhney has held that creamy layer should be excluded for purposes of Article 16(4), dealing with 'backward class' which is much wider than 'socially and educationally backward class' occurring in Article 15(4) and (5), it goes without saying that without the removal of creamy layer there cannot be a socially and educationally backward class. Therefore when a caste is identified as a socially and educationally backward caste, it becomes a 'socially and educationally backward class' only when it sheds its creamy layer.

13. Caste has divided this country for ages. It has hampered its growth. To have a casteless society will be realization of a noble dream. To start with, the effect of reservation may appear to perpetuate caste. The immediate effect of caste based reservation has been rather unfortunate. In the pre-reservation era people wanted to get rid of the backward tag -- either social or economical. But post reservation, there is a tendency even among those who are considered as 'forward', to seek 'backward' tag, in the hope of enjoying the benefits of reservations. When more and more people aspire for 'backwardness' instead of 'forwardness' the country itself stagnates. Be that as it may. Reservation as an affirmative action is required only for a limited period to bring forward the

socially and educationally backward classes by giving them a gentle supportive push. But if there is no review after a reasonable period and if reservation is continued, the country will become a caste divided society permanently. Instead of developing an united society with diversity, we will end up as a fractured society for ever suspicious of each other. While affirmative discrimination is a road to equality, care should be taken that the road does not become a rut in which the vehicle of progress gets entrenched and stuck. Any provision for reservation is a temporary crutch. Such crutch by unnecessary prolonged use, should not become a permanent liability. It is significant that Constitution does not specifically prescribe a casteless society nor tries to abolish caste. But by barring discrimination in the name of caste and by providing for affirmative action Constitution seeks to remove the difference in status on the basis of caste. When the differences in status among castes are removed, all castes will become equal. That will be a beginning for a casteless egalitarian society.

14. I agree that the petitions shall stand disposed of in the manner stated by the learned Chief Justice.