Ashoka Kumar Thakur vs Union Of India And Ors on 10 April, 2008

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Bench: Arijit Pasayat, C.K. Thakker

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           CASE NO.:
Writ Petition (civil)  265 of 2006

PETITIONER:
Ashoka Kumar Thakur

RESPONDENT:
Union of India and Ors

DATE OF JUDGMENT: 10/04/2008

BENCH:
Dr. ARIJIT PASAYAT & C.K. THAKKER

JUDGMENT:
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J U D G M E N T WRIT PETITION (CIVIL) NO. 265 OF 2006 (With WP (C) Nos. 269/2006, 598/2006, 29/2007, 35/2007, 53/2007 Contempt Petition (C)No.112/2007 in WP) No.265/2006, 336/2007, 313/2007, 335/2007, 231/2007, 425/2007 and 428/2007) Dr. ARIJIT PASAYAT, J

1. The issues involved in the present writ petitions have far reaching consequences and in essence pose several questions of seminal importance. In essence, they raise questions which have no easy answers. The complexity can be gauged from the fact that on one hand the petitioners have questioned the logic of providing reservations/quotas for a class of people whom they described as "unidentifiable" or "undetermined" while the respondents justify their action by labelling them as measures taken for upliftment of vast majority of people who have suffered social humiliation and sneer for the social backwardness. Complex questions like whether the expressions 'class' and 'castes' are synonyms, whether reservations provide the only solution for social empowerment measures, alleged lack of concern for the economically weaker group of citizens are some of the basic issues which need to be addressed. It has been emphatically highlighted by the petitioners that when the ultimate objective is classless and casteless in Indian democracy, there is no question of unendingly providing the reservation and that too without any definite data regarding backwardness. In essence, they contend that these measures perpetuate backwardness and do not remove them. On the epicenter of challenge is the Central Educational Institutions (Reservation in Admission) Act 2006 (in short the 'Act') and the 93rd Amendment to the Constitution of India, 1950 (in short the 'Constitution'). Interestingly, both the petitioners and the respondents rely strongly on certain observations made by this Court in Indra Sawhney v. Union of India 1992 (Suppl. 3) SCC 217 (commonly known as 'Indra Sawhney No.1')

2. When the writ petitions were placed before a Bench of two Judges, considering the importance of the matter they were referred to be heard by a larger bench and certain questions which arise for consideration were formulated. That is how these cases are before this Bench.

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

4. Various Articles of the Constitution of India and the Preamble provide an insight to the monumental document i.e. the Constitution of India. Article 14 guarantees equality before the law in addition to equal protection of law. Article 15(1) mandates that there shall not be any discrimination against any citizen on the grounds of religion, caste, sex, race, or place of birth. Article 16(1) makes the fundamental right of equality specific relating to job opportunities. Article 16(2) significantly speaks of government employment by providing that no citizen shall be ineligible only on the grounds of religion, race, caste, sex, descent, place of birth or any of them or discriminated against in respect of any employment or office under the State. Article 16(4) is an important provision which empowers the State permitting the provision for the reservation of appointments and posts in favour of any backward class of citizens which in the opinion of the State is not adequately represented in the services of the State. The stress is on backwardness of the citizens and inadequate representation in the services under the State.

5. If one takes a walk on the pathway relating to the views expressed by this Court in the matter of reservation or quotas for the other backward classes one comes across many milestones. Some of them were noted extensively in Indra Sawhney No.1. They are: The State of Madras v. Sm. Champakam Dorairajan & Anr. (AIR 1951 SC 226), Minor A Peeriakaruppan v. Sobha Joseph (1971 (1) SCC 38), The State of Andhra Pradesh and Ors. v. U.S.V. Balram, etc. (1972 (1) SCC 660), Shri Janki Prasad Parimoo and Ors. v. State of Jammu and Kashmir and Ors. (1973(1) SCC 420), State of Uttar Pradesh and Ors. v. Pradip Tandon and Ors. (1975 (1) SCC 267), State of Kerala and Anr. v. N.M. Thomas and Ors. (1976(2) SCC 310), Kumari K.S. Jayashree and Anr. v. The State of Kerala and Anr. (1976 (3) SCC 730), K.C. Vasanth Kumar and Anr. v. State of Karnataka (1985 (Supp) SCC 714) and Indra Sawhney v. Union of India and Ors. (2000 (1) SCC

168) (known as Indra Sawhney No.2).

6. Two recent decisions have also been highlighted by the parties. They are M. Nagaraj and Ors. v. Union of India and Ors. (2006 (8) SCC 212) and Nair Service Society v. State of Kerala (2007 (4) SCC 1). It is to be noted that some of the arguments which have been raised relate to broad

principles of law and the jurisprudential approach. They are the applicability of the foreign decisions, more particularly, the decisions of the American Courts. They relate to the principles of strict scrutiny and narrow tailoring.

7. Learned counsel for the petitioners have stressed on these decisions to show as to what should be the approach in matters relating to social empowerment. Learned counsel for the respondents have however submitted that the approach is to be different because the problems before the American Courts essentially related to individual rights while the Indian Courts are more concerned with group rights i.e. rights of class of citizens. We shall deal with this in some length later.

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

9. One of the major challenges raised by the petitioners is based on the allegation that there is no acceptable data for fixing the percentage of other backward classes. This has been highlighted to show that there is no rational basis for fixing the percentage of reservation at 27% for the other backward classes. It is pointed out that the figures appear to have been culled out from some survey done more than seven decades back i.e. 1931 to be precise. Thereafter, there seems to be no definite data to know the actual percentage. It is pointed out that in Indra Sawhney No.1 (supra) this Court had laid considerable stress on having a Commission to identify and determine the criteria for determining the socially and educationally backward classes. Very little appears to have been done. It is surprising, it was contended, that there has been not even a single case of exclusion but on the other hand more than 250 new castes/sub-castes have been added. This shows that there is really no serious attempt to identify the other backward classes. On the other hand, there has been over-jealous anxiety to include more number of people so that they can get the benefits of reservations/quotas and this has been termed as "vote bank politics". It is highlighted that even when a serious matter relating to adoption of the Act was under consideration there was hardly any discussion and every political party was exhibiting its anxiety to get the Statute passed. Crocodile tears were shed to show lip sympathy for the backwardness of the people. In reality, the object was to give a wrong impression to the people that they were concerned about the backwardness of the people and they were the 'Messiahs' of the poor and the down trodden. In reality, in their hearts the ultimate object was to grab more votes. The lack of seriousness of the debate exhibits that the debate was nothing but a red-herring to divert attention from the sinister, politically motivated design masked by the "tearful" faces of the people masquerading as champions of the poor and down trodden. It is pointed out that contrary to what was being projected by the parties when the discussions were going on, in an impassioned speech by late Rajeev Gandhi who was the leader of opposition at an earlier point of time, the fallacies in adopting the Mandal Report were highlighted. It is surprising, it is submitted, that those very people who were the champions of anti-reservation and anti- quota as members of opposition, have done summersault and were saying just the opposite. It is pointed out that when one member Shri P.C. Alexandar exhibited real courage and highlighted the fallacies in the stand taken, his view appears to have been lightly brushed aside and the Statute hustled through. It is also submitted that the objectivity and sanctity of the report submitted in the Parliament commonly known as "Oversight Committee Report" has been lightly brushed aside. This only indicates that there was no serious debate about the consequences. The foresight of late Rajiv Gandhi in saying that the country will be divided on caste basis and that would

lead to disaster has been prophetically proved to be correct and it is a reality. It is submitted that the enactment has created a sharp divide amongst the citizens of the country and it has not even an iota of good results flowing from it. On the contrary, the country will be divided sharply leading to social unrest and caste-wars. It is pointed out that in the recent past such caste wars have resulted in large scale loss of life and destruction of public properties.

10. The relevance of the parliamentary debate or the speech of the Minister has been highlighted by this Court in many cases. It is a settled position in law that there can be only limited use of the parliamentary debate. The Courts should not normally critically analyse the proceedings of Parliament. This flows from a very fundamental aspect i.e. mutual respect of the Parliament and the Judiciary for each other. Each of these great institutions in a democracy operates in different fields. It is not expected that one wing of democracy would criticize the manner of functioning of another wing. That would be against the basic desirability of mutual respect. Any opinion or comment or criticism about the manner of functioning of one by the other would be not only undesirable but imperatively avoidable. The citizens of this country expect a great deal from the Parliament and the Judiciary. It is but natural that the people of this country would be disappointed and dis-heartened and their hopes will be shattered if instead of showing respect for each other, there is mudslinging, unwanted criticism or impermissible criticism about the manner of functioning or the rationale of a decision or a view taken. In this context, it would be relevant to take note of what this Court said in Builders Association of India v. Union of India and Ors. (1995 Supp (1) SCC 41), and K. Nagaraj and Ors. v. State of Andhra Pradesh and Anr. (1985 (1) SCC 523). In State of Mysore v. R.V. Bidap (1974 (3) SCC 337), it was observed as follows:

> "5. Anglo-American jurisprudence, unlike other systems, has generally frowned upon the use of parliamentary debates and press discussions as throwing light upon the meaning of statutory provisions. Willes, J. in Miller v. Tayler, [1769] 4 Burri, 2303, 2332., stated that the sense and meaning of an Act of Parliament must be collected from what it says when passed into law, and not from the history of changes it underwent in the House where it took its rise. That history is not known to the other House or to the Sovereign. In Assam Railways and Trading Company Ltd. v. I.R.C., [1935] A.C. 445 at p. 458, Lord Writ in the Privy Council said :
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> "It is clear that the language of a Minister of the Crown in proposing in Parliament a measure which eventually becomes law is inadmissible and the report of commissioners is even more removed from value as evidence of intention, because it does not follow that their recommendations were accepted."

The rule of grammatical construction has been accepted in India before and after Independence. In the State of Travancore- Cochin and Ors. v. Bombay Company Ltd., Alleppey, (AIR 1952 S.C. 366), Chief Justice Patanjali Sastri delivering the judgment of the Court, said :-

> "It remains only to point out that the use made by the learned Judges below of the speeches made by the members of the Constituent Assembly in the course of the debates on the draft Constitution is unwarranted. That this form of extrinsic aid to

> the interpretation of statutes is not admissible has been generally accepted in England, and the same rule has been observed in the construction of Indian statutes- see Administrator-General of Bengal v. Prem Lal Mullick, 22 Ind. Appl.
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> 107 (P.C.) at p. 118. The reason behind the rule was explained by one of us in Gopalan v. State of Madras, (1950) S.C.R. 88 thus :
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> A speech made in the course of the debate on a bill could at best be indicative of the subjective intent of the speaker, but it could not reflect the inarticulate mental process lying behind the majority vote which carried the bill. Nor is it reasonable to assume that the minds of all those legislators were in accord".

Or, as it is more tersely put in an American case-

> "Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other- United States v. Trans-Missouri Freight Association, (1897) 169 U.S. 290 at p. 318 (sic).
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> This rule of exclusion has not always been adhered to in America, and sometimes distinction is made between using such material to ascertain the purpose of a statute and using it for ascertaining its meaning. It would seem that the rule is adopted in Canada and Australia-see Craies on Statute Law, 5th Edn. p. 122 (pp. 368-9)".

11. In the American jurisdiction, a more natural note has sometimes been struck. Mr. Justice Frankfurter was of the view that-

> "If the purpose of construction is the ascertainment of meaning, nothing that is logically relevant should be excluded, and yet, the Rule of Exclusion, which is generally followed in England, insists that, in interpreting statutes, the proceedings in the Legislatures, including speeches delivered when the statute was discussed and adopted, cannot be cited in courts."

12. Crawford on Statutory Construction at page 388 notes that-

> "The judicial opinion on this point is certainly not quite uniform and there are American decisions to the effect that the general history of a statute and the various steps leading up to an enactment including amendments or modifications of the original bill and reports of Legislative Committees can be looked at for ascertaining the intention of the legislature where it is in doubt; but they hold definitely that the legislative history is inadmissible when there is no obscurity in the meaning of the statute."

The Rule of Exclusion has been criticised by jurists as artificial. The trend of academic opinion and the practice in the European system suggest that interpretation of a statute being an exercise in the

ascertainment of meaning, everything which is logically relevant should be admissible. Recently, an eminent Indian jurist has reviewed the legal position and expressed his agreement with Julius Stone and Justice Frankfurter. Of course, nobody suggests that such extrinsic materials should be decisive but they must be admissible. Authorship and interpretation must mutually illumine and interact. There is authority for the proposition that resort may be had to these sources with great caution and only when incongruities and ambiguities are to be resolved. A.K. Gopalan v. State of Madras (1950 SCR 88). There is a strong case for whittling down the Rule of Exclusion followed in the British courts and for less apologetic reference to legislative proceedings and like materials to read the meaning of the words of a statute. Where it is plain, the language prevails, but where there is obscurity or lack of harmony with other provisions and in other special circumstances, it may be legitimate to take external assistance such as the object of the provisions, the mischief sought to be remedied, the social context, the words of the authors and other allied matters. The law of statutory construction is a strategic branch of jurisprudence which must, it may be felt, respond to the great social changes but a conclusive pronouncement on the particular point arising here need not detain us because nothing decisive as between the alternative interpretations flows from a reliance on the Constituent Assembly proceedings or the broad purposes of the statutory scheme.

13. One thing however needs to be noted here that mere short length of debate cannot and does not become a ground for invalidity of the decision and the reverse is also not true.

14. Elaborate arguments have been advanced about the applicability of the foreign decisions, more particularly, the American Courts. It is to be noted that the American cases which have been highlighted by the petitioners relate essentially to strict classification, strict scrutiny and narrow tailoring. This issue is of considerable importance when so much debate is taking place about respect being shown by courts of a country to a decision of another country. The factual scenario and the basic issues involved in the cases sometimes throw light on the controversy. It has been rightly contended by Mr. Vahanvati and Mr. Gopal Subramanium that there is a conceptual difference between the cases decided by the American Supreme Court and the cases at hand. In Saurabh Chaudri and Ors. v. Union of India and Ors. (2003 (11) SCC 146) it was held that the logic of strict classification and strict scrutiny does not have much relevance in the cases of the nature at hand. If one looks at the different Statutes in India, Article 14 of the Constitution is conceptually different from 14th Amendment to the American Constitution as was noted in State of West Bengal vs. Anwar Ali Sarkar (1952 SCR

284) and State of Bombay and Anr. v. F.N. Balsara (1952 SCR

682). In Anwar Ali's case (supra) at pages 363 and 364 it was noted as follows:

> "I find it impossible to read these portions of the Constitution without regard to the background out of which they arose. I cannot blot out their history and omit from consideration the brooding spirit of the times. They are not just dull, lifeless words static and hide- bound as in some mummified manuscript, but, living flames intended to give life to a great nation and order its being, tongues of dynamic fire, potent to mould the future as well as guide the present. The Constitution must, in my

judgment, be left elastic enough to meet from time to time the altering conditions of a changing world with its shifting emphasis and differing needs. I feel therefore that in each case judges must look straight into the heart of things and regard the facts of each case concretely much as a jury would do; and yet, not quite as a jury, for we are considering here a matter of law and not just one of fact; Do these "laws" which have been called in question offend a still greater law before which even they must bow?

99. Doing that, what is the history of these provisions? They arose out of the fight for freedom in this land and are but the endeavour to compress into a few pregnant phrases some of the main attributes of a sovereign democratic republic as seen through Indian eyes. There was present to the collective mind of the Constituent Assembly, reflecting the mood of the peoples of India, the memory of grim trials by hastily constituted tribunals with novel forms of procedure set forth in Ordinances promulgated in haste because of what was then felt to be the urgent necessities of the moment. Without casting the slightest reflection of the judges and the Courts so constituted, the fact remains that when these tribunals were declared invalid and the same persons were retired in the ordinary Courts, many were acquitted, many who had been sentenced to death were absolved. That was not the fault of the judges but of the imperfect tools with which they were compelled to work. The whole proceedings were repugnant to the peoples of this land, and to my mind, article 14 is but a reflex of this mood.

100. What I am concerned to see is not whether there is absolute equality in any academical sense of the term but whether the collective conscience of a sovereign democratic republic can regard the impugned law, contrasted with the ordinary law of the land, as the sort of substantially equal treatment which men of resolute minds and unbiased views can regard as right and proper in a democracy of the kind we have proclaimed ourselves to be. Such views must take into consideration the practical necessities of government, the right to alter the laws and many other facts, but in the forefront must remain the freedom of the individual from unjust and unequal treatment, unequal in the broad sense in which a democracy would view it. In my opinion, 'law' as used in Article 14 does not mean the "legal precepts which are actually recognised and applied in tribunals of a given time and place" but "the more general body of doctrine and tradition from which those precepts are chiefly drawn, and by which we criticise, them."

15. It needs no emphasis that the formal equality concept came to be recognized in U.S.A. after about 10 years of its inception. In the first phase of the U.S.A. Constitutional Law there was only affirmative action but in the Indian Constitution right from the beginning affirmative action has been provided, for example, provisions made for Scheduled Castes and Schedules Tribes. A distinction has been noted in para 640 of Indra Sawhney No.1. Articles 38(1) and 38(2) read with Article 46 of the Constitution make the position clear that the State is charged with the duty to secure interests of the weaker sections of the people and minimize the inequalities in income. The Constitution from its inception contained Article 17 which abolishes untouchability.

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

17. In Minerva Mills Ltd. and Ors. v. Union of India and Ors. (1980) 3 SCC 625) in para 63 it was held as follows:

> "63. The learned Attorney General argues that the State is under an obligation to take steps for promoting the welfare of the people by bringing about a social order in which social, economic and political justice shall inform all the institutions of the national life. He says that the deprivation of some of the fundamental rights for the purpose of achieving this goal cannot possibly amount to a destruction of the basic structure of the Constitution. We are unable to accept this contention. The principles enunciated in Part IV are not the proclaimed monopoly of democracies alone. They are common to all polities, democratic or authoritarian. Every State is goal-oriented and claims to strive for securing the welfare of its people. The distinction between the different forms of Government consists in that a real democracy will endeavour to achieve its objectives through the discipline of fundamental freedoms like those conferred by Articles14 and 19. Those are the most elementary freedoms without which a free democracy is impossible and which must therefore be preserved at all costs. Besides, as observed by Brandies, J., the need to protect liberty is the greatest when Government's purposes are beneficent. If the discipline of Article 14 is withdrawn and if immunity from the operation of that article is conferred, not only on laws passed by the Parliament but on laws passed by the State Legislatures also, the political pressures exercised by numerically large groups can tear the country asunder by leaving it to the legislature to pick and choose favoured areas and favourite classes for preferential treatment."

18. In His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and Anr. (1973 (4) SCC 225) it was held as under:

> "531. According to Mr. Palkhivala, the test of the true width of a power is not how probable it is that it may be exercised but what can possibly be done under it; that the abuse or misuse of power is entirely irrelevant; that the question of the extent of the power cannot be mixed up with the question of its exercise and that when the real question is as to the width of the power, expectation that it will never be used is as wholly irrelevant as an imminent danger of its use. The court does not decide what is the best and what is the worst. It merely decides what can possibly be done under a power if the words conferring it are so construed as to have an unbounded and limitless width, as claimed on behalf of the respondents.
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> 532. It is difficult to accede to the submission on behalf of the respondents that while considering the consequences with reference to the width of an amending power contained in a Constitution any question of its abuse is involved. It is not for the courts to enter into the wisdom or policy of a particular provision in a Constitution or a statute. That is for the Constitution makers or for the parliament or the legislature.

But that the real consequences can be taken into account while judging the width of the power is well settled. The Court cannot ignore the consequences to which a particular construction can lead while ascertaining the limits of the provisions granting the power. According to the learned Attorney General, the declaration in the preamble to our Constitution about the resolve of the people of India to constitute it into a Sovereign, Democratic Republic is only a declaration of an intention which was made in 1947 and it is open to the amending body now under Article 368 to change the Sovereign Democratics Republic into some other kind of polity. This by itself shows the consequence of accepting the construction sought to be put on the material words in that article for finding out the ambit and width of the power conferred by it."

19. In Sajan Singh v. Maharashtra Sugar Mills Ltd. (AIR 1965 SC 845) it was held as follows:

"6. It is obvious that the fundamental rights enshrined in Part III are not included in the proviso, and so, if Parliament intends to amend any of the provisions contained in Articles 12 to 35 which are included in Part III, it is not necessary to take recourse to the proviso and to satisfy the additional requirements prescribed by it. Thus far, there is no difficulty. But in considering the scope of Art. 368, it is necessary to remember that Art. 226, which is included in Chapter V of Part VI of the Constitution, is one of the constitutional provisions which fall under clause (b) of the proviso; and so, it is clear that if Parliament intends to amend the provisions of Art. 226, the bill proposing to make such an amendment must satisfy the requirements of the proviso. The question which calls for our decision is : what would be the requirement about making an amendment in a constitutional provision contained in Part III, if as a result of the said amendment, the powers conferred on the High Courts under Art. 226 are likely to be affected? The petitioners contend that since it appears that the powers prescribed by Art. 226 are likely to be affected by the intended amendment of the provisions contained in Part III, the bill introduced for the purpose of making such an amendment, must attract the proviso, and as the impugned Act has admittedly not gone through the procedure prescribed by the proviso, it is invalid; and that raises the question about the construction of the provisions contained in Art. 368 and the relation between the substantive part of Art. 368 with its proviso.

8. On the other hand, if the substantive part of Art. 368 is very liberally and generously construed and it is held that even substantial modification of the fundamental rights which may make a very serious and substantial inroad on the powers of the High Courts under Art. 226 can be made without invoking the proviso, it may deprive clause (b) of the proviso of its substance. In other words, in construing both the parts of Art. 368, the rule of harmonious construction requires that if the direct effect of the amendment of fundamental rights is to make a substantial inroad on the High Courts' powers under Art. 226, it would become necessary to consider whether the proviso would cover such a case or not. If the effect of the amendment made in the fundamental rights on the powers of the High Courts prescribed by Art.

226, is indirect, incidental, or is otherwise of an insignificant order, it may be that the proviso will not apply. The proviso would apply where the amendment in question seeks to make any change, inter alia, in Art. 226, and the question in such a case would be : does the amendment seek to make a change in the provisions of Art. 226? The answer to this question would depend upon the effect of the amendment made in the fundamental rights.

9. In dealing with constitutional questions of this character, courts generally adopt a test which is described as the pith and substance test. In Attorney-General for Ontario v. Reciprocal Insurers ([1924] A.C. 328), the Privy Council was called upon to consider the validity of the Reciprocal Insurance Act, 1922 (12 & 13 Geo. 5, Ont., c. 62) and s. 508c which had been added to the Criminal Code of Canada by ss. 7 & 8 Geo. 5, c. 29 Dom. Mr. Justice Duff, who spoke for the Privy Council, observed that in an enquiry like the one with which the Privy Council was concerned in that case, "it has been formally laid down in judgments of this Board, that in such an inquiry the Courts must ascertain the 'true nature and character' of the enactment :

Citizens' Insurance Co. of Canada v. Parsons ([1881] 7 AC 96); its 'pith and substance' : Union Colliery Co. of British Columbia Ltd. v. Bryden ([1899] A.C. 580); and it is the result of this investigation, not the form alone, which the statute may have assumed under the hand of the draughtsman, that will determine within which of the categories of subject matters mentioned in ss. 91 and 92 the legislation falls; and for this purpose the legislation must be 'scrutinised in its entirety' : "Great West Saddlery Co. v. The King" ([1921] 2 A.C. 91,117). It is not necessary to multiply authorities in support of the proposition that in considering the constitutional validity of the impugned Act, it would be relevant to inquire what the pith and substance of the impugned Act is. This legal position can be taken to be established by the decisions of this Court which have consistently adopted the view expressed by Justice Duff, to which we have just referred.

14. Thus, it would be seen that the genesis of the amendments made by Parliament in 1951 by adding Articles 31A and 31B to the Constitution, clearly is to assist the State Legislatures in this country to give effect to the economic policy in which the party in power passionately believes to bring about much needed agrarian reform. It is with the same object that the second amendment was made by Parliament in 1955, and as we have just indicated, the object underlying the amendment made by the impugned Act is also the same. Parliament desires that agrarian reform in a broad and comprehensive sense must be introduced in the interests of a very large section of Indian citizens who live in villages and whose financial prospects are integrally connected with the pursuit of progressive agrarian policy. Thus, if the pith and substance test is applied to the amendment made by the impugned Act, it would be clear that Parliament is seeking to amend fundamental rights solely with the object of removing any possible obstacle in the fulfilment of the socio-economic policy in which the party in power believes. If that be so, the effect of the amendment on the

area over which the High Courts' powers prescribed by Art. 226 operate, is incidental and in the present case can be described as of an insignificant order. The impugned Act does not purport to change the provisions of Art. 226 and it cannot be said even to have that effect directly or in any appreciable measure. That is why we think that the argument that the impugned Act falls under the proviso, cannot be sustained. It is an Act the object of which is to amend the relevant Articles in Part III which confer fundamental rights on citizens and as such it falls under the substantive part of Art. 368 and does not attract the provisions of clause (b) of the proviso. If the effect of the amendment made in the fundamental rights on Art. 226 is direct and not incidental and is of a very significant order, different considerations may perhaps arise. But in the present case, there is no occasion to entertain or weigh the said considerations. Therefore the main contention raised by the petitioners and the interveners against the validity of the impugned Act must be rejected."

20. In Kihoto Hollohan v. Zachillhu and Ors. (1992 Supp. (2) SCC 651) it was observed as follows:

"61. The propositions that fell for consideration in Sankari Prasad Singh's and Sajjan Singh's cases are indeed different. There the jurisdiction and power of the Courts under Articles 136 and 226 were not sought to be taken away nor was there any change brought about in those provisions either "in terms or in effect", since the very rights which could be adjudicated under and enforced by the Courts were themselves taken away by the Constitution. The result was that there was no area for the jurisdiction of the Courts to operate upon. Matters are entirely different in the context of paragraph 7. Indeed the aforesaid cases, by necessary implication support the point urged for the petitioners. The changes in Chapter IV of Part V and Chapter V of Part VI envisaged by the proviso need not be direct. The change could be either "in terms of or in effect". It is not necessary to change the language of Articles 136 and 226 of the Constitution to attract the proviso. If in effect these Articles are rendered ineffective and made inapplicable where these articles could otherwise have been invoked or would, but for Paragraph 7, have operated there is `in effect' a change in those provisions attracting the proviso. Indeed this position was recognised in Sajjan Singh's case (supra) where it was observed:

"If the effect of the amendment made in the fundamental rights on Article 226 is direct and not incidental and is of a very significant order, different considerations may perhaps arise."

62. In the present cases, though the amendment does not bring in any change directly in the language of Article 136, 226 and 227 of the Constitution, however, in effect paragraph 7 curtails the operation of those Articles respecting matters falling under the Tenth Schedule. There is a change in the effect in Article 136, 226 and 227 within the meaning of clause (b) of the proviso to Article 368(2). Paragraph 7, therefore, attracts the proviso and ratification was necessary. Accordingly, on Point B, we hold:

"That having regard to the background and evolution of the principles underlying the Constitution (52nd Amendment) Act, 1985, in so far as it seeks to introduce the Tenth Schedule in the Constitution of India, the provisions of Paragraph 7 of the Tenth Schedule of the constitution in terms and in effect bring about a change in the operation and effect to Articles 136, 226 and 227 of the Constitution of India and, therefore, the amendment would require to be ratified in accordance with the proviso to sub-Article (2) of Article 368 of the Constitution of India."

21. In Shri Sarwan Singh and Anr. v. Shri Kasturi Lal (1977 (1) SCC 750) it was observed as follows:

"20. Speaking generally, the object and purpose of a legislation assume greater relevance if the language of the law is obscure and ambiguous. But, it must be stated that we have referred to the object of the provisions newly introduced into the Delhi Rent Act in 1975 not for seeking light from it for resolving in ambiguity, for there is none, but for a different purpose altogether. When two or more laws operate in the same field and each contains a non obstante clause stating that its provisions will override those of any other law, stimulating and incisive problems of interpretation arise. Since statutory interpretation has no conventional protocol, cases of such conflict have to be decided in reference to the object and purpose of the laws under consideration. A piquant situation, like the one before us, arose in Shri Ram Narain v. Simla Banking & Industrial Co. Ltd. competing statutes being the Banking Companies Act, 1949 as amended by Act 52 of 1953, and the Displaced Persons (Debts Adjustment) Act, 1951. Section 45A of the Banking Companies Act, which was introduced by the amending Act of 1953, and Section 3 of the Displaced Persons Act 1951 contained such a non obstante clause, providing that certain provisions would have effect "notwithstanding anything inconsistent therewith contained in any other law for the time being in force". This Court resolved the conflict by considering the object and purpose of the two laws and giving precedence to the Banking Companies Act by observing : "It is, therefore, desirable to determine the overriding effect of one or the other of the relevant provisions in these two Acts, in a given case, on much broader considerations of the purpose and policy underlying the two Acts and the clear intendment conveyed by the language of the relevant provisions therein." (p. 615) As indicated by us, the special and specific purpose which motivated the enactment of Section 14A and Chapter IIIA of the Delhi Rent Act would be wholly frustrated if the provisions of the Slum Clearance Act requiring permission of the competent authority were to prevail over them. Therefore, the newly introduced provisions of the Delhi Rent Act must hold the field and be given full effect despite anything to the contrary contained in the Slum Clearance Act.

21. For resolving such inter se conflicts, one other test may also be applied though the persuasive force of such a test is but one of the factors which combine to give a, fair meaning to the language of the law. That test is that the later enactment must prevail over the earlier one. Section 14A and Chapter IIIA having been enacted with effect from December 1, 1975 are later enactments in reference to Section 19 of the Slum

Clearance Act which, in Its present form, was placed on the statute book with effect from February 28, 1965 and in reference to Section 39 of the same Act, which came into force in 1956 when the Act itself was passed. The legislature gave overriding effect to Section 14A and Chapter IIIA with the knowledge that Sections 19 and 39 of the Slum Clearance Act contained non obstante clauses of equal efficacy. Therefore the later enactment must prevail over the former. The same test was mentioned with approval by this Court in Shri Ram Narain's case at page 615.

23. The argument of implied repeal has also no substance in it because our reason for according priority to the provisions of the Delhi Rent Act is not that the Slum Clearance Act stands impliedly repealed protanto. Bearing in mind the language of the two laws, their object and purpose, and the fact that one of them is later in point of time and was enacted with the knowledge of the non obstante clauses in the earlier law, we have come to the conclusion that the provisions of Section 14A and Chapter IIIA of the Rent Control Act must prevail over those contained in Sections 19 and 39 of the Slum Clearance Act.

22. In J.K. Cotton Spinning and weaving co. Ltd. v. State of U.P. and Anr. (1961 (3) SCR 185) it was observed as under:

"There will be complete harmony however if we hold instead that clause 5(a) will apply in all other cases of proposed dismissal or discharge except where an inquiry is pending within the meaning of clause 23. We reach the same result by applying another well known rule of construction that general provisions yield to special provisions. The learned Attorney- General seemed to suggest that while this rule of construction is applicable to resolve the conflict between the general provision in one Act and the special provision in another Act, the rule cannot apply in resolving a conflict between general and special provisions in the same legislative instrument. This suggestion does not find support in either principle or authority. The rule that general provisions should yield to specific provisions is not an arbitrary principle made by lawyers and judges but springs from the common understanding of men and women that when the same person gives two directions one covering a large number of matters in general and another to only some of them his intention is that these latter directions should prevail as regards these while as regards all the rest the earlier direction should have effect. In Pretty v. Solly [(1859-53 ER 1032) (quoted in Craies on Statute Law at p. 205, 5th Edition) Romilly, M. R. mentioned the rule thus :-

"The rule is, that whenever there is a particular enactment and a general enactment in the same statute and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply". The rule has been applied as between different provisions of the same statute in numerous cases some of which only need be mentioned : De Winton

v. Brecon [(1858) 28 L.J. Ch. 598], Churchill v. Crease [(1828) 5 Bing. 177], United States v. Chase [(1889) 135 U.S. 255] and Carroll v. Greenwich Ins. Co. [(1905) 199 U.S. 401]."

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

"The question whether a statute which is void in part is to be treated as void in toto, or whether it is capable of enforcement as to that part which is valid is one which can arise only with reference to laws enacted by bodies which do not possess unlimited powers of legislation, as, for example, the legislatures in a Federal Union. The limitation on their powers may be of two kinds: It may be with reference to the subject-matter on which they could legislate, as, for example, the topics enumerated in the Lists in the Seventh Schedule in the Indian Constitution, ss. 91 and 92 of the Canadian Constitution, and s. 51 of the Australian Constitution; or it may be with reference to the character of the legislation which they could enact in respect of subjects assigned to them, as for example, in relation to the fundamental rights guaranteed in Part III of the Constitution and similar constitutionally protected rights in the American and other Constitutions. When a legislature whose authority is subject to limitations aforesaid enacts a law which is wholly in excess of its powers, it is entirely void and must be completely ignored. But where the legislation falls in part within the area allotted to it and in part outside it, it is undoubtedly void as to the latter; but does it on that account become necessarily void in its entirety? The answer to this question must depend on whether what is valid could be separated from what is invalid, and that is a question which has to be decided by the court on a consideration of the provisions of the Act. This is a principle well established in American Jurisprudence, Vide Cooley's Constitutional Limitations, Vol. I, Chap. VII, Crawford on Statutory Construction, Chap. 16 and Sutherland on Statutory Construction, 3rd Edn, Vol. 2, Chap. 24. It has also been applied by the Privy Council in deciding on the validity of laws enacted by the legislatures of Australia and Canada, Vide Attorney-General for the Commonwealth of Australia v. Colonial Sugar Refining Company Limited [[1914] A.C. 237] and Attorney-General for Alberta v. Attorney-General for Canada [L.R. [1947] A.C. 503]. It was approved by the Federal Court in In re Hindu Women's Rights to Property Act [[1941] F.C.R. 12] and adopted by this Court in The State of Bombay and another v. F. N. Balsara [[1951] S.C.R. 682] and The State of Bombay v. The United Motors (India) Ltd., and others [[1953] S.C.R. 1069]. These decisions are relied on by Mr. Seervai as being decisive in his favour. Mr. Palkhiwala disputes this position, and maintains that on the decision of the Privy Council in Punjab Province v. Daulat Singh and others [[1946] F.C.R. 1] and of the decisions of this Court in Romesh Thappar v. State of Madras [[1950] S.C.R. 594] and Chintaman Rao v. State of Madhya Pradesh [[1950] S.C.R. 759], the question must be answered in this favour. We must now examine the precise scope of these decisions.

The resulting position may thus be stated :

> When a statute is in part void, it will be enforced as regards the rest, if that is severable from what is invalid. It is immaterial for the purpose of this rule whether the invalidity of the statute arises by reason of its subject-matter being outside the competence of the legislature or by reason of its provisions contravening constitutional prohibitions. That being the position in law, it is now necessary to consider whether the impugned provisions are severable in their application to competitions of a gambling character, assuming of course that the definition of 'prize competition' in s. 2(d) is wide enough to include also competitions involving skill to a substantial degree. It will be useful for the determination of this question to refer to certain rules of construction laid down by the American Courts, where the question of severability has been the subject of consideration in numerous authorities. They may be summarised as follows :
>
> 1. In determining whether the valid parts of a statute are separable from the invalid parts thereof, it is the intention of the legislature that is the determining factor.

The test to be applied is whether the legislature would have enacted the valid part if it had known that the rest of the statute was invalid. Vide Corpus Juris Secundum, Vol. 82, p. 156; Sutherland on Statutory Construction, Vol. 2, pp. 176-177.

2. If the valid and invalid provisions are so inextricably mixed up that they cannot be separated from one another, then the invalidity of a portion must result in the invalidity of the Act in its entirety. On the other hand, if they are so distinct and separate that after striking out what is invalid, what remains is in itself a complete code independent of the rest, then it will be upheld notwithstanding that the rest has become unenforceable. Vide Cooley's Constitutional Limitations, Vol. 1 at pp. 360-361; Crawford on Statutory Construction, pp. 217-218.

3. Even when the provisions which are valid are distinct and separate from those which are invalid, if they all form part of a single scheme which is intended to be operative as a whole, then also the invalidity of a part will result in the failure of the whole. Vide Crawford on Statutory Construction, pp. 218-219.

4. Likewise, when the valid and invalid parts of a statute are independent and do not form part of a scheme but what is left after omitting the invalid portion is so thin and truncated as to be in substance different from what it was when it emerged out of the legislature, then also it will be rejected in its entirety.

5. The separability of the valid and invalid provisions of a statute does not depend on whether the law is enacted in the same section or different sections; (Vide Cooley's Constitutional Limitations, Vol. 1, pp. 361-

362); it is not the form, but the substance of the matter that is material, and that has to be ascertained on an examination of the Act as a whole and of the setting of the relevant provisions therein.

6. If after the invalid portion is expunged from the statute what remains cannot be enforced without making alterations and modifications therein, then the whole of it must be struck down as void, as otherwise it will amount to judicial legislation. Vide Sutherland on Statutory Construction, Vol. 2, p. 194.

7. In determining the legislative intent on the question of separability, it will be legitimate to take into account the history of the legislation, its object, the title and the preamble to it. Vide Sutherland on Statutory Construction, Vol. 2, pp. 177-

178."

24. In AIIMS Students Union v. AIIMS (2002 (1) SCC 428) in para 35 it was observed as follows:

> "35. The principle of institutional continuity while seeking admission to higher levels of study as propounded by the learned counsel for the appellants though argued at length does not have much room available for innovative judicial zeal to play, for the ground already stands almost occupied by a set of precedents, more so when we are dealing with professional or technical courses of study. It would suffice to have a brief resume thereof noticing the details wherever necessary".

It was again highlighted in para 44 as follows:

> "44. When protective discrimination for promotion of equalisation is pleaded, the burden is one the party who seeks to justify the ex facie deviation from equality. The basic rule is equality of opportunity for every person in the country, which is a constitutional guarantee. A candidate who gets more marks than another is entitled to preference for admission. Merit must be the test when choosing the best, according to this rule of equal chance for equal marks. This proposition has greater importance when we reach the higher levels and education like post-graduate courses. Reservation, as an exception, may be justified subject to discharging the burden of proving justification in favour of the class which must be educationally handicapped-the reservation geared up to getting over the handicap. The rationale of reservation in the case of medical students must be removal of regional or class inadequacy or like disadvantage. Even there the quantum of reservation should not be excessive or societally injurious. The higher the level of the speciality the lesser the role of reservation."

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

26. Even then, this doctrine was upheld by the Supreme Court of U.S.A. in Plessy v. Ferguson (163 U.S. 537(1896). This case involved a challenge to a Louisiana statute that provided for equal but separate accommodations for black and white passengers in trains. The Court rejected the challenge. Justice Brown famously observed:

> If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane. (163 U.S. at 552)

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

28. Thus, even in this second phase, affirmative action was never truly initiated the country was still struggling to establish even a formally equal society.

29. At the same time, another very important development in its constitutional law was taking place, which would later have a serious impact on affirmative action programmes. This was the birth of the doctrine of strict scrutiny.

30. 'Strict scrutiny' is one of the three standards for judicial review of legislative and administrative action developed in the United States, the other being "rational basis" and "intermediate scrutiny".

31. The origin of this standard can be traced to the decision in United States v Carolene Products (304 U.S. 144 (1938). The question before the Court was whether the Filled Milk Act, 1923 which prohibited the shipment in interstate commerce of skimmed milk compounded with any fat or oil other than milk fat, so as to resemble milk or cream, transcended the power of Congress to regulate inter state commerce or infringed the Fifth Amendment. Justice Harlan Stone, writing the opinion for the Court, upheld the law, holding that the existence of facts supporting the legislative judgment was to be presumed, for regulatory legislation affecting ordinary commercial transactions was not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it was of such a character as to preclude the assumption that it rested upon some rational basis within the knowledge and experience of the legislators. However, he added what has been described as "the most celebrated footnote in constitutional law".

> "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth."

32. What the Court was saying was that economic legislation would be judged by a standard of "rational basis" so long as the law was a rational way of furthering a legitimate governmental purpose, it was valid. However, where the legislation "on its face" appeared to be violating any of the fundamental rights, a more exacting standard would be applied.

33. The precise term "strict scrutiny" was used by the Court for the first time in Skinner v. Oklahoma (316 U.S. 535 (1942). The Oklahoma Habitual Criminal Sterilisation Act provided for vasectomy to be performed on any person convicted two or more times for crimes amounting to "felonies involving moral turpitude". Justice Douglas, giving the opinion of the Court, described the statute as violating the right to have offspring "a right which is basic to the perpetuation of a race". The question before the Court was whether this statute violated the 14th Amendment. Holding that it

did, Justice Douglas observed:

> "Strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly or otherwise invidious discriminations are made against groups or types of individuals in violation of the constitutional guarantee of just and equal laws."

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

35. It is to be noted that the doctrine of separation as is prevalent in the American Society is not of much consequence in the Indian scenario. It needs to be clarified that the expression 'strict scrutiny' has also been used by the Indian Courts in Narendra Kumar and Ors. v. Union of India and Ors. (1960 (2) SCR 375) but it appears to have been used in different context. What really appears to be the intention for the use of the expression is "careful and deeper scrutiny" and not in the sense of strict scrutiny of the provisions as is prevalent in the American jurisprudence. It is used in different sense. The application appears to be in technical sense in the American Courts, for example, Regents of University of California v. Allan Bakke (438 U.S. 265).

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

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

> "Hence, the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of "societal discrimination" does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions".
>
> "The fatal flaw in petitioner's preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment. Shelley v. Kraemer, 334 US, at 22, 92 L Ed 1161, 68 S Ct 836, 3 ALRd 441. Such rights are not absolute. But when a State's distribution of benefits or imposition of burdens hinges on ancestry or the color of a person's skin or ancestry, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial state interest. Petitioner has failed to carry this burden."

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

> [21, 22a] "We acknowledge that "there are serious problems of justice connected with the idea of preference itself." Bakke, 438 US, at 298, 57 L Ed 2d 750, 98 S Ct 2733 (opinion of Powell, J). Narrow tailoring, therefore, requires that a race-conscious admissions program not unduly harm members of any racial group. Even remedial

> race-based governmental action generally "remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit." Id., at 308, 57 L Ed 2d 750, 98 S Ct 2733. To be narrowly tailored, a race-conscious admissions program must not "unduly burden individuals who are not members of the favored racial and ethnic groups." Metro Broadcasting, Inc. v. FCC, 497 Us 547, 630, 111 L Ed 2d 445, 110 S Ct 2997 (1990) (O' Connor, J., dissenting).

[22b, 23] We are satisfied that the Law School's admissions program does not. Because the Law School considers "all pertinent elements of diversity," it can (and does) select non-minority applicants who have greater potential to enhance student body diversity over underrepresented minority applicants. See Bakke, supra, at 317, 57 L Ed 2d 750, 98 S Ct 2733 (opinion of Powell, J). As Justice Powell recognized in Bakke, so long as a race-conscious admissions program uses race as a "plus" factor in the context of individualized consideration, a rejected applicant "will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment." 438 US, at 318, 57 L Ed 2d 750, 98 S Ct 2733. [13f, 22C] We agree that, in the context of its individualized inquiry into the possible diversity contributions of all applicants, the Law School's race-conscious admissions program does not unduly harm nonminority applicants.

[24, 25a, 26] We are mindful, however, that "[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race" Palmore v Sidoti, [539 US 342] 466 US 429, 432, 80 L Ed 2d, 421, 104 s Ct 1879 (1984). Accordingly, race-conscious admissions policies must be limited in time. This requirement reflects that racial classifications, however, compelling their goals are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle. We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point. The Law School, too, concedes that all "race-conscious programs must have reasonable durational limits." Brief for Respondent Bollinger et al. 32. [25b] In the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity. Universities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law, are currently engaged in experimenting with a wide variety of alternative approaches. Universities in other States can and should draw on the most promising aspects of these race-neutral alternatives as they develop. Cf. United States v. Lopez, 514 US 549, 581, 131 L Ed 2d 626, 115 S Ct 1624 (1995) (Kennedy, J., concurring) ("[T] he States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear"). The requirement that all race-conscious admissions programs have a termination point "assure[s] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself." Richmond v. J.A. Croson Co., 488 US, at 510, 102 L Ed 2d 854, 109 S Ct 706 (plurality opinion); see also Nathanson & Bartnik. The Constitutionality of Preferential Treatment for

Minority Applicants to Professional Schools, [539 US 343] 58 Chicago Bar Rec. 282, 293 (May-June 1977) ("It would be a sad day indeed, were America to become a quota- ridden society, with each identifiable minority assigned proportional representation in every desirable walk of life. But that is not the rationale for programs of preferential treatment; the acid test of their justification will be their efficacy in eliminating the need for any racial or ethnic preferences at all."

39. The provisions of the American Constitution in United States relating to formal equality concept do not appear to have operated from the beginning of the American Constitution.

40. Although even under the 1919 and 1935 Government of India Acts the rights of certain class of people like Scheduled Castes, Scheduled Tribes and the deprived classes have been recognized, in America, the rights have been conferred on individuals and so much on the groups. The freedoms contemplated by the Indian Constitution originally related to seven categories which presently stand at six after the property rights were deleted. The stand of Mr. Vahanvati and Mr. Gopal Subramanium is that the logic of strict scrutiny, compelling the Government and narrow tailoring do not have relevance so far as the present case is concerned.

41. In Thomas's case (supra) it was clearly noticed by this Court that American conditions do not apply adequately for the Indian scenario. Unlike U.S.A., the targeted beneficiaries are alien to our Constitution. In India cognizance has been taken constitutionally. The victims of untouchability, identifying social and economic backwardness have been accepted as permissible measures. However, the question how long they can be continued is another aspect which shall be dealt with separately. Rationality in that sense is a measure for the special provisions. But the question that still needs to be addressed is whether these groups are really identifiable. While formulating the policy all factors need not be specifically expressed but there must be some criteria to identify social and educational backwardness.

42. In A.K. Roy v. Union of India (1982 (1) SCC 271) it was noted as follows:

> "8. We are not, as we cannot be, unmindful of the danger to people's liberties which comes in any community from what is called the tyranny of the majority. Uncontrolled power in the executive is a great enemy of freedom and therefore, eternal vigilance is necessary in the realm of liberty. But we cannot transplant, in the Indian context and conditions, principles which took birth in other soils, without a careful examination of their relevance to the interpretation of our Constitution. No two Constitutions are alike, for it is not mere words that make a Constitution. It is the history of a people which lends colour and meaning to its Constitution. We must therefore turn inevitably to the historical origin of the ordinance making power conferred by our Constitution and consider the scope of that power in the light of the restraints by which that power is hedged. Neither in England nor in the United States of America does the executive enjoy anything like the power to issue ordinances. In India, that power has a historical origin and the executive, at all times, has resorted to it freely as and when it considered it necessary to do so. One of the larger States in India has manifested its addiction to that power by making an overgenerous use of it

> so generous indeed, that ordinances which lapsed by efflux of time were renewed successively by a chain of kindred creatures, one after another. And, the ordinances embrace everything under the sun, from Prince to pauper and crimes to contracts. The Union Government too, so we are informed passed about 200 Ordinances between 1960 and 1980, out of which 19 were passed in 1980".

43. One of the grey areas focused by learned counsel for the petitioners and the respondents is the ever perplexing question "how long". The respondents say that so long as the problems of backwardness exist they can be continued. The petitioners have highlighted that notwithstanding the concerns shown in Indra Sawhney No.1 and in a large number of cases that the reservations are not meant to be a permanent feature there is a case for concern. Admittedly, there is no deletion from the list of other backward classes. It goes on increasing. Learned counsel for the respondents have stated that in large number of cases where applications were made for inclusion they have been turned down. But that is no answer to the question as to why and how there has been no exclusion. Is it that backwardness has increased instead of decreasing. If the answer is 'yes', as contended by the respondents, then one is bound to raise eyebrows as to the effectiveness of providing reservations or quotas.

44. The ultimate object is to bring those who are disadvantaged to a level where they no longer continue to be dis-advantaged. It needs no emphasis that individual rights are superior to the social rights. All fundamental rights are to be read together. The inequalities are to be removed. Yet the fact that there has been no exclusion raises a doubt about the real concern to remove inequality.

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

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

47. Learned counsel for the respondents have stated that the measures under challenge are nothing but a much needed leap towards attainment of the objectives. If it is true, the leap has to end somewhere. It cannot hang in the air as there is nothing immortal in this world; much less, a progressive measure purportedly intended to benefit the other backward classes. If after nearly six decades the objectives have not been achieved, necessarily the need for its continuance warrants deliberations. It is to be noted that some of the provisions were intended to be replaced after a decade but have continued. It indirectly shows that backwardness appears to have purportedly increased and not diminished. It would therefore be rational and logical to restrict operation of the impugned Statute for a period of 10 years from its inception.

48. At this juncture, report of the Oversight Committee throws considerable light on the controversy. Some parts of the Report need to be noted.

This report seeks to expand the provision of Higher Education while at the same time ensuring social inclusion and academic excellence. A society which excludes a significant section of its population from access to higher education cannot be said to be providing equality of opportunity. Equally, if academic excellence gets compromised in the process of expansion, it would lose its competitive edge in the emerging knowledge society an edge which can propel India into a position of global leadership.

Page X and XI of the report A simpler way of implementing reservations was to steamroll our way through, in the name of social equity, regardless of its impact on quality and excellence. We have deliberately chosen the more difficult way which delivers equity in a manner that enhances excellence i.e. by making concomitant investments in faculty & infrastructure and by bringing much needed governance related reforms involving institutional, financial and administrative autonomy and process re-engineering in our Higher Educational Governance system. It is easy to equalize by "mindlessly leveling everyone down to lowest common-denominator". Our effort has been to create an upward moving equalization process- where the disabilities are overcome by the erstwhile excluded sections and the system brings out the best in them.

Besides the many out of the box innovative ideas concerning faculty and infrastructure related issues, I believe three of our recommendations, which cut horizontally across the five groups, are critical to the establishment of the goal of an "inclusive society, in pursuit of excellence". These four programmes are considered by the Oversight Committee to be integral to the above vision and should be considered to be inseverable part of our core recommendations. (page-x) We have to acknowledge that the challenges facing us in the entire education sector are enormous and in the Tertiary Education Sector these can be met, only if both public and private funding to educational institutions increased several fold. The need for private participation in this mammoth task cannot be over-emphasized but market forces themselves cannot deliver justice. The relative importance of public vs. private funding is brought out very strongly by Joseph Stiglitz when he opined "I had studied the failures of both markets and governments, and was not so naove to think that the government could remedy every failure. Neither was I so foolish as to believe that markets by themselves solved every societal problem. Inequality, unemployment, pollution:

> these are all important issues in which Government has to take an importance role."
>
> "Expansion, Inclusion and Excellence" has been our credo. They have remained the abiding theme guiding all our deliberations. I will be failing in my duty if the Oversight Committee does not acknowledge the source of inspiration for our deliberations. It is the Prime Minister's speech giving the overpowering vision of the "need to create the second wave of nation building" which has inspired us in our thoughts and deliberations. I would also like to express my gratitude to Hon'ble HRD Minister, Sri Arjun Singhji for his affection and guidance right through. (Page-xi) Treatment of the creamy Layer (Chapter IV- Report of Oversight Committee Vol.-I)

4.2 (b) The true benefit of reservations will be realized only when the high school enrolment of OBCs, especially in rural areas, increases significantly. Attention will need to be paid to this issue in the coming years.

Chapter VI- Estimate of Resources required for the expansion 6.1 In overall terms, the total estimated expenditure on the expansion has now been assessed by the five Sub-Groups in their final reports at Rs.18,197.83 crore, as compared to the amount of Rs.16,563.34 crore, that was included by the Oversight Committee in its interim report. The summary statement of additional student strength, faculty required and estimates of recurring and non-recurring expenditure that have been projected by the Groups are as at Table 6.1 and the year-wise break up is at table 6.2.

6.3 The Committee in its discussions with the individual Groups, had stressed the need to estimate the additional infrastructure and manpower that would be required after taking into account the slack, if any, in the existing facilities as also the scope for using IT as a resource multiplier. While the Groups seems to have accepted this in principle, their expenditure projections, and the norms on which they are based seems to have just extrapolated past trends. The Committee has had some input regarding global trends and the best practices being followed in the world's leading institutions. Based on this, and in consultation with experts, the Committee has developed a plan for a "Gyan Vahini" project, as has been explained in an earlier Chapter in this report. The total expenditure on this component of the expansion and upgradation project would be Rs.1752 crore in 5 years. Apart from significantly enhancing the quality of instruction and learning, and brining it close to the best levels in the world, this investment will certainly contribute to efficiency and to reducing the conventional costs of the higher education system.

Summary Statement of Expenditure Requirements (As given in the Final Reports of the Groups) Sector No. of Instns.

Existing Student Intake Annual Addl.

Student Intake Addl.

Facility Required Non Recurring Ex.

Recur ring Exp.

(5Yrs) Total Exp.

In 5 Yrs.

Agricu lture 102.75 92.71 195.46 Central Univers ities 92011 49689 2702.11 2455.

5158.

Manag ement 511.32

177.

688. Medic al N.A. 1783.98 1027.

2811.

Engin eering 29671 16440 5503.83 3840.

9343.

Grand Total 125291 68114 11854 10603.99 7593.

18197.

Chapter VII- The Way Forward 7.1 As indicated earlier in this report, this opportunity for expansion, inclusion and excellence should only be the beginning of a larger process, which is to build a knowledge society in India and allow the country to take its rightful place in the comity of nations. Our recent economic growth and the values of knowledge and education carried forward by a billion diverse people, point to India's potential future as a knowledge society. Other countries that visualize a similar future have planned massive investments in order to enhance both the quality and quantity of higher education and research. China, for example, has made substantial increase in its allocation of resources of higher education. In the first phase, China has provided a grant of US $ 125 million to each of the 10 leading universities and US $ 225 million to Beijing and Tsinghua Universities. In the second phase, China proposes to provide additional grants to 30 universities, with the objective of having 100 high quality universities in China in the 21st century and with 15% of the citizens in the age group 18-22 receiving tertiary education.

7.2 India has suffered in the past because of severe under investment in higher education. This has been caused partly by the thinking that looks at primary and higher education in an either or manner. It is very clear however that large public investment is needed in both sectors. As Prime Minister Dr. Manmohan Singh said, while launching the Knowledge Commission, "At the bottom of the knowledge pyramid, the challenge is one of improving access to primary education. At the top of the pyramid there is need to make our institutions of higher education and research world class. The time has come for India to embark on a second wave of nation building. Denied this investment, the youth will become a social and economic liability.

49. It was emphasized by learned counsel for the petitioners that the massive financial burden question finds no place in the parliamentary debate. In response, Mr. Vahanvati has submitted that before the Parliamentary Standing Committee, the report of the Oversight Committee was available. When the Oversight Committee's report was discussed in detail, needless to say the financial aspect

was also considered.

50. It has been highlighted by Mr. P.P. Rao that unmindful of the duty to focus on primary and elementary education, large sums of money are intended to be used for implementation of Statute. Various figures and datas have been highlighted to show that there is really no concern for the primary and elementary education. Repelling these contentions Mr. Vahanvati has highlighted that there is no laxity so far as primary and elementary education is concerned. He has referred to voluminous details relating to Sarva Shiksha Abhiyan. It is contended that uniform policy of elementary education and the progress made upto 31.3.2007 shows the concern of the Government to translate into reality the constitutional objective of providing adequate education to all citizens. It is true that there has been considerable effort in this regard. But one question still remains to be answered. There has to be balancing of priorities. Mr. Vahanvati has said that this balancing is prerogative of the Government. It is true that Government has a large area of discretion in choosing its priorities. But one factor cannot be lost sight of. The fundamental stress has to be on elementary education. If that is done, as a consequence there would be reduction in the need for spending more money on higher education. Stress on primary and elementary education would be a leap forward towards higher education. There has been considerable number of drop outs in the higher classes. This is a reality in spite of all steps which the Government claims to have adopted to ensure that every child of a particular age group has education as warranted by the Constitution as a fundamental right.

51. Unni Krishnan, J.P. and Ors. v. State of A.P. and Ors. (1993 (1) SCC 645) emphasized on the importance of education in the following words:

> "166. In Bandhua Mukti Morcha this Court held that the right to life guaranteed by Article 21 does take in "educational facilities". (The relevant portion has been quoted herein before). Having regard to the fundamental significance of education to the life of, an individual and the nation, and adopting the reasoning and logic adopted in the earlier decisions of this Court referred to herein before, we hold, agreeing with the statement in Bandhua Mukti Morcha, that right to education is implicit in and flows from the right to life guaranteed by Article 21. That the right to education has been treated as one of transcendental importance in the life of an individual has been recognised not only in this country since thousands of years, but all over the world. In Mohini Jain, the impatience of education has been duly and rightly stressed. The relevant observations have already been set out in para 7 herein before. In particular, we agree with the observation that without education being provided to the citizens of this country, the objectives set forth in the Preamble to the Constitution cannot be achieved. The Constitution would fail. We do not think that the importance of education could have been better emphasised than in the above words. The importance of education was emphasised in the "Neethishatakam' by Bhartruhari (First Century B.C. in the following words:
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> Translation:

Education is the special manifestation of man; Education is the treasure which can be preserved without the fear of loss; Education secures material pleasure, happiness and fame;

Education is the teacher of the teacher; Education is God incarnate;

Education secures honour at the hands of the State, not money.

A man without education is equal to animal.

168. In Brown v. Board of Education (347 US 483 (1954) Earl Warren, C.J., speaking for the U.S. Supreme Court emphasized the right to education in the following words:

"Today, education is perhaps the most important function of State and local governments It is required in the performance of our most basic responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."

52. Observations of this Court in AIIMS Students' Union case (supra) highlight the importance of higher education and the modalities to be adopted for ensuring excellence are in the following words:

"58. The Preamble to the Constitution of India secures, as one of its objects, fraternity assuring the dignity of the individual and the unity and integrity of the nation to 'we he people of India'. Reservation unless protected by the constitution itself, as given to us by the founding fathers and as adopted by the people of India, is sub-version of fraternity, unity and integrity and dignity of the individual. While dealing with Directive Principles of State Policy, Article 46 is taken note of often by overlooking Articles 41 and 47. Article 41 obliges the State inter alia to make effective provision for securing the right to work and right to education. Any reservation in favour of one, to the extent of reservation, is an inroad on the right of others to work and to learn. Article 47 recognises the improvement of public health as one of the primary duties of the State. Public health can be improved by having the best of doctors, specialists and super specialists. Under-graduate level is a primary or basic level of education in medical sciences wherein reservation can be understood as the fulfilment of societal obligation of the State towards the weaker segments of the society. Beyond this, a reservation is a reversion or diversion from the performance of primary duty of the State. Permissible reservation at the lowest or primary rung is a step in the direction of assimilating the lesser fortunates in mainstream of society by bringing them to the level of others which they cannot achieve unless protectively pushed. Once that is done the protection needs to be withdrawn in the own interest of

> protectees so that they develop strength and feel confident of stepping on higher rungs on their own legs shedding the crutches. Pushing the protection of reservation beyond the primary level betrays bigwigs' desire to keep the crippled crippled for ever. Rabindra Nath Tagore's vision of a free India cannot be complete unless "knowledge is free"

and "tireless striving stretches its arms towards perfection". Almost a quarter century after the people of India have given the Constitution unto themselves, a chapter on fundamental duties came to be incorporated in the Constitution. Fundamental duties, as defined in Article 51A, are not made enforceable by a writ of court just as the fundamental rights are, but it cannot be lost sight of that 'duties' in Part IVA - Article 51A are prefixed by the same word 'fundamental' which was prefixed by the founding fathers of the Constitution to 'rights' in Part III. Every citizen of India is fundamentally obliged to develop the scientific temper and humanism. He is fundamentally duty bound to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievements. State is, all the citizens placed together and hence though Article 51A does not expressly cast any fundamental duty on the State, the fact remains that the duty of every citizen of India is the collective duty of the Sate. Any reservation, apart from being sustainable on the constitutional anvil, must also be reasonable to be permissible. In assessing the reasonability one of the factors to be taken into consideration would be -- whether the character and quantum of reservation would stall or accelerate achieving the ultimate goal of excellence enabling the nation constantly rising to higher levels. In the era of globalisation, where the nation as a whole has to compete with other nations of the world so as to survive, excellence cannot be given an unreasonable go by and certainly not compromised in its entirety. Fundamental duties, though not enforceable by a writ of the court, yet provide a valuable guide and aid to interpretation of constitutional and legal issues. In case of doubt or choice, people's wish as manifested through Article 51A, can serve as a guide not only for resolving the issue but also for constructing or moulding the relief to be given by the courts. Constitutional enactment of fundamental duties, if it has to have any meaning, must be used by courts as a tool to tab, even a taboo, on State action drifting away from constitutional values".

53. Respondents have vehemently contended that the concept of creamy layer may have relevance for the purpose of Article 16(4), but is really inconsequential so far as Articles 15(4) and 15(5) are concerned. It is submitted that Article 16(4) is relatable to inadequate representation in Government services and in that context the well to do in the socially and educationally backward classes have to be excluded in view of the decisions of this Court. But that logic cannot apply to the present dispute which relates to admissions to educational institutions. Before considering the question as to the desirability of excluding 'creamy layer' the concept of creamy layer needs to be focused upon. Observations of this Court in various cases on this concept need to be noted.

54. In N.M. Thomas's case (supra) at page 363, it was inter alia observed as follows :

> "124. A word of sociological caution. In the light of experience, here and elsewhere, the danger of "reservation", it seems to me, is threefold. Its benefits, by and large, are snatched away by the top creamy layer of the "backward" caste or class, thus keeping

> the weakest among the weak always weak and leaving the fortunate layers to consume the whole cake. Secondly, this claim is overplayed extravagantly in democracy by large and vocal groups whose burden of backwardness has been substantially lightened by the march of time and measures of better education and more opportunities of employment, but wish to wear the "weaker section" label as a means to score over their near-equals formally categorised as the upper brackets. Lastly, a lasting solution to the problem comes only from improvement of social environment, added educational facilities and cross- fertilisation of castes by inter-caste and inter- class marriages sponsored as a massive State programme, and this solution is calculatedly hidden from view by the higher "backward"

groups with a vested interest in the plums of backwardism. But social science research, not judicial impressionism, will alone tell the whole truth and a constant process of objective re-evaluation of progress registered by the "underdog" categories is essential lest a once deserving "reservation" should be degraded into "reverse discrimination". Innovations in administrative strategy to help the really untouched, most backward classes also emerge from such socio-legal studies and audit exercises, if dispassionately made. In fact, research conducted by the A.N. Sinha Institute of Social Studies, Patna, has revealed a dual society among harijans, a tiny elite gobbling up the benefits and the darker layers sleeping distances away from the special concessions. For them, Articles 46 and 335 remain a "noble romance", the bonanza going to the "higher" harijans. I mention this in the present case because lower division clerks are likely to be drawn from the lowest levels of harijan humanity and promotion prospects being accelerated by withdrawing, for a time, "test" qualifications for this category may perhaps delve deeper. An equalitarian breakthrough in a hierarchical structure has to use many weapons and Rule 13/AA perhaps is one. Xx xx xx

139. It is platitudinous constitutional law that Articles 14 to 16 are a common code of guaranteed equality, the first laying down the broad doctrine, the other two applying it to sensitive areas historically important and politically polemical in a climate of communalism and jobbery.

55. In Vasant Kumar's case (supra) at page 732 the view was re-iterated in the following words :

> "24. In order to appreciate the view point advanced by Mr Desai which appeals to me both for its indepth study of the problem, and a fresh outlook on this vexed problem, at the outset let me take a look at the futuristic view of the Indian Society as envisaged in the Constitution. No one is left in any doubt that the future Indian Society was to be casteless and classless. Pandit Jawaharlal Nehru the first Prime Minister of India said that Mahatma Gandhi has shaken the foundations of caste and the masses have been powerfully affected. But an even greater power than Gandhi is at work, the conditions of modern life and it seems at last this hoary and tenacious ralic of past times must die. Mahatma Gandhi, the Father of the Nation said, "The caste system as we know is an anachronism. It must go if both Hinduism and India are to live and grow from day to day". In its onward march towards realising the constitutional goal, every attempt has to be made to destroy caste stratification. Article 38(2) enjoins the State to strive to minimise the inequality in income and

endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations. Article 46 enjoins duty to promote with special care the educational and economic interests of the weaker sections of the people, and in particular of the Scheduled Castes and Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation. Continued retention of the division of the society into various castes simultaneously introduces inequality of status. And this inequality in status is largely responsible for retaining inequality in facilities and opportunities, ultimately resulting in bringing into existence an economically depressed class for transcending caste structure and caste barrier. The society therefore was to be classless casteless society. In order to set up such a society, steps have to be taken to weaken and progressively eliminate caste structure. Unfortunately, the movement is in the reverse gear. Caste stratification has become more rigid to some extent, and where concessions and preferred treatment schemes are introduced for economically disadvantaged classes, identifiable by caste label, the caste structure unfortunately received a fresh lease of life. In fact there is a mad rush for being recognized as belonging to a caste which by its nomenclature would be included in the list of socially and educationally backward classes. To illustrate:

Bakshi Commission in Gujarat recognized as many as 82 castes as being socially and educationally backward. On the publication of its report, Government of Gujarat received representations by members of those castes who had not made any representation to the Bakshi Commission for treating them as socially and educationally backward. This phenomenon was noticed by Mandal Commission when it observed: "Whereas the Commission has tried to make the State-wise lists of OBCs as comprehensive as possible, it is quite likely that several synonymy of the castes listed as backward have been left out. Certain castes are known by a number of synonymy which vary from one region to the other and their complete coverage is almost impossible". Mandal Commission found a way out by recommending that if a particular caste has been listed as backward then all its synonyms whether mentioned in the State lists or not should also be treated as backward. Gujarat Government was forced to appoint a second commission known as Rane Commission. Rane Commission took note of the fact that there was an organised effort for being considered socially and educationally backward castes. Rane Commission recalled the observations in Balaji case that "Social backwardness is on the ultimate analysis the result of poverty to a very large extent". The Commission noticed that some of the castes just for the sake of being considered as socially and educationally backward, have degraded themselves to such an extent that, they had no hesitation in attributing different types of vices to and associating other factors indicative of backwardness, with their castes. The Commission noted that the malaise requires to be remedied. The Commission therefore, devised a method for determining socially and educationally backward classes without reference to caste, beneficial to all sections of people irrespective of the caste to which they belong. The Commission came to an irrefutable conclusion that amongst certain castes and communities or

> class of people, only lower income groups amongst them are socially and educationally backward. We may recall here a trite observation in case of N.M. Thomas which reads as under (SCC pg.363 para 124): "A word of sociological caution. In the light of experience, here and elsewhere, the danger of 'reservation', it seems to me, is threefold. Its benefits, by and large, are snatched away by the top creamy layer of the 'backward' caste or class, thus keeping the weakest among the weak always weak and leaving the fortunate layers to consume the whole cake. Secondly, this claim is overplayed extravagantly in democracy by large and vocal groups whose burden of backwardness has been substantially lightened by the march of time and measures of better education and more opportunities of employment, but wish to wear the 'weaker section' label as a means to score over their near-equals formally categorised as the upper brackets."

25. A few other aspects for rejecting caste as the basis for identifying social and educational backwardness may be briefly noted. If State patronage for preferred treatment accepts caste as the only insignia for determining social and educational backwardness, the danger looms large that this approach alone would legitimise and perpetuate caste system. It does not go well with our proclaimed secular character as enshrined in the Preamble to the Constitution. The assumption that all members of same caste a re equally socially and educationally backward is not well-founded. Such an approach provides an over-simplification of a complex problem of identifying the social and educational backwardness. The Chairman of the Backward Classes Commission, set up in 1953, after having finalised the report, concluded that "it would have been better if we could determine the criteria of backwardness on principles other than caste". Lastly it is recognised without dissent that the caste based reservation has been usurped by the economically well-placed section in the same caste. To illustrate, it may be pointed that some years ago, I came across a petition for special leave against the decision of the Punjab and Haryana High Court in which the reservation of 2= per cent for admission to medical and engineering colleges in favour of Majhabi Sikhs was challenged by none other than the upper crust of the members of the Scheduled castes amongst Sikhs in Punjab, proving that the labeled weak exploits the really weaker. Add to this, the findings of the Research Planning Scheme of sociologists assisting the Mandal Commission when it observed: "while determining the criteria of socially and educationally backward classes, social backwardness should be considered to be the critical element and educational backwardness to be the linked element though not necessarily derived from the former". The team ultimately concluded that "social backwardness refers to ascribed status, and it considered social backwardness as the critical element and educational backwardness to be the linked though not derived element". The attempt is to identify socially and educationally backward classes of citizens. The caste, as is understood in Hindu Society, is unknown to Muslims, Christians, Parsis, Jews etc. Caste criterion would not furnish a reliable yardstick to identify socially and educationally backward group in the aforementioned communities though economic backwardness would.

28. Reservation in one or other form has been there for decades. If a survey is made with reference to families in various castes considered to be socially and educationally backward, about the benefits of preferred treatment, it would unmistakably show that the benefits of reservations are snatched away by the top creamy layer of the backward castes. This has to be avoided at any cost.

56. Significantly in Indra Sawhney No.1 it was emphatically noted as follows:

> "520. Society does not remain static. The industrialisation and the urbanisation which necessarily followed in its wake, the advance on political, social and economic fronts made particularly after the commencement of the Constitution, the social reform movements of the last several decades, the spread of education and the advantages of the special provisions including reservations secured so far, have all undoubtedly seen at least some individuals and families in the backward classes, however small in number, gaining sufficient means to develop their capacities to compete with others in every field. That is an undeniable fact. Legally, therefore, they are not entitled to be any longer called as part of the backward classes whatever their original birthmark. It can further hardly be argued that once a backward class, always a backward class. That would defeat the very purpose of the special provisions made in the Constitution for the advancement of the backward classes, and for enabling them to come to the level of and to compete with the forward classes, as equal citizens. On the other hand, to continue to confer upon such advanced sections from the backward classes the special benefits, would amount to treating equals unequally violating the equality provisions of the Constitution. Secondly, to rank them with the rest of the backward classes would equally violate the right to equality of the rest in those classes, since it would amount to treating the unequals equally. What is more, it will lead to perverting the objectives of the special constitutional provisions since the forwards among the backward classes will thereby be enabled to lap up all the special benefits to the exclusion and at the cost of the rest in those classes, thus keeping the rest in perpetual backwardness. The object of the special constitutional provisions is not to uplift a few individuals and families in the backward classes but to ensure the advancement of the backward classes as a whole. Hence, taking out the forwards from among the backward classes is not only permissible but obligatory under the Constitution. However, it is necessary to add that just as the backwardness of the backward groups cannot be measured in terms of the forwardness of the forward groups, so also the forwardness of the forwards among the backward classes cannot be measured in terms of the backwardness of the backward sections of the said classes. It has to be judged on the basis of the social capacities gained by them to compete with the forward classes. So long as the individuals belonging to the backward classes do not develop sufficient capacities of their own to compete with others, they can hardly be classified as forward.
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> 629. More backward and backward is an illusion. No constitutional exercise is called for it. What is required is practical approach to the problem. The collectivity or the group may be backward class but the individuals from that class may have achieved the social status or economic affluence. Disentitle them from claiming reservation. Therefore, while reserving posts for backward classes, the departments should make a condition precedent that every candidate must disclose the annual income of the

parents beyond which one could not be considered to be backward. What should be that limit can be determined by the appropriate State. Income apart, provision should be made that wards of those backward classes of persons who have achieved a particular status in society either political or social or economic or if their parents are in higher services then such individuals should be precluded to avoid monopolisation of the services reserved for backward classes by a few. Creamy layer, thus, shall stand eliminated. And once a group or collectivity itself is found to have achieved the constitutional objective then it should be excluded from the list of backward class. Therefore, (1) No reservation can be made on economic criteria.

(2) It may be under Article 16(4) if such class satisfies the test of inadequate representation.

(3) Exclusion of creamy layer is a social purpose. Any legislative or executive action to remove such persons individually or collectively cannot be constitutionally invalid.

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790. 'Means-test' in this discussion signifies imposition of an income limit, for the purpose of excluding persons (from the backward class) whose income is above the said limit. This submission is very often referred to as the "creamy layer" argument. Petitioners submit that some members of the designated backward classes are highly advanced socially as well as economically and educationally. It is submitted that they constitute the forward section of that particular backward class as forward as any other forward class member and that they are lapping up all the benefits of reservations meant for that class, without allowing the benefits to reach the truly backward members of that class. These persons are by no means backward and with them a class cannot be treated as backward. It is pointed out that since Jayasree almost every decision has accepted the validity of this submission.

791. On the other hand, the learned counsel for the States of Bihar, Tamil Nadu, Kerala and other counsel for respondents strongly oppose any such distinction. It is submitted that once a class is identified as a backward class after applying the relevant criteria including the economic one, it is not permissible to apply the economic criteria once again and sub-divide a backward class into two sub-categories. Counsel for the State of Tamil Nadu submitted further that at one stage (in July 1979) the State o f Tamil Nadu did indeed prescribe such an income limit but had to delete it in view of the practical difficulties encountered and also in view of the representations received. In this behalf, the learned counsel invited our attention to Chapter 7-H (pages 60 to 62) of the Ambashankar Commission (Tamil Nadu Second Backward Classes Commission) Report. According to the respondents the argument of 'creamy layer' is but a mere ruse, a trick, to deprive the backward classes of the benefit of reservations. It is submitted that no member of backward class has come forward with this plea and that it ill becomes the members of forward classes to raise this point. Strong reliance is placed upon the observations of Chinnappa Reddy, J in Vasanth kumar to the following effect (SCC p.763, para 72) " .. .. One must, however, enter a caveat to the criticism that the benefits of reservation are often snatched away by the top creamy layer of backward class or

caste. That a few of the seats and posts reserved for backward classes are snatched away by the more fortunate among them is not to say that reservation is not necessary. This is bound to happen in a competitive society such as ours. Are not the unreserved seats and posts snatched away, in the same way, by the top creamy layer of society itself? Seats reserved for the backward classes are taken away by the top layers amongst them on the same principle of merit on which the unreserved seats are taken away by the top layers of society. How can it be bad if reserved seats and posts are snatched away by the creamy layer of backward classes, if such snatching away of unreserved posts by the top creamy layer of society itself is not bad?"

792. In our opinion, it is not a question of permissibility or desirability of such test but one of proper and more appropriate identification of a class a backward class. The very concept of a class denotes a number of persons having certain common traits which distinguish them from the others. In a backward class under clause (4) of Article 16, if the connecting link is the social backwardness, it should broadly be the same in a given class. If some of the members are far too advanced socially (which in the context, necessarily means economically and, may also mean educationally) the connecting thread between them and the remaining class snaps. They would be misfits in the class. After excluding them alone, would the class be a compact class. In fact, such exclusion benefits the truly backward. Difficulty, however, really lies in drawing the line how and where to draw the line? For, while drawing the line, it should be ensured that it does not result in taking away with one hand what is given by the other. The basis of exclusion should not merely be economic, unless, of course, the economic advancement is so high that it necessarily means social advancement. Let us illustrate the point. A member of backward class, say a member of carpenter caste, goes to Middle East and works there as a carpenter. If you take his annual income in rupees, it would be fairly high from the Indian standard. Is he to be excluded from the Backward Class? Are his children in India to be deprived of the benefit of Article 16(4)? Situation may, however, be different, if he rises so high economically as to become say a factory owner himself. In such a situation, his social status also rises. He himself would be in a position to provide employment to others. In such a case, his income is merely a measure of his social status. Even otherwise there are several practical difficulties too in imposing an income ceiling. For example, annual income of Rs.36,000 may not count for much in a city like Bombay, Delhi or Calcutta whereas it may be a handsome income in rural India anywhere. The line to be drawn must be a realistic one. Another question would be, should such a line be uniform for the entire country or a given State or should it differ from rural to urban areas and so on. Further, income from agriculture may be difficult to assess and, therefore, in the case of agriculturists, the line may have to be drawn with reference to the extent of holding. While the income of a person can be taken as a measure of his social advancement, the limit to be prescribed should not be such as to result in taking away with one hand what is given with the other. The income limit must be such as to mean and signify social advancement. At the same time, it must be recognised that there are certain positions, the occupants of which can be treated as socially advanced without any further enquiry. For example, if a member of a designated backward class becomes a member of IAS or IPS or any other All India Service, his status is society (social status) rises; he is no longer socially disadvantaged. His children get full opportunity to realize their potential. They are in no way handicapped in the race of life.

793. Keeping in mind all these considerations, we direct the Government of India to specify the basis of exclusion whether on the basis of income, extent of holding or otherwise of 'creamy layer'. This shall be done as early as possible, but not exceeding four months. On such specification persons falling within the net of exclusionary rule shall cease to be the members of the Other Backward Classes (covered by the expression 'backward class of citizens') for the purpose of Article 16(4). The impugned Office Memorandums dated August 13, 1990 and September 25, 1991 shall be implemented subject only to such specification and exclusion of socially advanced persons from the backward classes contemplated by the said O.M. In other words, after the expiry of four months from today, the implementation of the said O.M. shall be subject to the exclusion of the 'creamy layer' in accordance with the criteria to be specified by the Government of India and not otherwise".

57. In Indra Sawhney v. Union of India (1996) 6 SCC 506) at page 508) it was noted as follows :

> "3. Thereafter the matter again came up before the Court on 20-3-1995. Finding that the State of Kerala has not taken any steps, this Court issued notice to show cause why action should not be taken for non-compliance of this Court's order. Again the matter came up on 10-7- 1995. Even on that date no report of compliance was submitted to the Court; instead an affidavit sworn to by the Chief Secretary to the State was handed over explaining the circumstances why the implementation of the judgment was delayed. xx xx xx
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> 5. In the circumstances, out of sheer exhaustion and having regard to the fact that the constitutionality of the Kerala Act 16 of 1995 is pending disposal before this Court, we have decided to get the information ourselves regarding "creamy layer" issue through a High Level Committee.
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> 6. Accordingly, we request the learned Chief Justice of the Kerala High Court to appoint a retired Judge of the High Court to be the Chairman of the High Level Committee who will induct not more than 4 members from various walks of life to identify the "creamy layer" among "the designated other backward classes" in Kerala State in the light of the ruling of this Court in Mandal case and forward the report to this Court within 3 months from the date of receipt of this order."

58. In Indra Sawhney No. 2 it was observed as follows:

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

is not adequately represented in the services under the State. Reservation is permissible (i) in favour of any backward class of citizens; and (ii) if it is not adequately represented in services under the State.

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

9. Inclusion of castes in the list of backward classes cannot be mechanical and cannot be done without adequate relevant data. Nor can it be done for extraneous reasons Likewise, periodic examination of a backward class could lead to its exclusion if it ceases to be socially backward or if it is adequately represented in the services. Once backward, always backward is not acceptable. In any case, the "creamy layer" has no place in the reservation system.

10. If forward classes are mechanically included in the list of backward classes or if the creamy layer among backward classes is not excluded, then the benefits of reservation will not reach the really backward among the backward classes. Most of the benefits will then be knocked away by the forward castes and the creamy layer. That will leave the truly backward, backward forever.

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13. In Indra Sawhney on the question of exclusion of the "creamy layer" from the backward classes, there was agreement among eight out of the nine learned Judges of this Court. There were five separate judgments in this behalf which required the "creamy layer"

to be identified and excluded.

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22. As appears from the judgments of six out of the eight Judges, viz. Jeevan Reddy (for himself and three others), Sawant and Sahai, JJ. (i.e. six learned Judges out of nine), they specifically refer to those in higher services like IAS, IPS and All India Services or near about as persons who have reached a higher level of social advancement and economic status and therefore as a matter of law, such persons are declared not entitled to be treated as backward. They are to be treated as creamy layer "without further inquiry". Likewise, persons living in sufficient affluence who are able to

provide employment to others are to be treated as having reached a higher social status on account of their affluence, and therefore outside the backward class. Those holding higher levels of agricultural landholdings or getting income from property, beyond a limit, have to be excluded from the backward classes. This, in our opinion, is a judicial " declaration " made by this Court. Xx xx xx

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

520) "To continue to confer upon such advanced sections special benefits, would amount to treating equals unequally.

Secondly, to rank them with the rest of the backward classes would amount to treating the unequals equally."

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

64. The Preamble to the Constitution of India emphasises the principle of equality as basic to our Constitution. In Kesavananda Bharati v. State of Kerala it was ruled that even constitutional amendments which offended the basic structure of the Constitution would be ultra vires the basic structure. Sikri, C.J. laid stress on the basic features enumerated in the Preamble to the Constitution and said that there were other basic features too which could be gathered from the constitutional scheme (para 506-A of SCC). Equality was one of the basic features referred to in the Preamble to our Constitution. Shelat and Grover, JJ. also referred to the basic rights referred to in the Preamble. They specifically referred to equality (paras 520 and 535-A of SCC). Hegde and Shelat, JJ. also referred to the Preamble (paras 648, 652). Ray, J. (as he then was) also did so (para 886). Jaganmohan Reddy, J. too referred to the Preamble and the equality doctrine (para 1159). Khanna, J. accepted this position (para 1471). Mathew, J. referred to equality as a basic feature (para 1621). Dwivedi, J. (paras 1882, 1883) and Chandrachud, J. (as he then was) (see para 2086) accepted this position.

65. What we mean to say is that Parliament and the legislature in this country cannot transgress the basic feature of the Constitution, namely, the principle of equality enshrined in Article 14 of which Article 16(1) is a facet. Whether the creamy layer is not excluded or whether forward castes get included in the list of backward classes , the position will be the same, namely, that there will be a breach not only of Article 14 but of the basic structure of the Constitution. The non-exclusion of the creamy layer or the inclusion of forward castes in the list of backward classes will, therefore, be

totally illegal. Such an illegality offending the root of the Constitution of India cannot be allowed to be perpetuated even by constitutional amendment. The Kerala Legislature is, therefore, least competent to perpetuate such an illegal discrimination. What even Parliament cannot do, the Kerala Legislature cannot achieve."

59. Though in M. Nagaraj's case (supra) some observations of general nature have been made so far as the applicability of the principles to Scheduled Castes and Scheduled Tribes are concerned, really that case did not concern with Scheduled Castes and Scheduled Tribes. Similar is the position here. The focus on the identity test in M. Nagaraj's case (supra) is unexceptionable. At paras 80 and 110, it was noted as follows:

> "80. Before concluding, we may refer to the judgment of this Court in M.G. Badappanavar. In that case the facts were as follows. Appellants were general candidates. They contended that when they and the reserved candidates were appointed at Level-1 and junior reserved candidates got promoted earlier on the basis of roster- points to Level-2 and again by way of roster-points to Level-3, and when the senior general candidate got promoted to Level-3, then the general candidate would become senior to the reserved candidate at Level-3. At Level-3, the reserved candidate should have been considered along with the senior general candidate for promotion to Level-4. In support of their contention, appellants relied upon the judgment of the Constitution Bench in Ajit Singh (II). The above contentions raised by the appellants were rejected by the tribunal. Therefore, the general candidates came to this Court in appeal. This Court found on facts that the Service Rule concerned did not contemplate computation of seniority in respect of roster promotions. Placing reliance on the judgment of this Court in Ajit Singh (I) and in Virpal Singh, this Court held that roster promotions were meant only for the limited purpose of due representation of backward classes at various levels of service and, therefore, such roster promotions did not confer consequential seniority to the roster- point promotee. In Ajit Singh (II) , the circular which gave seniority to the roster-point promotees was held to be violative of Articles 14 and 16. It was further held in M.G. Badappanavar that equality is the basic feature of the Constitution and any treatment of equals as unequals or any treatment of unequals as equals violated the basic structure of the Constitution. For this proposition, this Court placed reliance on the judgment in Indra Sawhney while holding that if creamy layer among backward classes were given some benefits as backward classes, it will amount to equals being treated unequals. Applying the creamy layer test, this Court held that if roster-point promotees are given consequential seniority, it will violate the equality principle which is part of the basic structure of the Constitution and in which event, even Article 16(4A) cannot be of any help to the reserved category candidates. This is the only judgment of this Court delivered by three-Judge bench saying that if roster-point promotees are given the benefit of consequential seniority, it will result in violation of equality principle which is part of the basic structure of the Constitution. Accordingly, the judgment of the tribunal was set aside.

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110. As stated above, the boundaries of the width of the power, namely, the ceiling-limit of 50% (the numerical benchmark), the principle of creamy layer, the compelling reasons, namely, backwardness, inadequacy of representation and the overall administrative efficiency are not obliterated by the impugned amendments. At the appropriate time, we have to consider the law as enacted by various States providing for reservation if challenged. At that time we have to see whether limitations on the exercise of power are violated. The State is free to exercise its discretion of providing for reservation subject to limitation, namely, that there must exist compelling reasons of backwardness, inadequacy of representation in a class of post(s) keeping in mind the overall administrative efficiency. It is made clear that even if the State has reasons to make reservation, as stated above, if the impugned law violates any of the above substantive limits on the width of the power the same would be liable to be set aside."

60. There is an interesting article by an author dealing with Affirmative Action which reads as follows:

"In his much referred to speech on 26 November 1949, Dr. Ambedkar said that India was wanting in its recognition of the principle of fraternity. What does fraternity mean? Fraternity means a sense of common brotherhood of all Indians - of India being one people. The virtues of liberty by themselves do not create fraternity. This is why several liberal theorists are unsure about whether or not state interventions should be allowed for when the issue of overcoming disprivileges are concerned. The central concern then is how to inculcate a sense of `common brotherhood' among people with divergent histories and who occupy vastly different positions in the economic and social structure of a society.

Before we go further on discussing the specifics of caste and reservations in India it is worth recording that liberty and equality can sometimes be contradictorily positioned. This is why it is important for democracy to redress these community-based grievances within a framework that does not violate liberal principles. While the individual needs to be protected, there are individuals in certain groups and communities that need safeguards and support as well. After all it must be remembered that communities do not create citizens, but that there are citizens within communities. Also, while it is rather risky to say that communities have rights, there is no doubt at all that within liberal democracies, individuals have rights. Indeed, these rights were secured historically so that individuals did not have to be burdened by community and ascriptive pressures on them.

The rationale behind affirmative action is that it releases suppressed talents and expands the pool of social assets in society for the general good. If today we are looking for a justification for affirmative action in this fashion, several decades ago it

was precisely this enlarging of the social pool of talents that recommended equal treatment for women. As L.T. Hobhouse argued then that when women are repressed then there is a loss of all the elements in the common stock which the free play of the woman's mind would contribute. By increasing the sum of realized talents in society individuals can actually gain greater inter-subjectivity in their everyday lives. As the set of resemblances between them is now so much larger, they can practice, pace Rawls, the moral precept of participating in one another's fate. In this process, fraternal values of citizenship gain materiality and fulfilment. It should be recognized that fraternity can only come about through a basic set of resemblances between citizens. This conception of resemblances is about citizens being equally able to avail of institutional facilities that ensure their acquisition of those skills that are considered to be socially valuable. In other words, social opportunities exist for individual self-expansion, and it is only individuals now who can exclude themselves. If grinding poverty comes in the way of acquiring such socially valuable skills, then those blocks should be met by developmental interventions such as the anti- poverty programmes. But on no account should the removal of poverty be made synonymous with reservations. Reservations are only meant to create a measure of confidence and dignity among those who didn't dare dream of an alternative life. But that alone cannot create structural conditions that address the root causes of poverty. If quality education and the imparting of socially valuable skills are provided across the board through reservations, then that would take care of the complaint that affirmative action is largely about the equality of results. Rawls' principle of justice as fairness only says that offices should be open to all. But what if people do not qualify for these offices because their potentialities have remained unrealized on account of inadequate qualifications arising from a history of discrimination compounded by poverty, or, indeed, because of sub- standard education? Does it mean that, through positive discrimination and reservations, they should be given these jobs anyway regardless of the welfare of institutions? In this connection, Andre Beteille's warning that affirmative action should be sensitive to institutional well-being as well needs to be recalled. Beteille sifted between the various imperatives that different organizations are subsumed under and accordingly advised a careful calibration of reservations such that these provisions of performance do not undermine efficiency of performance. The resemblances that are being advocated in the context of affirmative action should not be interpreted in terms of homogeneous `sameness'. Sameness is what medieval religious fundamentalists aim for. On the other hand, the set of resemblances in a constitutional democracy enhances equality and not sameness by providing identical opportunities to all for self-expression and development. Citizenship is not about the sameness of lifestyles or of income. Marshall's notion of citizenship as a status that tends towards equality should be interpreted in this light. According to Marshall, the equality that citizenship guarantees should be the foundation on which other kinds of differences can develop.

It will no doubt be the case that differences will exist even after a minimum set of resemblances is established. But these will no longer be outcomes of the accidents of

birth. When diversity exists outside of choice then that is not a state of affairs that a democratic society can rejoice in. Affirmative action is instrumental in enlarging the scope of difference and diversity, but it succeeds in doing so by first ensuring that citizens resemble one another at a very critical level namely in their ability to acquire socially valuable skills.

Affirmative action gets somewhat complicated in India on account of caste politics. Undeniably, India is the most stratified society in the world. Over and above caste differentiations there are huge income disparities, religious and community differences that are deeply engraved into everyday social relations. No doubt, the nature of caste and community interactions has changed over time, but considerations along ascriptive lines still remain important markers, both at the public and private domains.

Not only are we now confronted by identity assertions of earthy peasant castes, that were earlier ranked as lowly shudras (or menials), but also, of those who, till recently, were called 'untouchables'. Now we also know that none of these castes had ever ideologically accepted their degraded status. Yet they lived out their humble lives quietly for generations for fear of offending the privileged strata. We now know more of their origin tales that boast of the elevated positions they once held before an unsuspected chicanery, a lost war, or a mercurial god, demoted them to lowly rungs in popular perceptions. Today these tales are an important source of symbolic energy for caste mobilizations and identity assertions. Now that the Mandal recommendations are in place, reservations are not just for the Scheduled Castes and Tribes, but for the so-called other Backward Castes as well. While there are a large number of castes listed as Backward, the demand for reservations for this category has been spearheaded by the class of owner-cultivators, or peasant proprietors. Before we assess Mandal reforms it would be useful to know how these peasant castes emerged. After the zamindari abolition came into effect, adult franchise and land-to-the-tiller programme together forced the earlier landed castes slowly to cede ground in the villages. Soon, however, traditional peasant castes such as the Ahirs, Kurmis, Koeris, Lodhs, Rajputs and Jats began to dominate the political scape of northern India. In the southern State of Tamil Nadu, the Vanniyars and Thevars have become assertive, and in Karnataka control was wrested in the mid-1950s from the traditional rural elite within the Congress Party by the Vokkaligas and Linagayats. xx xx xx In pursuance of Article 340 of the Constitution, the Kalelkar Commission was set up in 1955 but it could not come to any satisfactory conclusion about who should be legitimately considered as OBCs. The Mandal Commission came into existence in 1980 and it promptly came up with a long list of 3,743 backward castes on the basis of social, economic and educational backwardness. The Mandal Commission's recommendations were implemented in 1990 by the then Prime Minister VP Singh. This meant that a further 29 per cent of seats in educational institutions and government jobs would now be reserved for OBCs.

The implementation of reservations for OBCs set off a furore of protests, including a few suicides, all over the country by those who are considered to be members of forward castes. Many felt that reservations for OBCs were not warranted for two reasons. First, this would make India a caste society by law; and, second, because many of those who are considered as OBCs are really quite powerful and dominant in rural India. The obvious reference was to Jats and Yadavs. A majority of social anthropologists wrote against reservations for OBCs primarily on these grounds. Andre Beteille's criticism of the Mandal Commission recommendations was widely commented upon. He distinguishes between reservations for OBCs following Mandal recommendations and the reservations that were already granted in the Constitution for Scheduled Castes and Tribes. While provisions for Scheduled Castes and Tribes were with the intention of reaching towards greater equality, reservations for OBCs were really to bring about a balance of power on the calculus of caste. The kind of deprivations that ex-untouchables (Scheduled Castes) and Adivasis (Scheduled Tribes) encountered for centuries can in no way be compared to the traditional condition of the OBCs. Besides, many OBCs are quite powerful in rural India, both economically and politically. In fact, the Mandal Commission recommendations were actually giving in to a powerful rural lobby that did not really care for equality of opportunities as much as it did for equality of results.

xx xx xx There are two considerations that escape many uncritical applications of affirmative action. First, affirmative action must resist any tendency whereby its beneficiaries become vested interests. And secondly, it must eventually seek its own dissolution. While the second may be far away, it is by paying attention to the first issue that it is possible for affirmative action to eventually annihilate itself. Paradoxical as it may appear, but when this happens it is then that positive discrimination has finally triumphed.

Affirmative action fails to reach this final destination when it is inconsistently applied, or when its beneficiaries form vested interest bloc within a democratic electoral system on the basis of ascriptive identity alone. The latter poses a stronger practical and intellectual challenge to the policy of affirmative action. As long as historical disprivileges and economic backwardness go together and the relationship between them is statistically very strong, colour or caste membership can act as ready reckoners for targeting beneficiaries of affirmative action. This, however, does not mean that membership in these communities should advantage individuals in perpetuity once they are able to develop the minimum set of resemblances. Therefore, as and when those who belong to targeted categories for affirmative action acquire socially useful talents and attributes, they should contribute them to the society as a whole, and not employ them only for sectional advantages.

Consequently, those who benefit from this policy owe it to society to put their newly acquired social talents back into the collective social pool. This would mean that they would automatically fall outside the scope of affirmative action programme in the

future. The net would no longer cover them as they already have socially useful assets. Indeed the society will be richer and better endowed on account of it as the beneficiaries of affirmative action will now begin to contribute to the social pool of talents. This would both release and add to social and material resources required for continuing with the policy aimed at the enhancement of resemblances. As a result, society will progressively acquire a higher strike rate with the policy of affirmative action by reaching out to those who have thus far fallen outside its ambit. By increasing the number of those who possess the minimum set of resemblances, the society has now a larger wealth of talents in a variety of fields and specialities than it had before. This is how affirmative action, which is aimed at the historically most disadvantaged sections, ultimately improves the lot of everybody in society. If, on the other hand, either colour or race, which are only ready reckoners, become permanent considerations, without taking into account biographical profiles of actual and potential beneficiaries, then that would inhibit fraternity and sow seeds of permanent divisions in society.

Affirmative action begins by placing the assets of the better off in a collective pool, not for redistribution, but to create the infrastructure that is needed to enhance the minimum set of resemblances necessary for substantive citizenship. With the help of this capital, socially valuable assets are now created in sites where there were none. This measure has a strong practical dimension for out of this collective pooling new assets are being created. The creation of such new assets is possible because the initial pooling of assets of the privileged section allows the society to underwrite the expenses incurred for the establishment of certain baseline similarities in society as a whole. As the most important feature in this case is not one's ascriptive badge, but the creation of socially valuable assets, it is expected that those who have been the beneficiaries of the scheme will gradually slip out of the net. They will cease to receive from the collective pool and instead will begin to contribute to it. As far as public policy is concerned they are no long members of certain designated castes or communities. They are now simply citizens.

In passing it is worth putting in perspective that the difference between reservations in India and affirmative action in America is that the former talks about extirpating caste whereas the latter is interested primarily in representing races. If the accent is on representation then the ascriptive factor becomes a permanent badge that can never be overcome. Again, Americans believe in race representation, not in quotas, and in not sacrificing standards for social justice. But the great similarity between the two forms of preferential policy is that in both cases it is the public sector where positive discrimination is effectively realized. In America, the State encourages private sector units to employ people of diverse backgrounds without specifying quotas for different races. If these enterprises can show a fair racial mix then they can get preferential contracts from the government. The State cannot force any private sector unit to implement affirmative action. It is a combination of goodwill and rewards that takes affirmative action forward in the private sector of America. For

> example, Bob Jones University does not receive any public money and, therefore, it refuses to accept affirmative action, even of the most muted kind. It is only when organizations depend on state funding, or when they want to be rewarded by the State, that policy of affirmative action comes to life."

61. It has been rightly observed in Indra Sawhney No. 2 (supra) whether creamy layer is not excluded or whether forward classes can be excluded in the list of backward classes, the position would be the same and there will be breach not only of Article 14 but of the basic structure of the Constitution. As was rightly observed in the said case, non exclusion of the creamy layer or inclusion of forward castes in the lists of backward classes will be totally illegal. The illegality offends the roots and foundation of the Constitution and cannot be allowed to be perpetuated.

62. In Nair Service Society's case (supra) this Court observed as follows:

> "54. This Court, thus, has categorically laid down the law that determination of creamy layer is a part of the constitutional scheme."

63. In our view, even non exclusion of the creamy layer for the purpose of admission to the educational institutions cannot be countenanced. It is inconceivable that a person who belongs to the creamy layer is socially and educationally backward. The backward status vanishes when somebody becomes part of the creamy layer.

64. In Vasant Kumar's case (supra) it was aptly described that the benefits of reservation are snatched away by the top creamy layer of the backward classes and this has to be avoided at any cost. By inclusion of the creamy layer or in other words non inclusion thereof a fresh lease of life to those who should have been left out is given. Their continuance would mean keeping weakest amongst the weak always weak and leaving the fortunate ones to enjoy the benefits. If the ultimate aim is a casteless and classless society in line with the dream of the Constitution framers that has to be chewed out. As Father of the Nation had once said if the caste system as we know is an anchronism, then it must go. There is a feeling and it cannot be said without reason that reservation hits at the root of this belief and instead of its obliteration there is perceivable perpetuation. It is true that obliteration cannot be done immediately or within a short span of time but that is no answer to the lack of seriousness in seeking obliteration.

65. In Indra Sawhney No.1 (supra) the following observations on the question of giving priority over reservation are of significance. It was held:

> "293. Preference without reservation may be adopted in favour of the chosen classes of citizens by prescribing for them a longer period for passing a test or by awarding additional marks or granting other advantages like relaxation of age or other minimum requirements. (See the preferential treatment in State of Kerala and Anr. v. N.M. Thomas and Ors. (1976) 1 SCR 906). Furthermore, it would be within the discretion of the State to provide financial assistance to such persons by way of grant, scholarships, fee concessions etc. Such preferences or advantages are like temporary

> crutches for additional support to enable the members of the backward and other disadvantaged classes to march forward and compete with the rest of the people. These preferences are extended to them because of their inability otherwise to compete effectively in open selections on the basis of merits for appointment to posts in public services and the like or for selection to academic courses. Such preferences can be extended to all disadvantaged classes of citizens, whether or not they are victims of prior discrimination. What qualifies persons for preference is backwardness or disadvantage of any kind which the State has a responsibility to ameliorate. The blind and the deaf, the dumb and the maimed, and other handicapped persons qualify for preference. So do all other classes of citizens who are at a comparative disadvantage for whatever reason, and whether or not they are victims of prior discrimination. All these persons may be beneficiaries of preferences short of reservation. Any such preference, although discriminatory on its face, may be justified as a benign classification for affirmative action warranted by a compelling state interest.
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> 294. In addition to such preferences, quotas may be provided exclusively reserving posts in public services or seats in academic institutions for backward people entitled to such protection. Reservation is intended to redress backwardness of a higher degree. Reservation prima facie is the very antithesis of a free and open selection. It is a discriminatory exclusion of the disfavoured classes of meritorious candidates: M.R. Balaji (supra). It is not a case of merely providing an advantage or a concession or preference in favour of the backward classes and other disadvantaged groups. It is not even a handicap to disadvantage the forward classes so as to attain a measure of qualitative or relative equality between the two groups.

Reservation which excludes from consideration all those persons falling outside the specially favoured groups, irrespective of merits and qualifications, is much more positive and drastic a discrimination - albeit to achieve the same end of qualitative equality - but unless strictly and narrowly tailored to a compelling constitutional mandate, it is unlikely to qualify as a benign discrimination. Unlike in the case of other affirmative action programmes, backwardness by itself is not sufficient to warrant reservation. What qualifies for reservation is backwardness which is the result of identified past discrimination and which is comparable to that of the Scheduled Castes and the Scheduled Tribes. Reservation is a remedial action specially addressed to the ill effects stemming from historical discrimination. To ignore this vital distinction between affirmative action short of reservation and reservation by a predetermined quota as a remedy for past inequities is to ignore the special characteristic of the constitutional grant of power specially addressed to the constitutionally recognised backwardness. xx xx xx

319. Reservation should be avoided except in extreme cases of acute backwardness resulting from prior discrimination as in the case of the Scheduled Castes and the Scheduled Tribes and other classes of persons in comparable positions. In all other cases, preferential treatment short of reservation can be adopted. Any such action, though in some respects discriminatory, is permissible on the basis of a legitimate classification rationally related to the attainment of equality in all its

aspects.

Xx xx xx 323 (16). In the final analysis, poverty which is the ultimate result of inequities and which is the immediate cause and effect of backwardness has to be eradicated not merely by reservation as aforesaid, but by free medical aid, free elementary education, scholarships for higher education and other financial support, free housing, self- employment and settlement schemes, effective implementation of land reforms, strict and impartial operation of the law-enforcing machinery, industrialization, construction of roads, bridges, culverts, canals, markets, introduction of transport, free supply of water, electricity and other ameliorative measures particularly in areas densely populated by backward classes of citizens.

(underlined for emphasis)

66. Following observations in M.R. Balaji v. State of Mysore (AIR 1963 SC 649) are also relevant:

> "In this connection, it is necessary to remember that the reservation made by the impugned order is in regard to admission in the seats of higher education in the State. It is well-known that as a result of the awakening caused by political freedom, all classes of citizens are showing a growing desire to give their children higher university education and so, the Universities are called upon to face the challenge of this growing demand. While it is necessary that the demand for higher education which is thus increasing from year to year must be adequately met and properly channelised, we cannot overlook the fact that in meeting that demand standards of higher education in Universities must not be lowered. The large demand for education may be met by starting larger number of educational institutions vocational schools and polytechnics. But it would be against the national interest to exclude from the portals of our Universities qualified and competent students on the ground that all the seats in the Universities are reserved for weaker elements in society. As has been observed by the University Education Commission, "he indeed must be blind who does not see that mighty as are the political changes, far deeper are the fundamental questions which will be decided by what happens in the universities"

(p. 32). Therefore, in considering the question about the propriety of the reservation made by the impugned order, we cannot lose sight of the fact that the reservation is made in respect of higher university education. The demand for technicians, scientists, doctors, economists, engineers and experts for the further economic advancement of the country is so great that it would cause grave prejudice to national interests if considerations of merit are completely excluded by whole-sale reservation of seats in all Technical, Medical or Engineering colleges or institutions of that kind. Therefore, considerations of national interest and the interests of the community or society as a whole cannot be ignored in determining the question as to whether the special provision contemplated by Art. 15(4) can be special provision which excludes the rest of the society altogether. In this connection, it would be relevant to mention that the University Education Commission which considered the problem of the assistance to backward communities, had observed that the

percentage of reservation shall not exceed a third of the total number of seats, and it has added that the principle of reservation may be adopted for a period of ten years. (p. 53).

We have already noticed that the Central Government in its communication to the State has suggested that reservation for backward classes, Scheduled Castes and Scheduled Tribes may be up to 25% with marginal adjustments not exceeding 10% in exceptional cases.

The learned Advocate-General has suggested that reservation of a large number of seats for the weaker sections of the society would not affect either the depth or efficiency of scholarship at all, and in support of this argument, he has relied on the observations made by the Backward Classes Commission that it found no complaint in the States of Madras, Andhra, Travancore-Cochin and Mysore where the system of recruiting candidates from other Backward Classes to the reserve quota has been in vogue for several decades. The Committee further observed that the representatives of the upper classes did not complain about any lack of efficiency in the offices recruited by reservation (p. 135). This opinion, however, is plainly inconsistent with what is bound to be the inevitable consequence of reservation in higher university education. If admission to professional and technical colleges is unduly liberalised it would be idle to contend that the quality of our graduates will not suffer. That is not to say that reservation should not be adopted; reservation should and must be adopted to advance the prospects of the weaker sections of society, but in providing for special measures in that behalf care should be taken not to exclude admission to higher educational centres to deserving and qualified candidates of other communities. A special provision contemplated by Art. 15(4) like reservation of posts and appointments contemplated by Art. 16(4) must be within reasonable limits. The interests of weaker sections of society which are a first charge on the states and the Centres have to be adjusted with the interests of the community as a whole. The adjustment of these competing claims is undoubtedly a difficult matter, but if under the guise of making a special provision, a State reserves practically all the seats available in all the colleges, that clearly would be subverting the object of Art. 15(4). In this matter again, we are reluctant to say definitely what would be a proper provision to make. Speaking generally and in a broad way, a special provision should be less than 50%; how much less than 50% would depend upon the relevant prevailing circumstances in each case. In this particular case it is remarkable that when the State issued its order on July 10, 1961, it emphatically expressed its opinion that the reservation of 68% recommended by the Nagan Gowda Committee would not be in the larger interests of the State. What happened between July 10, 1961, and July 31, 1962, does not appear on the record. But the State changed its mind and adopted the recommendation of the Committee ignoring its earlier decision that the said recommendation was contrary to the larger interests of the State. In our opinion, when the State makes a special provision for the advancement of the weaker sections of society specified in Art. 15(4) it has to approach its task objectively and in a rational manner. Undoubtedly, it has to take reasonable and even generous steps to help the advancement of weaker elements; the extent of the problem must be weighted, the requirements of the community at large must be borne in mind and a formula must be evolved which would strike a reasonable balance between the several relevant considerations. Therefore, we are satisfied that the reservation of 68% directed by the impugned order is plainly inconsistent with Art. 15(4).

The petitioners contend that having regard to the infirmities in the impugned order, action of the State in issuing the said order amounts to a fraud on the Constitutional power conferred on the State by Art. 15(4). This argument is well-founded, and must be upheld. When it is said about an executive action that it is a fraud on the Constitution, it does not necessarily mean that the action is actuated by mala fides. An executive action which is patently and plainly outside the limits of the constitutional authority conferred on the State in that behalf is struck down as being ultra vires the State's authority. If, on the other hand, the executive action does not patently or overtly transgress the authority conferred on it by the Constitution, but the transgression is covert or latent, the said action is struck down as being a fraud on the relevant constitutional power. It is in this connection that courts often consider the substance of the matter and not its form and in ascertaining the substance of the matter, the appearance or the cloak, or the veil of the executive action is carefully scrutinized and if it appears that notwithstanding the appearance, the cloak or the veil of the executive action, in substance and in truth the constitutional power has been transgressed, the impugned action is struck down as a fraud on the Constitution. We have already noticed that the impugned order in the present case has categorised the Backward Classes on the sole basis of caste which, in our opinion, is not permitted by Art. 15(4); and we have also held that the reservation of 68% made by the impugned order is plainly inconsistent with the concept of the special provision authorised by Art. 15(4). Therefore, it follows that the impugned order is a fraud on the Constitutional power conferred on the State by Art. 15(4). The learned Advocate-General has made an earnest and strong plea before us that we should not strike down the order, but should strike down only such portions of the order which appear to us to be unconstitutional on the doctrine of severability. He has urged that since 1958, the State has had to make five orders to deal with the problem of advancing the lot of the Backward Classes and the State is anxious that the implementation of the impugned order should not be completely prohibited or stopped. We do not see how it would be possible to sever the invalid provisions of the impugned order. If the categorisation of the Backward Classes is invalid, this Court cannot and would not attempt the task of enumerating the said categories; and if the percentage of reservation is improper and outside Art. 15(4), this Court would not attempt to lay down definitely and in an inflexible manner as to what would be the proper percentage to reserve. In this connection, it may be relevant to refer to one fact on which the petitioners have strongly relied. It is urged for them that the method adopted by the Government of Maharashtra in exercising its power under Art. 15(4) is a proper method to adopt. It appears that the Maharashtra Government has decided to afford financial assistance, and make monetary grants to students seeking higher education where it is shown that the annual income of their families is below a prescribed minimum. The said scheme is not before us and we are not called upon to express any opinion on it. However, we may observe that if any State adopts such a measure, it may afford relief to and assist the advancement of the Backward Classes in the State, because backwardness, social and educational, is ultimately and primarily due to poverty. An attempt can also be made to start newer and more educational institutions, polytechnics, vocational institutions and even rural Universities and thereby create more opportunities for higher education. This dual attack on the problem posed by the weakness of backward communities can claim to proceed on a rational, broad and scientific approach which is consistent with, and true to, the noble ideal of a secular welfare democratic State set up by the Constitution of this country. Such an approach can be supplemented, if necessary by providing special provision by way of reservation to aid the Backward classes and Scheduled castes and Tribes. It may well be that there may be other

ways and means of achieving the same result. In our country where social and economic conditions differ from State to State, it would be idle to expect absolute uniformity of approach; but in taking executive action to implement the policy of Art. 15(4), it is necessary for the States to remember that the policy which is intended to be implemented is the policy which has been declared by Art. 46 and the preamble of the Constitution. It is for the attainment of social and economic justice Art. 15(4) authorises the making of special provisions for the advancement of the communities there contemplated even if such provisions may be inconsistent with the fundamental rights guaranteed under Art. 15 or 29(2). The context, therefore, requires that the executive action taken by the State must be based on an objective approach, free from all extraneous pressures. The said action is intended to do social and economic justice and must be taken in a manner that justice is and should be done.

Whilst we are dealing with this question, it would be relevant to add to that the provisions of Art. 15(4) are similar to those of Art. 16(4) which fell to be considered in the case of The General Manager, Southern Railway v. Rangachari (1962 (2) SCR 586). In that case, the majority decision of this Court held that the power of reservation which is conferred on the State under Art. 16(4) can be exercised by the State in a proper case not only by providing for reservation of appointments, but also by providing for reservation of selection posts. This conclusion was reached on the basis that it served to give effect to the intention of the Constitution makers to make adequate safeguards for the advancement of Backward Classes and to secure their adequate representation in the Services. The judgment shows that the only point which was raised for the decision of this Court in that case was whether the reservation made was outside Art. 16(4) and that posed the bare question about the construction of Art. 16(4). The propriety, the reasonableness or the wisdom of the impugned order was not questioned because it was not the respondent's case that if the order was justified under Art. 16(4), it was a fraud on the Constitution. Even so, it was pointed out in the judgment that the efficiency of administration is of such a paramount importance that it would be unwise and impermissible to make any reservation at the cost of efficiency of administration; that, it was stated, was undoubtedly the effect of Art. 335. Therefore, what is true in regard to Art. 15(4) is equally true in regard to Art. 16(4). There can be no doubt that the Constitution-makers assumed, as they were entitled to, that while making adequate reservation under Art. 16(4), care would be taken not to provide for unreasonable, excessive or extravagant reservation, for that would, by eliminating general competition in a large field and by creating wide-spread dissatisfaction amongst the employees, materially affect efficiency. Therefore, like the special provision improperly made under Art. 15(4), reservation made under Art. 16(4) beyond the permissible and legitimate limits would be liable to be challenged as a fraud on the Constitution. In this connection it is necessary to emphasize that Art. 15(4) is an enabling provision; it does not impose an obligation, but merely leaves it to the discretion of the appropriate government to take suitable action, if necessary."

67. To similar effect is the view expressed in K.C. Vasanth Kumar's case (supra) at para 150:

> "At this stage it should be made clear that if on a fresh determination some castes or communities have to go out of the list of backward classes prepared for Article 15(4) and Article 16(4) the Government may still pursue the policy of amelioration of weaker sections of the population amongst them in accordance with the directive

> principle contained in article 46 of the Constitution. There are in all castes and communities poor people who if they are given adequate opportunity and training may be able to compete successfully with persons belonging to richer classes. The Government may provide for them liberal grants of scholarships, free studentship, free boarding and lodging facilities, free uniforms, free mid day meals etc. to make the life of poor students comfortable. The Government may also provide extra tutorial facilities, stationery and books free of costs and library facilities. These and other steps should be taken in the lower classes so that by the time a student appears for the qualifying examination he may be able to attain a high degree of proficiency in his studies."

It has also been noted as follows:

> "I wish to add that the doctrine of protective discrimination embodied in Article 15(4) and 16(4) and the mandate of Article 29(2) cannot be stretched beyond a particular limit. The State exists to serve its people. There are some services where expertise and skill are of the essence. For example, a hospital run by the State serves the ailing members of the public who need medical aid. Medical services directly affect and deal with the health and life of the populace. Profession expertise, born of knowledge and experience, of a high degree of technical knowledge and operation skill is required of pilots and aviation engineers. The lives of citizens depend on such persons. There are other similar fields of governmental activity where professional, technological, scientific or other special skill is called for. In such services or posts under the Union or State, we think where can be no room for reservation of posts; merit alone must be the sole and decisive consideration for appointments."

(underlined for emphasis)

68. Lengthy arguments have been advanced as to the seriousness in identifying the backward classes. On the basis of Indra Sawhney No.1's judgment, the Government of India issued orders in respect of reservations of appointments or on posts under the Government of India in favour of backward classes of citizens. It was the subject matter of challenge in Indra Sawhney No.1. In its judgment dated 16.11.1992 this Court directed the Government to constitute a permanent body by 15.3.1993 for entertaining and examining and recommending upon requests made for inclusion or complaints of over inclusion and under inclusion in the lists of backward classes of citizens.

69. Constituent Assembly Debates 1951 have also relevance for adjudicating the controversy. The following portion needs to be extracted:

70. Parliamentary Standing Committee Report at paras 36, 37 and 46 read as follows:

> "36. The committee notes that there is a major limitation on data about the social economic and educational profile of our population in general and about OBCs in particular. The last caste-based census in India was done in 1931. Accordingly there

are no periodic data available on the demographic spread of OBCs and their access to amenities. Even the Mandal Commission had used the 1931 Census data. Whatever limited data are available, pertain to surveys conducted by NSSO from 1998-99 onwards, which are only 'sample surveys'.

37. The Committee found that there exists no accepted mechanism/criteria to group the people into different categories. As a result, existing list of backward castes/communities are termed in some cases, as inaccurate. Besides, any regular process of review is also not in place. Such a review implies both 'inclusion' and 'exclusion'. The Committee, therefore, emphasizes the need for taking urgent measures/steps for identifying and removing all such lacunae and removing all such lacunae and problems by putting in place scientific and objective mechanism/benchmarks for this purpose.

xx xx xx

46. There have been suggestions/counter- suggestions on the issue of exclusion of the 'creamy layer amongst OBCs in the proposed legislation. On the one hand, it was argued that the concept of creamy layer did not apply in the case of reservation in admission. It was pointed out that the debate on the exclusion of the creamy layer was misplaced as the Supreme Court's observation regarding the exclusion of the creamy layer within the SCs and STs from the purview of reservation was only for public employment and promotion. The other view in this regard was that the inclusion of the creamy layer in reservation would defeat the very purpose of providing reservation to the backward classes. It was also stated that the exclusion of the creamy layer would ensure that the intended benefits of the reservation reach to the really deserving among the backward classes. It was further stated that this in itself would not suffice and should be supplemented by categorization of the backward classes in various groups depending upon their degree of backwardness and apportioning of appropriate percentage of reservation to each group. It was also brought to the committee that similar experiments in States of Andhra Pradesh, Kerala, Karnataka, Tamil Nadu, Maharashtra etc. have, in fact, stood the test of time and yielded the desired results."

71. One of the petitioners "Youth for Equality" had filed a representation before the Parliamentary Committee giving certain important data. Relevant portions read as follows:

"TOP WITHOUT BASE The condition of infrastructure and staff at the primary and secondary level is of some concern and the government - especially the Ministry for Human Resource and Development which has proposed increased reservations, should work towards improvement in this area for "Real" affirmative action. According to the National Institute of Educational Planning and Administration (in 2003) the state of affairs at the primary level was as under:-

(i) In 62 996 schools in country do not have school building and are operating in tents or under the trees.

(ii) In 70,739 Primary Schools - No class room.

(iii) In 95,003 primary Schools - Single Class room.

(iv) In 8,269 Primary Schools No teacher

(v) In 1,15,267 Primary schools -Single teacher

(vi) In more than 60,000 schools the pupil :

Teacher ratio is greater than 100 :1 while the acceptable ratio is less than 40:1.

(vii) In 84,848 schools No black board

(viii) In More than 1 00 000 Schools - No electricity.

Apart from the above, according to the NCERT (In 1998), Only 34.6% of Govt. Schools had safe Drinking water, 13.2% had urinal and 4.9% had urinals for girls and only 6.0% had a lavatory. While the government promises a spending of about 6% of GDP for the development of education, the reality has been to the contrary. The Government spending in the years was as under:

2000-2001 4.1% 2001-2002 4.3% 2002-2004 3.8% 2004-2005 3.5%

72. The National Commission for Backward Classes Act, 1993 (in short 'Backward Classes Act') was accordingly enacted. Few provisions of this Act need to be noted.

73. Section 2 (c) defines lists as follows:

"Lists means lists prepared by the Government of India from time to time for purposes of making provisions for the reservation of appointments or posts in favour of backward classes of citizens which, in the opinion of that Government, are not adequately represented in the services under the Government of India and any local or other authority within the territory of India or under the control of the Government of India".

74. Important provisions are Sections 9 and 10 which read as follows:

"9. Functions of the Commission (1) The Commission shall examine requests for inclusion of any class of citizens as a backward class in such lists and hear complaints of over-inclusion or under inclusion of any backward class in such lists and tender such advice to the Central Government as it deems appropriate.

(2) The advice of the Commission shall ordinarily be binding upon the Central Government.

10. Powers of the Commission- The Commission shall, while performing its functions under sub-section (1) of Section 9, have all the powers of a civil court trying a suit and in particular, in respect of the following matters, namely:-

(a) summoning and enforcing the attendance of any person from any part of India and examining him on oath;

(b) requiring the discovery and production of any document;

(c) receiving evidence on affidavits;

(d) requisitioning any public record or copy thereof from any court of office;

(e) issuing commissions for the examination of witnesses and documents;

and

(f) any other matter which may be prescribed."

75. A periodic revision of the lists by the Central Government is a statutory mandate. Petitioners have highlighted that there is no exclusion and on the other hand there has been inclusion. On the question of castes enumeration it is emphasized that 1931 Census was not the basis for identification of other backward classes. In fact the central OBC List is not drawn up on the basis of 1931 Census. Each State has different modalities for identification. Only for the purpose of quantum the population provides a foundation.

76. It needs no emphasis that if ultimately and indisputably the constitutional goal is the casteless and classless society, there has to be more effective implementation of the Backward Classes Act. The exercise required to be undertaken under Section 11 of the said Act is not intended to be a routine exercise and also not an exercise in futility. It has to be not only effective but also result oriented. The petitioners have highlighted the lack of seriousness of the Government in carrying out the exercise. Voluminous datas have been brought on record in this regard. With reference to the reports of the Commission, learned counsel for the respondents on the other hand have stressed on the fact that the Commission has been working with all sincerity and with the object of effectively implementing the Backward Classes Act. One thing needs to be noted here. Concrete data about the number of backward classes in the country does not appear to be available. The survey conducted by the National Sample Survey reveals that the percentage is not 52% as is highlighted by the respondents.

77. Section 2(g) of the Act is relevant in this regard. It reads as follows:

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

78. At this juncture, it is to be noted that the Backward Classes Act in order to be wholly functional mandates determination by the Central Government of the backward classes for whom the Statute is intended. Undisputedly, such determination has not been done. The plea is that for more than half a century enough attention has not been given for the benefit of the other backward classes in the matter of admissions to higher educational institutions. That cannot be a ground to act with hurry and with un-determined datas. It may be as rightly contended by learned counsel for the respondents that the percentage can certainly be not less than 27%. But that is no answer to the important question as to the identity test. In the background loom the socially and economically backward class of citizens. Poverty knows no caste. Poor has no caste. It is an unfortunate class. It is a matter of common knowledge that the institution of caste is a peculiarity of Indian institution when there is considerable controversy amongst the scholars as to how the caste system originated in this country. Originally, there were four main castes known as Varnas . But gradually castes and sub-castes multiplied as the social fabric expanded with the absorption of different groups of people who belong to various cults and professing different religious faiths. The caste system in its earlier stage was quite elastic but in course of time it gradually hardened into a rigid framework based upon heredity. The inevitable result was social inequality. At some point of time occupation was the background for determination of castes. May be, at some point of time it depended on the income of the individual. But it appears to have taken disastrous turn with difference of status of various castes. But passage of time shows that the occupational label has lost much of its significance. But at the same time, the poor and down trodden who belong to the caste of their own were the founders of poor. In Indra Sawhney No.1 this factor was noticed.

79. It is said that one must take life in ones stride, let today embrace the past with remembrance and the future with longing.

80. Don't look for the path far away, the path exists under your feet.

81. What is past and what cannot be prevented should not be grieved for.

82. With reference to the Office Memorandum which provides for preference in favour of "poorer sections" over other members of the backward classes, the expression was held to be relatable to those who are socially and economically more backward. The use of the word 'poorer' in the context was held to be a measure of the social backwardness. It is therefore unmistakenly recognized that economic backwardness is a factor which can never be lost sight of. There are only two families in the world; the haves and the have nots said Miquel De Cervantes Don Qutxote de ta Mancha. Tolstoy has emphatically said "We will do anything for the poor man anything but get of his back" (quoted in Huntington Philanthrophy and Morality).

83. William Cobbett had said "to be poor and independent is very nearly an impossibility. (See His book 'Advise to Young Men'). We cannot turn Nelson's eye to the poor, those covered by all encompassing expression "economically backward classes".

84. Should this class of people be kept out of the mainstream of governmental priorities and policies because they belong to a particular caste? As noted above, the poor have no caste. A person belonging to a higher caste should not be made to suffer for what his forefathers had done several generations back.

85. Franklin D Roosevelt in a speech in 1940 had said "It is an unfortunate human failing that a full pocket book often groans more loudly than an empty stomach". The haves and the have nots have to co-exist. If the creamy layer has to be excluded the economically backward classes have to be included. That would be social balancing and that would be giving true meaning of the objectives of the Constitution. Social empowerment cannot be and is certainly not a measure for only socially and educationally backward classes. It also has to be for the socially and economically backward classes. Unless this balance, which is very delicate, is maintained the system inevitably will develop a crack and this crack may after a certain point of time be difficult to be joined. Instead of lightening the society from castes or classes it will be over burdened and a point of time may come when we shall not be able to bear the burden any further. Timely steps in this regard will save the Indian society and democracy from a catastrophe of collapse because of something which the Constitution wants to obliterate.

86. On the question of time period for the reservation, it is submitted that length of the leap to be provided depends upon the gap to be filled. It is fairly accepted by learned counsel for the respondents that as and when castes reach a higher level it is to be excluded from the zone of consideration. It is further submitted that traditional occupation is being pursued by persons belonging to some castes and the system still subsists and has not broken down. In the absence of alternative occupation which may not be lucrative, the persons who used to previously carry on the traditional occupation find it difficult to take up any other occupation.

87. It has been averred that consequent to several efforts, India has made enormous progress in terms of increase in institutions, teachers and students in elementary education. But despite all the efforts large population of the children in the country still remain out of school.

88. One of the contentions is that by passage of time prolonged reservation becomes illicit. In Motor General Traders and Anr. v. State of Andhra Pradesh and Ors. (1984 (1) SCC

222) following observations were made:

> "16. What may be unobjectionable as a transitional or temporary measure at an initial stage can still become discriminatory and hence violative of Article 14 of the Constitution if it is persisted in over a long period without any justification. The trend of decisions of this Court on the above question may be traced thus. In Bhaiyalal Shukla v. State of Madhya Pradesh [1962] Supp. 2 S.C.R. 257 one of the contentions urged was that the levy of sales tax in the area which was formerly known as Vindhya Pradesh (a Part 'C' State) on building materials used in a works contract was discriminatory after the merger of that area in the new State of Madhya Pradesh which was formed on November 1,1956 under the States Reorganisation Act, 1956 as

the sale of building materials in a works contract was not subject to any levy of sales tax in another part of the same new State namely the area which was formerly part of the area known as State of Madhya Pradesh (the Central Provinces and Berar area). That contention was rejected by this Court with the following observations at pages 274-275 :

The laws in different portions of the new State of Madhya Pradesh were enacted by different Legislatures, and under Section 119 of the States Reorganisation Act all laws inforce are to continue until repealed or altered by the appropriate Legislature. We have already held that the sales tax law in Vindhya Pradesh was validly enacted, and it brought its validity with it under Section 119 of the States Reorganisation Act, when it became a part of the State of Madhya Pradesh. Thereafter, the different laws in different parts of Madhya Pradesh can be sustained on the ground that the differentiation arises from historical reasons, and a geographical classification based on historical reasons has been upheld by this Court in M.K. Prithi Rajji v. The State of Rajasthan (Civil Appeal No. 327 of 1956 decided on November 2, 1960) and again in The State of Madhya Pradesh v. The Gwalior Sugar Co. Ltd. (Civil Appeals Nos. 98 and 99 of 1957 decided on November 30, 1960). The latter case is important, because the sugarcane cess levied in the former Gwalior State but not in the rest of Madhya Bharat of which it formed a part, was challenged on the same ground as here, but was upheld as not affected by Article14. We, therefore, reject this argument.

89. In N.M. Thomas's case (supra) the parameters of various clauses of Article 16 were highlighted as follows:

"37. The rule of equality within Articles 14 and 16(1) will not be violated by a rule which will ensure equality of representation in the services for unrepresented classes after satisfying the basic needs of efficiency of administration. Article 16(2) rules out some basis of classification including race, caste, descent, place of birth etc. Article 16(4) clarifies and explains that classification on the basis of backwardness does not fall within Article 16(2) and is legitimate for the purposes of Article 16(1). If preference shall be given to a particular under-represented community other than a backward class or under- represented State in an All India Service such a rule will contravene Article 16(2). A similar rule giving preference to an under-represented backward community is valid and will not contravene Articles 14, 16(1) and 16(2). Article 16(4) removes any doubt in this respect.

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44. Our Constitution aims at equality of status and opportunity for all citizens including those who are socially, economically and educationally backward. The claims of members of backward classes require adequate representation in legislative and executive bodies. If members of Scheduled Castes and Tribes, who are said by this Court to be backward classes, can maintain minimum necessary requirement of

administrative efficiency, not only representation but also preference may be given to them to enforce equality and to eliminate inequality. Articles 15(4) and 16(4) bring out the position of backward classes to merit equality. Special provisions are made for the advancement of backward classes and reservations of appointments and posts for them to secure adequate representation. These provisions will bring out the content of equality guaranteed by Articles 14, 15(1) and 16(1). The basic concept of equality is equality of opportunity for appointment. Preferential treatment for members of backward classes with due regard to administrative efficiency alone can mean equality of opportunity for all citizens. Equality under Article 16 could not have a different content from equality under Article 14. Equality of opportunity for unequals can only mean aggravation of inequality. Equality of opportunity admits discrimination with reason and prohibits discrimination without reason. Discrimination with reasons means rational classification for differential treatment having nexus to the Constitutionally permissible object. Preferential representation for the backward classes in services with due regard to administrative efficiency is permissible object and backward classes are a rational classification recognised by our Constitution. Therefore, differential treatment in standards of selection is within the concept of equality. xx xx xx

56. If we are all to be treated in the same manner, this must carry with it the important requirement that none of us should be better or worse in upbringing, education, than any one else which is an unattainable ideal for human beings of anything like the sort we now see. Some people maintain that the concept of equality of opportunity is an unsatisfactory concept For, a complete formulation of it renders it incompatible with any form of human society. Take for instance, the case of equality of opportunity for education. This equality cannot start in schools and hence requires uniform treatment in families which is an evident impossibility. To remedy this, all children might be brought up in state nurseries, but, to achieve the purpose, the nurseries would have to be run on vigorously uniform lines. Could we guarantee equality of opportunity to the young even in those circumstances? The idea is well expressed by Laski:

'Equality means, in the second place, that adequate opportunities are laid open to all. By adequate opportunities we cannot imply equal opportunities in a sense that implies identity of original chance. The native endowments of men are by no means equal. Children who are brought up in an atmosphere where things of the mind are accounted highly are bound to start the race of life with advantages no legislation can secure. Parental character will inevitably affect profoundly the equality of the children whom it touches. So long, therefore, as the family endures - and there seems little reason to anticipate or to desire its disappearance - the varying environments it will create make the notion of equal opportunities a fantastic one'.

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60. Bernard A.O. Williams, in his article 'The Idea of Equality" (supra) gives an illustration of the working of the principle of equality of opportunity:

'Suppose that in a certain society great prestige is attached to membership of a warrior class, the duties of which require great physical strength. This class has in the past been recruited from certain wealthy families only, but egalitarian reformers achieve a change in the rules, by which warriors are recruited from all sections of the society, on the result of a suitable competition. The effect of this, however, is that the wealthy families still provide virtually all the warriors, because the rest of the populace is so undernourished by reason of poverty that their physical strength is inferior to that of the wealthy and well nourished. The reformers protest that equality of opportunity has not really been achieved; the wealthy reply that in fact it has, and that the poor now have the opportunity of becoming warriors - it is just bad luck that their characteristics are such that they do not pass the test- "We are not", they might say, "excluding anyone for being poor; we exclude people for being weak, and it is unfortunate that those who are poor are also weak'.

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67. Today, the political theory which acknowledges the obligation of government under Part IV of the Constitution to provide jobs, medical care, old age pension, etc., extends to human rights and imposes an affirmative obligation to promote equality and liberty. The force of the idea of a state with obligation to help the weaker sections of its members seems to have increasing influence in Constitutional law. The idea finds expression in a number of cases in America involving social discrimination and also in the decisions requiring the state to offset the effects of poverty by providing counsel, transcript of appeal, expert witnesses, etc. Today, the sense that government has affirmative responsibility for elimination of inequalities, social, economic or otherwise, is one of the dominant forces in Constitutional law. While special concessions for the under-privileged have been easily permitted, they have not traditionally been required. Decisions in the areas of criminal procedure, voting rights and education in America suggest that the traditional approach may not be completely adequate. In these areas, the inquiry whether equality has been achieved no longer ends with numerical equality; rather the equality clause has been held to require resort to a standard of proportional equality which requires the state, in framing legislation, to take into account the private inequalities of wealth, of education and other circumstances.

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89. The ultimate reason for the demand of equality for the members of backward classes is a moral perspective which affirms the intrinsic value of all human beings and calls for a society which provides these conditions of life which men need for development of their varying capacities. It is an assertion of human equality in the

sense that it manifests an equal concern for the well being of all men. On the one hand it involves a demand for the removal of those obstacles and impediments which stand in the way of the development of human capacities, that is, it is a call for the abolition of unjustifiable inequalities. On the other hand, the demand itself gets its sense and moral driving force from the recognition that "the poorest he that is in England hath a life to live, as the greatest he".

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

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

This was the exercise which was to be undertaken apart from considering the applications for inclusion or exclusion as the case may be. As has been conceded at the beginning of the case affirmative action is not under challenge. Affirmative action is nothing but a crucial component of social justice in the constitutional dispensation but at the same time it has to be kept in view that the same does not infringe the principles of equality of which it is a part and/or unreasonably restraint or restrict other fundamental freedoms and that it does not violate the basic structure of the Constitution.

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

93. It is a well settled principle in law that the Court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the Legislature. The language employed in a statute is the determinative factor of legislative intent.

94. Words and phrases are symbols that stimulate mental references to referents. The object of interpreting a statute is to ascertain the intention of the Legislature enacting it. (See Institute of Chartered Accountants of India v. M/s Price Waterhouse and Anr. (AIR 1998 SC 74). The intention of the Legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. As a consequence, a construction which requires for its support, addition or substitution of words or which results in rejection of words as meaningless has to be avoided. As observed in Crawford v. Spooner (1846 (6) Moore PC 1), Courts, cannot aid the Legislatures' defective phrasing of an Act, we cannot add or mend, and by construction make up deficiencies which are left there. (See The State of Gujarat and Ors. v. Dilipbhai Nathjibhai Patel and Anr. (JT 1998 (2) SC 253). It is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so. (See Stock v. Frank Jones (Tiptan) Ltd. (1978 1 All ER 948 (HL). Rules of interpretation do not permit Courts to do so, unless the provision as it stands is meaningless or of doubtful meaning. Courts are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself. (Per Lord Loreburn L.C. in Vickers Sons and Maxim Ltd. v. Evans (1910) AC 445 (HL), quoted in Jamma Masjid, Mercara v. Kodimaniandra Deviah and Ors.(AIR 1962 SC 847).

95. The question is not what may be supposed and has been intended but what has been said. "Statutes should be construed not as theorems of Euclid". Judge Learned Hand said, "but words must be construed with some imagination of the purposes which lie behind them". (See Lenigh Valley Coal Co. v. Yensavage 218 FR 547). The view was re-iterated in Union of India and Ors. v. Filip Tiago De Gama of Vedem Vasco De Gama (AIR 1990 SC 981).

96. In D.R. Venkatchalam and Ors. etc. v. Dy. Transport Commissioner and Ors. etc. (AIR 1977 SC 842), it was observed that Courts must avoid the danger of a priori determination of the meaning of a provision based on their own pre-conceived notions of ideological structure or scheme into which the provision to be interpreted is somewhat fitted. They are not entitled to usurp legislative function under the disguise of interpretation.

97. While interpreting a provision the Court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary. (See Commissioner of Sales Tax, M.P. v. Popular Trading Company, Ujjain (2000 (5) SCC 511). The legislative casus omissus cannot be supplied by judicial interpretative process.

98. Two principles of construction one relating to casus omissus and the other in regard to reading the statute as a whole appear to be well settled. Under the first principle a casus omissus cannot be supplied by the Court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself but at the same time a casus omissus should not be readily inferred and for that purpose all the parts of a statute or section must be construed together and every clause of a

section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular provision makes a consistent enactment of the whole statute. This would be more so if literal construction of a particular clause leads to manifestly absurd or anomalous results which could not have been intended by the Legislature. "An intention to produce an unreasonable result", said Danackwerts, L.J. in Artemiou v. Procopiou (1966 1 QB 878), "is not to be imputed to a statute if there is some other construction available". Where to apply words literally would "defeat the obvious intention of the legislature and produce a wholly unreasonable result" we must "do some violence to the words" and so achieve that obvious intention and produce a rational construction. (Per Lord Reid in Luke v. IRC (1963 AC 557) where at p. 577 he also observed: "this is not a new problem, though our standard of drafting is such that it rarely emerges".

99. It is then true that, "when the words of a law extend not to an inconvenience rarely happening, but due to those which often happen, it is good reason not to strain the words further than they reach, by saying it is casus omissus, and that the law intended quae frequentius accidunt." "But," on the other hand, "it is no reason, when the words of a law do enough extend to an inconvenience seldom happening, that they should not extend to it as well as if it happened more frequently, because it happens but seldom" (See Fenton v. Hampton (1858) XI Moore, P.C. 347). A casus omissus ought not to be created by interpretation, save in some case of strong necessity. Where, however, a casus omissus does really occur, either through the inadvertence of the legislature, or on the principle quod semel aut bis existit praeterunt legislatores (legislators says pass over that which happens only once or twice), the rule is that the particular case, thus left unprovided for, must be disposed of according to the law as it existed before such statute - Casus omissus et oblivioni datus dispositioni communis juris relinquitur; "a casus omissus,"

> observed Buller, J. in Jones v. Smart (1 T.R. 52), "can in no case be supplied by a court of law, for that would be to make laws."

100. The golden rule for construing wills, statutes, and, in fact, all written instruments has been thus stated: "The grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further" (See Grey v. Pearson (1857 (6) H.L. Cas. 61). The latter part of this "golden rule" must, however, be applied with much caution. "if," remarked Jervis, C.J., "the precise words used are plain and unambiguous in our judgment, we are bound to construe them in their ordinary sense, even though it lead, in our view of the case, to an absurdity or manifest injustice. Words may be modified or varied where their import is doubtful or obscure. But we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to their literal meaning" (See Abley v. Dale 11, C.B. 378).

101. Classifications on the basis of castes in the long run has tendency of inherently becoming pernicious. Therefore, the test of reasonableness has to apply. When the object is elimination of castes and not perpetuation to achieve the goal of casteless society and a society free from discrimination of castes judicial review within the permissible limits is not ruled out. But at the

same time compelling State interest can be considered while assessing backwardness. The impact of poverty on backwardness cannot be lost sight of. Economic liberation and freedom are also important. In Nagaraj's case (supra) it was inter alia observed as follows:

> "44. The above three concepts are independent variable concepts. The application of these concepts in public employment depends upon quantifiable data in each case. Equality in law is different from equality in fact. When we construe Article 16(4), it is equality in fact which plays the dominant role. Backward Classes seek justice. General class in public employment seeks equity. The difficulty comes in when the third variable comes in, namely, efficiency in service. In the issue of reservation, we are being asked to find a stable equilibrium between justice to the backwards, equity for the forwards and efficiency for the entire system. Equity and justice in the above context are hard concepts. However, if you add efficiency to equity and justice, the problem arises in the context of the reservation. This problem has to be examined, therefore, on the facts of each case. Therefore, Article 16(4) has to be construed in the light of Article 335 of the Constitution. Inadequacy in representation and backwardness of the Scheduled Castes and Scheduled Tribes are circumstances which enable the State Government to act under Article 16(4) of the Constitution. However, as held by this Court the limitations on the discretion of the Government in the matter of reservation under Article 16(4) as well as Article 16(4-A) come in the form of Article 335 of the Constitution. xx xx xx
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> 46. The point which we are emphasising is that ultimately the present controversy is regarding the exercise of the power by the State Government depending upon the fact situation in each case. Therefore, "vesting of the power" by an enabling provision may be constitutionally valid and yet "exercise of the power" by the State in a given case may be arbitrary, particularly, if the State fails to identify and measure backwardness and inadequacy keeping in mind the efficiency of service as required under Article 335. xx xx xx
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> 48. It is the equality "in fact" which has to be decided looking at the ground reality. Balancing comes in where the question concerns the extent of reservation. If the extent of reservation goes beyond cut-off point then it results in reverse discrimination. Anti- discrimination legislation has a tendency of pushing towards de facto reservation. Therefore, a numerical benchmark is the surest immunity against charges of discrimination.
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> 49. Reservation is necessary for transcending caste and not for perpetuating it. Reservation has to be used in a limited sense otherwise it will perpetuate casteism in the country. Reservation is underwritten by a special justification. Equality in Article 16(1) is individual-specific whereas reservation in Article 16(4) and Article 16(4-A) is enabling. The discretion of the State is, however, subject to the existence of "backwardness" and "inadequacy of representation" in public employment. Backwardness has to be based on objective factors whereas inadequacy has to

> factually exist. This is where judicial review comes in. However, whether reservation in a given case is desirable or not, as a policy, is not for us to decide as long as the parameters mentioned in Articles 16(4) and 16(4-A) are maintained. As stated above, equity, justice and merit (Article 335)/efficiency are variables which can only be identified and measured by the State. Therefore, in each case, a contextual case has to be made out depending upon different circumstances which may exist State- wise.
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102. In the matter of application of the principle of basic structure, twin tests have to be satisfied, namely, the "width test" and the test of "identity". As stated hereinabove, the concept of the "catch-up" rule and "consequential seniority" are not constitutional requirements. They are not implicit in clauses (1) and (4) of Article 16. They are not constitutional limitations. They are concepts derived from service jurisprudence. They are not constitutional principles. They are not axioms like, secularism, federalism, etc. Obliteration of these concepts or insertion of these concepts does not change the equality code indicated by Articles 14, 15 and 16 of the Constitution. Clause (1) of Article 16 cannot prevent the State from taking cognizance of the compelling interests of Backward Classes in the society. Clauses (1) and (4) of Article 16 are restatements of the principle of equality under Article 14. Clause (4) of Article 16 refers to affirmative action by way of reservation. Clause (4) of Article 16, however, states that the appropriate Government is free to provide for reservation in cases where it is satisfied on the basis of quantifiable data that Backward Class is inadequately represented in the services. Therefore, in every case where the State decides to provide for reservation there must exist two circumstances, namely, "backwardness" and "inadequacy of representation". As stated above, equity, justice and efficiency are variable factors. These factors are context-specific. There is no fixed yardstick to identify and measure these three factors, it will depend on the facts and circumstances of each case. These are the limitations on the mode of the exercise of power by the State. None of these limitations have been removed by the impugned amendments. If the State concerned fails to identify and measure backwardness, inadequacy and overall administrative efficiency then in that event the provision for reservation would be invalid. These amendments do not alter the structure of Articles 14, 15 and 16 (equity code). The parameters mentioned in Article 16(4) are retained. Clause (4-A) is derived from clause (4) of Article 16. Clause (4-A) is confined to SCs and STs alone. Therefore, the present case does not change the identity of the Constitution. The word "amendment" connotes change. The question is whether the impugned amendments discard the original Constitution. It was vehemently urged on behalf of the petitioners that the Statement of Objects and Reasons indicates that the impugned amendments have been promulgated by Parliament to overrule the decisions of this Court. We do not find any merit in this argument. Under Article 141 of the Constitution the pronouncement of this Court is the law of the land. The judgments of this Court in Virpal Singh, Ajit Singh (I), Ajit Singh (II) and Indra Sawhney were judgments delivered by this Court which enunciated the law of the land. It is that law which is sought to be changed by the impugned constitutional amendments. The impugned constitutional amendments are enabling in nature. They leave it to the States to provide for reservation. It is well settled that Parliament while enacting a law does not provide content to the "right". The content is provided by the judgments of the Supreme Court. If the appropriate Government enacts a law providing for reservation without keeping in mind the parameters in Article 16(4) and Article 335

then this Court will certainly set aside and strike down such legislation. Applying the "width test", we do not find obliteration of any of the constitutional limitations. Applying the test of "identity", we do not find any alteration in the existing structure of the equality code. As stated above, none of the axioms like secularism, federalism, etc. which are overarching principles have been violated by the impugned constitutional amendments. Equality has two facets "formal equality" and "proportional equality". Proportional equality is equality "in fact" whereas formal equality is equality "in law". Formal equality exists in the rule of law. In the case of proportional equality the State is expected to take affirmative steps in favour of disadvantaged sections of the society within the framework of liberal democracy. Egalitarian equality is proportional equality.

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107. It is important to bear in mind the nature of constitutional amendments. They are curative by nature. Article 16(4) provides for reservation for Backward Classes in cases of inadequate representation in public employment. Article 16(4) is enacted as a remedy for the past historical discriminations against a social class. The object in enacting the enabling provisions like Articles 16(4), 16(4-A) and 16(4-B) is that the State is empowered to identify and recognise the compelling interests. If the State has quantifiable data to show backwardness and inadequacy then the State can make reservations in promotions keeping in mind maintenance of efficiency which is held to be a constitutional limitation on the discretion of the State in making reservation as indicated by Article 335. As stated above, the concepts of efficiency, backwardness, inadequacy of representation are required to be identified and measured. That exercise depends on availability of data. That exercise depends on numerous factors. It is for this reason that enabling provisions are required to be made because each competing claim seeks to achieve certain goals. How best one should optimise these conflicting claims can only be done by the administration in the context of local prevailing conditions in public employment. This is amply demonstrated by the various decisions of this Court discussed hereinabove. Therefore, there is a basic difference between "equality in law" and "equality in fact" (see Affirmative Action by William Darity). If Articles 16(4-A) and 16(4-B) flow from Article 16(4) and if Article 16(4) is an enabling provision then Articles 16(4-A) and 16(4-B) are also enabling provisions. As long as the boundaries mentioned in Article 16(4), namely, backwardness, inadequacy and efficiency of administration are retained in Articles 16(4-A) and 16(4-B) as controlling factors, we cannot attribute constitutional invalidity to these enabling provisions. However, when the State fails to identify and implement the controlling factors then excessiveness comes in, which is to be decided on the facts of each case. In a given case, where excessiveness results in reverse discrimination, this Court has to examine individual cases and decide the matter in accordance with law. This is the theory of "guided power". We may once again repeat that equality is not violated by mere conferment of power but it is breached by arbitrary exercise of the power conferred".

102. In Minerva Mills Ltd. v. Union of India (1980) 3 SCC

625) it was observed as follows:

"57. This is not mere semantics. The edifice of our Constitution is built upon the concepts crystallised in the preamble. We resolved to constitute ourselves into a Socialist State which carried with it the obligation to secure to our people justice social, economic and political. We, therefore, put Part IV into our Constitution containing directive principles of State policy which specify the socialistic goal to be achieved. We promised to our people a democratic polity which carries with it the obligation of securing to the people liberty of thought, expression, belief, faith and worship; equality of status and of opportunity and the assurance that the dignity of the individual will at all costs be preserved. We, therefore, put Part III in our Constitution conferring those rights on the people. Those rights are not an end in themselves but are the means to an end. The end is specified in Part IV. Therefore, the rights conferred by Part III are subject to reasonable restrictions and the Constitution provides that enforcement of some of them may, in stated uncommon circumstances, be suspended. But just as the rights conferred by Part III would be without a radar and a compass if they were not geared to an ideal, in the same manner the attainment of the ideals set out in Part IV would become a pretence for tyranny if the price to be paid for achieving that ideal is human freedoms. One of the faiths of our founding fathers was the purity of means. Indeed, under our law, even a dacoit who has committed a murder cannot be put to death in the exercise of right of self-defence after he has made good his escape. So great is the insistence of civilised laws on the purity of means. The goals set out in Part IV have, therefore, to be achieved without the abrogation of the means provided for by Part III. It is in this sense that Parts III and IV together constitute the core of our Constitution and, combine to form its conscience. Anything that destroys the balance between the two parts will ipso facto destroy an essential element of the basic structure of our Constitution".

103. The view was affirmed in T.M.A. Pai Foundation and Ors. v. State of Karnataka and Ors. (2002 (8) SCC 481)

104. It has been highlighted that Articles 15(4) and 15(5) are irreconcilable. It is pointed out that Article 30 is not intended to pamper any class of people, but is intended to assure minorities regarding the right to establish. In that sense, Article 19(1)(g) is applicable. The said right is an inalienable and sacrosanct right. According to Mr. Venugopal, Article 15(5) carved out an area from Article 15(4). Article 29(2) has to be read into Article 15(5) as Articles 15(4) and 15(5) operated side by side. As a result of Article 15(5) by special provision minorities unaided rights are excluded. Article 30 does not relate to any special right for protection against majority and it cannot be termed to be any higher right and, therefore, Article 19(1)(g) restriction is not there. The object is not to create inequality.

105. It is pointed out that both Articles 15(4) and 15(5) begin with non obstante provision. Article 15(5) is a later introduction. It is stated that Article 15(1) has to prevail over Article 15(4) and the right given to certain class of people in Article 15(4) gets eliminated because of Article 15(5).

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

107. A construction which reduces the statute to a futility has to be avoided. A statute or any enacting provision therein must be so construed as to make it effective and operative on the principle expressed in the maxim ut res magis valeat quam pereat i.e. a liberal construction should be put upon written instruments, so as to uphold them, if possible, and carry into effect the intention of the parties. [See Broom's Legal Maxims (10th Edn.), p. 361, Craies on Statutes (7th Edn.), p. 95 and Maxwell on Statutes (11th Edn.).

108. A statute is designed to be workable and the interpretation thereof by a court should be to secure that object unless crucial omission or clear direction makes that end unattainable. (See Whitney v. IRC (1926 AC 37) at p. 52 referred to in CIT v. S. Teja Singh (AIR 1959 SC 352) and Gursahai Saigal v. CIT (AIR 1963 SC 1062).

109. The courts will have to reject that construction which will defeat the plain intention of the legislature even though there may be some inexactitude in the language used. (See Salmon v. Duncombe (1886) 11AC 627 at p.634, Curtis v. Stovin (1889) 22 QBD 513) referred to in S. Teja Singh case .)

110. If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility, and should rather accept the bolder construction, based on the view that Parliament would legislate only for the purpose of bringing about an effective result. (See Nokes v. Doncaster Amalgamated Collieries (1940 (3) All ER 549) referred to in Pye v. Minister for Lands for NSW (1954) 3 All ER 514. The principles indicated in the said cases were reiterated by this Court in Mohan Kumar Singhania v. Union of India (1992 Supp (1) SCC 594).

111. The statute must be read as a whole and one provision of the Act should be construed with reference to other provisions in the same Act so as to make a consistent enactment of the whole statute.

112. The court must ascertain the intention of the legislature by directing its attention not merely to the clauses to be construed but to the entire statute; it must compare the clause with other parts of the law and the setting in which the clause to be interpreted occurs. (See R.S. Raghunath v. State of Karnataka (1992) 1 SCC 335) Such a construction has the merit of avoiding any inconsistency or repugnancy either within a section or between two different sections or provisions of the same statute. It is the duty of the court to avoid a head- on clash between two sections of the same Act. (See Sultana Begum v. Prem Chand Jain 1997 (1) SCC 373.)

113. Whenever it is possible to do so, it must be done to construe the provisions which appear to conflict so that they harmonise. It should not be lightly assumed that Parliament had given with one

hand what it took away with the other.

114. The provisions of one section of the statute cannot be used to defeat those of another unless it is impossible to effect reconciliation between them. Thus a construction that reduces one of the provisions to a "useless lumber" or "dead letter" is not a harmonized construction. To harmonise is not to destroy.

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

116. In Indra Sawhney's No.1 the desirability of excluding some posts from the zone of reservation was highlighted. It was also emphasized that periodic review of policy of reservation was imperative. It was inter-alia observed as follows:

> "838. While on Article 335, we are of the opinion that there are certain services and positions where either on account of the nature of duties attached to them or the level (in the hierarchy) at which they obtain, merit as explained hereinabove, alone counts. In such situations, it may not be advisable to provide for reservations. For example technical posts in research and development organizations/departments/institutions, in specialties and super-specialties in medicine, Engineering and other such courses in physical sciences and mathematics in defence services and in the establishment connected therewith. Similarly, in the case of posts at the higher echelons e.g. Professors (in Education), Pilots in Indian Airlines and Air India, Scientists and Technicians in Nuclear and Space application, provision for reservation would not be advisable. xx xx xx
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> 840. We may point out that the services/posts enumerated above, on account of their nature and duties attached, are such as call for highest level of intelligence, skill and excellence. Some of them are second level and third level posts in the ascending order. Hence, they form a category apart. Reservation therein may not be consistent with "efficiency of administration" contemplated by Article 335.
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> 859. "We may summarise our answers to the various questions dealt with and answered hereinabove;

(1) (a) It is not necessary that the 'provision' under Article 16(4) should necessarily be made by the Parliament/Legislature. Such a provision can be made by the Executive also. Local bodies, statutory Corporations and other instrumentalities of the State falling under Article 12 of the Constitution are themselves competent to make such a provision, if so advised.

(b) An executive order making a provision under Article 16(4) is enforceable the moment it is made and issued.

(2) (a) Clause (4) of Article 16 is not an exception to clause (1). It is an instance and an illustration of the classification inherent in clause (1).

(b) Article 16(4) is exhaustive of the subject of reservation in favour of backward class of citizens, as explained in this judgment.

(c) Reservations can also be provided under clause (1) of Article

16. It is not confined to extending of preferences, concessions or exemptions alone. These reservations, if any, made under clause (1) have to be so adjusted and implemented as not to exceed the level of representation prescribed for 'backward class of citizens' as explained in this judgment.

3. (a) A caste can be and quite often is a social class in India. If it is backward socially, it would be a backward class for the purposes of Article 16(4). Among non-Hindus, there are several occupational groups, sets and denominations, which for historical reasons are socially backward. They too represent backward, social collectivities for the purposes of Article 16(4).

(b) Neither the Constitution nor the law prescribes the procedure or method of identification of backward classes. Nor is it possible or advisable for the court to lay down any such procedure or method. It must be left to the authority appointed to identify. It can adopt such method/procedure as it thinks convenient and so long as its survey covers the entire populace, no objection can be taken to it.

Identification of the backward classes can certainly be done with reference to castes among, and alongwith, other occupational groups, classes and sections of people. One can start the process either with occupational groups or with castes or with some other groups. Thus one can start the process with castes, wherever they are found, apply the criteria (evolved for determining backwardness) and find out whether it satisfy the criteria. If it does-what emerges is a "backward class of citizens" within the meaning of and for the purposes of Article 16(4). Similar process can be adopted in the case of other occupational groups, communities and classes so as to cover the entire populace. The central idea and overall objective should be to consider all available groups, sections and classes in society. Since caste represents an existing, identifiable social group/class encompassing an overwhelming minority of the country's population, one can well begin with it and then go to other groups, sections and classes.

(c) It is not correct to say that the backward class of citizens contemplated in Article 16(4) is the same as the socially and educationally backward classes referred to in Article 15(4). It is much wider. The accent in Article 16(4) is on social backwardness. Of course, social, educational and economic backwardness are closely inter-

twined in the Indian context.

(d) 'Creamy layer' can be, and must be excluded.

(e) It is not necessary for a class to be designated as a backward class that it is situated similarly to the Scheduled Castes/Scheduled Tribes.

f) The adequacy of representation of a particular class in the services under the State is a matter within the subjective satisfaction of the appropriate Government. The judicial scrutiny in that behalf is the same as in other matters within the subjective satisfaction of an authority.

(4) (a) A backward class of citizens cannot be identified only and exclusively with reference to economic criteria.

(b) It is, of course, permissible for the Government or other authority to identify a backward class of citizens on the basis of occupation cum income, without reference to caste, if it is so advised.

5. There is no constitutional bar to classify the backward classes of citizens into backward and more backward categories.

6. (a) and (b) The reservations contemplated in clause (4) of Article 16 should not exceed 50%. While 50% shall be the rule, it is necessary not to put out of consideration certain extra ordinary situation inherent in the great diversity of this country and the people.

117. In Vasanth Kumar's case (supra) at para 2(4), it was observed as follows:

> "2(4). The policy of reservations in employment, education and legislative institutions should be reviewed every five years or so. That will at once afford an opportunity (i) to the State to rectify distortions arising out of particular facets of the reservation policy and
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> (ii) to the people, both backward and non-

backward, to ventilate their views in a public debate on the practical impact of the policy of reservations."

118. In State of A.P. & Anr. v. P. Sagar (1968 (3) SCR 595) at para 15, it was observed as follows:

> "Article 15 guarantees by the first clause a fundamental right of far-reaching importance to the public generally. Within certain defined limits an exception has been engrafted upon the guarantee of the freedom in cl. (1), but being in the nature of an exception, the conditions which justify departure must be strictly shown to exist. When a dispute is raised before a Court that a particular law which is inconsistent with the guarantee against discrimination is valid on the plea that it is permitted under clause (4) of Art. 15 the assertion by the State that the officers of the State had taken into consideration the criteria which had been adopted by the Courts for determining who the socially and educationally backward classes of the Society are, or that the authorities had acted in good faith in determining the socially and educationally backward classes of citizens, would not be sufficient to sustain the validity of the claim. The Courts of the country are invested with the power to determine the validity of the law which infringes the fundamental rights of citizens and others and when a question arises whether a law which prima facie infringes a guaranteed fundamental right is within an exception, the validity of that law has to be determined by the Courts on materials placed before them. By merely asserting that the law was made after full consideration of the relevant evidence and criteria which have a bearing thereon, and was within the exception, the jurisdiction of the Courts to determine whether by making the law a fundamental right has been infringed is not excluded."

119. Significant observations were made in Kumari K.S. Jayasree and Anr. v. The State of Kerala and Anr. (1976 (3) SCC 730). At para 22 it was noted as follows:

> ."The problem of determining who are socially and educationally backward classes is undoubtedly not simple. Sociological and economic considerations come into play in evolving proper criteria for its determination. This is the function of the State. The Court's jurisdiction is to decide whether the tests applied are valid. If it appears that tests applied are proper and valid the classification of socially and educationally backward classes based on the tests will have to be consistent with the requirements of Article 15(4). The Commission has found on applying the relevant tests that the lower income group of the communities named in Appendix VIII of the Report constitute the socially and educationally backward classes. In dealing with the question as to whether any class of citizens is socially backward or not, it may not be irrelevant to consider the caste of the said group of citizens. It is necessary to remember that special provision is contemplated for classes of citizens and not for individual citizens as such, and so though the caste of the group of citizen may be relevant, its importance should not be exaggerated. If the classification is based solely on caste of the citizen, it may not be logical. Social backwardness is the result of poverty to a very large extent. Caste and poverty are both relevant for determining the backwardness. But neither caste alone nor poverty alone will be the determining tests. When the Commission has determined a class to be socially and educationally backward it is not on the basis of income alone, and the determination is based on the relevant criteria laid down by the Court. Evidence and material are placed before

> the Commission. Article 15(4) which speaks of backwardness of classes of citizens indicates that the accent is on classes of citizens. Article 15(4) also speaks of Scheduled Castes and Scheduled Tribes. Therefore, socially and educationally backward classes of citizens in Article 15(4) cannot be equated with castes. In R. Chitralekha and Anr. v. State of Mysore and Ors. (1964 (6) SCR 368) this Court said that the classification of backward classes based on economic conditions and occupations does not offend Article 15(4)."

120. Further, in Minor A. Peeriakaruppan, Sobha Joseph v. State of Tamil Nadu and Ors. (1971 (1) SCC 38) at para 29 it was observed as follows:

> "Rajendran's case (1968 (2) SCR 786) is an authority for the proposition that the classification of backward classes on the basis of castes is within the purview of Article 15(4) if those castes are shown to be socially and educationally backward. No further material has been placed before us to show that the reservation for backward classes with which we are herein concerned is not in accordance with Article 15(4). There is no gainsaying the fact the 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 impugned reservation is not in accordance with Article 15(4). But all the same the Government should not proceed on the basis that once a class is considered as a backward class it should continue to be backward class for all times. Such an approach would defeat the very purpose of the reservation because once a class reaches a stage of progress which some modern writers call as take off stage then competition is necessary for their future progress. The Government should always keep under review the question of reservation of seats and only the classes which are really socially and educationally backward should be allowed to have the benefit of reservation. Reservation of seats should not be allowed to become a vested interest. The fact that candidates of backward classes have secured about 50% of the seats in the general pool does show that the time has come for a de novo comprehensive examination of the question. It must be remembered that the Government's decision in this regard is open to judicial review."

121. It has been highlighted that the Act has been made applicable to Central Educational Institutions established, maintained or aided by the Central Government. Central Educational Institutions have been defined in Section 2(d) 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."

122. It is pointed out that there cannot be any reservations in respect of super specialities and institutions imparting education of highly complex subjects. The example of All India Institute of Medical Sciences has been given. It has been pointed out that its status as an institution for super speciality has been judicially recognized. It needs to be noted that in terms of Section 4(b) of the Act certain educational institutions have been excluded from the operation of the Act.

123. The Act has been made inapplicable to them. It is to be noted that in the said provision, institutions of research, institutions of excellence, institutions of national and strategic importance have been specified in the Schedule to the Act. The proviso permits the Central Government as and when considered necessary to amend the Schedule. In other words, on an appropriate case being presented and established before the Central Government that the Institution is of excellence and/or a research institute and/or an institution of national and strategic importance, the Central Government can amend the Schedule and include such institution in the Schedule. In other words, it is permissible for the petitioners and anybody else to highlight to the Government about the desirability to include an Institution in the Schedule of the Act.

124. One of the major issues highlighted by Mr. P.P. Rao was that in several cases the matriculation standard of education was considered to be the measure for measuring backwardness. It is, therefore, submitted that when at least half of the persons belonging to a particular caste have reached the matriculation level of education, they cannot be considered to be educationally backward any longer. It is therefore submitted that if that be taken as a yardstick for measuring backwardness then the reservation of seats for technical education or in higher studies cannot be sustained. It has also been highlighted that the shift of emphasis from primary and basic education to higher education is against the constitutional mandate making education compulsory in terms of Article 21-A of the Constitution. It is not correct to contend that in fixing the priorities the Government is the best Judge as contended by the respondents. It may be correct in matters relating to simple policy decisions but when the constitutional mandate is under consideration the underlying object has also to be kept in view. In this context reference is made to Article 46 of the Constitution. It is in that background pointed out by learned counsel for the petitioners that what cannot be lost sight of is the fact that is the foundation for basic, elementary and primary education. The educational backwardness can be obliterated when at least half of the persons belonging to a

particular caste come up to a matriculation level.

125. There is substance in this plea. It is not merely the existence of schemes but the effective implementation of the schemes that is important. It is to be noted that financial constraint cannot be a ground to deny fundamental rights and the provision for the schemes and the utilization of the funds are also relevant factors. It appears that better coordination between the funds provider and the utiliser is necessary. It is suggested that putting stress on cut off limit by shifting from matriculation to Class XII level education as a benchmark of gauging educational backwardness will be a step in the right direction. Though as rightly contended by Mr. P.P. Rao that in several decisions, for example, M.R. Balaji's case (supra), Balram's case (supra) and Kumari K.S. Jayasree's case (supra) the secondary education was taken to be the benchmark, ground reality cannot be lost sight of that with the limited availability of jobs and the spiraling increase in population, secondary or matriculation examination can no longer be considered to be an appropriate bench mark. It has to be at the most graduation. But the question arises whether technical education can be included while considering educational backwardness. A delicate balancing has to be done in this regard. While technical education cannot be the sole criteria for gauging educational backwardness it definitely will form part of 50 per cent norms fixed by this Court. Slightly variable plus or minus would be the appropriate standard to gauge educational backwardness.

126. One of the grey areas which have been highlighted by learned counsel for the petitioners is that caste is not a substitute for class and nevertheless the two terms are not synonyms. Much of the argument in this regard is centred round the paragraphs 782 and 783 of Indra Sawhney No.1 (supra). The same read as under:

> "782. Coming back to the question of identification, the fact remains that one has to begin somewhere with some group, class or section. There is no set or recognised method. There is no law or other statutory instrument prescribing the methodology. The ultimate idea is to survey the entire populace. If so, one can well begin with castes, which represent explicit identifiable social classes/groupings, more particularly when Article 16(4) seeks to ameliorate social backwardness. What is unconstitutional with it, more so when caste, occupation poverty and social backwardness are so closely intertwined in our society? [Individual survey is out of question, since Article 16(4) speaks of class protection and not individual protection]. This does not mean that one can wind up the process of identification with the castes. Besides castes (whether found among Hindus or others) there may be other communities, groups, classes and denominations which may qualify as backward class of citizens. For example, in a particular State, Muslim community as a whole may be found socially backward. (As a matter of fact, they are so treated in the State of Karnataka as well as in the State of Kerala by their respective State Governments). Similarly, certain sections and denominations among Christians in Kerala who were included among backward communities notified in the former princely State of Travancore as far back as in 1935 may also be surveyed and so on and so forth. Any authority entrusted with the task of identifying backward classes may well start with the castes. It can take caste 'A', apply the criteria of backwardness evolved by it to

that caste and determine whether it qualifies as a backward class or not. If it does qualify, what emerges is a backward class, for the purposes of clause (4) of Article 16. The concept of 'caste' in this behalf is not confined to castes among Hindus. It extends to castes, wherever they obtain as a fact, irrespective of religious sanction for such practice. Having exhausted the castes or simultaneously with it, the authority may take up for consideration other occupational groups, communities and classes. For example, it may take up the Muslim community (after excluding those sections, castes and groups, if any, who have already been considered) and find out whether it can be characterised as a backward class in that State or region, as the case may be. The approach may differ from State to State since the conditions in each State may differ from State to State since the conditions in each State may differ. Nay, even within a State, conditions may differ from region to region. Similarly, Christians may also be considered. If in a given place, like Kerala, there are several denominations, sections or divisions, each of these groups may separately be considered. In this manner, all the classes among the populace will be covered and that is the central idea. The effort should be to consider all the available groups, sections and classes of society in whichever order one proceeds. Since caste represents an existing, identifiable, social group spread over an over whelming majority of the country's population, we say one may well begin with castes, if one so chooses, and then go to other groups, sections and classes. We may say, at this stage, that we broadly commend the approach and methodology adopted by the Justice O. Chinnappa Reddy Commission in this respect.

783. We do not mean to suggest we may reiterate that the procedure indicated hereinabove is the only procedure or method/approach to be adopted. Indeed, there is no such thing as a standard or model procedure/approach. It is for the authority (appointed to identify) to adopt such approach and procedure as it thinks appropriate, and so long as the approach adopted by it is fair and adequate, the court has no say in the matter. The only object of the discussion in the preceding para is to emphasise that if a Commission/Authority begins its process of identification with castes (among Hindus) and occupational groupings among others, it cannot by that reason alone be said to be constitutionally or legally bad. We must also say that there is no rule of law that a test to be applied for identifying backward classes should be only one and/or uniform. In a vast country like India, it is simply not practicable. If the real object is to discover and locate backwardness, and if such backwardness is found in a caste, it can be treated as backward; if it is found in any other group, section or class, they too can be treated as backward."

127. On a closer reading of the paragraphs it appears that this Court took note of the fact that several religions do not have any caste. Therefore, the first sentence of para`782 lays emphasis to begin somewhere with some group, class or section. It also states that there is no set or recognized method and there is no law or other statutory instrument prescribing the methodology. In this context, it has also been stated that one can well begin with castes which represent explicit identifiable social classes or groupings. Therefore, the emphasis was on beginning with castes which

represent as explicit identifiable social classes or grouping. Again in paragraph 783, it has been stated that in a vast country like India it is simply not practicable to fix the test for identifying backward classes. In that background it was held that if the real objective is to discover and locate the real backwardness and if such backwardness is found in a caste it can be considered as backwardness. Similarly if it is found in any other group, section or class they too can be treated as backward. The intention therefore is clear that if caste is found to be backward it can certainly be treated as backward. To give any other meaning would be adding or subtracting to what has been specifically stated in the decision.

128. It is also relevant to take note of certain earlier decisions referred to in Indra Sawhney No.1 case (supra) which throw beacon light on the issue. They are as under:

> 1. M.R. Balaji v. State of Mysore,1963 Supp (1) SCR 439 "Article 15(4) authorises the State to make a special provision for the advancement of any socially and educationally backward classes of citizens, as distinguished from the Scheduled Castes and Scheduled Tribes. No doubt, special provision can be made for both categories of citizens, but in specifying the categories, the first category is distinguished from the second. Sub-clauses (24) and (25) of Article 366 define Scheduled Castes and Scheduled Tribes respectively, but there is no clause defining socially and educationally backward classes of citizens, and so, in determining the question as to whether a particular provision has been validly made under Article 15(4) or not, the first question which falls to be determined is whether the State has validly determined who should be included in these Backward Classes. It seems fairly clear that the backward classes of citizens for whom special provision is authorised to be made are, by Article 15(4) itself, treated as being similar to the Scheduled Castes and Scheduled Tribes. Scheduled Castes and Scheduled Tribes which have been defined were known to be backward and the Constitution-makers felt no doubt that special provision had to be made for their advancement. It was realised that in the Indian Society there were other classes of citizens who were equally, or may be somewhat less, backward than the Scheduled Castes and Tribes and it was thought that some special provision ought to be made even for them.

Let us take the question of social backwardness first. By what test should it be decided whether a particular class is socially backward or not? The group of citizens to whom Article 15(4) applies are described as "classes of citizens", not as castes of citizens. A class, according to the dictionary meaning, shows division of society according to status, rank or caste. In the Hindu social structure, caste unfortunately plays an important part in determining the status of the citizen. Though according to sociologists and vedic scholars, the caste system may have originally begun on occupational or functional basis, in course of time, it became rigid and inflexible. The history of the growth of caste system shows that its original functional and occupational basis was later over-burdened with considerations of purity based on ritual concepts, and that led to its ramifications which introduced inflexibility and rigidity. This artificial growth inevitably tended to create a feeling of superiority and inferiority, and to foster narrow caste loyalties. Therefore, in dealing with the question as to whether any class of citizens is socially backward or not, it may not

be irrelevant to consider the caste of the said group of citizens. In this connection it is, however, necessary to bear in mind that the special provision is contemplated for classes of citizens and not for individual citizens as such, and so, though the caste of the group of citizens may be relevant, its importance should not be exaggerated. If the classification of backward classes of citizens was based solely on the caste of the citizen, it may not always be logical and may perhaps contain the vice of perpetuating the castes themselves.

xx xx xx Besides, if the caste of the group of citizens was made the sole basis for determining the social backwardness of the said group, that test would inevitably break down in relation to many sections of Indian society which do not recognise castes in the conventional sense known to Hindu society. How is one going to decide whether Muslims, Christians or Jains, or even Lingayats are socially backward or not? The test of castes would be inapplicable to those groups, but that would hardly justify the exclusion of these groups in toto from the operation of Article 15(4). It is not unlikely that in some States some Muslims or Christians or Jains forming groups may be socially backward. That is why we think that though castes in relation to Hindus may be a relevant factor to consider in determining the social backwardness of groups or classes of citizens, it cannot be made the sole or the dominant test in that behalf. Social backwardness is on the ultimate analysis the result of poverty to a very large extent. The classes of citizens who are deplorably poor automatically become socially backward. They do not enjoy a status in society and have, therefore, to be content to take a backward seat. It is true that social backwardness which results from poverty is likely to be aggravated by considerations of caste to which the poor citizens may belong, but that only shows the relevance of both caste and poverty in determining the backwardness of citizens.

2. R. Chitralekha v State of Mysore AIR 1964 SC 1823 Justice Subba Rao referred to the observations in M.R. Balaji v. State of Mysore and observed:

> "15. Two principles stand out prominently from the said observations, namely, (i) the caste of a group of citizens may be a relevant circumstance in ascertaining their social backwardness; and (ii) though it is a relevant factor to determine the social backwardness of a class of citizens, it cannot be the dole or dominant test in that behalf. The observations extracted in the judgment of the High Court appear to be in conduct with the observations of this Court. While this Court said that caste is only a relevant circumstance and that it cannot be the dominant test in ascertaining the backwardness of a class of citizens, the High Court said that it is an important basis in determining the class of backward Hindus and that the Government should have adopted caste as one of the tests. As the said observations made by the High Court may lead to some confusion in the mind of the authority concerned who may be entrusted with the duty of prescribing the rules for ascertaining the backwardness of classes of citizens within the meaning of Art. 15(4) of the Constitution, we would hasten to make it clear that caste is only a relevant circumstance in ascertaining the backwardness of a class and there is nothing in the judgment of this Court which precludes the authority concerned from determining the social backwardness of a group of citizens if it can do so without reference to caste. While this Court has not excluded caste from ascertaining the backwardness of a class of citizens, it has not

made it one of the compelling circumstances affording a basis for the ascertainment of backwardness of a class. To put it differently, the authority concerned may take caste into consideration in ascertaining the backwardness of a group of persons; but, if it does not, its order will not be bad on that account, if it can ascertain the backwardness of a group of persons on the basis of other relevant criteria.

19 The important factor to be noticed in Art. 15(4) is that it does not speak of castes, but only speaks of classes. If the makers of the Constitution intended to take castes also as units of social and educational backwardness, they would have said so as they have said in the case of the Scheduled Castes and the Scheduled Tribes. Though it may be suggested that the wider expression "classes" is used in clause (4) of Art. 15 as there are communities without castes, if the intention was to equate classes with castes, nothing prevented the makers of the Constitution from using the expression "backward classes or castes". The juxtaposition of the expression "backward classes" and "Scheduled Castes" in Art. 15(4) also leads to a reasonable inference that the expression "classes" is not synonymous with castes. It may be that for ascertaining whether a particular citizen or a group of citizens belong to a backward class or not, his or their caste may have some relevance, but it cannot be either the sole or the dominant criterion for ascertaining the class to which he or they belong.

20. This interpretation will carry out the intention of the Constitution expressed in the aforesaid Articles. It helps the really backward classes instead of promoting the interests of individuals or groups who, though they belong to a particular caste a majority whereof is socially and educationally backward, really belong to a class which is socially and educationally advanced. To illustrate, take a caste in a State which is numerically the largest therein. It may be that though a majority of the people in that caste are socially and educationally backward, an effective minority may be socially and educationally far more advanced than another small sub-caste the total number of which is far less than the said minority. If we interpret the expression "classes" as "castes", the object of the Constitution will be frustrated and the people who do not deserve any adventitious aid may get it to the exclusion of those who really deserve. This anomaly will not arise if, without equating caste with class, caste is taken as only one of the considerations to ascertain whether a person belongs to a backward class or not. On the other hand, if the entire sub- caste, by and large, is backward, it may be included in the Scheduled Castes by following the appropriate procedure laid down by the Constitution.

21. We do not intend to lay down any inflexible rule for the Government to follow. The laying down of criteria for ascertainment of social and educational backwardness of a class is a complex problem depending upon many circumstances which may vary from State to State and even from place to place in a State. But what we intend to emphasize is that under no circumstances a "class" can be equated to a "caste", though the caste of an individual or a group of individual may be considered along

with other relevant factors in putting him in a particular class. We would also like to make it clear that if in a given situation caste is excluded in ascertaining a class within the meaning of Art. 15(4) of the Constitution, it does not vitiate the classification if it satisfied other tests.

3. Minor P. Rajendran v State of Madras (1968 (2) SCR 787) "The first challenge is to r. 5 on the ground that it violates Art. 15 of the Constitution. Article 15 forbids discrimination against any citizen on the grounds only of religion, race, caste, sex, place of birth or any of them. At the same time Art. 15(4) inter alia permits the State to make any special provision for the advancement of any socially and educationally backward classes of citizens. The contention is that the list of socially and educationally backward classes for whom reservation is made under r. 5 is nothing but a list of certain castes. Therefore, reservation in favour of certain castes based only on caste considerations violates Art. 15(1), which prohibits discrimination on the ground o 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 Art. 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 Art. 15(4). Reference in this connection may be made to the observations of this Court in M. R. Balaji v. State of Mysore ([1963] Supp. 1 S.C.R. 439 at p. 459-460) to the effect that it was not irrelevant to consider the caste of a class of citizens in determining their social and educational backwardness. It was further observed that though the caste of a class of citizens may be relevant its importance should not be exaggerated; and if classification of backward classes of citizens was based solely on the caste of the citizen, it might be open to objection. It is true that in the present cases the list of socially and educationally backward classes has been specified by caste. But that does not necessarily mean that caste was the sole consideration and that persons belonging to these castes are also not a class of socially and educationally backward citizens. In its reply, the State of Madras has given the history as to how this list of backward classes was made, starting from the year 1906 and how the list has been kept upto date and necessary amendments made therein. It has also been stated that the main criterion for inclusion in the list was the social and educational backwardness of the caste based on occupations pursued by these castes. Because the members of the caste as a whole were found to be socially and educationally backward, they were put in the list. The matter was finally examined after the Constitution came into force in the light of the provisions contained in Art. 15(4). As it was found that members of these castes as a whole were educationally and socially backward, the list which had been coming on from as far back as 1906 was finally adopted for purposes of Art. 15(4). In short the case of the State of Madras is that the castes included in the list are only a compendious indication of the class of people in those castes and these classes of people had been put in the list for the purpose of Art. 15(4) because they had been found to be socially and educationally backward.

This is the position as explained in the Affidavit filed on behalf of the State of Madras. On the other hand the only thing stated in the petitions is that as the list is based on caste alone it is violative of Art. 15(1). In view however of the explanation given by the State of Madras, which has not been controverted by any rejoinder, it must be accepted that though the list shows certain castes, the members of those castes are really classes of educationally and socially backward citizens. No

attempt was made on behalf of the petitioners/appellant to show that any caste mentioned in this list was not educationally and socially backward. No such averment was made in the affidavit in support of their cases, nor was any attempt made to traverse the case put forward on behalf of the State of Madras by filing a rejoinder affidavit to show that even one of the castes included in the list was not educationally and socially backward. In this state of the pleadings, we must come to the conclusion that though the list is prepared caste-wise, the castes included therein are as a whole educationally and socially backward and therefore the list is not violate of Art. 15. The challenge to r. 5 must therefore fail.

4) State of Andhra Pradesh v P. Sagar (1968 (3) SCR 595) "In the context in which it occurs the expression "class" means a homogeneous section of the people grouped together because of certain likenesses or common traits and who are identifiable by some common attributes such as status, rank, occupation, residence in a locality, race, religion and the like. In determining whether a particular section forms a class, caste cannot be excluded altogether. But in the determination of a class a test solely based upon the caste or community cannot also be accepted. By cl. (1) Art. 15 prohibits the State from discriminating against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. By cl. (3) of Art. 15 the State is, notwithstanding the provision contained in cl. (1), permitted to make special provision for women and children. By cl. (4) a special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes is outside the purview of cl. (1). But cl. (4) is an exception to cl. (1). Being an exception, it cannot be extended so as in effect to destroy the guarantee of cl. (1). The Parliament has by enacting cl. (4) attempted to balance as against the right of equality of citizens the special necessities of the weaker sections of the people by allowing a provision to be made for their advancement. In order that effect may be given to cl. (4), it must appear that the beneficiaries of the special provision are classes which are backward socially and educationally and they are other that the Scheduled Castes and Scheduled Tribes, and that the provision made is for their advancement."

5. Minor A. Peeriakaruppan (Minor) v. State of T.N., (1971) 1 SCC 38 :

> "25. A caste has always been recognized as a class. In construing the expression "classes of His Majesty's subject" found in Section 153- A of the Indian Penal Code, Wassoodew, J., observed in Narayan Vasudev v. Emperor AIR 1940 Bomb 379 "In my opinion, the expression 'classes of His Majesty's subjects' in Section 153-A of the Code is used in restrictive sense as denoting a collection of individuals or groups bearing a common and exclusive designation and also possessing common and exclusive characteristics which may be associated with their origin, race or religion, and that the term 'class' within that section carries with it the idea of numerical strength so large as could be grouped in a single homogeneous community."

26. In para 10, Chapter V of the Backward Classes Commission's Report, it is observed:

> "We tried to avoid caste but we find it difficult to ignore caste in the present prevailing conditions. We wish it were easy to dissociate caste from social

> backwardness at the present juncture. In modern time anybody can take to any profession. The Brahman taking to tailoring, does not become a tailor by caste, nor is his social status lowered as a Brahman. A Brahman may be a seller of boots and shoes, and yet his social status is not lowered thereby. Social backwardness, therefore, is not today due to the particular profession of a person, but we cannot escape caste in considering the social backwardness in India.
>
> In para 11 of that Report it is stated:
>
> "It is not wrong to assume that social backwardness has largely contributed to the educational backwardness of a large number of social groups."

27. Finally in para 13, the committee concludes with following observations:

> "All this goes to prove that social backwardness is mainly based on racial, tribal, caste and denominational differences."

28. The validity of the impugned list of backward classes came up for consideration before this Court in Rajendran case and this is what this Court observed therein:

> "The contention is that the list of socially and educationally backward classes for whom reservation is made under Rule 5 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 justice in question, it would be violative of Article 15(1). But it must not be forgotten that a caste is also a class of citizens and if the caste as a whole is socially and educationally backward, reservation can be made in favour of such a caste on the ground that it is a socially and educationally backward class of citizens within the meaning of Article 15(4)."

29. Rajendran case is an authority for the proposition that the classification of backward classes on the basis of castes is within the purview of Article 15(4) if those castes are shown to be socially and educationally backward. No further material has been placed before us to show that the reservation for backward classes with which we are herein concerned is not in accordance with Article 15(4). There is no gainsaying the fact that there are numerous castes in this country which are socially and educationally backward. To ignore their existence is to ignore the facts of life. Hence we are unable to uphold the contention that the impugned reservation is not in accordance with Article 15(4). But all the same the Government should not proceed on the basis that once a class is considered as a backward class it should continue to be backward class for all times. Such an approach would defeat the very purpose of the reservation because once a class reaches a stage of progress which some modern writers call as take off stage then competition is necessary for their future progress. The Government should always keep under review the question of reservation of seats and only the classes which are really socially and educationally backward should be allowed to have the benefit of

reservation. Reservation of seats should not be allowed to become a vested interest. The fact that candidates of backward classes have secured about 50% of the seats in the general pool does show that the time has come for a de novo comprehensive examination of the question. It must be remembered that the Government's decision in this regard is open to judicial review."

6. State of A.P. v. U.S.V. Balram, (1972) 1 SCC 660, at page 685 :

> "82 In the determination of a class to be grouped as backward, a test solely based upon caste or community cannot be accepted as valid. But, in our opinion, though Directive Principles contained in Article 46 cannot be enforced by courts. Article 15(4) will have to be given effect to in order to assist the weaker sections of the citizens, as the State has been charged with such a duty. No doubt, we are aware that any provision made under this clause must be within the well defined limits and should not be on the basis of caste alone. But it should not also be missed that a caste is also a class of citizens and that a caste as such may be socially and educationally backward. If after collecting the necessary data, it is found that the caste as a whole is socially and educationally backward, in our opinion, the reservation made of such persons will have to be upheld notwithstanding the fact that a few individuals in that group may be both socially and educationally above the general average. There is no gainsaying the fact that there are numerous castes in the country, which are socially and educationally backward and therefore a suitable provision will have to be made by the State, as charged in Article 15(4) to safeguard their interest".

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94. To conclude, though prima facie the list of Backward Classes which is under attack before us may be considered to be on the basis of caste, a closer examination will clearly show that it is only a description of the group following the particular occupations or professions, exhaustively referred to by the Commission. Even on the assumption that the list is based exclusively on caste, it is clear from the materials before the Commission and the reasons given by it in its report that the entire caste is socially and educationally backward and therefore their inclusion in the list of Backward Classes is warranted by Article 15(4). The groups mentioned therein have been included in the list of Backward Classes as they satisfy the various tests, which have been laid down by this Court for ascertaining the social and educational backwardness of a class."

7. Janki Prasad Parimoo v. State of J&K, (1973) 1 SCC 420, at page 432 :

> "22. Article 15(4) speaks about "socially and educationally backward classes of citizens"

while Article 16(4) speaks only of "any backward class citizens". However, it is now settled that the expression "backward class of citizens" in Article 16(4) means the same thing as the expression "any socially and educationally backward class of citizens" in Article 15(4). In order to qualify for being called a "backward class citizen" he must be a member of a socially and educationally backward

class. It is social and educational backwardness of a class which is material for the purposes of both Articles 15(4) and 16(4)."

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24. It is not merely the educational backwardness or the social backwardness which makes a class of citizens backward; the class identified as a class as above must be both educationally and socially backward. In India social and educational backwardness is further associated with economic backwardness and it is observed in Balaji case referred to above that backwardness, socially and educationally, is ultimately and primarily due to proverty. But if proverty is the exclusive test, a very large proportion of the population in India would have to be regarded as socially and educationally backward, and if reservations are made only on the ground of economic considerations, an untenable situation may arise. Even in sectors which are recognised as socially and educationally advanced there are large pockets of poverty. In this country except for a small percentage of the population the people are generally poor some being more poor, others less poor. Therefore, when a social investigator tries to identify socially and educationally backward classes, he may do it with confidence that they are bound to be poor. His chief concern is, therefore, to determine whether the class or group is socially and educationally backward. Though the two words "socially" and "educationally" are used cumulatively for the purpose of describing the backward class, one may find that if a class as a whole is educationally advanced it is generally also socially advanced because of the reformative effect of education on that class. The words "advanced" and "backward" are only relative terms there being several layers or strata of classes, hovering between "advanced" and "backward", and the difficult task is which class can be recognised out of these several layers as been socially and educationally backward."

25 ..Indeed all sectors in the rural areas deserve encouragement but whereas the former by their enthusiasm for education can get on without special treatment, the latter require to be goaded into the social stream by positive efforts by the State. That accounts for the raison-d'etre of the principle explained in Balaji case which pointed out that backward classes for whose improvement special provision was contemplated by Article 15(4) must be comparable to Scheduled Castes and Scheduled Tribes who are standing examples of backwardness socially and educationally. If those examples are steadily kept before the mind the difficulty in determining which other classes should be ranked as backward classes will be considerably eased."

8. State of Kerala v. N.M. Thomas, (1976) 2 SCC 310, at page 367 :

> "135. We may clear the clog of Article 16(2) as it stems from a confusion about caste in the terminology of scheduled castes and scheduled tribes. This latter expression has been defined in Articles 341 and 342. A bare reading brings out the quintessential concept that they (sic there) are no castes in the Hindu fold but an amalgam of castes, races, groups, tribes, communities or parts thereof found on investigation to be the lowliest and in need of massive State aid and notified as such by the President. To confuse this backwardmost social composition with castes is to commit a constitutional error, misled by a compendious appellation. So that, to protect

harijans is not to prejudice any caste but to promote citizen solidarity. Article 16(2) is out of the way and to extend protective discrimination to this mixed bag of tribes, races, groups, communities and non-castes outside the four-fold Hindu division is not to compromise with the acceleration of castelessness enshrined in the sub-article. The discerning sense of the Indian Corpus Juris has generally regarded scheduled castes and scheduled tribes, not as caste but as a large backward group deserving of societal compassion ..."

9. State of U.P. v. Pradip Tandon, (1975) 1 SCC 267, at page 273 :

"14. Article 15(4) speaks of socially and educationally backward classes of citizens. The State described the rural, hill and Uttrakhand areas as socially and educationally backward areas. The Constitution does not enable the State to bring socially and educationally backward areas within the protection of Article 15(4). The Attorney-General however submitted that the affidavit evidence established the rural, hill and Uttrakhand areas to have socially and educationally backward classes of citizens. The backwardness contemplated under Article 15(4) is both social and educational. Article 15(4) speaks of backwardness of classes of citizens. The accent is on classes of citizens. Article 15(4) also speaks of Scheduled Castes and Scheduled Tribes. Therefore, socially and educationally backward classes of citizens in Article 15(4) could not be equated with castes. In M.R. Balaji v. State of Mysore 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).

15. Broadly stated, neither caste nor race nor religion can be made the basis of classification for the purposes of determining social and educational backwardness within the meaning of Article 15(4). When Article 15(1) forbids discrimination on grounds only of religion, race, caste, caste cannot be made one of the criteria for determining social and educational backwardness. If caste or religion is recognised as a criterion of social and educational backwardness Article 15(4) will stultify Article 15(1). It is true that Article 15(1) forbids discrimination only on the ground of religion, race, caste, but when a classification takes recourse to caste as one of the criteria in determining socially and educationally backward classes the expression "classes" in that case violates the rule of expressio unius est exclusio alterius. The socially and educationally backward classes of citizens are groups other than groups based on caste.

16. The expression "socially and educationally backward classes" in Article 15(4) was explained in Balaji case to be comparable to Scheduled Castes and Scheduled Tribes. The reason is that the Scheduled Castes and Scheduled Tribes illustrated social and educational backwardness. It is difficult to define the expression "socially and educationally backward classes of citizens". The traditional unchanging occupations of citizens may contribute to social and educational backwardness. The place of habitation and its environment is also a determining factor in judging the social and

educational backwardness.

17. The expression "classes of citizens"

indicates a homogeneous section of the people who are grouped together because of certain likenesses and common traits and who are identifiable by some common attributes. The homogeneity of the class of citizens is social and educational backwardness. Neither caste nor religion nor place of birth will be the uniform element of common attributes to make them a class of citizens."

10. K.S. Jayasree (Kumari) v. State of Kerala, (1976) 3 SCC 730, at page 733 :

"13. Backward classes for whose improvement special provisions are contemplated by Article 15(4) are in the matter of their backwardness comparable to scheduled castes and scheduled tribes. This Court has emphasised in decisions that the backwardness under Article 15(4) must be both social and educational. In ascertaining social backwardness of a class of citizens, the caste of a citizen cannot be the sole or dominant test. Just as caste is not the sole or dominant test, similarly poverty is not the decisive and determining factor of social backwardness.

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21. In ascertaining social backwardness of a class of citizens it may not be irrelevant to consider the caste of the group of citizens. Caste cannot however be made the sole or dominant test. Social backwardness is in the ultimate analysis the result of poverty to a large extent. Social backwardness which results from poverty is likely to be aggravated by considerations of their caste. This shows the relevance of both caste and poverty in determining the backwardness of citizens. Poverty by itself is not the determining factor of social backwardness. Poverty is relevant in the context of social backwardness. The commission found that the lower income group constitutes socially and educationally backward classes. The basis of the reservation is not income but social and educational backwardness determined on the basis of relevant criteria. If any classification of backward classes of citizens is based solely on the caste of the citizen it will perpetuate the vice of caste system. Again, if the classification is based solely on poverty it will not be logical. The society is taking steps for uplift of the people. In such a task groups or classes who are socially and educationally backward are helped by the society. That is the philosophy of our Constitution. It is in this context that social backwardness which results from poverty is likely to be magnified by caste considerations. Occupations, place of habitation may also be relevant factors in determining who are socially and educationally backward classes. Social and economic considerations come into operation in solving the problem and evolving the proper criteria of determining which classes are socially and educationally backward. That is why our Constitution provided for special consideration of socially and educationally backward classes of citizens as also

> scheduled castes and tribes. It is only by directing the society and the State to offer them all facilities for social and educational uplift that the problem is solved. It is in that context that the commission in the present case found that income of the classes of citizens mentioned in Appendix VIII was a relevant factor in determining their social and educational backwardness."

129. In Chitrelekha's case (supra) it was stated that the caste is the starting point. This is subject of course to the parameters that if the caste itself satisfies the test of backwardness which is implicit and inherent as noted in para 782 of Indra Sawhney No.1 (supra). In that case caste becomes the relevant factor. The view expressed in Chitralekha's case (supra) was not dissented from in Indra Sawhney No.1 (supra). In fact Justice Jeevan Reddy in the majority judgment in Indra Sawhney No.1 (supra) referred to Chitrelekha's case (supra) at para 704. As noted above in para 782 of Indra Sawhney No.1 (supra) it has not been held that caste is class. In the said paragraph it has been stated that individual survey is out of question since Article 16(4) speaks of class protection and not individual protection. In that context also it has been said that it does not mean that one can wind up the process of identification for the castes. It has also been emphasized in the said paragraph that having exhausted the castes or simultaneously with it, the authority may take up for consideration other occupational groups, communities and classes. If caste is a substitute for class, the question of any simultaneous consideration of others does not arise. Therefore, the Court observed that one may well begin with castes if one chooses and then go to other groups, sections and classes. If the Court meant to substitute the word caste with class the question of going to other classes would not arise.

130. Reference may also be made to Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India (UOI) and Ors. (1981(1) SCC 246) where at para 22 it was noted as follows:

> "This is not mere harmonious statutory construction of Article 16(1) and (4) but insightful perception of our constitutional culture, reflecting the current of resurgent India bent on making, out of a sick and stratified society of inequality and poverty, a brave new Bharat. If freedom, justice and equal opportunity to unfold one's own personality, belong alike to bhangi and brahmin, prince and pauper, if the panchama proletariat is to feel the social transformation Article 16(4) promises, the State must apply equalising techniques which will enlarge their opportunities and thereby progressively diminish the need for props. The success of State action under Article 16(4) consists in the speed with which result-oriented reservation withers away as, no longer a need, not in the everwidening and everlasting operation of an exception [Article 16(4)] as if it were a super- fundamental right to continue backward all the time. To lend immortality to the reservation policy is to defeat its raison de'etre; to politicise this provision for communal support and Party ends is to subvert the solemn undertaking of Article16(1), to casteify 'reservation' even beyond the dismal groups of backward-most people, euphemistically described as SC & ST, is to run a grave constitutional risk. Caste, ipso facto, is not class in a secular State."

131. Much emphasis has been laid on the use of the word 'only'. It is to be noted that while the respondents contend that where it is demonstrated that caste is not the only consideration the

permissible provision will operate. Reference was made to Venkataraman's case (supra). As has been rightly contended by learned counsel for the petitioners the true effect of the word 'only' has been clarified in the decision itself.

132. It is unnecessary to decide as it has been contended by learned counsel for the petitioners whether the concept of strict scrutiny is a measure of judicial scrutiny as highlighted by the conditions in India. It is submitted that label is not relevant.

133. The ultimate object is the eradication of castes and that is the foundation for reservation. While considering the method adopted for eradication by adopting the process of reservation indirectly the facet of strict scrutiny comes in. The strict scrutiny test was applied in the background of Article 19 vis-`-vis compelling State needs. The principle was recognized in Chintaman Rao v. The State of Madhya Pradesh (1950 SCR

759). It was inter-alia quoted as follows:

> "The question for decision is whether the statute under the guise of protecting public interests arbitrarily interferes with private business and imposes unreasonable and unnecessarily restrictive regulations upon lawful occupation; in other words, whether the total prohibition of carrying on the business of manufacture of bidis within the agricultural season amounts to a reasonable restriction on the fundamental rights mentioned in article 19 (1)(g) of the Constitution. Unless it is shown that there is a reasonable relation of the provisions of the Act to the purpose in view, the right of freedom of occupation and business cannot be curtailed by it.

The phrase "reasonable restriction"

> connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word "reasonable" implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Article 19(1)(g) and the social control permitted by clause (6) of Article19, it must be held to be wanting in that quality".

134. Again in State of Madras v. V.G. Row (AIR 1952 SC 196) it was observed as follows:

> "13. Before proceeding to consider this question we think it right to point out, what is sometimes overlooked, that our Constitution contains express provisions for judicial review of legislation as to its conformity with the constitution unlike as in America where the Supreme Court has assumed extensive power of reviewing legislative acts under cover of the widely interpreted "due process" clause in the Fifth and Fourteenth Amendments. If, then, the courts in this country face up to such

> important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution. This is especially true as regards the "fundamental rights" as to which this Court has been assigned the role of a sentinel on the qui vive. While the Court naturally attaches great weight to the legislative judgment, it cannot dessert its own duty to determine finally the constitutionality of an impugned statute. We have ventured on these obvious remarks because it appears to have been suggested in some quarters that the courts in the new set up are out to seek clashes with the legislatures in the country".

135. At the outset, it may be pointed out that the stand of petitioners is that the primary consideration in selection of candidates for admission to the higher educational institutions must be merit. The object of any rules, which may be made for regulating admissions to such institutions therefore, must be to secure the best and most meritorious students. The national interest and the demand of universal excellence may even override the interests of the weaker sections. In this context, Krishna Iyer J aptly observed:

> "To sympathise mawkishly with the weaker sections by selecting substandard candidates, is to punish society as a whole by denying the prospect of excellence, say, in hospital service. Even the poorest, when stricken by critical illness, needs the attention of super-skilled specialists not humdrum second rates".

136. Thus, the interest of no person, class or region can be higher than that of the nation. The philosophy and pragmatism of universal excellence through equality of opportunity for education and advancement across the nation is part of the constitutional creed. It is, therefore, the best and most meritorious students that must be selected for admission to technical institutions and medical colleges and no citizen can be regarded as outsider in the constitutional set-up without serious detriment to the `unity and integrity' of the nation. The Supreme Court has laid down that so far as admissions to post graduate course such as MS, MD and the like are concerned, it would be imminently desirable not to provide for any reservation based on residence or institutional preference. However, a certain percentage of seats are allowed to be reserved on the ground of institutional preference. But even in this regard, so far as super specialties such as neurosurgery and cardiology are concerned there should be no reservation at all even on the basis of institutional preference and admissions should be granted purely on all-India basis. Further, classification made on the basis of super-specialties may serve the interests of the nation better, though interests of individual states may to a small extent, be affected.

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

138. The inevitable conclusion is that the impugned Statute can be operative only after excluding the creamy layer from identifiable OBCs. There has to be periodic review of the classes who can be covered by the Statute. The periodicity should be five years. To strike constitutional balance there is need for making provision for suitable percentage for socially and economically backward classes in the 27% fixed. I

139. To sum up, the conclusions are as follows:

(1) For implementation of the impugned Statute creamy layer must be excluded.

(2) There must be periodic review as to the desirability of continuing operation of the Statute. This shall be done once in every five years.

(3) The Central Government shall examine as to the desirability of fixing a cut off marks in respect of the candidates belonging to the Other Backward Classes (OBCs). By way of illustration it can be indicated that five marks grace can be extended to such candidates below the minimum eligibility marks fixed for general categories of students. This would ensure quality and merit would not suffer. If any seats remain vacant after adopting such norms they shall be filled up by candidates from general categories.

(4) So far as determination of backward classes is concerned, a Notification should be issued by the Union of India. This can be done only after exclusion of the creamy layer for which necessary data must be obtained by the Central Government from the State Governments and Union Territories. Such Notification is open to challenge on the ground of wrongful exclusion or inclusion.

Norms must be fixed keeping in view the peculiar features in different States and Union Territories.

(5) There has to be proper identification of Other Backward Classes (OBCs.). For identifying backward classes, the Commission set up pursuant to the directions of this Court in Indra Sawhney No.1 has to work more effectively and not merely decide applications for inclusion or exclusion of castes. While determining backwardness, graduation (not technical graduation) or professional shall be the standard test yardstick for measuring backwardness.

(6) To strike the constitutional balance it is necessary and desirable to ear-mark certain percentage of seats out of permissible limit of 27% for socially and economically backward classes.

(7) In the Constitution for the purposes of both Articles 15 and 16, caste is not synonyms with class and this is clear from the paragraphs 782 and 783 of Indra Sawhney No.1. However, when creamy layer is excluded from the caste, the same becomes an identifiable class for the purpose of Articles 15 and 16.

(8) Stress has to be on primary and secondary education so that proper foundation for higher education can be effectively laid. (9) So far as the constitutional amendments are concerned:

> (i) Articles 16(1) and 16(4) have to be harmoniously construed. The one is not an exception to the other.
>
> (ii) Articles 15(4) and 15(5) operate in different fields. Article 15(5) does not render Article 15(4) inactive or inoperative.
>
> (10) While interpreting the constitutional provisions, foreign decisions do not have great determinative value. They may provide materials for deciding the question regarding constitutionality. In that sense, the strict scrutiny test is not applicable and indepth scrutiny has to be made to decide the constitutionality or otherwise, of a statute. (11) If material is shown to the Central Government that the Institution deserves to be included in the Schedule, the Central Government must take an appropriate decision on the basis of materials placed and on examining the concerned issues as to whether Institution deserves to be included in the Schedule.
>
> (12) Challenge relating to private un-aided educational institutions has not been examined because no such institution has laid any challenge. It is to be noted that the petitioners have made submissions in the background of Article 19(6) of the Constitution. Since none of the affected institutions have made any challenge we do not propose to consider it necessary to express any opinion or decide on the question.

140. In view of the above-said conclusions, the writ petitions and the Contempt Petition (Civil) No.112/2007 in W.P. (C) No.265/2006 are disposed of.