

## **‘STATE’ UNDER ARTICLE 12**

**The Constitution of India, Article 12** : “In this part, unless the context otherwise requires, “the State” includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.”

### ***Tests to decide which “other authorities” could be considered as agencies or instrumentalities of state***

The cumulative effect of all the following factors has to be seen:

1. “If the entire share capital of the corporation is held by government, it would go a long way towards indicating that the corporation is an instrumentality or agency of government.”
2. The existence of “deep and pervasive State control may afford an indication that the Corporation is a State agency or instrumentality.”
3. “It may also be a relevant factor...whether the corporation enjoys monopoly status which is State conferred or State protected.”
4. “If the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of government.”
5. “Specifically, if a department of government is transferred to a corporation, it would be a strong factor supportive of this inference” of the corporation being an instrumentality or agency of government.

### ***Som Prakash Rekhi v. Union of India***

AIR 1981 SC 212 : (1981) 1 SCC 449

The petitioner was a clerk in the Burmah Shell Oil Storage Ltd. He retired at the age of 50 after qualifying for a pension, on April 1, 1973. He was also covered by a scheme under the Employees’ Provident Funds and Family Pension Fund Act, 1952. The employer undertaking was statutorily taken over by the Bharat Petroleum Corporation Ltd. under the Burmah Shell (Acquisition of Undertakings in India) Act, 1976, and the Corporation became the statutory successor of the petitioner employer. His pensionary rights, such as he had, therefore, became claimable from the second respondent. The pensionary provision for the Burmah Shell employees depended on the terms of a Trust Deed of 1950 under which a Pension Fund was set up and regulations were made for its administration.

By virtue of Regulation 13, the petitioner was entitled to a pension of Rs. 165.99 subject to certain deductions which formed the controversy in this case. He was also being paid Supplementary Retirement Benefit of Rs. 86/- per month for a period of 13 months after his retirement which was stopped thereafter. By a letter dated September 25, 1974, the employer (Burmah Shell) explained that from out of the pension of Rs. 165.99 two deductions were

authorised by Regulation 16. One such deduction was based on Regulation 16(1) because of Employees' Provident Fund payment to the pensioner and the other rested on Regulation 16(3) on account of payment of gratuity. Resultantly, the 'pension payable' was shown as Rs 40.05.

Further, the petitioner claimed and received his provident fund amount under the PF Act and recovered a gratuity amount due under the Payment of Gratuity Act, 1972. The petitioner was intimated by the Burmah Shell that consequent on his drawal of provident fund and gratuity benefits, the quantum of his pension would suffer a *pro tanto* shrinkage, leaving a monthly pension of Rs 40/-. Since no superannuated soul can survive on Rs. 40/- per month, the petitioner moved the court challenging the deductions from his original pension as illegal and inhuman and demanding restoration of the full sum which he was originally drawing. According to the petitioner, his right to property under Article 19 had been violated.

The first issue before the Supreme Court was whether a writ could be issued under Article 32 of the Constitution against the BPCL, a government company.

**V.R. KRISHNA IYER, J.** – 18. A preliminary objection has been raised by Shri G.B. Pai (Counsel for Respondent 2) that no writ will lie against the second respondent since it is neither a Government department nor a statutory corporation but just a company and so the court should reject out of hand this proceeding under Article 32. We do see the force of this contention, notwithstanding the observations in the *Airport Authority* case [*Ramana Dayaram Shetty v. International Airport Authority of India*, AIR 1979 SC 1628] that the status of 'State' will attach to the Government companies like the second respondent.

19. Let us first look at the facts emerging from the Act and then superimpose the law in Article 12 which conceptualises 'State' for the purposes of Part III. After all, cynicism apart, Mark Twain is good chewing-gum for lawyers: "Get your facts first, and then you can distort them as much as you please." It is common ground that the present writ petition, invoking Article 32, is limited to issuing directions or orders or writs for the enforcement of fundamental rights and the question is whether the addressee is the 'State' within the meaning of Article 12 of the Constitution. We will examine this position more closely a little later, but granting that Article 19 is aimed at State action the contours of 'State', conceptually speaking, are largely confined to Article 12. We have to study the anatomy of the Corporation in the setting of the Act and decide whether it comes within the scope of that Article. We have only an inclusive definition, not a conclusive definition. One thing is clear. Any *authority* under the *control of the Government of India* comes within the definition. Before expanding on this theme, we may scan the statutory scheme, the purpose of the legislative project and the nature of the juristic instrument it has created for fulfillment of that purpose. Where constitutional fundamentals, vital to the survival of human rights, are at stake functional realism, not facial cosmetics, must be the diagnostic tool. Law, constitutional law, seeks the substance, not merely the form. For, one may look like the innocent flower but be the serpent under it. The preamble, which ordinarily illumines the object of the statute, makes it plain that what is intended and achieved is nationalisation of an undertaking of strategic importance:

And whereas it is expedient in the public interest that the undertakings in India, of Burmah Shell Oil Storage and Distributing Company of India Limited, should be

acquired *in order to ensure that the ownership and control* of the petroleum products distributed and marketed in India by the said Company *are vested in the State* and thereby so distributed as best to subserve the common good;

It is true that what is nationalised is a private enterprise motivated, undoubtedly, by the need for transferring the ownership and control of the company and its petroleum products distributed and marketed in India. Section 3 is important from this angle.

On the appointed day, the right, title and interest of Burmah Shell, in relation to its undertakings in India, shall stand transferred to, and shall vest in, the Central Government.

20. This provision lays bare the central object of making the Central Government the proprietor of the Undertaking. It hardly needs argument to convince a court that by virtue of Section 3, the Central Government is the transferee of the Undertaking. Had a writ proceeding been commenced during the period of vesting in the Central Government, it could not have been resisted on the score that the employer is not "the State". The appointed day did arrive and the right, title and interest in Burmah Shell did vest in the Central Government.

21. A commercial undertaking although permitted to be run under our constitutional scheme by government, may be better managed with professional skills and on business principles, guided, of course, by social goals, if it were administered with commercial flexibility and clarity free from departmental rigidity, slow motion procedures and hierarchy of officers. That is why a considerable part of the public undertakings is in the corporate sector.

22. It is interesting that with the industrial expansion, economics was assisted by jurisprudence and law invented or at least expanded the corporate concept to facilitate economic development consistently with the rule of law. Said Woodrow Wilson, several decades back:

There was a time when corporations played a minor part in our business affairs, but now they play the chief part, and most men are the servants of corporations.

This legal facility of corporate instrument came to be used by the State in many countries as a measure of immense convenience especially in its commercial ventures. The trappings of personality, liberation from governmental stiffness and capacity for mammoth growth, together with administrative elasticity, are the attributes and advantages of corporations. A corporation is an artificial being, invisible, intangible, and existing only in the contemplation of the law. Being the mere creature of the law, it possesses only those properties which the charter of its creation confers on it, either expressly, or as incidental to its very existence. Those are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression be allowed, individuality; properties by which a perpetual succession of many persons are considered the same, and may act as a single individual.

Although corporate personality is not a modern invention, its adaptation to embrace the wide range of industry and commerce has a modern flavour. Welfare States like ours called upon to execute many economic projects readily resort to this resourceful legal contrivance

because of its practical advantages without a wee bit of diminution in ownership and control of the Undertaking. The true owner is the State, the real operator is the State and the effective controller is the State and accountability for its actions to the community and to Parliament is of the State. Nevertheless, a distinct juristic person with a corporate structure conducts the business, with the added facilities enjoyed by companies and keeping the quasi-autonomy which comes in handy from the point of view of business management. Be it remembered though that while the formal ownership is cast in the corporate mould, the reality reaches down to State control. With this background we have to read Section 7 of the Act which runs thus

7. (1) Notwithstanding anything contained in Sections 3, 4 and 5, *the Central Government may*, if satisfied that a Government company is willing to comply, or has complied with such terms and conditions as that government may think fit to impose, *direct* by notification that the right, title and interest and the liabilities of Burmah Shell in relation to any of its undertakings in India, shall *instead of continuing to vest in the Central Government, vest in the Government company....* (emphasis added)

The core fact is that the Central Government, through this provision, chooses to make over, for better management, its own property to its own offspring. A Government company is a mini-incarnation of government itself, made up of its blood and bones and given corporate shape and status for defined objectives, not beyond.

23. Nor is this any isolated experiment in government formally transferring ownership to a company. There are a number of statutory takeovers in India as in other countries, where the initial vesting is in government, followed by a later transfer to another instrumentality – may be an existing government company or a corporation created by statute or even a society or other legal person. In the present case, a Government company was created anteriorly and by virtue of a notification under Section 7 it became the transferee of the right, title and interest as well as the liabilities of Burmah Shell.

24. The device is too obvious for deception that what is done is a formal transfer from government to a Government company as the notification clearly spells out:

In exercise of the powers conferred by sub-section (1) of Section 7 of the Burmah Shell (Acquisition of Undertakings in India) Act, 1976 (2 of 1976), *the Central Government*, being satisfied that Burmah Shell Refineries Ltd., a Government company is willing to comply with such terms and conditions as may be imposed by the Central Government, *hereby directs that the right, title and interest and the liabilities of Burmah Shell Oil Storage and Distributing Co. of India Ltd.* in relation to its undertakings in India, *shall, instead of continuing to vest in the Central Government vest with effect from the twenty-fourth day of January 1976, in Burmah Shell Refineries Ltd.*

This is the well-worn legal strategy for government to run economic and like enterprises. We live in an era of public sector corporations, the State being the reality behind. Law does not hoodwink itself and what is but a strategy cannot be used as a stratagem.

25. These are the facts when we come to brass tacks. Facts form the raw material out of which the finished product of judicial finding is fabricated after processing through

established legal principles. Indeed, in life as in law “it is as fatal as it is cowardly to blink facts because they are not to our taste”. What, then, are the basic facts available from the Act? Constitutional law is not a game of hide and seek but practical real-life conclusions. So viewed, we are constrained to hold that *Burmah Shell*, a Government company though, is but the *alter ego* of the Central Government and must, therefore, be treated as definitionally caught in the net of ‘State’ since a juristic veil worn for certain legal purposes cannot obliterate the true character of the entity for the purposes of constitutional law.

26. If we distil the essence of Article 12 textually and apprehend the expanded meaning of “State” as interpreted precedentially, we may solve the dilemma as to whether the *Bharat Petroleum* is but a double of *Bharat Sarkar*. Let us be clear that the jurisprudence bearing on corporations is not myth but reality. What we mean is that corporate personality is a reality and not an illusion or fictitious construction of the law. It is a legal person. Indeed, ‘a legal person’ is any subject-matter other than a human being to which the law attributes personality. “This extension, for good and sufficient reasons, of the conception of personality ... is one of the most noteworthy feats of the legal imagination.” Corporations are one species of legal persons invented by the law and invested with a variety of attributes so as to achieve certain purposes sanctioned by the law. For those purposes, a corporation or company has a legal existence all its own. The characteristics of corporations, their rights and liabilities, functional autonomy and juristic status, are jurisprudentially recognised as of a distinct entity even where such corporations are but State agencies or instrumentalities. For purposes of the Companies Act, 1956, a Government company has a distinct personality which cannot be confused with the State. Likewise, a statutory corporation constituted to carry on a commercial or other activity is for many purposes a distinct juristic entity not drowned in the sea of State, although, in substance, its existence may be but a projection of the State. What we wish to emphasise is that merely because a company or other legal person has functional and jural individuality for certain purposes and in certain areas of law, it does not necessarily follow that for the effective enforcement of fundamental rights under our constitutional scheme, we should not scan the real character of that entity; and if it is found to be a mere agent or surrogate of the State, in fact owned by the State, in truth controlled by the State and in effect an incarnation of the State, constitutional lawyers must not blink at these facts and frustrate the enforcement of fundamental rights despite the inclusive definition of Article 12 that any authority controlled by the Government of India is itself State. Law has many dimensions and fundamental facts must govern the applicability of fundamental rights in a given situation.

27. Control by government of the corporation is writ large in the Act and in the factum of being a Government company. Moreover, here, Section 7 gives to the Government Company mentioned in it a statutory recognition, a legislative sanction and status above a mere Government Company. If the entity is no more than a company under the company law or society under the law relating to registered societies or cooperative societies you cannot call it an authority. A ration shop run by a cooperative store financed by government is not an authority, being a mere merchant, not a sharer of State power. ‘Authority’ in law belongs to the province of power: “Authority (in Administrative Law) is a body having jurisdiction in certain matters of a public nature.” Therefore, the “ability conferred upon a person by the law

to alter, by his own will directed to that end, the rights, duties, liabilities or other legal relations, either of himself or of other persons” must be present *ab extra* to make a person an ‘authority’. When the person is an ‘agent or instrument of the functions of the State’ the power is public. So the search here must be to see whether the Act vests authority, as agent or instrument of the State, to affect the legal relations of oneself or others.

29. In the present instance, the source of both, read in the light of Sections 3 and 7, is saturated with State functions. Avowedly, the statutory contemplation, as disclosed by Section 7, is that the company should step into the shoes of the executive power of the State. The legislative milieu in which the second respondent came to be the successor of Burmah Shell suggests that the former is more than a mere company registered under the Companies Act. It has a statutory flavour acquired under Section 7. Moreover, everything about the second respondent in the matter of employees, their provident, superannuation and welfare funds, is regulated statutorily unlike in the case of ordinary companies. Sections 9 and 10 deal with these aspects. These two provisions which regulate the conditions of service and even provide for adjudication of disputes relating to employees indicate that some of the features of a statutory corporation attach to this Government Company. Sections 9 and 10, in terms, create rights and duties vis-a-vis the Government Company itself apart from the Companies Act. An ordinary company, even a Government company *simpliciter* has not the obligations cast on the second respondent by Sections 9 and 10. And, Section 11 specifically gives the Act primacy vis-a-vis other laws. Section 12, although it has no bearing on the specific dispute we are concerned with in this case, is a clear pointer to the statutory character of the Government company and the vesting of an authority therein. This provision clothes the Government company with power to take delivery of the property of Burmah Shell from every person in whose possession, custody or control such property may be. There are other powers akin to this one in Section 12. The provision for penalties if any person meddles with the property of the second respondent emphasises the special character of this Government Company. Equally unique is the protection conferred by Section 16 on the Government Company and its officers and employees “for anything which is, in good faith, done or intended to be done under this Act”. Such an immunity does not attach to employees of companies *simpliciter*, even if they happen to be Government companies. In the same strain is the indemnity conferred by Section 18. This review, though skeletal, is sufficient strikingly to bring home the point that the Corporation we are concerned with is more than a mere Government company. Whatever its character antecedent to the Act, the provisions we have adverted to have transformed it into an instrumentality of the Central Government with a strong statutory flavour superadded and clear indicia of power to make it an “authority”. Although registered as a company under the Indian Companies Act, the second respondent is clearly a creature of the statute, the Undertaking having vested in it by force of Section 7 of the Act. The various provisions to which our attention was drawn, an elaboration of which is not called for, emphasise the fact that the second respondent is not a mere company but much more than that and has a statutory flavour in its operations and functions, in its powers and duties, and in its personality itself, apart from being functionally and administratively under the thumb of government. It is a limb of government, an agency of the State, a vicarious creature of statute working on the wheels of the Acquisition Act. We do not mean to say that

for purposes of Article 309 or otherwise this Government Company is State but limit our holding to Article 12 and Part III.

32. Let us dilate a little on the living essence of constitutional fundamentals if we are not to reduce fundamental rights to paper hopes and people's dupes! The judicial branch shall not commit breach of faith with the bill of rights by interpretative exoneration of the State from observance of these founding faiths. The higher values enacted into Part III of the Constitution certainly bind the State in its executive and legislative branches. They are constitutional guarantees to the Indian people, not fleeting promises in common enactments. So long as they last in the National Charter they should not be truncated in their application unless a contra-indication is clearly written into the prescription, *a la* Articles 31A, 31B and 31C. Article 12 is a special definition with a broader goal. Far from restricting the concept of State it enlarges the scope to embrace all authorities under the control of government. The constitutional philosophy of a democratic, socialist republic mandated to undertake a multitude of socio-economic operations inspires Part IV and so we must envision the State entering the vast territory of industrial and commercial activity, competitively or monopolistically, for ensuring the welfare of the people. This expansive role of the State under Part IV is not played at the expense of the cherished rights of the people entrenched in Part III since both the sets of imperatives are complementary and coexist harmoniously. Wherever the Constitution has felt the need to subordinate Part III to Part IV it has specified it and absent such express provision, both the Parts must and can flourish happily together given benign judicial comprehension *a la Kerala v. N.M. Thomas* [AIR 1976 SC 490]. There is no inherent conflict between the two parts if orchestrated humanely. We are at pains to emphasise this perspective because the substance of Part III, save where the Constitution says so, shall not be sacrificed at the altar of Part IV by the stratagem of incorporation. It is well known, and surely within the erudite and experienced ken of our 'founding fathers', that government embarks on myriad modern commercial activities by resort to the jurisprudential gift of personification through incorporation. This contrivance of carrying on business activities by the State through statutory corporations, government companies and other bodies with legal personality, simplifies and facilitates transactions and operations beyond the traditional and tardy processes of governmental desks and cells noted for their red tape exercise and drowsy *dharma*. But to use the corporate methodology is not to liberate the State from its basic obligation to obey Part III. To don the mantle of company is to free the State from the inevitable constraints of governmental slow motion, not to play truant with the great rights. Otherwise, a cunning plurality of corporations taking over almost every State business - the post and the rail-road, the T.V. and the radio, every economic ministry activity, why, even social welfare work - will cheat the people of Part III rights by the easy plea: "No admission for the bill of rights; no State here". From Indian Posts and Telegraphs Limited to Indian Defence Manufacturers Limited, from Social Welfare Board to Backward Classes Corporation, the nation will be told that 'the State has ceased to be, save for the non-negotiable sovereign functions; and fundamental rights may suffer eclipse only to be viewed in museum glass cases. Such a situation will be a treachery on the founding fathers, a mockery of the Constitution and a government by puppetry because the crowd of corporations which have carved out all functions will still be controlled completely by the switchboards of bureaucrats and political bosses from remote control rooms in Government Secretariats. The

extended definition of “the State” in Article 12 is not to be deadened but quickened by judicial construction. Before our eyes the corporate phenomenon is becoming ubiquitous. What was archaically done yesterday by Government departments is alertly executed today by Government companies, statutory corporations and like bodies and this tribe may legitimately increase tomorrow. This efficiency is not to be purchased at the price of fundamental rights.

33. This Court in *Airport Authority* pointed its unanimous finger on these events and portents:

Today with tremendous expansion of welfare and social service functions, increasing control of material and economic resources and large scale assumption of industrial and commercial activities by the State, the power of the executive Government to affect the lives of the people is steadily growing. The attainment of socioeconomic justice being a conscious end of State policy, there is a vast and inevitable increase in the frequency with which ordinary citizens came into relationship of direct encounter with State power-holders. This renders it necessary to structure and restrict the power of the executive Government so as to prevent its arbitrary application or exercise. . . .

Today, the Government in a welfare State, is the regulator and dispenser of special services and provider of a large number of benefits, including jobs, contracts, licences, quotas, mineral rights etc. The government pours forth wealth, money, benefits, services, contracts, quotas and licences. The valuables dispensed by government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of wealth. These valuables which derive from relationships to government are of many kinds. They comprise social security benefits, cash grants for political sufferers and the whole scheme of State and local welfare. Then again, thousands of people are employed in the State and the Central Governments and local authorities. Licences are required before one can engage in many kinds of businesses or work. The power of giving licences means power to withhold them and this gives control to the government or to the agents of government on the lives of many people. Many individuals and many more businesses enjoy largesse in the form of Government contracts... All these mean growth in the government largesse and with the increasing magnitude and range of governmental functions as we move closer to a welfare State, more and more of our wealth consists of these new forms.

We do not suggest that there is any vice at all in government undertaking commercial or other activities through the facile device of companies or other bodies. But to scuttle Part III through the alibi of ‘company, not State’ - ‘ay, there’s the rub!’ The rationale of this proposition is well brought out by Bhagwati, J:

So far as India is concerned, the genesis of the emergence of corporations as instrumentalities or agencies of government is to be found in the Government of India Resolution on Industrial Policy dated April 6, 1948 where it was stated inter alia that “management of State enterprise will as a rule be through the medium of public corporation under the statutory control of the Central Government who will assume such powers as may be necessary to ensure this”. It was in pursuance of the



policy envisaged in this and subsequent resolutions on industrial policy that corporations were created by government for setting up and management of public enterprises and carrying out other public functions. Ordinarily these functions could have been carried out by government departmentally through its service personnel, but the instrumentality or agency of the corporations was resorted to in these cases having regard to the nature of the task to be performed. *The corporations acting as instrumentality or agency of government would obviously be subject to the same limitations in the field of constitutional and administrative law as government itself, though in the eye of the law, they would be distinct and independent legal entities. If government acting through its officers is subject to certain constitutional and public law limitations, it must follow a fortiori that government acting through the instrumentality or agency of corporations should equally be subject to the same limitations,* (emphasis added)

34. Article 12 gives the cue to forbid this plea. “Other authorities... under the control of the Government of India” are comprehensive enough to take care of Part III without unduly stretching the meaning of “the State” to rope in whatever any autonomous body which has some nexus with government. A wide expansion coupled with a wise limitation may and must readily and rightly be read into the last words of Article 12.

35. Addressing itself to the question of identifying those bodies which are agencies of instrumentalities of government, the court, in *Airport Authority*, observed:

A corporation may be created in one of two ways. It may be either established by statute or incorporated under a law such as the Companies Act, 1956 or the Societies Registration Act, 1860. Where a corporation is wholly controlled by government not only in its policy-making but also in carrying out the functions entrusted to it by the law establishing it or by the charter of its incorporation, there can be no doubt that it would be an instrumentality or agency of government...When does such a corporation become an instrumentality or agency of government? Is the holding of the entire share capital of the corporation by government enough or is it necessary that in addition, there should be a certain amount of direct control exercised by government and, if so, what should be the nature of such control? Should the functions which the corporation is charged to carry out possess any particular characteristic or feature, or is the nature of the functions immaterial? Now, one thing is clear that if the entire share capital of the corporation is held by government, *it would go a long way towards indicating that the corporation is an instrumentality or agency of government.....* What then are the tests to determine whether a corporation established by statute or incorporated under law is an instrumentality or agency of government? It is not possible to formulate an all-inclusive or exhaustive test which would adequately answer this question. There is no cut and dried formula which would provide the correct division of corporations into those which are instrumentalities or agencies of government and those which are not. (emphasis added)

36. The court proceeded to crystallise the tests to determine the ‘State’ complexion of corporate bodies, beyond furnishing the full share capital:

“But a finding of State financial support plus an unusual degree of control over the management and policies might lead one to characterise an operation as State action”. [Vide *Sukhdev v. Bhagatram*, (1975) 1 SCC 421]. So also the existence of deep and pervasive State control may afford an indication that the Corporation is a State agency or instrumentality. It may also be a relevant factor to consider whether the corporation enjoys monopoly status which is State conferred or State protected. There can be little doubt that State conferred or State protected monopoly status would be highly relevant in assessing the aggregate weight of the corporations’ ties to the State.

There is also another factor which may be regarded as having a bearing on this issue and it is whether the operation of the corporation is an *important public function*. It has been held in the United States in a number of cases that the concept of private action must yield to a conception of State action where public functions are being performed.... If the *functions* of the corporation are of *public* importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government. This is precisely what was pointed out by Mathew, J., in *Sukhdev v. Bhagatram* where the learned Judge said that ‘institutions engaged in matters of high public interest or performing public functions are by virtue of the nature of the functions performed by government agencies’. Activities which are too fundamental to the society are by definition too important not to be considered government functions”

37. The conclusion is impeccable that if the corporate body is but an ‘instrumentality or agency’ of government, then Part III will trammel its operations. It is a case of quasi-governmental beings, not of non State entities. We have no hesitation to hold that where the chemistry of the corporate body answers the test of ‘State’ above outlined it comes within the definition in Article 12. In our constitutional scheme where the commanding heights belong to the public sector of the national economy, to grant absolution to government companies and their ilk from Part III may be perilous. The court cannot connive at a process which eventually makes fundamental rights as rare as “roses in December, ice in June”. Article 12 uses the expression “other authorities” and its connotation has to be clarified. On this facet also, the *Airport Authority* case supplies a solution.

If a statutory corporation, body or other authority is an instrumentality or agency of the government, it would be an “authority” and therefore ‘State’ within the meaning of that expression in Article 12.

38. The decisions are not uniform as to whether being an instrumentality or agency of government *ipso jure* renders the company or other similar body ‘State’. This again involves a navigation through precedents and Bhagwati, J. in *Airport Authority* has spoken for the court,

We may point out here that when we speak of a corporation being an instrumentality or agency of government, we do not mean to suggest that the corporation should be an agent of the government in the sense that whatever it does should be binding on the Government. It is not the relationship of principal and agent which is relevant and material but whether the corporation is an instrumentality of the government in the sense that a part of the governing power of the State is located in the corporation and

though the corporation is acting on its own behalf and not on behalf of the government, its action is really in the nature of State action.

39. Let us cull out from *Airport Authority* the indicia of “other authorities ... under the control of the Government of India” bringing a corporation within the definition of “the State”. The following factors have been emphasised in that ruling as telling, though not clinching. These characteristics convert a statutory corporation, a Government company, a cooperative society and other registered society or body into a State and they are not confined to statutory corporations alone.

40. The finale is reached when the cumulative effect of all the relevant factors above set out (see p. 1) is assessed and once the body is found to be an instrumentality or agency of government, the further conclusion emerges that it is ‘State’ and is subject to the same constitutional limitations as government.

41. This divagation explains the ratio of the *Airport Authority* in its full spectrum. There the main contention was that the said authority, a statutory corporation, was not State and enforcement of fundamental rights against such a body was impermissible. As is apparent from the extensive discussion above, the identical issue confronting us as to what are the “other authorities” contemplated by Article 12 fell for consideration there. Most of the rulings relied on by either side received critical attention there and the guide-lines and parameters spelt out there must ordinarily govern our decision. A careful study of the features of the Airport Authority and a Government company covered by Sections 7, 9, 10 and 12 of the Act before us discloses a close parallel except that the Airport Authority is *created by a statute* while Bharat Petroleum (notified under Section 7 of the Act) is *recognised by and clothed with rights and duties by the statute*.

42. There is no doubt that Bhagwati, J. broadened the scope of State under Article 12 and according to Shri G.B. Pai the observations spill over beyond the requirements of the case and must be dismissed as obiter. His submission is that having regard to the fact that the International Airport Authority is a corporation created by statute there was no occasion to go beyond the narrow needs of the situation and expand upon the theme of State in Article 12 vis-a-vis Government companies, registered societies and what not.

44. Shri G.B. Pai hopefully took us through *Sukhdev* case at length to demolish the ratio in *Airport Authority*. A majority of three judges spoke through Ray, C.J., while Mathew, J. ratiocinated differently to reach the same conclusion. Alagiriswamy, J., struck a dissenting note. Whether certain statutory corporations were ‘State’ under Article 12 was the question mooted there at the instance of the employees who invoked Articles 14 and 16. The judgment of the learned Chief Justice sufficiently clinches the issue in favour of the petitioner here. The problem was posed thus:

In short the question is whether these statutory corporations are authorities within the meaning of Article 12. The answer was phrased thus;

The employees of these statutory bodies have a statutory status and they are entitled to declaration of being in employment when their dismissal or removal is in contravention of statutory provisions. By way of abundant caution we state that these

employees are not servants of the Union or the State. These statutory bodies are “authorities” within the meaning of Article 12 of the Constitution.

Thus, the holding was that the legal persons involved there (three corporations, viz., the Oil and Natural Gas Commission, the Industrial Finance Corporation and the Life Insurance Corporation) were ‘State’ under Article 12. The reasoning adopted by Ray C.J. fortifies the argumentation in *Airport Authority*.

45. Repelling the State's plea that these bodies were not ‘other authorities’ under Article 12, Ray, C.J. observed:

The State undertakes commercial functions in combination with governmental functions in a welfare State. Governmental function must be authoritative. It must be able to impose decision by or under law with authority. The element of authority is of a binding character. The rules and regulations are authoritative because these rules and regulations direct and control not only the exercise of powers by the corporations but also all persons who deal with these corporations....

The expression “other authorities” in Article 12 has been held by this Court in the *Rajasthan State Electricity Board* case [*Rajasthan Electricity Board v. Mohan Lal*, AIR 1967 SC 1857] to be wide enough to include within it every authority created by a statute and functioning within the territory of India, or under the control of the Government of India. This Court further said referring to earlier decisions that the expression “other authorities” in Article 12 will include all constitutional or statutory authorities on whom powers are conferred by law. The State itself is envisaged under Article 298 as having the right to carry on trade and business. The State as *defined in Article 12 is comprehended to include bodies created for the purpose of promoting economic interests of the people*. The circumstance that the statutory body is required to carry on some activities of the nature of trade or commerce does not indicate that the Board must be excluded from the scope of the word ‘State’. The Electricity Supply Act showed that the Board had power to give directions, the disobedience of which is punishable as a criminal offence. The power to issue directions and to enforce compliance is an important aspect,

Dealing with governmental purposes and public authorities, the court clarified:

In the *British Broadcasting Corporation v. Johns (Inspector of Taxes)* [(1965) 1 Ch. 32], it was said that persons who are created to carry out governmental purposes enjoy immunity like Crown servants. *Government purposes include the traditional provinces of government as well as non-traditional provinces of government if the Crown has constitutionally asserted that they are to be within the province of government. . . .*

*A public authority is a body which has public or statutory duties to perform and which performs those duties and carries out its transactions for the benefit of the public and not for private profit, (emphasis added)*

46. Taking up each statute and analysing its provisions the learned Chief Justice concluded:

The structure of the Life Insurance Corporation indicates that the Corporation is an agency of the government carrying on the exclusive business of life insurance. *Each and every provision shows in no uncertain terms that the voice is that of the Central Government and the hands are also of the Central Government.*

These provisions of the Industrial Finance Corporation Act show that the Corporation *is in effect managed and controlled by the Central Government,* (emphasis added)

The italicised portion pithily sums up the meat of the matter. If the voice is of the government and so also the hands, the face will not hide the soul. There is nothing in this judgment which goes against a Government company being regarded as 'State'. On the contrary, the thrust of the logic and the generality of the law are far from restrictive and apply to all bodies which fill the bill.

47. Mathew, J. is more positive in his conception of 'State' under Article 12:

The concept of State has undergone drastic changes in recent years. Today State cannot be conceived of simply as a coercive machinery wielding the thunderbolt of authority. It has to be viewed mainly as a service corporation:

If we clearly grasp the character of the state as a social agent, understanding it rationally as a form of service and not mystically as an ultimate power, we shall differ only in respect of the limits of its ability to render service.

A state is an abstract entity. It can only act through the instrumentality or agency of natural or judicial persons. Therefore, there is nothing strange in the notion of the State acting through a corporation and making it an agency or instrumentality of the State.

The tasks of government multiplied with the advent of the welfare State and consequently, the framework of civil service administration became increasingly insufficient for handling the new tasks which were often of a specialised and highly technical character. At the same time, 'bureaucracy' came under a cloud. The distrust of government by civil service, justified or not, was a powerful factor in the development of a policy of public administration through separate corporations which would operate largely according to business principles and be separately accountable.

The public corporation, therefore, became a third arm of the government. In Great Britain, the conduct of basic industries through giant corporation is now a permanent feature of public life.

The Indian situation is an *a fortiori* case, what with Part IV of the Constitution and the Government of India Resolution on Industrial Policy of 1956:

Accordingly, the State will progressively assume a predominant and direct responsibility for setting up new industrial undertakings and for developing transport facilities. It will also undertake State trading on an increasing scale.

48. Of course, mere State aid to a company will not make its actions State actions. Mathew, J. leaned to the view that:

State financial support plus an unusual degree of control over the management and policies might lead one to characterise an operation as state action.

Indeed, the learned Judge went much farther:

Another factor which might be considered is whether the operation is an important public function. The combination of State aid and the furnishing of an important public service may result in a conclusion that the operation should be classified as a State agency. If a given function is of such public importance and so closely related to governmental functions as to be classified as a governmental agency, then even the presence or absence of state financial aid might be irrelevant in making a finding of state action. If the function does not fall within such a description, then mere addition of State money would not influence the conclusion.

It must be noticed that the emphasis is on functionality plus State control rather than on the statutory character of the Corporation:

Institutions engaged in matters of high public interests or performing public functions are by virtue of the nature of the function performed government agencies. Activities which are too fundamental to the society are by definition too important not to be considered government functions.

49. We may read the ratio from the judgment of Mathew, J. where he says:

It is clear from those provisions that the Central Government has contributed the original capital of the corporation, that part of the profit of the corporation goes to that Government, that the Central Government exercises control over the policy of the Corporation, that the Corporation carries on a business having great public importance and that it enjoys a monopoly in the business. I would draw the same conclusions from the relevant provisions of the Industrial Finance Corporation Act which have also been referred to in the aforesaid judgment. In these circumstances, I think, these corporations are agencies or instrumentalities of the 'State' and are, therefore, 'State' within the meaning of Article 12. The fact that these corporations have independent personalities in the eye of law does not mean that they are not subject to the control of government or that they are not instrumentalities of the government. These corporations are instrumentalities or agencies of the State for carrying on businesses which otherwise would have been run by the State departmentally. If the State had chosen to carry on these businesses through the medium of Government Departments, there would have been no question that actions of these departments would be 'State actions'. Why then should the actions be not State actions?

(M)erely because a corporation has legal personality of its own, it does not follow that the corporation cannot be an agent or instrumentality of the State, if it is subject to control of government in all important matters of policy. No doubt, there might be some distinction between the nature of control exercised by principal over agent and the control exercised by government over public corporation. That, I think is only a distinction in degree. The crux of the matter is that public corporation is a new type of institution which has sprung from the new social and economic functions

of government and that it therefore does not neatly fit into old legal categories. Instead of forcing it into them, the later should be adapted to the needs of changing times and conditions.

50. There is nothing in these observations to confine the concept of State to statutory corporations. Nay, the tests are common to any agency or instrumentality, the key factor being the brooding presence of the State behind the operations of the body, statutory or other.

51. A study of *Sukhdev* case yields the clear result that the preponderant considerations for pronouncing an entity as State agency or instrumentality are financial resources of the State being the chief finding source, functional character being governmental in essence, plenary control residing in government, prior history of the same activity having been carried on by government and made over to the new body and some element of authority or command. Whether the legal person is a corporation created *by* a statute, as distinguished from *under* a statute, is not an important criterion although it may be an *indicium*. Applying the constellation of criteria collected by us from *Airport Authority*, on a cumulative basis, to the given case, there is enough material to hold that the Bharat Petroleum Corporation is 'State' within the enlarged meaning of Article 12.

52. The *Rajasthan Electricity Board* case (the majority judgment of Bhargava, J.) is perfectly compatible with the view we take of Article 12 or has been expressed in *Sukhdev* and the *Airport Authority*. The short question that fell for decision was as to whether the Electricity Board was 'State'. There was no debate, no discussion and no decision on the issue of excluding from the area of State under Article 12, units incorporated *under* a statute as against those created by a statute. On the other hand, the controversy was over the exclusion from the definition of State in Article 12 corporations engaged in commercial activities. This plea for a narrow meaning was negated by Bhargava, J. and in that context the learned Judge explained the signification of "other authorities" in Article 12:

The meaning of the word "authority" given in *WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY*, which can be applicable, is "a public administrative agency or corporation having quasi-governmental powers authorised to administer a revenue-producing public enterprise". This dictionary meaning of the word "authority" is clearly wide enough to include all bodies created by a statute on which powers are conferred to carry out governmental or quasi-governmental functions. The expression "other authorities" is wide enough to include within it every authority created by a statute and functioning within the territory of India, or under the control of the Government of India; and we do not see any reason to narrow down this meaning in the context in which the words "other authorities" are used in Article 12 of the Constitution.

These decisions of the court support our view that the expression "other authorities" in Article 12 will include all constitutional or statutory authorities on whom powers conferred may be for the purpose of carrying on commercial activities. Under the Constitution, the State is itself envisaged as having the right to carry on trade or business as mentioned in Article 19(1)(g). In Part IV, the State has been given the same meaning as in Article 12 and one of the directive principles laid down in Article 46 is that the State shall promote with special care the educational and

economic interests of the weaker sections of the people. *The State, as defined in Article 12, is thus comprehended to include bodies created for the purpose of promoting the educational and economic interests of the people.* The State, as constituted by our Constitution, is further specifically empowered under Article 298 to carry on any trade or business. The circumstance that the Board under the Electricity Supply Act, is required to carry on some activities of the nature of trade or commerce does not, therefore, give any indication that the Board must be excluded from the scope of the word “State” as used in Article 12.

The meaning of the learned Judge is unmistakable that “the State” in Article 12 comprehends bodies created for the purpose of promoting economic activities. These bodies may be statutory corporations, registered societies, Government companies or other like entities. The court was not called upon to consider this latter aspect, but to the extent to which the holding goes, it supports the stand of the petitioners.

54. Imagine the possible result of holding that a Government company, being just an entity created under a statute, not by a statute, it is not ‘State’. Having regard to the directive in Article 38 and the amplitude of the other Articles in Part IV government may appropriately embark upon almost any activity which in a non-socialist republic may fall within the private sector. Any person’s employment, entertainment, travel, rest and leisure, hospital facility and funeral service may be controlled by the State. And if all these enterprises are executed through Government companies, bureaus, societies, councils, institutes and homes, the citizen may forfeit his fundamental freedoms *vis-a-vis* these strange beings which are government *in fact* but corporate *in form*. If only fundamental rights were forbidden access to corporations, companies, bureaus, institutes, councils and kindred bodies which act as agencies of the Administration, there may be a breakdown of the rule of law and the constitutional order in a large sector of governmental activity carried on under the guise of ‘jural persons’. It may pave the way for a new tyranny by arbitrary administrators operated from behind by government but unaccountable to Part III of the Constitution. We cannot assent to an interpretation which leads to such a disastrous conclusion unless the language of Article 12 offers no other alternative.

55. It is well known that “corporations have neither bodies to be kicked, nor souls to be damned” and Government corporations are mammoth organisations

It is dangerous to exonerate corporations from the need to have constitutional conscience; and so, that interpretation, language permitting, which makes governmental agencies, whatever their mien, amenable to constitutional limitations must be adopted by the court as against the alternative of permitting them to flourish as an *imperium in imperio*.

56. The common sense signification of the expression “other authorities under the control of the Government of India” is plain and there is no reason to make exclusions on sophisticated grounds such as that the legal person must be a statutory corporation, must have power to make laws, must be created by and not under a statute and so on.

\* \* \* \* \*



***Pradeep Kumar Biswas v. Indian Institute of Chemical Biology***  
(2002) 5 SCC 111

**RUMA PAL, J.** - In 1972 Sabhajit Tewary, a Junior Stenographer with the Council of Scientific and Industrial Research (CSIR) filed a writ petition under Article 32 of the Constitution claiming parity of remuneration with the Stenographers who were newly recruited to CSIR. His claim was based on Article 14 of the Constitution. A Bench of five Judges of this Court denied him the benefit of that article because they held in *Sabhajit Tewary v. Union of India* [(1975) 1 SCC 485] that the writ application was not maintainable against CSIR as it was not an “authority” within the meaning of Article 12 of the Constitution. The correctness of the decision is before us for reconsideration.

2. The immediate cause for such reconsideration is a writ application filed by the appellants in the Calcutta High Court challenging the termination of their services by Respondent 1 which is a unit of CSIR. They prayed for an interim order before the learned Single Judge. That was refused by the Court on the prima facie view that the writ application was itself not maintainable against Respondent 1. The appeal was also dismissed in view of the decision of this Court in *Sabhajit Tewary* case.

3. Challenging the order of the Calcutta High Court, the appellants filed an appeal by way of special leave before this Court. On 5-8-1986, a Bench of two Judges of this Court referred the matter to a Constitution Bench being of the view that the decision in *Sabhajit Tewary* required reconsideration “having regard to the pronouncement of this Court in several subsequent decisions in respect of several other institutes of similar nature set up by the Union of India”.

4. The questions therefore before us are - is CSIR a State within the meaning of Article 12 of the Constitution and if it is, should this Court reverse a decision which has stood for over a quarter of a century?

5. The Constitution has to an extent defined the word “State” in Article 12 itself as including

“the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India”.

6. That an “inclusive” definition is generally not exhaustive is a statement of the obvious and as far as Article 12 is concerned, has been so held by this Court. The words “State” and “authority” used in Article 12 therefore remain, to use the words of *Cardozo*, among “the great generalities of the Constitution” the content of which has been and continues to be supplied by courts from time to time.

7. It would be a practical impossibility and an unnecessary exercise to note each of the multitude of decisions on the point. It is enough for our present purposes to merely note that the decisions may be categorized broadly into those which express a narrow and those that express a more liberal view and to consider some decisions of this Court as illustrative of this apparent divergence. In the ultimate analysis the difference may perhaps be attributable to

different stages in the history of the development of the law by judicial decisions on the subject.

8. But before considering the decisions it must be emphasized that the significance of Article 12 lies in the fact that it occurs in Part III of the Constitution which deals with fundamental rights. The various articles in Part III have placed responsibilities and obligations on the "State" vis-à-vis the individual to ensure constitutional protection of the individual's rights against the State, including the right to equality under Article 14 and equality of opportunity in matters of public employment under Article 16 and most importantly, the right to enforce all or any of these fundamental rights against the "State" as defined in Article 12 either under Article 32 by this Court or under Article 226 by the High Courts by issuance of writs or directions or orders.

9. The range and scope of Article 14 and consequently Article 16 have been widened by a process of judicial interpretation so that the right to equality now not only means the right not to be discriminated against but also protection against any arbitrary or irrational act of the State.

10. Keeping pace with this broad approach to the concept of equality under Articles 14 and 16, courts have whenever possible, sought to curb an arbitrary exercise of power against individuals by "centres of power", and there was correspondingly an expansion in the judicial definition of "State" in Article 12.

11. Initially the definition of State was treated as exhaustive and confined to the authorities or those which could be read *ejusdem generis* with the authorities mentioned in the definition of Article 12 itself. The next stage was reached when the definition of "State" came to be understood with reference to the remedies available against it. For example, historically, a writ of mandamus was available for enforcement of statutory duties or duties of a public nature. Thus a statutory corporation, with regulations framed by such corporation pursuant to statutory powers was considered a State, and the public duty was limited to those which were created by statute.

12. The decision of the Constitution Bench of this Court in **Rajasthan SEB v. Mohan Lal** [(1969) 1 SCC 585] is illustrative of this. The question there was whether the Electricity Board - which was a corporation constituted under a statute primarily for the purpose of carrying on commercial activities could come within the definition of "State" in Article 12. After considering earlier decisions, it was said:

"These decisions of the Court support our view that the expression 'other authorities' in Article 12 will include all constitutional or statutory authorities on whom powers are conferred by law. It is not at all material that some of the powers conferred may be for the purpose of carrying on commercial activities."

13. It followed that since a company incorporated under the Companies Act is not formed statutorily and is not subject to any statutory duty vis-à-vis an individual, it was excluded from the purview of "State". In **Praga Tools Corpn. v. C.A. Imanual** [AIR 1967 SC 1857] where the question was whether an application under Article 226 for issuance of a writ of mandamus would lie impugning an agreement arrived at between a company and its workmen, the Court held that:

“[T]here was neither a statutory nor a public duty imposed on it by a statute in respect of which enforcement could be sought by means of a *mandamus*, nor was there in its workmen any corresponding legal right for enforcement of any such statutory or public duty. The High Court, therefore, was right in holding that no writ petition for a *mandamus* or an order in the nature of *mandamus* could lie against the company.”

14. By 1975, Mathew, J. in *Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi* [(1975) 1 SCC 421] noted that the concept of “State” in Article 12 had undergone “drastic changes in recent years”. The question in that case was whether the Oil and Natural Gas Commission, the Industrial Finance Corporation and the Life Insurance Corporation, each of which were public corporations set up by statutes, were authorities and therefore within the definition of State in Article 12. The Court affirmed the decision in *Rajasthan SEB v. Mohan Lal*<sup>6</sup> and held that the Court could compel compliance of statutory rules. But the majority view expressed by A.N. Ray, C.J. also indicated that the concept would include a public authority which

“is a body which has public *or* statutory duties to perform and which performs those duties and carries out its transactions for the benefit of the public and not for private profit. Such an authority is not precluded from making a profit for the public benefit”. (*emphasis added*)

15. The use of the alternative is significant. The Court scrutinised the history of the formation of the three Corporations, the financial support given by the Central Government, the utilization of the finances so provided, the nature of service rendered and noted that despite the fact that each of the Corporations ran on profits earned by it nevertheless the structure of each of the Corporations showed that the three Corporations represented the “voice and hands” of the Central Government. The Court came to the conclusion that although the employees of the three Corporations were not servants of the Union or the State, “these statutory bodies are ‘authorities’ within the meaning of Article 12 of the Constitution”.

16. Mathew, J. in his concurring judgment went further and propounded a view which presaged the subsequent developments in the law. He said:

“A State is an abstract entity. It can only act through the instrumentality or agency of natural or juridical persons. Therefore, there is nothing strange in the notion of the State acting through a corporation and making it an agency or instrumentality of the State.”

17. For identifying such an agency or instrumentality he propounded four indicia:

(1) “A finding of the State financial support plus an unusual degree of control over the management and policies might lead one to characterize an operation as State action.”

(2) “Another factor which might be considered is whether the operation is an important public function.”

(3) “The combination of State aid and the furnishing of an important public service may result in a conclusion that the operation should be classified as a State agency. If a given function is of such public importance and so closely related to governmental

functions as to be classified as a governmental agency, then even the presence or absence of State financial aid might be irrelevant in making a finding of State action. If the function does not fall within such a description, then mere addition of State money would not influence the conclusion.”

(4) “The ultimate question which is relevant for our purpose is whether such a corporation is an agency or instrumentality of the Government for carrying on a business for the benefit of the public. In other words, the question is, for whose benefit was the corporation carrying on the business?”

18. *Sabhajit Tewary* was decided by the same Bench on the same day as *Sukhdev Singh*. The contention of the employee was that CSIR is an agency of the Central Government on the basis of the CSIR Rules which, it was argued, showed that the Government controlled the functioning of CSIR in all its aspects. The submission was somewhat cursorily negated by this Court on the ground that all this

“will not establish anything more than the fact that the Government takes special care that the promotion, guidance and cooperation of scientific and industrial research, the institution and financing of specific researches, establishment or development and assistance to special institutions or departments of the existing institutions for scientific study of problems affecting particular industry in a trade, the utilisation of the result of the researches conducted under the auspices of the Council towards the development of industries in the country are carried out in a responsible manner”.

19. Although the Court noted that it was the Government which was taking the “special care” nevertheless the writ petition was dismissed ostensibly because the Court factored into its decision two premises:

(i) “The society does not have a statutory character like the Oil and Natural Gas Commission, or the Life Insurance Corporation or Industrial Finance Corporation. It is a Society incorporated in accordance with the provisions of the Societies Registration Act” and

(ii) “This Court has held in *Praga Tools Corpn. v. C.A. Imanual* [(1969) 1 SCC 585], *Heavy Engg. Mazdoor Union v. State of Bihar* [(1969) 1 SCC 765] and in *S.L. Agarwal (Dr) v. G.M., Hindustan Steel Ltd.* [(1970) 1 SCC 177] that the Praga Tools Corporation, Heavy Engineering Mazdoor Union and Hindustan Steel Ltd. are all companies incorporated under the Companies Act and the employees of these companies do not enjoy the protection available to government servants as contemplated in Article 311. The companies were held in these cases to have independent existence of the Government and by the law relating to corporations. These could not be held to be departments of the Government.”

20. With respect, we are of the view that both the premises were not really relevant and in fact contrary to the “voice and hands” approach in *Sukhdev Singh*. Besides reliance by the Court on decisions pertaining to Article 311 which is contained in Part XIV of the Constitution was inapposite. What was under consideration was Article 12 which by

definition is limited to Part III and by virtue of Article 36 to Part IV of the Constitution. As said by another Constitution Bench later in this context:

“[M]erely because a juristic entity may be an ‘authority’ and therefore ‘State’ within the meaning of Article 12, it may not be elevated to the position of ‘State’ for the purpose of Articles 309, 310 and 311 which find a place in Part XIV. The definition of ‘State’ in Article 12 which includes an ‘authority’ within the territory of India or under the control of the Government of India is limited in its application only to Part III and by virtue of Article 36, to Part IV: it does not extend to the other provisions of the Constitution and hence a juristic entity which may be ‘State’ for the purpose of Parts III and IV would not be so for the purpose of Part XIV or any other provision of the Constitution. This is why the decisions of this Court in *S.L. Agarwal v. Hindustan Steel Ltd* and other cases involving the applicability of Article 311 have no relevance to the issue before us.”

21. Normally, a precedent like *Sabhajit Tewary* which has stood for a length of time should not be reversed, however erroneous the reasoning if it has stood unquestioned, without its reasoning being “distinguished” out of all recognition by subsequent decisions and if the principles enunciated in the earlier decision can stand consistently and be reconciled with subsequent decisions of this Court, some equally authoritative. In our view *Sabhajit Tewary* fulfils both conditions.

22. Sidestepping the majority approach in *Sabhajit Tewary*, the “drastic changes” in the perception of “State” heralded in *Sukhdev Singh* by Mathew, J. and the tests formulated by him were affirmed and amplified in *Ramana Dayaram Shetty v. International Airport Authority of India* [(1979) 3 SCC 489]. Although the International Airport Authority of India is a statutory corporation and therefore within the accepted connotation of State, the Bench of three Judges developed the concept of State. The rationale for the approach was the one adopted by Mathew, J. in *Sukhdev Singh*:

“In the early days, when the Government had limited functions, it could operate effectively through natural persons constituting its civil service and they were found adequate to discharge governmental functions, which were of traditional vintage. But as the tasks of the Government multiplied with the advent of the welfare State, it began to be increasingly felt that the framework of civil service was not sufficient to handle the new tasks which were often of specialised and highly technical character. The inadequacy of the civil service to deal with these new problems came to be realised and it became necessary to forge a new instrumentality or administrative device for handling these new problems. It was in these circumstances and with a view to supplying this administrative need that the public corporation came into being as the third arm of the Government.”

23. From this perspective, the logical sequitur is that it really does not matter what guise the State adopts for this purpose, whether by a corporation established by statute or incorporated under a law such as the Companies Act or formed under the Societies Registration Act, 1860. Neither the form of the corporation, nor its ostensible autonomy would take away from its character as “State” and its constitutional accountability under Part

III vis-à-vis the individual if it were in fact acting as an instrumentality or agency of the Government.

24. As far as *Sabhajit Tewary* was concerned, it was “explained” and distinguished in *Ramana* saying:

“The Court no doubt took the view on the basis of facts relevant to the constitution and functioning of the Council that it was not an ‘authority’, but we do not find any discussion in this case as to what are the features which must be present before a corporation can be regarded as an ‘authority’ within the meaning of Article 12. This decision does not lay down any principle or test for the purpose of determining when a corporation can be said to be an ‘authority’. If at all any test can be gleaned from the decision, it is whether the Corporation is ‘really an agency of the Government’. The Court seemed to hold on the facts that the Council was not an agency of the Government and was, therefore, not an ‘authority’.”

25. The tests propounded by Mathew, J. in *Sukhdev Singh* were elaborated in *Ramana* and were reformulated two years later by a Constitution Bench in *Ajay Hasia v. Khalid Mujib Sehravardi*. What may have been technically characterised as *obiter dicta* in *Sukhdev Singh* and *Ramana* (since in both cases the “authority” in fact involved was a statutory corporation), formed the ratio decidendi of *Ajay Hasia*. The case itself dealt with a challenge under Article 32 to admissions made to a college established and administered by a society registered under the Jammu and Kashmir Registration of Societies Act, 1898. The contention of the Society was that even if there were an arbitrary procedure followed for selecting candidates for admission, and that this may have resulted in denial of equality to the petitioners in the matter of admission in violation of Article 14, nevertheless Article 14 was not available to the petitioners because the Society was not a State within Article 12.

26. The Court recognised that:

“Obviously the Society cannot be equated with the Government of India or the Government of any State nor can it be said to be a local authority and therefore, it must come within the expression ‘other authorities’ if it is to fall within the definition of ‘State’.”

But it said that:

“The courts should be anxious to enlarge the scope and width of the Fundamental Rights by bringing within their sweep *every authority* which is an instrumentality or agency of the Government or through the corporate personality of which the Government is acting, so as to subject the Government in all its myriad activities, whether through natural persons or through corporate entities, to the basic obligation of the Fundamental Rights.”

It was made clear that the genesis of the corporation was immaterial and that:

“The concept of instrumentality or agency of the Government is not limited to a corporation created by a statute but is equally applicable to a company or society and in a given case it would have to be decided, on a consideration of the relevant factors,

whether the company or society is an instrumentality or agency of the Government so as to come within the meaning of the expression 'authority' in Article 12."

27. **Ramana** was noted and quoted with approval *in extenso* and the tests propounded for determining as to when a corporation can be said to be an instrumentality or agency of the Government therein were culled out and summarised as follows:

"(1) One thing is clear that if the entire share capital of the corporation is held by Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of Government.

(2) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character.

(3) It may also be a relevant factor ... whether the corporation enjoys monopoly status which is State-conferred or State-protected.

(4) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality.

(5) If the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government.

(6) 'Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference' of the corporation being an instrumentality or agency of Government."

28. In dealing with **Sabhajit Tewary** the Court in **Ajay Hasia** noted that since **Sabhajit Tewary** was a decision given by a Bench of five Judges of this Court, it was undoubtedly binding. The Court read **Sabhajit Tewary** as implicitly assenting to the proposition that CSIR could have been an instrumentality or agency of the Government even though it was a registered society and limited the decision to the facts of the case. It held that the Court in **Sabhajit Tewary**:

"did not rest its conclusion on the ground that the Council was a society registered under the Societies Registration Act, 1860, but proceeded to consider various other features of the Council for arriving at the conclusion that it was not an agency of the Government and therefore not an 'authority'".

29. The conclusion was then reached applying the tests formulated to the facts that the Society in **Ajay Hasia** was an authority falling within the definition of "State" in Article 12.

30. On the same day that the decision in **Ajay Hasia** was pronounced came the decision of **Som Prakash Rekhi v. Union of India**. Here too, the reasoning in **Ramana** was followed and Bharat Petroleum Corporation was held to be a "State" within the "enlarged meaning of Article 12". **Sabhajit Tewary** was criticised and distinguished as being limited to the facts of the case. It was said:

"The rulings relied on are, unfortunately, in the province of Article 311 and it is clear that a body may be 'State' under Part III but not under Part XIV. Ray, C.J., rejected the

argument that merely because the Prime Minister was the President or that the other members were appointed and removed by Government did not make the Society a 'State'. With great respect, we agree that in the absence of the other features elaborated in *Airport Authority* case the composition of the governing body alone may not be decisive. The laconic discussion and the limited ratio in *Tewary* hardly help either side here."

31. The tests to determine whether a body falls within the definition of "State" in Article 12 laid down in *Ramana* with the Constitution Bench imprimatur in *Ajay Hasia* form the keystone of the subsequent jurisprudential superstructure judicially crafted on the subject which is apparent from a chronological consideration of the authorities cited.

32. In *P.K. Ramachandra Iyer v. Union of India* [(1984) 2 SCC 141], it was held that both the Indian Council of Agricultural Research (ICAR) and its affiliate the Indian Veterinary Research Institute were bodies as would be comprehended in the expression "other authority" in Article 12 of the Constitution. Yet another judicial blow was dealt to the decision in *Sabhajit Tewary* when it was said:

"Much water has flown down the Jamuna since the dicta in *Sabhajit Tewary* case and conceding that it is not specifically overruled in later decision, its ratio is considerably watered down so as to be a decision confined to its own facts."

33. *B.S. Minhas v. Indian Statistical Institute* [(1983) 4 SCC 582] held that the Indian Statistical Institute, a registered society is an instrumentality of the Central Government and as such is an "authority" within the meaning of Article 12 of the Constitution. The basis was that the composition of Respondent 1 is dominated by the representatives appointed by the Central Government. The money required for running the Institute is provided entirely by the Central Government and even if any other moneys are to be received by the Institute, it can be done only with the approval of the Central Government, and the accounts of the Institute have also to be submitted to the Central Government for its scrutiny and satisfaction. The Society has to comply with all such directions as may be issued by the Central Government. It was held that the control of the Central Government is deep and pervasive.

34. The decision in *Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly* [(1986) 3 SCC 156] held that the appellant Company was covered by Article 12 because it is financed entirely by three Governments and is completely under the control of the Central Government and is managed by the Chairman and Board of Directors appointed by the Central Government and removable by it and also that the activities carried on by the Corporation are of vital national importance.

35. However, the tests propounded in *Ajay Hasia* were not applied in *Tekraj Vasandi v. Union of India* [(1988) 1 SCC 236] where the Institute of Constitutional and Parliamentary Studies (ICPS), a society registered under the Societies Registration Act, 1860 was held not be an "other authority" within the meaning of Article 12. The reasoning is not very clear. All that was said was:

"Having given our anxious consideration to the facts of this case, we are not in a position to hold that ICPS is either an agency or instrumentality of the State so as to come within the purview of 'other authorities' in Article 12 of the Constitution."



36. However, the Court was careful to say that “ICPS is a case of its type - typical in many ways and the normal tests may perhaps not properly apply to test its character”

38. Perhaps this rather overenthusiastic application of the broad limits set by *Ajay Hasia* may have persuaded this Court to curb the tendency in *Chander Mohan Khanna v. National Council of Educational Research and Training* [(1991) 4 SCC 576]. The Court referred to the tests formulated in *Sukhdev Singh, Ramana, Ajay Hasia* and *Som Prakash Rekhi* but striking a note of caution said that “these are merely indicative indicia and are by no means conclusive or clinching in any case”. In that case, the question arose whether the National Council of Educational Research (NCERT) was a “State” as defined under Article 12 of the Constitution. NCERT is a society registered under the Societies Registration Act. After considering the provisions of its memorandum of association as well as the rules of NCERT, this Court came to the conclusion that since NCERT was largely an autonomous body and the activities of NCERT were not wholly related to governmental functions and that the government control was confined only to the proper utilisation of the grant and since its funding was not entirely from government resources, the case did not satisfy the requirements of the State under Article 12 of the Constitution. The Court relied principally on the decision in *Tekraj Vasandi v. Union of India*. However, as far as the decision in *Sabhajit Tewary v. Union of India* was concerned, it was noted that the “decision has been distinguished and watered down in the subsequent decisions”.

39. Fresh off the judicial anvil is the decision in *Mysore Paper Mills Ltd. v. Mysore Paper Mills Officers’ Assn* [(2002) 2 SCC 167] which fairly represents what we have seen as a continuity of thought commencing from the decision in *Rajasthan Electricity Board* in 1967 up to the present time. It held that a company substantially financed and financially controlled by the Government, managed by a Board of Directors nominated and removable at the instance of the Government and carrying on important functions of public interest under the control of the Government is “an authority” within the meaning of Article 12.

40. The picture that ultimately emerges is that the tests formulated in *Ajay Hasia*<sup>010</sup> are not a rigid set of principles so that if a body falls within any one of them it must, ex hypothesi, be considered to be a State within the meaning of Article 12. The question in each case would be - whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State.

41. Coming now to the facts relating to CSIR, we have no doubt that it is well within the range of Article 12, a conclusion which is sustainable when judged according to the tests judicially evolved for the purpose.

#### ***The formation of CSIR***

42. On 27-4-1940, the Board of Scientific and Industrial Research and on 1-2-1941, the Industrial Research Utilisation Committee were set up by the Department of Commerce, Government of India with the broad objective of promoting industrial growth in this country.

On 14-11-1941, a Resolution was passed by the Legislative Assembly and accepted by the Government of India.

43. For the purpose of coordinating and exercising administrative control over the working of the two research bodies already set up by the Department of Commerce, and to oversee the proper utilisation of the Industrial Research Fund, by a further Resolution dated 26-9-1942, the Government of India decided to set up a Council of Industrial Research on a permanent footing which would be a registered society under the Registration of Societies Act, 1860. Pursuant to the Resolution, on 12-3-1942 CSIR was duly registered. Bye-laws and rules were framed by the Governing Body of the Society in 1942 which have been subsequently revised and amended. Unquestionably this shows that CSIR was “created” by the Government to carry on in an organized manner what was being done earlier by the Department of Commerce of the Central Government. In fact the two research bodies which were part of the Department of Commerce have since been subsumed in CSIR.

***Objects and functions***

44. The 26-9-1942 Resolution had provided that the functions of CSIR would be:

(a) to implement and give effect to the following resolution moved by the Hon’ble Dewan Bahadur Sir A.R. Mudaliar and passed by the Legislative Assembly on 14-11-1941 and accepted by the Government of India; ... (quoted earlier in this judgment)

(b) the promotion, guidance and coordination of scientific and industrial research in India including the institution and the financing of specific researches;

(c) the establishment or development and assistance to special institutions or department of existing institutions for scientific study of problems affecting particular industries and trade;

(d) the establishment and award of research studentships and fellowships;

(e) the utilisation of the results of the researches conducted under the auspices of the Council towards the development of industries in the country and the payment of a share of royalties arising out of the development of the results of researches to those who are considered as having contributed towards the pursuit of such researches;

(f) the establishment, maintenance and management of laboratories, workshops, institutes, and organisation to further scientific and industrial research and utilise and exploit for purposes of experiment or otherwise any discovery or invention likely to be of use to Indian industries;

(g) the collection and dissemination of information in regard not only to research but to industrial matters generally;

(h) publication of scientific papers and a journal of industrial research and development; and

(i) any other activities to promote generally the objects of the resolution mentioned in (a) above.

45. These objects which have been incorporated in the memorandum of association of CSIR manifestly demonstrate that CSIR was set up in the national interest to further the

economic welfare of the society by fostering planned industrial development in the country. That such a function is fundamental to the governance of the country has already been held by a Constitution Bench of this Court as far back as in 1967 in *Rajasthan SEB v. Mohan Lal* where it was said:

“The State, as defined in Article 12, is thus comprehended to include bodies created for the purpose of promoting the educational and economic interests of the people.”

46. We are in respectful agreement with this statement of the law. The observations to the contrary in *Chander Mohan Khanna v. NCERT* relied on by the learned Attorney-General in this context, do not represent the correct legal position.

47. Incidentally, CSIR was and continues to be a non-profit-making organization and according to clause 4 of CSIR’s memorandum of association, all its income and property, however derived shall be applied only “towards the promotion of those objects subject nevertheless in respect of the expenditure to such limitations as the Government of India may from time to time impose”.

*Management and control*

48. When the Government of India resolved to set up CSIR on 26-2-1942, it also decided that the Governing Body would consist of the following members:

(1) The Honourable Member of the Council of His Excellency the Governor-General in charge of the portfolio of Commerce (ex officio).

(2) A representative of the Commerce Department of the Government of India, appointed by the Government of India.

(3) A representative of the Finance Department of the Government of India, appointed by the Government of India.

(4) Two members of the Board of Scientific and Industrial Research elected by the said Board.

(5) Two members of the Industrial Research Utilisation Committee elected by the said Committee.

(6) The Director of Scientific and Industrial Research.

(7) One or more members to be nominated by the Government of India to represent interests not otherwise represented.

49. The present Rules and Regulations, 1999 of CSIR provide that:

“(a) The Prime Minister of India shall be the ex officio President of the Society.

(b) The Minister in charge of the ministry or department, dealing with the Council of Scientific and Industrial Research shall be the ex officio Vice-President of the Society:

Provided that during any period when the Prime Minister is also such Minister, any person nominated in this behalf by the Prime Minister shall be the Vice-President.

(c) Minister in charge of Finance and Industry (ex officio).

(d) The members of the Governing Body.

(e) Chairman, Advisory Board.

(f) Any other person or persons appointed by the President, CSIR.”

The Governing Body of the Society is constituted by the:

- (a) Director General;
- (b) Member Finance;
- (c) Directors of two national laboratories;
- (d) Two eminent Scientists/Technologists, one of whom shall be from academia;
- (e) Heads of two scientific departments/agencies of the Government of India.

50. The dominant role played by the Government of India in the Governing Body of CSIR is evident. The Director General who is *ex officio* Secretary of the Society is appointed by the Government of India [Rule 2(iii)]. The submission of the learned Attorney-General that the Governing Body consisted of members, the majority of whom were non-governmental members is, having regard to the facts on record, unacceptable. Furthermore, the members of the Governing Body who are not there *ex officio* are nominated by the President and their membership can also be terminated by him and the Prime Minister is the *ex officio* President of CSIR. It was then said that although the Prime Minister was *ex officio* President of the Society but the power being exercised by the Prime Minister is as President of the Society. This is also the reasoning in *Sabhajit Tewary*. With respect, the reasoning was and the submission is erroneous. An *ex officio* appointment means that the appointment is by virtue of the office; without any other warrant or appointment than that resulting from the holding of a particular office. Powers may be exercised by an officer, in this case the Prime Minister, which are not specifically conferred upon him, but are necessarily implied in his office (as Prime Minister), these are *ex officio*.

51. The control of the Government in CSIR is ubiquitous. The Governing Body is required to administer, direct and control the affairs and funds of the Society and shall, under Rule 43, have authority “to exercise all the powers of the Society subject nevertheless in respect of expenditure to such limitations as the Government of India may from time to time impose”. The aspect of financial control by the Government is not limited to this and is considered separately. The Governing Body also has the power to frame, amend or repeal the bye-laws of CSIR but only with the sanction of the Government of India. Bye-law 44 of the 1942 Bye-laws had provided “any alteration in the bye-laws shall require the prior approval of the Governor-General-in-Council”.

52. Rule 41 of the present Rules provides that:

“The President may review/amend/vary any of the decisions of the Governing Body and pass such orders as considered necessary to be communicated to the Chairman of the Governing Body within a month of the decision of the Governing Body and such order shall be binding on the Governing Body. The Chairman may also refer any question which in his opinion is of sufficient importance to justify such a reference for decision of the President, which shall be binding on the Governing Body.” (emphasis added)

53. Given the fact that the President of CSIR is the Prime Minister, under this Rule the subjugation of the Governing Body to the will of the Central Government is complete.

54. As far as the employees of CSIR are concerned the Central Civil Services (Classification, Control and Appeal) Rules and the Central Civil Services (Conduct) Rules,

for the time being in force, are from the outset applicable to them subject to the modification that references to the “President” and “government servant” in the Conduct Rules would be construed as “President of the Society” and “officer and establishments in the service of the Society” respectively (Bye-law 12). The scales of pay applicable to all the employees of CSIR are those prescribed by the Government of India for similar personnel, save in the case of specialists (Bye-law 14) and in regard to all matters concerning service conditions of employees of CSIR, the Fundamental and Supplementary Rules framed by the Government of India and such other rules and orders issued by the Government of India from time to time are also, under Bye-law 15 applicable to the employees of CSIR. Apart from this, the rules/orders issued by the Government of India regarding reservation of posts for SC/ST apply in regard to appointments to posts to be made in CSIR (Bye-law 19). CSIR cannot lay down or change the terms and conditions of service of its employees and any alteration in the bye-laws can be carried out only with the approval of the Government of India (Bye-law 20).

#### ***Financial aid***

55. The initial capital of CSIR was Rs 10 lakhs, made available pursuant to the Resolution of the Legislative Assembly on 14-11-1941. Paragraph 5 of the 26-9-1942 Resolution of the Government of India pursuant to which CSIR was formed reads:

“The Government of India have decided that a fund, viz., the Industrial Research Fund, should be constituted by grants from the Central revenues to which additions are to be made from time to time as moneys flow in from other sources. These ‘other sources’ will comprise grants, if any, by Provincial Governments, by industrialists for special or general purposes, contributions from universities or local bodies, donations or benefactions, royalties, etc., received from the development of the results of industrial research, and miscellaneous receipts. The Council of Scientific and Industrial Research will exercise full powers in regard to the expenditure to be met out of the Industrial Research Fund subject to its observing the bye-laws framed by the Governing Body of the Council, from time to time, *with the approval of the Governor-General-in-Council, and to its annual budget being approved by the Governor-General-in-Council.*”

56. As already noted, the initial capital of Rs 10 lakhs was made available by the Central Government. According to the statement handed up to the Court on behalf of CSIR the present financial position of CSIR is that at least 70% of the funds of CSIR are available from grants made by the Government of India. For example, out of the total funds available to CSIR for the years 1998-99, 1999-2000, 2000-01 of Rs 1023.68 crores, Rs 1136.69 crores and Rs 1219.04 crores respectively, the Government of India has contributed Rs 713.32 crores, Rs 798.74 crores and Rs 877.88 crores. A major portion of the balance of the funds available is generated from charges for rendering research and development works by CSIR for projects such as the Rajiv Gandhi Drinking Water Mission, Technology Mission on oilseeds and pulses and maize or grant-in-aid projects from other government departments. Funds are also received by CSIR from sale proceeds of its products, publications, royalties etc. Funds are also received from investments but under Bye-law 6 of CSIR, funds of the Society may be invested only in such manner as prescribed by the Government of India. Some contributions are made by the State Governments and to a small extent by “individuals,

institutions and other agencies”. The non-governmental contributions are a pittance compared to the massive governmental input.

57. As far as expenditure is concerned, under Bye-law 1 as it stands at present, the budget estimates of the Society are to be prepared by the Governing Body “keeping in view the instructions issued by the Government of India from time to time in this regard”. Apart from an internal audit, the accounts of CSIR are required to be audited by the Comptroller and Auditor-General and placed before the table of both Houses of Parliament (Rule 69).

58. In the event of dissolution, unlike other registered societies which are governed by Section 14 of the Societies Registration Act, 1860, the members of CSIR have no say in the distribution of its assets and under clause 5 of the memorandum of association of CSIR, on the winding up or dissolution of CSIR any property remaining after payment of all debts shall have to be dealt with “in such manner as the Government of India may determine”. CSIR is therefore both historically and in its present operation subject to the financial control of the Government of India. The assets and funds of CSIR though nominally owned by the Society are in the ultimate analysis owned by the Government.

59. From whichever perspective the facts are considered, there can be no doubt that the conclusion reached in *Sabhajit Tewary* was erroneous. If the decision of *Sabhajit Tewary* had sought to lay down as a legal principle that a society registered under the Societies Act or a company incorporated under the Companies Act is, by that reason alone, excluded from the concept of State under Article 12, it is a principle which has long since been discredited. “Judges have made worthy, if shamefaced, efforts, while giving lip service to the rule, to riddle it with exceptions and by distinctions reduce it to a shadow.”

60. In the assessment of the facts, the Court had assumed certain principles, and sought precedential support from decisions which were irrelevant and had “followed a groove chased amidst a context which has long since crumbled”. Had the facts been closely scrutinised in the proper perspective, it could have led and can only lead to the conclusion that CSIR is a State within the meaning of Article 12.

61. Should *Sabhajit Tewary* still stand as an authority even on the facts merely because it has stood for 25 years? We think not. Parallels may be drawn even on the facts leading to an untenable interpretation of Article 12 and a consequential denial of the benefits of fundamental rights to individuals who would otherwise be entitled to them and

“[t]here is nothing in our Constitution which prevents us from departing from a previous decision if we are convinced of its error and its baneful effect on the general interests of the public”

Since on a re-examination of the question we have come to the conclusion that the decision was plainly erroneous, it is our duty to say so and not perpetuate our mistake.

62. Besides a new fact relating to CSIR has come to light since the decision in *Sabhajit Tewary* which unequivocally vindicates the conclusion reached by us and fortifies us in delivering the *coup de grâce* to the already attenuated decision in *Sabhajit Tewary*. On 31-10-1986, in exercise of the powers conferred by sub-section (2) of Section 14 of the Administrative Tribunals Act, 1985, the Central Government specified 17-11-1986 as the date

on and from which the provisions of sub-section (3) of Section 14 of the 1985 Act would apply to CSIR “being the Society owned and controlled by Government”.

63. The learned Attorney-General contended that the notification was not conclusive of the fact that CSIR was a State within the meaning of Article 12 and that even if an entity is not a State within the meaning of Article 12, it is open to the Government to issue a notification for the purpose of ensuring the benefits of the provisions of the Act to its employees.

64. We cannot accept this. Reading Article 323-A of the Constitution and Section 14 of the 1985 Act it is clear that no notification under Section 14(2) of the Administrative Tribunals Act could have been issued by the Central Government unless the employees of CSIR were either appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation owned or controlled by the Government. Once such a notification has been issued in respect of CSIR, the consequence will be that an application would lie at the instance of the appellants at least before the Administrative Tribunal. No new jurisdiction was created in the Administrative Tribunal. The notification which was issued by the Central Government merely served to shift the service disputes of the employees of CSIR from the constitutional jurisdiction of the High Court under Article 226 to the Administrative Tribunals on the factual basis that CSIR was amenable to the writ jurisdiction as a State or other authority under Article 12 of the Constitution.

65. Therefore, the notification issued in 1986 by the Central Government under Article 14(2) of the Administrative Tribunals Act, 1985 serves in removing any residual doubt as to the nature of CSIR and decisively concludes the issues before us against it.

66. *Sabhajit Tewary* decision must be and is in the circumstances overruled. Accordingly the matter is remitted back to the appropriate Bench to be dealt with in the light of our decision.

\* \* \* \* \*

**G. Basi Reddy v. International Crops Research Institute**

JT 2003 (2) SC 180

**RUMA PAL, J.** - 1. The appellants were employees of the respondent no. 1 (ICRISAT). Their services were terminated. They filed writ petitions before the High Court of Andhra Pradesh against ICRISAT and the Union of India. The writ petitions were dismissed. The first writ petition so dismissed was W.P. No. 2730/1981 (*K.S. Mathew v. ICRISAT*). A second group of writ petitions was dismissed on 30<sup>th</sup> June 1988. The dismissals are the subject matter of these appeals. Both the Division Benches held that ICRISAT was an international organisation and was immune from being sued because of a notification issued in 1972 under the United Nations (Privileges and Immunities) Act, 1947 and that a writ under Article 226 could not be issued to ICRISAT.

2. What or who is ICRISAT? Was the High Court right in holding that it was not amenable to the writ jurisdiction under Article 226?

3. ICRISAT was proposed to be set up as a non-profit research and training centre by the Consultative Group on International Agricultural Research (CGIAR). The CGIAR is an informal association of about 50 government and non-governmental bodies and is co-sponsored by the Food and Agriculture Organisation of the United Nations, (FAO). The United Nations Development Program (UNDP), the United Environment Program (UNEP) and the World Bank. The members of the CGIAR at the relevant time were the African Development Bank, the Asian Development Bank; Belgium, Canada, Denmark, the Food and Agriculture Organization of the United States, Ford Foundation, France, Germany, the Inter-American Development Bank, the International Bank for Reconstruction and Development, the International Development Research Centre, Japan, Kellogg Foundation, Netherlands, Norway, Rockefeller Foundation, Sweden, Switzerland, United Kingdom, United Nations Development Programme and the United States of America. In addition there were representatives from the five major developing regions of the world, namely, Africa, Asia and the Far East, Latin America, the Middle East, Southern and Eastern Europe.

4. The object of setting up ICRISAT was to help developing countries in semi-arid tropics to alleviate rural poverty and hunger in ways that are environmentally sustainable. The developing countries include India, parts of South Asian, sub-Saharan and South and Eastern Africa and parts of Latin America. The object was sought to be achieved by research and development of scientific technologies which could improve the quantity and quality of sorghum (*bajra*), pearl and finger millet, pigeon peas, chick peas and ground nut.

6. A memorandum of agreement was then entered into between the government of India and the Ford Foundation (acting on behalf of the Consultative Group) on 28<sup>th</sup> March 1972 (referred to as the March agreement) for the establishment of ICRISAT. The agreement provided that the principal headquarters of ICRISAT would be at Hyderabad, India. The agreement recorded that ICRISAT would, inter alia, serve, as a world centre for conducting research and training of scientists for the improvement of sorghum, millet, pigeon peas and chick peas.

19. On 23<sup>rd</sup> June 1983, in view of growing indiscipline in the institute the director-general



issued a circular which inter alia stated:

“A new set of disciplinary and appeal procedures for staff has been drafted and the staff management joint council will be consulted in this regard. Until these procedures are promulgated, procedures laid down in 1976 continue to apply. These provide for minor and major penalties according to the schedule in annexure I. Where the nature of the misconduct warrants a major penalty, an enquiry must be held before the penalty can be proposed and awarded.”

20. A show cause notice was issued to the appellant calling for an explanation for the acts of misconduct specified therein. The appellant gave an explanation on 25<sup>th</sup> July 1983. The explanation was not found satisfactory and an enquiry officer was appointed to enquire into the charges framed against the appellant. In August 1983, the appellant filed the writ application which resulted in the impugned order. The prayer in the writ petition was for issuance of a writ of mandamus directing ICRISAT to frame rules regarding the conditions of service which "nearly approximate to the accepted custom of India" and to direct the Union of India to take action for fulfillment of clause 6(a)(2) of the March agreement between the Union of India and CGIAR.

21. It is not clear whether any copy of the writ petition was served on the respondents at that stage. In any event, ICRISAT proceeded with the disciplinary enquiry against the appellant. An inquiry notice was issued on 13<sup>th</sup> September 1983. The appellant did not participate in the inquiry. Ultimately, the enquiry officer submitted a report to the personnel manager on 17<sup>th</sup> October 1983 finding the charges against the appellant proved. The order of termination was passed on 5<sup>th</sup> August 1983 by the principal administrator. In the order dismissing the appellant, it was stated that the appellant would stand relieved with effect from 5<sup>th</sup> December 1983 and that the appellant would be entitled to three months' salary in lieu of notice consequent upon the cessation of his employment with ICRISAT. It does not appear that the appellant's writ petition was amended to challenge the order of dismissal.

24. The appellant's arguments that the Union of India could not have granted immunity from legal process to ICRISAT under the 1947 Act and that in any event the grant of such immunity could not serve to curtail the courts' constitutional power under Article 226, proceeds on the basis that if it were not for such immunity, a writ could issue to ICRISAT. If a writ did otherwise lie against a body, it is a moot point whether judicial review of its actions could be excluded by grant of Immunity either by statute or by a statutory notification. Since, in our view, no writ would lie against ICRISAT, therefore, further questions whether it could or should have been granted immunity or whether the immunity debarred remedies under Article 226 do not arise.

26. The facts which have been narrated earlier clearly show that ICRISAT does not fulfill any of these tests. It was not set up by the government and, it gives its services voluntarily to a large number of countries besides India. It is not controlled by nor is it accountable to the government. The Indian government's financial contribution to ICRISAT is minimal. Its participation in ICRISAT's administration is limited to 3 out of 15 members. It cannot therefore be said that ICRISAT is a State or other authority as defined in Article 12 of the Constitution.

27. It is true that a writ under Article 226 also lies against a 'person' for "any other purpose". The power of the High Court to issue such a writ to "any person" can only mean the power to issue such a writ to any person to whom, according to well-established principles, a writ lies. That a writ may issue to an appropriate person for the enforcement of any of the rights conferred by part III is clear enough from the language used. But the words "and for any other purpose" must mean "for any other purpose" for which any of the writs mentioned would according to well established principles issue.

28. A writ under Article 226 can lie against a "person" if it is a statutory body or performs a public function or discharges a public or statutory duty. ICRISAT has not been set up by a statute nor are its activities statutorily controlled. Although, it is not easy to define what a public function or public duty is, it can reasonably be said that such functions are similar to or closely related to those performable by the state in its sovereign capacity. The primary activity of ICRISAT is to conduct research and training programmes in the sphere of agriculture purely on a voluntary basis. A service voluntarily undertaken cannot be said to be a public duty. Besides ICRISAT has a role which extends beyond the territorial boundaries of India and its activities are designed to benefit people from all over the world. While the Indian public may be the beneficiary of the activities of the institute, it certainly cannot be said that the ICRISAT owes a duty to the Indian public to provide research and training facilities.

29. We are therefore of the view that the High Court was right in its conclusion that the writ petition of the appellant was not maintainable against ICRISAT.

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**Zee Telefilms Ltd. v. Union of India**

(2005) 4 SCC 649

Zee Telefilms Ltd. (the first petitioner), is one of the largest vertically integrated media entertainment groups in India. The Board of Control for Cricket in India (BCCI) (the second respondent), is a society registered under the Tamil Nadu Societies Registration Act which is said to be recognised by the Union of India, the Ministry of Youth Affairs and Sports. The third and fourth respondents are President and Secretary respectively of the second respondent. "ESPN Star Sports", known as "ESS" (the fifth respondent), is a partnership firm of the United States of America having a branch office in Singapore. The sixth respondent is a firm of Chartered Accountants which was engaged by the Board in relation to the tender floated on 7-8-2004.

In furtherance of a notice inviting tender for grant of exclusive television rights for a period of four years, several entertainment groups including the petitioners and the fifth respondent gave their offers. Both the petitioners and the said respondent were found eligible therefor. The first petitioner gave an offer for an amount of US \$ 260,756,756.76 [INR equivalent to Rs. 12,06,00,00,000] or US \$ 281,189,189.19 [INR equivalent to Rs 13,00,50,00,000]. Upon holding negotiations with the first petitioner as also the fifth respondent, the Board decided to accept the offer of the former. Pursuant to and in furtherance of the same, a sum of Rs. 92.50 crores equivalent to US \$ 20 million was deposited by the first petitioner in the State Bank of Travancore. The first petitioner agreed to abide by the terms and conditions of offer subject to the conditions mentioned by the Board.

The fifth respondent in the meanwhile filed a writ petition before the Bombay High Court [Writ Petition (L) No. 2462 of 2004]. In its affidavit, the Board justified its action in granting the contract in favour of the first petitioner. The matter was taken up for hearing on a day-to-day basis. On 21-9-2004, the Board before commencing its argument stated that it purported to have cancelled the entire tender process on the premise that no concluded contract was reached between the parties as no letter of intent had therefor been issued. The first petitioner, however, raised a contention that such a concluded contract in fact had been arrived at. The fifth respondent, in view of the statements made by the counsel for the Board, prayed for withdrawal of the writ petition, which was permitted. On the same day [21-9-2004] itself, the Board terminated the contract of the first petitioner stating:

"In the larger interest of the game of cricket and due to the stalemate that has been created in the grant of television rights for the ensuing test series owing to litigation and as informed before the Hon'ble High Court at Bombay this day, the Board of Control for Cricket in India (BCCI) hereby cancels the entire process of tender by invoking clauses 5.3, 5.4(c) and 5.4(d) of the invitation to tender (ITT) dated 7-8-2004, the terms of which were accepted and acknowledged by you. The security in the form of bank guarantee and/or money deposited by you is being returned immediately."

The order of the Board dated 21-9-2004 terminating the contract was questioned in the writ petition contending that the action on the part of the Board in terminating the contract was arbitrary and thus, violative of Article 14 of the Constitution. The petitioners prayed for

setting aside the above said communication as also for issuance of a writ of or in the nature of mandamus commanding the Board to act in terms of the decision arrived at on 5-9-2004.

The BCCI raised the issue of maintainability of the writ petition on the premise that it was not "State" within the meaning of Article 12 of the Constitution.

**Pleas of the petitioners:**

(a) BCCI undertook all activities in relation to cricket including entering into the contracts for awarding telecast and broadcasting rights, for advertisement revenues in the stadium, etc.

(b) The team fielded by BCCI played as 'Indian Team' while playing one-day internationals or test matches - it could not be gainsaid that the team purported to represent India as a nation, and its wins were matters of national prestige. They wore uniform that carried the national flag, and were treated as sports ambassadors of India.

(c) The sportsmen of today were professionals devoting their life to playing the game. They were paid a handsome remuneration by BCCI for their participation in the team. Thus, they were not amateurs who participated on an honorary basis. Consequently, they had a right under Article 19(1)(g) to be considered for participation in the game. BCCI claimed the power to debar players from playing cricket in exercise of its disciplinary powers. Obviously, a body that purports to exercise powers that impinged on the fundamental rights of citizens constituted at least an 'authority' within the meaning of Article 12 of the Constitution - it could hardly contend that it had the power to arbitrarily deny players all rights to even be considered for participation in a tournament in which they were included as a team from 'India'.

(d) The Supreme Court had already, by its interim orders, directed a free-to-air telecast of the matches that were played in Pakistan in which a team selected by the respondent BCCI participated. This was done, keeping in view the larger public interest involved in telecasting of such a sport. The regulatory body that controlled solely and to the exclusion of all others, the power to organise such games, and to select a team that would participate in such games was performing a public function that must be discharged in a manner that complies with the constitutional discipline of Part III of the Constitution. If the events organised were public events, then that body was the controlling authority of such public events and be subject to the discipline of Articles 14 and 19 of the Constitution.

(e) It was also submitted that even domestically, all representative cricket could only be under its aegis. No representative tournament could be organised without the permission of BCCI or its affiliates at any level of cricket.

(f) BCCI and its affiliates were the recipients of State largesse, *inter alia*, in the form of nominal rent for *stadia*. BCCI, performing one of the most important public functions for the country with the authorisation and recognition by the Government of India, was amenable to the writ jurisdiction of the Court under the provisions of the Constitution.

The Union of India contended that BCCI was State. In support of the said plea an affidavit affirmed by the Deputy Secretary, Ministry of Youth Affairs and Sports, Government of India had been filed. A large number of documents were also filed to show that the Board had all along been acting as a recognised body and as regards international

matches had always been seeking its prior permission. The Board had also been under the administrative control of the Government of India.

**Pleas of BCCI:**

(a) BCCI was an autonomous non-profit-making association limited and restricted to its members only and registered under the Tamil Nadu Societies Registration Act. It was a private organisation whose objects were to *promote the game of cricket*. Its functions were regulated and governed by its own Rules and Regulations independent of any statute and only related to its members. The Rules and Regulations of Respondent 2 had neither any statutory force nor it had any statutory powers to make rules or regulations having statutory force.

(b) The Working Committee elected from amongst its members in accordance with its own Rules controlled the entire affairs and management of BCCI. There was no representation of the government or any statutory body of whatsoever nature by whatever form in it. There existed no control of the government over the function, finance, administration, management and affairs of Respondent 2.

(c) BCCI did not discharge or perform any public or statutory duty.

(d) BCCI received no grant or assistance in any form or manner from the government. It could be stated that in a writ petition in *Rahul Mehra v. Union of India* [WP (C) 1680/2000] in the Hon'ble High Court at Delhi, 'Union of India' had filed affidavits stating categorically that there was no government control of any nature upon the BCCI and as it did not follow the government guidelines which had been consolidated and issued under the title 'Sports India Operation Excellence' vide Circular No. F.1-27/86-DESK-1 (SP-IV) dated 16-2-1988 issued by the Department of Youth Affairs and Sports, Government of India had neither extended any financial assistance to BCCI nor had any relationship of whatsoever nature with it and no financial assistance was extended for participation in any tournament, competition or otherwise organised by BCCI.

(e) BCCI organised cricket matches and/or tournaments between the teams of its members and with the teams of the members of the International Cricket Council (ICC) which was also an autonomous body dehors any government control.... Matches that were organised were played at places either belonging to members in India or at the places belonging to the members of ICC only. Only when for the purpose of organising any match or tournament with foreign participants, BCCI required normal and scheduled permissions from the Ministry of Sports for travel of foreign teams, it obtained the same like any other private organisation, particularly in the subject-matter of foreign exchange. BCCI was the only autonomous sporting body which not only did not obtain any financial grants but on the contrary earned foreign exchange.

(f) Organising cricket matches and/or tournaments between the teams of the members of Respondent 2 and/or with the co-members of the International Cricket Council could not be said to be a facet of public function or government in character. No monopoly status had been conferred upon BCCI either by statute or by the government. Any other body could organise any matches on its own and neither BCCI nor the government could oppose the same. As a matter of fact, a number of cricket matches including international matches were played in the country which had nothing to do with BCCI. BCCI had no monopoly over sending teams overseas for the game of cricket and to control the entire game of cricket in India. Matches

which were sanctioned or recognised by ICC were only known as official test matches or one-day international matches. BCCI was entitled to invite teams of other members of ICC or send teams to participate in such matches by virtue of its membership of ICC.

**N. SANTOSH HEGDE, J.** [*Majority view*] – 8. A perusal of Article 12 shows that the definition of State in the said article includes the Government of India, Parliament of India, Governments of the States, legislatures of the States, local authorities as also “other authorities”. It is the argument of the Board that it does not come under the term “other authorities”, hence is not a State for the purpose of Article 12. While the petitioner contends to the contrary on the ground that the various activities of the Board are in the nature of public duties, a literal reading of the definition of State under Article 12 would not bring the Board under the term “other authorities” for the purpose of Article 12. However, the process of judicial interpretation has expanded the scope of the term “other authorities” in its various judgments. It is on this basis that the petitioners contend that the Board would come under the expanded meaning of the term “other authorities” in Article 12 because of its activities which are those of a public body discharging public function.

9. Therefore, to understand the expanded meaning of the term “other authorities” in Article 12, it is necessary to trace the origin and scope of Article 12 in the Indian Constitution. The present Article 12 was introduced in the Draft Constitution as Article 7. While initiating a debate on this article in the Draft Constitution in the Constituent Assembly, Dr. Ambedkar described the scope of this article and the reasons why this article was placed in the chapter on fundamental rights as follows:

“The object of the fundamental rights is twofold. First, that every citizen must be in a position to claim those rights. Secondly, they must be binding upon every authority - I shall presently explain what the word ‘authority’ means - upon every authority which has got either the power to make laws or the power to have discretion vested in it. Therefore, it is quite clear that if the fundamental rights are to be clear, then they must be binding not only upon the Central Government, they must not only be binding upon the Provincial Government, they must not only be binding upon the Governments established in the Indian States, they must also be binding upon District Local Boards, Municipalities, even Village Panchayats and Taluk Boards, *in fact, every authority which has been created by law and which has got certain power to make laws, to make rules, or make bye-laws* .

If that proposition is accepted - and I do not see anyone who cares for fundamental rights can object to such a universal obligation *being imposed upon every authority created by law* - then, what are we to do to make our intention clear? There are two ways of doing it. One way is to use a composite phrase such as ‘the State’, as we have done in Article 7; or, to keep on repeating every time, ‘the Central Government, the Provincial Government, the State Government, the Municipality, the Local Board, the Port Trust, or any other authority’. It seems to me not only most cumbersome but stupid to keep on repeating this phraseology every time we have to make a reference to some authority . *The wisest course is to have this comprehensive phrase and to economise in words.*” [VII CAD 610 (1948)] (emphasis supplied)

10. From the above, it is seen that the intention of the Constitution-framers in incorporating this article was to treat such authority which has been created by law and which has got certain powers to make laws, to make rules and regulations to be included in the term “other authorities” as found presently in Article 12.

11. Till about the year 1967 the courts in India had taken the view that even statutory bodies like universities, Selection Committees for admission to government colleges were not “other authorities” for the purpose of Article 12. In the year 1967 in the case of **Rajasthan SEB v. Mohan Lal** a Constitution Bench of this Court held that the expression “other authorities” is wide enough to include within it *every authority created by a statute on which powers are conferred to carry out governmental or quasi-governmental functions and functioning within the territory of India or under the control of the Government of India.* (emphasis supplied) Even while holding so Shah, J. in a separate but concurring judgment observed that every constitutional or statutory authority on whom powers are conferred by law is not “other authority” within the meaning of Article 12. He also observed further that it is only those authorities which are invested with sovereign powers, that is, power to make rules or regulations and to administer or enforce them to the detriment of citizens and others that fall within the definition of “State” in Article 12: *but constitutional or statutory bodies invested with power but not sharing the sovereign power of the State are not “State” within the meaning of that article.* (emphasis supplied)

12. Almost a decade later another Constitution Bench of this Court somewhat expanded this concept of “other authority” in the case of **Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi**. In this case the Court held that bodies like Oil and Natural Gas Commission, Industrial Finance Corporation and Life Insurance Corporation which were created by statutes, because of the nature of their activities do come within the term “other authorities” in Article 12 even though in reality they were really constituted for commercial purposes.

13. From the above, it is to be noticed that because of the change in the socio-economic policies of the Government this Court considered it necessary by judicial interpretation to give a wider meaning to the term “other authorities” in Article 12 so as to include such bodies which were created by an Act of legislature to be included in the said term “other authorities”.

14. This judicial expansion of the term “other authorities” came about primarily with a view to prevent the Government from bypassing its constitutional obligations by creating companies, corporations, etc. to perform its duties.

15. At this stage it is necessary to refer to the judgment of **Sabhajit Tewary v. Union of India** [AIR 1975 SC 1329] which was delivered by the very same Constitution Bench which delivered the judgment in **Sukhdev Singh** on the very same day. In this judgment this Court noticing its judgment in **Sukhdev Singh** rejected the contention of the petitioner therein that the Council for Scientific and Industrial Research, the respondent body in the said writ petition which was only registered under the Societies Registration Act, would come under the term “other authorities” in Article 12.

16. The distinction to be noticed between the two judgments referred to hereinabove namely **Sukhdev Singh** and **Sabhajit Tewary** is that in the former the Court held that bodies which were creatures of statutes having important State functions and where the State had

pervasive control of activities of those bodies would be State for the purpose of Article 12; while in *Sabhajit Tewary* case, the Court held that a body which was registered under a statute and not performing important State functions and not functioning under the pervasive control of the Government would not be a State for the purpose of Article 12.

17. Subsequent to the above judgments of the Constitution Bench a three-Judge Bench of this Court in the case of *Ramana Dayaram Shetty v. International Airport Authority of India* placing reliance on the judgment of this Court in *Sukhdev Singh* held that the International Airport Authority which was an authority created by the International Airport Authority Act, 1971 was an instrumentality of the State, hence, came within the term “other authorities” in Article 12.

18. It is in the above context that the Bench in *Ramana Dayaram Shetty* case laid down the parameters or the guidelines for identifying a body as coming within the definition of “other authorities” in Article 12.

19. The above tests propounded for determining as to when a corporation can be said to be an instrumentality or agency of the Government was subsequently accepted by a Constitution Bench of this Court in the case of *Ajay Hasia v. Khalid Mujib Sehravardi*. But in the said case of *Ajay Hasia*, the Court went one step further and held that a society registered under the Societies Registration Act could also be an instrument of State for the purpose of the term “other authorities” in Article 12. This part of the judgment of the Constitution Bench in *Ajay Hasia* was in direct conflict or was seen as being in direct conflict with the earlier Constitution Bench of this Court in *Sabhajit Tewary* case which had held that a body registered under a statute and which was not performing important State functions or which was not under the pervasive control of the State cannot be considered as an instrumentality of the State for the purpose of Article 12.

20. The above conflict in the judgments of *Sabhajit Tewary* and *Ajay Hasia* of two coordinate Benches was noticed by this Court in the case of *Pradeep Kumar Biswas* [(2002) 5 SCC 111] and hence the said case of *Pradeep Kumar Biswas* came to be referred to a larger Bench of seven Judges and the said Bench, speaking through Ruma Pal, J. held that the judgment in *Sabhajit Tewary* was delivered on the facts of that case, hence could not be considered as having laid down any principle in law. The said larger Bench while accepting the ratio laid down in *Ajay Hasia* case though cautiously had to say the following in regard to the said judgment of this Court in *Ajay Hasia* (*Pradeep Kumar Biswas* case):

“38. Perhaps this rather overenthusiastic application of the broad limits set by *Ajay Hasia* may have persuaded this Court to curb the tendency in *Chander Mohan Khanna v. National Council of Educational Research and Training*. The Court referred to the tests formulated in *Sukhdev Singh*, *Ramana*, *Ajay Hasia* and *Som Prakash Rekhi* but striking a note of caution said that ‘these are merely indicative indicia and are by no means conclusive or clinching in any case’. In that case, the question arose whether the National Council of Educational Research and Training (NCERT) was a ‘State’ as defined under Article 12 of the Constitution. NCERT is a society registered under the Societies Registration Act. After considering the provisions of its memorandum of association as well as the rules of NCERT, this



Court came to the conclusion that since NCERT was largely an autonomous body and the activities of NCERT were not wholly related to governmental functions and that the government control was confined only to the proper utilisation of the grant and since its funding was not entirely from government resources, the case did not satisfy the requirements of the State under Article 12 of the Constitution. The Court relied principally on the decision in *Tekraj Vasandi v. Union of India*. However, as far as the decision in *Sabhajit Tewary v. Union of India* was concerned, it was noted that the 'decision has been distinguished and watered down in the subsequent decisions'."

21. Thereafter the larger Bench of this Court in *Pradeep Kumar Biswas* after discussing the various case-laws laid down the following parameters for gauging whether a particular body could be termed as State for the purpose of Article 12:

"40. The picture that ultimately emerges is that the tests formulated in *Ajay Hasia* are not a rigid set of principles so that if a body falls within any one of them it must, *ex hypothesi*, be considered to be a State within the meaning of Article 12. The question in each case would be - whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State."

22. Above is the *ratio decidendi* laid down by a seven-Judge Bench of this Court which is binding on this Bench. The facts of the case in hand will have to be tested on the touchstone of the parameters laid down in *Pradeep Kumar Biswas* case. Before doing so it would be worthwhile once again to recapitulate what are the guidelines laid down in *Pradeep Kumar Biswas* case for a body to be a State under Article 12. They are:

(1) Principles laid down in *Ajay Hasia* are not a rigid set of principles so that if a body falls within any one of them it must *ex hypothesi*, be considered to be a State within the meaning of Article 12.

(2) The question in each case will have to be considered on the basis of facts available as to whether in the light of the cumulative facts as established, the body is financially, functionally, administratively dominated, by or under the control of the Government.

(3) Such control must be particular to the body in question and must be pervasive.

(4) Mere regulatory control whether under statute or otherwise would not serve to make a body a State.

23. The facts established in this case show the following:

1. The Board is not created by a statute.
2. No part of the share capital of the Board is held by the Government.
3. Practically no financial assistance is given by the Government to meet the whole or entire expenditure of the Board.

4. The Board does enjoy a monopoly status in the field of cricket but such status is not State-conferred or State-protected.

5. There is no existence of a deep and pervasive State control. The control if any is only regulatory in nature as applicable to other similar bodies. This control is not specifically exercised under any special statute applicable to the Board. All functions of the Board are not public functions nor are they closely related to governmental functions.

6. The Board is not created by transfer of a government-owned corporation. It is an autonomous body.

24. To these facts if we apply the principles laid down by the seven-Judge Bench in *Pradeep Kumar Biswas* it would be clear that the facts established do not cumulatively show that the Board is financially, functionally or administratively dominated by or is under the control of the Government. Thus the little control that the Government may be said to have on the Board is not pervasive in nature. Such limited control is purely regulatory control and nothing more.

25. Assuming for argument's sake that some of the functions do partake the nature of public duties or State actions, they being in a very limited area of the activities of the Board, would not fall within the parameters laid down by this Court in *Pradeep Kumar Biswas* case. Even otherwise assuming that there is some element of public duty involved in the discharge of the Board's functions, even then, as per the judgment of this Court in *Pradeep Kumar Biswas*, that by itself would not suffice for bringing the Board within the net of "other authorities" for the purpose of Article 12.

26. The learned counsel appearing for the petitioners, however, contended that there are certain facets of the activities of the Board which really did not come up for consideration in any one of the earlier cases including in *Pradeep Kumar Biswas* case and those facts if considered would clearly go on to show that the Board is an instrumentality of the State. In support of this argument, he contended that in the present-day context cricket has become a profession and that cricketers have a fundamental right under Article 19(1)(g) to pursue their professional career as cricketers. It was also submitted that the Board controls the said rights of a citizen by its Rules and Regulations and since such a regulation can be done only by the State, the Board of necessity must be regarded as an instrumentality of the State. It was also pointed out that under its Memorandum of Association and the rules and regulations and due to its monopolistic control over the game of cricket, the Board has all-pervasive powers to control a person's cricketering career as it has the sole authority to decide on his membership and affiliation to any particular cricket association, which in turn would affect his right to play cricket at any level in India as well as abroad.

27. Assuming that these facts are correct the question then is, would it be sufficient to hold the Board to be a State for the purpose of Article 12?

28. There is no doubt that Article 19(1)(g) guarantees to all citizens the fundamental right to practise any profession or to carry on any trade, occupation or business and that such a right can only be regulated by the State by virtue of Article 19(6). Hence, it follows as a logical corollary that any violation of this right will have to be claimed only against the State

and unlike the rights under Articles 17 or 21, which can be claimed against non-State actors including individuals, the right under Article 19(1)(g) cannot be claimed against an individual or a non-State entity. Thus, to argue that every entity, which validly or invalidly arrogates to itself the right to regulate or for that matter even starts regulating the fundamental right of the citizen under Article 19(1)(g), is a State within the meaning of Article 12 is to put the cart before the horse. If such logic were to be applied, every employer who regulates the manner in which his employee works would also have to be treated as State. The prerequisite for invoking the enforcement of a fundamental right under Article 32 is that the violator of that right should be a State first. Therefore, if the argument of the learned counsel for the petitioner is to be accepted then the petitioner will have to first establish that the Board is a State under Article 12 and it is violating the fundamental rights of the petitioner. Unless this is done the petitioner cannot allege that the Board violates fundamental rights and is therefore State within Article 12. In this petition under Article 32 we have already held that the petitioner has failed to establish that the Board is State within the meaning of Article 12. Therefore assuming there is violation of any fundamental right by the Board that will not make the Board a "State" for the purpose of Article 12.

29. It was then argued that the Board discharges public duties which are in the nature of State functions. Elaborating on this argument it was pointed out that the Board selects a team to represent India in international matches. The Board makes rules that govern the activities of the cricket players, umpires and other persons involved in the activities of cricket. These, according to the petitioner, are all in the nature of State functions and an entity which discharges such functions can only be an instrumentality of State, therefore, the Board falls within the definition of State for the purpose of Article 12. Assuming that the abovementioned functions of the Board do amount to public duties or State functions, the question for our consideration is: would this be sufficient to hold the Board to be a State for the purpose of Article 12? While considering this aspect of the argument of the petitioner, it should be borne in mind that the State/Union has not chosen the Board to perform these duties nor has it legally authorised the Board to carry out these functions under any law or agreement. It has chosen to leave the activities of cricket to be controlled by private bodies out of such bodies' own volition (self-arrogated). In such circumstances when the actions of the Board are not actions as an authorised representative of the State, can it be said that the Board is discharging State functions? The answer should be no. In the absence of any authorisation, if a private body chooses to discharge any such function which is not prohibited by law then it would be incorrect to hold that such action of the body would make it an instrumentality of the State. The Union of India has tried to make out a case that the Board discharges these functions because of the de facto recognition granted by it to the Board under the guidelines framed by it, but the Board has denied the same. In this regard we must hold that the Union of India has failed to prove that there is any recognition by the Union of India under the guidelines framed by it, and that the Board is discharging these functions on its own as an autonomous body.

30. However, it is true that the Union of India has been exercising certain control over the activities of the Board in regard to organising cricket matches and travel of the Indian team abroad as also granting of permission to allow the foreign teams to come to India. But this

control over the activities of the Board cannot be construed as an administrative control. At best this is purely regulatory in nature and the same according to this Court in *Pradeep Kumar Biswas* case is not a factor indicating a pervasive State control of the Board.

31. Be that as it may, it cannot be denied that the Board does discharge some duties like the selection of an Indian cricket team, controlling the activities of the players and others involved in the game of cricket. These activities can be said to be akin to public duties or State functions and if there is any violation of any constitutional or statutory obligation or rights of other citizens, the aggrieved party may not have a relief by way of a petition under Article 32. But that does not mean that the violator of such right would go scot-free merely because it or he is not a State. Under the Indian jurisprudence there is always a just remedy for the violation of a right of a citizen. Though the remedy under Article 32 is not available, an aggrieved party can always seek a remedy under the ordinary course of law or by way of a writ petition under Article 226 of the Constitution, which is much wider than Article 32.

33. Thus, it is clear that when a private body exercises its public functions even if it is not a State, the aggrieved person has a remedy not only under the ordinary law but also under the Constitution, by way of a writ petition under Article 226. Therefore, merely because a non-governmental body exercises some public duty, that by itself would not suffice to make such body a State for the purpose of Article 12. In the instant case the activities of the Board do not come under the guidelines laid down by this Court in *Pradeep Kumar Biswas* case hence there is force in the contention of Mr Venugopal that this petition under Article 32 of the Constitution is not maintainable.

34. At this stage, it is relevant to note another contention of Mr Venugopal that the effect of treating the Board as State will have far-reaching consequences inasmuch as nearly 64 other National Sports Federations as well as some other bodies which represent India in the international forum in the field of art, culture, beauty pageants, cultural activities, music and dance, science and technology or other such competitions will also have to be treated as a “State” within the meaning of Article 12, opening the floodgates of litigation under Article 32. We do find sufficient force in this argument. Many of the abovementioned federations or bodies do discharge functions and/or exercise powers which if not identical are at least similar to the functions discharged by the Board. Many of the sportspersons and others who represent their respective bodies make a livelihood out of it (for e.g. football, tennis, golf, beauty pageants, etc.). Therefore, if the Board which controls the game of cricket is to be held to be a State for the purpose of Article 12, there is absolutely no reason why other similarly placed bodies should not be treated as a State. The fact that the game of cricket is very popular in India also cannot be a ground to differentiate these bodies from the Board. Any such differentiation dependent upon popularity, finances and public opinion of the body concerned would definitely violate Article 14 of the Constitution, as any discrimination to be valid must be based on hard facts and not mere surmises. Therefore, the Board in this case cannot be singly identified as an “other authority” for the purpose of Article 12. In our opinion, for the reasons stated above none of the other federations or bodies referred to hereinabove including the Board can be considered as a “State” for the purpose of Article 12.

35. In conclusion, it should be noted that there can be no two views about the fact that the Constitution of this country is a living organism and it is the duty of courts to interpret the

same to fulfill the needs and aspirations of the people depending on the needs of the time. It is noticed earlier in this judgment that in Article 12 the term “other authorities” was introduced at the time of framing of the Constitution with a limited objective of granting judicial review of actions of such authorities which are created under statute and which discharge State functions. However, because of the need of the day this Court in *Rajasthan SEB* and *Sukhdev Singh* noticing the socio-economic policy of the country thought it fit to expand the definition of the term “other authorities” to include bodies other than statutory bodies. This development of law by judicial interpretation culminated in the judgment of the seven-Judge Bench in the case of *Pradeep Kumar Biswas*. It is to be noted that in the meantime the socio-economic policy of the Government of India has changed and the State is today distancing itself from commercial activities and concentrating on governance rather than on business. Therefore, the situation prevailing at the time of *Sukhdev Singh* is not in existence at least for the time being, hence, there seems to be no need to further expand the scope of “other authorities” in Article 12 by judicial interpretation at least for the time being. It should also be borne in mind that as noticed above, in a democracy there is a dividing line between a State enterprise and a non-State enterprise, which is distinct and the judiciary should not be an instrument to erase the said dividing line unless, of course, the circumstances of the day require it to do so.

36. In the above view of the matter, the second respondent Board cannot be held to be a State for the purpose of Article 12. Consequently, this writ petition filed under Article 32 of the Constitution is not maintainable and the same is dismissed.

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**State of U. P. v. Radhey Shyam Rai**

2009 (3) SCALE 754

**S.B. SINHA, J.** - The short question which arises for consideration herein is as to whether the Uttar Pradesh Ganna Kishan Sansthan ("the Sansthan"), a society registered under the Societies Registration Act is a 'State' within the meaning of Article 12 of the Constitution of India.

2. Indisputably, before constituting the Sansthan, its functions, viz., imparting of knowledge and training to the cane-growers and connected persons so as to effect increase in the production of sugar in the State was being performed by the Cane Development Department. The Sansthan was established by a Government Order dated 4.08.1975. The State had established training centers at Shahjahanpur, Muzaffarnagar and Gorakhpur. These training centers, as noticed hereinbefore, were being run by the Cane Development Department of the Government of Uttar Pradesh. Management of the said training centers was transferred to the Sansthan. The expenses thereof were to be met from U.P. Sakhari Ganna Sam iti Sangh and Sakkar Vishesh Nidhi.

4. Respondent was appointed in the post of Computer Officer/Data Processing Officer. The Governing Council of the Sansthan in its meeting held on 28.04.1997 resolved to abolish the posts created and to cancel the appointments made, pursuant whereunto the services of the respondent, were dispensed with by an order dated 17.05-199777.

Feeling aggrieved by the said order dated 17.05.1997, he filed a writ petition before the Lucknow Bench of the High Court of Judicature at Allahabad being Writ Petition No. 869 of 1998 wherein one of the issues raised was whether the Sansthan is a 'State' within the meaning of Article 12 of the Constitution of India.

5. The writ petition filed by the respondent came up for consideration before a Division Bench of the High Court. It noticed an earlier decision of another Division Bench of the said Court wherein it was opined that the appellant No. 2 is not a 'State' within the meaning of Article 12 of the Constitution of India. However, a different view was taken.

The question as to whether the Sansthan would answer the description of a 'State' within the meaning of Article 12 of the Constitution of India was, therefore, referred to a Full Bench of the High Court.

The Full Bench held that the Sansthan being an authority would come within the purview of definition of 'State' within the meaning of Article 12 of the Constitution of India.

6. Article 12 of the Constitution of India reads as under:

"12. Definition.- In this part, unless the context otherwise requires, 'the State' includes the Government and Parliament of India and the Government and the legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India."

7. Law in this behalf has developed a lot. With the changing societal conditions, a large number of bodies exercising public functions have been brought within the purview of the definition of "State". In *Mysore Paper Mills Ltd v. Mysore Paper Mills Officers' Association* [(2002) 2 SCC 167] Mysore Paper Mills Ltd. Was held to be a 'State' within the meaning of

Article 12 of the Constitution of India as it was substantially financed and controlled by the Government, managed by the Board of Directors nominated and removable at the instance of the Government and carrying on functions of public interest under its control.

9. In *Pradeep Kumar Biswas*, the following tests for the purpose of determining the nature of activities which would make the body come within the definition of 'State' have been laid down by a Seven-Judge Bench of this Court:

- (i) Formation of the body
- (ii) Objects and functions
- (iii) Management and control
- (iv) Financial aid, etc.

The dicta of Mathew, J. in *Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi* [(1975) 1 SCC 421] was quoted with approval in *Pradeep Kumar Biswas* which is in the following terms:

"17. For identifying such an agency or instrumentality he propounded four indicia:

(1) "A finding of the State financial support plus an unusual degree of control over the management and policies might lead one to characterize an operation as State action."

(2) "Another factor which might be considered is whether the operation is an important public function."

"The combination of State aid and the furnishing of an important public service may result in a conclusion that the operation should be classified as a State agency. If a given function is of such public importance and so closely related to governmental functions as to be classified as a governmental agency, then even the presence or absence of State financial aid might be irrelevant in making a finding of State action. If the function does not fall within such a description, then mere addition of State money would not influence the conclusion."

(3) "The ultimate question which is relevant for our purpose is whether such a corporation is an agency or instrumentality of the Government for carrying on a business for the benefit of the public. In other words, the question is, for whose benefit was the corporation carrying on the business?"

(4) This Court referred to *Ajay Hasia* wherein the tests gathered from the decision of this Court in *Ramana Dayaram Shetty v. International Airport Authority of India* [(1979) 3 SCC 489] were stated in the following terms:

"(1) One thing is clear that if the entire share capital of the corporation is held by Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of Government.

Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with Governmental character.

(2) It may also be a relevant factor whether the corporation enjoys monopoly status which is State conferred or State protected.

(3) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality.

(4) If the functions of the corporation are of public importance and closely related to Governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government.

(5) Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference of the corporation being an instrumentality or agency of Government.”

(6) It was held in *Pradeep Kumar Biswas*:

“40. The picture that ultimately emerges is that the tests formulated in *Ajay Hasia* are not a rigid set of principles so that if a body falls within any one of them must ex hypothesi be considered within the meaning of Article 12. The question in each case would be whether in the light of the cumulative facts as was established, the body is financially, and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the `body a State.”

11. The question as to whether the Board of Control for Cricket in India (BCCI) which is a private body but had a control over the sport of cricket in India is a ‘State’ within the meaning of Article 12 of the Constitution of India came up for consideration before a Constitution Bench of this Court in *Zee Telefilms Ltd. v. Union of India* [(2005) 4 SCC 649] wherein the majority felt itself bound by the dicta laid down in *Pradeep Kumar Biswas* (supra) to opine that it was not a ‘State’ within the meaning of Article 12 of the Constitution of India.

However, the minority view was as under:

“10. Broadly, there are three different concepts which exist for determining the questions which fall within the expression "other authorities":

(i) The corporations and the societies created by the State for carrying on its trading activities in terms of Article 298 of the Constitution wherefor the capital, infrastructure, initial investment and financial aid, provided by the State and it also exercises regulation and control thereover.

(ii) Bodies created, for research and other developmental works which are otherwise governmental functions but may or may not be a part of the sovereign function.

(iii) A private body is allowed to discharge public duty or positive obligation of public nature and furthermore is allowed to perform regulatory and controlling functions and activities which were otherwise the job of the Government.



71. There cannot be same standard or yardstick for judging different bodies for the purpose of ascertaining as to whether any of them fulfils the requirements of law therefor or not.

80. The concept that all public sector undertakings incorporated under the Companies Act or the Societies Registration Act or any other Act for answering the description of State must be financed by the Central Government and be under its deep and pervasive control has in the past three decades undergone a sea change. The thrust now is not upon the composition of the body but the duties and functions performed by it. The primary question which is required to be posed is whether the body in question exercises public function.

110. Tests evolved by the courts have, thus, been expanded from time to time and applied having regard to the factual matrix obtaining in each case. Development in this branch of law as in others has always found differences. Development of law had never been an easy task and probably would never be."

The majority despite holding that BCCI is not a 'State' within the meaning of Article 12 of the Constitution of India opined that a writ petition under Article 226 of the Constitution of India against it would be maintainable.

12. Keeping in view the aforementioned principles, we may consider the fact of the present matter.

10 For the purpose of determining the question as to whether a society registered under the Societies Registration Act would be a "State' within the meaning of Article 12 of the Constitution of India or not, the history of its constitution plays an important role. The functions which are being performed by the Sansthan were used to be performed by the Government directly. The main purpose and object for which the training institutes were established at different places in the State of Uttar Pradesh admittedly was to provide scientific ways of sugarcane cultivation and management so as to improve the production of cane with a view to achieve better production of sugar. Such a function indisputably is a State function. The State established the 'Sansthan' so as to take over its own functions. It even transferred the entire management relating to imparting of training in various institutes in its favour. All the assets held by it for the aforementioned purpose including the infrastructural facilities stood transferred in favour of the Sansthan. It was created under a Government charter contained in the, Government Order dated 4.08.1975 issued in the name of the Governor of Uttar Pradesh. A budget of Rs. 6.00 lakhs was sanctioned in the year 1975-76, 50% of which was made by the Government and the remaining 50% by the Mills run by the State Sugar Corporation, Indian Mill Association, U. P. Sugarcane Cooperative Federation and Cane Development Societies. A sum of Rs. 2 lakhs was released immediately from the Contingent Fund of the State and the remaining amount was released on acceptance of supplementary demands and passing of Appropriation Bill by the Legislature. Some of the objectives stated in the Memorandum of Association are:

- (i) To establish, run and maintain training institute for the benefit of cane growers and the personnel in the Cane Development Department;
- (ii) To purchase land or building, etc. for establishing the institute, auditorium, etc.

(iii) To diffuse practical and scientific ways of sugar cane cultivation and management through sugar cane research workers.

It started with eight members of the Governing Council; all of whom were public servants including the Cane Commissioner, Uttar Pradesh or were nominated by the State.

The Sansthan framed rules called the Rules of Association of Sansathan, some of which are as under:

(I) Co-opted Members not exceeding two (Rule-4)

(II) Donors Members with right to elect two of them to be members of Sansthan..

(III) The Governing Council (having 12 members) headed by Minister, In charge of the Cane Department of the Government of U.P., with majority of the members, by virtue of their respective offices under the State Government (Rule-9)

(IV) Chairman of the Governing Council, to be the Chief Executive Authority of Sansthan (Rule-25)

(V) Vice-Chairman who shall be Pramukh Sachiv, Sugar industry and Cane Development of the Government and will preside the meetings in absence of Chairman (Rule - 26).

(VI) The affairs of Sansthan shall be carried on and managed by the Governing Council, which shall have also power to appoint officers, employees of Sansthan and to fix their pay scales and remuneration (Rule-29).

(VII) The Director of Sansthan, to be the ex-officio Secretary of the Governing Council and he shall be officers, of the Government of U.P., on deputation (Rule-30).

(VIII) Account Officer of Sansthan, to be taken on deputation from amongst, servants of the State Government. He shall be responsible for maintenance of the accounts etc. (Rule - 32).

(IX) The Governor of Uttar Pradesh may from time to time issue directives to the society as to the exercise and performance of its functions in matters involving the security of the State or substantial public interest and such other directives as he considers necessary in regard to the finances and conduct of business and affairs of the society and in the like manner may vary and annul any such directives and the society shall give immediate effect to the directives so issued (Rule -41(a)).

(X) The Governor of Uttar Pradesh may call for such returns, accounts and other information with respect to the properties and activities of the society as may be required by him from time to time (Rule-41 (b)).

13. The Government had constituted and re-constituted a Committee consisting of officers of the Government and other holders of the public office with the Cane Commissioner to streamline curriculum of training courses to be undertaken by it. The provisions of the Uttar Pradesh Sugar Cane (Purchase Tax) Act, 1961 provided for appropriation of 50% of the amount of tax from the Consolidated Fund of the State and credited to and vested in 'Sakkar Vishesh Nidhi' which was to be administered by a committee headed by the Secretary to the Government in the sugar industry. The Government withdrew a huge amount from the said

fund for making it available to the Sansthan in the financial year 1988-89.

14. The documents produced before the High Court reveal that 80 to 90% of the expenditure of Sansthan was met out of the funds made available to it by the Government. The majority of the office bearers of the -Governing Council were holders of various offices of the Government. It had, thus, a dominance of the holders of the office in the Government of Uttar Pradesh; the Minister Incharge of Cane Department being its ex-officio Chairman of the Governing Council. He is the Chief Executive Authority. The Director and Accounts Officer are also the government servants and the Sansthan is not free to appoint anybody on those posts who is not a government servant. This itself clearly shows that the composition and constitution of Sansthan and its Governing Council was nothing but a show of the Government and only a cover of the Society was given. Rule 41 of the Rules of Sansthan provides that the Governor shall have power to issue any directives to the Sansthan concerning any matter of public importance and the Sansthan shall give immediate effect to the directives so issued. Furthermore, Rule 41(b) of the Rules of Sansthan reads as under:.

“The Governor of Uttar Pradesh may call for such returns, accounts and other information with respect to, the properties and activities of the society as maybe required by him from time to time.”

The functions of the Sansthan are public functions.

15. From the materials placed before the court there cannot be any doubt whatsoever that the State exercises a deep and pervasive control over the affairs of the Sansthan, the Cane Commissioner being at the helm of the affairs. The Accounts Officer is the officer of the State Government and, is also sent, on deputation. The Majority of members of the Governing Council, as noticed hereinbefore, are holders of different offices of the State Government. They play a vital role in carrying out the affairs of the Sansthan. They alone have power to appoint anybody of their choice on the post. It is required to obey all the directions issued by the State Governor froth time totime. We therefore, are of the opinion that the Full Bench of the High Court has "rightly held the Sansthan `State' within the meaning of Article 12 of the Constitution of India.

16. For the reasons aforementioned, appeal is dismissed with costs.

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**'LAW' UNDER ARTICLE 13*****Keshavan Madhava Menon v. State of Bombay***

AIR 1951 SC 128 : 1951 SCR 228

[On the 9<sup>th</sup> December, 1949, the appellant who was the secretary of the People's Publishing House Ltd., Bombay was arrested and a prosecution was started against him under Section 18(1) of the Indian Press (Emergency Powers) Act, 1931 in the Court of the Chief Presidency Magistrate at Bombay for publishing a pamphlet in Urdu entitled "*Railway Mazdoorun Ke Khilaf Nai Sazish.*" The prosecution case was that the pamphlet was a news-sheet within the meaning of Section 2(6) of the Act and that since it had been published without the authority required by section 15(1) of the Act, the appellant had committed an offence punishable under Section 18(1) of the Act. While the prosecution was pending, the Constitution of India came into force on the 26 January, 1950, and thereafter the appellant raised the contention that sections 2(6), 15 and 18 of the Act were void, being inconsistent with Article 19(1)(a) of the Constitution and therefore the case against him could not proceed. Having raised this contention, the appellant filed a petition in the High Court at Bombay under Article 228 of the Constitution asking the High Court to send for the record of the case and declare that Sections 15 and 18 of the Indian Press (Emergency Powers) Act read with section 2(6) and (10) thereof were void and inoperative and the petitioner should be ordered to be acquitted. The High Court refused this application and held that the proceedings instituted against the appellant before the commencement of the Constitution could not be affected by the provisions of the Constitution that came into force on the 26 January, 1950. The Court further held that Article 13(1) had virtually the effect of repealing such provisions of existing laws as were inconsistent with any of the fundamental rights and that consequently under Section 6 of the General Clauses Act, which is made applicable for the interpretation of the Constitution by Article 367, pending proceedings were not affected. Dissatisfied with this decision, the appellant referred the present appeal to the Supreme Court].

**DAS, J.** - 10. Two questions were raised before the three-judge Bench of Bombay High Court, namely -

(1) Whether Sections 15(1) and 18(1) read with the definitions contained in Sections 2(6) and 2(10) of the Indian Press (Emergency Powers) Act, 1931, were inconsistent with Article 19(1)(a) read with clause (2) of that article? and

(2) Assuming that they were inconsistent, whether the proceedings commenced under Section 18(1) of that Act before the commencement of the Constitution could nevertheless be proceeded with?

11. The High Court considered it unnecessary to deal with or decide the first question and disposed of the application only on the second question. The High Court took the view that the word "void" was used in Article 13(1) in the sense of "repealed" and that consequently it attracted Section 6 of the General Clauses Act, which Act by Article 367 was made applicable for the interpretation of the Constitution. The High Court, therefore, reached the conclusion that proceedings under the Indian Press (Emergency Powers) Act, 1931, which were pending at the date of the commencement of the Constitution were not affected, even if the Act were inconsistent with the fundamental rights conferred by Article 19(1)(a) and as such became void under Article 13(1) of the Constitution after January 26, 1950. The High Court accordingly answered the second question in the affirmative and dismissed the petitioner's

application. The petitioner has now come up on appeal before us on the strength of a certificate granted by the High Court under Article 132(1) of the Constitution.

13. An argument founded on what is claimed to be the spirit of the Constitution is always attractive, for it has a powerful appeal to sentiment and emotion; but a court of law has to gather the spirit of the Constitution from the language of the Constitution. What one may believe or think to be the spirit of the Constitution cannot prevail if the language of the Constitution does not support that view. Article 372(2) gives power to the President to adapt and modify existing laws by way of repeal or amendment. There is nothing to prevent the President, in exercise of the powers conferred on him by that article, from repealing, say the whole or any part of the Indian Press (Emergency Powers) Act, 1931. If the President does so, then such repeal will at once attract Section 6 of the General Clauses Act. In such a situation all prosecutions under the Indian Press (Emergency Powers) Act, 1931, which were pending at the date of its repeal by the President would be saved and must be proceeded with notwithstanding the repeal of that Act unless an express provision was otherwise made in the repealing Act. It is therefore clear that the idea of the preservation of past inchoate rights or liabilities and pending proceedings to enforce the same is not foreign or abhorrent to the Constitution of India. We are, therefore, unable to accept the contention about the spirit of the Constitution as invoked by the learned counsel in aid of his plea that pending proceedings under a law which has become void cannot be proceeded with. Further, if it is against the spirit of the Constitution to continue the pending prosecutions under such a void law, surely it should be equally repugnant to that spirit that men who have already been convicted under such repressive law before the Constitution of India came into force should continue to rot in jail. It is, therefore, quite clear that the court should construe the language of Article 13(1) according to the established rules of interpretation and arrive at its true meaning uninfluenced by any assumed spirit of the Constitution.

15. It will be noticed that all that this clause [(Art. 13(1)] declares is that all existing laws, *insofar as they are inconsistent* with the provisions of Part III shall, *to the extent of such inconsistency*, be void. Every statute is *prima facie* prospective unless it is expressly or by necessary implications made to have retrospective operation. There is no reason why this rule of interpretation should not be applied for the purpose of interpreting our Constitution. We find nothing in the language of Article 13(1) which may be read as indicating an intention to give it retrospective operation. On the contrary, the language clearly points the other way. The provisions of Part III guarantee what are called fundamental rights. Indeed, the heading of Part III is "Fundamental Rights". These rights are given, for the first time, by and under our Constitution. Before the Constitution came into force there was no such thing as fundamental right. What Article 13(1) provides is that all existing laws which clash with the exercise of the fundamental rights (which are for the first time created by the Constitution) shall to that extent be void. As the fundamental rights became operative only on and from the date of the Constitution the question of the inconsistency of the existing laws with those rights must necessarily arise on and from the date those rights came into being. It must follow, therefore, that Article 13(1) can have no retrospective effect but is wholly prospective in its operation. After this first point is noted, it should further be seen that Article 13(1) does not in terms make the existing laws which are inconsistent with the fundamental rights void *ab initio* or for all purposes. On the contrary, it provides that all existing laws, insofar as they are inconsistent

with the fundamental rights, shall be void to the extent of their inconsistency. They are not void for all purposes but they are void only to the extent they come into conflict with the fundamental rights. In other words, on and after the commencement of the Constitution no existing law will be permitted to stand in the way of the exercise of any of the fundamental rights. Therefore, the voidness of the existing law is limited to the future exercise of the fundamental rights. Article 13(1) cannot be read as obliterating the entire operation of the inconsistent laws, or to wipe them out altogether from the statute book, for to do so will be to give them retrospective effect which, we have said, they do not possess. Such laws exist for all past transactions and for enforcing all rights and liabilities accrued before the date of the Constitution. Learned counsel for the appellant has drawn our attention to Articles 249(3), 250, 357, 358 and 369 where express provision has been made for saving things done under the laws which expired. It will be noticed that each of those articles was concerned with expiry of temporary statutes. It is well known that on the expiry of a temporary statute no further proceedings can be taken under it, unless the statute itself saved pending proceedings. If, therefore, an offence had been committed under a temporary statute and the proceedings were initiated but the offender had not been prosecuted and punished before the expiry of the statute, then, in the absence of any saving clause, the pending prosecution could not be proceeded with after the expiry of the statute by efflux of time. It was on this principle that express provision was made in the several articles noted above for saving things done or omitted to be done under the expiring laws referred to therein. As explained above, Article 13(1) is entirely prospective in its operation and as it was not intended to have any retrospective effect there was no necessity at all for inserting in that article any such saving clause. The effect of Article 13(1) is quite different from the effect of the expiry of a temporary statute or the repeal of a statute by a subsequent statute. As already explained, Article 13(1) only has the effect of nullifying or rendering all inconsistent existing laws ineffectual or nugatory and devoid of any legal force or binding effect only with respect to the exercise of fundamental rights on and after the date of the commencement of the Constitution. It has no retrospective effect and if, therefore, an act was done before the commencement of the Constitution in contravention of the provisions of any law which, after the Constitution, becomes void with respect to the exercise of any of the fundamental rights, the inconsistent law is not wiped out so far as the past act is concerned, for, to say that it is, will be to give the law retrospective effect. There is no fundamental right that a person shall not be prosecuted and punished for an offence committed before the Constitution came into force. So far as the past acts are concerned the law exists, notwithstanding that it does not exist with respect to the future exercise of fundamental rights. We, therefore, agree with the conclusion arrived at by the High Court on the second question, although on different grounds. In our opinion, therefore, this appeal fails and is dismissed.

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**State of Gujarat v. Shri Ambica Mills Ltd.**

(1974) 4 SCC 656 : AIR 1974 SC 1300

**K.K. MATHEW, J.** - 2. The first respondent, a company registered under the Companies Act, filed a Writ Petition in the High Court of Gujarat. In that petition it impugned the provisions of Sections 3, 6A and 7 of the Bombay Labour Welfare Fund Act, 1953 (the Act) and Section 13 of the Bombay Labour Welfare Fund (Gujarat Extension and Amendment) Act, 1961 (the First Amendment Act) and Rules 3 and 4 of the Bombay Labour Welfare Fund Rules, 1953 (the Rules) as unconstitutional and prayed for the issue of a writ in the nature of mandamus or other appropriate writ or direction against the respondents in the writ petition to desist from enforcing the direction in the notice dated August 2, 1962 of respondent No. 3 to the writ petition requiring the petitioner - 1<sup>st</sup> respondent to pay the unpaid accumulations specified therein.

3. The High Court held that Section 3(1) of the Act in so far as it relates to unpaid accumulations specified in Section 3(2)(b), Section 3(4) and Section 6A of the Act and Rules 3 and 4 of the Rules was unconstitutional and void.

4. In order to appreciate the controversy, it is necessary to state the background of the amendment made by the Legislature of Gujarat in the Act. The Act was passed by the legislature of the then State of Bombay in 1953 with a view to provide for the constitution of a fund for financing the activities for promoting the welfare of labour in the State of Bombay. Section 2(10) of the Act defined "unpaid accumulation" as meaning all payments due to the employees but not made to them within a period of three years from the date on which they became due, whether before or after the commencement of the Act, including the wages and gratuity legally payable, but not including the amount of contribution, if any, paid by any employer to a Provident Fund established under the Employees' Provident Fund Act, 1952. Section 3(1) provided that the State Government shall constitute a fund called the Labour Welfare Fund and that notwithstanding anything contained in any other law for the time being in force, the sums specified in sub-section (2) shall, subject to the provisions of sub-section (4) and Section 6A be paid into the fund. Clause (b) of sub-section (2) of Section 3 provided that the Fund shall consist of "all unpaid accumulations". Section 7(1) provided that the fund shall vest in and be applied by the Board of Trustees subject to the provisions and for the purposes of the Act. Section 19 gave power to the State Government to make rules and in the exercise of that power, the State Government made the Rules. Rules 3 and 4 were concerned with the machinery for enforcing the provisions of the Act in regard to fines and unpaid accumulations.

5. In *Bombay Dyeing & Manufacturing Co. Ltd. v. State of Bombay* [AIR 1958 SC 328], this Court held that the provisions of Sections 3(1) and 3(2) were invalid on the ground that they violated the fundamental right of the employer under Article 19 (1)(f). The reasoning of the Court was that the effect of the relevant provisions of the Act was to transfer to the Board the debts due by the employer to the employees free from the bar of limitation without discharging the employer from his liability to the employees and that Section 3(1) therefore operated to take away the moneys of the employer without releasing him from his liability to the employees. The Court also found that there was no machinery provided for

adjudication of the claim of the employees when the amounts were required to be paid to the fund.

6. The State sought to justify the provisions of the Act as one relating to abandoned property and, therefore, by their very nature, they could not be held to violate the rights of any person either under Article 19(1)(f) or Article 31(2). The Court did not accept the contention of the State but held that the purpose of a legislation with respect to abandoned property being in the first instance to safeguard the property for the benefit of the true owners and the State taking it over only in the absence of such claims, the law which vests the property absolutely in the State without regard to the claims of the true owners cannot be considered as one relating to abandoned property.

7. On May 1, 1960, the State of Bombay was bifurcated into the States of Maharashtra and Gujarat. The Legislature of Gujarat thereafter enacted the First Amendment Act making various amendments in the Act, some of them with retrospective effect. The First Amendment Act was intended to remedy the defects pointed out in the decision of this Court in the *Bombay Dyeing* case. The preamble to the First Amendment Act recites that “it is expedient to constitute a Fund for the financing of activities to promote welfare of labour in the State of Gujarat, for conducting such activities and for certain other purposes”. Section 2(2) defines ‘employee’. Section 2(3) defines ‘employer’ as any person who employs either directly or through another person either on behalf of himself or any other person, one or more employees in an establishment and includes certain other persons. Section 2(4) defines ‘establishment’ and that sub-section as amended reads:

2(4) ‘Establishment’ means:

- (i) A factory;
- (ii) A Tramway or motor omnibus service; and
- (iii) Any establishment including a society registered under the Societies Registration Act, 1960, and a charitable or other trust, whether registered under the Bombay Public Trusts Act, 1950, or not, which carries on any business or trade or any work in connection with or ancillary thereto and which employs or on any working day during the preceding twelve months employed more than fifty persons; but does not include an establishment (not being a factory) of the Central or any State Government.

Sub-section (10) of Section 2 defines ‘unpaid accumulations’:

‘unpaid accumulations’ means all payments due to the employees but not made to them within a period of three years from the date on which they became due whether before or after the commencement of this Act including the wages and gratuity legally payable but not including the amount of contribution if any, paid by an employer to a provident fund established under the Employees’ Provident Funds Act, 1952.

Section 3 is retrospectively amended and the amended section in its material part provides that the State Government shall constitute a fund called the Labour Welfare Fund and that the Fund shall consist of, among other things, all unpaid accumulations. It provides that the sums specified shall be collected by such agencies and in such manner and the accounts of the fund



shall be maintained and audited in such manner as may be prescribed. The section further provides that notwithstanding anything contained in any law for the time being in force or any contract or instrument, all unpaid accumulations shall be collected by such agencies and in such manner as may be prescribed and be paid in the first instance to the Board which shall keep a separate account therefor until claims thereto have been decided in the manner provided in Section 6A. Section 6A is a new section introduced retrospectively in the Act and sub-sections (1) and (2) of that section state that all unpaid accumulations shall be deemed to be abandoned property and that any unpaid accumulations paid to the Board in accordance with the provisions of Section 3 shall, on such payment, discharge an employer of the liability to make payment to an employee in respect thereof, but to the extent only of the amount paid to the Board and that the liability to make payment to the employee to the extent aforesaid shall, subject to the other provisions of the section, be deemed to be transferred to the Board. Sub-section (3) provides that as soon as possible after any unpaid accumulation is paid to the Board, the Board shall, by a public notice, call upon interested employees to submit to the Board their claims for any payment due to them. Sub-section (4) provides that such public notice - shall contain such particulars as may be prescribed and that it shall be affixed on the notice board or in its absence on a conspicuous part of the premises, of each establishment in which the unpaid accumulations were earned and shall be published in the Official Gazette and also in any two newspapers in the language commonly understood in the area in which such establishment is situated, or in such other manner as may be prescribed, regard being had to the amount of the claim. Sub-section (5) states that after the notice is first affixed and published under sub-section (4) it shall be again affixed and published from time to time for a period of three years from the date on which it was first affixed and published, in the manner provided in that sub-section in the months of June and December each year. Sub-section (6) states that a certificate of the Board to the effect that the provisions of sub-sections (4) and (5) were complied with shall be conclusive evidence thereof. Sub-section (7) provides that any claim received whether in answer to the notice or otherwise within a period "of four years from the date of the first publication of the notice in respect of such claim, shall be transferred by the Board to the Authority appointed under Section 15 of the Payment of Wages Act, 1936, having jurisdiction in the area in which the factory or establishment is situated, and the Authority shall proceed to adjudicate upon and decide such claim and that in hearing such claim the Authority shall have the powers conferred by and shall follow the procedure (in so far as it is applicable) followed in giving effect to the provisions of that Act. Sub-section (8) states that if in deciding any claim under sub-section (7), the Authority allows the whole or part of such claim, it shall declare that the unpaid accumulation in relation to which the claim is made shall, to the extent to which the claim is allowed cease to be abandoned property and shall order the Board to pay to the claimant the amount of the claim as allowed by it and the Board shall make payment accordingly: provided that the Board shall not be liable to pay any sum in excess of that paid under sub-section (4) of Section 3 to the Board as unpaid accumulations, in respect of the claim. Sub-section (9) provides for an appeal against the decision rejecting any claim. Sub-section (10) provides that the Board shall comply with any order made in appeal. Sub-section (11) makes the decision in appeal final and conclusive as to the right to receive payment, the liability of the Board to pay and also as to the amount, if any; and sub-section (12) states that if no claim is made within the time specified in sub-section (7)

or a claim or part thereof has been rejected, then the unpaid accumulations in respect of such claim shall accrue to and vest in the State as *bona vacantia* and shall thereafter without further assurance be deemed to be transferred to and form part of the Fund.

8. Section 7(1) provides that the Fund shall vest in and be held and applied by the Board as Trustees subject to the provisions and for the purposes of the Act and the moneys in the Fund shall be utilized by the Board to defray the cost of carrying out measures which may be specified by the State Government from time to time to promote the welfare of labour and of their dependents. Sub-section (2) of Section 7 specifies various measures for the benefit of employees in general on which the moneys in the Fund may be expended by the Board.

12. During the pendency of the writ petition before the High Court, the Gujarat Legislature passed the Bombay Labour Welfare Fund (Gujarat Amendment) Act, 1962 on January 5, 1963 (the Second Amendment Act) introducing sub-section (13) in Section 6A with retrospective effect from the date of commencement of the Act. That sub-section provides as follows:

(13) Nothing in the foregoing provisions of this section shall apply to unpaid accumulations not already paid to the Board:

(a) in respect of which no separate accounts have been maintained so that the unpaid claims of employees are not traceable, or

(b) which are proved to have been spent before the sixth day of December, 1961,

and accordingly such unpaid accumulations shall not be liable to be collected and paid under sub-section (4) of Section 3.

13. The State Government, in the exercise of its rule-making power under Section 19 amended the Rules by amending Rule 3 and adding a new Rule 3A setting out the particulars to be contained in the public notice issued under Section 6A(3).

14. The first respondent raised several contentions before the High Court, but the Court rejected all except two of them and they were: (1) that the impugned provisions violated the fundamental right of citizen-employers and employees under Article 19(1)(f) and, therefore, the provisions were void under Article 13(2) of the Constitution and hence there was no law, and so, the notice issued by the Welfare Commissioner was without the authority of law; and (2) that discrimination was writ large in the definition of 'establishment' in Section 2(4) and since the definition permeates through every part of the impugned provisions and is an integral part of the impugned provisions, the impugned provisions were violative of Article 14 and were void.

15. So, the two questions in this appeal are, whether the first respondent was competent to challenge the validity of the impugned provisions on the basis that they violated the fundamental right under Article 19(1)(f) of citizen-employers or employees and thus show that the law was void and non-existent and, therefore, the action taken against it was bad; and whether the definition of 'establishment' in Section 2(4) violated the fundamental right of the respondent under Article 14 and the impugned provisions were void for that reason.

17. By Section 6A (1) it was declared that unpaid accumulations shall be deemed to be abandoned property and that the Board shall take them over. As soon as the Board takes over

the unpaid accumulations treating them as abandoned property, notice as provided in Section 6A will have to be published and claims invited. Sub-sections (3) to (6) of Section 6A provide for a public notice calling upon interested employees to submit to the Board their claims for any payment due to them and sub-sections (7) to (11) of Section 6A lay down the machinery for adjudication of claims which might be received in pursuance to the public notice. It is only if no claim is made for a period of 4 years from the date of the publication of the first notice, or, if a claim is made but rejected wholly or in part, that the State appropriates the unpaid accumulations as *bona vacantia*. It is not as if unpaid accumulations become *bona vacantia* on the expiration of three years. They are, no doubt, deemed to be abandoned property under Section 6A(1), but they are not appropriated as *bona vacantia* until after claims are invited in pursuance to public notice and disposed of.

18. At common law, abandoned personal property could not be the subject of escheat. It could only be appropriated by the sovereign as *bona vacantia*. The Sovereign has a prerogative right to appropriate *bona vacantia*. And abandoned property can be appropriated by the Sovereign as *bona vacantia*.

19. Unpaid accumulations represent the obligation of the 'employers' to the 'employees' and they are the property of the employees. In other words, what is being treated as abandoned property is the obligation to the employees owed by the employers and which is property from the stand-point of the employees. No doubt, when we look at the scheme of the legislation from a practical point of view, what is being treated as abandoned property is the money which the employees are entitled to get from the employers and what the Board takes over is the obligation of the employers to pay the amount due to the employees in consideration of the moneys paid by the employers to the Board. The State, after taking the money, becomes liable to make the payment to the employees to the extent of the amount received. Whether the liability assumed by the State to the employees is an altogether new liability or the old liability of the employers is more a matter of academic interest than of practical consequence.

20. When the moneys representing the unpaid accumulations are paid to the Board, the liability of the employers to make payment to the employees in respect of their claims against the employers would be discharged to the extent of the amount paid to the Board and on such liability being transferred to the Board, the debts or claims to that extent cannot thereafter be enforced against the employer.

21. We think that if unpaid accumulations are not claimed within a total period of 7 years, the inactivity on the part of the employees would furnish adequate basis for the administration by State of the unasserted claims or demands. We cannot say that the period of 7 years allowed to the employees for the purpose of claiming unpaid accumulations is an unreasonably short one which will result in the infringement of any constitutional rights of the employees. And, in the absence of some persuasive reason, which is lacking here, we see no reason to think that the State will be, in fact, less able or less willing to pay the amounts when it has taken them over. We cannot also assume that the mere substitution of the State as the debtor will deprive the employees of their property or impose on them any unconstitutional burden. And, in the absence of a showing of injury, actual or threatened, there can be no constitutional argument against the taking over of the unpaid accumulations by the State.

Since the employers are the debtors of the employees, they can interpose no objection if the State is lawfully entitled to demand the payment, for, in that case, payment of the debt to the State under the statute releases the employers of their liability to the employees. As regards notice, we are of the view that all persons having property located within a State and subject to its dominion must take note of its statutes affecting control and disposition of such property and the procedure prescribed for these purposes. The various modes of notice prescribed in Section 6A are sufficient to give reasonable information to the employees to come forward and claim the amount if they really want to do so.

22. Be that as it may, we do not, however, think it necessary to consider whether the High Court was right in its view that the impugned provisions violated the fundamental rights of the citizen-employers or employees, for, it is a wise tradition with courts that they will not adjudge on the constitutionality of a statute except when they are called upon to do so when legal rights of the litigants are in actual controversy and as part of this rule is the principle that one to whom the application of a statute is constitutional will not be heard to attack the statute on the ground that it must also be taken as applying to other persons or other situations in which its application might be unconstitutional.

A person ordinarily is precluded from challenging the constitutionality of governmental action by invoking the rights of others and it is not sufficient that the statute or administrative regulation is unconstitutional as to other persons or classes of persons; it must affirmatively appear that the person attacking the statute comes within the class of persons affected by it.

23. We, however, proceed on the assumption that the impugned provisions abridge the fundamental right of citizen-employers and citizen-employees under Article 19(1)(f) in order to decide the further question and that is, whether, on that assumption, the first respondent could claim that the law was void as against the non-citizen employers or employees under Article 13(2) and further contend that the non-citizen employers have been deprived of their "property without the authority of law, as, *ex hypothesi* a void law is a nullity.

24. It is settled by the decisions of this Court that a Corporation is not a citizen for the purposes of Article 19 and has, therefore, no fundamental right under that Article.

25. As already stated, the High Court found that the impugned provisions, in so far as they abridged the fundamental rights of the citizen-employers and employees under Article 19(1)(f) were void under Article 13(2) and even if the respondent-company had no fundamental right under Article 19(1)(f), it had the ordinary right to hold and dispose of its property, and that the right cannot be taken away or even affected except under the authority of a law. Expressed in another way, the reasoning of the Court was that since the impugned provisions became void as they abridged the fundamental right under Article 19(1)(f) of the citizen-employers and employees the law was void and non-est, and therefore, the first respondent was entitled to challenge the notice issued by the Welfare Commissioner demanding the unpaid accumulation as unauthorised by any law.

26. The first respondent, no doubt, has the ordinary right of every person in the country to hold and dispose of property and that right, if taken away or even affected by the Act of an Authority without the authority of law, would be illegal. That would give rise to a justiciable issue which can be agitated in a proceeding under Article 226.

27. The real question, therefore, is, even if a law takes away or abridges the fundamental right of citizens under Article 19(1)(f), whether it would be void and therefore non-est as respects non-citizens?

28. In *Keshava Madhava Menon v. State of Bombay* [AIR 1951 SC 128], question was whether a prosecution commenced before the coming into force of the Constitution could be continued after the Constitution came into force as the Act in question there became void as violating Article 19(1)(a) and 19(2). Das, J. who delivered the majority judgment was of the view that the prosecution could be continued on the ground that the provisions of the Constitution including Article 13(1) were not retrospective. The learned Judge said that after the commencement of the Constitution, no existing law could be allowed to stand in the way of the exercise of fundamental rights, that such inconsistent laws were not wiped off or obliterated from the statute book and that the statute would operate in respect of all matters or events which took place before the Constitution came into force and that it also operated after the Constitution came into force and would remain in the statute book as operative so far as non-citizens are concerned.

29. This decision is clear that even though a law which is inconsistent with fundamental rights under Article 19 would become void after the commencement of the Constitution, the law would still continue in force in so far as non-citizens are concerned. This decision takes the view that the word 'void' in Article 13(1) would not have the effect of wiping out pre-Constitution laws from the statute book, that they will continue to be operative so far as non-citizens are concerned, notwithstanding the fact that they are inconsistent with the fundamental rights of citizens and therefore become void under Article 13(1).

30. In *Behram Khurshed Pesikaka v. State of Bombay* [AIR 1955 SC 123], the question was about the scope of Article 13(1). This Court had held that certain provisions of the Bombay Prohibition Act, 1949 (a pre-Constitution Act), in so far as they prohibited the possession, use and consumption of medicinal preparations were void as violating Article 19(1)(f). The appellant was prosecuted under the said Act and he pleaded that he had taken medicine containing alcohol. The controversy was whether the burden of proving that fact was on him. It became necessary to consider the legal effect of the declaration made by this Court that Section 9(b) of the said Act in so far as it affected liquid medicinal and toilet preparations containing alcohol was invalid as it infringed Article 19(1)(d). At the first hearing all the judges were agreed that a declaration by a court that part of a section was invalid did not repeal or amend that section. Venkatarama Aiyar, J. with whom Jagannadhadas, J. was inclined to agree, held that a distinction must be made between unconstitutionality arising from lack of legislative competence and that arising from a violation of constitutional limitations on legislative power. According to him, if the law is made without legislative competence, it was a nullity; a law violating a constitutional prohibition enacted for the benefit of the public generally was also a nullity; but a law violating a constitutional prohibition enacted for individuals was not a nullity but was merely unenforceable. At the second hearing of the case, Mahajan, C.J., after referring to *Madhava Menon* case, said that for determining the rights and obligations of citizens, the part declared void should be notionally taken to be obliterated from the section for all intents and purposes though it may remain written on the statute book and be a good law when a question arises for

determination of rights and obligations incurred prior to January 26, 1950, and also for the determination of rights of persons who have not been given fundamental rights by the Constitution. Das, J., in his dissenting judgment held that to hold that the invalid part was obliterated would be tantamount to saying covertly that the judicial declaration had to that extent amended the section. Mahajan, C.J., rejected the distinction between a law void for lack of legislative power and a law void for violating a constitutional fetter or limitation on legislative power. Both these declarations, according to the learned Chief Justice, of unconstitutionality go to the root of the power itself and there is no real distinction between them and they represent but two aspects of want of legislative power.

31. In *Bhikhaji Narain Dhakras v. State of M.P.* [AIR 1955 SC 781], the question was whether the C.P. and Berar Motor Vehicles (Amendment) Act, 1947, amended Section 43 of the Motor Vehicles Act, 1939, by introducing provisions which authorised the Provincial Government to take up the entire motor transport business in the Province and run it in competition with and even to the exclusion of motor transport operators. These provisions, though valid when enacted, became void on the coming into force of the Constitution, as they violated Article 19(1)(g). On June 18, 1951, the Constitution was amended so as to authorise the State to carry on business “whether to the exclusion, complete or partial, of citizens or otherwise”. A notification was issued after the amendment and the Court was concerned with the validity of the notification. The real question before the Court was that although Section 43 was void between January 26, 1950, and June 18, 1951, the amendments of the Article 19(6) had the effect of removing the constitutional invalidity of Section 43 which, from the date of amendment, became valid and operative. After referring to the meaning given to the word ‘void’ in *Keshava Madhava Menon* case, Das, Acting C.J., said for the Court:

All laws, existing or future, which are inconsistent with the provisions of Part III of our Constitution are, by the express provision of Article 13, rendered void ‘to the extent of such inconsistency’. Such laws were not dead for all purposes. They existed for the purposes of pre-Constitution rights and liabilities and they remained operative, even after the Constitution, as against non-citizens. It is only as against the citizens that they remained in a dormant or moribund condition.

32. In *M.P.V. Sundararamaier v. State of A.P.* [AIR 1958 SC 468], Venkatarama Aiyer, J., said that a law made without legislative competence and a law violative of constitutional limitations on legislative power were both unconstitutional and both had the same reckoning in a court of law; and they were both unenforceable but it did not follow from this that both laws were of the same quality and character and stood on the same footing for all purposes. The proposition laid down by the learned Judge was that if a law is enacted by a legislature on a topic not within its competence, the law was a nullity, but if the law was on topic within its competence but if it violated some constitutional prohibition, the law was only unenforceable and not a nullity. In other words, a law if it lacks legislative competence was absolutely null and void and a subsequent cession of the legislative topic would not revive the law which was still-born and the law would have to be re-enacted; but a law within the legislative competence but violative of constitutional limitation was unenforceable but once the limitation was removed, the law became effective. The learned judge said that the observations of Mahajan, J., in *Pesikaka* case that *qua* citizens that part of Section 13(b) of

the Bombay Prohibition Act, 1949, which had been declared invalid by this Court “had to be regarded as null and void” could not in the context be construed as implying that the impugned law must be regarded as *non-est so* as to be incapable of taking effect when the bar was removed. He summed up the result of the authorities as follows:

Where an enactment is unconstitutional in part but valid as to the rest, assuming of course that the two portions are severable, it cannot be held to have been wiped out of the statute book as it admittedly must remain there for the purpose of enforcement of the valid portion thereof, and being on the statute book, even that portion which is unenforceable on the ground that it is unconstitutional will operate *proprio vigore* when the Constitutional bar is removed, and there is no need for a fresh legislation.

33. In *Deep Chand v. State of U.P.* [AIR 1959 SC 648], it was held that a post-Constitution law is void from its inception but that a pre-Constitution law having been validly enacted would continue in force so far as non-citizens are concerned after the Constitution came into force. The Court further said that there is no distinction in the meaning of the word ‘void’ in Article 13(1) and in 13(2) and that it connoted the same concept but, since from its inception the post-Constitution law is void, the law cannot be resuscitated without re-enactment. Subba Rao, J., who wrote the majority judgment said after citing the observations of Das, Acting C.J., in *Keshava Madhava Menon* case:

The second part of the observation directly applies only to a case covered by Article 13(1), for the learned Judges say that the laws exist for the purposes of pre-Constitution rights and liabilities and they remain operative even after the Constitution as against non-citizens. The said observation could not obviously apply to post-Constitution laws. Even so, it is said that by a parity of reasoning the post-Constitution laws are also void to the extent of their repugnancy and therefore the law in respect of non-citizens will be on the statute-book and by the application of the doctrine of eclipse, the same result should flow in its case also. There is some plausibility in this argument, but it ignores one vital principle, viz., the existence or the non-existence of legislative power or competency at the time the law is made governs the situation.

34. Das, C.J., dissented. He was of the view that a post-Constitution law may infringe either a fundamental right conferred on citizens only or a fundamental right conferred on any person, citizen or non-citizen and that in the first case the law will not stand in the way of the exercise by the citizens of that fundamental right and, therefore, will not have any operation on the rights of the citizens, but it will be quite effective as regards non-citizens.

35. In *Maheidra Lal Jaini v. State of U.P.* [AIR 1963 SC 1019], the Court was of the view that the meaning of the word ‘void’ is the same both in Article 13(1) and Article 13(2) and that the application of the doctrine of eclipse in the case of pre-Constitution laws and not in the case of post-Constitution laws does not depend upon the two parts of Article 13: (at p. 940)

(T)hat it arises from the inherent difference between Article 13(1) and Article 13(2) arising from the fact that one is dealing with pre-Constitution laws, and the other is dealing with post-Constitution laws, with the result that in one use the laws being not

still-born the doctrine of eclipse will apply while in the other case the law being still-born there will be no scope for the application of the doctrine of eclipse.

36. If the meaning of the word 'void' in Article 13(1) is the same as its meaning in Article 13(2), it is difficult to understand why a pre-Constitution law which takes away or abridges the rights under Article 19 should remain operative even after the Constitution came into force as regards non-citizens and a post-Constitution law which takes away or abridges them should not be operative as respects non-citizens. The fact that pre-Constitution law was valid when enacted can afford no reason why it should remain operative as respects non-citizens after the Constitution came into force as it became void on account of its inconsistency with the provisions of Part III. Therefore, the real reason why it remains operative as against non-citizens is that it is void only to the extent of its inconsistency with the rights conferred under Article 19 and that its voidness is, therefore, confined to citizens, as, *ex hypothesi*, the law became inconsistent with their fundamental rights alone. If that be so, we see no reason why a post-Constitution law which takes away or abridges the rights conferred by Article 19 should not be operative in regard to non-citizens as it is void only to the extent of the contravention of the rights conferred on citizens, namely, those under Article 19.

37. Article 13(2) is an injunction to the 'state' not to pass any law which takes away or abridges the fundamental rights conferred by Part III and the consequence of the contravention of the injunction is that the law would be void to the extent of the contravention. The expression 'to the extent of the contravention' in the sub-article can only mean, to the extent of the contravention of the rights conferred under that part. Rights do not exist in vacuum. They must always inhere in some person whether natural or juridical and, under Part III, they inhere even in fluctuating bodies like linguistic or religious minorities or denominations. And, when the sub-article says that the law would be void "to the extent of the contravention", it can only mean to the extent of the contravention of the rights conferred on persons, minorities or denominations, as the case may be. Just as a pre-Constitution law taking away or abridging the fundamental rights under Article 19 remains operative after the Constitution came into force as respects non-citizens as it is not inconsistent with their fundamental rights, so also a post-Constitution law offending Article 19, remains operative as against non-citizens as it is not in contravention of any of their fundamental rights. The same scheme permeates both the sub-articles, namely, to make the law void in Article 13(1) to the extent of the inconsistency with the fundamental rights, and in Article 13(2) to the extent of the contravention of those rights. In other words, the voidness is not in *rem* but to the extent only of inconsistency or contravention, as the case may be of the rights conferred under Part III. Therefore, when Article 13(2) uses the expression 'void', it can only mean, void as against persons whose fundamental rights are taken away or abridged by a law. The law might be 'still-born' so far as the persons, entities or denominations whose fundamental rights are taken away or abridged, but there is no reason why the law should be void or 'still-born' as against those who have no fundamental rights.

38. It is said that the expression "to the extent of the contravention" in the Article means that the part of the law which contravenes the fundamental right would alone be void and not the other parts which do not so contravene. In other words, the argument was that the expression is intended to denote only the part of the law that would become void and not to



show that the law will be void only as regards the persons or entities whose fundamental rights have been taken away or abridged.

39. The first part of the sub-article speaks of ‘any law’ and the second part refers to the same law by using the same expression, namely, ‘any law’. We think that the expression ‘any law’ occurring in the latter part of the sub-article must necessarily refer to the same expression in the former part and therefore, the Constitution-makers have already made it clear that the law that would be void is only the law that contravenes the fundamental rights conferred by Part III, and so, the phrase ‘to the extent of the contravention’ can mean only to the extent of the contravention of the rights conferred. For instance, if a section in a statute takes away or abridges any of the rights conferred by Part III, it will be void because it is the law embodied in the section which takes away or abridges the fundamental right. And this is precisely what the sub-article has said in express terms by employing the expression ‘any law’ both in the former and the latter part of it. It is difficult to see the reason why the Constitution-makers wanted to state that the other sections, which did not violate the fundamental right, would not be void, and any such categorical statement would have been wrong, as the other sections might be void if they are inseparably knitted to the void one. When we see that the latter part of the sub-article is concerned with the effect of the violation of the injunction contained in the former part, the words “to the extent of the contravention” can only refer to the rights conferred under Part III and denote only the compass of voidness with respect to persons or entities resulting from the contravention of the rights conferred upon them. Why is it that a law is void under Article 13(2)? It is only because the law takes away or abridges a fundamental right. There are many fundamental rights and they inhere in diverse types of persons, minorities or denominations. There is no conceivable reason why a law which takes away the fundamental right of one class of persons, or minorities or denominations should be void as against others who have no such fundamental rights as, *ex hypothesi* the law cannot contravene their rights.

40. It was submitted that this Court has rejected the distinction drawn by Venkatarama Aiyar, J. in *Sundararamaier* case between legislative incapacity arising from lack of power under the relevant legislative entry and that arising from a check upon legislative power on account of constitutional provisions like fundamental rights and that if the law enacted by a legislature having no capacity in the former sense would be void in rem, there is no reason why a law passed by a legislature having no legislative capacity in the latter sense is void only qua persons whose fundamental rights are taken away or abridged.

41. It was also urged that the expression “the State shall not make any law” in Article 13(2) is a clear mandate of the fundamental law of the land and, therefore, it is a case of total incapacity and total want of power. But the question is: what is the mandate? The mandate is that the State shall not make any law which takes away or abridges the rights conferred by Part III, If no rights are conferred under Part III upon a person, or, if rights are conferred, but they are not taken away or abridged by the law, where is the incapacity of the legislature? It may be noted that both in *Deep Chand* case and *Mahendra Lal Joini* case, the decision in *Sundararamaier* case was not adverted to. If on a textual reading of Article 13, the conclusion which we have reached is the only reasonable one, we need not pause to consider whether that conclusion could be arrived at except on the basis of the distinction drawn by

Venkatarama Aiyar, J. in *Sundaramier* case. However, we venture to think that there is nothing strange in the notion of a legislature having no inherent legislative capacity or power to take away or abridge by a law the fundamental rights conferred on citizens and yet having legislative power to pass the same law in respect of non-citizens who have no such fundamental rights to be taken away or abridged. In other words, the legislative incapacity subjectwise with reference to Articles 245 and 246 in this context would be the taking away or abridging by law the fundamental rights under Article 19 of citizens.

43. In *Jagannath v. Authorized Officer, Land Reforms* [(1971) 2 SCC 893], this Court has said that a post-Constitution Act which has been struck down for violating the fundamental rights conferred under Part III and was therefore still-born, has still an existence without re-enactment, for being put in the Ninth Schedule. That only illustrates that any statement that a law which takes away or abridges fundamental rights conferred under Part III is still-born or null and void requires qualifications in certain situations. Although the general rule is that a statute declared unconstitutional is void at all times and that its invalidity must be recognized and acknowledged for all purposes and is no law and a nullity, this is neither universally nor absolutely true and there are many exceptions to it. A realistic approach has been eroding the doctrine of absolute nullity in all cases and for all purposes and it has been held that such broad statements must be taken with some qualifications, that even an unconstitutional statute is an operative fact at least prior to a determination of constitutionality and may have consequences which cannot be ignored.

The decision made by the competent authority that something that presents itself as a norm is null *ab initio* because it fulfils the conditions of nullity determined by the legal order is a constitutive act; it has a definite legal effect; without and prior to this act the phenomenon in question cannot be considered as null. Hence the decision is not 'declaratory', that is to say, it is not, as it presents itself, a declaration of nullity; it is a true annulment, an annulment with retroactive force. There must be something legally existing to which this decision refers. Hence, the phenomenon in question cannot be something null *ab initio*, that is to say, legally nothing. It has to be considered as a norm annulled with retroactive force by the decision declaring it null *ab initio*. Just as everything King Midas touched turned into gold, everything to which the law refers becomes law, i.e., something legally existing.

45. We do not think it necessary to pursue this aspect further in this case. For our purpose it is enough to say that if a law is otherwise good and does not contravene any of their fundamental rights, non-citizens cannot take advantage of the voidness of the law for the reason that it contravenes the fundamental right of citizens and claim that there is no law at all. Nor would this proposition violate any principle of equality before the law because citizens, and non-citizens are not similarly situated as the citizens have certain fundamental rights which non-citizens have not. Therefore, even assuming that under Article 226 of the Constitution, the first respondent was entitled to move the High Court and seek a remedy for infringement of its ordinary right to property, the impugned provisions were not non-est but were valid laws enacted by a competent legislature as respects non-citizens and the first respondent cannot take the plea that its rights to property are being taken away or abridged without the authority of law.

46. Now, let us see whether the definition of 'establishment' in Section 2(4) violates the right under Article 14 and make the impugned provisions void.

47. The High Court held that there was no intelligible differentia to distinguish establishments grouped together under the definition of 'establishment' in Section 2(4) and establishments left out of the group; and that in any event, the differentia had no rational relation or nexus with the object sought to be achieved by the Act and that the impugned provisions as they affected the rights and liabilities of employers and employees in respect of the establishments defined in Section 2(4) were, therefore, violative of Article 14. The reasoning of the High Court was that all factories falling within the meaning of Section 2(m) of the Factories Act, 1948, were brought within the purview of the definition of 'establishment' while establishments carrying business or trade and employing less than fifty persons were left out and that out of this latter class of establishments an exception was made and all establishments carrying on the business of tramways or motor omnibus services were included without any fair reason and that, though Government establishments which were factories were included within the definition of 'establishment' other Government establishments were excluded and, therefore, the classification was unreasonable.

48. The definition of 'establishment' includes factories, tramway or motor omnibus services and any establishment carrying on business or trade and employing more than 50 persons, but excludes all Government establishments carrying on business or trade.

49. In the High Court, an affidavit was filed by Mr Brahmbhatt, Deputy Secretary to Education and Labour Department, wherein it was stated that the differentiation between factories and commercial establishments employing less than 50 persons was made for the reason that the turnover of labour is more in factories than in commercial establishments other than factories on account of the fact that industrial labour frequently changes employment for a variety of reasons.

50. The High Court was not prepared to accept this explanation. The High Court said:

It may be that in case of commercial establishments employing not more than 50 persons, the turnover of labour in commercial establishments being less, the unpaid accumulations may be small. But whether unpaid accumulations are small or large is an immaterial consideration for the purpose of the enactment of the impugned provisions. The object of the impugned provisions being to get at the unpaid accumulations and to utilize them for the benefit of labour, the extent of the unpaid accumulations with any particular establishment can never be a relevant consideration.

51. According to the High Court, as an establishment carrying on tramway or motor omnibus service would be within the definition of 'establishment' even if it employs less than 50 persons, or for that matter, even less than 10 persons, the reason given in the affidavit of Mr Brahmbhatt for excluding all commercial establishments employing less than 50 persons from the definition was not tenable. The Court was also of the view that when Government factories were included in the definition of 'establishment' there was no reason for excluding government establishments other than factories from the definition. The affidavit of Mr Brahmbhatt made it clear that there were hardly any establishments of the Central or State

Governments which carried on business or trade or any work in connection with or ancillary thereto and, therefore, the legislature did not think it fit to extend the provisions of the Act to such establishments. No affidavit in rejoinder was filed on behalf of respondents to contradict this statement.

52. It would be an idle parade of familiar learning to review the multitudinous cases in which the constitutional assurance of equality before the law has been applied.

53. The equal protection of the laws is a pledge of the protection of equal laws. But laws may classify. And the very idea of classification is that of inequality. In tackling this paradox the Court has neither abandoned the demand for equality nor denied the legislative right to classify. It has taken a middle course. It has resolved the contradictory demands of legislative specialisation and constitutional generality by a doctrine of reasonable classification.

54. A reasonable classification is one which includes all who are similarly situated and none who are not. The question then is: what does the phrase 'similarly situated' mean? The answer to the question is that we must look beyond the classification to the purpose of the law. A reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law. The purpose of a law may be either the elimination of a public mischief or the achievement of some positive public good.

55. A classification is under-inclusive when all who are included in the class are tainted with the mischief but there are others also tainted whom the classification does not include. In other words, a classification is bad as under-inclusive when a State benefits or burdens persons in a manner that furthers a legitimate purpose but does not confer the same benefit or place the same burden on others who are similarly situated. A classification is over-inclusive when it includes not only those who are similarly situated with respect to the purpose but others who are not so situated as well. In other words, this type of classification imposes a burden upon a wider range of individuals than are included in the class of those attended with mischief at which the law aims. Herod ordering the death of all male children born on a particular day because one of them would some day bring about his downfall employed such a classification.

56. The first question, therefore, is, whether the exclusion of establishments carrying on business or trade and employing less than 50 persons makes the classification under-inclusive, when it is seen that all factories employing 10 or 20 persons, as the case may be, have been included and that the purpose of the law is to get in unpaid accumulations for the welfare of the labour. Since the classification does not include all who are similarly situated with respect to the purpose of the law, the classification might appear, at first blush, to be unreasonable. But the Court has recognized the very real difficulties under which legislatures operate - difficulties arising out of both the nature of the legislative process and of the society which legislation attempts perennially to re-shape and it has refused to strike down indiscriminately all legislation embodying classificatory inequality here under consideration. Mr. Justice Holmes, in urging tolerance of under-inclusive classifications, stated that such legislation should not be disturbed by the Court unless it can clearly see that there is no fair reason for the law which would not require with equal force its extension to those whom it leaves untouched. What, then, are the fair reasons for non-extension? What should a court do when it

is faced with a law making an under-inclusive classification in areas relating to economic and tax matters? Should it, by its judgment, force the legislature to choose between inaction or perfection?

57. The legislature cannot be required to impose upon administrative agencies tasks which cannot be carried out or which must be carried out on a large scale at single stroke.

If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied. There is no doctrinaire requirement that the legislation should be couched in all embracing terms

58. The piecemeal approach to a general problem permitted by under-inclusive classifications, appears justified when it is considered that legislative dealing with such problems is usually an experimental matter. It is impossible to tell how successful a particular approach may be, what dislocations might occur, what evasions might develop, what new evils might be generated in the attempt. Administrative expedients must be forged and tested. Legislators, recognizing these factors, may wish to proceed cautiously, and courts must allow them to do so.

59. Administrative convenience in the collection of unpaid accumulations is a factor to be taken into account in adjudging whether the classification is reasonable. A legislation may take one step at a time addressing itself to the phase of the problem which seems most acute to the legislative mind. Therefore, a legislature might select only one phase of one field for application of a remedy.

60. It may be remembered that Article 14 does not require that every regulatory statute apply to all in the same business: where size is an index to the evil at which the law is directed, discriminations between the large and small are permissible, and it is also permissible for reform to take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.

61. A legislative authority acting within its field is not bound to extend its regulation to all cases which it might possibly reach. The legislature is free to recognize degrees of harm and it may confine the restrictions to those classes of cases where the need seemed to be clearest.

62. In short, the problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions requiring different remedies. Or so the legislature may think.

63. Once an objective is decided to be within legislative competence, however, the working out of classifications has been only infrequently impeded by judicial negatives. The Court's attitude cannot be that the State either has to regulate all businesses, or even all related businesses, and in the same way, or, not at all. An effort to strike at a particular economic evil could not be hindered by the necessity of carrying in its wake a train of vexatious, troublesome and expensive regulations covering the whole range of connected or similar enterprises.

64. Laws regulating economic activity would be viewed differently from laws which touch and concern freedom of speech and religion, voting, procreation, rights with respect to

criminal procedure, etc. The prominence given to the equal protection clause in many modern opinions and decisions in America all show that the Court feels less constrained to give judicial deference to legislative judgment in the field of human and civil rights than in that of economic regulation and that it is making a vigorous use of the equal protection clause to strike down legislative action in the area of fundamental human rights. Equal protection clause rests upon two largely subjective judgments: one as to the relative invidiousness of particular differentiation and the other as to the relative importance of the subject with respect to which equality is sought.

65. The question whether, under Article 14, a classification is reasonable or unreasonable must, in the ultimate analysis depends upon the judicial approach to the problem. The great divide in this area lies in the difference between emphasizing the actualities or the abstractions of legislation. The more complicated society becomes, the greater the diversity of its problems and the more does legislation direct itself to the diversities:

Statutes are directed to less than universal situations. Law reflects distinctions that exist in fact or at least appear to exist in the judgment of legislators - those who have the responsibility for making law fit fact. Legislation is essentially empirical. It addresses itself to the more or less crude outside world and not to the neat, logical models of the mind. Classification is inherent in legislation. To recognise marked differences that exist in fact is living law; to disregard practical differences and concentrate on some abstract identities is lifeless logic.

66. That the legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry, that exact wisdom and nice adaptation of remedies cannot be required, that judgment is largely a prophecy based on meagre and un-interpreted experience, should stand as reminder that in this area the Court does not take the equal protection requirement in a pedagogic manner.

67. In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The legislature after all has the affirmative responsibility. The Courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts and the number of times the judges have been overruled by events - self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability.

69. The purpose 'of the Act is to get unpaid accumulations for utilizing them for the welfare of labour in general. The aim of any legislature would then be to get the unpaid accumulation from all concerns. So an ideal classification should include all concerns which have 'unpaid accumulations'. But then there are practical problems. Administrative convenience as well as the apprehension whether the experiment, if undertaken as an all-embracing one will be successful, are legitimate considerations in confining the realization of the objective in the first instance to large concerns such as factories employing large amount of labour and with statutory duty to keep register of wages, paid and unpaid, and the

legislature has, in fact, brought all factories, whether owned by Government or otherwise, within the purview of the definition of 'establishment'. In other words, it is from the factories that the greatest amount of unpaid accumulations could be collected and since the factories are bound to maintain records from which the amount of unpaid accumulations could be easily ascertained, the legislature brought all the factories within the definition of 'establishment'. It then addressed itself to other establishments but thought that establishments employing less than 50 persons need not be brought within the purview of the definition as unpaid accumulations in those establishments would be less and might not be sufficient to meet the administrative expenses of collection and as many of them might not be maintaining records from which the amount of unpaid accumulations could be ascertained. The affidavit of Mr Brahmhatt made it clear that unpaid accumulations in these establishments would be comparatively small. The reason why government establishments other than factories were not included in the definition is also stated in the affidavit of Mr. Brahmhatt, namely, that there were hardly any establishments run by the Central or State Government. This statement was not contradicted by any affidavit in rejoinder.

70. There remains then the further question whether there was any justification for including tramways and motor omnibuses within the purview of the definition. So far as tramways and motor omnibuses are concerned, the legislature of Bombay, when it enacted the Act in 1953, must have had reason to think that unpaid accumulations in these concerns would be large as they usually employed large amount of labour force and that they were bound to keep records of the wages earned and paid. Section 2(ii) (a) of the Payment of Wages Act, 1936, before that section was amended in 1965 so far as it is material provided:

2. In this Act, unless there is anything repugnant in the subject or context,—
- (ii) "industrial establishment" means any -
- (a) tramway or motor omnibus service.

Rule 5 of the Bombay Payment of Wages Rules, 1937 provided:

**5. Register of Wages.**- A Register of Wages shall be maintained in every factory and industrial establishment and may be kept in such form as the paymaster finds convenient but shall include the following particulars:

- (a) the gross wages earned by each person employed for each wage period;
- (b) all deductions made from those wages, with an indication in each case of the clause of sub-section (2) of Section 7 under which the deduction is made;
- (c) the wages actually paid to each person employed for each wage period.

71. The Court must be aware of its own remoteness and lack of familiarity with local problems. Classification is dependent on the peculiar needs and specific difficulties of the community. The needs and difficulties of the community are constituted out of facts and opinions beyond the easy ken of the Court. It depends to a great extent upon an assessment of the local condition of these concerns which the legislature alone was competent to make.

72. Judicial deference to legislature in instances of economic regulation is sometimes explained by the argument that rationality of a classification may depend upon 'local conditions' about which local legislative or administrative body would be better informed than a court. Consequently, lacking the capacity to inform itself fully about the peculiarities of

a particular local situation, a court should hesitate to dub the legislative classification irrational. Tax laws, for example, may respond closely to local needs and court's familiarity with these needs is likely to be limited.

73. Mr S.T. Desai for the appellants argued that, if it is held that the inclusion of tramways and motor omnibuses in the category of 'establishment' is bad, the legislative intention to include factories and establishments employing more than 50 persons should not be thwarted by striking down the whole definition. He said that the doctrine of severability can be applied and that establishments running tramways and motor omnibuses can be excluded from the definition without in the least sacrificing the legislative intention.

74. In *Skinner v. Oklahoma ex rel Williamson* [316 US 535], a statute providing for sterilization of habitual criminals excluded embezzlers and certain other criminals from its coverage. The Supreme Court found that the statutory classification denied equal protection and remanded the case to the State Court to determine whether the sterilization provisions should be either invalidated or made to cover all habitual criminals. Without elaboration, the State Court held the entire statute unconstitutional, declining to use the severability clause to remove the exception that created the discrimination. In *Skinner* case the exception may have suggested a particular legislative intent that one class should not be covered even if the result was that none would be. But there is no necessary reason for choosing the intent to exclude one group over the intent to include another. Courts may reason that without legislation none would be covered, and that invalidating the exemption therefore amounts to illegitimate judicial legislation over the remaining class not previously covered. The conclusion, then, is to invalidate the whole statute, no matter how narrow the exemption had been. The reluctance to extend legislation may be particularly great if a statute defining a crime is before a court, since extension would make behaviour criminal that had not been so before. But the consequences of invalidation will be unacceptable if the legislation is necessary to an important public purpose. For example, a statute requiring licensing of all doctors except those from a certain school could be found to deny equal protection, but a court should be hesitant to choose invalidation of licensing as an appropriate remedy. Though the test is imprecise, a court must weigh the general interest in retaining the statute against the court's own reluctance to extend legislation to those not previously covered. Such an inquiry may lead a court into examination of legislative purpose, the overall statutory scheme, statutory arrangements in connected fields and the needs of the public

75. This Court has, without articulating any reason, applied the doctrine of severability by deleting the offending clause which made classification unreasonable.

76. Whether a court can remove the unreasonableness of a classification when it is under-inclusive by extending the ambit of the legislation to cover the class omitted to be included, or, by applying the doctrine of severability delete a clause which makes a classification over-inclusive are matters on which it is not necessary to express any final opinion as we have held that the inclusion of tramway and motor omnibus service in the definition of 'establishment' did not make the classification unreasonable having regard to the purpose of the legislation.

77. In the result, we hold that the impugned sections are valid and allow the appeals.

\* \* \* \* \*



***Bhikaji Narain Dhakras v. State of M.P.***

(1955) 2 SCR 589 : AIR 1955 SC 781

**S.R. DAS, C.J.** - This judgment will dispose of all the five petitions (Nos. 189 to 193 of 1955) which have been heard together and which raise the same question as to the constitutional validity of the C. P. & Berar Motor Vehicles (Amendment) Act, 1947.

2. The facts are short and simple. Each of the petitioners has been carrying on business as stage carriage operator for a considerable number of years under permits granted under Section 58 of the Motor Vehicles Act, 1939 as amended by the C. P. & Berar Motor Vehicles (Amendment) Act, 1947.

3. Prior to the amendment Section 58 of the Motor Vehicles Act, 1939 was in the following terms:

“58.(1) A permit other than a temporary permit issued under Section 62 shall be effective without renewal for such period, not less than three years and not more than five years, as the Regional Transport Authority may in its discretion specify in the permit.

Provided that in the case of a permit issued or renewed within two years of the commencement of this Act, the permit shall be effective without renewal for such period of less than three years as the Provincial Government may prescribe.

(2) A permit may be renewed on an application made and disposed of as if it were an application for a permit:

Provided that, other conditions being equal, an application for renewal shall be given preference over new applications for permits.”

It will be noticed that under the section as it originally stood the permit granted thereunder was for a period of not less than 3 years and not more than 5 years and a permit-holder applying for renewal of the permit had, other things being equal, preference over new applicants for permit over the same route and would ordinarily get such renewal.

4. Very far reaching amendments were introduced by the C. P. & Berar Motor Vehicles (Amendment) Act, 1947 into the Motor Vehicles Act, 1939 in its application to Central Provinces and Berar. By Section 3 of the amending Act, item (ii) of sub-Section (1) of Section 43 of the Central Act was replaced by the following items:

“(ii) fix maximum, minimum or specified fares or freights for stage carriages and public carriers to be applicable throughout the province or within any area or on any route within the province, or

(iii) notwithstanding anything contained in Section 58 or Section 60 cancel any permit granted under the Act in respect of a transport vehicle or class of such permits either generally or in any area specified in the notification:

Provided that no such notification shall be issued before the expiry of a period of three months from the date of a notification declaring its intention to do so:

Provided further that when any such permit has been cancelled, the permit-holder shall be entitled to such compensation as may be provided in the rules; or

(iv) declare that it will engage in the business of road transport service either generally or in any area specified in the notification.”

The following sub-section (3) was added after sub-section (2) of Section 58 of the Central Act by Section 8 of the amending Act, namely:

“(3) Notwithstanding anything contained in sub-section (1), the Provincial Government may order a Regional Transport Authority or the Provincial Transport Authority to limit the period for which any permit or class of permits is issued to any period less than the minimum specified in the Act.”

Section 9 of the amending Act added after Section 58 a new section reading as follows:

“58-A. Notwithstanding anything hereinbefore contained the Provincial Government may by order direct any Regional Transport Authority or the Provincial Transport Authority to grant a stage carriage permit to the Provincial Government or any undertaking in which the Provincial Government is financially interested or a permit-holder whose permit has been cancelled under Section 43 or any local authority specified in the order.”

The result of these amendments was that power was given to the Government (i) to fix fares or freights throughout the Province or for any area or for any route, (ii) to cancel any permit after the expiry of three months from the date of notification declaring its intention to do so and on payment of such compensation as might be provided by the Rules, (iii) to declare its intention to engage in the business of road transport generally or in any area specified in the notification, (iv) to limit the period of the license to a period less than the minimum specified in the Act, and (v) to direct the specified Transport Authority to grant a permit, inter alia, to the Government or any undertaking in which Government was financially interested. It may be mentioned here that in the State of Madhya Pradesh there are two motor transport companies known as C. P. Transport Services Ltd., and Provincial Transport Co. Ltd., in which, at the date of these writ petitions, the State of Madhya Pradesh and the Union of India held about 85 per cent. of the share capital. Indeed, since the filing of these petitions the entire undertakings of these companies have been purchased by the State of Madhya Pradesh and the latter are now running the services on some routes for which permits had been granted to them.

5. A cursory perusal of the new provisions introduced by the amending Act will show that very extensive powers were conferred on the Provincial Government and the latter were authorised, in exercise of these powers, not only to regulate or control the fares or freights but also to take up the entire motor transport business in the province and run it in competition with and even to the exclusion of all motor transport operators. It was in exercise of the powers under the newly added sub-section (3) of Section 58 that the period of the permit was limited to four months at a time. It was in exercise of powers conferred on it by the new Section 43(1)(iv) that the Notification hereinafter mentioned declaring the intention of the Government to take up certain routes was issued. It is obvious that these extensive powers were given to the Provincial Government to carry out and implement the policy of nationalisation of the road transport business adopted by the Government. At the date of the passing of the amending Act, 1948 there was no such thing as fundamental rights of the

citizens and it was well within the legislative competency of the Provincial Legislature to enact that law. It has been conceded that the amending Act was, at the date of its passing, a perfectly valid piece of legislation.

6. Then came our Constitution on the 26-1-1950. Part III of the Constitution is headed "Fundamental Rights" and consists of Articles 12 to 35. By Article 19(1) the Constitution guarantees to all citizens the right to freedom under seven heads. Although in Article 19(1) all these rights are expressed in unqualified language, none of them, however, is absolute, for each of them is cut down or limited by whichever of the several clauses (2) to (6) of that Article is applicable to the particular right. Thus the right to practise any profession or to carry on any occupation, trade or business conferred by Article 19(1)(g) was controlled by clause (6) which, prior to its amendment to which reference will presently be made, ran as follows:

"(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it prescribes or empowers any authority to prescribe, or prevent the State from making any law prescribing or empowering any authority to prescribe, the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business."

The fundamental rights conferred by Articles 14 to 35 are protected by the provisions of Article 13.

7. The amending Act (III of 1948) was, at the commencement of the Constitution, an existing law. The new provisions introduced by the Act authorised the Provincial Government to exclude all private motor transport operators from the field of transport business. *Prima facie*, therefore, it was an infraction of the provisions of Article 19(1)(g) of the Constitution and would be void under Article 13(1), unless this invasion by the Provincial Legislature of the fundamental right could be justified under the provisions of clause (6) of Article 19 on the ground that it imposed reasonable restrictions on the exercise of the right under Article 19(1)(g) in the interests of the general public. In *Shagir Ahmad v. The State of U.P.* [(1955) 1 SCR 707], it was held by this Court that if the word "restriction" was taken and read in the sense of limitation and not extinction then clearly the law there under review which, like the amending Act now before us, sanctioned the imposition of total prohibition on the right to carry on the business of a motor transport operator could not be justified under Article 19(6). It was further held in that case that if the word "restriction" in clause (6) of Article 19 of the Constitution, as in other clauses of that Article, were to be taken in certain circumstances to include prohibition as well, even then, having regard to the nature of the trade which was perfectly innocuous and to the number of persons who depended upon business of this kind for their livelihood, the impugned law could not be justified as reasonable. In this view of the matter, there is no escape from the conclusion that the amending Act, insofar as it was inconsistent with Article 19(1)(g) read with clause (6) of that Article, became, under Article

13(1), void “to the extent of such inconsistency” and if there were nothing else in the case the matter would have been completely covered by the decision of this Court in that case.

8. On the 18-6-1951, however, was passed the Constitution (First Amendment) Act, 1951. By Section 3(1) of that Act for clause (2) of Article 19 a new sub-clause was substituted which was expressly made retrospective. Clause (6) of Article 19 was also amended.

It will be noticed that clause (6), as amended, was not made retrospective as the amended clause (2) had been made. The contention of the respondents before us is that although the amending Act, on the authority of our decision in *Shagir Ahmad* case, became on and from the 26-1-1950 void as against the citizens to the extent of its inconsistency with the provisions of Article 19(1)(g), nevertheless, after the 18-6-1951 when clause (6) was amended by the Constitution (First Amendment) Act, 1951 the amending Act ceased to be inconsistent with the fundamental right guaranteed by Article 19(1)(g) read with the amended clause (6) of that Article, because that clause, as it now stands, permits the creation by law of State monopoly in respect, inter alia, of motor transport business and it became operative again even as against the citizens. The petitioners, on the other hand, contend that the law having become void for unconstitutionality was dead and could not be vitalised by a subsequent amendment of the Constitution removing the constitutional objection, unless it was re-enacted, and reference is made to Prof. Cooley’s work on *Constitutional Limitations*, Vol. I, p. 384 Note referred to in our judgment in *Shagir Ahmad* case and to similar other authorities. The question thus raised by the respondents, however, was not raised by the learned Advocate-General in that case, although the notification was published by the U.P. Government on the 25-3-1953 and the proposed scheme was published on the 7-4-1953, i.e., long after the Constitution (First Amendment) Act, 1951 had been passed. This question was not considered by this Court in *Shagir Ahmad* case.

9. The meaning to be given to the word “void” in Article 13 is no longer *res integra*, for the matter stands concluded by the majority decision of this Court in *Keshavan Madhava Menon v. The State of Bombay* [AIR 1955 SC 128]. We have to apply the *ratio decidendi* in that case to the facts of the present case. The impugned Act was an existing law at the time when the Constitution came into force. That existing law imposed on the exercise of the right guaranteed to the citizens of India by Article 19(1)(g) restrictions which could not be justified as reasonable under clause (6) as it then stood and consequently under Article 13(1) that existing law became void “to the extent of such inconsistency”. As explained in *Keshavan Madhava Menon* case the law became void not *in toto* or for all purposes or for all times or for all persons but only “to the extent of such inconsistency”, that is to say, to the extent it became inconsistent with the provisions of Part III which conferred the fundamental rights on the citizens. It did not become void independently of the existence of the rights guaranteed by Part III. In other words, on and after the commencement of the Constitution the existing law, as a result of its becoming inconsistent with the provisions of Article 19(1)(g) read with clause (6) as it then stood, could not be permitted to stand in the way of the exercise of that fundamental right. Article 13(1) by reason of its language cannot be read as having obliterated the entire operation of the inconsistent law or having wiped it out altogether from the statute book. Such law existed for all past transactions and for enforcement of rights and liabilities accrued before the date of the Constitution, as was held in *Keshavan Madhava Menon* case.

The law continued in force, even after the commencement of the Constitution, with respect to persons who were not citizens and could not claim the fundamental right. In short, Article 13(1) had the effect of nullifying or rendering the existing law which had become inconsistent with Article 19(1)(g) read with clause (6) as it then stood ineffectual, nugatory and devoid of any legal force or binding effect only with respect to the exercise of the fundamental right on and after the date of the commencement of the Constitution. Therefore, between the 26-1-1950 and the 18-6-1951 the impugned Act could not stand in the way of the exercise of the fundamental right of a citizen under Article 19(1)(g). The true position is that the impugned law became, as it were, eclipsed, for the time being, by the fundamental right. The effect of the Constitution (First Amendment) Act, 1951 was to remove the shadow and to make the impugned Act free from all blemish or infirmity. If that were not so, then it is not intelligible what "existing law" could have been sought to be saved from the operation of Article 19(1)(g) by the amended clause (6) insofar as it sanctioned the creation of State monopoly, for, *ex hypothesi*, all existing laws creating such monopoly had already become void at the date of the commencement of the Constitution in view of clause (6) as it then stood. The American authorities refer only to post-Constitution laws which were inconsistent with the provisions of the Constitution. Such laws never came to life but were still born as it were. The American authorities, therefore, cannot fully apply to pre-Constitution laws which were perfectly valid before the Constitution. But apart from this distinction between pre-Constitution and post-Constitution laws on which, however, we need not rest our decision, it must be held that these American authorities can have no application to our Constitution. All laws, existing or future, which are inconsistent with the provisions of Part III of our Constitution are, by the express provision of Article 13, rendered void "to the extent of such inconsistency". Such laws were not dead for all purposes. They existed for the purposes of pre-Constitution rights and liabilities and they remained operative, even after the Constitution, as against non-citizens. It is only as against the citizens that they remained in a dormant or moribund condition. In our judgment, after the amendment of clause (6) of Article 19 on the 18-6-1951, the impugned Act ceased to be unconstitutional and became revived and enforceable against citizens as well as against non-citizens. It is true that as the amended clause (6) was not made retrospective the impugned Act could have no operation as against citizens between the 26-1-1950 and the 18-6-1951 and no rights and obligations could be founded on the provisions of the impugned Act during the said period whereas the amended clause (2) by reason of its being expressly made retrospective had effect even during that period. But after the amendment of clause (6) the impugned Act immediately became fully operative even as against the citizens. The notification declaring the intention of the State to take over the bus routes to the exclusion of all other motor transport operators was published on the 4-2-1955 when it was perfectly constitutional for the State to do so. In our judgment the contentions put forward by the respondents as to the effect of the Constitution (First Amendment) Act, 1951 are well-founded and the objections urged against them by the petitioners are untenable and must be negatived.

10. The petitioners then contend that assuming that the impugned Act cannot be questioned on the ground of infringement of their fundamental right under Article 19(1)(g) read with clause (6) of that Article, there has been another infraction of their fundamental right in that they have been deprived of their property, namely, the right to ply motor vehicles

for gain which is an interest in a commercial undertaking and, therefore, the impugned Act does conflict with the provisions of Article 31(2) of the Constitution and again they rely on our decision in *Shagir Ahmad* case. Here, too, if there were nothing else in the case this contention may have been unanswerable. But unfortunately for the petitioners there is the Constitution (Fourth Amendment) Act, 1955 which came into force on the 27-4-1955.

There can be no question that the amended provisions, if they apply, save the impugned law, for it does not provide for the transfer of the ownership or right to possession of any property and cannot, therefore, be deemed to provide for the compulsory acquisition or requisitioning of any property. But the petitioners contend, as they did with regard to the Constitution (First Amendment) Act, 1951, that these amendments which came into force on the 27-4-1955 are not retrospective and can have no application to the present case. It is quite true that the impugned Act became inconsistent with Article 31 as soon as the Constitution came into force on the 26-1-1950 as held by this Court in *Shagir Ahmad* case and continued to be so inconsistent right up to the 27-4-1955 and, therefore, under Article 13(1) became void "to the extent of such inconsistency." Nevertheless, that inconsistency was removed on and from the 27-4-1955 by the Constitution (Fourth Amendment) Act, 1955. The present writ petitions were filed on the 27-5-1955, exactly a month after the Constitution (Fourth Amendment) Act, 1955 came into force, and, on a parity of reasoning hereinbefore mentioned, the petitioners cannot be permitted to challenge the constitutionality of the impugned Act on and from the 27-4-1955 and this objection also cannot prevail.

12. The result, therefore, is that these petitions must be dismissed.

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## **RIGHT TO EQUALITY**

### ***Kathi Raning Rawat v. State of Saurashtra***

1952 SCR 435 : AIR 1952 SC 123

[Section 11 of the Saurashtra State Public Safety Measures (Third Amendment) Ordinance (No. 66), 1949, provided:

A Special Judge shall try such offences or classes of offences or such cases or classes of cases as the Government of the United State of Saurashtra may, by general or special order in writing direct.

Compare the above provision with section 5(1) of the West Bengal Special Courts Act, 1950:

A Special Court shall try such offences or classes of offences or cases or classes of cases as the State Government may, by general or special order in writing, direct.]

**SAIYID FAZL ALI J.** - This is an appeal by one Kathi Raning Rawat, who has been convicted under Sections 302, 307 and 392 read with Section 34 of the Indian Penal Code and sentenced to death and to seven years' RI, the sentences to run concurrently. The appellant was tried by a Special Court constituted under the Saurashtra State Public Safety Measures (Third Amendment) Ordinance, 1949 (Ordinance 66 of 1949), which was issued by the Rajpramukh of Saurashtra on 2<sup>nd</sup> November, 1949, and his conviction and sentence were upheld on appeal by the State High Court. He has preferred an appeal to this Court against the decision of the High Court.

12. The principal question which arises in this appeal is whether the Ordinance to which reference has been made is void under Article 13(1) of the Constitution on the ground that it violates the provisions of Article 14. It appears that on the 5<sup>th</sup> April, 1948, the Rajpramukh of Saurashtra State promulgated an Ordinance called the Criminal Procedure Code, 1898 (Adaptation) Ordinance, 1948 by which "the Criminal Procedure Code of the Dominion of India as in force in that Dominion on the 1<sup>st</sup> day of April, 1948" was made applicable to the State of Saurashtra with certain modifications. In the same month, another Ordinance called the Saurashtra State Public Safety Measures Ordinance (Ordinance 9 of 1948) was promulgated, which provided among other things for the detention of persons acting in a manner prejudicial to public safety, maintenance of public order and peace and tranquillity in the State. Subsequently, on 5<sup>th</sup> November, 1949, the Ordinance with which we are concerned, namely, the Saurashtra State Public Safety Measures (Third Amendment) Ordinance, 1949, was promulgated, which purported to amend the previous Ordinance by inserting in it certain provisions which may be summarised as follows:

13. Section 9 of the Ordinance empowers the State Government by notification in the Official Gazette to constitute Special Courts of criminal jurisdiction for such area as may be specified in the notification. Section 11 provides that a Special Judge shall try such offences or class of offences or such cases or class of cases as the State Government may, by general or special order in writing, direct. Sections 12 to 18 lay down the procedure for the trial of cases by the Special Judge, the special features of which are as follows:

- (1) The Special Judge may take cognizance of offences without the accused being committed to his court for trial;
- (2) There is to be no trial by jury or with the aid of assessors;
- (3) The Special Judge should ordinarily record a memorandum only of the substance of the evidence of each witness; and
- (4) The person convicted has to appeal to the High Court within 15 days from the date of the sentence.

14. The Ordinance further provides that the provisions of Sections 491 and 526 of the Code of Criminal Procedure shall not apply to any person or case triable by the Special Judge, and the High Court may call for the record of the proceedings of any case tried by a Special Judge and may exercise any of the powers conferred on an appellate court by Sections 423, 426, 427 and 428 of the Code.

15. From the foregoing summary of the provisions of the Ordinance, it will appear that the difference between the procedure laid down in the Criminal Procedure Code and the procedure to be followed by the Special Judge consists mainly in the following matters:

- (1) Where a case is triable by a Court of Session, no commitment proceeding is necessary, and the Special Judge may take cognizance without any commitment;
- (2) The trial shall not be by jury or with the aid of assessors;
- (3) Only a memorandum of the substance of the evidence of each witness is ordinarily to be recorded;
- (4) The period of limitation for appeal to the High Court is curtailed; and
- (5) No court has jurisdiction to transfer any case from any Special Judge, or to make an order under Section 491 of the Criminal Procedure Code.

16. It appears that pursuant to the provisions contained in Sections 9, 10 and 11 of the Ordinance, the State Government issued a Notification H/35-5-C, dated the 9/11<sup>th</sup> February, 1951, directing the constitution of a Special Court for certain areas mentioned in a schedule attached to the Notification and empowering such court to try the following offences, namely, offences under Sections 183, 189, 190, 212, 216, 224, 302, 304, 307, 323 335, 341-344, 379-382, 384-389 and 392-402 of the Indian Penal Code, 1860, as adapted and applied to the State of Saurashtra, and most of the offences under the Ordinance of 1948.

17. In the course of the hearing, an affidavit was filed by the Assistant Secretary in the Home Department of the Saurashtra Government, stating that since the integration of different States in Kathiawar in the beginning of 1948 there had been a series of crimes against public peace and that had led to the promulgation of Ordinance 9 of 1948, which provided among other things for detention of persons acting in a manner prejudicial to public safety and maintenance of public order in the State. Notwithstanding this Ordinance, the crimes went on increasing and there occurred numerous cases of dacoity, murder, nose-cutting, ear-cutting, etc. for some of which certain notorious gangs were responsible, and hence Ordinance LXVI of 1949 was promulgated to amend the earlier Ordinance and to constitute Special Courts for the speedy trial of cases arising out of the activities of the dacoits and other criminals guilty of violent crimes.



18. As has been already indicated, the main contention advanced before us on behalf of the appellant is that the Ordinance of 1949 violates the provisions of Article 14 of the Constitution, by laying down a procedure which is different from and less advantageous to the accused than the ordinary procedure laid down in the Criminal Procedure Code, and thereby discriminating between persons who are to be tried under the special procedure and those tried under the normal procedure. In support of this argument, reliance is placed on the decision of this Court in *State of West Bengal v. Anwar Ali Sarkar* and *Gajen Mali*, in which certain provisions of the West Bengal Special Courts Act, 1949, have been held to be unconstitutional on grounds similar to those urged on behalf of the appellant in the present case. A comparison of the provisions of the Ordinance in question with those of the West Bengal Act will show that several of the objectionable features in the latter enactment do not appear in the Ordinance, but, on the whole, I am inclined to think that that circumstance by itself will not afford justification for upholding the Ordinance. There is however one very important difference between the West Bengal Act and the present Ordinance which, in my opinion, does afford such justification, and I shall try to refer to it as briefly as possible.

19. I think that a distinction should be drawn between “discrimination without reason” and “discrimination with reason”. The whole doctrine of classification is based on this distinction and on the well-known fact that the circumstances which govern one set of persons or objects may not necessarily be the same as those governing another set of persons or objects, so that the question of unequal treatment does not really arise as between persons governed by different conditions and different sets of circumstances. The main objection to the West Bengal Act was that it permitted discrimination “without reason” or without any rational basis. Having laid down a procedure which was materially different from and less advantageous to the accused than the ordinary procedure, that Act gave uncontrolled and unguided authority to the State Government to put that procedure into operation in the trial of any case or class of cases or any offence or class of offences. There was no principle to be found in that Act to control the application of the discriminatory provisions or to correlate those provisions to some tangible and rational objective, in such a way as to enable anyone reading the Act to say: If that is the objective, the provisions as to special treatment of the offences seem to be quite suitable and there can be no objection to dealing with a particular type of offences on a special footing. The mere mention of speedier trial as the object of the Act did not cure the defect, because the expression “speedier trial” standing by itself provided no rational basis of classification. It was merely a description of the result sought to be achieved by the application of the special procedure laid down in the Act and afforded no help in determining what cases required speedier trial.

20. As regards the present Ordinance, we can discover a guiding principle within its four corners, which cannot but have the effect of limiting the application of the special procedure to a particular category of offences only and establish such a nexus (which was missing in the West Bengal Act) between offences of a particular category and the object with which the Ordinance was promulgated, as should suffice to repel the charge of discrimination and furnish some justification for the special treatment of those offences. The Ordinance, as I have already stated, purported to amend another Ordinance, the object of which was to provide for public safety, maintenance of public order and preservation of peace and tranquility in the

State. It was not disputed before us that the preamble of the original Ordinance would govern the amending Ordinance also, and the object of promulgating the subsequent Ordinance was the same as the object of promulgating the original Ordinance. Once this is appreciated, it is easy to see that there is something in the Ordinance itself to guide the State Government to apply the special procedure not to any and every case but only to those cases or offences which have a rational relation to or connection with the main object and purpose of the Ordinance and which for that reason become a class by themselves requiring to be dealt with on a special footing. The clear recital of a definite objective furnishes a tangible and rational basis of classification to the State Government for the purpose of applying the provisions of the Ordinance and for choosing only such offences or cases as affect public safety, maintenance of public order and preservation of peace and tranquility. Thus, under Section 11, the State Government is expected to select only such offences or class of offences or class of cases for being tried by the Special Court in accordance with the special procedure, as are calculated to affect public safety, maintenance of public order, etc., and under Section 9, the use of the special procedure must necessarily be confined to only disturbed areas or those areas where adoption of public safety measures is necessary. That this is how the Ordinance was intended to be understood and was in fact understood, is confirmed by the Notification issued on the 9/11th February by the State Government in pursuance of the Ordinance. That Notification sets out 49 offences under the Indian Penal Code as adapted and applied to the State and certain other offences punishable under the Ordinance, and one can see at once that all these offences directly affect the maintenance of public order and peace and tranquility.

The Notification also specifies certain areas in the State over which only the Special Court is to exercise jurisdiction. There can be no dispute that if the State Legislature finds that lawlessness and crime are rampant and there is a direct threat to peace and tranquility in certain areas within the State, it is competent to deal with offences which affect the maintenance of public order and preservation of peace and tranquility in those areas as a class by themselves and to provide that such offences shall be tried as expeditiously as possible in accordance with a special procedure devised for the purpose. This, in my opinion, is in plain language the rationale of the Ordinance, and it will be going too far to say that in no case and under no circumstances can a legislature lay down a special procedure for the trial of a particular class of offences, and that recourse to a simplified and less cumbrous procedure for the trial of those offences, even when abnormal conditions prevail, will amount to a violation of Article 14 of the Constitution. I am satisfied that this case is distinguishable from the case relating to the West Bengal Act, but I also feel that the legislatures should have recourse to legislation such as the present only in very special circumstances. In the result, I would hold that the Saurashtra State Public Safety Measures (Third Amendment) Ordinance is not unconstitutional, and accordingly overrule the objection as to the jurisdiction of the Special Court to try the appellant.

**BIJAN KUMAR MUKHERJEA, J.** - 26. It was set down for hearing on certain preliminary points of law raised by the learned counsel for the appellant attacking the legality of the entire trial on the ground that Section 11 of the Saurashtra Public Safety Measures Ordinance 66 of 1949 passed by the Rajpramukh of Saurashtra as well as the Notification

issued by the State Government on 9/11<sup>th</sup> February, 1951, under which the Special Court was constituted and the trial held, were void and inoperative. The first and the main ground upon which the constitutional validity of the section and the notification has been assailed is that they are in conflict with the provision of Article 14 of the Constitution.

28. It is not disputed that the language of Section 11 of the Saurashtra Ordinance, with which we are now concerned, is identically the same as that of Section 5(1) of the West Bengal Special Courts Act.

29. In the West Bengal Act there is a further provision embodied in clause (2) of Section 5 which lays down that no such direction as is contemplated by clause (1) could be given in respect of cases pending before ordinary criminal courts at the date when the Act came into force. No such exception has been made in the Saurashtra Ordinance. In the Calcutta cases referred to above, the notification under Section 5(1) of the West Bengal Act directed certain individual cases in which specified persons were involved to be tried by the Special Court and it was held by the High Court of Calcutta that Section 5(1) of the West Bengal Special Courts Act to the extent that it empowers the State Government to direct *any case* to be tried by Special Courts was void as offending against the provision of the equal protection clause in Article 14 of the Constitution; and this view was affirmed in appeal by a majority of this court. With regard to the remaining part of Section 5(1), which authorises the State Government to direct, "offences, classes of offences...or classes of cases" for trial by Special Courts, the majority of the Judges of the Calcutta High Court were of opinion that it was not obnoxious to Article 14 of the Constitution. In the present case the notification, that was issued by the Saurashtra State Government on 9/11<sup>th</sup> February, 1951, did not relate to individual cases. The notification constituted in the first place a Special Court in the areas specified in the schedule. It appointed in the next place a judge to preside over the Special Court and finally gave a list of offences with reference to appropriate sections of the Indian Penal Code which were to be tried by the Special Judge. If the view taken by the Chief Justice of the Calcutta High Court and the majority of his colleagues is right, such notification and that part of Section 11 of the Ordinance, under which it was issued, could not be challenged as being in conflict with Article 14 of the Constitution. This point did come up for consideration before us in the appeals against the Calcutta decision with reference to the corresponding part of Section 5(1) of the West Bengal Act, but although a majority of this court concurred in dismissing the appeals, there was no such majority in the pronouncement of any final opinion on this particular point.

30. In my judgment in the Calcutta appeals I was sceptical about the correctness of the view taken upon this point by the learned Chief Justice of the Calcutta High Court and the majority of his colleagues. The consideration that weighed with me was that as the learned Judges were definitely of opinion that the necessity of speedier trial, as set out in the preamble, was too elusive and uncertain a criterion to form the basis of a proper classification, the authority given by Section 5(1) of the Special Courts Act to the State Government to direct any class of cases or offences to be tried by the Special Court would be an unguided authority and the propriety of the classification made by the State Government that is said to be implied in the direction could not be tested with reference to any definite legislative policy or standard. Mr Sen, appearing for the State of Saurashtra, has argued before us that in this

respect the Saurashtra Ordinance stands on a different footing and he has referred in this connection to the preamble to the original ordinance as well as the circumstances which necessitated the present one. As the question is an important one and is not concluded by our previous decision, it merits, in my opinion, a careful consideration.

31. It may be stated at the outset that the Criminal Procedure Code of India as such has no application to the State of Saurashtra. After the State acceded to the Indian Union, there was an Ordinance promulgated by the Rajpramukh on 5<sup>th</sup> of April, 1948, which introduced the provisions of the Criminal Procedure Code of India (Act 5 of 1898) with certain modifications into the Saurashtra State. Another ordinance, known as the Public Safety Measures Ordinance, was passed on the 2<sup>nd</sup> of April, 1948, and this ordinance, like similar other public safety measures obtaining in other States, provided for preventive detention, imposition of collective fines, control of essential supplies and similar other matters. On 11<sup>th</sup> of November, 1949, the present Ordinance was passed by way of amendment of the Public Safety Measures Ordinance and inter alia it made provisions for the establishment of Special Courts. Section 9 of this Ordinance empowers the State Government to constitute Special Courts of criminal jurisdiction for such areas as may be specified in the notification. Section 10 relates to appointment of Special Judges who are to preside over such courts and Section 11 lays down that the Special Judge shall try "such offences or classes of offences... or classes of cases as the Government of United State of Saurashtra may by general or special order in writing, direct." The procedure to be followed by the Special Judges is set out in Sections 12 to 18 of the Ordinance. In substance the Special Court is given the status of a sessions court, although committal proceeding is eliminated and so also is trial by jury or with the aid of assessors. The Special Judge has only to make a memorandum of the evidence and he can refuse to summon any witness if he is satisfied after examination of the accused that the evidence of such witness would not be material. Section 16(1) curtails the period of limitation within which an accused convicted by the Special Judge has to file his appeal before the High Court and clause (3) of the section provides that no court shall have jurisdiction to transfer any case from any Special Judge or make any order under Section 491 of the Criminal Procedure Code.

The ordinance certainly lacks some of the most objectionable features of the West Bengal Act. Thus it has not taken away the High Court's power of revision, nor does it expose the accused to the chance of being convicted of a major offence though he stood charged with a minor one. There is also no provision in the ordinance similar to that in the West Bengal Act which enables the court to proceed with the trial in the absence of the accused. But although the ordinance in certain respects compares favourably with the West Bengal Act, the procedure which it lays down for the Special Judge to follow does differ on material points from the normal procedure prescribed in the Criminal Procedure Code; and as these differences abridge the rights of the accused who are to be tried by the Special Court, and deprive them of certain benefits to which they would otherwise have been entitled under the general law, the ordinance prima facie makes discrimination and the question has got to be answered whether such discrimination brings it in conflict with Article 14 of the Constitution.

32. The nature and scope of the guarantee that is implied in the equal protection clause of our Constitution have been explained and discussed in more than one decision of this court and do not require repetition. It is well settled that a legislature for the purpose of dealing with

the complex problems that arise out of an infinite variety of human relations, cannot but proceed upon some sort of selection or classification of persons upon whom the legislation is to operate. The consequence of such classification would undoubtedly be to differentiate the persons belonging to that class from others, but that by itself would not make the legislation obnoxious to the equal protection clause. Equality prescribed by the Constitution would not be violated if the statute operates equally on all persons who are included in the group, and the classification is not arbitrary or capricious, but bears a reasonable relation to the objective which the legislation has in view. The legislature is given the utmost latitude in making the classification and it is only when there is a palpable abuse of power and the differences made have no rational relation to the objectives of the legislation, that necessity of judicial interference arises.

33. Section 11 of the Saurashtra Ordinance so far as it is material for our present purpose lays down that a Special Court shall try “such offences or classes of offences...or classes of cases as the State Government may...direct”. This part of the section undoubtedly contemplates a classification to be made of offences and cases but no classification appears on the terms of the statute itself which merely gives an authority to the State Government to determine what classes of cases or offences are to be tried by the Special Tribunal. The question arises at the outset as to whether such statute is not on the face of it discriminatory as it commits to the discretion of an administrative body or officials the duty of making selection or classification for purposes of the legislation; and there is a still further question, namely, by what tests, if any, is the propriety of the administrative action to be adjudged and what would be the remedy of the aggrieved person if the classification made by the administrative body is arbitrary or capricious?

35. As has been stated already, Section 11 of the Saurashtra Ordinance is worded in exactly the same manner as Section 5(1) of the West Bengal Special Courts Act; and that part of it, with which we are here concerned, authorises the State Government to direct any classes of offences or cases to be tried by the Special Tribunal. The State Government, therefore, has got to make a classification of cases or offences before it issues its directions to the Special Court. The question is, on what basis is the classification to be made? If it depends entirely upon the pleasure of the State Government to make any classification it likes, without any guiding principle at all, it cannot certainly be a proper classification, which requires that a reasonable relation must exist between the classification and the objective that the legislation has in view. On the other hand, if the legislature indicates a definite objective and the discretion has been vested in the State Government as a means of achieving that object, the law itself, as I have said above, cannot be held to be discriminatory, though the action of the State Government may be condemned if it offends against the equal protection clause, by making an arbitrary selection. Now, the earlier ordinance, to which the present one is a subsequent addition by way of amendment, was passed by the Rajpramukh of Saurashtra on 2<sup>nd</sup> April, 1948. It is described as an ordinance to provide for the security of the State, maintenance of public order and maintenance of supplies and services essential to the community in the State of Saurashtra. The preamble to the ordinance sets out the objective of the ordinance in identical terms. It is to be noted that the integration of several States in Kathiawar which now form the State of Saurashtra, was completed some time in February, 1948. It appears from the affidavit of an officer of the Home Government of the Saurashtra

State that soon after the integration took place, an alarming state of lawlessness prevailed in some of the districts within the State. There were gangs of dacoits operating at different places and their number began to increase gradually. As ordinary law was deemed insufficient to cope with the nefarious activities of those criminal gangs, the Saurashtra Public Safety Measures Ordinance was promulgated by the Rajpramukh on 2<sup>nd</sup> April, 1948. The ordinance, as stated already, provided principally for preventive detention and imposition of collective fines; and it was hoped that armed with these extraordinary powers the State Government would be able to bring the situation under control. These hopes, however, were belied, and the affidavit gives a long list of offences in which murder and nose-cutting figure conspicuously in addition to looting and dacoity, which were committed by the dacoits during the years 1948 and 1949.

In view of this ugly situation in the State, the new Ordinance was passed on 11<sup>th</sup> of November, 1949, and this ordinance provides inter alia for the establishment of Special Courts which are to try offenders under a special procedure. Acting under Section 11 of the Ordinance, the Government issued a notification on 9/11<sup>th</sup> February, 1950, which constituted a Special Court for areas specified in the schedule, and here again the affidavit shows that all these areas are included in the districts of Gohilwad, Madhya Saurashtra and Sorath, where the tribe of marauders principally flourished. The object of passing this new ordinance is identically the same for which the earlier Ordinance was passed, and the preamble to the latter, taken along with the surrounding circumstances, discloses a definite legislative policy which has been sought to be effectuated by the different provisions contained in the enactment. If Special Courts were considered necessary to cope with an abnormal situation, it cannot be said that the vesting of authority in the State Government to select offences for trial by such courts is in any way unreasonable.

36. In the light of the principles stated already, I am unable to hold that Section 11 of the Ordinance insofar as it authorises the State Government to direct classes of offences or cases to be tried by the Special Court offends against the provision of the equal protection clause in our Constitution. If the notification that has been issued by the State Government proceeds on any arbitrary or unreasonable basis, obviously that could be challenged as unconstitutional. It is necessary, therefore, to examine the terms of the notification and the list of offences it has prescribed.

37. The notification, as said above, constitutes a Special Court for the areas mentioned in the Schedule and appoints Mr P.P. Anand as a Special Judge to preside over the Special Court. The offences triable by the Special Court are then set out with reference to the specific sections of the Indian Penal Code. Mr. Chibber attacks the classification of offences made in this list primarily on the ground that while it mentions offences of a particular character, it excludes at the same time other offences of a cognate character in reference to which no difference in treatment is justifiable. It is pointed out that while Section 183 of the Indian Penal Code is mentioned in the list, Sections 184, 186 and 188 which deal with similar offences are excluded. Similarly the list does not mention Section 308 of the Indian Penal Code, though it mentions Section 307. The learned counsel relies in this connection upon the decision of the Supreme Court of America in *Skinner v. Oklahoma* [316 US 535]. In that case the question for consideration related to the constitutionality of a certain statute of Oklahoma which provided for sterilization of certain habitual criminals who were convicted

two or more times in any State of felony involving moral turpitude. The statute applied to persons guilty of larceny, which was a felony, but not to embezzlement, and it was held that the legislation violated the equal protection clause. It is undoubtedly a sound and reasonable proposition that when the nature of two offences is intrinsically the same and they are punishable in the same manner, a person accused of one should not be treated differently from a person accused of the other, because it is an essential principle underlying the equal protection clause that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. At the same time it is to be noted as Douglas, J., observed in the very case that in determining the reach and scope of particular legislation it is not necessary for the legislature to provide abstract symmetry. "It may mark and set apart the classes and types of problems according to the needs and as dictated or suggested by experience."

A too rigid instance therefore on a thing like scientific classification is neither practicable nor desirable. It is true that the notification mentions Section 183 of the Indian Penal Code, though it omits Section 184; but I am unable to hold that the two are identically of the same nature. Section 183 deals with resistance to the taking of property by the lawful authority of public servant; while Section 184 relates to obstructing sale of property offered for sale by authority of public servant. Section 186 on the other hand does not relate to the taking of property at all, but is concerned with obstructing a public servant in the discharge of his public duties. Then again I am not sure that it was incumbent upon the State Government to include Section 308 of the Indian Penal Code in the list simply because they included Section 307. It is true that culpable homicide as well as attempt to murder are specified in the list; but an attempt to commit culpable homicide is certainly a less heinous offence and the State Government might think it proper, having regard to all the facts known to them, that an offence of attempt to commit culpable homicide does not require a special treatment.

38. Be that as it may, I do not think that a meticulous examination of the various offences specified in the list with regard to their nature and punishment is necessary for purposes of this case. The appellant before us was accused of murder punishable under Section 302 of the Indian Penal Code. There is no other offence, I believe, described in the Indian Penal Code, which can be placed on an identical footing as murder. Even culpable homicide not amounting to murder is something less heinous than murder, although it finds a place in the list. In my opinion, the appellant can have no right to complain if he has not been aggrieved in any way by any unjust or arbitrary classification. As he is accused of murder and dacoity and no offences of a similar nature are excluded from the list, I do not think that it is open to him to complain of any violation of equal protection clause in the notification. There are quite a number of offences specified in the notification and they are capable of being grouped under various heads. Simply because certain offences which could have been mentioned along with similar other in a particular group have been omitted therefrom, it cannot be said that the whole list is bad. The question of inequality on the ground of such omission can be raised only by the person who is directed to be tried under the special procedure for a certain offence, whereas for commission of a similar offence not mentioned in the list another person has still the advantages of the ordinary procedure open to him. In my opinion, therefore, the first point raised on behalf of the appellant cannot succeed.

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**Constitutional Validity of Reservations for OBCs in  
Public Employment**

***Indra Sawhney v. Union of India***

AIR 1993 SC 477

**B.P. JEEVAN REDDY, J.** - 659. By an Order made by the President of India, in the year 1979, under Article 340 of the Constitution, a Backward Class Commission was appointed to investigate the conditions of socially and educationally backward classes within the territory of India, which Commission is popularly known as Mandal Commission. The terms of reference of the Commission were:

- “(i) to determine the criteria for defining the socially and educationally backward classes;
- (ii) to recommend steps to be taken for the advancement of the socially and educationally backward classes of citizens so identified;
- (iii) to examine the desirability or otherwise of making provision for the reservation of appointments or posts in favour of such backward classes of citizens which are not adequately represented in public services and posts in connection with the affairs of the Union or of any State; and
- (iv) present to the President a report setting out the facts as found by them and making such recommendations as they think proper.”

667. In para 11.23 the Commission sets out the eleven Indicators/Criteria evolved by it for determining social and educational backwardness. Paras 11.23, 11.24 and 11.25 are relevant and may be set out in full:

“11.23. As a result of the above exercise, the Commission evolved eleven ‘Indicators’ or ‘criteria’ for determining social and educational backwardness. These 11 ‘Indicators’ were grouped under three broad heads, i.e., Social, Educational and Economic. They are:

**A. Social**

- (i) Castes/Classes considered as socially backward by others.
- (ii) Castes/Classes which mainly depend on manual labour for their livelihood.
- (iii) Castes/Classes where at least 25% females and 10% males above the State average get married at an age below 17 years in rural areas and at least 10% females and 5% males do so in urban areas.
- (iv) Castes/Classes where participation of females in work is at least 25% above the State average.

**B. Educational**

- (v) Castes/Classes where the number of children in the age group of 5-15 years who never attended school is at least 25% above the State average.
- (vi) Castes/Classes where the rate of student drop-out in the age group of 5-15 years is at least 25% above the State average.



(vii) Castes/Classes amongst whom the proportion of matriculates is at least 25% below the State average.

**C. Economic**

(viii) Castes/Classes where the average value of family assets is at least 25% below the State average.

(ix) Castes/Classes where the number of families living in Kutcha houses is at least 25% above the State average.

(x) Castes/Classes where the source of drinking water is beyond half a kilometre for more than 50% of the households.

(xi) Castes/Classes where the number of households having taken consumption loan is at least 25% above the State average.

11.24 As the above three groups are not of equal importance for our purpose, separate weightage was given to 'Indicators' in each group. All the Social 'Indicators' were given a weightage of 3 points each. Educational 'Indicators' a weightage of 2 points each and Economic 'Indicators' a weightage of one point each. Economic, in addition to Social and Educational Indicators, were considered important as they directly flowed from social and educational backwardness. This also helped to highlight the fact that socially and educationally backward classes are economically backward also.

11.25 It will be seen that from the values given to each Indicator, the total score adds up to 22. All these 11 Indicators were applied to all the castes covered by the survey for a particular State. As a result of this application, all castes which had a score of 50% (i.e., 11 points) or above were listed as socially and educationally backward and the rest were treated as 'advanced'. (It is a sheer coincidence that the number of indicators and minimum point score for backwardness, both happen to be eleven). Further, in case the number of households covered by the survey for any particular caste were below 20, it was left out of consideration, as the sample was considered too small for any dependable inference."

668. Chapter XII deals with "*Identification of OBCs*". In the first instance, the Commission deals with OBCs among Hindu communities. It says that it applied several tests for determining the SEBCs like stigmas of low-occupation, criminality, nomadism, beggary and untouchability besides inadequate representation in public services. The multiple approach adopted by the Commission is set out in para 12.7 which reads:

"12.7 Thus, the Commission has adopted a multiple approach for the preparation of comprehensive lists of Other Backward Classes for all the States and Union Territories. The main sources examined for the preparation of these lists are:

- (i) Socio-educational field survey;
- (ii) Census Report of 1961 (particularly for the identification of primitive tribes, aboriginal tribes, hill tribes, forest tribes and indigenous tribes);
- (iii) Personal knowledge gained through extensive touring of the country and receipt of voluminous public evidences as described in Chapter X of this Report; and

(iv) Lists of OBCs notified by various State Governments.”

669. The Commission next deals with OBCs among non-Hindu communities. In paragraphs 12.11 to 12.16 the Commission refers to the fact that even among Christian, Muslim and Sikh religions, which do not recognise caste, the caste system is prevailing though without religious sanction. After giving a good deal of thought to several difficulties in the way of identifying OBCs among non-Hindus, the Commission says, it has evolved a rough and ready criteria, viz., (1) all untouchables converted to any non-Hindu religion and (2) such occupational communities which are known by the name of their traditional hereditary occupation and whose Hindu counterparts have been included in the list of Hindu OBCs - ought to be treated as SEBCs. The Commission then sought to work out the estimated population of the OBCs in the country and arrived at the figure of 52%. Paras 12.19 and 12.22 may be set out in full in view of their relevancy:

“12.19 Systematic caste-wise enumeration of population was introduced by the Registrar General of India in 1881 and discontinued in 1931. In view of this, figures of caste-wise population beyond 1931 are not available. But assuming that the inter se rate of growth of population of various castes, communities and religious groups over the last half a century has remained more or less the same, it is possible to work out the percentage that all these groups constitute of the total population of the country. “

“12.22 From the foregoing it will be seen that excluding Scheduled Castes and Scheduled Tribes, Other Backward Classes constitute nearly 52% of the Indian population.

**Percentage Distribution of Indian Population by Caste and Religious Groups**

<b>S. No.</b>	<b>Group Name</b>	<b>Percentage of total population</b>
<b>I.</b>	<b><i>Scheduled Castes and Scheduled Tribes</i></b>	
	A-1 Scheduled Castes	15.05
	A-2 Scheduled Tribes	07.51
	<b>Total of 'A'</b>	<b>22.56</b>
<b>II.</b>	<b><i>Non-Hindu Communities, Religious Groups, etc</i></b>	
	B-1 Muslims (other than STs)	11.19 (0.02) †
	B-2 Christians (other than STs)	02.16 (0.44) †
	B-3 Sikhs (other than SCs & STs)	01.67 (0.22) †
	B-4 Budhists (other than STs)	00.67 (0.03) †
	B-5 Jains	00.47
	<b>Total of 'B'</b>	<b>16.16</b>

<b>III.</b>	<b>Forward Hindu Castes &amp; Communities</b>	05.52
	C-1 Brahmins (including Bhumihars)	03.90
	C-2 Rajputs	02.21
	C-3 Marathas	01.00
	C-4 Jats	01.07
	C-5 Vaishyas-Bania, etc.	01.88
	C-6 Kayasthas	02.00
	C-7 Other forward Hindu castes, groups	<b>Total of 'C' 17.58</b>
	<b>TOTAL OF 'A', 'B' &amp; 'C'</b>	<b>56.30</b>
<b>IV.</b>	<b>Backward Hindu Castes &amp; Communities</b>	43.70 <sup>†</sup>
	D. Remaining Hindu castes/groups which come in the category of "Other Backward Classes"	
<b>V.</b>	<b>Backward Non-Hindu Communities</b>	
	E. 52% of religious groups under Section B may also be treated as OBCs	08.40
	F. The approximate derived population of Other Backward Classes including non-Hindu communities	<b>52% (Aggregate of D and E, rounded)"</b>

<sup>†</sup> Figures in brackets give these population of SC & ST among the non-Hindu communities.

<sup>‡</sup> This is a derived figure.

670. Chapter XIII contains various recommendations including reservations in services. In view of the decisions of the Supreme Court limiting the total reservation to 50%, the Commission recommended 27% reservation in favour of OBCs (in addition to 22.5% already existing in favour of SCs and STs). It recommended several measures for improving the condition of these backward classes. Chapter XIV contains a summary of the report.

**The Office Memorandum dated August 13, 1990**

674. No action was, however, taken on the basis of the Mandal Commission Report until the issuance of the Office Memorandum on August 13, 1990. On that day, the then Prime Minister, Shri V.P. Singh made a statement in the Parliament in which he stated inter alia as follows:

“After all, if you take the strength of the whole of the government employees as a proportion of the population, it will be 1% or 1 1/2. I do not know exactly, it may be less than 1%. We are under no illusion that this 1% of the population, or a fraction of it will resolve the economic problems of the whole section of 52%. No. We consciously want to give them a position in the decision-making of the country, a share in the power structure. We talk about merit. What is the merit of the system itself? That the section which has 52% of the population gets 12.55% in government employment. What is the merit of the system? That in Class I employees of the

government it gets only 4.69%, for 52% of the population in decision-making at the top echelons it is not even one-tenth of the population of the country; in the power structure it is hardly 4.69%. I want to challenge first the merit of the system itself before we come and question on the merit, whether on merit to reject this individual or that. And we want to change the structure basically, consciously, with open eyes. And I know when changing the structures comes, there will be resistance . . . .

What I want to convey is that treating unequals as equals is the greatest injustice.

And, correction of this injustice is very important and that is what I want to convey. Here, the National Front Government's commitment for not only change of government, but also change of the social order, is something of great significance to all of us; it is a matter of great significance. Merely making programmes of economic benefit to various sections of the society will not do . . . .

There is a very big force in the argument to involve the poorest in the power structure. For a lot of time we have acted on behalf of the poor. We represent the poor . . . .

Let us forget that the poor are begging for some crumbs. They have suffered it for thousands of years. Now they are fighting for their honour as a human being . . . .

A point was made by Mahajanji that if there are different lists in different States how will the Union List harmonise? It is so today in the case of the Scheduled Castes and the Scheduled Tribes. That has not caused a problem. On the same pattern, this will be there and there will be no problem."

675. The Office Memorandum dated August 13, 1990 reads as follows:

**OFFICE MEMORANDUM**

**Subject: Recommendations of the Second Backward Classes Commission (Mandal Report) - Reservation for Socially and Educationally Backward Classes in Services under the Government of India.**

In a multiple undulating society like ours, early achievement of the objective of social justice as enshrined in the Constitution is a must. The Second Backward Classes Commission called the Mandal Commission was established by the then Government with this purpose in view, which submitted its report to the Government of India on December 31, 1980.

2. Government have carefully considered the report and the recommendations of the Commission in the present context regarding the benefits to be extended to the socially and educationally backward classes as opined by the Commission and are of the clear view that at the outset certain weightage has to be provided to such classes in the services of the Union and their public undertakings. Accordingly orders are issued as follows:

(i) 27% of the vacancies in civil posts and services under the Government of India shall be reserved for SEBC.

(ii) The aforesaid reservation shall apply to vacancies to be filled by direct recruitment. Detailed instructions relating to the procedures to be followed for enforcing reservation will be issued separately.

(iii) Candidates belonging to SEBC recruited on the basis of merit in an open competition on the same standards prescribed for the general candidates shall not be adjusted against the reservation quota of 27%.

(iv) The SEBC would comprise in the first phase the castes and communities which are common to both the lists in the report of the Mandal Commission and the State Governments' lists. A list of such castes/communities is being issued separately.

(v) The aforesaid reservation shall take effect from 7-8-1990. However, this will not apply to vacancies where the recruitment process has already been initiated prior to the issue of these orders.

3. Similar instructions in respect of public sector undertakings and financial institutions including public sector banks will be issued by the Department of Public Enterprises and Ministry of Finance respectively.

Sd/- (Smt Krishna Singh)  
Joint Secretary to the Govt. of India"

676. Writ petitions were filed in this Court questioning the said Memorandum along with applications for staying the operation of the Memorandum. It was stayed by this Court.

677. After the change of the government at the Centre following the general election held in the first-half of 1991, another Office Memorandum was issued on September 25, 1991 modifying the earlier Memorandum dated August 13, 1990. The later Memorandum reads as follows:

**The Office Memorandum dated September 25, 1991**

**Subject: Recommendation of the Second Backward Classes Commission (Mandal Report) - Reservation for Socially and Educationally Backward Classes in Services under the Government of India.**

The undersigned is directed to invite the attention to O.M. of even number dated the 13th August 1990, on the above-mentioned subject and to say that in order to enable the poorer sections of the SEBCs to receive the benefits of reservation on a preferential basis and to provide reservation for other economically backward sections of the people not covered by any of the existing schemes of reservation, Government have decided to amend the said memorandum with immediate effect as follows:

(i) Within the 27% of the vacancies in civil posts and services under the Government of India reserved for SEBCs, preference shall be given to candidates belonging to the poorer sections of the SEBCs. In case sufficient number of such candidates are not available, unfilled vacancies shall be filled by the other SEBC candidates.

(ii) 10% of the vacancies in civil posts and services under the Government of India shall be reserved for other economically backward sections of the people who are not covered by any of the existing schemes of reservation.

(iii) The criteria for determining the poorer sections of the SEBCs or the other economically backward sections of the people who are not covered by any of the existing schemes of reservations are being issued separately.

The O.M. of even number dated the 13th August 1990, shall be deemed to have been amended to the extent specified above.

Sd/- (A.K. Harit)  
Dy. Secretary to the Government of India”

678. Till now, the Central Government has not evolved the economic criteria as contemplated by the later Memorandum, though the hearing of these writ petitions was adjourned on more than one occasion for the purpose. Some of the writ petitions have meanwhile been amended challenging the later Memorandum as well. Let us notice at this stage what do the two memorandums say, read together. The *first* provision made is: 27% of vacancies to be filled up by direct recruitment in civil posts and services under the Government of India are reserved for backward classes. Among the members of the backward classes preference has to be given to candidates belonging to the poorer sections. Only in case sufficient number of such candidates are not available, will the unfilled vacancies be filled by other backward class candidates. The *second* provision made is: Backward class candidates recruited on the basis of merit in open competition along with general candidates shall not be adjusted against the quota of 27% reserved for them. *Thirdly*, it is provided that backward classes shall mean those castes and communities which are common to the list in the report of the Mandal Commission and the respective State Government’s list. It may be remembered that Mandal Commission has prepared the list of backward classes State-wise. *Lastly*, it is provided that 10% of the vacancies shall be reserved for other economically backward sections of the people who are not covered by any of the existing schemes of reservations. As stated above, the criteria for determining the poorer sections among the backward classes or for determining the other economically backward sections among the non-reserved category has so far not been evolved. Though the first Memorandum stated that the orders made therein shall take effect from August 7, 1990, they were not in fact acted upon on account of the orders made by this Court.

#### Issues for Consideration

682. [The court re-framed the questions posed on behalf of the parties]. The re-framed questions are:

1. (a) Whether the ‘provision’ contemplated by Article 16(4) must necessarily be made by the legislative wing of the State?

(b) If the answer to clause (a) is in the negative, whether an executive order making such a provision is enforceable without incorporating it into a rule made under the proviso to Article 309?

2. (a) Whether clause (4) of Article 16 is an exception to clause (1) of Article 16?

(b) Whether clause (4) of Article 16 is exhaustive of the special provisions that can be made in favour of ‘backward class of citizens’? Whether it is exhaustive of the special provisions that can be made in favour of all sections, classes or groups?

(c) Whether reservations can be made under clause (1) of Article 16 or whether it permits only extending of preferences/concessions?

3. (a) What does the expression ‘backward class of citizens’ in Article 16(4) means?

(b) Whether backward classes can be identified on the basis and with reference to caste alone?

(c) Whether a class, to be designated as a backward class, should be situated similarly to the SCs/STs?

(d) Whether the 'means' test can be applied in the course of identification of backward classes? And if the answer is yes, whether providing such a test is obligatory?

4. (a) Whether the backward classes can be identified only and exclusively with references to economic criteria?

(b) Whether a criteria like occupation-cum-income without reference to caste altogether, can be evolved for identifying the backward classes?

5. Whether the backward classes can be further categorised into backward and more backward categories?

6. To what extent can the reservation be made?

(a) Whether the 50% rule enunciated in *Balaji* is a binding rule or only a rule of caution or rule of prudence?

(b) Whether the 50% rule, if any, is confined to reservations made under clause (4) of Article 16 or whether it takes in all types of reservations that can be provided under Article 16?

(c) Further while applying 50% rule, if any, whether an year should be taken as a unit or whether the total strength of the cadre should be looked to?

(d) Whether *Devadasan* was correctly decided?

7. Whether Article 16 permits reservations being provided in the matter of promotions?

8. Whether reservations are anti-meritarian? To what extent are Articles 335, 38(2) and 46 of the Constitution relevant in the matter of construing Article 16?

9. Whether the extent of judicial review is restricted with regard to the identification of Backward Classes and the percentage of reservations made for such classes to a demonstrably perverse identification or a demonstrably unreasonable percentage?

10. Whether the distinction made in the second Memorandum between 'poorer sections' of the backward classes and others permissible under Article 16?

11. Whether the reservation of 10% of the posts in favour of 'other economically backward sections of the people who are not covered by any of the existing schemes of the reservations' made by the Office Memorandum dated September 25, 1991 permissible under Article 16?

#### *Decisions of this Court on Articles 16 and 15*

695. Soon after the enforcement of the Constitution two cases reached this Court from the State of Madras - one under Article 15 and the other under Article 16. Both the cases were decided on the same date and by the same Bench. The one arising under Article 15 is *State of Madras v. Champakam Dorairajan* [AIR 1951 SC 226] and the other arising under Article

16 is *Venkataramana v. State of Madras*. By virtue of certain orders issued prior to coming into force of the Constitution, - popularly known as 'Communal G.O.' - seats in the Medical and Engineering Colleges in the State of Madras were apportioned in the following manner: Non-Brahmin (Hindus) - 6, Backward Hindus - 2, Brahmin - 2, Harijan - 2, Anglo-Indians and Indian Christians - 1, Muslims - 1. Even after the advent of the Constitution, the G.O. was being acted upon which was challenged by Smt Champakam as violative of the fundamental rights guaranteed to her by Article 15(1) and 29(2) of the Constitution of India. A full Bench of Madras High Court declared the said G.O. as void and unenforceable with the advent of the Constitution. The State of Madras brought the matter in appeal to this Court. A Special Bench of seven Judges heard the matter and came to the unanimous conclusion that the allocation of seats in the manner aforesaid is violative of Articles 15(1) and 29(2) inasmuch as the refusal to admit the respondent (writ petitioner) notwithstanding her higher marks, was based only on the ground of caste. The State of Madras sought to sustain the G.O. with reference to Article 46 of the Constitution. Indeed the argument was that Article 46 overrides Articles 29(2). This argument was rejected. The Court pointed out that while in the case of employment under the State, clause (4) of Article 16 provides for reservations in favour of backward class of citizens, no such provision was made in Article 15.

696. In the matter of appointment to public services too, a similar Communal G.O. was in force in the State of Madras since prior to the Constitution. In December, 1949, the Madras Public Service Commission invited applications for 83 posts of District Munsifs, specifying at the same time that the selection of the candidates would be made from the various castes, religions and communities as specified in the Communal G.O. The 83 vacancies were distributed in the following manner: Harijans - 19, Muslims - 5, Christians - 6, Backward Hindus - 10, Non-Brahmin (Hindus) - 32 and Brahmins - 11. The petitioner Venkataraman (it was a petition under Article 32 of the Constitution) applied for and appeared at the interview and the admitted position was that if the provisions of the Communal G.O. were to be disregarded, he would have been selected. Because of the G.O., he was not selected (he belonged to Brahmin community). Whereupon he approached this Court. S.R. Das, J speaking for the Special Bench referred to Article 16 and in particular to clause (4) thereof and observed:

“Reservation of posts in favour of any backward class of citizens cannot, therefore, be regarded as unconstitutional.”

He proceeded to hold:

“The Communal G.O. itself makes an express reservation of seats for Harijans and Backward Hindus. The other categories, namely, Muslims, Christians, non-Brahmin Hindus and Brahmins must be taken to have been treated as other than Harijans and Backward Hindus. Our attention was drawn to a schedule of Backward Classes set out in Sch. III to Part I of the Madras Provincial and Subordinate Service Rules. It was, therefore, argued that Backward Hindus would mean Hindus of any of the communities mentioned in that Schedule. It is, in the circumstances, impossible to say that classes of people other than Harijans and Backward Hindus can be called Backward Classes. As regards the posts reserved for Harijans and Backward Hindus it may be said that the petitioner who does not belong to those two classes is regarded



as ineligible for those reserved posts not on the ground of religion, race, caste etc. but because of the necessity for making a provision for reservation of such posts in favour of the backward class of citizens, but the ineligibility of the petitioner for any of the posts reserved for communities other than Harijans and Backward Hindus cannot but be regarded as founded on the ground only of his being a Brahmin. For instance, the petitioner may be far better qualified than a Muslim or a Christian or a non-Brahmin candidate and if all the posts reserved for those communities were open to him, he would be eligible for appointment, as is conceded by the learned Advocate-General of Madras, but, nevertheless, he cannot expect to get any of those posts reserved for those different categories only because he happens to be a Brahmin. His ineligibility for any of the posts reserved for the other communities, although he may have far better qualifications than those possessed by members falling within those categories, is brought about only because he is a Brahmin and does not belong to any of those categories. This ineligibility created by the Communal G.O. does not appear to us to be sanctioned by clause (4) of Article 16 and it is an infringement of the fundamental right guaranteed to the petitioner as an individual citizen under Article 16(1) and (2). The Communal G.O., in our opinion, is repugnant to the provisions of Article 16 and is as such void and illegal.”

697. Shri Ram Jethmalani, the learned counsel appearing for the respondent State of Bihar placed strong reliance on the above passage. He placed before us an extract of the Schedule of the backward classes appended to the Madras Provincial and Subordinate Services Rule, 1942. He pointed out that clause (3)(a) in Rule 2 defined the expression backward classes to mean “the communities mentioned in Schedule III to this part”, and that Schedule III is exclusively based upon caste. The Schedule describes the communities mentioned therein under the heading “Race, Tribe or Caste”. It is pointed out that when the said Schedule was substituted in 1947, the basis of classification still remained the caste, though the heading “Race, Tribe or Caste” was removed. Mr Jethmalani points out that the Special Bench took note of the fact that Schedule III was nothing but a collection of certain ‘communities’, notified as backward classes and yet upheld the reservation in their favour. According to him, the decision in *Venkataramana* clearly supports the identification of backward classes on the basis of caste. The Communal G.O. was struck down, he submits, only in so far as it apportioned the remaining vacancies between sections other than Harijans and backward classes.

698. Soon after the said two decisions were rendered Parliament intervened and in exercise of its constituent power, amended Article 15 by inserting clause (4), which reads:

“Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes.”

699. It is worthy of notice that the Parliament, which enacted the First Amendment to the Constitution, was in fact the very same Constituent Assembly which had framed the Constitution. The speech of Dr Ambedkar on the occasion is again instructive. He said:

“Then with regard to Article 16, clause (4), my submission is this that it is really impossible to make any reservation which would not result in excluding somebody who has a caste. I think it has to be borne in mind and it is one of the fundamental principles which I believe is stated in *Mulla's edition* on the very first page that there is no Hindu who has not a caste. Every Hindu has a caste - he is either a Brahmin or a Mahratta or a Kundby or a Kumbhar or a carpenter. There is no Hindu - that is the fundamental proposition - who has not a caste. Consequently, if you make a reservation in favour of what are called backward classes which are nothing else but a collection of certain castes, those who are excluded are persons who belong to certain castes. Therefore, in the circumstances of this country, it is impossible to avoid reservation without excluding some people who have got a caste.”

700. After the enactment of the First Amendment the first case that came up before this Court is *Balaji v. State of Mysore* [AIR 1963 SC 649]. (In the year 1961, this Court decided the *General Manager, Southern Railway v. Rangachari* AIR 1962 SC 36, but that related to reservations in favour of the Scheduled Castes and Scheduled Tribes in the matter of promotion in the Railways. *Rangachari* will be referred to at an appropriate stage later.) In the State of Karnataka, reservations were in force since a few decades prior to the advent of the Constitution and were being continued even thereafter. On July 26, 1958 the State of Mysore issued an order under Article 15(4) of the Constitution declaring all the communities excepting the Brahmin community as socially and educationally backward and reserving a total of 75% seats in educational institutions in favour of SEBCs and SCs/STs. Such orders were being issued every year, with minor variation in the percentage of reservations. On July 13, 1962, a similar order was issued wherein 68% of the seats in all Engineering and Medical Colleges and Technical Institutions in the State were reserved in the favour of the SEBCs, SCs and STs. SEBCs were again divided into two categories - backward classes and more backward classes. The validity of this order was questioned under Article 32 of the Constitution. While striking down the said order this Court enunciated the following principles:

(1) Clause (4) of Article 15 is a proviso or an exception to clause (1) of Article 15 and to clause (2) of Article 29;

(2) For the purpose of Article 15(4), backwardness must be both social and educational. Though caste in relation to Hindus may be a relevant factor to consider in determining the social backwardness of a class of citizens, it cannot be made the sole and dominant test. Christians, Jains and Muslims do not believe in caste system; the test of caste cannot be applied to them. Inasmuch as identification of all backward classes under the impugned order has been made solely on the basis of caste, it is bad.

(3) The reservation made under clause (4) of Article 15 should be reasonable. It should not be such as to defeat or nullify the main rule of equality contained in clause (1). While it is not possible to predicate the exact permissible percentage of reservations, it can be stated in a general and broad way that they should be less than 50%.

(4) A provision under Article 15(4) need not be in the form of legislation; it can be made by an executive order.

(5) The further categorisation of backward classes into backward and more backward is not warranted by Article 15(4).

701. It must be remembered that *Balaji* was a decision rendered under and with reference to Article 15 though it contains certain observations with respect to Article 16 as well.

702. Soon after the decision in *Balaji* this Court was confronted with a case arising under Article 16 - *Devadasan v. Union of India* [AIR 1964 SC 179]. This was also a petition under Article 32 of the Constitution. It related to the validity of the 'carry-forward' rule obtaining in Central Secretariat Service. The reservation in favour of Scheduled Castes was twelve and half per cent while the reservation in favour of Scheduled Tribes was five per cent. The 'carry-forward' rule considered in the said decision was in the following terms:

"If a sufficient number of candidates considered suitable by the recruiting authorities, are not available from the communities for whom reservations are made in a particular year, the unfilled vacancies should be treated as unreserved and filled by the best available candidates. The number of reserved vacancies, thus, treated as unreserved will be added as an additional quota to the number that would be reserved in the following year in the normal course; and to the extent to which approved candidates are not available in that year against this additional quota, a corresponding addition should be made to the number of reserved vacancies in the second following year."

Because sufficient number of SC/ST candidates were not available during the earlier years the unfilled vacancies meant for them were carried forward as contemplated by the said rule and filled up in the third year - that is in the year 1961. Out of 45 appointments made, 29 went to Scheduled Castes and Scheduled Tribes. In other words, the extent of reservation in the third year came to 65%. The rule was declared unconstitutional by the Constitution Bench, with Subba Rao, J dissenting. The majority held that the carry-forward rule which resulted in more than 50% of the vacancies being reserved in a particular year, is bad. The principle enunciated in *Balaji* regarding 50% was followed. Subba Rao, J in his dissenting opinion, however, upheld the said rule. The learned Judge observed:

"The expression, 'nothing in this article' is a legislative device to express its intention in a most emphatic way that the power conferred thereunder is not limited in any way by the main provision but falls outside it. It has not really carved out an exception, but has preserved a power untrammelled by the other provisions of the Article."

The learned Judge opined that once a class is a backward class, the question whether it is adequately represented or not is left to the subjective satisfaction of the State and is not a matter for this Court to prescribe.

703. We must, at this stage, clarify that a 'carry-forward' rule may be in a form different than the one considered in *Devadasan*. The rule may provide that the vacancies reserved for Scheduled Castes or Scheduled Tribes shall not be filled up by general (open competition) candidates in case of non-availability of SC/ST candidates and that such vacancies shall be carried forward.

704. In the year 1964 another case from Mysore arose, again under Article 15. The Mysore Government had by an order defined backward classes on the basis of occupation and income, unrelated to caste. Thirty per cent of seats in professional and technical institutions were reserved for them in addition to eighteen per cent in favour of SCs and STs. One of the arguments urged was that the identification done without taking the caste into consideration is impermissible. The majority speaking through Subba Rao, J, held that the identification or classification of backward classes on the basis of occupation-cum-income, without reference to caste, is not bad and does not offend Article 15(4).

705. During the years 1968 to 1971, this Court had to consider the validity of identification of backward classes made by Madras and Andhra Pradesh Governments. **P. Rajendran v. State of Madras** [AIR 1968 SC 1012] related to specification of socially and educationally backward classes with reference to castes. The question was whether such an identification infringes Article 15. Wanchoo, CJ, speaking for the Constitution Bench dealt with the contention in the following words:

“The contention is that the list of socially and educationally backward classes for whom reservation is made under Rule 5 is nothing but a list of certain castes. Therefore, reservation in favour of certain castes based only on caste considerations violates Article 15(1), which prohibits discrimination on the ground of caste only. Now if the reservation in question had been based only on caste and had not taken into account the social and educational backwardness of the caste in question, it would be violative of Article 15(1). But it must not be forgotten that a caste is also a class of citizens and if the caste as a whole is socially and educationally backward reservation can be made in favour of such a caste on the ground that it is a socially and educationally backward class of citizens within the meaning of Article 15(4) . . . . It is true that in the present cases the list of socially and educationally backward classes has been specified by caste. But that does not necessarily mean that caste was the sole consideration and that persons belonging to these castes are also not a class of socially and educationally backward citizens . . . . As it was found that members of these castes as a whole were educationally and socially backward, the list which had been coming on from as far back as 1906 was finally adopted for purposes of Article 15(4) ....

In view however of the explanation given by the State of Madras, which has not been controverted by any rejoinder, it must be accepted that though the list shows certain castes, the members of those castes are really classes of educationally and socially backward citizens. No attempt was made on behalf of the petitioners/appellant to show that any caste mentioned in this list was not educationally and socially backward. In this state of the pleadings, we must come to the conclusion that though the list is prepared caste-wise, the castes included therein are as a whole educationally and socially backward and therefore the list is not violative of Article 15. The challenge to Rule 5 must therefore fail.”

706. The shift in approach and emphasis is obvious. The Court now held that a caste is a class of citizens and that if a caste as a whole is socially and educationally backward, reservation can be made in favour of such a caste on the ground that it is a socially and

educationally backward class of citizens within the meaning of Article 15(4). Moreover the burden of proving that the specification/identification was bad, was placed upon the petitioners. In case of failure to discharge that burden, the identification made by the State was upheld. The identification made on the basis of caste was upheld inasmuch as the petitioner failed to prove that any caste mentioned in the list was not socially and educationally backward.

713. *Thomas* marks the beginning of a new thinking on Article 16, though the seed of this thought is to be found in the dissenting opinion of Subba Rao, J in *Devadasan*. The Kerala Government had, by amending Kerala State and Subordinate Service Rules empowered the Government to exempt, by order, for a specified period, any member or members belonging to Scheduled Castes or Scheduled Tribes and already in service, from passing the test which an employee had to pass as a precondition for promotion to next higher post. Exercising the said power, the Government of Kerala issued a notification granting “temporary exemption to members already in service belonging to any of the Scheduled Castes or Scheduled Tribes from passing all tests (unified, special or departmental test) for a period of two years”. On the basis of the said exemption, a large number of employees belonging to Scheduled Castes and Scheduled Tribes, who had been stagnating in their respective posts for want of passing the departmental tests, were promoted. They were now required to pass the tests within the period of exemption. Out of 51 vacancies which arose in the category of Upper Division Clerks in the year 1972, 34 were filled up by members of Scheduled Castes leaving only 17 for others. This was questioned by Thomas, a member belonging to non-reserved category. His grievance was: but for the said concession/exemption given to members of Scheduled Castes/Scheduled Tribes he would have been promoted to one of those posts in view of his passing the relevant tests. He contended that Article 16(4) permits only reservations in favour of backward classes but not such an exemption. This argument was accepted by the Kerala High Court. It also upheld the further contention that inasmuch as more than 50% vacancies in the year had gone to the members of Scheduled Castes as a result of the said exemption, it is bad for violating the 50% rule in *Balaji*. The State of Kerala carried the matter in appeal to this Court which was allowed by a majority of 5:2. All the seven Judges wrote separate opinions. The headnote to the decision in Supreme Court Reports succinctly sets out the principles enunciated in each of the judgments. We do not wish to burden this judgment by reproducing them here. We would rest content with delineating the broad features emerging from these opinions. Ray, CJ held that Article 16(1), being a facet of Article 14, permits reasonable classification. Article 16(4) clarifies and explains that classification on the basis of backwardness. Classification of Scheduled Castes does not fall within the mischief of Article 16(2) since Scheduled Castes historically oppressed and backward, are not castes. The concession granted to them is permissible under and legitimate for the purposes of Article 16(1). The rule giving preference to an un-represented or under-represented backward community does not contravene Article 14, 16(1) or 16(2). Any doubt on this score is removed by Article 16(4). He opined further that for determining whether a reservation is excessive or not one must have to look to the total number of posts in a given unit of department, as the case may be. Mathew, J agreed that Article 16(4) is not an exception to Article 16(1), that Article 16(1) permits reasonable classification and that Scheduled Castes are not ‘castes’ within the meaning of Article 16(2). He espoused the theory of ‘proportional

equality' evolved in certain American decisions. He does not refer to the decisions in *Balaji* or *Devadasan* in his opinion nor does he express any opinion on the extent of permissible reservation. Beg, J adopted a different reasoning. According to him, the rule and the orders issued thereunder was "a kind of reservation" falling under Article 16(4) itself. Krishna Iyer, J was also of the opinion that Article 16(1) being a facet of Article 16 permits reasonable classification, that Article 16(4) is not an exception but an emphatic statement of what is inherent in Article 16(1) and further that Scheduled Castes are not 'castes' within the meaning of Article 16(2) but a collection of castes, races and groups. Article 16(4) is one mode of reconciling the claims of backward people and the opportunity for free competition the forward sections are ordinarily entitled to, held the learned Judge. He approved the dissenting opinion of Subba Rao, J. in *Devadasan*. Fazal Ali, J. too adopted a similar approach. The learned Judge pointed out:

"[I]f we read Article 16(4) as an exception to Article 16(1) then the inescapable conclusion would be that Article 16(1) does not permit any classification at all because an express provision has been made for this in clause (4). This is, however, contrary to the basic concept of equality contained in Article 14 which implicitly permits classification in any form provided certain conditions are fulfilled. Furthermore, if no classification can be made under Article 16(1) except reservation contained in clause (4) then the mandate contained in Article 335 would be defeated."

He held that the rule and the orders impugned are referable to and sustainable under Article 16. The learned Judge went further and held that the rule of 50% evolved in *Balaji* is a mere rule of caution and was not meant to be exhaustive of all categories. He expressed the opinion that the extent of reservation depends upon the proportion of the backward classes to the total population and their representation in public services. He expressed a doubt as to the correctness of the majority view in *Devadasan*. Among the minority Khanna, J. preferred the view taken in *Balaji* and other cases to the effect that Article 16(4) is an exception to Article 16(1). He opined that no preference can be provided in favour of backward classes outside clause (4). A.C. Gupta, J concurred with this view.

714. The last decision of this Court on this subject is in *K.C. Vasanth Kumar v. State of Karnataka* [1985 Supp SCC 714]. The five Judges constituting the Bench wrote separate opinions, each treading a path of his own. Chandrachud, C.J., opined that the present reservations should continue for a further period of 15 years making a total of 50 years from the date of commencement of the Constitution. He added that the means-test must be applied to ensure that the benefit of reservations actually reaches the deserving sections. Desai, J was of the opinion that the only basis upon which backward classes should be identified is the economic one and that a time has come to discard all other bases. Chinnappa Reddy, J. was of the view that identification of backward classes on the basis of caste cannot be taken exception to for the reason that in the Indian context caste is a class. Caste, the learned Judge said, is the primary index of social backwardness, so that social backwardness is often readily identifiable with reference to a person's caste. If it is found in the case of a given caste that a few members have progressed far enough so as to compare favourably with the forward classes in social, economic and educational fields, an upper income ceiling can perhaps be

prescribed to ensure that the benefit of reservation reaches the really deserving. He opined that identification of SEBCs in the Indian milieu is a difficult and complex exercise, which does not admit of any rigid or universal tests. It is not a matter for the courts. The 'backward class of citizens', he held, are the very same SEBCs referred to in Article 15(4). The learned Judge condemned the argument that reservations are likely to lead to deterioration in efficiency or that they are anti-meritarian. He disagreed with the view that for being identified as SEBCs, the relevant groups should be comparable to SCs/STs in social and educational backwardness. The learned Judge agreed with the opinion of Fazal Ali, J. in *Thomas* [AIR 1976 SC 490] that the rule of 50% in *Balaji* is a rule of caution and not an inflexible rule. At any rate, he said, it is not for the court to lay down any such hard and fast rule. A.P. Sen, J. was of the opinion that the predominant and only factor for making special provision under Article 15(4) or 16(4) should be poverty and that caste should be used only for the purpose of identification of groups comparable to Scheduled Castes/Scheduled Tribes. The reservation should continue only till such time as the backward classes attain a state of enlightenment. Venkataramiah, J. agreed with Chinnappa Reddy, J. that identification of backward classes can be made on the basis of caste. He cited the Constituent Assembly and Parliamentary debates in support of this view. According to the learned Judge, equality of opportunity revolves around two dominant principles viz., (i) the traditional value of equality of opportunity and (ii) the newly appreciated - though not newly conceived - idea of equality of results. He too did not agree with the argument of 'merit'. Application of the principle of individual merit, unmitigated by other consideration, may quite often lead to inhuman results, he pointed out. He supported the imposition of the 'means' test but disagreed with the view that the extent of reservations can exceed 50%. Periodic review of this list of SEBCs and extension of other facilities to them was stressed.

733. At this stage, we wish to clarify one particular aspect. Article 16(1) is a facet of Article 14. Just as Article 14 permits reasonable classification, so does Article 16(1). A classification may involve reservation of seats or vacancies, as the case may be. In other words, under clause (1) of Article 16, appointments and/or posts can be reserved in favour of a class.

#### **(Questions 1 and 2)**

#### **Question 1 (a):: Whether the 'provision' in Article 16(4) must necessarily be made by the Parliament/Legislature?**

735. Shri K.K. Venugopal submits that the "provision" contemplated by clause (4) of Article 16 can be made only by and should necessarily be made by the legislative wing of the State and not by the executive or any other authority. He disputes the correctness of the holding in *Balaji* negating an identical contention. He submits that since the provision made under Article 16(4) affects the fundamental rights of other citizens, such a provision can be made only by the Parliament/Legislature. He submits that if the power of making the "provision" is given to the executive, it will give room for any amount of abuse. According to the learned counsel, the political executive, owing to the degeneration of the electoral process, normally acts out of political and electoral compulsions, for which reason it may not act fairly and independently. If, on the other hand, the provision is to be made by the legislative wing of the State, it will not only provide an opportunity for debate and discussion in the legislature

where several shades of opinion are represented but a balanced and unbiased decision free from the allurements of electoral gains is more likely to emerge from such a deliberating body. Shri Venugopal cites the example of Tamil Nadu where, according to him, before every general election a few communities are added to the list of backward classes, only with a view to winning them over to the ruling party. The use of the expression 'provision' in clause (4) of Article 16 appears to us to be not without design. According to the definition of 'State' in Article 12, it includes not merely the Government and Parliament of India and Government and Legislature of each of the States but all local authorities and other authorities within the territory of India or under the control of the Government of India which means that such a measure of reservation can be provided not only in the matter of services under the Central and State Governments but also in the services of local and other authorities referred to in Article 12. The expression 'Local Authority' is defined in Section 3(31) of the General Clauses Act. It takes in all municipalities, Panchayats and other similar bodies. The expression 'other authorities' has received extensive attention from the court. It includes all statutory authorities and other agencies and instrumentalities of the State Government/Central Government. Now, would it be reasonable, possible or practicable to say that the Parliament or the Legislature of the State should provide for reservation of posts/appointments in the services of all such bodies besides providing for in respect of services under the Central/State Government? This aspect would become clearer if we notice the definition of "Law" in Article 13(3)(a). It reads:

"13(3) In this article, unless the context otherwise requires,—

(a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law; ..."

736. The words "order", "bye-law", "rule" and "regulation" in this definition are significant. Reading the definition of "State" in Article 12 and of "law" in Article 13(3)(a), it becomes clear that a measure of the nature contemplated by Article 16(4) can be provided not only by the Parliament/Legislature but also by the executive in respect of Central/State services and by the local bodies and "other authorities" contemplated by Article 12, in respect of their respective services. Some of the local bodies and some of the statutory corporations like universities may have their own legislative wings. In such a situation, it would be unreasonable and inappropriate to insist that reservation in all these services should be provided by Parliament/Legislature. The situation and circumstances of each of these bodies may vary. The rule regarding reservation has to be framed to suit the particular situations. All this cannot reasonably be done by Parliament/Legislature.

737. Even textually speaking, the contention cannot be accepted. The very use of the word "provision" in Article 16(4) is significant. Whereas clauses (3) and (5) of Article 16 - and clauses (2) to (6) of Article 19 - use the word "law", Article 16(4) uses the word "provision". Regulation of service conditions by orders and rules made by the executive was a well-known feature at the time of the framing of the Constitution. Probably for this reason, a deliberate departure has been made in the case of clause (4). Accordingly, we hold, agreeing with *Balaji*, that the "provision" contemplated by Article 16(4) can also be made by the executive wing of the Union or of the State, as the case may be, as has been done in the present case. With respect to the argument of abuse of power by the political executive, we



may say that there is adequate safeguard against misuse by the political executive of the power under Article 16(4) in the provision itself. Any determination of backwardness is not a subjective exercise nor a matter of subjective satisfaction. As held herein - as also by earlier judgments - the exercise is an objective one. Certain objective social and other criteria have to be satisfied before any group or class of citizens could be treated as backward. If the executive includes, for collateral reasons, groups or classes not satisfying the relevant criteria, it would be a clear case of fraud on power.

**Question 1(b) : Whether an executive order making a 'provision' under Article 16(4) is enforceable forthwith?**

738. A question is raised whether an executive order made in terms of Article 16(4) is effective and enforceable by itself or whether it is necessary that the said "provision" is enacted into a law made by the appropriate legislature under Article 309 or is incorporated into and issued as a Rule by the President/Governor under the proviso to Article 309 for it to become enforceable? Mr Ram Jethmalani submits that Article 16(4) is merely declaratory in nature, that it is an enabling provision and that it is not a source of power by itself. He submits that unless made into a law by the appropriate legislature or issued as a rule in terms of the proviso to Article 309, the "provision" so made by the executive does not become enforceable. At the same time, he submits that the impugned Memorandums must be deemed to be and must be treated as Rules made and issued under the proviso to Article 309 of the Constitution. We find it difficult to agree with Shri Jethmalani. Once we hold that a provision under Article 16(4) can be made by the executive, it must necessarily follow that such a provision is effective the moment it is made.

739. Be that as it may, there is yet another reason, why we cannot agree that the impugned Memorandums are not effective and enforceable the moment they are issued. It is well settled by the decisions of this Court that the appropriate government is empowered to prescribe the conditions of service of its employees by an executive order in the absence of the rules made under the proviso to Article 309. It is further held by this Court that even where Rules under the proviso to Article 309 are made, the Government can issue orders/instructions with respect to matters upon which the Rules are silent.

740. It would, therefore, follow that until a law is made or rules are issued under Article 309 with respect to reservation in favour of backward classes, it would always be open to the Executive Government to provide for reservation of appointments/posts in favour of Backward Classes by an executive order. We cannot also agree with Shri Jethmalani that the impugned Memorandums should be treated as Rules made under the proviso to Article 309. There is nothing in them suggesting even distantly that they were issued under the proviso to Article 309. They were never intended to be so, nor is that the stand of the Union Government before us. They are executive orders issued under Article 73 of the Constitution read with clause (4) of Article 16. The mere omission of a recital "in the name and by order of the President of India" does not affect the validity or enforceability of the orders, as held by this Court repeatedly.

**Question 2(a) : Whether clause (4) of Article 16 is an exception to clause (1)?**

741. In *Balaji* it was held - “there is no doubt that Article 15(4) has to be read as a proviso or an exception to Articles 15(1) and 29(2)”. It was observed that Article 15(4) was inserted by the First Amendment in the light of the decision in *Champakam*, with a view to remove the defect pointed out by this court namely, the absence of a provision in Article 15 corresponding to clause (4) of Article 16. Following *Balaji* it was held by another Constitution Bench (by majority) in *Devadasan* - “further this Court has already held that clause (4) of Article 16 is by way of a proviso or an exception to clause (1)”. Subba Rao, J, however, opined in his dissenting opinion that Article 16(4) is not an exception to Article 16(1) but that it is only an emphatic way of stating the principle inherent in the main provision itself. Be that as it may, since the decision in *Devadasan*, it was assumed by this Court that Article 16(4) is an exception to Article 16(1). This view, however, received a severe setback from the majority decision in *State of Kerala v. N.M. Thomas*. Though the minority (H.R. Khanna and A.C. Gupta, JJ) stuck to the view that Article 16(4) is an exception, the majority (Ray, CJ, Mathew, Krishna Iyer and Fazal Ali, JJ) held that Article 16(4) is not an exception to Article 16(1) but that it was merely an emphatic way of stating a principle implicit in Article 16(1). (Beg, J took a slightly different view which it is not necessary to mention here.) The said four learned Judges - whose views have been referred to in para 713 - held that Article 16(1) being a facet of the doctrine of equality enshrined in Article 14 permits reasonable classification just as Article 14 does. In our respectful opinion, the view taken by the majority in *Thomas* is the correct one. We too believe that Article 16(1) does permit reasonable classification for ensuring attainment of the equality of opportunity assured by it. For assuring equality of opportunity, it may well be necessary in certain situations to treat unequally situated persons unequally. Not doing so, would perpetuate and accentuate inequality. Article 16(4) is an instance of such classification, put in to place the matter beyond controversy. The “backward class of citizens” are classified as a separate category deserving a special treatment in the nature of reservation of appointments/posts in the services of the State. Accordingly, we hold that clause (4) of Article 16 is not exception to clause (1) of Article 16. It is an instance of classification implicit in and permitted by clause (1). The speech of Dr Ambedkar during the debate on draft Article 10(3) [corresponding to Article 16(4)] in the Constituent Assembly shows that a substantial number of members of the Constituent Assembly insisted upon a “provision (being) made for the entry of certain communities which have so far been outside the administration”, and that draft clause (3) was put in in recognition and acceptance of the said demand. It is a provision which must be read along with and in harmony with clause (1). Indeed, even without clause (4), it would have been permissible for the State to have evolved such a classification and made a provision for reservation of appointments/posts in their favour. Clause (4) merely puts the matter beyond any doubt in specific terms.

742. Regarding the view expressed in *Balaji* and *Devadasan*, it must be remembered that at that time it was not yet recognised by this Court that Article 16(1) being a facet of Article 14 does implicitly permit classification. Once this feature was recognised the theory of clause (4) being an exception to clause (1) became untenable. It had to be accepted that clause (4) is an instance of classification inherent in clause (1). Now, just as Article 16(1) is a facet or an

elaboration of the principle underlying Article 14, clause (2) of Article 16 is also an elaboration of a facet of clause (1). If clause (4) is an exception to clause (1) then it is equally an exception to clause (2). Question then arises, in what respect if clause (4) an exception to clause (2), if 'class' does not mean 'caste'. Neither clause (1) nor clause (2) speaks of class. Does the contention mean that clause (1) does not permit classification and therefore clause (4) is an exception to it. Thus, from any point of view, the contention of the petitioners has no merit.

**Question 2(b) : Whether Article 16(4) is exhaustive of the concept of reservations in favour of backward classes?**

743. The question then arises whether clause (4) of Article 16 is exhaustive of the topic of reservations in favour of backward classes. Before we answer this question it is well to examine the meaning and content of the expression "reservation". Its meaning has to be ascertained having regard to the context in which it occurs. The relevant words are "any provision for the reservation of appointments or posts". The question is whether the said words contemplate only one form of provision namely reservation simpliciter, or do they take in other forms of special provisions like preferences, concessions and exemptions. In our opinion, reservation is the highest form of special provision, while preference, concession and exemption are lesser forms. The constitutional scheme and context of Article 16(4) induces us to take the view that larger concept of reservations takes within its sweep all supplemental and ancillary provisions as also lesser types of special provisions like exemptions, concessions and relaxations, consistent no doubt with the requirement of maintenance of efficiency of administration - the admonition of Article 335. The several concessions, exemptions and other measures issued by the Railway Administration and noticed in **Karamchhari Sangh** are instances of supplementary, incidental and ancillary provisions made with a view to make the main provision of reservation effective i.e., to ensure that the members of the reserved class fully avail of the provision for reservation in their favour. The other type of measure is the one in **Thomas**. There was no provision for reservation in favour of Scheduled Castes/Scheduled Tribes in the matter of promotion to the category of Upper Division Clerks. Certain tests were required to be passed before a Lower Division Clerk could be promoted as Upper Division Clerk. A large number of Lower Division Clerks belonging to SC/ST were not able to pass those tests, with the result they were stagnating in the category of LDCs. Rule 13-AA was accordingly made empowering the Government to grant exemption to members of SC/ST from passing those tests and the Government did exempt them, not absolutely, but only for a limited period. This provision for exemption was a lesser form of special treatment than reservation. There is no reason why such a special provision should not be held to be included within the larger concept of reservation. It is in this context that the words "any provision for the reservation of appointments and posts" assume significance. The word "any" and the associated words must be given their due meaning. They are not a mere surplusage. It is true that in **Thomas** it was assumed by the majority that clause (4) permits only one form of provision namely reservation of appointments/posts and that if any concessions or exemptions are to be extended to backward classes it can be done only under clause (1) of Article 16. In fact the argument of the writ petitioners (who succeeded before the Kerala High Court) was that the only type of provision that the State can make in favour of

the backward classes is reservation of appointments/posts provided by clause (4) and that the said clause does not contemplate or permit granting of any exemptions or concessions to the backward classes.

In our opinion, therefore, where the State finds it necessary - for the purpose of giving full effect to the provision of reservation to provide certain exemptions, concessions or preferences to members of backward classes, it can extend the same under clause (4) itself. In other words, all supplemental and ancillary provisions to ensure full availment of provisions for reservation can be provided as part of concept of reservation itself. Similarly, in a given situation, the State may think that in the case of a particular backward class it is not necessary to provide reservation of appointments/posts and that it would be sufficient if a certain preference or a concession is provided in their favour. This can be done under clause (4) itself. In this sense, clause (4) of Article 16 is exhaustive of the special provisions that can be made in favour of "the backward class of citizens". Backward Classes having been classified by the Constitution itself as a class deserving special treatment and the Constitution having itself specified the nature of special treatment, it should be presumed that no further classification or special treatment is permissible in their favour apart from or outside of clause (4) of Article 16.

**Question 2(c) : Whether Article 16(4) is exhaustive of the very concept of reservations?**

744. The aspect next to be considered is whether clause (4) is exhaustive of the very concept of reservations? In other words, the question is whether any reservations can be provided outside clause (4) i.e., under clause (1) of Article 16. There are two views on this aspect. On a fuller consideration of the matter, we are of the opinion that clause (4) is not, and cannot be held to be, exhaustive of the concept of reservations; it is exhaustive of reservations in favour of backward classes alone. Merely because, one form of classification is stated as a specific clause, it does not follow that the very concept and power of classification implicit in clause (1) is exhausted thereby. To say so would not be correct in principle. But, at the same time, one thing is clear. It is in very exceptional situations, - and not for all and sundry reasons - that any further reservations, of whatever kind, should be provided under clause (1). In such cases, the State has to satisfy, if called upon, that making such a provision was necessary (in public interest) to redress a specific situation. The very presence of clause (4) should act as a damper upon the propensity to create further classes deserving special treatment. The reason for saying so is very simple. If reservations are made both under clause (4) as well as under clause (1), the vacancies available for free competition as well as reserved categories would be a correspondingly whittled down and that is not a reasonable thing to do.

**Whether clause (1) of Article 16 does not permit any reservations?**

745. For the reasons given in the preceding paragraphs, we must reject the argument that clause (1) of Article 16 permits only extending of preference, concessions and exemptions, but does not permit reservation of appointments/posts. As pointed out in para 733 the argument that no reservations can be made under Article 16(1) is really inspired by the opinion of Powell, J in *Bakke*. But in the very same paragraph we had pointed out that it is not the unanimous opinion of the Court. In principle, we see no basis for acceding to the said contention. What kind of special provision should be made in favour of a particular class is a

matter for the State to decide, having regard to the facts and circumstances of a given situation – subject, of course, to the observations in the preceding paragraph.

**(Questions 3, 4 and 5)**

**Question 3 : (a) Meaning of the expression “backward class of citizens” in Article 16(4).**

746. What does the expression “backward class of citizens” in Article 16(4) signify and how should they be identified? This has been the single most difficult question tormenting this nation. The expression is not defined in the Constitution. What does it mean then? The arguments before us mainly revolved round this question. Several shades of opinion have been presented to us ranging from one extreme to the other. Indeed, it may be difficult to set out in full the reasoning presented before us orally and in several written propositions submitted by various counsel. We can mention only the substance of and the broad features emerging from those submissions. At one end of the spectrum stands Shri N.A. Palkhivala (supported by several other counsel) whose submissions may briefly be summarised in the following words: a secular, unified and casteless society is a basic feature of the Constitution. Caste is a prohibited ground of distinction under the Constitution. It ought to be erased altogether from the Indian society. It can never be the basis for determining backward classes referred to in Article 16(4). The Report of the Mandal Commission, which is the basis of the impugned Memorandums, has treated the expression “backward classes” as synonymous with backward castes and has proceeded to identify backward classes solely and exclusively on the basis of caste, ignoring all other considerations including poverty. It has indeed invented castes for non-Hindus where none exist. The Report has divided the nation into two sections, backward and forward, placing 52% of the population in the former section. Acceptance of the Report would spell disaster to the unity and integrity of the nation. If half of the posts are reserved for backward classes, it would seriously jeopardise the efficiency of the administration, educational system, and all other services resulting in backwardness of the entire nation. Merit will disappear by defying backwardness. Article 16(4) is broader than Article 15(4). The expression “backward class of citizens” in Article 16(4) is not limited to “socially and educationally backward classes” in Article 15(4). The impugned Memorandum, based on the said report must necessarily fall to the ground along with the Report. In fact the main thrust of Shri Palkhivala’s argument has been against the Mandal Commission Report.

756. In *Venkataramana* case, a seven-Judge Bench of this Court noticed the list of backward classes mentioned in Schedule III to the Madras Provincial and Subordinate Service Rules, 1942, as also the fact that backward classes were enumerated on the basis of caste/race. It found no objection thereto though in *Champakam*, rendered by the same Bench and on the same day it found such a classification bad under Article 15 on the ground that Article 15 did not contain a clause corresponding to clause (4) of Article 16. In *Venkataramana* case this Court observed that in respect of the vacancies reserved for backward classes of Hindus, the petitioner (a Brahmin) cannot have any claim inasmuch as “those reserved posts (were reserved) not on the ground of religion, race, caste etc. but because of the necessity for making a provision for reservation of such post in favour of a backward class of citizens”. The writ petition was allowed on the ground that the allocation of vacancies to and among communities other than Harijans and backward classes of Hindus cannot be sustained in view of clauses (1) and (2) of Article 16.

757. Though *Balaji* was not a case arising under Article 16(4), what it said about Article 15(4) came to be accepted as equally good and valid for the purpose of Article 16(4). The formulations enunciated with respect to Article 15(4) were, without question, applied and adopted in cases arising under Article 16(4). It is, therefore, necessary to notice precisely the formulations in *Balaji* relevant in this behalf. Gajendragadkar, J speaking for the Constitution Bench found, on an examination of the Nagangowda Committee Report, “that the Committee virtually equated the class with the castes”.

758. The criticism of the respondents’ counsel against the judgment runs thus: While it recognises the relevance and significance of the caste and the integral connection between caste, poverty and social backwardness, it yet refuses to accept caste as the sole basis of identifying socially backward classes, partly for the reason that castes do not exist among non-Hindus. The judgment does not examine whether caste can or cannot form the starting point of process of identification of socially backward classes. Nor does it consider the aspect – how does the non-existence of castes among non-Hindus (assuming that the said premise is factually true) makes it irrelevant in the case of Hindus, who constitute the bulk of the country’s population. There is no rule of law that a test or basis adopted must be uniformly applicable to the entire population in the country as such.

759. Before proceeding further it may be noticed that *Balaji* was dealing with Article 15(4) which clause contains the qualifying words “socially and educationally” preceding the expression “backward classes”. Accordingly, it was held that the backwardness contemplated by Article 15(4) is both social *and* educational. Though, clause (4) of Article 16 did not contain any such qualifying words, yet they came to be read into it. In *Janki Prasad Parimoo*, Palekar, J., speaking for a Constitution Bench, took it as “well-settled that the expression ‘backward classes’ in Article 16(4) means the same thing as the expression ‘any socially and educationally backward class of citizens’ in Article 15(4)”.

765. The above opinions emphasise the integral connection between caste, occupation, poverty and social backwardness. They recognise that in the Indian context, lower castes are and ought to be treated as backward classes. *Rajendran* and *Vasanth Kumar* (opinions of Chinnappa Reddy and Venkataramiah, JJ) constitute important milestones on the road to recognition of relevance and significance of caste in the context of Article 16(4) and Article 15(4).

774. In our opinion too, the words “class of citizens - not adequately represented in the services under the State” would have been a vague and uncertain description. By adding the word “backward” and by the speeches of Dr Ambedkar and Shri K.M. Munshi, it was made clear that the “class of citizens ... not adequately represented in the services under the State” meant only those classes of citizens who were not so represented on account of their social backwardness.

776. It must be remembered that the Parliament which enacted the First Amendment was the very same Constituent Assembly which framed the Constitution and Dr Ambedkar as the Minister of Law was piloting the Bill. He said that backward classes “are nothing else but a collection of certain castes”. (The relevant portion of his speech is referred to in para 699) and that it was for those backward classes that Article 15(4) was being enacted.

778. Indeed, there are very good reasons why the Constitution could not have used the expression “castes” or “caste” in Article 16(4) and why the word “class” was the natural choice in the context. The Constitution was meant for the entire country and for all time to come. Non-Hindu religions like Islam, Christianity and Sikh did not recognise caste as such though, as pointed out hereinabove, castes did exist even among these religions to a varying degree. Further, a Constitution is supposed to be a permanent document expected to last several centuries. It must surely have been envisaged that in future many classes may spring up answering the test of backwardness, requiring the protection of Article 16(4). It, therefore, follows that from the use of the word “class” in Article 16(4), it cannot be concluded either that “class” is antithetical to “caste” or that a caste cannot be a class or that a caste as such can never be taken as a backward class of citizens. The word “class” in Article 16(4), in our opinion, is used in the sense of *social class* - and not in the sense it is understood in Marxist jargon.

779. The above material makes it amply clear that a caste is nothing but a social class - a socially homogeneous class. It is also an occupational grouping, with this difference that its membership is hereditary. One is born into it. Its membership is involuntary. Even if one ceases to follow that occupation, still he remains and continues a member of that group. To repeat, it is a socially and occupationally homogeneous class. Endogamy is its main characteristic. Its social status and standing depends upon the nature of the occupation followed by it. Lower the occupation, lower the social standing of the class in the graded hierarchy. In rural India, occupation-caste nexus is true even today. A few members may have gone to cities or even abroad but when they return - they do, barring a few exceptions - they go into the same fold again. It doesn't matter if he has earned money. He may not follow that particular occupation. Still, the label remains. His identity is not changed. For the purposes of marriage, death and all other social functions, it is his social class - the caste - that is relevant. It is a matter of common knowledge that an overwhelming majority of doctors, engineers and other highly qualified people who go abroad for higher studies or employment, return to India and marry a girl from their own caste. Even those who are settled abroad come to India in search of brides and bridegrooms for their sons and daughters from among their own caste or community. As observed by Dr Ambedkar, a caste is an enclosed class and it was mainly these classes the Constituent Assembly had in mind - though not exclusively - while enacting Article 16(4). Urbanisation has to some extent broken this caste-occupation nexus but not wholly. If one sees around himself, even in towns and cities, a barber by caste continues to do the same job - may be, in a shop (hair dressing saloon). A washerman ordinarily carries on the same job though he may have a laundry of his own. May be some others too carry on the profession of barber or washerman but that does not detract from the fact that in the case of an overwhelming majority, the caste-occupation nexus subsists. In a rural context, of course, a member of barber caste carrying on the occupation of a washerman or vice versa would indeed be a rarity - it is simply not done. There, one is supposed to follow his caste-occupation, ordained for him by his birth. There may be exceptions here and there, but we are concerned with generality of the scene and not with exceptions or aberrations. Lowly occupation results not only in low social position but also in poverty; it generates poverty. ‘Caste-occupation-poverty’ cycle is thus an ever present reality. In rural India, it is strikingly apparent; in urban centres, there may be some dilution. But since rural India and rural

population is still the overwhelmingly predominant fact of life in India, the reality remains. All the decisions since *Balaji* speak of this 'caste-occupation-poverty' nexus. The language and emphasis may vary but the theme remains the same. This is the stark reality notwithstanding all our protestations and abhorrence and all attempts at weeding out this phenomenon. We are not saying it ought to be encouraged. It should not be. It must be eradicated. That is the ideal - the goal. But any programme towards betterment of these sections/classes of society and any programme designed to eradicate this evil must recognise this ground reality and attune its programme accordingly. Merely burying our heads in the sand - ostrich-like - wouldn't help. One cannot fight his enemy without recognising him. The U.S. Supreme Court has said repeatedly, if race be the basis of discrimination - past and present - race must also form the basis of redressal programmes though in our constitutional scheme, it is not necessary to go that far. Without a doubt an extensive restructuring of the socio-economic system is the answer. That is indeed the goal, as would be evident from the Preamble and Part IV (Directive Principles). But we are concerned here with a limited aspect of equality emphasised in Article 16(4) - equality of opportunity in public employment and a special provision in favour of backward class of citizens to enable them to achieve it.

***(b) Identification of "backward class of citizens"***

780. Now, we may turn to the identification of "backward class of citizens". How do you go about it? Where do you begin? Is the method to vary from State to State, region to region and from rural to urban? What do you do in the case of religions where caste-system is not prevailing? What about other classes, groups and communities which do not wear the label of caste? Are the people living adjacent to cease-fire line (in Jammu and Kashmir) or hilly or inaccessible regions to be surveyed and identified as backward classes for the purpose of Article 16(4)? And so on and so forth are the many questions asked of us. We shall answer them. But our answers will necessarily deal with generalities of the situation and not with problems or issues of a peripheral nature which are peculiar to a particular State, district or region. Each and every situation cannot be visualised and answered. That must be left to the appropriate authorities appointed to identify. We can lay down only general guidelines.

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. 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.

784. The only basis for saying that caste should be excluded from consideration altogether while identifying the backward class of citizens for the purpose of Article 16(4) is clause (2) of Article 16. This argument, however, overlooks and ignores the true purport of clause (2). It prohibits discrimination on *any* or *all* of the grounds mentioned therein. The significance of the word "any" cannot be minimised. Reservation is not being made under clause (4) in favour of a 'caste' but a backward class. Once a caste satisfies the criteria of backwardness, it becomes a backward class for the purposes of Article 16(4). Even that is not enough. It must be further found that that backward class is not adequately represented in the services of the State. In such a situation, the bar of clause (2) of Article 16 has no application whatsoever. Similarly, the argument based upon secular nature of the Constitution is too vague to be accepted. It has been repeatedly held by the U.S. Supreme Court in school desegregation cases that if race be the basis of discrimination, race can equally form the basis of redressal. In any event, in the present context, it is not necessary to go to that extent. It is sufficient to say that the classification is not on the basis of the caste but on the ground that that caste is found to be a backward class not adequately represented in the services of the State. Born heathen, by baptism, it becomes a Christian - to use a simile. Baptism here means passing the test of backwardness.

**(c) Whether the backwardness in Article 16(4) should be both social and educational?**

786. The other aspect to be considered is whether the backwardness contemplated in Article 16(4) is social backwardness or educational backwardness or whether it is both social *and* educational backwardness. Since the decision in *Balaji* it has been assumed that the backward class of citizens contemplated by Article 16(4) is the same as the socially and educationally backward classes, Scheduled Castes and Scheduled Tribes mentioned in Article 15(4). Though Article 15(4) came into existence later in 1951 and Article 16(4) does not contain the qualifying words "socially and educationally" preceding the words "backward class of citizens" the same meaning came to be attached to them.

787. It is true that no decision earlier to it specifically said so, yet such an impression gained currency and it is that impression which finds expression in the above observation. In our respectful opinion, however, the said assumption has no basis. Clause (4) of Article 16 does not contain the qualifying words “socially and educationally” as does clause (4) of Article 15. It may be remembered that Article 340 (which has remained unamended) does employ the expression ‘socially and educationally backward classes’ and yet that expression does not find place in Article 16(4). The reason is obvious: “backward class of citizens” in Article 16(4) takes in Scheduled Tribes, Scheduled Castes and all other backward classes of citizens including the socially and educationally backward classes. Thus, certain classes which may not qualify for Article 15(4) may qualify for Article 16(4). They may not qualify for Article 15(4) but they may qualify as backward class of citizens for the purposes of Article 16(4). It is equally relevant to notice that Article 340 does not expressly refer to services or to reservations in services under the State, though it may be that the Commission appointed thereunder may recommend reservation in appointments/posts in the services of the State as one of the steps for removing the difficulties under which SEBCs are labouring and for improving their conditions. Thus, SEBCs referred to in Article 340 is only of the categories for whom Article 16(4) was enacted: Article 16(4) applies to a much larger class than the one contemplated by Article 340. It would, thus, be not correct to say that ‘backward class of citizens’ in Article 16(4) are the same as the socially and educationally backward classes in Article 15(4). Saying so would mean and imply reading a limitation into a beneficial provision like Article 16(4). Moreover, when speaking of reservation in appointments/posts in the State services – which may mean, at any level whatsoever – insisting upon educational backwardness may not be quite appropriate.

788. Further, if one keeps in mind the context in which Article 16(4) was enacted it would be clear that the accent was upon social backwardness. It goes without saying that in the Indian context, social backwardness leads to educational backwardness and both of them together lead to poverty - which in turn breeds and perpetuates the social and educational backwardness. They feed upon each other constituting a vicious circle. It is a well-known fact that till independence the administrative apparatus was manned almost exclusively by members of the ‘upper’ castes. The Shudras, the Scheduled Castes and the Scheduled Tribes and other similar backward social groups among Muslims and Christians had practically no entry into the administrative apparatus. It was this imbalance which was sought to be redressed by providing for reservations in favour of such backward classes. In this sense Dr Rajeev Dhavan may be right when he says that the object of Article 16(4) was “empowerment” of the backward classes. The idea was to enable them to share the state power. We are, accordingly, of the opinion that the backwardness contemplated by Article 16(4) is *mainly* social backwardness. It would not be correct to say that the backwardness under Article 16(4) should be both social *and* educational. The Scheduled Tribes and the Scheduled Castes are without a doubt backward for the purposes of the clause; no one has suggested that they should satisfy the test of social and educational backwardness. It is necessary to state at this stage that the Mandal Commission appointed under Article 340 was concerned only with the socially and educationally backward classes contemplated by the said article. Even so, it is evident that social backwardness has been given precedence over others by the Mandal Commission - 12 out of 22 total points. Social backwardness - it may be

reiterated - leads to educational and economic backwardness. No objection can be, nor is taken, to the validity and relevancy of the criteria adopted by the Mandal Commission. For a proper appreciation of the criteria adopted by the Mandal Commission and the difficulties in the way of evolving the criteria of backwardness, one must read closely Chapters III and XI of Volume I along with Appendixes XII and XXI in Volume II. Appendix XII is the Report of the Research Planning Team of the Sociologists while Appendix XXI is the 'Final List of Tables' adopted in the course of socio-educational survey.

11.20. In *Balaji* case the Supreme Court held that if a particular community is to be treated as educationally backward, the divergence between its educational level and that of the State average should not be marginal but *substantial*. The Court considered 50% divergence to be satisfactory. Now, 80% of the population of Bihar (1971 Census) is illiterate. To beat this percentage figure by a margin of 50% will mean that 120% members of a caste/class should be illiterates. In fact it will be seen that in this case even 25% divergence will stretch us to the maximum saturation point of 100%.

11.21. In the Indian situation where vast majority of the people are illiterate, poor or backward, one has to be very careful in setting deviations from the norms as, in our conditions, norms themselves are very low. For example, Per Capita Consumer Expenditure for 1977-78 at current prices was Rs 991 per annum. For the same period, the poverty line for urban areas was at Rs 900 per annum and for rural areas at Rs 780. It will be seen that this poverty line is quite close to the Per Capita Consumer Expenditure of an average Indian. Now following the dictum of *Balaji* case, if 50% deviation from this average Per Capita Consumer Expenditure was to be accepted to identify 'economically backward' classes, their income level will have to be 50% below the Per Capita Consumer Expenditure i.e., less than Rs 495.5 per year. This figure is so much below the poverty line both in urban and rural areas that most of the people may die of starvation before they qualify for such a distinction.

11.22. In view of the above, 'Indicators for Backwardness' were tested against various cut-off points. For doing so, about a dozen castes well-known for their social and educational backwardness were selected from amongst the castes covered by our survey in a particular State. These were treated as 'Control' and validation checks were carried out by testing them against 'Indicators' at various cut-off points. For instance, one of the 'Indicators' for social backwardness is the rate of student drop-outs in the age group 5-15 years as compared to the State average. As a result of the above tests, it was seen that in educationally backward castes this rate is at least 25% above the State average. Further, it was also noticed that this deviation of 25% from the State average in the case of most of the 'Indicators' gave satisfactory results. In view of this, wherever an 'Indicator' was based on deviation from the State average, it was fixed at 25%, because a deviation of 50% was seen to give wholly unsatisfactory results and, at times, to create anomalous situations."

789. The SEBCs referred to by the impugned Memorandums are undoubtedly 'backward class of citizens' within the meaning of Article 16(4).

**(d) 'Means-test' and 'creamy layer':**

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.

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 in society (social status) rises; he is no longer socially disadvantaged. His children get full opportunity to realise their potential. They are in no way handicapped in the race of life. His salary is also such that he is above want. It is but logical that in such a situation, his children are not given the benefit of reservation. For by giving them the benefit of reservation, other disadvantaged members of that backward class may be deprived of that benefit. It is then argued for the respondents that 'one swallow doesn't make the summer', and that merely

because a few members of a caste or class become socially advanced, the class/caste as such does not cease to be backward. It is pointed out that clause (4) of Article 16 aims at group backwardness and not individual backwardness. While we agree that clause (4) aims at group backwardness, we feel that exclusion of such socially advanced members will make the 'class' a truly backward class and would more appropriately serve the purpose and object of clause (4). (This discussion is confined to Other Backward Classes only and has no relevance in the case of Scheduled Tribes and Scheduled Castes).

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.

**(e) Whether a class should be situated similarly to the Scheduled Castes/Scheduled Tribes for being qualified as a Backward Class?**

794. In *Balaji* it was held "that the Backward Classes for whose improvement special provision is contemplated by Article 15(4) are in the matter of their backwardness comparable to Scheduled Castes and Scheduled Tribes". (emphasis supplied) The correctness of this observation is questioned by the counsel for the respondents.

795. We see no reason to qualify or restrict the meaning of the expression "backward class of citizens" by saying that it means those other backward classes who are situated similarly to Scheduled Castes and/or Scheduled Tribes. As pointed out in para 786, the relevant language employed in both the clauses is different. Article 16(4) does not expressly refer to Scheduled Castes or Scheduled Tribes; if so, there is no reason why we should treat their backwardness as the standard backwardness for all those claiming its protection. As a matter of fact, neither the several castes/groups/tribes within the Scheduled Castes and Scheduled Tribes are similarly situated nor are the Scheduled Castes and Scheduled Tribes similarly situated. If any group or class is situated similarly to the Scheduled Castes, they may have a case for inclusion in that class but there seems to be no basis either in fact or in principle for holding that other classes/groups must be situated similarly to them for qualifying as backward classes. There is no warrant to import any such *a priori notions* into the concept of Other Backward Classes. At the same time, we think it appropriate to clarify that backwardness, being a relative term, must in the context be judged by the general level of advancement of the entire population of the country or the State, as the case may be. More than this, it is difficult to say. How difficult is the process of ascertainment of backwardness would be known if one peruses Chapters III and XI of Volume I of the Mandal Commission Report along with Appendixes XII and XXI in Volume II. It must be left to the Commission/Authority appointed to identify the backward classes to evolve a proper and

relevant criteria and test the several groups, castes, classes and sections of people against that criteria. If, in any case, a particular caste or class is wrongly designated or not designated as a backward class, it can always be questioned before a court of law as well. We may add that relevancy of the criteria evolved by Mandal Commission (Chapter XI) has not been questioned by any of the counsel before us. Actual identification is a different matter, which we shall deal with elsewhere.

796-797. We may now summarise our discussion under Question No. 3. (a) A caste can be and quite often is a social class in India. If it is backward socially, it would be a backward class for the purposes of Article 16(4). Among non-Hindus, there are several occupational groups, sects and denominations, which for historical reasons are socially backward. They too represent backward social collectivities for the purposes of Article 16(4). (b) Neither the constitution nor the law prescribe the procedure or method of identification of backward classes. Nor is it possible or advisable for the court to lay down any such procedure or method. It must be left to the authority appointed to identify. It can adopt such method/procedure as it thinks convenient and so long as its survey covers the entire populace, no objection can be taken to it. Identification of the backward classes can certainly be done with reference to castes among, and along with, other groups, classes and sections of people. One can start the process with the castes, wherever they are found, apply the criteria (evolved for determining backwardness) and find out whether it satisfies the criteria. If it does – what emerges is a “backward class of citizens” within the meaning of and for the purposes of Article 16(4). Similar process can be adopted in the case of other occupational groups, communities and classes, so as to cover the entire populace. The central idea and 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 majority of the country’s population, one can well begin with it and then go to other groups, sections and classes. (c) 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. (d) ‘Creamy layer’ can be, and must be, excluded. (e) It is not correct to say that the backward class contemplated by Article 16(4) is limited to the socially and educationally backward classes referred to in Article 15(4) and Article 340. It is much wider. The test or requirement of social and educational backwardness cannot be applied to Scheduled Castes and Scheduled Tribes, who indubitably fall within the expression “backward class of citizens”. The accent in Article 16(4) appears to be on social backwardness. Of course, social, educational and economic backwardness are closely intertwined in the Indian context. The classes contemplated by Article 16(4) may be wider than those contemplated by Article 15(4).

**(f) Adequacy of Representation in the Services under the State**

798. Not only should a class be a backward class for meriting reservations, it should also be inadequately represented in the services under the State. The language of clause (4) makes it clear that the question whether a backward class of citizens is not adequately represented in the services under the State is a matter within the subjective satisfaction of the State. This is evident from the fact that the said requirement is preceded by the words “in the opinion of the State”. This opinion can be formed by the State on its own, i.e., on the basis of the material it has in its possession already or it may gather such material through a Commission/

Committee, person or authority. All that is required is, there must be some material upon which the opinion is formed. Indeed, in this matter the court should show due deference to the opinion of the State, which in the present context means the executive. The executive is supposed to know the existing conditions in the society, drawn as it is from among the representatives of the people in Parliament/Legislature. It does not, however, mean that the opinion formed is beyond judicial scrutiny altogether.

**Question 4 : (a) Whether backward classes can be identified only and exclusively with reference to the economic criterion?**

799. It follows from the discussion under Question No. 3 that a backward class cannot be determined *only and exclusively* with reference to economic criterion. It may be a consideration or basis along with and in addition to social backwardness, but it can never be the sole criterion. This is the view uniformly taken by this Court and we respectfully agree with the same.

**(b) Whether a backward class can be identified on the basis of occupation-cum-income without reference to caste?**

800. In *Chitralkha*, this court held that such an identification is permissible. We see no reason to differ with the said view inasmuch as this is but another method to find socially backward classes. Indeed, this test in the Indian context is broadly the same as the one adopted by the Mandal Commission. While answering Question 3(b), we said that identification of backward classes can be done with reference to castes along with other occupational groups, communities and classes. We did not say that that is the only permissible method. Indeed, there may be some groups or classes in whose case caste may not be relevant to all. For example, agricultural labourers, rickshaw-pullers/drivers, street-hawkers etc. may well qualify for being designated as Backward Classes.

**Question No. 5 : Whether Backward Classes can be further divided into backward and more backward categories?**

802. We are of the opinion that there is no constitutional or legal bar to a State categorising the backward classes as backward and more backward. We are not saying that it ought to be done. We are concerned with the question if a State makes such a categorisation, whether it would be invalid? We think not. Let us take the criteria evolved by Mandal Commission. Any caste, group or class which scored eleven or more points was treated as a backward class. Now, it is not as if all the several thousands of castes/groups/classes scored identical points. There may be some castes/groups/classes which have scored points between 20 to 22 and there may be some who have scored points between eleven and thirteen. It cannot reasonably be denied that there is no difference between these two sets of castes/groups/classes. To give an illustration, take two occupational groups viz., goldsmiths and vaddes (traditional stone-cutters in Andhra Pradesh) both included within Other Backward Classes. None can deny that goldsmiths are far less backward than vaddes. If both of them are grouped together and reservation provided, the inevitable result would be that goldsmiths would take away all the reserved posts leaving none for vaddes. In such a situation, a State may think it advisable to make a categorisation even among other backward classes so as to ensure that the more backward among the backward classes obtain the

benefits intended for them. Where to draw the line and how to effect the sub-classification is, however, a matter for the Commission and the State - and so long as it is reasonably done, the Court may not intervene. In this connection, reference may be made to the categorisation obtaining in Andhra Pradesh. The Backward Classes have been divided into four categories. Group A comprises "Aboriginal tribes, Vimukta jatis, nomadic and semi-nomadic tribes etc." Group B comprises professional group like tappers, weavers, carpenters, ironsmiths, goldsmiths, kamsalins, etc. Group C pertains to "Scheduled Castes converts to Christianity and their progeny", while Group D comprises all other classes/communities/groups, which are not included in Groups A, B and C. The 25% vacancies reserved for backward classes are sub-divided between them in proportion to their respective population. This is merely to show that even among backward classes, there can be a sub-classification on a reasonable basis.

803. There is another way of looking at this issue. Article 16(4) recognises only one class viz., "backward class of citizens". It does not speak separately of Scheduled Castes and Scheduled Tribes, as does Article 15(4). Even so, it is beyond controversy that Scheduled Castes and Scheduled Tribes are also included in the expression "backward class of citizens" and that separate reservations can be provided in their favour. It is a well-accepted phenomenon throughout the country. What is the logic behind it? It is that if Scheduled Tribes, Scheduled Castes and Other Backward Classes are lumped together, OBCs will take away all the vacancies leaving Scheduled Castes and Scheduled Tribes high and dry. The same logic also warrants categorisation as between more backward and backward. We do not mean to say that this should be done. We are only saying that if a State chooses to do it, it is not impermissible in law.

**(Question Nos. 6, 7 and 8)**

**Question 6:**

To what extent can the reservation be made?

- (a) Whether the 50% rule enunciated in *Balaji* a binding rule or only a rule of caution or rule of prudence?
- (b) Whether the 50% rule, if any, is confined to reservations made under clause (4) of Article 16 or whether it takes in all types of reservations that can be provided under Article 16?
- (c) Further, while applying 50% rule, if any, whether a year should be taken as a unit or whether the total strength of the cadre should be looked to?
- (d) Was *Devadasan* correctly decided?

804. In *Balaji*, a Constitution Bench of this Court rejected the argument that in the absence of a limitation contained in Article 15(4), no limitation can be prescribed by the Court on the extent of reservation. It observed that a provision under Article 15(4) being a "special provision" must be within reasonable limits. It may be appropriate to quote the relevant holding from the judgment:

"When Article 15(4) refers to the special provision for the advancement of certain classes or Scheduled Castes and Scheduled Tribes, it must not be ignored that the provision which is authorised to be made is a special provision; it is not a provision which is exclusive in character, so that in looking after the advancement of



those classes, the State would be justified in ignoring altogether the advancement of the rest of the society. It is because the interests of the society at large would be served by promoting the advancement of the weaker elements in the society that Article 15(4) authorises special provision to be made. But if a provision which is in the nature of an exception completely excludes the rest of the society, that clearly is outside the scope of Article 15(4). It would be extremely unreasonable to assume that in enacting Article 15(4) the Parliament intended to provide that where the advancement of the Backward Classes or the Scheduled Castes and Tribes was concerned, the fundamental rights of the citizens constituting the rest of the society were to be completely and absolutely ignored... A special provision contemplated by Article 15(4) like reservation of posts and appointments contemplated by Article 16(4) must be within reasonable limits. The interests of weaker sections of society which are a first charge on the States and the Centre have to be adjusted with the interests of the community as a whole. The adjustment of these competing claims is undoubtedly a difficult matter, but if under the guise of making a special provision, a State reserves practically all the seats available in all the colleges, that clearly would be subverting the object of Article 15(4). In this matter again, we are reluctant to say definitely what would be a proper provision to make. Speaking generally and in a broad way, a special provision should be less than 50%; how much less than 50% would depend upon the relevant prevailing circumstances in each case.”

In *Devadasan* this rule of 50% was applied to a case arising under Article 16(4) and on that basis the carry-forward rule was struck down.

807. We must, however, point out that clause (4) speaks of adequate representation and not proportionate representation. *Adequate representation* cannot be read as *proportionate representation*. Principle of proportionate representation is accepted only in Articles 330 and 332 of the Constitution and that too for a limited period. These articles speak of reservation of seats in Lok Sabha and the State legislatures in favour of Scheduled Tribes and Scheduled Castes proportionate to their population, but they are only temporary and special provisions. It is therefore not possible to accept the theory of proportionate representation though the proportion of population of backward classes to the total population would certainly be relevant. Just as every power must be exercised reasonably and fairly, the power conferred by clause (4) of Article 16 should also be exercised in a fair manner and within reasonable limits – and what is more reasonable than to say that reservation under clause (4) shall not exceed 50% of the appointments or posts, barring certain extraordinary situations as explained hereinafter. From this point of view, the 27% reservation provided by the impugned Memorandums in favour of backward classes is well within the reasonable limits. Together with reservation in favour of Scheduled Castes and Scheduled Tribes, it comes to a total of 49.5%.

808. It needs no emphasis to say that the principal aim of Articles 14 and 16 is equality and equality of opportunity and that clause (4) of Article 16 is but a means of achieving the very same objective. Clause (4) is a special provision - though not an exception to clause (1). Both the provisions have to be harmonised keeping in mind the fact that both are but the restatements of the principle of equality enshrined in Article 14. The provision under Article

16(4) - conceived in the interest of certain sections of society - should be balanced against the guarantee of equality enshrined in clause (1) of Article 16 which is a guarantee held out to every citizen and to the entire society. It is relevant to point out that Dr Ambedkar himself contemplated reservation being “confined to a minority of seats”. No other member of the Constituent Assembly suggested otherwise. It is, thus, clear that reservation of a majority of seats was never envisaged by the Founding Fathers. Nor are we satisfied that the present context requires us to depart from that concept.

809. From the above discussion, the irresistible conclusion that follows is that the reservations contemplated in clause (4) of Article 16 should not exceed 50%.

810. While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in farflung and remote areas the population inhabiting those areas might, on account of their being out of the mainstream of national life and in view of conditions peculiar to and characteristic to them, need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out.

811. In this connection it is well to remember that the reservations under Article 16(4) do not operate like a communal reservation. It may well happen that some members belonging to, say, Scheduled Castes get selected in the open competition field on the basis of their own merit; they will not be counted against the quota reserved for Scheduled Castes; they will be treated as open competition candidates.

812. We are also of the opinion that this rule of 50% applies only to reservations in favour of backward classes made under Article 16(4). A little clarification is in order at this juncture: all reservations are not of the same nature. There are two types of reservations, which may, for the sake of convenience, be referred to as ‘vertical reservations’ and ‘horizontal reservations’. The reservations in favour of Scheduled Castes, Scheduled Tribes and other backward classes [under Article 16(4)] may be called vertical reservations whereas reservations in favour of physically handicapped [under clause (1) of Article 16] can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations - what is called interlocking reservations. To be more precise, suppose 3% of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relatable to clause (1) of Article 16. The persons selected against this quota will be placed in the appropriate category; if he belongs to SC category he will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (OC) category, he will be placed in that category by making necessary adjustments. Even after providing for these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains - and should remain - the same. This is how these reservations are worked out in several States and there is no reason not to continue that procedure.

813. It is, however, made clear that the rule of 50% shall be applicable only to reservations proper; they shall not be - indeed cannot be - applicable to exemptions,

concessions or relaxations, if any, provided to 'Backward Class of Citizens' under Article 16(4).

814. The next aspect of this question is whether a year should be taken as the unit or the total strength of the cadre, for the purpose of applying the 50% rule. *Balaji* does not deal with this aspect but *Devadasan* (majority opinion) does. Mudholkar, J speaking for the majority says:

“We would like to emphasise that the guarantee contained in Article 16(1) is for ensuring equality of opportunity for all citizens relating to employment, and to appointments to any office under the State. This means that on every occasion for recruitment the State should see that all citizens are treated equally. The guarantee is to each individual citizen and, therefore, every citizen who is seeking employment or appointment to an office under the State is entitled to be afforded an opportunity for seeking such employment or appointment whenever it is intended to be filled. In order to effectuate the guarantee each year of recruitment will have to be considered by itself and the reservation for backward communities should not be so excessive as to create a monopoly or to disturb unduly the legitimate claims of other communities.”

On the other hand is the approach adopted by Ray, CJ in *Thomas*. While not disputing the correctness of the 50% rule he seems to apply it to the entire service as such. In our opinion, the approach adopted by Ray, CJ would not be consistent with Article 16. True it is that the backward classes, who are victims of historical social injustice, which has not ceased fully as yet, are not properly represented in the services under the State but it may not be possible to redress this imbalance in one go i.e., in a year or two. The position can be better explained by taking an illustration. Take a unit/service/cadre comprising 1000 posts. The reservation in favour of Scheduled Tribes, Scheduled Castes and Other Backward Classes is 50% which means that out of the 1000 posts 500 must be held by the members of these classes i.e., 270 by Other Backward Classes, 150 by Scheduled Castes and 80 by Scheduled Tribes. At a given point of time, let us say, the number of members of OBCs in the unit/service/category is only 50, a short fall of 220. Similarly the number of members of Scheduled Castes and Scheduled Tribes is only 20 and 5 respectively, shortfall of 130 and 75. If the entire service/cadre is taken as a unit and the backlog is sought to be made up, then the open competition channel has to be choked altogether for a number of years until the number of members of all backward classes reaches 500 i.e., till the quota meant for each of them is filled up. This may take quite a number of years because the number vacancies arising each year are not many. Meanwhile, the members of open competition category would become age barred and ineligible. Equality of opportunity in their case would become a mere mirage. It must be remembered that the equality of opportunity guaranteed by clause (1) is to each individual citizen of the country while clause (4) contemplates special provision being made in favour of socially disadvantaged classes. Both must be balanced against each other. Neither should be allowed to eclipse the other. For the above reason, we hold that for the purpose of applying the rule of 50% a year should be taken as the unit and not the entire strength of the cadre, service or the unit, as the case may be.

**(d) Was Devadasan correctly decided?**

815. The rule (providing for carry-forward of unfilled reserved vacancies as modified in 1955) struck down in *Devadasan* reads as follows:

“3(a) If a sufficient number of candidates considered suitable by the recruiting authorities, are not available from the communities for whom reservations are made in a particular year, the unfilled vacancies should be treated as unreserved and filled by the best available candidates. The number of reserved vacancies thus treated as unreserved will be added as an additional quota to the number that would be reserved in the following year in the normal course; and to the extent to which approved candidates are not available in that year against this additional quota, a corresponding addition should be made to the number of reserved vacancies in the second following year.”

The facts of the case relevant for our purpose are the following:

- (i) Reservation in favour of Scheduled Castes and Scheduled Tribes was 12.5% and 5% respectively;
- (ii) In 1960, UPSC issued a notification proposing to hold a limited competitive examination for promotion to the category of Assistant Superintendents in Central Secretariat Services. 48 vacancies were to be filled, out of which 16 were unreserved while 32 were reserved for Scheduled Castes/ Scheduled Tribes, because of the operation of the carry-forward rule; 28 vacancies were actually carried forward;
- (iii) UPSC recommended 16 for unreserved and 30 for reserved vacancies – a total of 46;
- (iv) The Government however appointed in all 45 persons, out of whom 29 belonged to Scheduled Castes/Scheduled Tribes.

The said rule and the appointments made on that basis were questioned mainly on the ground that they violated the 50% rule enunciated in *Balaji*. It was submitted that by virtue of the carry-forward rule, 65% of the vacancies for the year in question came to be reserved for Scheduled Castes/Scheduled Tribes.

816. The majority, speaking through Mudholkar, J. upheld the contention of the petitioners and struck down the rule purporting to apply the principle of *Balaji*.

817. We are of the respectful opinion that *on its own reasoning*, the decision *insofar as it strikes down the rule* is not sustainable. The most that could have been done in that case was to quash the appointments in excess of 50%, inasmuch as, as a matter of fact, more than 50% of the vacancies for the year 1960 came to be reserved by virtue of the said rule. But it would not be correct to presume that that is the necessary and the only consequence of that rule. Let us take the very illustration given at pp. 691-92, - namely 100 vacancies arising in three successive years and 18% being the reservation quota - and examine. Take a case, where in the first year, out of 18 reserved vacancies 9 are filled up and 9 are carried-forward. Similarly, in the second year again, 9 are filled up and another 9 are carried-forward. Result would be that in the third year,  $9 + 9 + 18 = 36$  (out of a total of 100) would be reserved which would be far less than 50%; the rule in *Balaji* is not violated. But by striking down the rule itself, carrying forward of vacancies even in such a situation has become impermissible, which

appears to us indefensible in principle. We may also point out that the premise made in *Balaji* and reiterated in *Devadasan* to the effect that clause (4) is an exception to clause (1) is no longer acceptable, having been given up in *Thomas*. It is for this reason that in *Karamchari Sangh Krishna Iyer, J* explained *Devadasan* in the following words:

“In *Devadasan* case the Court went into the *actuals*, not into the *hypotheticals*. This is most important. The Court actually verified the degree of deprivation of the ‘equal opportunity’ right ....

What is striking is that the Court did not take an academic view or make a notional evaluation but checked up to satisfy itself about the seriousness of the infraction of the right...Mathematical calculations, departing from realities of the case, may startle us without justification, the apprehension being misplaced. All that we need say is that the Railway Board shall take care to issue instructions to see that in no year shall SC and ST candidates be actually appointed to substantially more than 50% of the promotional posts. Some excess will not affect as mathematical precision is difficult in human affairs, but substantial excess will void the selection. Subject to this rider or condition that the ‘carry-forward’ rule *shall not result*, in any given year, in the selection or appointments of SC and ST candidates considerably in excess of 50% we uphold Annexure I.”

We are in respectful agreement with the above statement of law. Accordingly, we overrule the decision in *Devadasan*. We have already discussed and explained the 50% rule. The same position would apply in the case of carry-forward rule as well. We, however, agree that a year should be taken as the unit or basis, as the case may be, for applying the rule of 50% and not the entire cadre strength.

**Question No. 7 : Whether clause (4) of Article 16 provides reservation only in the matter of initial appointments/direct recruitment or does it contemplate and provide for reservations being made in the matter of promotion as well?**

819. The petitioners’ submission is that the reservation of appointments or posts contemplated by clause (4) is only at the stage of entry into State service, i.e., direct recruitment. It is submitted that providing for reservation thereafter in the matter of promotion amounts to a double reservation and if such a provision is made at each successive stage of promotion it would be a case of reservation being provided that many times. It is also submitted that by providing reservation in the matter of promotion, the member of a reserved category is enabled to leap-frog over his compatriots, which is bound to generate acute heart-burning and may well lead to inefficiency in administration. The members of the open competition category would come to think that whatever be their record and performance, the members of reserved categories would steal a march over them, irrespective of their performance and competence. Examples are given how two persons (A) and (B), one belonging to O.C. category and the other belonging to reserved category, having been appointed at the same time, the member of the reserved category gets promoted earlier and how even in the promoted category he jumps over the members of the O.C. category already there and gains a further promotion and so on. This would generate, it is submitted, a feeling of disheartening which kills the spirit of competition and develops a sense of disinterestedness among the members of O.C. category. It is pointed out that once persons coming from

different sources join a category or class, they must be treated alike thereafter in all matters including promotions and that no distinction is permissible on the basis of their "birth-mark". It is also pointed out that even the Constituent Assembly debates on draft Article 10(3) do not indicate in any manner that it was supposed to extend to promotions as well. It is further submitted that if Article 16(4) is construed as warranting reservation even in the matter of promotion it would be contrary to the mandate of Article 335 viz., maintenance of efficiency in administration. It is submitted that such a provision would amount to putting a premium upon inefficiency. The members of the reserved category would not work hard since they do not have to compete with all their colleagues but only within the reserved category and further because they are assured of promotion whether they work hard and efficiently or not. Such a course would also militate against the goal of excellence referred to in clause (j) of Article 51-A (Fundamental Duties).

822. Reservation in the case of promotion is normally provided only where the promotion is by selection i.e., on the basis of merit. For, if the promotion is on the basis of seniority, such a rule may not be called for; in such a case the position obtaining in the lower category gets reflected in the higher category (promotion category) also. Where, however, promotion is based on merit, it may happen that members of backward classes may not get selected in the same proportion as is obtaining in the lower category. With a view to ensure similar representation in the higher category also, reservation is thought of even in the matter of promotion based on selection. This is, of course, in addition to the provision for reservation at the entry (direct recruitment) level.

This was the position in *Rangachari*. Secondly, there may be a service/class/category, to which appointment is made partly by direct recruitment and partly by promotion (i.e., promotion on the basis of merit). If no provision is made for reservation in promotions, the backward class members may not be represented in this category to the extent prescribed. We may give an illustration to explain what we are saying. Take the category of Assistant Engineers in a particular service where 50% of the vacancies arising in a year are filled up by direct recruitment and 50% by promotion (by selection i.e., on merit basis) from among Junior Engineers. If provision for reservation is made only in the matter of direct recruitment but not in promotions, the result may be that members of backward classes (where quota, let us say, is 25%) would get in to that extent only in the 50% direct recruitment quota but may not get in to that extent in the balance 50% promotion quota. It is for this reason that reservation is thought of even in the matter of promotions, particularly where promotions are on the basis of merit. The question for our consideration, however, is whether Article 16(4) contemplates and permits reservation only in the matter of direct recruitment or whether it also warrants provision being made for reservation in the matter of promotions as well.

825. Validity of a number of circulars issued by the Railway Administration was questioned in *Karamchari Sangh* - a petition under Article 32. The experience gained over the years disclosed that reservation of appointments/posts in favour of SC/STs, though made both at the stage of initial recruitment and promotion was not achieving the intended results, inasmuch as several posts meant for them remained unfilled by them. Accordingly, the Administration issued several circulars from time to time extending further concessions and other measures to ensure that members of these categories avail of the posts reserved for them

fully. These circulars contemplated (i) giving one grade higher to SC/ST candidates than is assignable to an employee, (ii) carrying forward vacancies for a period of three years and (iii) provision for in-service training and coaching (after promotion) to raise the level of efficiency of SC/ST employees who were directed to be promoted on a temporary basis for a specified period, even if they did not obtain the requisite places. The contention of the writ petitioners was that these circulars, being inconsistent with the mandate of Article 335, are bad. **Rangachari** was sought to be reopened by arguing that Article 16(4) does not take in reservation in the matter of promotion. The carry-forward rule was also upheld subject to the condition that the operation of the rule shall not result, in any given year, in selection/appointment of Scheduled Caste/Scheduled Tribe candidates in excess of 50%.

827. We find it difficult to agree with the view in **Rangachari** that Article 16(4) contemplates or permits reservation in promotions as well. It is true that the expression “appointment” takes in appointment by direct recruitment, appointment by promotion and appointment by transfer. It may also be that Article 16(4) contemplates not merely quantitative but also qualitative support to backward class of citizens. But this question has not to be answered on a reading of Article 16(4) alone but on a combined reading of Article 16(4) and Article 335.

828. We see no justification to multiply ‘the risk’, which would be the consequence of holding that reservation can be provided even in the matter of promotion. While it is certainly just to say that a handicap should be given to backward class of citizens at the stage of initial appointment, it would be a serious and unacceptable inroad into the rule of equality of opportunity to say that such a handicap should be provided at every stage of promotion throughout their career. That would mean creation of a permanent separate category apart from the mainstream - a vertical division of the administrative apparatus. The members of reserved categories need not have to compete with others but only among themselves. There would be no will to work, compete and excel among them. Whether they work or not, they tend to think, their promotion is assured. This in turn is bound to generate a feeling of despondence and ‘heart-burning’ among open competition members. All this is bound to affect the efficiency of administration. Putting the members of backward classes on a fast-track would necessarily result in leap-frogging and the deleterious effects of “leap-frogging” need no illustration at our hands. At the initial stage of recruitment reservation can be made in favour of backward class of citizens but once they enter the service, efficiency of administration demands that these members too compete with others and earn promotion like all others; no further distinction can be made thereafter with reference to their “birth-mark”, as one of the learned Judges of this Court has said in another connection. They are expected to operate on equal footing with others. Crutches cannot be provided throughout one’s career. That would not be in the interest of efficiency of administration nor in the larger interest of the nation. It is wrong to think that by holding so, we are confining the backward class of citizens to the lowest cadres. It is well-known that direct recruitment takes place at several higher levels of administration and not merely at the level of Class IV and Class III. Direct recruitment is provided even at the level of All India Services. Direct recruitment is provided at the level of District Judges, to give an example nearer home. It may also be noted that

during the debates in the Constituent Assembly, none referred to reservation in promotions; it does not appear to have been within their contemplation.

829. It is true that *Rangachari* has been the law for more than 30 years and that attempts to re-open the issue were repelled in *Karamchari Sangh*. It may equally be true that on the basis of that decision, reservation may have been provided in the matter of promotion in some of the Central and State services but we are convinced that the majority opinion in *Rangachari* to the extent it holds, that Article 16(4) permits reservation even in the matter of promotion, is not sustainable in principle and ought to be departed from. However, taking into consideration all the circumstances, we direct that our decision on this question shall operate only prospectively and shall not affect promotions already made, whether on temporary, officiating or regular/permanent basis. It is further directed that wherever reservations are already provided in the matter of promotion - be it Central Services or State Services, or for that matter services under any corporation, authority or body falling under the definition of 'State' in Article 12 - such reservations shall continue in operation for a period of five years from this day. Within this period, it would be open to the appropriate authorities to revise, modify or re-issue the relevant Rules to ensure the achievement of the objective of Article 16(4). If any authority thinks that for ensuring adequate representation of 'backward class of citizens' in any service, class or category, it is necessary to provide for direct recruitment therein, it shall be open to it do so.

831. We must also make it clear that it would not be impermissible for the State to extend concessions and relaxations to members of reserved categories in the matter of promotion *without* compromising the efficiency of the administration. The relaxation concerned in *Thomas* and the concessions namely carrying forward of vacancies and provisions for in-service coaching/training in *Karamchari Sangh* are instances of such concessions and relaxations. However, it would not be permissible to prescribe lower qualifying marks or a lesser level of evaluation for the members of reserved categories since that would compromise the efficiency of administration. We reiterate that while it may be permissible to prescribe a reasonably lesser qualifying marks or evaluation for the OBCs, SCs and STs - consistent with the efficiency of administration and the nature of duties attaching to the office concerned - in the matter of direct recruitment, such a course would not be permissible in the matter of promotions for the reasons recorded hereinabove.

**Question No. 8 : Whether Reservations are anti-meritarian?**

832. In *Balaji* and other cases, it was assumed that reservations are necessarily anti-meritarian. For example, in *Janki Prasad Parimoo* it was observed, "it is implicit in the idea of reservation that a less meritorious person be preferred to another who is more meritorious". To the same effect is the opinion of Khanna, J in *Thomas*, though it is a minority opinion. Even Subba Rao, J who did not agree with this view did recognize some force in it. In his dissenting opinion in *Devadasan* while holding that there is no conflict between Article 16(4) and Article 335, he did say, "it is inevitable in the nature of reservation that there will be a lowering of standards to some extent", but, he said, on that account the provision cannot be said to be bad, inasmuch as in that case, the State had, as a matter of fact, prescribed minimum qualifications, and only those possessing such minimum qualifications were appointed.



834. It is submitted by the learned counsel for petitioners that reservation necessarily means appointment of less meritorious persons, which in turn leads to lowering of efficiency of administration. The submission, therefore, is that reservation should be confined to a small minority of appointments/posts, - in any event, to not more than 30%, the figure referred to in the speech of Dr Ambedkar in the Constituent Assembly. The mandate of Article 335, it is argued, implies that reservations should be so operated as not to affect the efficiency of administration. Even Article 16 and the directive of Article 46, it is said, should be read subject to the aforesaid mandate of Article 335.

836. We do not think it necessary to express ourselves at any length on the correctness or otherwise of the opposing points of view referred to above. (It is, however, necessary to point out that the mandate of Article 335 is to take the claims of members of SC/ST into consideration, consistent with the maintenance of efficiency of administration. It would be a misreading of the article to say that the mandate is maintenance of efficiency of administration.) Maybe, efficiency, competence and merit are not synonymous concepts; maybe, it is wrong to treat merit as synonymous with efficiency in administration and that merit is but a component of the efficiency of an administrator. Even so, the relevance and significance of merit at the stage of initial recruitment cannot be ignored. It cannot also be ignored that the very idea of reservation implies selection of a less meritorious person. At the same time, we recognise that this much cost has to be paid, if the constitutional promise of social justice is to be redeemed. We also firmly believe that given an opportunity, members of these classes are bound to overcome their initial disadvantages and would compete with - and may, in some cases, excel - members of open competition. It is undeniable that nature has endowed merit upon members of backward classes as much as it has endowed upon members of other classes and that what is required is an opportunity to prove it. It may not, therefore, be said that reservations are *anti-meritarian*. Merit there is even among the reserved candidates and the small difference, that may be allowed at the stage of initial recruitment is bound to disappear in course of time. These members too will compete with and improve their efficiency along with others.

837. Having said this, we must append a note of clarification. In some cases arising under Article 15, this Court has upheld the removal of minimum qualifying marks, in the case of Scheduled Caste/Scheduled Tribe candidates, in the matter of admission to medical courses. For example, in *State of M.P. v. Nivedita Jain* [(1982) 1 SCR 759], admission to medical course was regulated by an entrance test (called Pre-Medical Test). For general candidates, the minimum qualifying marks were 50% in the aggregate and 33% in each subject. For Scheduled Caste/Scheduled Tribe candidates, however, it was 40% and 30% respectively. On finding that Scheduled Caste/Scheduled Tribe candidates equal to the number of the seats reserved for them did not qualify on the above standard, the Government did away with the said minimum standard altogether. The Government's action was challenged in this Court but was upheld. Since it was a case under Article 15, Article 335 had no relevance and was not applied. But in the case of Article 16, Article 335 would be relevant and any order on the lines of the order of the Government of Madhya Pradesh (in *Nivedita Jain*) would not be permissible, being inconsistent with the efficiency of administration. To wit, in the matter of appointment of Medical Officers, the Government or the Public Service Commission cannot

say that there shall be no minimum qualifying marks for Scheduled Caste/Scheduled Tribe candidates, while prescribing a minimum for others. It may be permissible for the Government to prescribe a reasonably lower standard for Scheduled Castes/Scheduled Tribes/Backward Classes - consistent with the requirements of efficiency of administration - it would not be permissible not to prescribe any such minimum standard at all. While prescribing the lower minimum standard for reserved category, the nature of duties attached to the post and the interest of the general public should also be kept in mind.

838. While on Article 335, we are of the opinion that there are certain services and positions where either on account of the nature of duties attached to them or the level (in the hierarchy) at which they obtain, merit as explained hereinabove, alone counts. In such situations, it may not be advisable to provide for reservations. For example, technical posts in research and development organisations/departments/institutions, in specialities and super-specialities in medicine, engineering and other such courses in physical sciences and mathematics, in defence services and in the establishments connected therewith. Similarly, in the case of posts at the higher echelons e.g., Professors (in Education), Pilots in Indian Airlines and Air India, Scientists and Technicians in nuclear and space application, provision for reservation would not be advisable.

839. As a matter of fact, the impugned Memorandum dated August 13, 1990 applies the rule of reservation to "civil posts and services under the Government of India" only, which means that defence forces are excluded from the operation of the rule of reservation though it may yet apply to civil posts in defence services. Be that as it may, we are of the opinion that in certain services and in respect of certain posts, application of the rule of reservation may not be advisable for the reason indicated hereinbefore. Some of them are: (1) Defence Services including all technical posts therein but excluding civil posts. (2) All technical posts in establishments engaged in Research and Development including those connected with atomic energy and space and establishments engaged in production of defence equipment. (3) Teaching posts of Professors - and above, if any. (4) Posts in super-specialities in Medicine, engineering and other scientific and technical subjects. (5) Posts of pilots (and co-pilots) in Indian Airlines and Air India. The list given above is merely illustrative and not exhaustive. It is for the Government of India to consider and specify the service and posts to which the rule of reservation shall not apply but on that account the implementation of the impugned Office Memorandum dated August 13, 1990 cannot be stayed or withheld.

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.

841. We may add that we see no particular relevance of Article 38(2) in this context. Article 16(4) is also a measure to ensure equality of status besides equality of opportunity.

**(Questions 9, 10 & 11 and Other Miscellaneous Questions)**

**Question No. 9 : Will the extent of judicial review be limited or restricted in regard to the identification of Backward Classes and the percentage of reservations made for such classes, to a demonstrably perverse identification or a demonstrably unreasonable percentage?**

842. It is enough to say on this question that there is no particular or special standard of judicial scrutiny in matters arising under Article 16(4) or for that matter, under Article 15(4). The extent and scope of judicial scrutiny depends upon the nature of the subject-matter, the nature of the right affected, the character of the legal and constitutional provisions applicable and so on. The acts and orders of the State made under Article 16(4) do not enjoy any particular kind of immunity. At the same time, we must say that court would normally extend due deference to the judgment and discretion of the executive – a co-equal wing – in these matters. The political executive, drawn as it is from the people and represent as it does the majority will of the people, is presumed to know the conditions and the needs of the people and hence its judgment in matters within its judgment and discretion will be entitled to due weight. More than this, it is neither possible nor desirable to say. It is not necessary to answer the question as framed.

**Questions No. 10 : Whether the distinction made in the second Memorandum between 'poorer sections' of the backward classes and others permissible under Article 16?**

843. While dealing with Question No. 3(d), we held that that exclusion of 'creamy layer' must be on the basis of social advancement (such advancement as renders them misfits in the backward classes) and not on the basis of mere economic criteria. At the same time, we held that income or the extent of property held by a person can be taken as a *measure* of social advancement and on that basis 'creamy layer' of a given caste/community/occupational group can be excluded to arrive at a true backward class. Under Question No. 5, we held that it is not impermissible for the State to categorise backward classes into backward and more backward on the basis of their relative social backwardness. We had also given the illustration of two occupational groups, viz., goldsmiths and vaddes (traditional stone-cutters in Andhra Pradesh); both are included within 'other backward classes'. If these two groups are lumped together and a common reservation is made, the goldsmiths would walk away with all the vacancies leaving none for vaddes. From the said point of view, it was observed, such classification among the designated backwards classes may indeed serve to help the more backward among them to get their due. But the question now is whether clause (i) of the Office Memorandum dated September 25, 1991 is sustainable in law. The said clause provides for preference in favour of "poorer sections" of the backward classes over other members of the backward classes. On first impression, it may appear that backward classes are classified into two sub-groups on the basis of economic criteria alone and a preference provided in favour of the poorer sections of the backward classes. In our considered opinion, however, such an interpretation would not be consistent with context in which the said expression is used and the spirit underlying the clause nor would it further the objective it seeks to achieve. The object of the clause is to provide a preference in favour of more backward among the "socially and educationally backward classes". In other words, the

expression 'poorer sections' was meant to refer to those who are socially and economically more backward. The use of the word 'poorer', in the context, is meant only as a measure of social backwardness. (Of course, the Government is yet to notify which classes among the designated backward classes are more socially backward, i.e., 'poorer sections'). Understood in this sense, the said classification is not and cannot be termed as invalid either constitutionally speaking or in law. The next question that arises is: what is the meaning and context of the expression 'preference'? Having regard to the fact the backward classes are sought to be divided into two sub-categories, viz., backward and more backward, the expression 'preference' must be read down to mean an equitable apportionment of the vacancies reserved (for backward classes) among them. The object evidently could not have been to deprive the 'backward' altogether from benefit of reservation, which could be the result if word 'preference' is read literally - if the 'more backward' take away all the available vacancies/posts reserved for OBCs, none would remain for 'backward' among the OBCs. It is for this reason that we are inclined to read down the expression to mean an equitable apportionment. This, in our opinion, is the proper and reasonable way of understanding the expression 'preference' in the context in which it occurs. By giving the above interpretation, we would be effectuating the underlying purpose and the true intention behind the clause.

844. It shall be open to the Government to notify which classes among the several designated other backward classes are more backward for the purposes of this clause and the apportionment of reserved vacancies/posts among 'backward' and "more backward". On such notification, the clause will become operational.

**Questions No. 11 : Whether the reservation of 10% of the posts in favour of 'other economically backward sections of the people who are not covered by any of the existing schemes of the reservations' made by the Office Memorandum dated September 25, 1991 permissible under Article 16?**

845. This clause provides for a 10% reservation (in appointments/posts) in favour of economically backward sections among the open competition (non-reserved) category. Though the criteria is not yet evolved by the Government of India, it is obvious that the basis is either the income of a person and/or the extent of property held by him. The impugned Memorandum does not say whether this classification is made under clause (4) or clause (1) of Article 16. Evidently, this classification among a category outside clause (4) of Article 16 is not and cannot be related to clause (4) of Article 16. If at all, it is relatable to clause (1). Even so, we find it difficult to sustain. Reservation of 10% of the vacancies among open competition candidates on the basis of income/property-holding means exclusion of those above the demarcating line from those 10% seats. The question is whether this is constitutionally permissible? We think not. It may not be permissible to debar a citizen from being considered for appointment to an office under the State solely on the basis of his income or property-holding. Since the employment under the State is really conceived to serve the people (that it may also be a source of livelihood is secondary) no such bar can be created. Any such bar would be inconsistent with the guarantee of equal opportunity held out by clause (1) of Article 16. On this ground alone, the said clause in the Office Memorandum dated May 25, 1991 fails and is accordingly declared as such.

846. Dr Rajeev Dhavan describes Article 15(4) as a provision envisaging programmes of positive action and Article 16(4) as a provision warranting programmes of positive discrimination. We are afraid we may not be able to fit these provisions into this kind of compartmentalisation in the context and scheme of our constitutional provisions. By now, it is well settled that reservations in educational institutions and other walks of life can be provided under Article 15(4) just as reservations can be provided in services under Article 16(4). If so, it would not be correct to confine Article 15(4) to programmes of positive action alone. Article 15(4) is wider than Article 16(4) inasmuch as several kinds of positive action programmes can also be evolved and implemented thereunder (in addition to reservations) to improve the conditions of SEBCs, Scheduled Castes and Scheduled Tribes, whereas Article 16(4) speaks only of one type of remedial measure, namely, reservation of appointments/posts. But it may not be entirely right to say that Article 15(4) is a provision envisaging programmes of positive action. Indeed, even programmes of positive action may sometimes involve a degree of discrimination. For example, if a special residential school is established for Scheduled Tribes or Scheduled Castes at State expense, it is a discrimination against other students, upon whose education a far lesser amount is being spent by the State. Or for that matter, take the very American cases, can it be said that they do not involve any discrimination? They do. It is another matter that such discrimination is not unconstitutional for the reason that it is designed to achieve an important government objective.

**Desirability of a Permanent Statutory Body to Examine Complaints of Over-inclusion/Under-inclusion**

847. We are of the considered view that there ought to be a permanent body, in the nature of a Commission or Tribunal, to which complaints of wrong inclusion or non-inclusion of groups, classes and sections in the lists of *Other Backward Classes* can be made. Such body must be empowered to examine complaints of the said nature and pass appropriate orders. Its advice/opinion should ordinarily be binding upon the Government. Where, however, the Government does not agree with its recommendation, it must record its reasons therefor. Even if any new class/group is proposed to be included among the other backward classes, such matter must also be referred to the said body in the first instance and action taken on the basis of its recommendation. The body must be composed of experts in the field, both official and non-official, and must be vested with the necessary powers to make a proper and effective inquiry. It is equally desirable that each State constitutes such a body, which step would go a long way in redressing genuine grievances. Such a body can be created under clause (4) of Article 16 itself - or under Article 16(4) read with Article 340 - as a concomitant of the power to identify and specify backward class of citizens, in whose favour reservations are to be provided. We direct that such a body be constituted both at Central level and at the level of the States within four months from today. They should become immediately operational and be in a position to entertain and examine forthwith complaints and matters of the nature aforementioned, if any, received. It should be open to the Government of India and the respective State Governments to devise the procedure to be followed by such body. The body or bodies so created can also be consulted in the matter of periodic revision of lists of OBCs. As suggested by Chandrachud, CJ in *Vasanth Kumar* there should be a periodic revision of

these lists to exclude those who have ceased to be backward or for inclusion of new classes, as the case may be.

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

overwhelming minority of the country's population, one can well begin with it and then go to other groups, sections and classes.

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

(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 extraordinary situations inherent in the great diversity of this country and the people. It might happen that in far-flung and remote areas the population inhabiting those areas might, on account of their being out of the mainstream of national life and in view of the conditions peculiar to and characteristic of them need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out.

(c) The rule of 50% should be applied to each year. It cannot be related to the total strength of the class, category, service or cadre, as the case may be.

(d) *Devadasan* was wrongly decided and is accordingly over-ruled to the extent it is inconsistent with this judgment.

(7) Article 16(4) does not permit provision for reservations in the matter of promotion. This rule shall, however, have only prospective operation and shall not affect the promotions already made, whether made on regular basis or on any other basis. We direct that our decision on this question shall operate only prospectively and shall not affect promotions already made, whether on temporary, officiating or regular/permanent basis. It is further directed that wherever reservations are already provided in the matter of promotion - be it Central Services or State Services, or for that matter services under any

Corporation, authority or body falling under the definition of 'State' in Article 12 - such reservations may continue in operation for a period of five years from this day. Within this period, it would be open to the appropriate authorities to revise, modify or re-issue the relevant rules to ensure the achievement of the objective of Article 16(4). If any authority thinks that for ensuring adequate representation of 'backward class of citizens' in any service, class or category, it is necessary to provide for direct recruitment therein, it shall be open to it to do so. It would not be impermissible for the State to extend concessions and relaxations to members of reserved categories in the matter of promotion *without* compromising the efficiency of the administration.

(8) While the rule of reservation cannot be called anti-meritarian, there are certain services and posts to which it may not be advisable to apply the rule of reservation.

(9) There is no particular or special standard of judicial scrutiny applicable to matters arising under Article 16(4).

(10) The distinction made in the impugned Office Memorandum dated September 25, 1991 between 'poorer sections' and others among the backward classes is not invalid, if the classification is understood and operated as based upon relative backwardness among the several classes identified as Other Backward Classes, as explained in paras 843-844 of this Judgment.

(11) The reservation of 10% of the posts in favour of 'other economically backward sections of the people who are not covered by any of the existing schemes of the reservation' made in the impugned Office Memorandum dated September 25, 1991 is constitutionally invalid and is accordingly struck down.

(13) The Government of India and the State Governments have the power to, and ought to, create a permanent mechanism - in the nature of a Commission - for examining requests of inclusion and complaints of over-inclusion or non-inclusion in the list of OBCs and to advise the Government, which advice shall ordinarily be binding upon the Government. Where, however, the Government does not accept the advice, it must record its reasons therefor.

(14) In view of the answers given by us herein and the directions issued herewith, it is not necessary to express any opinion on the correctness and adequacy of the exercise done by the Mandal Commission. It is equally unnecessary to send the matters back to the Constitution Bench of five Judges.

860. For the sake of ready reference, we also record our answers to questions as framed by the counsel for the parties and set out in para 681. Our answers question-wise are:

(1) Article 16(4) is not an exception to Article 16(1). It is an instance of classification inherent in Article 16(1). Article 16(4) is exhaustive of the subject of reservation in favour of backward classes, though it may not be exhaustive of the very concept of reservation. Reservations for other classes can be provided under clause (1) of Article 16.

(2) The expression 'backward class' in Article 16(4) takes in 'Other Backward Classes', SCs, STs and may be some other backward classes as well. The accent in



Article 16(4) is upon social backwardness. Social backwardness leads to educational backwardness and economic backwardness. They are mutually contributory to each other and are intertwined with low occupations in the Indian society. A caste can be and quite often is a social class in India. Economic criterion cannot be the sole basis for determining the backward class of citizens contemplated by Article 16(4). The weaker sections referred to in Article 46 do include SEBCs referred to in Article 340 and covered by Article 16(4).

(3) Even under Article 16(1), reservations cannot be made on the basis of economic criteria alone.

(4) The reservations contemplated in clause (4) of Article 16 should not exceed 50%. While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in far-flung and remote areas the population inhabiting those areas might, on account of their being out of the mainstream of national life and in view of the conditions peculiar to and characteristic of them need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out.

For applying this rule, the reservations should not exceed 50% of the appointments in a grade, cadre or service in any given year. Reservation can be made in a service or category only when the State is satisfied that representation of backward class of citizens therein is not adequate.

To the extent, *Devadasan* is inconsistent herewith, it is over-ruled.

(5) There is no constitutional bar to classification of backward classes into more backward and backward classes for the purposes of Article 16(4). The distinction should be on the basis of degrees of social backwardness. In case of such classification, however, it would be advisable - nay, necessary - to ensure equitable distribution amongst the various backward classes to avoid lumping so that one or two such classes do not eat away the entire quota leaving the other backward classes high and dry.

For excluding 'creamy layer', an economic criterion can be adopted as measure of social advancement.

(6) A 'provision' under Article 16(4) can be made by an executive order. It is not necessary that it should be made by Parliament/Legislature.

(7) No special standard of judicial scrutiny can be predicated in matters arising under Article 16(4). It is not possible or necessary to say more than this under this question.

(8) Reservation of appointments or posts under Article 16(4) is confined to initial appointment only and cannot extend to providing reservation in the matter of promotion. We direct that our decision on this question shall operate only prospectively and shall not affect promotions already made, whether on temporary, officiating or regular/permanent basis. It is further directed that wherever reservations are already provided in the matter of promotion - be it Central Services or State Services, or for that matter services under any Corporation, authority or body falling under the definition of 'State' in Article 12 - such

reservations may continue in operation for a period of five years from this day. Within this period, it would be open to the appropriate authorities to revise, modify or re-issue the relevant rules to ensure the achievement of the objective of Article 16(4). If any authority thinks that for ensuring adequate representation of 'backward class of citizens' in any service, class or category, it is necessary to provide for direct recruitment therein, it shall be open to it to do so.

***The following Directions are given to the Government of India, the State Governments and the Administration of Union Territories***

861. (A) The Government of India, each of the State Governments and the Administrations of Union Territories shall, within four months from today, constitute a permanent body for entertaining, examining and recommending upon requests for inclusion and complaints of over-inclusion and under-inclusion in the lists of other backward classes of citizens. The advice tendered by such body shall ordinarily be binding upon the Government.

(B) Within four months from today the Government of India shall specify the bases, applying the relevant and requisite socio-economic criteria to exclude socially advanced persons/sections ('creamy layer') from 'Other Backward Classes'. The implementation of the impugned O.M. dated August 13, 1990 shall be subject to exclusion of such socially advanced persons ('creamy layer').

This direction shall not however apply to States where the reservations in favour of backward classes are already in operation. They can continue to operate them. Such States shall however evolve the said criteria within six months from today and apply the same to exclude the socially advanced persons/sections from the designated 'Other Backward Classes'.

(C) It is clarified and directed that any and all objections to the criteria that may be evolved by the Government of India and the State Governments in pursuance of the direction contained in clause (B) of para 861 as well as to the classification among backward classes and equitable distribution of the benefits of reservations among them that may be made in terms of and as contemplated by clause (i) of the Office Memorandum dated September 25, 1991, as explained herein, shall be preferred *only* before this Court and not before or in any other High Court or other Court or Tribunal. Similarly, any petition or proceeding questioning the validity, operation or implementation of the two impugned Office Memorandums, on any grounds whatsoever, shall be filed or instituted *only* before this Court and not before any High Court or other Court or Tribunal.

862. The Office Memorandum dated August 13, 1990 impugned in these writ petitions is accordingly held valid and enforceable subject to the exclusion of the socially advanced members/sections from the notified 'Other Backward Classes', as explained in para 861(B).

863. Clause (i) of the Office Memorandum dated September 25, 1991 requires - to uphold its validity - to be read, interpreted and understood as intending a distinction between backward and more backward classes on the basis of degrees of social backwardness and a rational and equitable distribution of the benefits of the reservations amongst them. To be valid, the said clause will have to be read, understood and implemented accordingly.

864. Clause (ii) of the Office Memorandum dated September 25, 1991 is held invalid and inoperative.

**Constitutional Validity of Reservations for OBCs for Admissions in Educational Institutions**

***Ashoka Kumar Thakur v. Union of India***  
(2008) 6 SCC 1

**K.G. BALAKRISHNAN, C.J.** – (*Majority*) 6. Reservation is one of the many tools that are used to preserve and promote the essence of equality, so that disadvantaged groups can be brought to the forefront of civil life. It is also the duty of the State to promote positive measures to remove barriers of inequality and enable diverse communities to enjoy the freedoms and share the benefits guaranteed by the Constitution. In the context of education, any measure that promotes the sharing of knowledge, information and ideas, and encourages and improves learning, among India's vastly diverse classes deserves encouragement. To cope with the modern world and its complexities and turbulent problems, education is a must and it cannot remain cloistered for the benefit of a privileged few. Reservations provide that extra advantage to those persons who, without such support, can forever only dream of university, education, without ever being able to realize it. This advantage is necessary.

7. Dr. Rajendra Prasad, at the concluding address of the Constituent Assembly, stated in the following words:

To all we give the assurance that it will be our endeavour to end poverty and squalor and its companions, hunger and disease; to abolish distinction and exploitation and to ensure decent conditions of living. We are embarking on a great task. We hope that in this we shall have the unstinted service and co-operation of all our people and the sympathy and support of all the communities....

8. It must also be borne in mind that many other democracies face similar problems and grapple with issues of discrimination, in their own societal context. Though their social structure may be markedly different from ours, the problem of inequality in the larger context and the tools used to combat it may be common.

9. We are conscious of the fact that any reservation or preference shall not lead to reverse discrimination. The Constitution (Ninety- Third) Amendment Act, 2005 and the enactment of Act 5 of 2007 giving reservation to Other Backward Classes (OBCs), Scheduled Castes (SCs) and Scheduled Tribes (STs) created mixed reactions in the society. Though the reservation in favour of SC and ST is not opposed by the petitioners, the reservation of 27% in favour of Other Backward Classes/Socially and educationally backward classes is strongly opposed by various petitioners in these cases. Eminent Counsel appeared both for the petitioners and respondents. The learned Solicitor General and Additional Solicitor General appeared and expressed their views. We have tried to address, with utmost care and attention, the various arguments advanced by the learned Counsel and we are greatly beholden to all of them for the manner in which they have analysed and presented the case before us which is of great importance, affecting large sections of the community.

10. By the Constitution (Ninety-Third Amendment) Act, 2005, Clause (5) was inserted in Article 15 of the Constitution which reads as under:

Nothing in this article or in Sub-clause (g) of Clause (1) of Article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to the educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in Clause (1) of Article 30.

11. In *Unni Krishnan, J.P. v. State of Andhra Pradesh* [1993 (1) SCC 645], it was held that right to establish educational institutions can neither be a trade or business nor can it be a profession within the meaning of Article 19(1)(g). This was overruled in *T.M.A. Pai Foundation v. State of Karnataka* [(2002) 8 SCC 481], wherein it was held that all citizens have the fundamental right to establish and administer educational institutions under Article 19(1)(g) and the term “occupation” in Article 19(1)(g) comprehends the establishment and running of educational institutions and State regulation of admissions in such institutions would not be regarded as an unreasonable restriction on that fundamental right to carry on business under Article 19(6) of the Constitution. Education is primarily the responsibility of the State Governments. The Union Government also has certain responsibility specified in the Constitution on matters relating to institutions of national importance and certain other specified institutions of higher education and promotion of educational opportunities for the weaker sections of society. The Parliament introduced Article 15(5) by The Constitution (Ninety-Third Amendment) Act, 2005 to enable the State to make such provision for the advancement of SC, ST and Socially and Educationally Backward Classes (SEBC) of citizens in relation to a specific subject, namely, admission to educational institutions including private educational institutions whether aided or unaided by the State notwithstanding the provisions of Article 19(1)(g). In the Statement of Objects and Reasons of the Constitution (Ninety-Third Amendment) Act, 2005 it has been stated that:

At present, the number of seats available in aided or State maintained institutions, particularly in respect of professional education, is limited in comparison to those in private unaided institutions.

To promote the educational advancement of the socially and educationally backward classes of citizens, i.e., the OBCs or the Scheduled Castes and Scheduled Tribes in matters of admission of students belonging to these categories in unaided educational institutions other than the minority educational institutions referred to Clause (1) of Article 30 of the Constitution, it is proposed to amplify Article 15. The new Clause (5) shall enable the Parliament as well as the State Legislatures to make appropriate laws for the purposes mentioned above.

12. After the above Constitution (Ninety-Third Amendment) Act, 2005, the Parliament passed The Central Educational Institutions (Reservation in Admission) Act, 2006 (Act 5 of 2007).

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

3. The reservation of seats in admission and its extent in a Central Educational Institution shall be provided in the following manner, namely:

- (i) out of the annual permitted strength in each branch of study or faculty, fifteen per cent seats shall be reserved for the Scheduled Castes;
- (ii) out of the annual permitted strength in each branch of study or faculty, seven and one-half per cent seats shall be reserved for the Scheduled Tribes;
- (iii) out of the annual permitted strength in each branch of study or faculty, twenty-seven per cent seats shall be reserved for the Other Backward Classes.

14. "Central Educational Institution" has been defined under Section 2(d) of the Act as follows:

2(d) "Central Educational Institution" means -

- (i) a university established or incorporated by or under a Central Act;
- (ii) an institution of national importance set up by an Act of Parliament;
- (iii) an institution, declared as a deemed University under section 3 of the University Grants Commission Act, 1956, and maintained by or receiving aid from the Central Government;
- (iv) an institution maintained by or receiving aid from the Central Government, whether directly or indirectly, and affiliated to an institution referred to in Clause (i) or Clause (ii), or a constituent unit of an institution, referred to in Clause (iii);
- (v) an educational institution set up by the Central Government under the Societies Registration Act, 1860.

15. The percentage of reservation to various groups such as Scheduled Castes, Scheduled Tribes and Other Backward Classes are with reference to the annual permitted strength of the Central Educational Institutions and the "annual permitted strength" is defined under Section 2(b) of the Act as follows:

2(b) "annual permitted strength" means the number of seats, in a course or programme for teaching or instruction in each branch of study or faculty authorized by an appropriate authority for admission of students to a Central Educational Institution.

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

4. The provisions of Section 3 of this Act shall not apply to -

- (a) a Central Educational Institution established in the tribal areas referred to in the Sixth Schedule to the Constitution;
- (b) the institutions of excellence, research institutions, institutions of national and strategic importance specified in the Schedule to this Act;  
Provided that the Central Government may, as and when considered necessary, by notification in the Official Gazette, amend the Schedule;
- (c) a Minority Educational Institution as defined in this Act;

(d) a course or programme at high levels of specialization, including at the post-doctoral level, within any branch or study or faculty, which the Central Government may, in consultation with the appropriate authority, specify.

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

"Minority Educational Institution" means an institution established and administered by the minorities under Clause (1) of article 30 of the Constitution and so declared by an Act of Parliament or by the Central Government or declared as a Minority Educational Institution under the National Commission for Minority Educational Institutions Act, 2004.

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

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

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

"Scheduled Castes" means the Scheduled Castes notified under Article 341 of the Constitution;

"Scheduled Tribes" means the Scheduled Tribes notified under Article 342 of the Constitution.

20. Section 5 of the Act mandates the increase of seats in the Central Educational Institutions by providing reservation to Scheduled Castes, Scheduled Tribes and Other Backward Classes. Section 5 reads as follows:

5 (1) Notwithstanding anything contained in Clause (iii) of section 3 and in any other law for the time being in force, every Central Educational Institution shall, with the prior approval of the appropriate authority, increase the number of seats in a branch of study or faculty over and above its annual permitted strength so that the number of seats, excluding those reserved for the persons belonging to the Scheduled Castes, the Scheduled Tribes and the Other Backward Classes, is not less than the number of such seats available for the academic session immediately preceding the date of the coming into force of this Act.

(2) Where, on a representation by any Central Educational Institution, the Central Government, in consultation with the appropriate authority, is satisfied that for reasons of financial, physical or academic limitations or in order to maintain the standards of education, the annual permitted strength in any branch of study or faculty of such institution cannot be increased for the academic session following the commencement of this Act, it may permit by notification in the Official Gazette, such institution to increase the annual permitted strength over a maximum period of three years beginning with the academic session following the commencement of this Act; and then, the extent of reservation for the Other Backward Classes as provided in Clause (iii) of section 3 shall be limited for that academic session in such manner that the number of seats available to the Other Backward Classes for each academic session are commensurate with the increase in the permitted strength for each year.

21. By virtue of definition of the “Central Educational Institutions” under Clause (d)(iv) of Section 2 of the Act, all institutions maintained by or receiving aid from the Central Government whether directly or indirectly, and affiliated to any university or deemed university or institution of national importance, in addition to universities which are established or incorporated under a Central Act, institutions of national importance set up by Acts of Parliament, deemed universities maintained or receiving aid from Central Government and institutions set up by the Central Government with the Societies Registration Act, 1960, are brought under the purview of reservation under Section 3 of the Act. The object of the Act is to introduce in reservation in only such institutions which are defined as “Central Educational Institutions” and not any other private unaided institutions.

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

Greater access to higher education including professional education, to a large number of students belonging to the socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes, has been a matter of major concern. The reservation of seats for the Scheduled Castes, the Scheduled Tribes and the Other Backward Classes of citizens (OBCs) in admission to educational institutions is derived from the provisions of Clause (4) of Article 15. At present, the number of seats available in aided or State maintained institutions, particularly in respect of professional education, is limited in comparison to those in private unaided institutions.

2. It is laid down in Article 46, as a directive principle of State policy, that the State shall promote with special care the educational and economic interests of the weaker sections of the people and protect them from social injustice. Access to education is important in order to ensure advancement of persons belonging to the Scheduled Castes, the Scheduled Tribes and the socially and educationally backward classes also referred to as the OBCs.

3. Clause (1) of Article 30 provides the right to all minorities to establish and administer educational institutions of their choice. It is essential that the rights available to minorities are protected in regard to institutions established and administered by them. Accordingly, institutions declared by the State to be minority institutions under Clause (1) of Article 30 are omitted from the operation of the proposal.

4. To promote the educational advancement of the socially and educationally backward classes of citizens i.e., the OBCs or of the Scheduled Castes and Scheduled Tribes in matters of admission of students belonging to these categories in unaided educational institutions, other than the minority educational institutions referred to in Clause (1) of Article 30 of the Constitution, it is proposed to amplify Article 15. The new Clause (5) shall enable the Parliament as well as the State Legislatures to make appropriate laws for the purposes mentioned above.

23. The Constitution (Ninety-Third Amendment) Act, 2005, by which Article 15(5) was inserted in the Constitution, is challenged in these petitions, on various grounds. In some of the writ petitions which have been filed after the passing of Act 5 of 2007, the challenge is directed against the various provisions of the Act 5 of 2007. Initially, these writ petitions were

heard by a Bench of two Judges. Considering the constitutional importance of these questions, all these writ petitions were referred to a Constitution Bench.

27. The validity of Constitution (Ninety-Third Amendment) Act, 2005 was seriously challenged by arguing that the amendment is destructive of basic structure of the Constitution. The learned Counsel was of the view that both the Act as well as the Constitution (Ninety-Third Amendment) Act, 2005 have to be declared ultra vires the Constitution.

39. Fundamental Rights and Directive Principles are both complementary and supplementary to each other. Preamble is a part of the Constitution and the edifice of our Constitution is built upon the concepts crystallized in the Preamble. Reference was made to the observations made by Chief Justice Sikri in *Kesavananda Bharati v. State of Kerala* [(1973) 4 SCC 225], wherein it was argued that the Constitution should be read and interpreted in the light of the grand and noble vision expressed in the Preamble. The Preamble secures and assures to all citizens justice, social, economic and political and it assures the equality of status and of opportunity. Education and the economic well-being of an individual give a status in society. When a large number of OBCs, SCs and STs get better educated and get into Parliament, legislative assemblies, public employment, professions and into other walks of public life, the attitude that they are inferior will disappear. This will promote fraternity assuring the dignity of the individual and the unity and integrity of the nation. The single most powerful tool for the upliftment and progress of such diverse communities is education.

40. The Fundamental Rights in Part III are not to be read in isolation. All rights conferred in Part III of the Constitution are subject to at least other provisions of the said Part III. The Directive Principles of State Policy in Part IV of the Constitution are equally as important as Fundamental Rights. Part IV is made not enforceable by Court for the reason inter alia as to financial implications and priorities. Principles of Part IV have to be gradually transformed into fundamental rights depending upon the economic capacity of the State. Article 45 is being transformed into a fundamental right by 86<sup>th</sup> Amendment of the Constitution by inserting Article 21A. Clause 2 of Article 38 says that, "*the State shall, in particular, strive to minimize the inequalities in income and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations*". Under Article 46, "*the State shall promote with special care the educational and economic interests of the weaker sections of the people and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation*". It is submitted that the Ninety-Third Constitutional Amendment was brought into force to bring about economic and social regeneration of the teeming millions who are steeped in poverty, ignorance and social backwardness. Shri K. Parasaran, learned Senior Counsel, contended that the concept of basic structure is not a vague concept and it was illustrated in the judgment in *Kesavananda Bharati* case. It was pointed out that the supremacy of the Constitution, republican and democratic form of Government and sovereignty of the country, secular and federal character of the Constitution, demarcation of power between the legislature, the executive and the judiciary, the dignity of the individual (secured by the various freedoms and basic rights in Part III and the mandate to build a welfare State contained in Part IV), the unity and the



integrity of the nation are some of the principles of basic structure of the Constitution. It was contended that when the constitutional validity of a statute is considered, the cardinal rule to be followed is to look at the Preamble to the Constitution as the guiding light and the Directive Principles of State Policy as a book of interpretation. On a harmonious reading of the Preamble, Part III and Part IV, it is manifest that there is a Constitutional promise to the weaker sections / SEBCs and this solemn duty has to be fulfilled.

41. It was pointed out that the observations in *Champakam Dorairajan* that the Directive Principles are subordinate to the Fundamental Rights is no longer good law after the decision of the *Kesavanda Bharati* case and other decisions of this Court. It was pointed out that the de facto inequalities which exist in the society are to be taken into account and affirmative action by way of giving preference to the socially and economically disadvantaged persons or inflicting handicaps on those more advantageously placed is to be made in order to bring about real equality. It is submitted that special provision for advancement of any socially and educationally backward citizens may be made by determining the socially and educationally backward classes on the basis of caste. Article 15(4) neutralized the decision in *Champakam Dorairajan* case. It was enacted by the Provisional Parliament which consisted of the very same Members who constituted the Constituent Assembly. Our Constitution is not caste blind and the Constitution prohibits discrimination based 'only on caste' and not 'caste and something else'.

42. In *Unni Krishnan* case it was held that Article 19(1)(g) is not attracted for establishing and running educational institutions. But this decision was overruled in *T.M.A. Pai Foundation* and it was held that establishing and running an educational institution is an "occupation" within the meaning of Article 19(1)(g). In *P.A. Inamdar* case, it was held that the private educational institutions, including minority institutions, are free to admit students of their own choice and the State by regulatory measures cannot control the admission. It was held that the State cannot impose reservation policy to unaided institutions. The above ruling disabled the State to resort to its enabling power under Article 15(4) of the Constitution. It was argued by Shri Parasaran that the above rulings necessitated the enactment of The Constitution (Ninety-Third Amendment) Act, 2005 by inserting Article 15(5) through which enabling power was conferred on the Parliament and the State Legislatures, so that they would have the legislative competence to pass a law providing for reservation in educational institutions which will not be hit by Article 19(1)(g). But rights of minorities under Article 30 are not touched by Article 15(5).

43. In *Kesavananda Bharati* it was held that the fundamental rights may not be abrogated but they can be abridged. The validity of the 24<sup>th</sup> Amendment of the Constitution abridging the fundamental rights was upheld by the Court. The right under Article 19(1)(f) has been completely abrogated by the 44<sup>th</sup> Amendment of the Constitution which is permissible for the constituent power to abridge the Fundamental Rights especially for reaching the goal of the Preamble of the Constitution. It is an instance of transforming the principles of Part IV into Part III whereby it becomes enforceable. All rights conferred in Part III of the Constitution are subject to other provisions in the same Part. Article 15(4) introduced by the 1<sup>st</sup> Amendment to the Constitution is a similar instance of abridging of Fundamental Rights of the general category of citizens to ensure the Fundamental Rights of OBCs, SCs and STs. Article 15(5) is

a similar provision and is well within the Constituent power of amendment. Article 15(5) is an enabling provision and vests power in the Parliament and the State legislatures.

44. There is vital distinction between the vesting of a power and the exercise of power and the manner of its exercise. It would only enable the Parliament and the State legislatures to make special provisions by law for enforcement of any socially and educationally backward class of citizens or for Scheduled Castes and Scheduled Tribes relating to their admission to educational institutions including private educational institutions.

45. As regards exemption of minority educational institutions in Article 15(5), it was contended that this was done to conform with the Constitutional mandate of additional protection for minorities under Article 30. It was argued that Article 15(5) does not override Article 15(4). They have to be read together as supplementary to each other and Article 15(5) being an additional provision, there is no conflict between Article 15(4) and Article 15(5). Article 15(4), 15(5), 29(2), 30(1), and 30(2) all together constitute a Code in relation to admission to educational institutions. They have to be harmoniously construed in the light of the Preamble and Part IV of the Constitution. It was also contended that the Article 15(5) does not interfere with the executive power of the State and there is no violation of the proviso to Article 368.

46. The Ninety-Third Constitutional Amendment does not specifically or impliedly make any change in Article 162. Article 15(5) does not seek to make any change in Article 162 either directly or indirectly. The field of legislation as to "education" was in Entry 11 of List II. By virtue of the 42<sup>nd</sup> Amendment of the Constitution, "education", which was in Entry 11 in List II, was deleted and inserted as Entry 25 in List III. The executive power of the State is not touched by the present Constitutional Amendment.

47. Article 15(5) does not abrogate the fundamental right enshrined under Article 19(1)(g). If at all there is an abridgement of Fundamental Right, it is in a limited area of admission to educational institutions and such abridgement does not violate the basic structure of the Constitution. In any way, Constitutional Amendments giving effect to Directive Principles of the State Policy would not offend the basic structure of the Constitution.

48. The Right to Equality enshrined in our Constitution is not merely a formal right or a vacuous declaration. Affirmative action though apparently discriminatory is calculated to produce equality on a broader basis. By eliminating de facto inequalities and placing the weaker sections of the community on a footing of equality with the stronger and more powerful sections so that each member of the community whatever is his birth, occupation or social position may be, enjoys equal opportunity of using to the full, his natural endowments of physique, of character and of intelligence.

54. It was held in *E.V. Chinnaiiah v. State of Andhra Pradesh* [(2005) 1 SCC 394] that the SCs and STs form a single class. The observations in *Nagaraj* case cannot be construed as requiring exclusion of creamy layer in SCs and STs. Creamy layer principle was applied for the identification of backward classes of citizens. And it was specifically held in *Indra Sawhney* case, that the above discussion was confined to Other Backward Classes and has no relevance in the case of Scheduled Tribes and Scheduled Castes. The observations of the

Supreme Court in *Nagaraj* case should not be read as conflicting with the decision in *Indra Sawhney* case. The observations in *Nagaraj* case as regards SCs and STs are obiter. In regard to SCs and STs, there can be no concept of creamy layer.

55. Once the President of India has determined the list of Scheduled Castes and Scheduled Tribes, it is only by a law made by the Parliament that there can be exclusion from the list of Scheduled Castes or Scheduled Tribes. As far as OBCs are concerned, the principle of exclusion of creamy lawyer is applicable only for Article 16(4). It has no application to Article 15(4) or 15(5) as education stands on a different footing.

56. Equality of opportunity of education is a must for every citizen and the doctrine of “creamy layer” is inapplicable and inappropriate in the context of giving opportunity for education. In the matter of education there cannot be any exclusion on the ground of creamy layer. Such exclusion would only be counter productive and would retard the development and progress of the groups and communities and their eventual integration with the rest of the society.

57. It was further argued that Article 15(4) and 15(5) are provisions of power coupled with duty. It is the constitutional duty to apply these principles in the governance of the country and in making law for the reason that it is a constitutional promise of social justice which has to be redeemed.

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

74. The Constitution never prohibits the practice of caste and casteism. Every activity in Hindu society, from cradle to grave is carried on solely on the basis of one's caste. Even after death, a Hindu is not allowed to be cremated in the crematorium which is maintained for the exclusive use of the other caste or community. Dalits are not permitted to be buried in graves or cremated in crematoriums where upper caste people bury or cremate their dead. Christians have their own graveyards. Muslims are not allowed to be buried in the Hindu crematoriums and vice-versa. Thus, caste rules the roost in the life of a Hindu and even after his death. In such circumstances, it is entirely fallacious to advance this argument on the ground that the Constitution has prohibited the use of caste. It was argued what the Constitution aims at is achievement of equality between the castes and not elimination of castes.

75. The learned Senior Counsel points out that it would be utopian to expect that by ignoring caste, the castes will perish. And the Counsel contended the Constitution has not abolished the caste system much less has it prohibited its use. The Counsel pointed out that the Constitutional Amendment under the impugned Act in favour of backward classes is an unprecedented leap taking the higher education in the country forward, without depriving a single seat to the forward castes. And the advanced castes, with a population of less than 20% would still be able to get 50% of the seats in the name of merit disproportionate to their known proportion of their population. It is contended that without the advancement of SCs, STs and OBCs constituting over 80% population and mainly living in rural areas, it will not be possible to take the nation forward. And the students who are admitted under the reserved quota have performed much better than the students admitted on the basis of merit. The learned Counsel also placed reliance on the Moily Report - Case studies from four States.

76. The main challenge in these writ petitions is the constitutional validity of the Act 5 of 2007. This legislation was passed by Parliament consequent upon The Constitution (Ninety-Third Amendment) Act, 2005, by which Sub-article (5) was inserted in Article 15 of the Constitution. The constitutionality of this amendment has also been challenged in the various writ petitions filed by the petitioners. As the Act itself is based on the Constitution (Ninety-Third Amendment) Act, 2005, the validity of the Act depends on the fact whether the Constitution (Ninety-Third Amendment) Act, 2005 itself is valid or not.

77. *T.M.A. Pai Foundation* held that a private unaided educational institution has the fundamental right under Article 19(1)(g) of the Constitution as the running of an educational institution was treated as an "occupation" and further that the State's regulation in such institutions would not be regarded as a reasonable restriction on that fundamental right to carry on business under Article 19(6). This decision necessitated the Ninety-Third Amendment to the Constitution since as a result of *T.M.A. Pai Foundation* the State would not be in a position to control or regulate the admission in private educational institutions. At the outset, it may have to be stated that no educational institution has come up to challenge the Constitution (Ninety-Third Amendment) Act, 2005. The challenge about the constitutionality of the Constitution (Ninety-Third Amendment) Act, 2005 has been advanced by the petitioners, who based their contentions on the equality principles enunciated in Articles 14, 15 and 16 of the Constitution.

78. The Constitution (Ninety-Third Amendment) Act, 2005 is challenged on many grounds. The first ground of attack is that if the Constitution (Ninety-Third Amendment) Act, 2005 is allowed to stand it would be against the "basic structure" of the Constitution itself and this Amendment seriously abridges the equality principles guaranteed under Article 15 and other provisions of the Constitution. Another contention raised by the petitioners' Counsel is that the Golden Triangle of Articles 14, 19 and 21 is not to be altered and the balance and structure of these constitutional provisions has been ousted by the Constitution (Ninety-Third Amendment) Act, 2005. Yet another contention urged by Shri K.K. Venugopal, learned Senior Counsel, is that Article 15(4) and 15(5) are mutually exclusive and under Article 15(5) the minority educational institutions are excluded. According to him, this is a clear contravention of the secular and equality principles. The learned Senior Counsel also pointed out that minority institutions are not severable from the purview of Article 15(5) and therefore, the whole Constitution (Ninety-Third Amendment) Act, 2005 is to be declared illegal. Another argument advanced by the learned Senior Counsel is that there is inconsistency between Article 15(4) and Article 15(5) and by virtue of the Constitution (Ninety-Third Amendment) Act, 2005, the States are devoid of their wide power under Article 15(5) to make reservation in minority educational institutions which are getting aid from the States and thus it is violative of the very essence of equality. He further argued that the Constitution (Ninety-Third Amendment) Act, 2005 could control the legislative and executive power of the State and, therefore, it is not constitutionally valid. The learned Counsel had further challenged the validity of Act 5 of 2007, with which we will deal separately.

***I. Whether Ninety-Third Amendment of the Constitution is against the "basic structure" of the Constitution?***

79. The Constitution (Ninety-Third Amendment) Act, 2005, by which Clause (5) was added to Article 15 of the Constitution, is an enabling provision which states that nothing in Article 15 or in Sub-clause (g) of Clause (1) of Article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to the educational institutions including private educational institutions, whether aided or unaided by the State. Of course, minority educational institutions referred to in Clause (1) of Article 30 are excluded. Thus, the newly added Clause (5) of Article 15 is sought to be applied to educational institutions whether aided or unaided. In other words, this newly added constitutional provision would enable the State to make any special provision by law for admission in private educational institutions whether aided or unaided. In all the petitions which have been filed before us the main challenge is against Act 5 of 2007. Act 5 of 2007 has been enacted to provide reservation of seats for Scheduled Castes, Scheduled Tribes and SEBCs of citizens in Central Educational Institutions. The "Central Educational Institution" has been defined under Section 2(d) of the Act. They are institutions established or incorporated by or under the Central Act or set up by an Act of Parliament or deemed Universities maintained by or receiving aid from the Central Government or institutions maintained by or receiving aid from the Central Government or educational institutions set up by the Central Government under the Societies Registration Act, 1860. Act 5 of 2007 is not intended to provide reservation in "private unaided" educational institutions. None of the private unaided educational institutions have filed petitions before us challenging the Ninety-Third Constitutional Amendment. Though the learned Counsel appearing for the petitioners have challenged the Ninety-Third Constitutional Amendment on various grounds, they were *vis-a-vis* the challenge to Act 5 of 2007. The counter to the challenge by the learned Solicitor General as well as by Shri K. Parasaran, learned Senior Counsel was also in that context. We do not want to enter a finding as to whether the Ninety-Third Constitutional Amendment is violative of the "basic structure" of the Constitution so far as it relates to "private unaided" educational institutions. In the absence of challenge by private unaided educational institutions, it would not be proper to pronounce upon the constitutional validity of that part of the Constitutional Amendment. As the main challenge in these various petitions was only regarding the provisions of Act 5 of 2007, which related to state maintained institutions, the challenge to the Ninety-Third Constitutional Amendment so far as it relates to private unaided educational institutions, does not strictly arise in these proceedings. In the absence of challenge by private unaided institutions, it may not be proper for this Court to decide whether the Ninety-Third Constitutional Amendment is violative of the "basic structure" of the Constitution so far as it relates to private unaided educational institutions merely because we are considering its validity in the context of Act 5 of 2007. We feel that such questions could be decided as the main questions that are involved in these petitions are specific regarding Act 5 of 2007, we leave open the question as to whether the Ninety-Third Amendment to the Constitution by which Sub-clause (5) was inserted is violative of the basic structure doctrine or not so far as it relates to "private unaided" educational institutions to be decided in other appropriate cases.

We deal only with the question of whether the Ninety-Third Constitutional Amendment is constitutionally valid so far as it relates to the state maintained institutions and aided educational institutions.

80. Several contentions have been advanced by the petitioners' Counsel challenging the constitutional validity of the Constitution (Ninety-Third Amendment) Act, 2005. The main argument was on the ground that this amendment is against the "basic structure" of the Constitution. In order to appreciate the contention of the petitioners' Counsel, it is necessary to understand the "basic structure" theory that has been propounded in the celebrated case of **Kesavananda Bharati**. This case was a decision of 13 Judge Bench of this Court. Though the Judges were not unanimous about what the "basic structure" of the Constitution be, however, Shelat J. (at page 280) in his judgment had indicated the following basic features of the Constitution:

The basic structure of the Constitution is not a vague concept and the apprehensions expressed on behalf of the respondents that neither the citizen nor the Parliament would be able to understand it are unfounded. If the historical background, the Preamble, the entire scheme of the Constitution, the relevant provisions thereof including Article 368 are kept in mind there can be no difficulty in discerning that the following can be regarded as the basic elements of the constitutional structure. (These cannot be catalogued but can only be illustrated):

1. The supremacy of the Constitution.
2. Republican and Democratic form of Government and sovereignty of the country.
3. Secular and federal character of the Constitution.
4. Demarcation of power between the legislature, the executive and the judiciary.
5. The dignity of the individual secured by the various freedoms and basic rights in Part III and the mandate to build a welfare State contained in Part IV.
6. The unity and the integrity of the nation.

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

The true position is that every provision of the Constitution can be amended provided in the result the basic foundation and structure of the constitution remains the same. The basic structure may be said to consist of the following features:

- (1) Supremacy of the Constitution.
- (2) Republication and Democratic form of Government.
- (3) Secular character of the Constitution.
- (4) Separation of powers between the Legislature, the executive and the judiciary.
- (5) Federal character of the Constitution.

82. The power of Parliament to amend the Constitution also was dealt with in detail and majority of the Judges held that the fundamental rights can be amended, altered or abridged. The majority decision in **Kesavananda Bharati** case overruled the decision in **Golak Nath v. State of Punjab**. **Kesavananda Bharati** indicates the extent to which amendment of the Constitution could be carried out and lays down that the legality of an amendment is no more

open to attack than the Constitution itself. It was held that the validity of an ordinary law can be questioned and when it is questioned it must be justified by reference to a higher law. In the case of the Constitution the validity is inherent and lies within itself. The Constitution generates its own validity. The validity of the Constitution lies in the social fact of its acceptance by the community. There is a clear demarcation between an ordinary law made in exercise of the legislative power and the constituent law made in exercise of constitutional power. Therefore, the power to amend the Constitution is different from the power to amend ordinary law. The distinction between the legislative power and the constitutional power is vital in a rigid or controlled Constitution because it is that distinction which brings in the doctrine that a law ultra vires the Constitution is void. When the Parliament is engaged in the amending process it is not legislating, it is exercising a particular power bestowed upon it *sui-generis* by the amending clause in the Constitution. Sikri, CJ, held that the expression "amendment of this Constitution" does not enable Parliament to abrogate or take away fundamental rights or to completely change the fundamental features of the Constitution so as to destroy its identity. Within these limits Parliament can amend every article. Shelat & Grover JJ. (at p 291) concluded that:

Though the power to amend cannot be narrowly construed and extends to all the Articles it is not unlimited so as to include the power to abrogate or change the identity of the Constitution or its basic features.

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

The power to amend the Constitution under Article 368 as it stood before its amendment empowered the Parliament by following the form and manner laid down in that Article, to amend each and every Article and each and every Part of the Constitution.... Though the power to amend the Constitution under Article 368 is a very wide power, it does not yet include the power to destroy or emasculate the basic elements or the fundamental features of the Constitution.

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

The Constitution is the supreme law. Third, an amendment of the Constitution is an exercise of the constituent power. The majority view in *Golak Nath* case is with respect wrong. Fourth, there are no express limitations to the power of amendment. Fifth, there are no implied and inherent limitations on the power of amendment. Neither the Preamble nor Article 13(2) is at all a limitation on the power of amendment. Sixth, the power to amend is wide and unlimited. The power to amend means the power to add, alter or repeal any provision of the Constitution. There can be or is no distinction between essential and in-essential features of the Constitution to raise any impediment to amendment of alleged essential features.

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

The power and the procedure for the amendment of the Constitution were contained in the unamended Article 368. An Amendment of the Constitution in accordance with the procedure prescribed in that Article is not a 'law' within the meaning of Article 13. An amendment of the Constitution abridging or taking away a fundamental right conferred by Part III of the Constitution is not void as contravening

the provisions of Article 13(2). There were no implied or inherent limitations on the amending power under the unamended Article 368 in its operation over the fundamental rights. There can be none after its amendment.

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

The power to amendment under Article 368 does not include power to abrogate the Constitution nor does it include the power to alter the basic structure or framework of the Constitution. Subject to the retention of the basic structure or framework of the Constitution, the power of amendment is plenary and includes within itself the power to amend the various articles of the Constitution, including those relating to fundamental rights as well as those which may be said to relate to essential features. No part of a fundamental right can claim immunity from amendatory process by being described as the essence or core of that right. The power of amendment would also include within itself the power to add, alter or repeal the various articles.

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

The only limitation is that the Constitution cannot be repealed or abrogated in the exercise of the power of amendment without substituting a mechanism by which the State is constituted and organized. That limitation flows from the language of the article itself.

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

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

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

89. Dwivedi, J finally concluded that:

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

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

The power of amendment of the Constitution conferred by the then Article 368 was wide and unfettered. It reached every part and provision of the Constitution.

91. A survey of the conclusions reached by the learned Judges in *Kesavananda Bharati* case clearly shows that the power of amendment was very wide and even the fundamental rights could be amended or altered. It is also important to note that the decision in *RE : The Berubari Union and Exchange of Enclaves, Reference under Article 143(1) of the Constitution of India* [AIR 1960 SC 845], to the effect that preamble to the Constitution was not part of the Constitution was disapproved in *Kesavananda Bharati* case and it was held that it is a part of the Constitution and the Preamble to the Constitution is of extreme importance and the Constitution should be read and interpreted in the light of the grand and



noble visions envisaged in the Preamble. A close analysis of the decisions in *Kesavananda Bharati* case shows that all the provisions of the Constitution, including the fundamental rights, could be amended or altered and the only limitation placed is that the basic structure of the Constitution shall not be altered. The judgment in *Kesavananda Bharati* case clearly indicates what is the basic structure of the Constitution. It is not any single idea or principle like equality or any other constitutional principles that are subject to variation, but the principles of equality cannot be completely taken away so as to leave the citizens in this country in a state of lawlessness. But the facets of the principle of equality could always be altered especially to carry out the Directive Principles of the State Policy envisaged in Part IV of the Constitution. The Constitution (Ninety-Third Amendment) Act, 2005 is to be examined in the light of the above position.

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

93. For determining whether a particular feature of the Constitution is part of the basic structure or not, it has to be examined in each individual case keeping in mind the scheme of the Constitution, its objects and purpose and the integrity of the Constitution as a fundamental instrument for the country's governance. It may be noticed that it is not open to challenge the ordinary legislations on the basis of the basic structure principle. State legislation can be challenged on the question whether it is violative of the provisions of the Constitution. But as regards constitutional amendments, if any challenge is made on the basis of basic structure, it has to be examined based on the basic features of the Constitution. It may be noticed that the majority in *Kesavananda Bharati* case did not hold that all facets of Article 14 or any of the fundamental rights would form part of the basic structure of the Constitution. The majority upheld the validity of the first part of Article 30(1)(c) which would show that the constitutional amendment which takes away or abridges the right to challenge the validity of an arbitrary law or violating a fundamental right under that Article would not destroy or damage the basic structure. Equality is a multi-coloured concept incapable of a single definition as is also the fundamental right under Article 19(1)(g). The principle of equality is a delicate, vulnerable and supremely precious concept for our society. It is true that it has embraced a critical and essential component of constitutional identity. The larger principles of equality as stated in Article 14, 15 and 16 may be understood as an element of the "basic

structure” of the Constitution and may not be subject to amendment, although, these provisions, intended to configure these rights in a particular way, may be changed within the constraints of the broader principle. The variability of changing conditions may necessitate the modifications in the structure and design of these rights, but the transient characters of formal arrangements must reflect the larger purpose and principles that are the continuous and unalterable thread of constitutional identity. It is not the introduction of significant and far-reaching change that is objectionable, rather it is the content of this change in so far as it implicates the question of constitutional identity.

95. If any Constitutional amendment is made which moderately abridges or alters the equality principle or the principles under Article 19(1)(g), it cannot be said that it violates the basic structure of the Constitution. If such a principle is accepted, our Constitution would not be able to adapt itself to the changing conditions of a dynamic human society. Therefore, the plea raised by the Petitioners' that the present Constitutional Ninety-Third Amendment Act, 2005 alters the basic structure of the constitution is of no force. Moreover, the interpretation of the Constitution shall not be in a narrow pedantic way. The observations made by the Constitution Bench in *Nagaraj* case at page 240 are relevant:

Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adapted to the various crisis of human affairs. Therefore, a purposive rather than a strict literal approach to the interpretation should be adopted. A Constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that constitutional provision does not get fossilized but remains flexible enough to meet the newly emerging problems and challenges.

96. It has been held in many decisions that when a constitutional provision is interpreted, the cardinal rule is to look to the Preamble to the Constitution as the guiding star and the Directive Principles of State Policy as the 'Book of Interpretation'. The Preamble embodies the hopes and aspirations of the people and Directive Principles set out the proximate grounds in the governance of this country.

97. Therefore, we hold that the Ninety-Third Amendment to the Constitution does not violate the “basic structure” of the Constitution so far as it relates to aided educational institutions. Question whether reservation could be made for SCs, STs or SEBCs in private unaided educational institutions on the basis of the Ninety-Third Constitutional Amendment; or whether reservation could be given in such institutions; or whether any such legislation would be violative of Article 19(1)(g) or Article 14 of the Constitution; or whether the Ninety-Third Constitutional Amendment which enables the State Legislatures or Parliament to make such legislation - are all questions to be decided in a properly constituted lis between the affected parties and others who support such legislation.

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

98. The next contention raised by the petitioner's Counsel is that Article 15(4) and 15(5) are mutually exclusive and contradictory. The Counsel for the petitioner, particularly the petitioner in Writ Petition (C) No. 598 of 2006, submitted that Article 15(4) was a provision and a source of legislative power for the purpose of making reservation for Scheduled Castes (SCs) and Scheduled Tribes (STs) as well as for Socially and Educationally Backward Classes (SEBCs) of citizens in aided minority educational institutions. And Article 15(4) was inserted after the decision of this Court in *Champakam Dorairajan* and Article 15(5) provides for reservation of seats for SCs, STs and SEBCs in aided or unaided educational institutions but expressly excludes all such reservation being made in minority educational institutions covered by Article 30(1) of the Constitution. This, according to the Petitioner's learned Counsel, will lead to a situation where the State would not be in a position to give reservation to SCs, STs and SEBCs even in aided minority institutions which have got protection under Article 30(1) of the Constitution. It is argued that in view of the express provision contained in Article 15(5), the State would no more be able to give the reservation and this according to the petitioner's Counsel would result in annulling the endeavour of the founding fathers and the various provisions for neutralizing the exclusion of SCs & STs from the mainstream of society and development for centuries.

99. It is argued by petitioners' learned Counsel that Article 15(4) and 15(5) both commence with an exclusionary clause excluding the operation of the rest of the Article 15, and hence would result in a conflict to the extent of inconsistency. According to the petitioners', Article 15(5) is a special provision relating to educational institutions and being a later amendment, it would prevail over Article 15(4), thus in substance and effect resulting in an amendment of Article 15(4) of the Constitution. According to the petitioner's Counsel, "nothing in this Article" in Article 15(5) would include Article 15(4) also and in view of this inconsistent provision, Article 15(5) has to be held to be inconsistent with 15(4) and thus non-operative.

100. Both Article 15(4) and 15(5) are enabling provisions. Article 15(4) was introduced when the "Communal G.O." in the State of Madras was struck down by this Court in *Champakam Dorairajan* case. In *Unni Krishnan*, this Court held that Article 19(1)(g) is not attracted for establishing and running educational institutions. However, in *T.M.A. Pai Foundation* case, it was held that the right to establish and running educational institutions is an occupation within the meaning of Article 19(1)(g). The scope of the decision in *T.M.A. Pai Foundation* case was later explained in *P.A. Inamdar* case. It was held that as regards unaided institutions, the State has no control and such institutions are free to admit students of their own choice. The said decision necessitated the enactment of the Constitution Ninety-Third Amendment Act, 2005. Thus, both Article 15(4) and 15(5) operate in different areas. The "nothing in this Article" [mentioned at the beginning of Article 15(5)] would only mean that the nothing in this Article which prohibit the State on grounds which are mentioned in Article 15(1) alone be given importance. Article 15(5) does not exclude 15(4) of the Constitution. It is a well settled principle of constitutional interpretation that while interpreting the provisions of Constitution, effect shall be given to all the provisions of the

Constitution and no provision shall be interpreted in a manner as to make any other provision in the Constitution inoperative or otiose. If the intention of the Parliament was to exclude Article 15(4), they could have very well deleted Article 15(4) of the Constitution. Minority institutions are also entitled to the exercise of fundamental rights under Article 19(1)(g) of the Constitution, whether they be aided or unaided. But in the case of Article 15(5), the minority educational institutions, whether aided or unaided, are excluded from the purview of Article 15(5) of the Constitution. Both, being enabling provisions, would operate in their own field and the validity of any legislation made on the basis of Article 15(4) and 15(5) have to be examined on the basis of provisions contained in such legislation or the special provision that may be made under Article 15(4) and 15(5). It may also be noticed that no educational institutions or any aggrieved party have come before us challenging the constitutional amendment on these grounds. The challenge is made by petitioners objecting to the reservations made under Act 5 of 2007. Therefore, the plea that Article 15(4) and 15(5) are mutually contradictory and, therefore, Article 15(5) is not constitutionally valid cannot be accepted. As has been held in *N.M. Thomas* case and *Indra Sawhney* case, Article 15(4) and 16(4) are not exceptions to Article 15(1) and Article 16(1) but independent enabling provision. Article 15(5) also to be taken as an enabling provision to carry out certain constitutional mandate and thus it is constitutionally valid and the contentions raised on these grounds are rejected.

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

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

102. Learned Senior Counsel Dr. Rajeev Dhavan and learned Counsel Shri Sushil Kumar Jain appearing for the petitioners contended that the Ninety-Third Constitutional Amendment would violate the equality principles enshrined in Articles 14, 19 and 21 and thereby the "Golden Triangle" of these three Articles could be seriously violated. The learned Counsel also contended that exclusion of minorities from the operation of Article 15(5) is also violative of Article 14 of the Constitution. We do not find much force in this contention. It has been held that Article 15(4) and Article 16(4) are not exceptions to Article 15(1) and Article 16(1) respectively. It may also be noted that if at all there is any violation of Article 14 or any other equality principle, the affected educational institution should have approached this Court to vindicate their rights. No such petition has been filed before this Court. Therefore, we hold that the exclusion of minority educational institutions from Article 15(5) is not violative of Article 14 of the Constitution as the minority educational institutions, by

themselves, are a separate class and their rights are protected by other constitutional provisions.

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

103. Another contention raised by the petitioner's Counsel is that the Ninety-Third Constitutional Amendment is invalid as it violates the proviso to Article 368 of the Constitution. According to the petitioner's Counsel, the procedure prescribed under the proviso to Article 368 was not followed in the case of the Ninety-Third Amendment. According to the petitioner's Counsel, Article 15(5) of the Constitution interferes with the executive power of the States as it impliedly takes away the power of the State Government under Article 162 of the Constitution.

104. This contention of the petitioner's Counsel has no force. The powers of the Parliament and the State legislatures to legislate are provided for under Article 245-255 of the Constitution. Under the proviso to Article 162, any matter with respect to which the legislature of the State and the Parliament have power to make laws, the executive power of the State shall be subject to and limited by the executive power expressly conferred by the Constitution or by any law made by Parliament upon the Union authorities thereof. The Ninety-Third Constitutional Amendment does not expressly or impliedly take away any such power conferred by Article 162. It may also be noticed that by virtue of the 42<sup>nd</sup> Amendment to the Constitution, "education" which was previously in Entry No. 11 in List II was deleted and inserted in List III as Entry No. 25 as the field of legislation in List III. Article 245 will operate and by reasons of proviso to Article 162, the executive power of the State be subject to, limited by, the executive power expressly conferred by the Constitution or by any law made by Parliament upon the Union authorities thereof. Subject to restrictions imposed under the Constitution, it has been in existence. Such power of the State is not limited or curtailed by the Ninety-Third Constitutional Amendment as it does not interfere with the power of the State under Article 162. The Ninety-Third Constitutional Amendment does not fall within the scope of proviso to Article 368. Therefore, the plea raised by the petitioner's Counsel that the Ninety-Third Constitutional Amendment did not follow the prescribed procedure of Article 368 is not correct and the plea is only to be rejected.

**5. Whether the Act 5 of 2007 is constitutionally invalid in view of definition of "Backward Class" and whether the identification of such "Backward Class" based on "caste" is constitutionally valid?**

105. The next important plea raised by the petitioner's Counsel is regarding the validity of the Act 5 of 2007. The several contentions have been raised regarding the validity of the Act 5 of 2007. The first contention which was raised by the petitioner's Counsel that this Act is ex-facie unconstitutional and is a suspect legislation and violative of the Article 14, 15 and 19(1)(g) of the Constitution. The main attack against the Act was that the socially and educationally backward classes of citizens were not properly identified and the delegation of power to identify the socially and educationally backward classes of citizens to the Central Government itself is illegal and the delegation of such powers by itself without laying down any guidelines is arbitrarily illegal. Elaborate arguments were made by the petitioner's

Counsel and the first and foremost contention was that “caste” is the sole basis on which the socially and educationally backward classes of citizens were determined. And this, according to the petitioner's Counsel, is illegal. Reference was made to a series of decisions of this Court on this issue.

106. There is a long jurisprudential history as to whether caste can play any role in determining the socially and educationally backward classes of citizens. In *Indra Sawhney* case, which is a Nine Judge Bench decision, it was held that the “caste” could be a beginning point and a determinative factor in identifying the socially and educationally backward classes of citizens. But nevertheless, a brief survey of various decisions on this question would give a history of the jurisprudential development on this subject.

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

108. In *Champakam Dorairajan*, this Court struck down the classification made in the Communal G.O. of the then State of Madras. The G.O. was founded on the basis of religion and castes and was struck down on the ground that it is opposed to the Constitution and is in violation of the fundamental rights guaranteed to the citizens. The court held that Article 46 cannot override the provisions of Article 29(2) because of the Directive Principles of State Policy which were then taken subsidiary to fundamental rights. This decision led to the first constitutional amendment by which Article 15(4) was added to the Constitution.

109. The next important case is *M.R. Balaji v. State of Mysore*. In this case, the State of Mysore issued an order that all the communities except the Brahmin community would fall within the definition of socially and educationally backward class and Scheduled Castes and Scheduled Tribes and 75% of the seats in educational institutions were reserved for them. It was observed that though caste in relation to Hindus may be a relevant factor to consider while determining social backwardness of groups or classes of citizens, it cannot be made the sole or dominant test. It was held that the classes of citizens who are deplorably poor automatically become socially backward. Moreover, the occupation of citizens and the place of their habitation also result in social backwardness. The problem of determining who are socially backward classes is undoubtedly very complex, but the classification of socially backward citizens on the basis of their caste alone is not permissible under Article 15(4). Learned Senior Counsel Shri Harish Salve drew our attention to the various passages in the judgment. Gajendragadkar, J. speaking for the majority of the Judges, said:

The Problem of determining who are socially backward classes is undoubtedly very complex. Sociological, social and economic considerations come into play in solving the problem and evolving proper criteria for determining which classes are socially backward is obviously a very difficult task; it will need an elaborate investigation and collection of data and examining the said data in a rational and

scientific way. That is the function of the State which purports to act under Article 15(4).

110. The court drew a clear distinction between 'caste' and 'class' and tried to make an attempt to find a new basis for ascertaining social and educational backwardness in place of caste and in this decision a majority of Judges held that in a broad way, a special provision of reservation should be less than 50%; how much less than 50% would depend upon the relevant and prevailing circumstances in each case.

111. In *R. Chitralakha* case, the Government of Mysore, by an order defining backward classes directed that 30% of the seats in professional and technical colleges and institutions shall be reserved for them and 18% to the SCs and STs. It was laid down that classification of socially and educationally backward classes should be made on the basis of economic condition and occupation. Suba Rao, J. (as he then was), speaking for the majority, held that a classification of backward classes based on economic conditions and occupations is not bad in law and does not offend Article 15(4). The caste of a group of citizens may be a relevant circumstance in ascertaining their social backwardness and though it is a relevant factor to determine social backwardness of a class, it cannot be the sole or dominant test in that behalf. If, in a given situation, caste is excluded in ascertaining a class within the meaning of Article 15(4), it does not vitiate the classification if it satisfies other tests. The Court observed that various provisions of the Constitution which recognized the factual existence of backwardness in the country and which make a sincere attempt to promote the welfare of the weaker sections thereof should be construed to effectuate that policy and not to give weightage to progressive sections of the society under the false colour of caste to which they happen to belong. The Court held that under no circumstance a 'class' can be equated to a 'caste' though the caste of an individual or group of individuals may be a relevant factor in putting him in a particular class.

112. *P. Rajendran v. State of Madras* [(1971) 1 SCC 38] is another Constitution Bench decision wherein the order of the State Government providing reservation of seats for various categories of candidates namely Scheduled Tribes, Scheduled Castes and SEBCs was challenged on various grounds. The main challenge was that the reservation was based entirely on consideration of caste and therefore it violates Article 15. Justice Wanchoo, held that:

Now if the reservation in question had been based only on caste and had not taken into account the social and educational backwardness of the castes in question, it would be violative of Article 15(1). But it must not be forgotten that a caste is also a class of citizens and if the caste as a whole is socially and educationally backward reservation can be made in favour of such a caste on the ground that it is a socially and educationally backward class of citizens within the meaning of Article 15(4). Reference in this connection may be made to the observations of this Court in *M.R. Balaji v. State of Mysore* to the effect that it was not irrelevant to consider the caste of a class of citizens in determining their social and educational backwardness. It was further observed that though the caste of a class of citizens may be relevant its importance should not be exaggerated; and if classification of backward classes of citizens was based solely on the caste of the citizen, it might be open to objection.

113. It may be noticed that the list prepared by the State showed certain castes, and members of those castes according to the State were really classes of socially and educationally backward citizens. It was observed in that case that the petitioners therein did not make any attempt to show that any caste mentioned in the list of educationally and socially backward classes of citizens was not educationally and socially backward and the list based on caste was upheld by the Constitution Bench and held to be not violative of Article 15(1).

114. In *Triloki Nath Tikku v. State of J & K (I)* [AIR 1969 SC 1], 50% of the gazetted posts were to be filled up by promotion in favour of the Muslims of Jammu & Kashmir. The Court held that inadequate representation in State services would not be decisive for determining the backwardness of a section. The Court accordingly gave directions for collecting further material relevant to the subject. And in a subsequent decision, *Triloki Nath(II)*, the court observed that the expression "backward class" is not used as synonymous with "backward caste".

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

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

116. The learned Counsel for the petitioners also made reference to *State of Uttar Pradesh v. Pradip Tandon* [(1975) 1 SCC 267] wherein Chief Justice Ray observed at paragraph 14:

Socially and educationally backward classes of citizens in Article 15(4) could not be equated with castes. In *M.R. Balaji v. State of Mysore* and *State of A.P. v. Sagar* this Court held that classification of backwardness on the basis of castes would violate both Articles 15(1) and 15(4).

117. Another important decision is that of *State of Kerala v. N.M. Thomas*, wherein the constitutional validity of Rule 13-AA of the Kerala State & Subordinate Services Rules was under challenge. The Rule gave exemption of 2 years to members belonging to Scheduled Castes and Scheduled Tribes in services, from passing the departmental test. The High Court of Kerala struck down the Rule and in an appeal by the State the question of reservation was elaborately considered. Mathew, J. in his concurring judgment, held that in order to give equality of opportunity for employment to the members of Scheduled Castes and Scheduled



Tribes, it is necessary to take note of their social, educational and economic backwardness. Not only is the Directive Principle embodied in Article 46 binding on the law-makers as ordinarily understood, but it should equally inform and illuminate the approach of the court when it makes a decision, as the court is also a “State” within the meaning of Article 12 and makes law even though interstitially. Existence of equality depends not merely on the absence of disabilities but on the presence of disabilities. To achieve it, differential treatment of persons who are unequal is permissible. This is what is styled as compensatory discrimination or affirmative action.

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

By its existence over thousands of years, more or less it was assumed that caste should be the criterion for determining social and educational backwardness. In other words, it was said, look at the caste, its traditional functions, its position in relation to upper castes by the standard of purity and pollution, pure and not so pure occupation, once these questions are satisfactorily answered without anything more, those who belong to that caste must be labeled socially and educationally backward. This oversimplified approach ignored a very realistic situation existing in each caste that in every such caste whose members claim to be socially and educationally backward, had an economically well-placed segments.

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

However we look at the question of ‘backwardness’, whether from the angle of class, status or power, we find the economic factor at the bottom of it all and we find poverty, the culprit-cause and the dominant characteristic. Poverty, the economic factor brands all backwardness just as the erect posture brands the homosapiens and distinguishes him from all other animals, in the eyes of the beholder from Mars. But, whether his racial stock is Caucasian, Mongoloid, Negroid, etc., further investigation will have to be made. So too the further question of social and educational backwardness requires further scrutiny. In India, the matter is further aggravated, complicated and pitilessly tyrannized by the ubiquitous caste system, a unique and devastating system of gradation and degradation which has divided the entire Indian and particularly Hindu society horizontally into such distinct layers as to be destructive of mobility, a system which has penetrated and corrupted the mind and soul of every Indian citizen. It is a notorious fact that there is an upper crust of rural society consisting of the superior castes, generally the priestly, the landlord and the merchant castes, there is a bottom strata consisting of the ‘out-castes’ of Indian Rural Society, namely the Scheduled Castes, and, in between the highest and the lowest, there are large segments of population who because of the low gradation of the caste to which they belong in the rural society hierarchy, because of the humble occupation which they pursue, because of their poverty and ignorance are also condemned to backwardness, social and educational, backwardness which prevents them from competing on equal terms to catch up with the upper crust.

120. Reference was also made to other decisions, namely, *State of Andhra Pradesh v. P. Sagar* [AIR 1968 SC 1379] and *T. Devadasan v. The Union of India* [AIR 1964 SC 179]. The earlier decisions took the view that caste shall not be a basis for determining the socially and educationally backward class of citizens. But from the later decisions, we find a slight shift in the approach of the court. If the classification of SEBCs is done exclusively on the basis of caste, it would fly in the face of Article 15(1) of the Constitution as it expressly prohibits any discrimination on the grounds of religion, race, caste, sex, place of birth or any of them. After a careful examination of the various previous decisions of this Court, in *Indra Sawhney*, while examining the validity of the 'Backward Class List' prepared by the Mandal Commission, Jeevan Reddy, J., speaking for the majority, held as under:

705. During the years 1968 to 1971, this Court had to consider the validity of identification of backward classes made by Madras and Andhra Pradesh Governments. *P. Rajendran v. State of Madras* 3 13 related to specification of socially and educationally backward classes with reference to castes. The question was whether such an identification infringes Article 15. Wanchoo, CJ, speaking for the Constitution Bench dealt with the contention in the following words:

The contention is that the list of socially and educationally backward classes for whom reservation is made under Rule 5 is nothing but a list of certain castes. Therefore, reservation in favour of certain castes based only on caste considerations violates Article 15(1), which prohibits discrimination on the ground of caste only. Now if the reservation in question had been based only on caste and had not taken into account the social and educational backwardness of the caste in question, it would be violative of Article 15(1). But it must not be forgotten that a caste is also a class of citizens and if the caste as a whole is socially and educationally backward reservation can be made in favour of such a caste on the ground that is a socially and educationally backward class of citizens within the meaning of Article 15(4).... It is true that in the present cases the list of socially and educationally backward classes has been specified by caste. But that does not necessarily mean that caste was the sole consideration and that persons belonging to these castes are also not a class of socially and educationally backward citizens....As it was found that members of these castes as a whole were educationally and socially backward, the list which had been coming on from as far back as 1906 was finally adopted for purposes of Article 15(4)....

In view however of the explanation given by the State of Madras, which has not been controverted by any rejoinder, it must be accepted that though the list shows certain castes, the members of those castes are really classes of educationally and socially backward citizens. No attempt was made on behalf of the petitioners/appellant to show that any caste mentioned in this list was not educationally and socially backward. In this state of the pleadings, we must come to the conclusion that though the list is prepared caste-wise, the castes included therein are as a whole educationally and socially backward and therefore the list is not violative of Article 15. The challenge to Rule 5 must therefore fail.

121. In that decision it was further held that “Backward Class” in Article 16(4) cannot be read as “Backward Caste”. And under Article 340 of the Constitution, the President may by order appoint a Commission consisting of such persons as he thinks fit to investigate the conditions of socially and educationally backward classes of citizens within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove the difficulties and to improve their condition. The object of this provision is to empower the President to appoint a Commission to ascertain the difficulties and problems of socially and educationally backward classes of citizens. And in *Indra Sawhney* case, the majority held that the ideal and wise method would be to mark out various occupations which on the lower level in many cases amongst Hindus would be their caste itself and find out their social acceptability and educational standard, weigh them in the balance of economic conditions and, the result would be backward class of citizens needing a genuine protective umbrella. And after having adopted occupation as the starting point, the next point should be to ascertain their social acceptability. A person carrying on scavenging becomes an untouchable whereas others who were as law in the social strata as untouchables became depressed. The Court has cautioned that the backwardness should be traditional. Mere educational or social backwardness would not have been sufficient as it would enlarge the field thus frustrating the very purpose of the constitutional goal. It was pointed out that after applying these tests, the economic criteria or the means-test should be applied since poverty is the prime cause of all backwardness as it generates social and educational backwardness.

122. The learned Counsel for the petitioner contended that caste cannot be used even as one of the criteria for identifying the SEBCs as many persons have shifted their traditional occupations and have become doctors, engineers and lawyers. But these are only a few cases and even such persons continue to suffer social segregation based on caste. In *Pradip Tandon* case it was held at para 17 that:

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

123. The above statement is not fully correct. Caste plays an important role in determining the backwardness of the individual. In society, social status and standing depend upon the nature of the occupation followed. In paragraph 779 of *Indra Sawhney's* case, it is stated:

Lowlier the occupation, lowlier the social standing of the class in the graded hierarchy. In rural India, occupation-caste nexus is true even today. A few members may have gone to cities or even abroad but when they return - they do, barring a few exceptions - they go into the same fold again. It does not matter if he has earned money. He may not follow that particular occupation. Still, the label remains. His identity is not changed for the purpose of marriage, death and all other social functions, it is his social class - the caste - that is relevant.

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

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

We are aware of the meanings of the words caste, race, or tribe or religious minorities in India. A caste is an association of families which practise the custom of endogamy i.e., which permits marriages amongst the members belonging to such families only. Caste rules prohibit its members from marrying outside their caste. There are sub-groups amongst the castes which sometimes inter-marry and sometimes do not. A caste is based on various factors, sometimes it may be a class, a race or a racial unit. A caste has nothing to do with wealth. The caste of a person is governed by his birth in a family. Certain ideas of ceremonial purity are peculiar to each caste. Sometimes caste practices even led to segregation of same castes in the villages. Even the choice of occupation of members of castes was predetermined in many cases, and the members of a particular caste were prohibited from engaging themselves in other types of callings, professions or occupations. Certain occupations were considered to be degrading or impure. A certain amount of rigidity developed in several matters and many who belonged to castes which were lower in social order were made to suffer many restrictions, privations and humiliations. Untouchability was practised against members belonging to certain castes. Inter-dining was prohibited in some cases. None of these rules governing a caste had anything to do with either the individual merit of a person or his capacity. The wealth owned by him would not save him from many social discriminations practised by members belonging to higher castes. Children who grew in this caste ridden atmosphere naturally suffered from many social disadvantages apart from the denial of opportunity to live in the same kind of environment in which persons of higher castes lived. Many social reformers have tried in the last two centuries to remove the stigma of caste from which people born in lower castes were suffering. Many laws were also passed prohibiting some of the inhuman caste practices. (p. 110)

134. On the other hand, it is possible that within a caste group there is a marked inequality of status, opportunity, or social standing – which then defines the "class" within that particular "caste" system. For example, all the Brahmins are not engaged in highly respectable employment, nor are all very wealthy. It may even be that some Brahmins may be servants of members of a lower caste, or it may also be so that the personal servant of a rich Brahmin may be a poor Brahmin.

135. Hence, there is every reason to believe that within a single caste group there are some classes or groups of people to whom good fortune or perseverance has brought more dignity, social influence and social esteem than it has to others.

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

137. A social class is therefore a homogeneous unit, from the point of view of status and mutual recognition; whereas a caste is a homogeneous unit from the point of view of common ancestry, religious rites and strict organizational control. Thus the manner in which the caste is closed both in the organizational and biological sense causes it to differ from social class. Moreover, its emphasis upon ritual and regulations pertaining to cleanliness and purity differs radically from the secular nature and informality of social class rules. In a social class, the exclusiveness would be based primarily on status. Social classes divide homogeneous populations into layers of prestige and esteem, and the members of each layer are able to circulate freely with it.

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

139. The Solicitor General, Mr. G.E. Vahanvati, pointed out that for the purpose of reservation under Article 16(4) of the Constitution, the Central List has been in operation for the past 14 years and not a single person has challenged any inclusion in the Central List as void or illegal.

140. It was pointed out that the National Commission for the Backward Classes and the State Commission for Backward Classes have prepared a list based on elaborate guidelines and these guidelines have been framed after studying the criteria/indicators framed by the Mandal Commission and the Commissions set up in the past by different State Governments. Various Commissions held public hearings at various places and the National Commission held 236 public hearings before it finalized the list. It is also pointed out that during the period of its functioning, the National Commission had recommended 297 requests for inclusion and at the same time rejected 288 requests for inclusion of the main castes. It is further pointed out that the Commission took into consideration detailed data with regard to social, educational and economic criteria. The Commission has also looked into whether there has been any improvement or deterioration in the condition of the caste or community being considered for inclusion during the past twenty years.

141. It is pointed out that an elaborate questionnaire was prepared by the Commission and the answers in this questionnaire were considered in detail for inclusion/rejection in the list. It is clear that the lists of socially and educationally backward classes of citizens are being prepared not solely on the basis of the caste and if caste and other considerations are taken into account for determining backwardness, it cannot be said that it would be violative of Article 15(1) of the Constitution.

142. We hold that the determination of SEBCs is done not solely based on caste and hence, the identification of SEBCs is not violative of Article 15(1) of the Constitution.

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

143. The SEBCs have been identified by applying various criteria. Though for the purpose of convenience, the list is based on caste, it cannot be said that 'Backward Class' has been identified solely on the basis of caste. All the castes which suffered the social and educational backwardness have been included in the list. Therefore, it is not violative of Article 15(1). The only possible objection that could be agitated is that in many of the castes included in this list, there may be an affluent section (Creamy Layer) which cannot be included in the list of SEBCs.

144. When socially and educationally backward classes are determined by giving importance to caste, it shall not be forgotten that a segment of that caste is economically advanced and they do not require the protection of reservation. It was argued on behalf of the petitioners that the principle of 'Creamy Layer' should be strictly applied to SEBCs while giving affirmative action and the principles of exclusion of 'Creamy Layer' applied in *Indra Sawhney* case should be equally applied to any of the legislations that may be passed as per Article 15(5) of the Constitution. The Counsel for the petitioners submitted that SEBCs have been defined under section 2 (g) of the Act and the Central Government has been delegated with the power to determine Other Backward Classes. The Counsel for the petitioners have pointed out that the definition given in section 2(g) of the Act should be judicially interpreted. That the backward class so stated therein should mean to exclude the 'Creamy Layer'. The learned Senior Counsel appearing for Pattali Makkal Katchi (PMK) stated that exclusion of 'Creamy Layer' shall not apply for reservation in educational institutions. He pointed out that in case the 'creamy layer' is excluded, the other members of the backward class community would not be in a position to avail the benefit of reservation and the fee structure in many of these centrally administered institutions is exorbitantly high and the ordinary citizen would not be in a position to afford the payment of fees and thus the very purpose of the reservation would be frustrated.

145. According to the learned Counsel for the respondents, the creamy layer elimination will only perpetuate caste inequalities. It would enable the advanced castes to eliminate any challenge or competition to their leadership in the professions and services and that they will gain by eliminating all possible beneficiaries of reservation in the name of creamy layer especially in the institutions of higher learning. It was argued that the analogy of Creamy Layer applied in reservations to jobs cannot be applied in reservations to educational institutions of higher learning. The position of a student getting admission to an institution of higher learning is totally different and can never be compared to that of backward class person to get a job by virtue of reservation. The study in any educational institution of higher learning is very expensive and the non-creamy layer backward class parent cannot afford his son or his daughter incurring such a huge expenditure. Eliminating them from the Creamy Layer will frustrate the very object of providing reservation. Therefore, it is wholly impracticable and highly counter productive to import the policy of Creamy Layer for reservation in these institutions. And according to the learned Counsel there is a difference between services and education and that under the purview of Act 5 of 2007, around 3 lakh

seats would be filled up every year. Whereas the jobs are limited and they will not become vacant every year.

146. The learned Counsel pointed out that grouping of all castes together may enable a less backward caste among the backward classes to corner more seats than it deserves. It is also possible that more backward classes cannot afford to compete with the less backward classes. The only way to solve the said problem is by categorization of Backward Classes and sub classifying them so as to ensure that under each category only similarly circumstanced castes are grouped together. The categorization of backward class has successfully worked in State of Tamil Nadu where most backward class is provided 20% reservation and the most backward castes and denotified tribes are grouped together and the backward classes are provided 30% reservation. In the State of Karnataka, backward classes are divided into 5 categories and separate reservations have been provided. And in the State of Andhra Pradesh, Backward Classes have been divided into 4 divisions and separate percentage of reservation has been provided.

147. As noticed earlier, determination of backward class cannot be exclusively based on caste. Poverty, social backwardness, economic backwardness, all are criteria for determination of backwardness. It has been noticed in *Indra Sawhney* case that among the backward class, a section of the backward class is a member of the affluent section of society. They do not deserve any sort of reservation for further progress in life. They are socially and educationally advanced enough to compete for the general seats along with other candidates.

148. In *Indra Sawhney* case, Jeevan Reddy, J., has observed:

In our opinion, it is not a question of permissibility or desirability of such test but one of proper and more appropriate identification of a class - a backward class. The very concept of a class denotes a number of persons having certain common traits which distinguish them from the others. In a backward class under Clause (4) of Article 16, if the connecting link is the social backwardness, it should broadly be the same in a given class. If some of the members are far too advanced socially (which in the context, necessarily means economically and, may also mean educationally) the connecting thread between them and the remaining class snaps. They would be misfits in the class. After excluding them alone, would the class be a compact class. In fact, such exclusion benefits the truly backward.

149. It is to be understood that “creamy layer” principle is introduced merely to exclude a section of a particular caste on the ground that they are economically advanced or educationally forward. They are excluded because unless this segment of caste is excluded from that caste group, there cannot be proper identification of the backward class. If the “Creamy Layer” principle is not applied, it could easily be said that all the castes that have been included among the socially and educationally backward classes have been included exclusively on the basis of caste. Identification of SEBC for the purpose of either Article 15(4), 15(5) or 16(4) solely on the basis of caste is expressly prohibited by various decisions of this Court and it is also against Article 15(1) and Article 16(1) of the Constitution. To fulfil the conditions and to find out truly what is socially and educationally backward class, the exclusion of “creamy layer” is essential.

150. It may be noted that the “creamy layer” principle is applied not as a general principle of reservation. It is applied for the purpose of identifying the socially and educationally backward class. One of the main criteria for determining the SEBC is poverty. If that be so, the principle of exclusion of “creamy layer” is necessary. Moreover, the majority in *Indra Sawhney* case upheld the exclusion of “creamy layer” for the purpose of reservation in Article 16(4). Therefore, we are bound by the larger Bench decision of this Court in *Indra Sawhney* case, and it cannot be said that the “creamy layer” principle cannot be applied for identifying SEBCs. Moreover, Articles 15(4) and 15(5) are designed to provide opportunities in education thereby raising educational, social and economical levels of those who are lagging behind and once this progress is achieved by this section, any legislation passed thereunder should be deemed to have served its purpose. By excluding those who have already attained economic well being or educational advancement, the special benefits provided under these clauses cannot be further extended to them and, if done so, it would be unreasonable, discriminatory or arbitrary, resulting in reverse discrimination.

151. Sawant, J. also made observation in *Indra Sawhney* case to ensure removal of 'creamy layer'. He observed:

(A)t least some individuals and families in the backward classes - gaining sufficient means to develop their capacities to compete with others in every field.... Legally, therefore, they are not entitled to be any longer called as part of the backward classes whatever their original birth mark - to continue to confer upon such advanced sections from the backward classes the special benefits, would amount to treating equals unequally violating the equality provisions of the Constitution. Secondly, to rank them with the rest of the backward classes would equally violate the right to equality of the rest in those classes, since it would amount to treating the unequals equally....It will lead to perverting the objectives of the special constitutional provisions since the forwards among the backward classes will thereby be enabled to tap up all the special benefits to the exclusion and to the cost of the rest in those classes, thus keeping the rest in perpetual backwardness.

152. All these reasonings are equally applicable to the reservation or any special action contemplated under Article 15(5). Therefore, we are unable to agree with the contention raised by the respondent's learned Counsel that if 'creamy layer' is excluded, there may be practically no representation for a particular backward class in educational institutions because the remaining members, namely, the non-creamy layer, may not have risen to the level or standard necessary to qualify to get admission even within the reserved quota. If the creamy layer is not excluded, the identification of SEBC will not be complete and any SEBC without the exclusion of 'creamy layer' may not be in accordance with Article 15(1) of the Constitution.

#### **7. What should be the para-meters for determining the "creamy layer" group?**

153. After the decision in *Indra Sawhney* case, the Government of India, Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training) issued an Office Memorandum dated 08.09.1993 providing for 27% reservation for Other Backward Classes. The Memorandum reads as follows:



## OFFICE MEMORANDUM

***Subject : Reservation for Other Backward Classes in Civil Posts and Services Under the Government of India – regarding.***

The undersigned is directed to refer to this Department's OM No. 36012/31/90-Estt. (SCT), dated the 13<sup>th</sup> August, 1990 and 25<sup>th</sup> September, 1991 regarding reservation for Socially and Educationally Backward Classes in Civil Posts and Services under the Government of India and to say that following the Supreme Court judgment in the ***Indra Sawhney v. Union of India*** [1992 Supp (3) SCC 217] the Government of India appointed an Expert Committee to recommend the criteria for exclusion of the socially advanced persons/sections from the benefits of reservations for Other Backward Classes in Civil Posts and Services under the Government of India.

2. Consequent to the consideration of the Expert Committee's recommendations this Department's Office Memorandum No. 36012/31/90-Estt. (SCT), dated 13.8.1990 referred to in para (1) above is hereby modified to provide as follows:

(a) 27% (twenty-seven per cent) of the vacancies in Civil Posts and Services under the Government of India, to be filled through direct recruitment, shall be reserved for the Other Backward Classes. Detailed instructions relating to the procedure to be followed for enforcing reservation will be issued separately.

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

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

## SCHEDULE

<i>Description of category</i>	<i>To whom rule of exclusion will apply</i>
<b>I. Constitutional Posts</b>	<p><b><i>Son(s) and daughter(s) of</i></b></p> <p>(a) President of India;</p> <p>(b) Vice-President of India;</p> <p>(c) Judges of the Supreme Court and of the High Courts;</p> <p>(d) Chairman and Members of UPSC and of the State Public Service Commission; Chief Election Commissioner; Comptroller and Auditor General of India;</p> <p>(e) persons holding constitutional positions of like nature</p>

<p><b>II. Service Category</b></p> <p><i>A. Group A/Class I Officers of the All India Central and State Services (Direct Recruits)</i></p>	<p><b><i>Son(s) and daughter(s) of</i></b></p> <p>(a) parents, both of whom are Class I Officers</p> <p>(b) parents, either of whom is a Class I officer;</p> <p>(c) parents, both of whom are Class I Officers, but one of them dies or suffers permanent incapacitation;</p> <p>(d) parents, either of whom is a Class I officer and such parent dies or suffers permanent incapacitation and before such death or such incapacitation has had the benefit of employment in any International Page 1479 Organisation like UN, IMF, World Bank, etc. for a period of not less than five years;</p> <p>(e) parents, both of whom are Class I officers die or suffer permanent incapacitation and before such death or such incapacitation of the both, either of them has had the benefit of employment in any International Organisation like UN, IMF, World Bank, etc. for a period of not less than 5 years.</p> <p>Provided that the rule of exclusion shall not apply in the following cases:</p> <p>(a) Son(s) and daughter(s) of parents either of whom or both of whom are class I officers and such parent(s) dies/die or suffer permanent incapacitation;</p> <p>(b) A lady belonging to OBC category has got married to a Class I officer, and may herself like to apply for a job.</p>
<p><i>B. Group B/Class II officers of the Central and State Services (Direct Recruitment)</i></p>	<p><b><i>Son(s) and daughter(s) of</i></b></p> <p>(a) Parents both of whom are Class II officers;</p> <p>(b) parents of whom only the husband is a Class II officer and he get into Class I at the age of 40 or earlier;</p> <p>(c) parents, both of whom are Class II officers and one of them dies or suffers permanent incapacitation and either one of them has had the benefit of employment in any International Organisation like UN, IMF, World Bank etc. for a period of not less than five years before such death</p>

<p><i>C. Employees in Public Sector Undertakings etc.</i></p>	<p>or permanent incapacitation;</p> <p>(d) parents of whom the husband is a Class I officer (direct recruit or pre-forty promoted) and the wife is a Class II officer and the wife dies; or suffers permanent incapacitation; and</p> <p>(e) parents, of whom the wife is a Class I officer (direct recruit or pre-forty promoted) and the husband is a Class II officer and the husband dies or suffers permanent incapacitation:</p> <p style="padding-left: 40px;">Provided that the rule of exclusion shall not apply in the following cases:</p> <p style="padding-left: 80px;">Son(s) and daughter(s) of:</p> <p style="padding-left: 40px;">(a) parents both of whom are Class II officers and one of them dies or suffers permanent incapacitation;</p> <p style="padding-left: 40px;">(b) parents, both of whom are Class II officers and both of them die or suffer permanent incapacitation, even though either of them has had the benefit of employment in any International Organisation like UN, IMF, World Bank etc. for a period of not less than five years before their death or permanent incapacitation.</p> <p>The criteria enumerated in A and B above in this category will apply mutatis mutandis to officers holding equivalent or comparable posts in PSUs, Banks, Insurance Organisations, Universities, etc. and also to equivalent or comparable posts and positions under private employment, pending the evaluation of the posts on equivalent or comparable basis in these institutions, the criteria specified in Category VI below will apply to the officers in these institutions.</p>
<p><b>III. Armed Forces Including Paramilitary Forces (Persons holding civil posts are not included)</b></p>	<p><i>Son(s) and daughter(s) of</i></p> <p>Parents either or both of whom is or are in the rank of Colonel and above in the Army and to equivalent posts in the Navy and the Air Force and the Paramilitary Forces:</p> <p style="padding-left: 40px;">Provided that:</p>

	<p>(i) If the wife of an Armed Forces officer is herself in the Armed Forces (i.e., the category under consideration) the rule of exclusion will apply only when she herself has reached the rank of Colonel;</p> <p>(ii) The service ranks below Colonel of husband and wife shall not be clubbed together;</p> <p>(iii) If the wife of an officer in the Armed Forces is in civil employment, this will not be taken into account for applying the rule of exclusion unless she falls in the service category under Item No. II in which case the criteria and conditions enumerated therein will apply to her independently.</p>
<p><b>IV. Professional Class and Those Engaged in Trade and Industry</b></p> <p>(i) Persons engaged in profession as a Doctor, Lawyer, Chartered Accountant, Income Tax consultant, financial or Hmanagement consultant, dental surgeon, engineer, architect, computer specialist, film artists and other film professional, author, playwright, sports persons, sports professional, media professional or any other vocations of like status.</p> <p>(ii) Persons engaged in trade, business and industry.</p>	<p>Criteria specified against Category VI will apply-</p> <p>Criteria specified against Category VI will apply-</p> <p>Explanation:</p> <p>(i) Where the husband is in same profession and the wife is in a Class II or lower grade employment, the income/wealth test will apply only on the basis of the husband's income;</p> <p>(ii) If the wife is in any profession and the husband is in employment in a Class II or lower</p>

	rank post, then the income/wealth criterion will apply only on the basis of the wife's income and the husband's income will not be clubbed with it.
<p><b>V. Property Owners</b></p> <p><i>A. Agricultural holdings</i></p> <p><i>B. Plantations</i></p> <p>(i) Coffee, tea, rubber etc.</p> <p>(ii) Mango, citrus, apple plantations, etc.</p> <p><i>C. Vacant land and/or</i></p>	<p><b><i>Son(s) and daughter(s) of</i></b> persons belonging to a family (father, mother and minor children) which owns</p> <p>(a) only irrigated land which is equal to or more than 85 per cent of the statutory Area; or</p> <p>(b) both irrigated and unirrigated land, as follows:-</p> <p>(i) The rule of exclusion will apply where the precondition exists that the irrigated area (having been brought to a single type under a common denominator) 40 per cent or more of the statutory ceiling limit for irrigated land (this being calculated by excluding the unirrigated portion). If this precondition of not less than 40 per cent exists, then only the area of unirrigated land will be taken into account. This will be done by converting the unirrigated land on the basis of the conversion formula existing, into the irrigated type. The irrigated area so computed from unirrigated land shall be added to the actual area of irrigated land and if after such clubbing together the total area in terms of irrigated land is 80 per cent or more of the statutory ceiling limit for irrigated land, then the rule of exclusion will apply and disentitlement will occur;</p> <p>(ii) The rule of exclusion will not apply if the land holding of a family is exclusively unirrigated.</p> <p>Criteria of income/wealth specified in Category VI below will apply.</p> <p>Deemed as agricultural holding and hence, criteria at A above under this category will apply. Criteria specified in Category VI below will apply.</p> <p>Criteria specified in Category VI below will apply.</p> <p><i>Explanation:</i> Building may be used for</p>

<i>buildings, in urban areas or urban agglomerations</i>	residential, industrial or commercial purpose and the like two or more such purposes.
<b>VI. Income/Wealth Test</b>	<p><b>Son(s) and daughter(s) of-</b></p> <p>(a) persons having gross annual income of Rs. 1 lakh or above or possessing wealth above the exemption limit as prescribed in the Wealth Tax Act for a period of three consecutive years;</p> <p>(b) persons in Categories I, II, III and V-A who are not disentitled to the benefit of reservation but have income from other sources of wealth which will bring them within the income/wealth criteria mentioned in (a) above.</p> <p><i>Explanation.-</i></p> <p>(i) Income from salaries or agricultural land shall not be clubbed;</p> <p>(ii) The income criteria in terms of rupee will be modified taking into account the change in its value every three years; If the situation, however, so demands, the interregnum may be less.</p>

*Explanation:* Wherever the expression ‘permanent incapacitation’ occurs in this Schedule, it shall mean incapacitation which results in putting an officer out of service.

[In *Ashoka Kumar Thakur v. State of Bihar* (1995) 5 SCC 403, 417, para 10, it was held that the above Office Memorandum conforms to the law laid down in *Indra Sawhney* case.]

154. We make it clear that same principle of determining the creamy layer for providing 27% reservation for backward classes for appointment need not be strictly followed in case of reservation envisaged under Article 15(5) of the Constitution. As pointed by Shri Ravivarma Kumar, learned Senior Counsel, if a strict income restriction is made for identifying the “creamy layer”, those who are left in the particular caste may not be able to have a sufficient number of candidates for getting admission in the central institutions as per Act 5 of 2007. Government can make a relaxation to some extent so that sufficient number of candidates may be available for the purpose of filling up the 27% reservation. It is for the Union Government and the State Governments to issue appropriate guidelines to identify the “creamy layer” so that SEBC are properly determined in accordance with the guidelines given by this Court. If, even by applying this principle, still the candidates are not available, the State can issue appropriate guidelines to effectuate the implementation of the reservation purposefully.

155. As noticed earlier, “backward class” defined in Section 2(g) does not exclude “creamy layer”. Therefore, we make it clear that backward class as defined in Section 2(g) of

Act 5 of 2007 must be deemed to have been such backward class by applying the principle of exclusion of “creamy layer”.

**8. Whether the “creamy layer” principle is applicable to Scheduled Tribes and Scheduled Castes?**

157. *N.M. Thomas* case does not state that “creamy layer” principle should apply to SCs and STs. In *K.C. Vasanth Kumar* case the “creamy layer” was used in the case of backward caste or class.

158. In *Nagaraj* case in paragraph 80, it is stated that while “*applying the ‘creamy layer’ test, this Court held that if roster-point promotees are given consequential seniority, it will violate the equality principle which is part of the basic structure of the Constitution and in which even Article 16(4-A) cannot be of any help to the reserved category candidates.*” This was with reference to the observations made in *Indra Sawhney* case and earlier in *M.G. Badappanavar v. State of Karnataka* [(2001) 2 SCC 666]; *Ajit Singh (II) v. State of Punjab* [(1999) 7 SCC 209] and *Union of India v. Virpal Singh Chauhan* [(1995) 6 SCC 684]. *Virpal Singh Chauhan* case dealt with reservation of railway employees wherein it is held that once the number of posts reserved for being filled by reserved category candidates in a cadre, category or grade (unit for application of rule of reservation) are filled by the operation of roster, the object of the rule of reservation should be deemed to have been achieved. *Ajit Singh II* case dealt with consequential seniority on promotion and held that roster points fixed at Level 1 are not intended to determine any seniority at Level 1 between general candidates and the reserved candidates and the roster point merely becomes operative whenever a vacancy reserved at Level 2 becomes available. Thereby holding that if promotion is obtained by way of reservation, the consequential seniority will not be counted. *M.G. Badappanavar* case followed the cases of *Ajit Singh II* and *Virpal Singh*.

159. In none of these decisions it is stated that the “creamy layer” principle would apply to SCs and STs. In *Indra Sawhney* case, it is specifically stated that the “creamy layer” principle will not apply to STs and SCs. In *Nagaraj* case, in paragraphs 110 and 120 and finally in paragraphs 121, 122 and 123, it is only stated that when considering questions of affirmative action, the larger principle of equality such as 50% ceiling (quantitative limitation) and “creamy layer” (quantitative exclusion) may be kept in mind. In *Nagaraj* case it has not been discussed or decided that the creamy layer principle would be applicable to SCs/STs. Therefore, it cannot be said that the observations made in *Nagaraj* case are contrary to the decision in *Indra Sawhney's* case.

160. Moreover, the “creamy layer” principle is not yet applied as a principle of equality or as a general principle to apply for all affirmative actions. The observations made by Chinnappa Reddy, J. in *K.C. Vasanth Kumar* case are relevant in this regard.

161. So far, this Court has not applied the “creamy layer” principle to the general principle of equality for the purpose of reservation. The “creamy layer” so far has been applied only to identify the backward class, as it required certain parameters to determine the backward classes. “Creamy layer” principle is one of the parameters to identify backward classes. Therefore, principally, the “creamy layer” principle cannot be applied to STs and SCs, as SCs and STs are separate classes by themselves. Ray, C.J., in an earlier decisions,

stated that “*Scheduled Castes and Scheduled Tribes are not a caste within the ordinary meaning of caste*”. And they are so identified by virtue of the Notification issued by the President of India under Articles 341 and 342 of the Constitution. The President may, after consultation with the Governor, by public notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which for the purpose of the Constitution shall be deemed to be Scheduled Castes or Scheduled Tribes. Once the Notification is issued, they are deemed to be the members of Scheduled Castes or Scheduled Tribes, whichever is applicable. In *E.V. Chinnaiah*, concurring with the majority judgment, S.B. Sinha, J. said:

The Scheduled Castes and Scheduled Tribes occupy a special place in our Constitution. The President of India is the sole repository of the power to specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of the Constitution be deemed to be Scheduled Castes. The Constitution (Scheduled Castes) Order, 1950 made in terms of Article 341(1) is exhaustive. The object of Articles 341 and 342 is to provide for grant of protection to the backward class of citizens who are specified in the Scheduled Castes Order and Scheduled Tribes Order having regard to the economic and education backwardness wherefrom they suffer. Any legislation which would bring them out of the purview thereof or tinker with the order issued by the President of India would be unconstitutional. (Paras 52, 111 and 84). (emphasis supplied)

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

But we must state that whenever such a situation arises in respect of Scheduled Caste, it will be Parliament alone to take the necessary legislative steps in terms of Clause (2) of Article 341 of the Constitution. The States concededly do not have the legislative competence therefor.

163. Moreover, right from the beginning, the Scheduled Castes and Scheduled Tribes were treated as a separate category and nobody ever disputed identification of such classes. So long as “creamy layer” is not applied as one of the principles of equality, it cannot be applied to Scheduled Castes and Scheduled Tribes. So far, it is applied only to identify the socially and educationally backward classes. We make it clear that for the purpose of reservation, the principles of “creamy layer” are not applicable for Scheduled Castes and Scheduled Tribes.

***9. Whether the principles laid down by the United States Supreme Court for affirmative action such as “suspect legislation”, “strict scrutiny” and “compelling State necessity” are applicable to principles of reservation or other affirmative action contemplated under Article 15(5) of the Constitution of India?***

164. Based on the Ninety-Third Constitutional Amendment Act, Act 5 of 2007 has been enacted. According to the petitioner’s Counsel, this is a “suspect legislation” and therefore, it is to be subjected to “strict scrutiny” as laid by the United States Supreme Court and only by passing this test of “strict scrutiny”, such legislation could be put into practice.



165. At the outset, it must be stated that the decisions of the United States Supreme Court were not applied in the Indian context as it was felt that the structure of the provisions under the two Constitutions and the social conditions as well as other factors are widely different in both the countries. Reference may be made to *Bhikaji Narain Dhakras v. The State of Madhya Pradesh* [(1955) 2 SCC 589] and *A.S. Krishna v. State of Madras* [(1957) SCR 399] wherein this Court specifically held that the due process clause in the Constitution of the United States of America is not applicable to India.

166. In *Kesavananda Bharati* [(1973) 4 SCC 225] case also, while considering the extent and scope of the power of amendment under Article 368 of the Constitution of India, the Constitution of the United States of America was extensively referred to and Ray, J., held:

The American decisions which have been copiously cited before us, were rendered in the context of the history of the struggle against colonialism of the American people, sovereignty of several States which came together to form a Confederation, the strains and pressures which induced them to frame a Constitution for a Federal Government and the underlying concepts of law and judicial approach over a period of nearly 200 years, cannot be used to persuade this Court to apply their approach in determining the cases arising under our Constitution.

167. It may also be noticed that there are structural differences in the Constitution of India and the Constitution of the United States of America. Reference may be made to the 14<sup>th</sup> Amendment to the U.S. Constitution. Some of the relevant portions thereof are as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

168. Whereas in India, Articles 14 and 18 are differently structured and contain express provisions for special provision for the advancement of SEBCs, STs and SCs. Moreover, in our Constitution there is a specific provision under the Directive Principles of State Policy in Part IV of the Constitution requiring the State to strive for justice 'social, economic and political' and to minimize the inequalities of income and endeavour to eliminate inequalities in status, facilities and opportunities (Article 38). Earlier, there was a view that Articles 16(4) and 15(5) are exceptions to Article 16(1) and 15(1) respectively.

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

The expression 'nothing in this article' is a legislative device to express its intention in a most emphatic way that the power conferred thereunder is not limited in any way by the main provision but falls outside it. It has not really carved out an exception, but has preserved a power untrammelled by the other provisions of the Article.

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

This form of classification which is referred to as reservation, is in my opinion, clearly covered by Article 16(4) of the Constitution which is completely exhaustive on this point. That is to say Clause (4) of Article 16 is not an exception to Article 14 in the sense that whatever classification can be made, can be done only through Clause (4) of Article 16. Clause (4) of Article 16, however, is an explanation containing an exhaustive and exclusive provision regarding reservation which is one of the forms of classification.

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

Article 14 of the Constitution consists of two parts. It asks the State not to deny to any person equality before law. It also asks the State not to deny the equal protection of the laws. Equality before law connotes absence of any discrimination in law. The concept of equal protection required the State to mete out differential treatment to persons in different situations in order to establish an equilibrium amongst all. This is the basis of the rule that equals should be treated equally and unequals must be treated unequally if the doctrine of equality which is one of the corner-stone of our Constitution is to be duly implemented. In order to do justice amongst unequals, the State has to resort to compensatory or protective discrimination. Article 15(4) and Article 16(4) of the Constitution were enacted as measures of compensatory or protective discrimination to grant relief to persons belonging to socially oppressed castes and minorities.

172. The amendment to Article 15 by inserting Article 15(5) and the new Act (Act 5 of 2007) are to be viewed in the background of these constitutional provisions. It may also be recalled that the Preamble to the Constitution and the Directive Principles of State Policy give a positive mandate to the State and the State is obliged to remove inequalities and backwardness from society. While considering the constitutionality of a social justice legislation, it is worthwhile to note the objectives which have been incorporated by the Constitution makers in the Preamble of the Constitution and how they are sought to be secured by enacting fundamental rights in Part III and Directives Principles of State Policy in Part IV of the Constitution. The Fundamental Rights represent the civil and political rights and the Directive Principles embody social and economic rights. Together they are intended to carry out the objectives set out in the Preamble of the Constitution. Granville Austin, in his book<sup>15</sup>, states:

Both types of rights have developed as a common demand, products of the national and social revolutions, of their almost inseparable intertwining, and of the character of Indian politics itself.

173. From the constitutional history of India, it can be seen that from the point of view of importance and significance, no distinction can be made between the two sets of rights,

namely, Fundamental Rights which are made justiciable and the Directive Principles which are made non-justiciable. The Directive Principles of State Policy are made non-justiciable for the reason that the implementation of many of these rights would depend on the financial capability of the State. Non-justiciable clause was provided for the reason that an infant State shall not be made accountable immediately for not fulfilling these obligations. Merely because the Directive Principles are non-justiciable by the judicial process does not mean that they are of subordinate importance. In *Champakam Dorairajan* case, it was observed that “the Directive Principles have to conform to and run subsidiary to the Chapter of Fundamental Rights.” But this view did not hold for a long time and was later changed in a series of subsequent decisions.

174. In *Minerva Mills* [(1980) 3 SCC 625], Bhagwati, J observed:

The Fundamental Rights are no doubt important and valuable in a democracy, but there can be no real democracy without social and economic justice to the common man and to create socio-economic conditions in which there can be social and economic justice to every one, is the theme of the Directive Principles. It is the Directive Principles which nourish the roots of our democracy, provide strength and vigour to it and attempt to make it a real participatory democracy which does not remain merely a political democracy with Fundamental Rights available to all irrespective of their power, position or wealth. The dynamic provisions of the Directive Principles fertilise the static provisions of the Fundamental Rights. The object of the Fundamental Rights is to protect individual liberty, but can individual liberty be considered in isolation from the socio-economic structure in which it is to operate. There is a real connection between individual liberty and the shape and form of the social and economic structure of the society. Can there be any individual liberty at all for the large masses of people who are suffering from want and privation and who are cheated out of their individual rights by the exploitative economic system? Would their individual liberty not come in conflict with the liberty of the socially and economically more powerful class and in the process, get mutilated or destroyed? It is axiomatic that the real controversies in the present day society are not between power and freedom but between one form of liberty and another. Under the present socio-economic system, it is the liberty of the few which is in conflict with the liberty of the many. The Directive Principles therefore, impose an obligation on the State to take positive action for creating socio-economic conditions in which there will be an egalitarian social order with social and economic justice to all, so that individual liberty will become a cherished value and the dignity of the individual a living reality, not only for a few privileged persons but for the entire people of the country. It will thus be seen that the Directive Principles enjoy a very high place in the constitutional scheme and it is only in the framework of the socio-economic structure envisaged in the Directive Principles that the Fundamental Rights are intended to operate, for it is only then they can become meaningful and significant for the millions of our poor and deprived people who do not have been the bare necessities of life and who are living below the poverty level.

175. Article 46 enjoins upon the State to promote with special care the educational and economic interests of the weaker sections of the people and to protect them from social injustice and all forms of exploitation whereas under the Constitution of the United States of America, we get an entirely different picture. Though equality was one of the solemn affirmations of the American Declaration of Independence, slavery continued unabatedly and it was, to some extent, legally recognized. In *Dred Scott v. Saunders* [60 US 393 (1856)] wherein Chief Justice Taney held that [African-Americans] were not entitled to get citizenship. He was of the view that 'once a slave always a slave', and one slave never would become the citizen of America. This view held by the Chief Justice Taney continued for a long time and after the Civil War, the 14<sup>th</sup> amendment was enacted in 1868 and this amendment gave (equal protection of laws to all persons). In *Plessy v. Ferguson* [163 US 537 (1896)] which involved a challenge to a Louisiana statute that provided for equal but separate accommodations for black and white passengers in trains, the United States Supreme Court was of the view that racial segregation was a reasonable exercise of State police power for the promotion of the public good and upheld the law. Several affirmative actions were challenged and the landmark decision of *Brown v. Board of Education* [347 US 483] was delivered in 1954. In many cases, the strict scrutiny doctrine was being applied to all laws of racial classifications. The learned Counsel for the petitioner made reference to *Gratz v. Bollinger* and some of the earlier decisions of the United States Supreme Court. During the past two decades, the Court has become sceptical of race-based affirmative action practiced or ordered by the State. The Supreme Court of the US is of the view that affirmative action plans must rest upon a sufficient showing or predicate of past discrimination which must go beyond the effects of societal discrimination.

176. The 14<sup>th</sup> Amendment to the Constitution of the United States of America and Title VI of the 1964 Civil Rights Act, prohibit universities to discriminate on the basis of classifications such as race, colour, national origin and the like in all their operations. In a number of decisions of the United States Supreme Court spanning decades of jurisprudence, a heavy burden has been placed on institutions whose affirmative action programmes are challenged before the United States Supreme Court on grounds that have been recognized as suspect or unconstitutional. According to the United States Supreme Court, all such programmes are inherently suspect since they rely on suspect forms of classification (such as race). Therefore, because such forms of classification are inherently suspect, the courts have subjected all affirmative action programmes relying on them to a very high standard of scrutiny, wherein those practicing these affirmative action programmes have to adhere to a very high standard of proof, which we know as the "strict scrutiny" test.

177. The case of *Regents of the University of California v. Bakke* [438 US 265 (1978)] provided a starting point and from this case onwards, affirmative action programmes can be justified only on two distinct grounds, and only these grounds have been recognized as compelling enough so as to satisfy the "strict scrutiny" test, as developed by the United States Supreme Court. The two grounds are as follows:

1. Remedial Justification – All efforts aimed at remedying past injustices against certain identified groups of people, who were unlawfully discriminated against in the past, serve as adequate justifications and all affirmative action programmes that are

implemented with this aim serve the compelling institutional interest in removing all vestiges of discrimination that occurred in the past. In the case of *City of Richmond v. J A Croson Co.* [488 U.S. 469 (1989)], the United States Supreme Court held that if a university is able to show “*some showing of prior discrimination*” in its existing affirmative action program furthering racial exclusion then the university may take “*affirmative steps to dismantle such a system*”. However, it is to be noted that the US Supreme Court also attached a warning with the above observation. While scrutinizing such programmes, it was held that the Court would make “*searching judicial inquiry into the justification for such race-based measures... [and to] identify that discrimination...with some specificity before they may use race - conscious relief*”. (*Croson's* case p. 492-93)

2. Diversity – All affirmative action programmes aimed at bringing about racial diversity among the scholarship of the institution(s) may be said to in furtherance of compelling institutional interest. The starting point for this ground is Justice Powell's detailed opinion regarding the issue of diversity in the case of *Regents of the University of California v. Bakke*. In this case, according to Justice Powell, “[T]he attainment of a diverse student body is clearly a constitutionally permissible goal for an institution of higher education”. He quoted from two of the Supreme Court's decisions regarding academic freedom [*Sweezy v. New Hampshire* [(1957) 354 US 234, 263] and *Keyishian v. Board of Regents* [(1967) 385 US 589, 603] and observed:

[I]t is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation.... The atmosphere of speculation, experiment and creation - so essential to the quality of higher education - is widely believed to be promoted by a diverse student body.... [I]t is not too much to say that the nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.

178. The other part of the “strict scrutiny” test is the “narrow tailoring” test. The University, whose affirmative action programme is in question before the United States Supreme Court, is required to prove that its affirmative action programme has been designed in the narrowest possible manner, in order to benefit only those specific people who are to be benefited, thus serving the “compelling purposes” of the affirmative action programme. The program cannot be made in a broad manner to encompass a large group of people, and it has to serve the minimum possible requirement, in order to achieve its goal. Otherwise, it may be possible that the rights of other people may be infringed upon, which would make the affirmative action programme unconstitutional.

179. Thus, the first limb of the strict scrutiny test that elucidates the “compelling institutional interest” is focused on the objectives that affirmative action programmes are designed to achieve. The second limb, that of “narrow tailoring”, focuses on the details of specific affirmative action programmes and on the specific people it aims to benefit.

180. The United States Supreme Court has held that race may be one of the many factors that can be taken into account while structuring an affirmative action programme. At this stage, an analogy may be drawn with the Indian situation wherein the Supreme Court of India,

in various cases, has held that caste may be one of the factors that can be taken into account, while providing for reservations for the socially and educationally backward classes. However, caste cannot be the “only” factor, just as race alone cannot be the only factor in the United States, while structuring reservation or affirmative action programmes.

181. Furthermore, the courts, both in India as well as in the United States of America, have looked with extreme caution and care at any legislation that aims to discriminate on the basis of race in the US and caste in India. As the US Supreme Court elucidated in the case of **Grutter v. Bollinger**, “Because the Fourteenth Amendment “protect[s] persons, not group” all governmental action based on race ought to be subjected to a very detailed and careful judicial inquiry and scrutiny so as to ensure that the personal right to equal protection of the laws has not been infringed.

182. It therefore follows that the government may treat people differently because of their race but only for those reasons that serve what is known as “compelling government interest”.

183. Furthermore, for any affirmative action programme to survive the strict standard of judicial scrutiny, the Courts want “compelling evidence”, that proves without any doubt that the affirmative action program is narrowly tailored and serves only the most compelling of interests. Thus, the bar for the State or institution that practices affirmative action programmes based of suspect classifications has been effectively raised. Therefore, in cases where a compelling interest is found, race-based methods may be used only after all other methods have been considered and found deficient, and that too only to that limited extent which is required to remedy a discrimination that has been identified, and only when it has been shown that the identified beneficiaries have suffered previously in the past, and lastly, only if all undue burdens that may impinge upon the rights of other non-beneficiaries are avoided.

184. The aforesaid principles applied by the Supreme Court of the United States of America cannot be applied directly to India as the gamut of affirmative action in India is fully supported by constitutional provisions and we have not applied the principles of “suspect legislation” and we have been following the doctrine that every legislation passed by the Parliament is presumed to be constitutionally valid unless otherwise proved. We have repeatedly held that the American decisions are not strictly applicable to us and the very same principles of strict scrutiny and suspect legislation were sought to be applied and this Court rejected the same in **Saurabh Chaudhari v. Union of India** [(2003) 11 SCC 146]. Speaking for the bench, V.N. Khare, CJI, said:

The strict scrutiny test or the intermediate scrutiny test applicable in the United States of America as argued by Shri Salve cannot be applied in this case. Such a test is not applied in Indian Courts. In any event, such a test may be applied in a case where a legislation *ex facie* is found to be unreasonable. Such a test may also be applied in a case where by reason of a statute the life and liberty of a citizen is put in jeopardy. This Court since its inception apart from a few cases where the legislation was found to be *ex facie* wholly unreasonable proceeded on the doctrine that constitutionality of a statute is to be presumed and the burden to prove *contra* is on him who asserts the same.

185. Learned Counsel Shri Sushil Kumar Jain contended that the classification of OBCs was not properly done and it is not clear as to whose benefit the legislation itself is made therefore, it is a suspect legislation. This contention cannot be accepted. We are of the view that the challenge of Act 5 of 2007 on the ground that it does not stand the “strict scrutiny” test and there was no “compellable State necessity” to enact this legislation cannot be accepted.

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

186. The learned Counsel for the petitioners contended that though “Backward Class” is defined under Section 2(g) of Act 5 of 2007, it is not stated in the Act how the “Backward Class” would be identified and the delegation of such power to the Union of India to determine as to who shall be the “backward class” without their being proper guidelines is illegal as it amounts to excessive delegation. According to the learned Counsel for the petitioners, the Parliament itself should have laid down the guidelines and decided that who shall be included in the backward class as defined under Section 2(g) of the Act 5 of 2007. “Backward class” is not a new word. Going by the Constitution, there are sufficient constitutional provisions to have an idea as to what “backward class” is. Article 340 of the Constitution specifically empowers the President of India to appoint a Commission to investigate the conditions of the socially and educationally backward classes within the territory of India. Socially and educationally backward classes of citizens are mentioned in Article 15(4) of the Constitution, which formed the First Amendment to the Constitution. Backward class citizens are also mentioned in Article 16(4) of the Constitution. It is only for the purpose of Act 5 of 2007 that the Union of India has been entrusted with the task of determining the backward class. There is already a National Commission and also various State Commissions dealing with the affairs of the backward class of citizens in this country. For the purpose of enforcement of the legislation passed under Article 16(4), the backward class of citizens have already been identified and has been in practice since the past 14 years. It is in this background that the Union of India has been given the task of determining the backward classes. The determination of backward classes itself is a laborious task and the Parliament cannot do it by itself. It is incorrect to say that there are no sufficient guidelines to determine the backward classes. Various parameters have been used and it may also be noticed that if any undeserving caste or group of persons are included in the backward class, it is open to any person to challenge the same through judicial review. Therefore, it is incorrect to say that the Union of India has been given wide powers to determine the backward classes. The challenge of Act 5 of 2007 on that ground fails.

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

187. The learned Counsel for the petitioners contended that the reservation of 27% provided for the backward classes in the educational institutions contemplated under the Act does not prescribe any time limit and this is opposed to the principle of equality. According to learned Counsel for the petitioners, this affirmative action that is to bring about equality is calculated to produce equality on a broader basis by eliminating de facto inequalities and placing the weaker sections of the community on a footing of equality with the stronger and

more power section so that each member of the community, whatever is his birth, occupation or social position may enjoy equal opportunity of using to the full, his natural endowments of physique, of character and of intelligence. This compensatory state action can be continued only for a period till that inequality is wiped off. Therefore, the petitioners have contended that unless the period is prescribed, this affirmative action will continue for an indefinite period and would ultimately result in reverse discrimination. It is true that there is some force in the contention advanced by the learned Counsel for the petitioners but that may happen in future if the reservation policy as contemplated under the Act is successfully implemented. But at the outset, it may not be possible to fix a time limit or a period of time. Depending upon the result of the measures and improvements that have taken place in the status and educational advancement of the socially and educationally backward classes of citizens, the matter could be examined by the Parliament at a future time but that cannot be a ground for striking down a legislation. After some period, if it so happens that any section of the community gets an undue advantage of the affirmative action, then such community can very well be excluded from such affirmative action programme. The Parliament can certainly review the situation and even though a specific class of citizens is in the legislation, it is the constitutional duty of the Parliament to review such affirmative action as and when the social conditions are required. There is also the safeguard of judicial review and the court can exercise its powers of judicial review and say that the affirmative action has carried out its mission and is thus no longer required. In the case of reservation of 27% for backward classes, there could be a periodic review after a period of 10 years and the Parliament could examine whether the reservation has worked for the good of the country. Therefore, the legislation cannot be held to be invalid on that ground but a review can be made after a period of 10 years.

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

188. Learned Senior Counsel Shri P.P. Rao contended that under Article 15(5) of the Constitution, the reservation or any other affirmative action could be made for the advancement of only socially and educationally backward classes of citizens or Scheduled Castes or Scheduled Tribes and the educational standard to be assessed shall be matriculation or 10+2 and not more than that. It was argued that many castes included in the backward class list have got a fairly good number of members who have passed 10+2 and thus such castes are to be treated as educationally forward and the present legislation, namely, Act 5 of 2007, is intended to give reservation to students in higher institutions of learning and the same is not permissible under Article 15(5) of the Constitution. He contended that the Parliament should not have made this legislation for reservation in the higher institutions of learning as it is not part of the duty of the State under Article 46 of the Constitution. According to the learned Counsel, education contemplated under Article 46 is only giving education upto the standard of 10+2. The learned Counsel argued that this was the desire of the Founding Fathers of the Constitution. The learned Counsel contended further that the State is not taking adequate steps to improve primary education.

189. In reply to Shri P.P. Rao's arguments, learned Solicitor General Shri G. E. Vahanvati drew our attention to various steps taken by the Union Government to improve the primary



school education and also the upper primary school education. It is incorrect to suggest that there have been no efforts on the part of successive Governments to concentrate on level of education towards universal elementary education. "Sarva Shiksha Abhiyanm" (SSA) had been launched by the Government in 2001-2002. The major components of SSA include opening of new schools, distribution of teaching equipments, school grant for teachers and maintenance for schools, community participation & training, carrying out civil works in school buildings, additional class rooms, distribution of free text books for ST students and girls. It was pointed out that in the year 2006-2007, nearly Rs. 15,000 crores had been spent for such education. The Integrated Child Development Services (ICDS) scheme was started in 1975. Latest figures show that progress has been made in the field of education. It is pointed out that the primary school coverage has increased from 86.96% (2002) to 96% and that of Upper Primary School has increased from 78.11% to 85.3% with the opening of 1.34 Lakh Primary Schools and 1.01 lakh Upper Primary Schools. The gross enrolment has also increased at the primary as well as upper primary stage. Drop out rate has fallen by 11.3%. It is also pointed out that girls enrolment has increased from 43.7% (2001) to 46.7% (2004) at primary and from 40.9% to 44% at upper primary stage. The Union of India has granted funds to various states for the purpose of meeting the education requirements. The entire details were furnished to the Court and we do not think it necessary to go into these details. Though at the time of attaining Independence, the basic idea was to improve primary and secondary level education, but now, after a period of more than 50 years, it is idle to contend that the backward classes shall be determined on the basis of their attaining education only to the level of 10+2 stage. In India there are a large number of arts, science and professional colleges and in the field of education, it is anachronistic to contend that primary education or secondary education shall be the index for fixing backward class of citizens. We find no force in the contention advanced by the learned Counsel for the petitioners and it is only to be rejected.

***13. Whether the quantum of reservation provided for in the Act is valid and whether 27% of seats for SEBC was required to be reserved?***

190. The main contention of the petitioner's Counsel especially that of Shri Sushil Kumar Jain is that the entire Act is liable to be set aside as there was no necessity to provide any reservation to socially and educationally backward classes and according to him most of the castes included in the list which is prepared in accordance with the Mandal Commission are educationally very much advanced and the population of such group is not scientifically collected and the population ratio of backward classes is projected only on the basis of the 1931 census and the entire legislation is an attempt to please a section of the society as part of a vote catching mechanism.

191. A legislation passed by the Parliament can be challenged only on constitutionally recognized grounds. Ordinarily, grounds of attack of a legislation is whether the legislature has legislative competence or whether the legislation is ultra vires of the provisions of the Constitution. If any of the provisions of the legislation violates fundamental rights or any other provisions of the Constitution, it could certainly be a valid ground to set aside the legislation by invoking the power of judicial review. A legislation could also be challenged as unreasonable if it violates the principles of equality adumbrated in our Constitution or it unreasonably restricts the fundamental rights under Article 19 of the Constitution. A

legislation cannot be challenged simply on the ground of unreasonableness because that by itself does not constitute a ground. The validity of a constitutional amendment and the validity of plenary legislation have to be decided purely as questions of constitutional law. This Court in *State of Rajasthan v. Union of India* [(1977) SCC 592, 660] said:

(I) If a question brought before the Court is purely a political question not involving determination of any legal or constitutional right or obligation, the court would not entertain it, since the Court is concerned only with adjudication of legal rights and liabilities.

192. Therefore, the plea of the Petitioner that the legislation itself was intended to please a section of the community as part of the vote catching mechanism is not a legally acceptable plea and it is only to be rejected.

193. The quantum of reservation provided under the Act 5 of 2007 is based on the detailed facts available with the Parliament. Various commissions have been in operation determining as to who shall form the SEBCs. Though a caste-wise census is not available, several other data and statistics are available. In the case of *Indra Sawhney*, the Mandal Commission was accepted in principle though the details and findings of the commissions were not fully accepted by this Court. 27% of reservation in the matter of employment was accepted by this Court. Petitioners have not produced any documents to show that the backward class citizens are less than 27%, vis-a-vis, the total population of this country or that there was no requirement of 27% reservation for them. The Parliament is invested with the power of legislation and must be deemed to have taken into consideration all relevant circumstances when passing a legislation of this nature. It is futile to contend whether Parliament was not aware of the statistical details of the population of this country and, therefore, we do not think that 27% reservation provided in the Act is illegal or on that account, the Act itself is liable to be struck down.

#### Questions:

##### **1. Whether the Ninety-Third Amendment of the Constitution is against the “basic structure” of the Constitution?**

The Constitution (Ninety-Third Amendment) Act, 2005 does not violate the “basic structure” of the Constitution so far as it relates to the state maintained institutions and aided educational institutions. Question whether the Constitution (Ninety-Third Amendment) Act, 2005 would be constitutionally valid or not so far as “private unaided” educational institutions are concerned, is left open to be decided in an appropriate case.

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

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

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

Exclusion of minority educational institutions from Article 15(5) is not violative of Article 14 of the Constitution as the minority educational institutions, by themselves, are a separate class and their rights are protected by other constitutional provisions.

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

The Ninety-Third Amendment of the Constitution does not affect the executive power of the State under Article 162 of the Constitution and hence, procedure prescribed under Proviso to Article 368(2) is not required to be followed.

**5. Whether the Act 5 of 2007 is constitutionally invalid in view of definition of “Backward Class” and whether the identification of such “Backward Class” based on “caste” is constitutionally valid?**

Identification of “backward class” is not done solely based on caste. Other parameters are followed in identifying the backward class. Therefore, Act 5 of 2007 is not invalid for this reason.

**6. Whether “Creamy Layer” is to be excluded from SEBCs?**

“Creamy Layer” is to be excluded from SEBCs. The identification of SEBCs will not be complete and without the exclusion of “creamy layer” such identification may not be valid under Article 15(1) of the Constitution.

**7. What should be the para-meters for determining the “creamy layer” group?**

The parameters contained in the Office Memorandum issued by the Government of India, Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training) on 08.09.1993 may be applied. And the definition of “Other Backward Classes” under Section 2(g) of the Act 5 of 2007 should be deemed to mean class or classes of citizens who are socially and educationally backward, and so determined by the Central Government; and if the determination is with reference to caste, then the backward class shall be after excluding the creamy layer.

**8. Whether the “creamy layer” principle is applicable to Scheduled Tribes and Scheduled Castes?**

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

**9. Whether the principles laid down by the United States Supreme Court for affirmative action such as “suspect legislation”, “strict scrutiny” and “compelling State necessity” are applicable to principles of reservation or other affirmative action contemplated under Article 15(5) of the Constitution?**

The principles laid down by the United States Supreme Court such as “suspect legislation”, “strict scrutiny” and “compelling State necessity” are not applicable for

challenging the validity of Act 5 of 2007 or reservations or other affirmative action contemplated under Article 15(5) of the Constitution.

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

The delegation of power to the Union Government to determine as to who shall be the “other backward classes” is not excessive delegation. Such delegation is constitutionally valid.

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

The Act 5 of 2007 is not invalid for the reason that there is no time limit prescribed for its operation, but a review can be made after a period of 10 years.

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

The contention that educational standard of matriculation or (10+2) should be the benchmark to find out whether any class is educationally backward is rejected.

**13. Whether the quantum of reservation provided for in the Act is valid and whether 27% of seats for SEBC was required to be reserved?**

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

These Writ Petitions are disposed off in light of the above findings, and the “Other Backward Classes” defined in Section 2(g) of Act 5 of 2007 is to be read as “Socially and Educationally Backward Classes” other than Scheduled Castes and Scheduled Tribes, determined as ‘Other Backward Classes’ by the Central Government and if such determination is with reference to caste, it shall exclude “Creamy Layer” from among such caste.

\* \* \* \* \*

***Dr. Gulshan Prakash v. State of Haryana***

2009 (14) SCALE 290

**P. SATHASIVAM, J.** – 2. Challenge in this appeal is to the judgment dated 05.02.2008 of the High Court of Punjab & Haryana at Chandigarh, dismissing the Civil Writ Petition No. 1431 of 2008, filed by the appellants herein for quashing of the prospectus for the MD/MS/PG Diploma and MDS Courses issued by Maharshi Dayanand University, Rohtak, Haryana for Academic Session 2007-2008 to the extent that it does not provide any reservation of seats for Scheduled Caste/Scheduled Tribe candidates.

3. Challenge in Writ Petition (C) No. 69 of 2009, filed under Art. 32 of the Constitution of India, relates to the prospectus issued by the aforesaid University for the same courses for Academic Session 2009-2010.

4. The brief facts leading to the filing of these matters are as under:

Vide Notification dated 12.11.2007, State of Haryana instructed Maharshi Dayanand University, ('MDU') Rohtak to conduct the entrance examination for admission in the MD/MS/PG Diploma and MDS Courses in Government Medical and Dental Colleges in the State of Haryana for the session 2008-2009 and declare results.

By the same notification, the State of Haryana also instructed Pt. B.D. Sharma PGIMS, Rohtak to conduct the counseling and to finalize the admission in the said courses. In pursuance of the said notification, MDU, Rohtak published a prospectus for holding entrance examination for the MD/MS/PG Diploma and MDS Courses in Government Medical and Dental Colleges in the State of Haryana for the year 2008-2009.

On 15.12.2007, the appellants made a representation to the Commissioner and Health Secretary, Ministry of Health and Medical Education, Government of Haryana, Panchkula for implementation of SC/ST reservation in Post-Graduate Courses (MD/MS/MDS/Diploma) PGIMS in accordance with the guidelines issued by the State Government on 19.03.1999. Since there was no response, the appellants preferred writ petition before the High Court for quashing of the prospectus which was dismissed. Hence, the appellants have preferred this appeal by way of special leave.

5. According to the appellants, on 07.08.2000, MDU published the prospectus for the MBBS/ BDS/ BAMS/ BHMS Common Entrance Examination for admission to Medical/Dental/Ayurvedic/Homeopathic Colleges/Institutions in Haryana notifying the seats for admission to various categories providing 20% reservation for the members of Scheduled Castes. On 17.09.2005, all the Institutions including All-India Institute of Medical Sciences provided reservation in the Post-Graduate courses for the members of Scheduled Castes and Scheduled Tribes. The Government Medical College, Patiala, Amritsar and Faridkot also provided reservation in Post-Graduate Courses for the Academic Session, 2007. The University of Delhi is also providing reservation to the members of the Scheduled Castes and Scheduled Tribes. In addition to the same, counsel for the appellants submitted that some States have also provided reservation in Post-Graduate Courses. On the other hand, learned counsel for the respondents submitted that the State of Haryana has already provided

reservation at the graduate level courses i.e. MBBS/BDS/BAMS/BHMS etc. and there is no reservation in respect of Post-Graduate Courses and that is the reason the prospectus issued for Post-Graduate Courses does not contain any clause for reservation. They also contended that Article 15(4) is only an enabling provision and the State of Haryana, taking note of various aspects, decided not to provide reservation for Scheduled Caste, Scheduled Tribe and Other Backward Class candidates in Post-Graduate Courses. They also pointed out that there cannot be any mandamus compelling the State to provide reservation for a particular class of persons.

7. Article 15 mandates that the State shall not discriminate against any citizen on the grounds only of religion, race, caste, sex, place of birth or any of them. Sub-clause (4) in both Articles 15 and 16 is only an enabling provision for the State Government to bring forward a legislation or pass an executive order for the benefit of socially and educationally Backward Classes of citizens and for the Scheduled Castes and Scheduled Tribes.

8. Learned counsel for the appellants, in support of his claim, relied on a seven-Judge Bench decision of this Court reported in *State of Kerala v. N.M. Thomas* [(1976) 2 SCC 310]. The issue therein relates to constitutionality of Rule 13AA of the Kerala State and Subordinate Services Rules, 1958 granting exemption to members of Scheduled Castes and Scheduled Tribes for a specified period from special and departmental tests in the matter of promotion. By majority, their Lordships have upheld the validity of Rule 13AA of the Kerala State and Subordinate Services Rules, 1958, and two consequential orders and set aside the judgment of the High Court. In the said decision, the Court nowhere considered the effect and implication of Article 15(4), particularly, whether it mandates the State to provide reservation in Post-Graduate Courses or is only an enabling provision.

9. On the other hand, the consistent view of this Court is that Article 15(4) is only an enabling provision and it is for the respective States either to enact a legislation or issue an executive instruction providing reservation in Post-Graduate Courses. In *Indra Sawhney v. Union of India* [1992 Supp (3) SCC 217], which is a nine-Judge Bench judgment of this Court, while considering Articles 16(4)(1), 15(4), 14, 32, 340 and various other provisions, Jeevan Reddy, J. speaking for the majority held:

“744. The aspect next to be considered is whether clause (4) is exhaustive of the very concept of reservations? In other words, the question is whether any reservations can be provided outside clause (4) i.e., under clause (1) of Article 16. There are two views on this aspect. On a fuller consideration of the matter, we are of the opinion that clause (4) is not, and cannot be held to be, exhaustive of the concept of reservations; it is exhaustive of reservations in favour of backward classes alone. Merely because, one form of classification is stated as a specific clause, it does not follow that the very concept and power of classification implicit in clause (1) is exhausted thereby. To say so would not be correct in principle. But, at the same time, one thing is clear. It is in very exceptional situations, - and not for all and sundry reasons - that any further reservations, of whatever kind, should be provided under clause (1). In such cases, the State has to satisfy, if called upon, that making such a provision was necessary (in public interest) to redress a specific situation. The very presence of clause (4) should act as a damper upon the propensity to create further

classes deserving special treatment. The reason for saying so is very simple. If reservations are made both under clause (4) as well as under clause (1), the vacancies available for free competition as well as reserved categories would be a correspondingly whittled down and that is not a reasonable thing to do.”

10. In *K. Duraisamy v. State of T.N.* [(2001) 2 SCC 538], a three-Judge Bench, while dealing with the reservation at the Post-Graduate level and super-speciality level, observed as follows:-

“8. That the Government possesses the right and authority to decide from what sources the admissions in educational institutions or to particular disciplines and courses therein have to be made and that too in what proportion, is well established and by now a proposition well settled, too. It has been the consistent and authoritatively-settled view of this Court that at the super-speciality level, in particular, and even at the postgraduate level reservations of the kind known as “protective discrimination” in favour of those considered to be backward should be avoided as being not permissible. Reservation, even if it be claimed to be so in this case, for and in favour of the in-service candidates, cannot be equated or treated on par with communal reservations envisaged under Articles 15(4) or 16(4) and extended the special mechanics of their implementation to ensure such reservations to be the minimum by not counting those selected in open competition on the basis of their own merit as against the quota reserved on communal considerations.”

11. In *AIIMS Student's Union v. AIIMS* [(2002) 1 SCC 428], while considering the similar issue, it was held:-

“44. When protective discrimination for promotion of equalisation is pleaded, the burden is on the party who seeks to justify the ex facie deviation from equality. The basic rule is equality of opportunity for every person in the country, which is a constitutional guarantee. A candidate who gets more marks than another is entitled to preference for admission. Merit must be the test when choosing the best, according to this rule of equal chance for equal marks. This proposition has greater importance when we reach the higher levels and education like postgraduate courses. Reservation, as an exception, may be justified subject to discharging the burden of proving justification in favour of the class which must be educationally handicapped - the reservation geared up to getting over the handicap. The rationale of reservation in the case of medical students must be removal of regional or class inadequacy or like disadvantage. Even there the quantum of reservation should not be excessive or societally injurious. The higher the level of the speciality the lesser the role of reservation.” Again it was held that:- “..... Permissible reservation at the lowest or primary rung is a step in the direction of assimilating the lesser fortunates in the mainstream of society by bringing them to the level of others which they cannot achieve unless protectively pushed. Once that is done the protection needs to be withdrawn in the own interest of protectees so that they develop strength and feel confident of stepping on higher rungs on their own legs shedding the crutches. Pushing the protection of reservation beyond the primary level betrays the bigwigs' desire to keep the crippled crippled for ever..... 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....."

12. In *Union of India v. R. Rajeshwaran* [(2003) 9 SCC 294], direction was sought for to apply the rule of reservation to the Scheduled Castes and Scheduled Tribes in respect of those seats which are set apart for All-India pool in MBBS/BDS list. In the present context, the following conclusion is relevant:-

"9. In *Ajit Singh (II) v. State of Punjab* this Court held that Article 16(4) of the Constitution confers a discretion and does not create any constitutional duty and obligation. Language of Article 15(4) is identical and the view in *Comptroller and Auditor General of India, Gian Prakash v. K.S. Jagannathan and Superintending Engineer, Public Health v. Kuldeep Singh* that a mandamus can be issued either to provide for reservation or for relaxation is not correct and runs counter to judgments of earlier Constitution Benches and, therefore, these two judgments cannot be held to be laying down the correct law. In these circumstances, neither the respondent in the present case could have sought for a direction nor the High Court could have granted the same.

10. Hence, we allow the writ appeal transferred to this Court and set aside order made in the writ petition. The appeal also shall stand disposed of accordingly."

13. The principle behind Article 15(4) is that a preferential treatment can be given validly when the socially and educationally backward classes need it. This article enables the State Government to make provisions for upliftment of Scheduled Castes and Scheduled Tribes including reservation of seats for admission to educational institutions. It was also held that Article 15(4) is not an exception but only makes a special application of the principle of reasonable classification. Article 15(4) does not make any mandatory provision for reservation and the power to make reservation under Article 15(4) is discretionary and no writ can be issued to effect reservation. Such special provision may be made not only by the Legislature but also by the Executive.

14. Learned counsel for the appellants relying on the Constitution Bench decision of this Court in *Dr. Preeti Srivastava v. State of M.P.* [(1999) 7 SCC 120], submitted that when it is permissible to prescribe a lower minimum percentage of qualifying marks for the reserved category candidates, as compared to the general category candidates, it is incumbent on the part of the State Government to prescribe certain percentage for SC/ST candidates even for the Post- Graduate Courses. On going through the decision, we are unable to accept the said contention. In para 10 of the judgment, this Court has posed the following question for consideration:-

"We have therefore, to consider whether for admission to the postgraduate medical courses, it is permissible to prescribe a lower minimum percentage of



qualifying marks for the reserved category candidates as compared to the general category candidates. We do not propose to examine whether reservations are permissible at the postgraduate level in Medicine. That issue was not debated before us, and we express no opinion on it. We need to examine only whether any special provision in the form of lower qualifying marks in PGMEE can be prescribed for the reserved category.”

After discussing relevant aspects and earlier decisions this Court concluded:-

“In the premises, we agree with the reasoning and conclusion in *Dr. Sadhna Devi v. State of U.P.* and we overrule the reasoning and conclusions in *Ajay Kumar Singh v. State of Bihar* and *Post Graduate Institute of Medical Education & Research v. K.L. Narasimhan*. To conclude:

1. We have not examined the question whether reservations are permissible at the postgraduate level of medical education.

2. A common entrance examination envisaged under the regulations framed by the Medical Council of India for postgraduate medical education requires fixing of minimum qualifying marks for passing the examination since it is not a mere screening test.

3. Whether lower minimum qualifying marks for the reserved category candidates can be prescribed at the postgraduate level of medical education is a question which must be decided by the Medical Council of India since it affects the standards of postgraduate medical education. Even if minimum qualifying marks can be lowered for the reserved category candidates, there cannot be a wide disparity between the minimum qualifying marks for the reserved category candidates and the minimum qualifying marks for the general category candidates at this level. The percentage of 20% for the reserved category and 45% for the general category is not permissible under Article 15(4), the same being unreasonable at the postgraduate level and contrary to the public interest.

4. At the level of admission to the super speciality courses, no special provisions are permissible, they being contrary to the national interest. Merit alone can be the basis of selection.”

It is clear that first of all in *Preeti Srivastava*, this Court did not examine whether reservation is permissible at the Post-Graduate level in Medicine. It is also clear that the Court has dealt with only the question as to the prescribing lower minimum percentage of qualifying marks for the reserved category candidates at the Post- Graduate Medical Courses and ultimately it was concluded that the same is permissible, however, insofar as medical education is concerned, it must be decided by the Medical Council of India. It is relevant to mention that pursuant to the said decision the Medical Council of India (‘MCI’ in short) has prescribed minimum qualifying marks as 50 per cent for the ‘general category candidates’ and 40 per cent for the ‘reserved category candidates’. In such circumstances, the argument based on *Preeti Srivastava*, by the learned counsel for the appellants is liable to be rejected.

15. It is also useful to refer the judgment in *State of Punjab v. Dayanand Medical College and Hospital* [(2001) 8 SCC 664], wherein similar contention as projected before us by the counsel for the appellants was raised. In para 10 of the judgment in *Preeti Srivastava* it

was clarified that this Court was only paying attention to the question of fixing lower minimum qualifying marks for reserved category candidates. In the same decision, it was stated that such question must be decided by the Medical Council of India, since it affects the standard of Post-graduate medical education. In *State of T.N. v. S.V. Bratheep (Minor)* [(2004) 4 SCC 513], this Court reiterated the same reasoning as stated in *State of Punjab v. Dayanand Medical College and Hospital*.

16. In *Ajit Singh (II) v. State of Punjab* [(1999) 7 SCC 209], Constitution Bench of this Court in paragraph 28 has held that Article 16(4) is only an enabling provision which reads as under:

“On the face of it, the above language in each of Articles 16(4) and 16(4-A) is in the nature of an enabling provision and it has been so held in judgments rendered by Constitution Benches and in other cases right from 1963.”

17. Learned counsel for the appellants next contended that, inasmuch as even in All-India Entrance Examination for Post-Graduate Courses, the Government of India itself has made a provision for reservation for SC/ST candidates, the State of Haryana is bound to follow the same and issue appropriate orders/directions providing reservation in the Post-Graduate Courses. He further contended that the prospectus *de hors* any provision for reservation is bad and is liable to be quashed. In our view, this contention is also liable to be rejected. It is true that Government of India itself has made a provision for reservation of SC/ST categories. This was a decision by the Government of India and it is applicable in respect of All-India Entrance Examination for MD/MS/PG Diploma and MDS Courses, and reservation for SC/ST candidates in All-India quota for PG seats. However, the same cannot automatically be applied in other selections where State Governments have power to regulate. In fact, the Government of Haryana, in the counter affidavit before the High Court, explained their position that according to them, the matter regarding reservation of seats in the PG Courses has been considered by the State Government from time to time and it has been decided that keeping in view the recommendations of the Medical Council of India and precedents in the other States, reservation of SC/ST in PG Courses is neither feasible nor warranted, as there is already a reservation of 50 per cent of the total seats in MD/MS/PG Diploma and MDS Course in the institutions of the State of Haryana on all-India basis entrance examination, being conducted by AIIMS, New Delhi, and that the appellants had already availed the benefit of reservation of seats in their qualifying examination of MBBS/BDS. They further clarified that only the State Government is the Competent Authority to decide the reservation in the State. The State Government did not prescribe any reservation for SC/ST and backward classes, due to which it was not included in the prospectus. They also clarified that the petitioners before the High Court were on the wrong impression that the Government of Haryana has already taken a decision to make a reservation in admission to MD/MS/PG Diploma and MDS Courses for SC/ST category. It was clarified that the Government of Haryana has never granted the benefit of reservation to SC/ST category in admission to MD/MS/PG Diploma and MDS Course. The Government of Haryana, for the first time, considered and decided on 05.04.1988 that there will be no reservation in admission to PG/Diploma courses. Again, in their letter dated 01.01.1991, reiterated that Government of Haryana is not in favour of reservation for SC/ST categories in PG/Degree/Diploma Courses.

Again, by the letter dated 26.04.2002 reiterated that there will be no reservation for SC/ST candidates at Post-Graduate level admission in PGIMS, Rohtak. It is pointed out that since Government of Haryana has taken a conscious decision of not to make reservation for SC/ST categories in admission at the Post-Graduate level, such a decision of the Government suffers no infirmity. The other materials placed by the State shows that before taking such a decision, they considered the recommendations of the Medical Council of India and precedents/decisions in other States and concluded that the reservation for SC/ST categories in Post-Graduate Degree and Diploma Courses is not feasible in the State. Though, even at the Post-Graduate level, reservation for SC/ST/Backward Community is permissible in view of the specific decision by the State of Haryana not to have reservation for Scheduled Castes and Scheduled Tribes at the Post-Graduate level, there cannot be any mandamus by this Court as claimed by the appellants. After all, medical education is an important issue which should not have any mandatory condition of this nature which may give rise to a situation against public interest if so interpreted by the State Government as State Government is in a better position to determine the situation and requirement of that particular State, as mandated by the Constitution.

18. Finally, learned counsel for the appellants, in more than one occasion, relied on an order dated 31.01.2007 of this Court in Writ Petition (C) No. 138 of 2006, *Abhay Nath v. University of Delhi*. The operative part of the order is as follows:-

“The Additional Solicitor General pointed out that in the All India quota of 50% seats, if 22.5% are reserved for SC/ST students, it would be difficult for the State to give the entire percentage to reservation out of the 50% seats left for them to be filled up. It is equally difficult for the DGHS to have entire 22.5% reservation out of the 50% of the seats allotted to be admitted in the All India Entrance Examination. Therefore, it is suggested that the Union of India has decided to provide 22.5% reservation for SC/ST candidates in All India Quota from the academic year 2007-2008 onwards. The Union of India seeks clarification of the order passed in *Budhi Prakash Sharma v. Union of India* passed on 28.02.2005, to the effect that 50% seats for All India Quota shall exclude the reservation. We review that order and make it clear that the 50% of the seats to be filled up by All India Entrance Examination shall include the reservation to be provided for SC/ST students. To that extent the order passed on 28.02.2005 is clarified.”

The above order makes it clear that the directions of this Court are applicable to admission on All-India basis whereas the same have no bearing on the admissions meant for State quota. Inasmuch as the Government of Haryana has not prescribed any reservation for the Post- Graduate Courses, neither the University nor any other authority be blamed for approving and publishing the prospectus which does not contain reservation for Post-Graduate Courses. The clarificatory order of this Court in *Abhay Nath* is applicable for the Institutes managed/run by the Central Government and unless the State Government takes any decision for granting reservation in MD/MS/PG Diploma and MDS Courses, it cannot be made applicable. As the State Government is competent to make the reservation to a particular class or category, until it is decided by the State, as being a Policy matter, there cannot be any direction to provide reservation at the PG level. The State of Haryana has

explained that reservation in under-Graduate Medical Courses is being provided strictly as per their policy. The Post-Graduate Degree/Diploma in medical education is governed by Medical Council. Even, the Medical Council of India has not followed strict adherence to the rule of reservation policy in admission for SC/ST category at the Post-Graduate level.

19. As stated earlier, Article 15(4) is an enabling provision and the State Government is the best judge to grant reservation for SC/ST/Backward Class categories at Post-Graduate level in admission and the decision of the State of Haryana not to make any provision for reservation at the Post-Graduate level suffers no infirmity. In our view, every State can take its own decision with regard to reservation depending on various factors. Since the Government of Haryana has decided to grant reservation for SC/ST categories/Backward Class candidates in admission at MBBS level i.e. under graduate level, then it does not mean that it is bound to grant reservation at the Post-Graduate level also. As stated earlier, the State Government, in more than one communication, has conveyed its decision that it is not in favour of reservation for SC/ST/Backward Classes at Post-Graduate level. In such circumstances, Court cannot issue mandamus against their decision and their prospectus also cannot be faulted with for not providing reservation in Post-Graduate Courses. However, we make it clear that irrespective of above conclusion, State of Haryana is free to reconsider its earlier decision, if they so desire, and circumstances warrant in the future years.

20. In the result, the Civil Appeal as well as the Writ Petition fail and the same are dismissed accordingly with no order as to costs.

\* \* \* \* \*

## Constitutional Validity of Reservations in Promotions

### *M. Nagaraj v. Union of India*

(2006) 8 SCC 212

The petitioners invoked Article 32 of the Constitution for a writ in the nature of certiorari to quash the Constitution (Eighty-fifth Amendment) Act, 2001 inserting Article 16(4-A) of the Constitution retrospectively from 17-6-1995 providing reservation in promotion with consequential seniority as being unconstitutional and violative of the basic structure. The petitioners argued that:

- Parliament has appropriated the judicial power to itself and has acted as an Appellate Authority by reversing the judicial pronouncements of the Court by the use of power of amendment as done by the impugned amendment and is, therefore, violative of the basic structure of the Constitution. The said amendment is, therefore, constitutionally invalid and is liable to be set aside.
- The amendment also sought to alter the fundamental right of equality which is part of the basic structure of the Constitution. The equality in the context of Article 16(1) connotes “accelerated promotion” so as not to include consequential seniority.
- By attaching consequential seniority to the accelerated promotion, the impugned amendment violated equality in Article 14 read with Article 16(1).
- By providing reservation in the matter of promotion with consequential seniority, there is impairment of efficiency.

In *Indra Sawhney* [1992 Supp (3) SCC 217] decided on 16-11-1992, the Supreme Court had held that under Article 16(4), reservation to the Backward Classes is permissible only at the time of initial recruitment and not in promotion. According to the petitioners contrary to the said judgment, Parliament enacted the Constitution (Seventy-seventh Amendment) Act, 1995. By the said amendment, Article 16(4A) was inserted, which reintroduced reservation in promotion.

- The Constitution (Seventy-seventh Amendment) Act, 1995 was also challenged by some of the petitioners. According to them if accelerated seniority is given to the roster-point promotees, the consequences would be disastrous. A roster-point promotee in the graduate stream would reach the 4<sup>th</sup> level by the time he attains the age of 45 years. At the age of 49, he would reach the highest level and stay there for nine years. On the other hand, the general merit promotee would reach the 3<sup>rd</sup> level out of 6 levels at the age of 56 and by the time, he gets eligibility to the 4<sup>th</sup> level, he would have retired from service. The petitioners say that the consequences of the impugned 85<sup>th</sup> Amendment which provides for reservation in promotion, with consequential seniority, would result in reverse discrimination in the percentage of representation of the reserved category officers in the higher cadre.

**The Constitution (Seventy-seventh Amendment) Act, 1995:** Clause (4A) to article 16 was inserted:

“(4-A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.”

**The Constitution (Eighty-first Amendment) Act, 2000:** Clause (4B) to article 16 was inserted:

“(4B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision of reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year.

**The Constitution (Eighty-second Amendment) Act, 2000:** A proviso was inserted at the end of Article 335 of the Constitution which reads:

“Provided that nothing in this article shall prevent in making of any provision in favour of the members of the Scheduled Castes and the Scheduled Tribes for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State.”

**The Constitution (Eighty-fifth Amendment) Act, 2001:**

“(4-A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.”

***Broad issues in Writ Petition No. 527 of 2002:***

The broad issues that arise for determination in this case related to: 1. Validity; 2. Interpretation; 3. Implementation, of (i) the Constitution (Seventy-seventh Amendment) Act, 1995, the Constitution (Eighty-first Amendment) Act, 2000, the Constitution (Eighty-second Amendment) Act, 2000, and the Constitution (Eighty-fifth Amendment) Act, 2001; and, (ii) action taken in pursuance thereof which seek to reverse decisions of the Supreme Court in matters relating to promotion and their application with retrospective effect.

**S.H. KAPADIA, J.** - The width and amplitude of the right to equal opportunity in public employment, in the context of reservation, broadly falls for consideration in these writ petitions under Article 32 of the Constitution.

***Standards of judicial review of constitutional amendments***

22. The question which arises before us is regarding the nature of the standards of judicial review required to be applied in judging the validity of the constitutional amendments in the context of the doctrine of basic structure. The concept of a basic structure giving coherence and durability to a Constitution has a certain intrinsic force. This doctrine has essentially developed from the German Constitution. This development is the emergence of the constitutional principles in their own right. It is not based on literal wordings.

25. For a constitutional principle to qualify as an essential feature, it must be established that the said principle is a part of the constitutional law binding on the legislature. Only thereafter, is the second step to be taken, namely, whether the principle is so fundamental as to bind even the amending power of Parliament i.e., to form a part of the basic structure. The basic structure concept accordingly limits the amending power of Parliament. To sum up: in order to qualify as an essential feature, a principle is to be first established as part of the constitutional law and as such binding on the legislature. Only then, can it be examined whether it is so fundamental as to bind even the amending power of Parliament i.e., to form part of the basic structure of the Constitution. This is the standard of judicial review of constitutional amendments in the context of the doctrine of basic structure.

26. As stated above, the doctrine of basic structure has essentially emanated from the German Constitution. Therefore, we may have a look at common constitutional provisions under German law which deal with rights, such as, freedom of press or religion which are not mere values, they are justiciable and capable of interpretation. The values impose a positive duty on the State to ensure their attainment as far as practicable. The rights, liberties and freedoms of the individual are not only to be protected against the State, they should be facilitated by it. They are to be informed. Overarching and informing of these rights and values is the principle of human dignity under the German basic law. Similarly, secularism is the principle which is the overarching principle of several rights and values under the Indian Constitution. Therefore, axioms like secularism, democracy, reasonableness, social justice, etc., are overarching principles which provide linking factor for principle of fundamental rights like Articles 14, 19 and 21. These principles are beyond the amending power of Parliament. They pervade all enacted laws and they stand at the pinnacle of the hierarchy of constitutional values. For example, under the German constitutional law, human dignity under Article 1 is inviolable. It is the duty of the State not only to protect the human dignity but to facilitate it by taking positive steps in that direction. No exact definition of human dignity exists. It refers to the intrinsic value of every human being, which is to be respected. It cannot be taken away. It cannot give (*sic* be given). It simply is. Every human being has dignity by virtue of his existence. The constitutional courts in Germany, therefore, see human dignity as a fundamental principle within the system of the basic rights. This is how the doctrine of basic structure stands evolved under the German Constitution and by interpretation given to the concept by the constitutional courts.

27. Under the Indian Constitution, the word “federalism” does not exist in the Preamble. However, its principle (not in the strict sense as in USA) is delineated over various provisions of the Constitution. In particular, one finds this concept in separation of powers under Articles 245 and 246 read with the three lists in the Seventh Schedule to the Constitution.

28. To conclude, the theory of basic structure is based on the concept of constitutional identity. The basic structure jurisprudence is a preoccupation with constitutional identity. In ***Kesavananda Bharati v. State of Kerala*** it has been observed that “one cannot legally use the Constitution to destroy itself”. It is further observed “the personality of the Constitution must remain unchanged”. Therefore, this Court in ***Kesavananda Bharati*** while propounding the theory of basic structure, has relied upon the doctrine of constitutional identity. The word “amendment” postulates that the old Constitution survives without loss of its identity despite the change and it continues even though it has been subjected to alteration. This is the constant theme of the opinions in the majority decision in ***Kesavananda Bharati***. To destroy its identity is to abrogate the basic structure of the Constitution. This is the principle of constitutional sovereignty. Secularism in India has acted as a balance between socio-economic reforms which limits religious options and communal developments. The main object behind the theory of the constitutional identity is continuity and within that continuity of identity, changes are admissible depending upon the situation and circumstances of the day.

29. Lastly, constitutionalism is about limits and aspirations. According to Justice Brennan, interpretation of the Constitution as a written text is concerned with aspirations and fundamental principles. In his article titled “Challenge to the Living Constitution” by Herman Belz, the author says that the Constitution embodies aspiration to social justice, brotherhood and human dignity. It is a text which contains fundamental principles. Fidelity to the text qua fundamental principles did not limit judicial decision-making. The tradition of the written constitutionalism makes it possible to apply concepts and doctrines not recoverable under the doctrine of unwritten living Constitution.

30. Constitutional adjudication is like no other decision-making. There is a moral dimension to every *major constitutional* case; the language of the text is not necessarily a controlling factor. Our Constitution works because of its generalities, and because of the *good sense of the judges when interpreting it. It is that informed freedom of action of the judges that helps to preserve and protect our basic document of governance.*

***Is equality a part of the fundamental features or the basic structure of the Constitution?***

31. At the outset, it may be noted that equality, rule of law, judicial review and separation of powers are distinct concepts. They have to be treated separately, though they are intimately connected. There can be no rule of law if there is no equality before the law; and rule of law and equality before the law would be empty words if their violation was not a matter of judicial scrutiny or judicial review and judicial relief and all these features would lose their significance if judicial, executive and legislative functions were united in only one authority, whose dictates had the force of law. The rule of law and equality before the law are designed to secure among other things, justice both social and economic. Secondly, a federal Constitution with its distribution of legislative powers between Parliament and the State



Legislatures involves a limitation on legislative powers and this requires an authority other than Parliament and the State Legislatures to ascertain whether the limits are transgressed and to prevent such violation and transgression. As far back as 1872, Lord Selbourne said that the duty to decide whether the limits are transgressed must be discharged by the courts of justice. Judicial review of legislation enacted by Parliament within limited powers under the controlled Constitution which we have, has been a feature of our law and this is on the ground that any law passed by a legislature with limited powers is ultra vires if the limits are transgressed. The framers conferred on the Supreme Court the power to issue writs for the speedy enforcement of those rights and made the right to approach the Supreme Court for such enforcement itself a fundamental right. Thus, judicial review is an essential feature of our Constitution because it is necessary to give effect to the distribution of legislative power between Parliament and the State Legislatures, and is also necessary to give practicable content to the objectives of the Constitution embodied in Part III and in several other articles of our Constitution.

32. In *Minerva Mills* Chandrachud, C.J., speaking for the majority, observed that Articles 14 and 19 do not confer any fanciful rights. They confer rights which are elementary for the proper and effective functioning of democracy. They are universally regarded by the Universal Declaration of Human Rights. If Articles 14 and 19 are put out of operation, Article 32 will be rendered nugatory.

33. From these observations, which are binding on us, the principle which emerges is that “equality” is the essence of democracy and, accordingly a basic feature of the Constitution. This test is very important. Free and fair elections *per se* may not constitute a basic feature of the Constitution. On their own, they do not constitute basic feature. However, free and fair election as a part of representative democracy is an essential feature as held in *Indira Nehru Gandhi v. Raj Narain (Election)* case). Similarly, federalism is an important principle of constitutional law. The word “federalism” is not in the Preamble. However, as stated above, its features are delineated over various provisions of the Constitution like Articles 245, 246 and 301 and the three lists in the Seventh Schedule to the Constitution.

34. However, there is a difference between formal equality and egalitarian equality which will be discussed later on.

35. The theory of basic structure is based on the principle that a change in a thing does not involve its destruction and destruction of a thing is a matter of substance and not of form. Therefore, one has to apply the test of overarching principle to be gathered from the scheme and the placement and the structure of an article in the Constitution. For example, the placement of Article 14 in the equality code; the placement of Article 19 in the freedom code; the placement of Article 32 in the code giving access to the Supreme Court. Therefore, the theory of basic structure is the only theory by which the validity of impugned amendments to the Constitution is to be judged.

***Working test in the matter of application of the doctrine of basic structure:***

36. Once it is held that fundamental rights could be abridged but not destroyed and once it is further held that several features of the Constitution cannot be destroyed, the concept of “express limitation” on the amending power loses its force for a precise formulation of the

basic features of the Constitution and for the courts to pronounce on the validity of a constitutional amendment.

37. A working test has been evolved by Chandrachud, J. (as he then was) in the *Election* case in which the learned Judge has rightly enunciated, with respect, that:

“For determining whether a particular feature of the Constitution is a part of its basic structure, one has perforce to examine in each individual case the place of the particular feature in the scheme of our Constitution, its object and purpose, and the consequences of its denial on the integrity of the Constitution as a fundamental instrument of country’s governance.”

38. Applying the above test to the facts of the present case, it is relevant to note that the concept of “equality” like the concept of “representative democracy” or “secularism” is delineated over various articles. Basically, Part III of the Constitution consists of the equality code, the freedom code and the right to move the courts. It is true that equality has several facets. However, each case has to be seen in the context of the placement of an article which embodies the foundational value of equality.

#### ***Concept of reservation***

39. Reservation as a concept is very wide. Different people understand reservation to mean different things. One view of reservation as a generic concept is that reservation is an anti-poverty measure. There is a different view which says that reservation is merely providing a right of access and that it is not a right to redressal. Similarly, affirmative action as a generic concept has a different connotation. Some say that reservation is not a part of affirmative action whereas others say that it is a part of affirmative action.

40. Our Constitution has, however, incorporated the word “reservation” in Article 16(4) which word is not there in Article 15(4). Therefore, the word “reservation” as a subject of Article 16(4) is different from the word “reservation” as a general concept.

41. Applying the above test, we have to consider the word “reservation” in the context of Article 16(4) and it is in that context that Article 335 of the Constitution which provides for relaxation of the standards of evaluation has to be seen. We have to go by what the Constitution-framers intended originally and not by general concepts or principles. Therefore, schematic interpretation of the Constitution has to be applied and this is the basis of the working test evolved by Chandrachud, J. in the *Election* case.

#### ***Justice, social, economic and political is provided not only in Part IV (directive principles) but also in Part III (fundamental rights)***

42. India is constituted into a sovereign, democratic republic to secure to all its citizens, fraternity assuring the dignity of the individual and the unity of the nation. The sovereign, democratic republic exists to promote fraternity and the dignity of the individual citizen and to secure to the citizens certain rights. This is because the objectives of the State can be realised only in and through the individuals. Therefore, rights conferred on citizens and non-citizens are not merely individual or personal rights. They have a large social and political content, because the objectives of the Constitution cannot be otherwise realised. Fundamental rights represent the claims of the individual and the restrictions thereon are the claims of the

society. Article 38 in Part IV is the only article which refers to justice, social, economic and political. However, the concept of justice is not limited only to directive principles. There can be no justice without equality. Article 14 guarantees the fundamental right to equality before the law on all persons. Great social injustice resulted from treating sections of the Hindu community as “untouchable” and, therefore, Article 17 abolished untouchability and Article 25 permitted the State to make any law providing for throwing open all public Hindu religious temples to untouchables. Therefore, provisions of Part III also provide for political and social justice.

43. This discussion is important because in the present case, we are concerned with reservation. Balancing a fundamental right to property *vis-à-vis* Articles 39(b) and 39(c) as in **Kesavananda Bharati** and **Minerva Mills** cannot be equated with the facts of the present case. In the present case, we are concerned with the right of an individual to equal opportunity on one hand and preferential treatment to an individual belonging to a Backward Class in order to bring about an equal level-playing field in the matter of public employment. Therefore, in the present case, we are concerned with conflicting claims within the concept of “justice, social, economic and political”, which concept as stated above exists both in Part III and Part IV of the Constitution. Public employment is a scarce commodity in economic terms. As the supply is scarce, demand is chasing that commodity. This is reality of life. The concept of “public employment” unlike the right to property is socialistic and, therefore, falls within the Preamble to the Constitution which states that WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC. Similarly, the Preamble mentions the objective to be achieved, namely, justice, social, economic and political. Therefore, the concept of “equality of opportunity” in public employment concerns an individual, whether that individual belongs to the general category or Backward Class. The conflicting claim of individual right under Article 16(1) and the preferential treatment given to a Backward Class has to be balanced. Both the claims have a particular object to be achieved. The question is of optimisation of these conflicting interests and claims.

***Equity, justice and merit***

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.

**Reservation and affirmative action**

47. Equality of opportunity has two different and distinct concepts. There is a conceptual distinction between a non-discrimination principle and affirmative action under which the State is obliged to provide a level-playing field to the oppressed classes. Affirmative action in the above sense seeks to move beyond the concept of non-discrimination towards equalising results with respect to various groups. Both the conceptions constitute “equality of opportunity”.

48. It is the equality “in fact” which has to be decided looking at the ground reality. Balancing comes in where the question concerns the extent of reservation. If the extent of reservation goes beyond cut-off point then it results in reverse discrimination. Anti-discrimination legislation has a tendency of pushing towards *de facto* reservation. Therefore, a numerical benchmark is the surest immunity against charges of discrimination.

49. Reservation is necessary for transcending caste and not for perpetuating it. Reservation has to be used in a limited sense otherwise it will perpetuate casteism in the country. Reservation is underwritten by a special justification. Equality in Article 16(1) is individual-specific whereas reservation in Article 16(4) and Article 16(4-A) is enabling. The discretion of the State is, however, subject to the existence of “backwardness” and “inadequacy of representation” in public employment. Backwardness has to be based on objective factors whereas inadequacy has to factually exist. This is where judicial review comes in. However, whether reservation in a given case is desirable or not, as a policy, is not for us to decide as long as the parameters mentioned in Articles 16(4) and 16(4-A) are maintained. As stated above, equity, justice and merit (Article 335)/efficiency are variables which can only be identified and measured by the State. Therefore, in each case, a contextual case has to be made out depending upon different circumstances which may exist Statewise.

**Extent of reservation**

53. The question of extent of reservation involves two questions:

1. Whether there is any upper-limit beyond which reservation is not permissible?
2. Whether there is any limit to which seats can be reserved in a particular year; in other words the issue is whether the percentage limit applies only on the total number of posts in the cadre or to the percentage of posts advertised every year as well?

54. The question of extent of reservation is closely linked to the issue whether Article 16(4) is an exception to Article 16(1) or is Article 16(4) an application of Article 16(1). If Article 16(4) is an exception to Article 16(1) then it needs to be given a limited application so as not to eclipse the general rule in Article 16(1). But if Article 16(4) is taken as an application of Article 16(1) then the two articles have to be harmonised keeping in view the interests of certain sections of the society as against the interest of the individual citizens of the society.

**Maximum limit of reservation possible**

55. Word of caution against excess reservation was first pointed out in *G.M., S. Rly. v. Rangachari*. Gajendragadkar, J. giving the majority judgment said that reservation under

Article 16(4) is intended merely to give adequate representation to backward communities. It cannot be used for creating monopolies or for unduly or illegitimately disturbing the legitimate interests of other employees. A reasonable balance must be struck between the claims of Backward Classes and claims of other employees as well as the requirement of efficiency of administration.

56. However, the question of extent of reservation was not directly involved in *Rangachari*. It was directly involved in *M.R. Balaji v. State of Mysore* with reference to Article 15(4). In this case, 60% reservation under Article 15(4) was struck down as excessive and unconstitutional. Gajendragadkar, J. observed that special provision should be less than 50 per cent, how much less would depend on the relevant prevailing circumstances of each case.

57. But in *State of Kerala v. N.M. Thomas* Krishna Iyer, J. expressed his concurrence with the views of Fazal Ali, J. who said that although reservation cannot be so excessive as to destroy the principle of equality of opportunity under clause (1) of Article 16, yet it should be noted that the Constitution itself does not put any bar on the power of the Government under Article 16(4). If a State has 80% population which is backward then it would be meaningless to say that reservation should not cross 50%.

58. However, in *Indra Sawhney* the majority held that the rule of 50% laid down in *Balaji* was a binding rule and not a mere rule of prudence.

59. Giving the judgment of the Court in *Indra Sawhney*, Jeevan Reddy, J. stated that Article 16(4) speaks of adequate representation not proportionate representation although proportion of population of Backward Classes to the total population would certainly be relevant. *He further pointed out that Article 16(4) which protects interests of certain sections of society has to be balanced against Article 16(1) which protects the interests of every citizen of the entire society. They should be harmonised because they are restatements of the principle of equality under Article 14.* (emphasis added)

***Are reserved category candidates free to contest for vacancies in general category?***

60. In *Indra Sawhney*, Jeevan Reddy, J. noted that reservation under Article 16(4) does not operate on communal ground. Therefore, if a member from reserved category gets selected in general category, his selection will not be counted against the quota limit provided to his class. Similarly, in *R.K. Sabharwal*, the Supreme Court held that while general category candidates are not entitled to fill the reserved posts, reserved category candidates are entitled to compete for the general category posts. The fact that considerable number of members of Backward Class have been appointed/promoted against general seats in the State services may be a relevant factor for the State Government to review the question of continuing reservation for the said class.

***Number of vacancies that could be reserved***

61. Wanchoo, J. who had given dissenting judgment in *Rangachari* observed that the requirement of Article 16(4) is only to give adequate representation and since the Constitution-makers intended it to be a short-term measure it may happen that all the posts in a year may be reserved. He opined that reserving a fixed percentage of seats every year may

take a long time before inadequacy of representation is overcome. Therefore, the Government can decide to reserve the posts. After having reserved a fixed number of posts the Government may decide that till those posts are filled up by the Backward Classes all appointments will go to them if they fulfil the minimum qualification. Once this number is reached the Government is deprived of its power to make further reservations. Thus, according to Wanchoo, J. the adequacy of representation has to be judged considering the total number of posts even if in a single year or for few years all seats are reserved, provided the scheme is short-term.

62. The idea given by Wanchoo, J. in *Rangachari* did not work out in practice because most of the time even for limited number of reservations, every year qualified Backward Class candidates were not available. This compelled the Government to adopt carry-forward rule. This carry-forward rule came in conflict with the *Balaji* ruling. In cases where the availability of reserved category candidates is less than the vacancies set aside for them, the Government has to adopt either of the two alternatives:

(1) the State may provide for carrying over the unfilled vacancies for the next year or next to the next year, or

(2) instead of providing for carrying over the unfilled vacancies to the coming years, it may provide for filling of the vacancies from the general quota candidates and carry forward the unfilled posts by Backward Classes to the next year quota.

63. But the problem arises when in a particular year due to carry-forward rule more than 50% of vacancies are reserved. In *T. Devadasan v. Union of India*, this was the issue. The Union Public Service Commission had provided for 17½% reservation for the Scheduled Castes and Scheduled Tribes. In case of non-availability of reserved category candidates in a particular year the posts had to be filled by general category candidates and the number of such vacancies were to be carried forward to be filled by the reserved category candidates next year. Due to this, the rule of carry-forward reservation in a particular year amounted to 65% of the total vacancies. The petitioner contended that reservation was excessive which destroyed his right under Article 16(1) and Article 14. The Court on the basis of decision in *Balaji* held the reservation excessive and, therefore, unconstitutional. It further stated that the guarantee of equality under Article 16(1) is to each individual citizen and to appointments to any office under the State. It means that on every occasion for recruitment the State should see that all citizens are treated equally. In order to effectuate the guarantee, each year of recruitment will have to be considered by itself.

64. Thus, the majority differed from Wanchoo, J.'s decision in *Rangachari* holding that a cent per cent reservation in a particular year would be unconstitutional in view of *Balaji* decision.

65. Subba Rao, J. gave a dissenting judgment. He relied on Wanchoo, J.'s judgment in *Rangachari* and held that Article 16(4) provides for adequate representation taking into consideration the entire cadre strength. According to him, if it is within the power of the State to make reservations then reservation made in one selection or spread over many selections is only a convenient method of implementing the provision of reservation. Unless it is established that an unreasonably disproportionate part of the cadre strength is filled up with

the said Castes and Tribes, it is not possible to contend that the provision is not one of reservation but amounts to an extinction of the fundamental right.

66. In *Thomas* under the Kerala State and Subordinate Services Rules, 1950 certain relaxation was given to the Scheduled Caste and Scheduled Tribe candidates passing departmental tests for promotions. For promotion to Upper Division Clerks from Lower Division Clerks the criterion of seniority-cum-merit was adopted. Due to relaxation in merit qualification in 1972, 34 out of 51 vacancies in Upper Division Clerks went to the Scheduled Caste candidates. It appeared that the 34 members of SC/ST had become senior-most in the lower grade. The High Court quashed the promotions on the ground that it was excessive. The Supreme Court upheld the promotions. Ray, C.J. held that the promotions made in services as a whole were nowhere near 50% of the total number of the posts. Thus, the majority differed from the ruling of the Court in *Devadasan* basically on the ground that the strength of the cadre as a whole should be taken into account. Khanna, J. in his dissenting opinion made a reference to it on the ground that such excessive concession would impair efficiency in administration.

67. In *Indra Sawhney* the majority held that 50% rule should be applied to each year otherwise it may happen that (if entire cadre strength is taken as a unit) the open competition channel gets choked for some years and meanwhile the general category candidates may become age-barred and ineligible. The equality of opportunity under Article 16(1) is for each individual citizen while special provision under Article 16(4) is for socially disadvantaged classes. Both should be balanced and neither should be allowed to eclipse the other.

68. However, in *R.K. Sabharwal* which was a case of promotion and the issue in this case was operation of roster system, the Court stated that the entire cadre strength should be taken into account to determine whether reservation up to the required limit had been reached. With regard to ruling in *Indra Sawhney* case that reservation in a year should not go beyond 50% the Court held that it applied to initial appointments. The operation of a roster, for filling the cadre strength, by itself ensures that the reservation remains within the 50% limit. In substance the Court said that presuming that 100% of the vacancies have been filled, each post gets marked for the particular category of candidate to be appointed against it and any subsequent vacancy has to be filled by that category candidate. The Court was concerned with the possibility that reservation in the entire cadre may exceed 50% limit if every year half of the seats are reserved. The Constitution (Eighty-first Amendment) Act, 2000 added Article 16(4-B) which in substance gives legislative assent to the judgment in *R.K. Sabharwal*.

***Catch-up rule – Is the said rule a constitutional requirement under Article 16(4)?***

69. One of the contentions advanced on behalf of the petitioners is that the impugned amendments, particularly, the Constitution (Seventy-seventh Amendment) and (Eighty-fifth Amendment) Acts, obliterate all constitutional limitations on the amending power of Parliament. That the width of these impugned amendments is so wide that it violates the basic structure of equality enshrined in the Constitution.

70. The key issue which arises for determination is – whether the above “catch-up” rule and the concept of “consequential seniority” are constitutional requirements of Article 16 and of equality, so as to be beyond the constitutional amendatory process. In other words, whether

obliteration of the “catch-up” rule or insertion of the concept of “consequential seniority code”, would violate the basic structure of the equality code enshrined in Articles 14, 15 and 16.

71. The concept of “catch-up” rule appears for the first time in *Virpal Singh Chauhan*. In the category of Guards in the Railways, there were four categories, namely, Grade C, Grade B, Grade A and Grade A Special. The initial recruitment was made to Grade C. Promotion from one grade to another was by seniority-cum-suitability. The rule of reservation was applied not only at the initial stage of appointment to Grade C but at every stage of promotion. The *percentage* reserved for SCs was 15% and for STs, it was 7.5%. To give effect to the rule of reservation, a forty-point roster was prepared in which certain points were reserved for SCs and STs respectively. Subsequently, a hundred-point roster was prepared reflecting the same *percentages*. In 1986, general candidates and members of SCs/STs came within Grade A in Northern Railway. On 1-8-1986, the Chief Controller promoted certain general candidates on *ad hoc* basis to Grade A Special. Within three months, they were reverted and SCs and STs were promoted. This action was challenged by general candidates as arbitrary and unconstitutional before the Tribunal. The general candidates asked for three reliefs, namely, (a) to restrain the Railways from filling up the posts in higher grades in the category of Guards by applying the rule of reservation; (b) to restrain the Railways from acting upon the seniority list prepared by them; and (c) to declare that the general candidates were alone entitled to be promoted and confirmed in Grade A Special on the strength of their seniority earlier to the reserved category employees. The contention of the general candidates was that once the quota prescribed for the reserved group is satisfied, the forty-point roster cannot be applied because that roster was prepared to give effect to the rule of reservation. *It was contended by the general candidates that accelerated promotion may be given but the Railways cannot give consequential seniority to reserved category candidates in the promoted category.* In this connection, the general category candidates relied upon decisions of the Allahabad and Madhya Pradesh High Courts. It was contended by the general candidates that giving consequential seniority in addition to accelerated promotion constituted conferment of double benefit upon the members of the reserved category and, therefore, violated the rule of equality in Article 16(1). It was further urged that accelerated promotion-cum-accelerated seniority is destructive of the efficiency of administration inasmuch as by this means the higher echelons of administration would be occupied entirely by members of reserved categories. This was opposed by the reserved category candidates who submitted that for the purposes of promotion to Grade A Special, the seniority list pertaining to Grade A alone should be followed that, the administration should not follow the seniority lists maintained by the administration pertaining to Grade C as urged by the general candidates and since SCs and STs were senior to the general candidates in Grade A, the seniority in Grade A alone should apply. In short, the general candidates relied upon the “catch-up” rule, which was opposed by the members of SCs/STs. They also relied upon the judgment of this Court in *R.K. Sabharwal*.

72. This Court gave the following reasons for upholding the decision of the Tribunal. *Firstly*, it was held that a rule of reservation as such does not violate Article 16(4). *Secondly*, this Court opined that there is no uniform method of providing reservation. The extent and



nature of reservation is a matter for the State to decide having regard to the facts and requirements of each case. It is open to the State, if so advised, to say that while the rule of reservation shall be applied, the candidate promoted earlier by virtue of rule of reservation/roster shall not be entitled to seniority over seniors in the feeder category and that it is open to the State to interpret the “catch-up” rule in the service conditions governing the promotions. *Thirdly*, this Court did not agree with the view expressed by the Tribunal that a harmonious reading of clauses (1) to (4) of Article 16 should mean that a reserved category candidate promoted earlier than his senior general category candidates in the feeder grade shall necessarily be junior in the promoted category to such general category. *This Court categorically ruled, that such catch-up principle cannot be said to be implicit in clauses (1) to (4) of Article 16.* Lastly, this Court found on facts that for 11 vacancies, 33 candidates were considered and they were all SC/ST candidates. Not a single candidate belonged to general category. It was argued on behalf of the general candidates that all top grades stood occupied exclusively by the reserved category members, which violated the rule of equality underlying Articles 16(1), 16(4) and 14. This Court opined that the above situation arose on account of faulty implementation of the rule of reservation, as the Railways did not observe the principle that reservation must be in relation to “posts” and not “vacancies” and also for applying the roster even after the attainment of the requisite percentage reserved for SCs/STs. In other words, this Court based its decision only on the faulty implementation of the rule by the Railways which the Court ordered to be rectified.

73. The point which we need to emphasise is that the Court has categorically ruled in *Virpal Singh Chauhan* that the “catch-up” rule is not implicit in clauses (1) to (4) of Article 16. Hence, the said rule cannot bind the amending power of Parliament. It is not beyond the amending power of Parliament.

74. In *Ajit Singh (I)* the controversy which arose for determination was – whether after the members of SCs/STs for whom specific percentage of posts stood reserved having been promoted against those posts, was it open to the administration to grant consequential seniority against general category posts in the higher grade. The appellant took a clear stand that he had no objection if members of SCs/STs get accelerated promotions. The appellant objected only to the grant of consequential seniority. Relying on the circulars issued by the administration dated 19-7-1969 and 8-9-1969, the High Court held that the members of SCs/STs can be promoted against general category posts on the basis of seniority. This was challenged in appeal before this Court. The High Court’s ruling was set aside by this Court on the ground that if the “catch-up” rule is not applied then the equality principle embodied in Article 16(1) would stand violated. This Court observed that the “catch-up” rule was a process adopted while making appointments through direct recruitment or promotion because merit cannot be ignored. This Court held that for attracting meritorious candidates a balance has to be struck while making provisions for reservation. It was held that the *promotion is an incident of service*. It was observed that seniority is one of the important factors in making promotion. It was held that the right to equality is to be preserved by preventing reverse discrimination. Further, it was held that the *equality principle requires exclusion of extra weightage of roster-point promotion to a reserved category candidate.* (emphasis supplied) This Court opined that without “catch-up” rule, giving weightage to earlier promotion secured

by roster-point promotee would result in reverse discrimination and would violate equality under Articles 14, 15 and 16. Accordingly, this Court took the view that the seniority between the reserved category candidates and general candidates in the promoted category shall be governed by their panel position. Therefore, this Court set aside the factor of extra weightage of earlier promotion to a reserved category candidate as violative of Articles 14 and 16(1) of the Constitution.

75. Therefore, in *Virpal Singh Chauhan* this Court has said that the “catch-up” rule insisted upon by the Railways though not implicit in Articles 16(1) and 16(4), is constitutionally valid as the said practice/process was made to maintain efficiency. On the other hand, in *Ajit Singh (I)* this Court has held that the equality principle excludes the extra weightage given by the Government to roster-point promotees as such weightage is against merit and efficiency of the administration and that the Punjab Government had erred in not taking into account the said merit and efficiency factors.

76. In *Ajit Singh (II)* three interlocutory applications were filed by the State of Punjab for clarification of the judgment of this Court in *Ajit Singh (I)*. The limited question was—whether there was any conflict between the judgments of this Court in *Virpal Singh Chauhan* and *Ajit Singh (I)* on one hand and *vis-à-vis* the judgment of this Court in *Jagdish Lal v. State of Haryana*. The former cases were decided in favour of general candidates whereas the latter was a decision against the general candidates. Briefly, the facts for moving the interlocutory applications were as follows: the Indian Railways following the law laid down in *Virpal Singh Chauhan* issued a circular on 28-2-1997 to the effect that the reserved candidates promoted on roster-points could not claim seniority over the senior general candidates promoted later on. The State of Punjab after following *Ajit Singh (I)* revised their seniority list and made further promotions of the senior general candidates following the “catch-up” rule. Therefore, both the judgments were against the reserved candidates. However, in the later judgment of this Court in *Jagdish Lal* another three-Judge Bench took the view that under the general rule of service jurisprudence relating to seniority, the date of continuous officiation has to be taken into account and if so, the roster-point promotees were entitled to the benefit of continuous officiation. In *Jagdish Lal* the Bench observed that the right to promotion was a statutory right while the rights of the reserved candidates under Article 16(4) and Article 16(4-A) were fundamental rights of the reserved candidates and, therefore, the reserved candidates were entitled to the benefit of continuous officiation.

77. Accordingly, in *Ajit Singh (II)* three points arose for consideration:

(i) Can the roster-point promotees count their seniority in the promoted category from the date of their continuous officiation *vis-à-vis* general candidates, who were senior to them in the lower category and who were later promoted to the same level?

(ii) Have *Virpal* and *Ajit Singh (I)* been correctly decided and has *Jagdish Lal* been correctly decided?

(iii) Whether the catch-up principles are tenable?

78. At the outset, this Court stated that it was not concerned with the validity of constitutional amendments and, therefore, it proceeded on the assumption that Article 16(4-A) is valid and not unconstitutional. Basically, the question decided was whether the “catch-up”

principle was tenable in the context of Article 16(4). It was held that the primary purpose of Article 16(4) and Article 16(4-A) is to give due representation to certain classes in certain posts keeping in mind Articles 14, 16(1) and 335; that, Articles 14 and 16(1) have prescribed permissive limits to affirmative action by way of reservation under Articles 16(4) and 16(4-A) of the Constitution; that, Article 335 is incorporated so that efficiency of administration is not jeopardised and that Articles 14 and 16(1) are closely connected as they deal with individual rights of the persons. They give a positive command to the State that there shall be equality of opportunity to all citizens in public employment. It was further held that Article 16(1) flows from Article 14. It was held that the word “employment” in Article 16(1) is wide enough to include promotions to posts at the stage of initial level of recruitment. It was observed that Article 16(1) provides to every employee otherwise eligible for promotion fundamental right to be considered for promotion. It was held that equal opportunity means the right to be considered for promotion. The right to be considered for promotion was not a statutory right. It was held that Articles 16(4) and 16(4-A) did not confer any fundamental right to reservation. That they are only enabling provisions. Accordingly, in *Ajit Singh (II)* the judgment of this Court in *Jagdish Lal* case was overruled. However, in the context of balancing of fundamental rights under Article 16(1) and the rights of reserved candidates under Articles 16(4) and 16(4-A), this Court opined that Article 16(1) deals with a fundamental right whereas Articles 16(4) and 16(4-A) are only enabling provisions and, therefore, the interests of the reserved classes must be balanced against the interests of other segments of society. As a remedial measure, the Court held that in matters relating to affirmative action by the State, the rights under Articles 14 and 16 are required to be protected and a reasonable balance should be struck so that the affirmative action by the State does not lead to reverse discrimination.

79. Reading the above judgments, we are of the view that the concept of “catch-up” rule and “consequential seniority” are judicially evolved concepts to control the extent of reservation. The source of these concepts is in service jurisprudence. These concepts cannot be elevated to the status of an axiom like secularism, constitutional sovereignty, etc. It cannot be said that by insertion of the concept of “consequential seniority” the structure of Article 16(1) stands destroyed or abrogated. It cannot be said that “equality code” under Articles 14, 15 and 16 is violated by deletion of the “catch-up” rule. These concepts are based on practices. However, such practices cannot be elevated to the status of a constitutional principle so as to be beyond the amending power of Parliament. Principles of service jurisprudence are different from constitutional limitations. Therefore, in our view neither the “catch-up” rule nor the concept of “consequential seniority” is implicit in clauses (1) and (4) of Article 16 as correctly held in *Virpal Singh Chauhan*.

80. Before concluding, we may refer to the judgment of this Court in *M.G. Badappanavar*. In that case the facts were as follows: the appellants were general candidates. They contended that when they and the reserved candidates were appointed at Level 1 and junior reserved candidates got promoted earlier on the basis of roster points to Level 2 and again by way of roster points to Level 3, and when the senior general candidate got promoted to Level 3, then the general candidate would become senior to the reserved candidate at Level 3. At Level 3, the reserved candidate should have been considered along with the senior

general candidate for promotion to Level 4. In support of their contention, the appellants relied upon the judgment of the Constitution Bench in *Ajit Singh (II)*. The above contentions raised by the appellants were rejected by the Tribunal. Therefore, the general candidates came to this Court in appeal. This Court found on the facts that the service rule concerned did not contemplate computation of seniority in respect of roster promotions. Placing reliance on the judgments of this Court in *Ajit Singh (I)* 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(4-A) cannot be of any help to the reserved category candidates. This is the only judgment of this Court delivered by a three-Judge Bench saying that if roster-point promotees are given the benefit of consequential seniority, it will result in violation of equality principle which is a part of the basic structure of the Constitution. Accordingly, the judgment of the Tribunal was set aside.

81. The judgment in *M.G. Badappanavar* was mainly based on the judgment in *Ajit Singh (I)* which had taken the view that the departmental circular which gave consequential seniority to the “roster-point promotee”, violated Articles 14 and 16 of the Constitution. In none of the above cases, was the question of the validity of the constitutional amendments involved. *Ajit Singh (I)*, *Ajit Singh (II)* and *M.G. Badappanavar* were essentially concerned with the question of “weightage”. Whether weightage of earlier accelerated promotion with consequential seniority should be given or not to be given are matters which would fall within the discretion of the appropriate Government, keeping in mind the backwardness, inadequacy and representation in public employment and overall efficiency of services. The above judgments, therefore, did not touch the questions which are involved in the present case.

#### *Scope of the impugned amendments*

82. Before dealing with the scope of the constitutional amendments we need to recap the judgments in *Indra Sawhney* and *R.K. Sabharwal*. In the former case the majority held that 50% rule should be applied to each year otherwise it may happen that the open competition channel may get choked if the entire cadre strength is taken as a unit. However, in *R.K. Sabharwal* this Court stated that the entire cadre strength should be taken into account to determine whether the reservation up to the quota limit has been reached. It was clarified that the judgment in *Indra Sawhney* was confined to initial appointments and not to promotions. The operation of the roster for filling the cadre strength, by itself, ensures that the reservation remains within the ceiling limit of 50%.

83. In our view, the appropriate Government has to apply the cadre strength as a unit in

the operation of the roster in order to ascertain whether a given class/group is adequately represented in the service. The cadre strength as a unit also ensures that upper ceiling limit of 50% is not violated. Further, roster has to be post-specific and not vacancy based.

84. With these introductory facts, we may examine the scope of the impugned constitutional amendments.

85. The Supreme Court in its judgment dated 16-11-1992 in **Indra Sawhney** stated that reservation in appointments or posts under Article 16(4) is confined to initial appointment and cannot extend to reservation in the matter of promotion. Prior to the judgment in **Indra Sawhney** reservation in promotion existed. The Government felt that the judgment of this Court in **Indra Sawhney** adversely affected the interests of SCs and STs in services, as they had not reached the required level. Therefore, the Government felt that it was necessary to continue the existing policy of providing reservation in promotion confined to SCs and STs alone. The Constitution (Seventy-seventh Amendment) Act, 1995 introduced clause (4-A) in Article 16 of the Constitution. The said clause (4-A) was inserted after clause (4) of Article 16 to say that nothing in the said article shall prevent the State from making any provision for reservation in matters of promotion to any class(es) of posts in the services under the State in favour of SCs and STs which, in the opinion of the States, are not adequately represented in the services under the State.

86. Clause (4-A) follows the pattern specified in clauses (3) and (4) of Article 16. Clause (4-A) of Article 16 emphasises the opinion of the States in the matter of adequacy of representation. It gives freedom to the State in an appropriate case depending upon the ground reality to provide for reservation in matters of promotion to any class or classes of posts in the services. The State has to form its opinion on the quantifiable data regarding adequacy of representation. Clause (4-A) of Article 16 is an enabling provision. It gives freedom to the State to provide for reservation in matters of promotion. Clause (4-A) of Article 16 applies only to SCs and STs. The said clause is carved out of Article 16(4). Therefore, clause (4-A) will be governed by the two compelling reasons - "backwardness" and "inadequacy of representation", as mentioned in Article 16(4). If the said two reasons do not exist then the enabling provision cannot come into force. The State can make provision for reservation only if the above two circumstances exist. Further, in **Ajit Singh (II)** this Court has held that apart from "backwardness" and "inadequacy of representation" the State shall also keep in mind "overall efficiency" (Article 335). Therefore, all the three factors have to be kept in mind by the appropriate Government in providing for reservation in promotion for SCs and STs.

87. After the Constitution (Seventy-seventh Amendment) Act, 1995 this Court stepped in to balance the conflicting interests. This was in **Virpal Singh Chauhan** in which it was held that a roster-point promotee getting the benefit of accelerated promotion would not get consequential seniority. As such, consequential seniority constituted additional benefit and, therefore, his seniority will be governed by the panel position. According to the Government, the decisions in **Virpal Singh** and **Ajit Singh (I)** bringing in the concept of "catch-up" rule adversely affected the interests of SCs and STs in the matter of seniority on promotion to the next higher grade.

88. In the circumstances, clause (4-A) of Article 16 was once again amended and the

benefit of consequential seniority was given in addition to accelerated promotion to the roster-point promotees. Suffice it to state that the Constitution (Eighty-fifth Amendment) Act, 2001 was an extension of clause (4-A) of Article 16. Therefore, the Constitution (Seventy-seventh Amendment) Act, 1995 has to be read with the Constitution (Eighty-fifth Amendment) Act, 2001.

91. The question in the present case concerns the width of the amending powers of Parliament. The key issue is - whether any constitutional limitation mentioned in Article 16(4) and Article 335 stands obliterated by the above constitutional amendments.

92. In **R.K. Sabharwal** the issue was concerning operation of roster system. This Court stated that the entire cadre strength should be taken into account to determine whether reservation up to the required limit has been reached. It was held that if the roster is prepared on the basis of the cadre strength, that by itself would ensure that the reservation would remain within the ceiling limit of 50%. In substance, the Court said that in the case of hundred-point roster each post gets marked for the category of candidate to be appointed against it and any subsequent vacancy has to be filled up by that category candidate alone (replacement theory).

93. The question which remained in controversy, however, was concerning the rule of “carry-forward”. In **Indra Sawhney** this Court held that the number of vacancies to be filled up on the basis of reservation in a year including the “carry-forward” reservations should in no case exceed the ceiling limit of 50%.

94. However, the Government found that total reservation in a year for SCs, STs and OBCs combined together had already reached 49½% and if the judgment of this Court in **Indra Sawhney** had to be applied it became difficult to fill “backlog vacancies”. According to the Government, in some cases the total of the current and backlog vacancies was likely to exceed the ceiling limit of 50%. Therefore, the Government inserted clause (4-B) after clause (4-A) in Article 16 vide the Constitution (Eighty-first Amendment) Act, 2000.

95. By clause (4-B) the “carry-forward”/“unfilled vacancies” of a year are kept out and excluded from the overall ceiling limit of 50% reservation. The clubbing of the backlog vacancies with the current vacancies stands segregated by the Constitution (Eighty-first Amendment) Act, 2000. Quoted hereinbelow is the Statement of Objects and Reasons with the text of the Constitution (Eighty-first Amendment) Act, 2000:

96. The Constitution (Eighty-first Amendment) Act, 2000 gives, in substance, legislative assent to the judgment of this Court in **R.K. Sabharwal**. Once it is held that each point in the roster indicates a post which on falling vacant has to be filled up by the particular category of candidate to be appointed against it and any subsequent vacancy has to be filled up by that category candidate alone then the question of clubbing the unfilled vacancies with current vacancies does not arise. Therefore, in effect, Article 16(4-B) grants legislative assent to the judgment in **R.K. Sabharwal**. If it is within the power of the State to make reservation then whether it is made in one selection or deferred selections, is only a convenient method of implementation as long as it is post based, subject to replacement theory and within the limitations indicated hereinafter.

97. As stated above, clause (4-A) of Article 16 is carved out of clause (4) of Article 16.

Clause (4-A) provides benefit of reservation in promotion only to SCs and STs. In *S. Vinod Kumar v. Union of India* this Court held that relaxation of qualifying marks and standards of evaluation in matters of reservation in promotion was not permissible under Article 16(4) in view of Article 335 of the Constitution. This was also the view in *Indra Sawhney*.

98. By the Constitution (Eighty-second Amendment) Act, 2000 a proviso was inserted at the end of Article 335 of the Constitution.

99. This proviso was added following the benefit of reservation in promotion conferred upon SCs and STs alone. This proviso was inserted keeping in mind the judgment of this Court in *Vinod Kumar* which took the view that relaxation in matters of reservation in promotion was not permissible under Article 16(4) in view of the command contained in Article 335. Once a separate category is carved out of clause (4) of Article 16 then that category is being given relaxation in matters of reservation in promotion. The proviso is confined to SCs and STs alone. The said proviso is compatible with the scheme of Article 16(4-A).

***Introduction of “time” factor in view of Article 16(4-B)***

100. As stated above, Article 16(4-B) lifts the 50% cap on carry-over vacancies (backlog vacancies). The ceiling limit of 50% on current vacancies continues to remain. In working out the carry-forward rule, two factors are required to be kept in mind, namely, unfilled vacancies and the time factor. This position needs to be explained. On one hand of the spectrum, we have unfilled vacancies; on the other hand, we have a time spread over a number of years over which unfilled vacancies are sought to be carried over. These two are alternating factors and, therefore, if the ceiling limit on the carry over of unfilled vacancies is removed, the other alternative time factor comes in and in that event, the time-scale has to be imposed in the interest of efficiency in administration as mandated by Article 335. If the time-scale is not kept then posts will continue to remain vacant for years, which would be detrimental to the administration. Therefore, in each case, the appropriate Government will now have to introduce the time-cap depending upon the fact situation. What is stated hereinabove is borne out by the service rules in some of the States where the carry-over rule does not extend beyond three years.

***Whether the impugned constitutional amendments violate the principle of basic structure?***

101. The key question which arises in the matter of the challenge to the constitutional validity of the impugned amending Acts is - whether the constitutional limitations on the amending power of Parliament are obliterated by the impugned amendments so as to violate the basic structure of the Constitution.

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 (equality 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.

103. The criterion for determining the validity of a law is the competence of the law-making authority. The competence of the law-making authority would depend on the ambit of the legislative power, and the limitations imposed thereon as also the limitations on the mode of exercise of the power. Though the amending power in the Constitution is in the nature of a constituent power and differs in content from the legislative power, the limitations imposed



on the constituent power may be substantive as well as procedural. Substantive limitations are those which restrict the field of the exercise of the amending power. Procedural limitations on the other hand are those which impose restrictions with regard to the mode of exercise of the amending power. Both these limitations touch and affect the constituent power itself, disregard of which invalidates its exercise.

104. Applying the above tests to the present case, there is no violation of the basic structure by any of the impugned amendments, including the Constitution (Eighty-second) Amendment Act, 2000. The constitutional limitation under Article 335 is relaxed and not obliterated. As stated above, be it reservation or evaluation, excessiveness in either would result in violation of the constitutional mandate. This exercise, however, will depend on the facts of each case. In our view, the field of exercise of the amending power is retained by the impugned amendments, as the impugned amendments have introduced merely enabling provisions because, as stated above, merit, efficiency, backwardness and inadequacy cannot be identified and measured in vacuum. Moreover, Article 16(4-A) and Article 16(4-B) fall in the pattern of Article 16(4) and as long as the parameters mentioned in those articles are complied with by the States, the provision of reservation cannot be faulted. Articles 16(4-A) and 16(4-B) are classifications within the principle of equality under Article 16(4).

***Role of enabling provisions in the context of Article 14***

106. The gravamen of Article 14 is equality of treatment. Article 14 confers a personal right by enacting a prohibition which is absolute. By judicial decisions, the doctrine of classification is read into Article 14. Equality of treatment under Article 14 is an objective test. It is not the test of intention. Therefore, the basic principle underlying Article 14 is that the law must operate equally on all persons *under like circumstances*. Every discretionary power is not necessarily discriminatory. According to the *Constitutional Law of India*, by H.M. Seervai, 4<sup>th</sup> Edn., p. 546, equality is not violated by mere conferment of discretionary power. It is violated by arbitrary exercise by those on whom it is conferred. This is the theory of “guided power”. This theory is based on the assumption that in the event of arbitrary exercise by those on whom the power is conferred, would be corrected by the courts. This is the basic principle behind the enabling provisions which are incorporated in Articles 16(4-A) and 16(4-B). Enabling provisions are permissive in nature. They are enacted to balance equality with positive discrimination. The constitutional law is the law of evolving concepts. Some of them are generic, others have to be identified and valued. The enabling provisions deal with the concept, which has to be identified and valued as in the case of access vis-à-vis efficiency which depends on the fact situation only and not abstract principle of equality in Article 14 as spelt out in detail in Articles 15 and 16. Equality before the law, guaranteed by the first part of Article 14, is a negative concept while the second part is a positive concept which is enough to validate equalising measures depending upon the fact situation.

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”. 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.

***Application of the doctrine of “guided power”– Article 335***

108. Applying the above tests to the proviso to Article 335 inserted by the Constitution (Eighty-second Amendment) Act, 2000 we find that the said proviso has a nexus with Articles 16(4-A) and 16(4-B). Efficiency in administration is held to be a constitutional limitation on the discretion vested in the State to provide for reservation in public employment. Under the proviso to Article 335, it is stated that nothing in Article 335 shall prevent the State to relax qualifying marks or standards of evaluation for reservation in promotion. This proviso is also confined only to members of SCs and STs. This proviso is also conferring discretionary power on the State to relax qualifying marks or standards of evaluation. Therefore, the question before us is – whether the State could be empowered to relax qualifying marks or standards for reservation in matters of promotion. In our view, even after insertion of this proviso, the limitation of overall efficiency in Article 335 is not obliterated. Reason is that “efficiency” is a variable factor. It is for the State concerned to decide in a given case, whether the overall efficiency of the system is affected by such relaxation. If the relaxation is so excessive that it ceases to be qualifying marks then certainly in a given case, as in the past, the State is free not to relax such standards. In other cases, the State may evolve a mechanism under which efficiency, equity and justice, all three variables, could be accommodated. Moreover, Article 335 is to be read with Article 46 which provides that the State shall promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Castes and Scheduled Tribes, and shall protect them from social injustice. Therefore, where the State finds compelling interests of backwardness and inadequacy, it may relax the qualifying marks for SCs/STs. These

compelling interests however have to be identified by weighty and comparable data.

109. In conclusion, we reiterate that the object behind the impugned constitutional amendments is to confer discretion on the State to make reservations for SCs/STs in promotions subject to the circumstances and the constitutional limitations indicated above.

***Tests to judge the validity of the impugned State Acts***

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.

***Are the impugned amendments making an inroad into the balance struck by the judgment of this Court in Indra Sawhney?***

111. The petitioners submitted that equality has been recognised to be a basic feature of our Constitution. To preserve equality, a balance was struck in ***Indra Sawhney*** so as to ensure that the basic structure of Articles 14, 15 and 16 remains intact and at the same time social upliftment, as envisaged by the Constitution, stood achieved. In order to balance and structure the equality, a ceiling limit on reservation was fixed at 50% of the cadre strength, reservation was confined to initial recruitment and was not extended to promotion. The petitioners further submitted that in ***Indra Sawhney*** this Court has held that reservation in promotion was not sustainable in principle. Accordingly, the petitioners submitted that the impugned constitutional amendments make a serious inroad into the said balance struck in ***Indra Sawhney*** which protected equality as a basic feature of our Constitution.

112. What are the outer boundaries of the amendment process in the context of Article 16 is the question which needs to be answered. Equality is the basic feature of the Constitution as held in ***Indra Sawhney***. The content of Article 14 was originally interpreted by this Court as a concept of equality confined to the aspects of discrimination and classification. It is only after the rulings of this Court in ***Maneka Gandhi*** and ***Ajay Hasia v. Khalid Mujib Sehravardi*** that the content of Article 14 got expanded conceptually so as to comprehend the doctrine of promissory estoppel, non-arbitrariness, compliance with rules of natural justice, eschewing irrationality, etc. There is a difference between “formal equality” and “egalitarian equality”. At one point of time Article 16(4) was read by the Supreme Court as an exception to Article 16(1). That controversy got settled in ***Indra Sawhney***. The words “nothing in this article” in Article 16(4) represent a legal device allowing positive discrimination in favour of a class. Therefore, Article 16(4) relates to “a class apart”. Article 16(4), therefore, creates a field which enables a State to provide for reservation provided there exists backwardness of a Class

and inadequacy of representation in employment. These are compelling reasons. They do not exist in Article 16(1). It is only when these reasons are satisfied that a State gets the power to provide for reservation in matters of employment. Therefore, Article 16(1) and Article 16(4) operate in different fields. Backwardness and inadequacy of representation, therefore, operate as justifications in the sense that the State gets the power to make reservation only if backwardness and inadequacy of representation exist. These factors are not obliterated by the impugned amendments.

113. The question still remains as to whether any of the constitutional limitations are obliterated by way of the impugned constitutional amendments. Articles 16(4-A) and 16(4-B) have been introduced by way of the impugned amendments.

114. In *Indra Sawhney* the equality which was protected by the rule of 50%, was by balancing the rights of the general category vis-à-vis the rights of BCs *en bloc* consisting of OBCs, SCs and STs. On the other hand, in the present case the question which we are required to answer is: whether within the egalitarian equality, indicated by Article 16(4), the sub-classification in favour of SCs and STs is in principle constitutionally valid. Article 16(4-A) is inspired by the observations in *Indra Sawhney* in which this Court has unequivocally observed that in order to avoid lumping of OBCs, SCs and STs which would make OBCs take away all the vacancies leaving SCs and STs high and dry, the State concerned was entitled to categorise and sub-classify SCs and STs on one hand vis-à-vis OBCs on the other hand.

115. Therefore, while judging the width and the ambit of Article 16(4-A) we must ascertain whether such sub-classification is permissible under the Constitution. The sub-classification between “OBCs” on one hand and “SCs and STs” on the other hand is held to be constitutionally permissible in *Indra Sawhney*. In the said judgment it has been held that the State could make such sub-classification between SCs and STs vis-à-vis OBCs. It refers to sub-classification within the egalitarian equality. Therefore, Article 16(4-A) follows the line suggested by this Court in *Indra Sawhney*. In *Indra Sawhney* on the other hand vide para 829 this Court has struck a balance between formal equality and egalitarian equality by laying down the rule of 50% (ceiling limit) for the entire BCs as “a class apart” vis-à-vis GC. Therefore, in our view, equality as a concept is retained even under Article 16(4-A) which is carved out of Article 16(4).

116. As stated above, Article 14 enables classification. A classification must be founded on intelligible differentia which distinguishes those that are grouped together from others. The differentia must have a rational relation to the object sought to be achieved by the law under challenge. In *Indra Sawhney* an opinion was expressed by this Court vide para 802 that there is no constitutional or legal bar to the making of classification. Article 16(4-B) is also an enabling provision. It seeks to make classification on the basis of the differentia between current vacancies and carry-forward vacancies. In the case of Article 16(4-B) we must keep in mind that following the judgment in *R.K. Sabharwal*, the concept of post-based roster is introduced. Consequently, specific slots for OBCs, SCs and STs as well as GC have to be maintained in the roster. For want of a candidate in a particular category the post may remain unfilled. Nonetheless, that slot has to be filled only by the specified category. Therefore, by Article 16(4-B) a classification is made between current vacancies on one hand and carry-

forward/backlog vacancies on the other hand. Article 16(4-B) is a direct consequence of the judgment of this Court in **R.K. Sabharwal** by which the concept of post-based roster is introduced. Therefore, in our view Articles 16(4-A) and 16(4-B) form a composite part of the scheme envisaged. Therefore, in our view Articles 16(4), 16(4-A) and 16(4-B) together form part of the same scheme. As stated above, Articles 16(4-A) and 16(4-B) are both inspired by observations of the Supreme Court in **Indra Sawhney** and **R.K. Sabharwal**. They have nexus with Articles 17 and 46 of the Constitution. Therefore, we uphold the classification envisaged by Articles 16(4-A) and 16(4-B). The impugned constitutional amendments, therefore, do not obliterate equality.

### **Conclusion**

121. The impugned constitutional amendments by which Articles 16(4-A) and 16(4-B) have been inserted flow from Article 16(4). They do not alter the structure of Article 16(4). They retain the controlling factors or the compelling reasons, namely, backwardness and inadequacy of representation which enables the States to provide for reservation keeping in mind the overall efficiency of the State administration under Article 335. These impugned amendments are confined only to SCs and STs. They do not obliterate any of the constitutional requirements, namely, ceiling limit of 50% (quantitative limitation), the concept of creamy layer (qualitative exclusion), the sub-classification between OBCs on one hand and SCs and STs on the other hand as held in **Indra Sawhney**, the concept of post-based roster with inbuilt concept of replacement as held in **R.K. Sabharwal**.

122. We reiterate that the ceiling limit of 50%, the concept of creamy layer and the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency are all constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse.

123. However, in this case, as stated above, the main issue concerns the “extent of reservation”. In this regard the State concerned will have to show in each case the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation. As stated above, the impugned provision is an enabling provision. The State is not bound to make reservation for SCs/STs in matters of promotions. However, if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance with Article 335. It is made clear that even if the State has compelling reasons, as stated above, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling limit of 50% or obliterate the creamy layer or extend the reservation indefinitely.

124. Subject to the above, we uphold the constitutional validity of the Constitution (Seventy-seventh Amendment) Act, 1995; the Constitution (Eighty-first Amendment) Act, 2000; the Constitution (Eighty-second Amendment) Act, 2000 and the Constitution (Eighty-fifth Amendment) Act, 2001.

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## **RIGHT TO FREEDOMS**

### ***Freedom of Speech and Expression – Freedom of Press***

#### ***Bennett Coleman & Co. v. Union of India***

(1972) 2 SCC 788 : AIR 1973 SC 106

**A.N. RAY J.** - These petitions challenge the Import Policy for Newsprint for the year April, 1972 to March, 1973. The Newsprint Policy is impeached as an infringement of fundamental rights to freedom of speech and expression in Article 19(1)(a) and right to equality in Article 14 of the Constitution. Some provisions of the Newsprint Control Order, 1962, are challenged as violative of Article 19(1)(a) and Article 14 of the Constitution.

3. The Newsprint Control Order, 1962 (1962 Newsprint Order) is made in exercise of powers conferred by Section 3 of the Essential Commodities Act, 1955. Section 3 of the Act enacts that if the Central Government is of opinion that it is necessary or expedient so to do for maintaining or increasing supply of essential commodities or for securing their equitable distribution and availability at fair prices, it may, by order, provide for regulating or prohibiting production, supply and distribution and trade and commerce therein. Section 2 of the 1955 Act defines “essential commodity”. Paper including newsprint, paper board and straw board is defined in Section 2 (a)(vii) of the 1955 Act to be an essential commodity.

4. The 1962 Newsprint Order in Clause 3 mentions restrictions on acquisition, sale and consumption of newsprint. Sub-clause 3 of Clause 3 of the 1962 Newsprint Order states that no consumer of newsprint shall, in any licensing period, consume or use newsprint in excess of the quantity authorised by the Controller from time to time. Sub-clause 3-A of Clause 3 of the 1962 Newsprint Order states that no consumer of newsprint, other than a publisher of text-books or books of general interest, shall use any kind of paper other than newsprint except with the permission, in writing, of the Controller. Sub-clause 5 of Clause 3 of the 1962 Newsprint Order states that in issuing an authorisation under this clause, the Controller shall have regard to the principles laid down in the Import Control Policy with respect to newsprint announced by the Central Government from time to time. Sub-clauses 3 and 3-A of Clause 3 of the 1962 Newsprint Order are challenged in these petitions on the ground that these clauses affect the volume of circulation, the size and growth of a newspaper and thereby directly infringe Article 19(1) (a) of the Constitution. The restrictions mentioned in these sub-clauses of Clause 3 of the 1962 Newsprint Order are also said to be not reasonable restrictions within the ambit of Article 19(2) of the Constitution.

5. Sub-clauses 3 and 3-A of Clause 3 of the 1962 Newsprint Order are further impeached on the ground that they offend Article 14 of the Constitution. Sub-clause 3-A is said to confer unfettered and unregulated power and uncontrolled discretion to the Controller in the matter of granting of authorisation. It is said that there are no provisions for redress of grievances by way of appeal or revision of the Controller decision in the matter of grant or renewal of authorisation. The restrictions are said to be not reasonable or justified in the interest of general public. The distinction between publishers of text-books and books of general interest

on the one hand and -other consumers of newsprint on the other in sub-clause 3-A is said to be discriminatory and without any rational basis. Again, the disability imposed by sub-clause 3-A on newspapers preventing them from using printing and writing paper while permitting all other consumers to do so, is said to be irrational discrimination between newspaper and periodicals as the latter are permitted to use unlimited quantity of printing and writing paper in addition to their allocation of newsprint.

6. The Newsprint Policy of 1972-73 deals with white printing paper (including water-lined newsprint which contained mechanical wood pulp amounting to not less than 78 per cent. of the fibre content). Licences are issued for newsprint. The validity of licences is for 12 months. The Newsprint Policy defines "common ownership unit" to mean newspaper establishment or concern owning two or more news interest newspapers including at least one daily irrespective of the centre of publication and language of such newspapers. Four features of the Newsprint Policy are called in question. These restrictions imposed by the Newsprint Policy are said to infringe rights of freedom of speech and expression guaranteed in Article 19(1) (a) of the Constitution. First, no new paper or new edition can be started by a common ownership unit even within the authorised quota of newsprint. Secondly, there is a limitation on the maximum number of pages to 10. No adjustment is permitted between circulation and the pages so as to increase the pages. Thirdly, no interchangeability is permitted between different papers of common ownership unit or different editions of the same paper. Fourthly, allowance of 20 per cent. increase in page level up to a maximum of 10 has been given to newspapers with less than 10 pages. It is said that the objectionable and irrational feature of the Newsprint Policy is that a big daily newspaper is prohibited and prevented from increasing the number of pages, page area and periodicity by reducing circulation to meet its requirement even within its admissible quota. In the Newsprint Policy for the year 1971-72 and the earlier periods the newspapers and periodicals were permitted to increase the number of pages, page area and periodicity by reducing circulation. The current policy prohibits the same. The restrictions are, therefore, said to be irrational, arbitrary and unreasonable. Big daily newspapers having large circulation contend that this discrimination is bound to have adverse effects on the big daily newspapers.

7. The Newsprint Policy is said to be discriminatory and violative of Article 14 because common ownership units alone are prohibited from starting a new paper or a new edition of the same paper while other newspapers with only one daily are permitted to do so. The prohibition against interchangeability between different papers of the same unit and different editions of the said paper is said to be arbitrary and irrational, because it treats all-common ownership units as equal and ignores pertinent and material differences between some common ownership units as compared to others. The 10 page limit imposed by the policy is said to violate Article 14 because it equates newspapers which are unequal and provides the same permissible page limit for newspapers which are essentially local in their character and newspapers which reach larger sections of people by giving world news and covering larger fields. The 20 per cent. increase allowed for newspapers, whose number of pages was less than 10 is also challenged as violative of Article 14 by discriminating against newspapers having more than 10 pages. The difference in entitlement between newspapers with an average of more than 10 pages as compared with newspapers of 10 or less than 10 pages is

said to be discriminatory because the differentia is not based on rational incidence of classification.

10. The Additional Solicitor-General raised the plea that the petitioners were companies and therefore, they could not invoke fundamental rights.

11. This Court in *State Trading Corporation of India Ltd. v. The Commercial Tax Officer, Visakhapatnam* [(1964) 4 SCR 99] and *Tata Engineering and Locomotive Co. v. State of Bihar* [AIR 1965 SC 40] expressed the view that a corporation was not a citizen within the meaning of Article 19 and, therefore, could not invoke that article. The majority held that nationality and citizenship were distinct and separate concepts. The view of this Court was that the word “citizen” in Part II and in Article 19 of the Constitution meant the same thing. The result was that an incorporated company could not be a citizen so as to invoke fundamental rights. In the *State Trading Corporation* case the Court was not invited to “tear the corporate veil”. In the *Tata Engineering and Locomotive Co.* case this Court said that a company was distinct and separate entity from shareholders. The corporate veil it was said could be lifted in cases where the company is charged with trading with the enemy or perpetrating fraud on the Revenue authorities.

12. There are however decisions of this Court where relief has been granted to the petitioners claiming fundamental rights as shareholders or editors of newspaper companies.

13. In *Express Newspapers* case, the Express Newspapers (Private) Ltd. was the petitioner in a writ petition under Article 32. The Press Trust of India Limited was another petitioner in a similar writ petition. The Indian National Press (Bombay) Private Ltd. otherwise known as the “Free Press Group” was a petitioner in the third writ petition. The Saurashtra Trust was petitioner for a chain of newspapers in another writ petition. The Hindustan Times Limited was another petitioner. These petitions in the *Express Newspapers* case challenged the *vires* of the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955. The petitioners contended that the provisions of the Act violated Articles 19(1)(a), 19(1)(g) and 14 of the Constitution.

16. In the *Express Newspaper* case, this Court held that freedom of speech and expression includes within its scope the freedom of the Press. This Court referred to the earlier decisions in *Romesh Thappar v. State of Madras* [1950 SCR 594] and *Brij Bhushan v. State of Delhi* [AIR 1950 SC 129]. *Romesh Thappar* case related to a ban on the entry and circulation of Thapper’s journal in the State of Madras under the provisions of the Madras Maintenance of Public Order Act, 1949. Patanjali Sastri, J. speaking for the Court said in *Romesh Thappar* case that “there can be no doubt that the freedom of speech and expression includes freedom of propagation of ideas and that freedom is ensured by the freedom of circulation. Liberty of circulation is as essential to that freedom as the liberty of publication. Indeed, without circulation publication would be of little value”. In *Brij Bhushan* case Patanjali Sastri, J. speaking for the majority judgment again said that “every free man has undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press”. Bhagwati, J. in the *Express Newspapers* case speaking for the Court said that the freedom of speech and expression includes freedom of propagation of ideas which freedom is ensured by the freedom of circulation and that the liberty of the press



is an essential part of the right to freedom of speech and expression and that the liberty of the press consists in allowing no previous restraint upon publication.

17. Describing the impugned Act in the *Express Newspapers* case as a measure which could be legitimately characterised to affect the press this Court said that if the intention or the proximate effect and operation of the Act was such as to bring it within the mischief of Article 19(1)(a) it would certainly be liable to be struck-down. But the Court found in the *Express Newspapers* case that the impugned measures were enacted for the benefit of the working journalists and it was, therefore, neither the intention nor the effect and operation of the impugned Act to take away or abridge the right of freedom of speech and expression enjoyed by the petitioners. There are ample observations of this Court in the *Express Newspapers* case to support the right of the petitioner companies there to invoke fundamental right in aid of freedom of speech and expression enshrined in the freedom of the press. This Court said that if the impugned measure in that case fell within the vice of Article 19(1)(a) it would be struck down. This observation is an illustration of the manner in which the truth and spirit of the freedom of press is preserved and protected.

19. In the present case, the petitioners in each case are in addition to the company the shareholders, the editors and the publishers. In the Bennett Coleman group of cases one shareholder, a reader of the publication and three editors of the three dailies published by the Bennett Coleman Group are the petitioners. In the *Hindustan Times* case a shareholder who happens to be a Deputy Director, a shareholder, a Deputy Editor of one of the publications, the printer and the publisher of the publications and a reader are the petitioners. In the *Express Newspapers* case the company and the Chief Editor of the dailies are the petitioners. In *the Hindu* case a shareholder, the Managing Editor, the publisher of the company are the petitioners. One of the important questions in these petitions is whether the shareholder, the editor, the printer, the Deputy Director who are all citizens and have the right to freedom under Article 19(i) can invoke those rights for freedom of speech and expression, claimed by them for freedom of the press in their daily publication. The petitioners contend that as a result of the Newsprint Control Policy of 1972-73 their freedom of speech and expression exercised through their editorial staff and through the medium of the publications is infringed. The petitioners also challenge the fixation of 10-page ceiling and the restriction on circulation and growth on their publications to be not only violative of but also to abridge and take away the freedom of speech and expression of the shareholders and the editors. The shareholders, individually and in association with one another represent the medium of newspapers through which they disseminate and circulate their views and news. The newsprint policy exposes them to heavy financial loss and impairs their right to carry on the business of printing and publishing of the dailies through the medium of the companies.

20. In *R. C. Cooper v. Union of India* [(1970) 3 SCR 530], which is referred to as the *Bank Nationalisation* case, Shah, J., speaking for the majority dealt with the contention raised about the maintainability of the petition. The petitioner there was a shareholder, a Director and holder of deposit of current accounts in the Bank. The *locus standi* of the petitioner was challenged on the ground that no fundamental right of the petitioner there was directly impaired by the enactment of the Ordinance and the Act or any action taken thereunder. The petitioner in the *Bank Nationalisation* case claimed that the rights

guaranteed to him under Articles 14, 19 and 31 of the Constitution were impaired. The petitioners grievances were these. The Act and the Ordinance were without legislative competence. The Act and the Ordinance interfered with the guarantee of freedom of trade. They were not made in public interest. The President had no power to promulgate the Ordinance. His right to receive dividends ceased. He suffered financial loss. He was deprived of the right as a shareholder to carry on business through the agency of the company.

21. The ruling of this Court in **Bank Nationalisation** case was this:

“A measure executive or legislative may impair the rights of the company alone, and not of its shareholders; it may impair the rights of the shareholders and not of the Company; it may impair the rights of the shareholders as well as of the company. Jurisdiction of the Court to grant relief cannot be denied, when by State action the rights of the individual shareholder are impaired, if that action, impairs the rights of the Company as well. The test in determining whether the shareholder’s right is impaired is not formal; it is essentially qualitative; if the State action impairs the right of the shareholders as well as of the Company, the Court will not, concentrating merely upon the technical operation of the action, deny itself jurisdiction to grant relief.”

22. In the **Bank Nationalisation** case, this Court held the statute to be void for infringing the rights under Articles 19(1)(f) and 19(1)(g) of the Constitution. In the **Bank Nationalisation** case, the petitioner was a shareholder and a director of the company which was acquired under the statute. As a result of the **Bank Nationalisation** case, it follows that the Court finds out whether the legislative measure directly touches the company of which the petitioner is a shareholder. A shareholder is entitled to protection of Article 19. That individual right is not lost by reason of the fact that he is a shareholder of the company. The **Bank Nationalisation** case has established the view that the fundamental rights of shareholders as citizens are not lost when they associate to form a company. When their fundamental rights as shareholders are impaired by State action their rights as shareholders are protected. The reason is that the shareholders’ rights are equally and necessarily affected if the rights of the company are affected. The rights of shareholders with regard to Article 19(1)(a) are projected and manifested by the newspapers owned and controlled by the shareholders through the medium of the corporation. In the present case, the individual rights of freedom of speech and expression of editors. Directors and shareholders are all exercised through their newspapers through which they speak. The press reaches the public through the newspapers. The shareholders speak through their editors. The fact that the companies are the petitioners does not prevent this Court from giving relief to the shareholders, editors, printers who have asked for protection of their fundamental rights by reason of the effect of the law and of the action upon their rights. The *locus standi* of the shareholder petitioners is beyond challenge after the ruling of the Supreme Court in the **Bank Nationalisation** case. The presence of the company is on the same ruling not a bar to the grant of relief.

26. The petitioners challenged the validity of the 1972-73 newsprint policy.

29. The power of the Government to import newsprint cannot be denied. The power of the Government to control the distribution of newsprint cannot equally be denied. It has, of

course, to be borne in mind that the distribution must be fair and equitable. The interests of the big, the medium and the small newspapers are all to be taken into consideration at the time of allotment of quotas. In the present case, there was some dispute raised as to whether there should be more import of newsprint. That is a matter of Government policy. This Court cannot adjudicate on such policy measures unless the policy is alleged to be mala fide. Equally, there was a dispute as to the quantity of indigenous newsprint available for newspapers. This Court cannot go into such disputes.

31. Article 19(1)(a) provides that all citizens shall have the right to freedom of speech and expression. Article 19(2) states that nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, 'Or prevent the State from making any law, insofar as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State; friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence. Although Article 19(1)(a) does not mention the freedom of the Press, it is the settled view of this Court that freedom of speech and expression includes freedom of the Press and circulation.

32. In the *Express Newspapers* case, it is said that there can be no doubt that liberty of the Press is an essential part of the freedom of speech and expression guaranteed by Article 19(1)(a). The Press has the right of free propagation and free circulation without any previous restraint on publication. If a law were to single out the Press for laying down prohibitive burdens on it that would restrict the circulation, penalise its freedom of choice as to personnel, prevent newspapers from being started and compel the press to Government aid. This would violate Article 19(1)(a) and would fall outside the protection afforded by Article 19(2).

33. In *Sakal Papers* case, it is said that the freedom of speech and expression guaranteed by Article 19(1)(a) gives a citizen the right to propagate and publish his ideas to disseminate them, to circulate them either by words of mouth or by writing. This right extends not merely to the matter it is entitled to circulate but also to the volume of circulation. In *Sakal Papers* case the Newspaper (Price and Page) Act, 1956 empowered the Government to regulate the prices of newspapers in relation to their pages and sizes and to regulate the allocation of space for advertisement matter. The Government fixed the maximum number of pages that might be published by a newspaper according to the price charged. The Government prescribed the number 'of supplements that would be issued. This Court held that the Act and the Order placed restraints on the freedom of the press to circulate. This Court also held that the freedom of speech could not be restricted for the purpose of regulating the commercial aspects of activities of the newspapers.

34. Publication means dissemination and circulation. The press has to carry on its activity by keeping in view the class of readers, the conditions of labour, price of material, availability of advertisements, size of paper and the different kinds of news comments and views and advertisements which are to be published and circulated. The law which lays excessive and prohibitive burden which would restrict the circulation of a newspaper will not be saved by Article 19(2). If the area of advertisement is restricted, price of paper goes up. If the price goes up circulation will go down. This was held in *Sakal Papers* case to be the direct consequence of curtailment of advertisement. The freedom of a newspaper to publish any

number of pages or to circulate it to any number of persons has been held by this Court to be an integral part of the freedom of speech and expression. This freedom is violated by placing restraints upon it or by placing restraints upon something which is an essential part of that freedom. A restraint on the number of pages, a restraint on circulation and a restraint on advertisements would affect the fundamental rights under Article 19(1)(a) on the aspects of propagation, publication and circulation.

36. The Additional Solicitor-General contended that the newsprint policy did not violate Article 19(1)(a). The reasons advanced were these. The newsprint policy does not directly and immediately deal with the right mentioned in Article 19(1)(a). The test of violation is the subject-matter and not the effect or result of the legislation. If the direct object of the impugned law or action is other than freedom of speech and expression Article 19(1)(a) is not attracted though the right to freedom of speech and expression may be consequentially or incidentally abridged. The rulings of this Court in *Express Newspapers* case and *Hamdard Dawakhana* case were referred to. In the *Express Newspapers* case, the Act was said to be a beneficent legislation intended to regulate the conditions of service of the working journalists. It was held that the direct and inevitable result of the Act could not be said to be taking away or abridging the freedom of speech and expression of the petitioners. In the *Hamdard Dawakhana* case the scope and object of the Act and its true nature and character were found to be not interference with the right of freedom of speech but to deal with trade or business. The subject-matter of the import policy in the present case was rationing of imported commodity and equitable distribution of newsprint. The restrictions in fixing the page level and circulation were permissible as directions, which were considered necessary in order to see that the imported newsprint was properly utilised for the purpose for which the import was considered necessary. Article 369 of the Constitution shows that rationing of and distribution of quota of newsprint' and regulation of supply is not a direct infringement of Article 19(1)(a). The scarcity of newspapers (*sic*) justifies the regulation and the direction in the manner of use.

41. This Court in the *Bank Nationalisation* case laid down two tests. First it is not the object of the authority making the law impairing the right of the citizen nor the form of action that determines the invasion of the right. Secondly, it is the effect of the law and the action upon the right which attracts the jurisdiction of the court to grant relief. The direct operation of the Act upon the rights forms the real test.

43. The various provisions of the newsprint import policy have been examined to indicate as to how the petitioners fundamental rights have been infringed by the restrictions on page limit, prohibition against new newspapers and new editions. The effect and consequence of the impugned policy upon the newspapers is directly controlling the growth and circulation of newspapers. The direct effect is the restriction upon circulation of newspapers. The direct effect is upon growth of newspapers through pages. The direct effect is that newspapers are deprived of their area of advertisement. The direct effect is that they are exposed to financial loss. The direct effect is that freedom of speech and expression is infringed.

44. The Additional Solicitor-General contended that a law which merely regulates even directly the freedom of the press is permissible so long as there is no abridgement or taking away of the fundamental rights of citizens. He leaned heavily on American decisions in

support of the submission that the right of the press of free expression is of all citizens speaking, publishing and printing in all languages and the grave concern for freedom of expression which permitted the inclusion of Article 19(1) (a) is not to be read as a command that the Government or Parliament is without power to protect that freedom. The Constitutional guarantees of freedom of speech and expression are said by the Additional Solicitor-General to be not so much for the benefit of the press as for the benefit of all people. In freedom of speech, according to the Additional Solicitor-General, is included the right of the people to read and the freedom of the press assures maintenance of an open society. What was emphasised on behalf of the Government was that the freedom of the press did not countenance the monopolies of the market.

45. It is indisputable that by freedom of the press is meant the right of all citizens to speak, publish and express their views. The freedom of the press embodies the right of the people to read. The freedom of the press is not antithetical to the right of the people to speak and express.

46. Article 13 of our Constitution states that the State is prohibited from making any law which abridges or takes away any fundamental rights. Again, Article 19(2) speaks of reasonable restrictions on the exercise of fundamental rights to freedom of speech *and* expression. Our Constitution does not speak of laws regulating fundamental rights. But there is no bar on legislating on the subject of newspapers as long as legislation does not impose unreasonable restrictions within the meaning of Article 19(2). It is also important to notice as was done in earlier decisions of this Court that our Article 19(1)(a) and the First Amendment of the American Constitution are different. The First Amendment of the American Constitution enacts that the Congress shall make no law ... abridging the freedom of speech of the press. The American First Amendment contains no exceptions like our Article 19(1) and (2) of the Constitution. Therefore, American decisions have evolved their own exceptions. Our Article 19(2) speaks of reasonable restrictions. Our Article 13 states that the State shall not make laws which abridge or take away fundamental rights in Part III of the Constitution.

50. At this stage it is necessary to appreciate the petitioners' contentions that the newsprint policy of 1972-73 violates Articles 19(1)(a) and 14 of the Constitution.

51. The first grievance is about Remark V in the newsprint policy. Remark V deals with dailies which are not above 10 pages and dailies over 10 pages. With regard to dailies which are not above 10 pages the policy is that the computation of entitlement to newsprint is on the basis of the actual newsprint consumption in 1970-71 or 1971-72 whichever is less. The average circulation, the average number of pages and the average page area actually published are all taken into consideration. The petitioners and in particular the Bennett Coleman Group illustrated the vice of this feature in Remark V by referring to their publications Maharashtra Times, Nav Bharat Times and Economic Times. The average circulation of these three publications in 1971-72 was higher than the average circulation in 1970-71. It is, therefore, said that Remark V which shows the basis of consumption to be the lesser of the two years will affect their quota. The Government version is that the figure of consumption in 1971-72 did not represent a realistic picture because of three principal events during that year. These were the Bangladesh Crisis, the Indo-Pak War in 1971 and the Elections. The petitioners say that the quota for 1971-72 was determined in April 1971 which was prior to the occurrence of

all the three events. Again, in the past when there was the Sino-Indian Conflict in 1962 and the Indo-Pak War in 1965 the performance of the newspapers during the years preceding those events was not ignored as was done in the impugned policy for 1972-73. With regard to elections, the petitioners say that a separate additional quota has been given. In the policies prior to 1971-72 the growth achieved in circulation as a result of the grant of the additional quota for elections was taken into consideration in determining the quota for the following year. The petitioners, therefore, contend that the policy in Remark V instead of increasing circulation will result in the reduction of circulation. The petitioners are, in our judgment, right in their submission that this policy negatives the claim of the Government that this policy is based on circulation.

52. With regard to dailies over 10 pages Remark V proceeds on the calculation of the basic entitlement to be on an average of 10 pages and either the average circulation in 1970-71 or the admissible circulation in terms of 1971-72 Newsprint Policy plus increases admissible in terms of Remark VII whichever is more.

53. The dominant direction in the newsprint policy particularly in Remarks V and VIII is that the page limit of newspapers is fixed at 10. The petitioners who had been operating on a page level of over 10 challenge this feature as an infringement of the freedom of speech and expression.

54. Remark V is therefore impeached first on the ground of fixation of 10 page ceiling and secondly on the basis of allotment of quota.

57. In our view shortage of newsprint can stop with allotment. If the Government rests content with granting consumers of newsprint a quantity equitably and fairly, the consumers will not quarrel with the policy. The consumers of newsprint are gravely concerned with the other features.

62. The maximum page level fixed at 10 and the prohibition against the adjustability between pages and circulation are strongly impeached by the petitioners. These seven dailies except Bombay Samachar are common ownership units. Some of them publish other leading language dailies also. The maximum number of pages at 10 will, according to the petitioners, not only adversely affect their profits but also deprive them of expressing and publishing the quality of writings and fulfillment of the role to be played by the newspaper in regard to their freedom of speech and expression. While it must be admitted that the language dailies should be allowed to grow, the English dailies should not be forced to languish under a policy of regimentation. It is therefore correct that the compulsory reduction to 10 pages offends article 19(1)(a) and infringes the rights of freedom of speech and expression.

63. It is further urged that the Government has fixed the quota on the basis of circulation multiplied by pages. The Government has on the one hand compared the circulation of the big dailies with the circulation of medium and small dailies and on the other has ignored the difference in the number of pages of big dailies as compared to the number of pages of the medium and the small dailies. The difference in pages coupled with the difference in circulation affords a reason for difference in the percentage of total allocation given to the big dailies as compared to the medium and the small dailies. The average number of pages for the big dailies is 10.3, for the medium dailies 8.3, and for the small dailies 4.4. The percentage of

allocation for the big dailies reflects really the large number of pages they publish. The big dailies therefore have not only larger requirements but also they render larger services to the readers. The Newsprint Policy of fixing the page level at 10 is seeking to make unequals equal and also to benefit one type of daily at the expense of another.

64. The historical reason given by the Government for fixing the maximum number of pages at 10 is that the affect of the policy on allowing any page increase and circulation increase from time to time has been to help the growth of the press. This is how newspapers like Ananda Bazar Patrika, Jugantar and Deccan Herald are said to have come up. The Government also relies on the recommendation of the newspaper proprietors in the year 1971 that eight pages should be considered the national minimum requirement for medium of information. The big English dailies had the number of pages over 12 in 1957. Because of adjustability between pages and circulation they had an actual page level which was higher than the permissible page level of 1957. The petitioners say that this has not impeded the growth of other papers.

65. The Government has sought to justify the reduction in the page level to 10 not only on the ground of shortage of newsprint but also on the grounds that these big dailies devote high percentage of space to advertisements and therefore the cut in pages will not be felt by them if they adjusted their advertisement space. In our judgment the policy of the Government to limit all papers at 10 pages is arbitrary. It tends to treat unequals as equals and discriminates against those who by virtue of their efficiency, standard and service and because of their All-India statute acquired a higher page level in 1957. The main source of income for the newspapers is from advertisements. The loss of revenue because of the cut in page level is said to be over several lakhs of rupees. Even if there is a saving in raw material by cut in page level there would be a revenue gap of a large sum of money. This gap could have been partly recouped by increasing the page level. The newspaper has a built-in mechanism. Advertisements are not only the sources of revenue but also 'one of the factors for circulation. Once circulation is lost it will be very difficult to regain the old level. The advertisement rate has undergone slight increase since 1972. As a result of the cut in page level the area for advertisements is also reduced.

67. The estimated loss on account of reduction of page limit is Rs 39 lakhs in the case of Bennett Coleman group, Rs 44 lakhs in the case of Hindustan Times and Rs 38 lakhs in the case of the Hindu. If as a result of reduction in pages the newspapers will have to depend on advertisements as their main source of income, they will be denied dissemination of news and views. That will also deprive them of their freedom of speech and expression. On the other hand, if as a result of restriction on page limit the newspaper will have to sacrifice advertisements and thus weaken the link of financial strength, the organisation may crumble. The loss on advertisements may not only entail the closing down but also affect the circulation and thereby impinge on freedom of speech and expression.

70. The impeached policy violates Article 14 because it treats newspapers which are not equal equally in assessing the needs and requirements of newsprint. The Government case is that out of 35 newspapers which were operating on a quota calculated on a higher page level than 10 pages 28 newspapers will benefit by the impeached policy of 1972-73. But seven newspapers out of 22 which were operating above 10 page level are placed at a disadvantage

by the fixation of 10 page limit and entitlement to quota on that basis. There is no intelligible differentia. Nor has this distinction any relation to equitable distribution of newsprint. The impeached policy also offends Article 19(1)(a) of the Constitution. Newspapers like 19 language dailies reduced their pages in order to increase circulation though such language dailies had prior to 1972-73 been given quota to increase pages. Under the impeached policy these language dailies are given additional quota to increase their pages against to 10.

71. The basic entitlement in Remark V to quota for newspapers operating above 10 page level violates Article 19(1)(a) because the quota is hedged in by direction not to increase the page number above 10. The reduction of page limit to 10 for the aforesaid reasons violates Article 19(1)(a) and Article 14 of the Constitution.

72. The other features in the newsprint policy complained of are those in Remark VII (c) read with Remark VIII of the impeached policy. Remark VII (c) allows 20 per cent. increase to daily newspapers in the number of pages within the ceiling of 10 over the average number of pages on which the basic entitlement is fixed under Remark V. In other words, dailies with less than 10 pages are prevented from adjusting the quota for 20 per cent. increase for increase in circulation. The Bennett Coleman group says that their Nav Bharat Times, Maharashtra Times and Economic Times would prefer to increase their circulation. Under Remark V they are entitled to quota on the basis of consumption in 1970-71 or 1971-72 whichever is less. This feature also indicates that the newsprint policy is not based on circulation. Under Remark VII, these newspapers within the ceiling of 10 can get 20 per cent. increase in the number of pages. They require circulation more than the number of pages. They are denied circulation as a result of this policy. The big English dailies which need to increase their pages are not permitted to do so. Other dailies which do not need increase in pages are permitted quota for increase, but they are denied the right of circulation. In our view, these features were rightly said by counsel for the petitioners to be not newsprint control but newspaper control in the guise of equitable distribution of newsprint. The object of the impeached policy is on the one hand said to increase circulation and on the other to provide for growth in pages for others. Freedom of speech and expression is not only in the volume of circulation but also in the volume of news and views.

73. Remark VIII in the Newsprint Policy of 1972-73 imposes two types of restrictions. First, a daily is not permitted to increase its number of pages by reducing circulation to meet its individual requirements. Secondly, dailies belonging to a common ownership unit are not permitted interchangeability between them of the quota allotted to each even when the publications are different editions of the same daily published from different places.

74. The first prohibition in Remark VIII against increase in pages by reducing circulation has been introduced for the first time in the policy for 1972-73. The reason given by the Government for this feature is that newspapers would obtain a quota on the basis of a certain stated circulation and they should not be allowed to reduce circulation. The petitioners say - that quota is not granted on the basis of actual circulation but is granted on the basis of notional circulation which means the actual circulation of 1961-62 with permissible increases year after year even though the actual circulation does not correspond to the permissible circulation on which the quota was based year after year. The Times of India Bombay in 1971-72 demanded quota on the basis of 20 pages and a circulation of 1,70,000. The Times of



India was allowed quota on the basis of 13.13 pages and a circulation of 2,02,817. The actual performance was average page number of 18.25 and circulation of 1,54, 904. In the past, adjustability between pages and circulation was permitted. In our judgment, the petitioners correctly say that the individual requirements of the different dailies render it eminently desirable in some cases to increase the number of pages than circulation. Such adjustment is necessary to maintain the quality and the range of the readers in question. The denial of this flexibility or adjustment is in our view rightly said to hamper the quality, range and standard of the dailies and to affect the freedom of the press.

75. The restriction on the petitioners that they can use their quota to increase circulation but not the page number violates Article 19(1)(a) as also Article 14. Big dailies are treated to be equal with newspapers who are not equal to them. Again, the policy of 1972-73 permits dailies with large circulation to increase their circulation. Dailies operating below 10 page level are allowed increase in pages. This page increase quota cannot be used for circulation increase. Previously, the big dailies were allowed quota for circulation growth. The present policy has decreased the quantity for circulation growth. In our view counsel for the petitioners rightly said that the Government could not determine thus which newspapers should grow in page and circulation and which newspapers should grow only in circulation and not in pages. Freedom of press entitles newspapers to achieve any volume of circulation. Though requirements of newspapers as to page, circulation are both taken into consideration for fixing their quota but the newspapers should be thereafter left free to adjust their page number and circulation as they wish in accordance with the dictates of Article 19(1)(a) of the Constitution.

76. Counsel for the petitioners contended that the second prohibition in Remark VIII in the Newsprint Policy prevented common ownership units from adjusting between them the newsprint quota allotted to each of them. The prohibition is to use the newsprint quota of one newspaper belonging to a common ownership unit for other newspaper belonging to that unit. On behalf of the petitioners it was said that from 1963-64 till 1966-67 interchangeability was permitted between different editions of the same publication to the extent of 20 per cent. In 1967-68 and 1968-69 complete interchangeability between different editions of the same newspaper and between different newspapers and periodicals was permitted. In 1969-70 and 1970-71 the total entitlement was given as an aggregate quota, though there was a separate calculation made for each newspaper. The present policy does not permit interchangeability. Interchangeability by using the quota for a new newspaper or a new edition or for another newspaper of the same unit will put common ownership unit in an advantageous position. Newsprint is allotted to each newspaper. The newspaper is considered to be the recipient. A single newspaper will suffer if common ownership units are allowed to adjust quota within their group.

77. The petitioners impeach Remark X in the Newsprint Policy for 1971-72 on the ground that a common ownership unit cannot bring out a new newspaper or start a new edition of an existing newspaper even from their allotted quota. Counsel on behalf of the petitioners rightly characterised this feature as irrational and irrelevant to the availability of newsprint. By way of illustration it was said that the Economic Times is sent by air to Calcutta and Delhi but the common ownership unit is not permitted to reduce the number of copies printed at Bombay

and print copies out of the authorised quota circulation at Calcutta and Delhi. Similarly, it was said that there was no reason to support the policy in Remark X preventing a common ownership unit from publishing a new daily though a person who brought out one daily was allowed to start a second daily. This was challenged as discriminatory. It is an abridgement of the freedom of expression to prevent a common ownership unit from starting a new edition or a new newspaper. A common ownership unit should be free to start a new edition out of their allotted quota and it would be logical to say that such a unit can use its allotted quota for changing the page structure and circulation of different editions of the same paper. It is made clear that newspapers cannot be permitted to use allotted quota for starting a newspaper. Newspapers will have to make necessary application for allotment of quota in that behalf. It will be open to the appropriate authorities to deal with the application in accordance with law.

78. Until 1968-69 big dailies were treated alike but thereafter from 1970-71 onwards dailies with circulation of more than 1,00,000 copies have been put in a different category and given a lesser increase than those with a circulation of 50,000 to 1,00,000 copies though both are big dailies. The policy of the Government is to level all papers at 10 pages. It tends to treat unequals as equals. It discriminates against those who by virtue of their standing status and service on all India basis acquired a higher page level in the past. The discrimination is apparent from Remark VII in the Newsprint Policy for 1972-73 by which newspapers with less than 1,00,000 circulation have been given 10 per cent. increase in circulation whereas those with more than 1,00,000 circulation have been given only 3 per cent. increase in circulation.

79. Mr Palkhivala said the policy worked admirably in the past because adjustability between pages and circulation was permitted. In our view the Newsprint Control has now been subverted to newspaper control. The growth of circulation does not mean that there should not be growth in pages. A newspaper expands with the news and views. A newspaper reaches different sections. It has to be left to the newspapers as to how they will adjust their newsprint. At one stage the Additional Solicitor-General said that if a certain quantity of steel was allotted the Government could insist as to how it was going to be used. It was said that the out-put could be controlled. In our view, newsprint does not stand on the same footing as steel. It has been said that freedom of the press indispensable to proper working of popular Government. Patanjali Sastri, J., speaking for this Court in *Romesh Thappar* case said that "Thus, every narrow and stringent limits have been set to permissible legislative abridgement of the right of free speech and expression, and this was doubtless due to the realisation that freedom of speech and of the press lay at the foundation of all democratic organisations, for without free political discussion no public education, so essential for the proper functioning of the processes of popular Government, is possible". It is appropriate to refer to what William Blackstone said in his commentaries:

"Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity."

80. The faith of a citizen is that political wisdom and virtue will sustain themselves in the free market of ideas so long as the channels of communication are left open. The faith in the popular Government rests on the old dictum, "let the people have the truth and the freedom to

discuss it and all will go well.” The liberty of the press remains an “Arc of the Covenant” in every democracy. Steel will yield products of steel. Newsprint will manifest whatever is thought of by man. The newspapers give ideas. The newspapers give the people the freedom to find out what ideas are correct. Therefore, the freedom of the press is to be enriched by removing the restrictions on page limit and allowing them to have new editions or new papers. It need not be stressed that if the quantity of newsprint available does not permit grant of additional quota for new papers that is a different matter. The restrictions are to be removed. Newspapers have to be left free to determine their pages, their circulation and their new editions within their quota of that has been fixed fairly.

81. Clauses 3 and 3-A of the 1962 Newsprint Order prevent the petitioners from using white paper and writing paper. The Additional Solicitor- General at one stage said that it was open to any-newspaper to an unrestricted use of any form of paper so long as newspapers do not apply for newsprint. This argument exposes grave errors. In the first place, it shows that there is no shortage of white printing paper. Secondly, it will show that there is no justification for rationing of newsprint. The cost of indigenous white paper is double the cost of the imported newsprint. This high price of white printing paper is a deterrent to any newspaper to use it. The periodicals are permitted the use of white printing paper. That is because of Public Notice No. 4-ITC(PN)/63, dated January 11, 1963. That may be one of the reasons why periodicals have not complained of the policy. The periodicals can supplement their newsprint quota. Further, the clientele of the periodicals is different. The prices of periodicals are also different. In any event, it cannot be said that the newspapers can buy white printing paper to meet their requirements. Nor can such plea be an answer to the violation of fundamental rights in Article 19(1)(a) or infraction of Article 14 by the provisions of the impeached Newsprint Policy.

82. In the present case, it cannot be said that the newsprint policy is a reasonable restriction within the ambit of Article 19(2). The newsprint policy abridges the fundamental rights of the petitioners in regard to freedom of speech and expression. The newspapers are not allowed their right of circulation. The newspapers are not allowed right of page growth. The common ownership units of newspapers cannot bring out new papers or new editions. The newspapers operating above 10 page level and newspapers operating below 10 page ^ level have been treated equally for assessing the needs and requirements of newspapers with newspapers which are not their equal. Once the quota is fixed and direction to use the quota in accordance with the newsprint policy is made applicable the big newspapers are prevented any increase in page number. Both page numbers and circulation are relevant for calculating the basic quota and allowance for increases. In the garb of distribution of newsprint the Government has tended to control the growth and circulation of newspapers. Freedom of the press is both qualitative and quantitative. Freedom lies both in circulation and in content. The newsprint policy which permits newspapers to increase circulation by reducing the number of pages, page area and periodicity, prohibits them to increase the number of pages, page area and periodicity by reducing circulation. These restrictions constrict the newspapers in adjusting their page number and circulation.

84. This Court in *Sakal Papers* case dealt with measures empowering the Government to regulate allocation of space to be allotted for advertising matter. This Court held that the measure had the direct effect of curtailing the circulation of the newspaper and thus to be

violation of Article 19(1)(a). It was said on behalf of the Government that regulation of space for advertisement was to prevent unfair competition. This Court held that the State could help or protect newly started newspapers but there could not be an abridgement of the right in Article 19(1) (a) on the ground of conferring right on the public in general or upon a section of the public.

87. Clause 3 of the Newsprint Control Order, 1962, was contended to confer unfettered and unregulated power on an executive officer. Clause 3 (3-A) of the Order of 1962 was also said to confer naked and arbitrary power. The disability imposed on newspapers from using printing and writing paper was said to be discriminatory. The Additional Solicitor-General contended that it is open to an unrestricted use of any form of paper so long as newspapers do not apply for newsprint. This would establish that there is no shortage of white printing paper. The error in the Government contention is thereby exposed. The periodicals were permitted in terms of Public Notice 4-ITC(PN)/63, dated January 11, 1963, unrestricted use of white printing paper to supplement their quota of newsprint. That again shows that the Government contention is wrong because there is restriction with regard to use of white printing paper. The cost of white printing paper is high. It is said that the cost is Rs 2,750 per metric tonne for white printing paper compared to Rs 1,274 of imported newsprint and Rs 1,362 of Nepal newsprint. Clause 3 (3-A) of the Order provides that no consumer of newsprint other than a publisher of text books or books of general interest shall use any kind of paper other than newsprint except with the permission in writing of the Controller. White printing paper like newsprint can be rationed. The distribution is to be fair and equitable. It is necessary also to point out-that text books and books of general interest require facilities for using white printing paper. Such measures with regard to rationing are defensible. It is true that no guidelines are to be found in Clause 3 (3-A) as to the circumstances under which a particular consumer of newsprint or class of consumers of newsprint other than a publisher or text books or books of general interest should or should not be allowed to use white printing paper. The Public Notice allowing periodicals permission to use white printing paper is not challenged. Periodicals were not before this Court. It is therefore not necessary to express any opinion on Clause 3(3) and Clause 3(3-A) of the Control Order.

88. For the foregoing reasons the newsprint policy for 1972-73 violates Articles 19(1)(a) and 14 of the Constitution. The restrictions by fixing 10 page limit in Remarks V and VIII of the policy infringe Articles 19(1)(a) and 14 of the Constitution and are, therefore, declared unconstitutional and struck-down. The policy of basic entitlement to quota in Remark V is violative of Articles 19(1) (a) and 14 of the Constitution and is therefore struck down. The measure in Remark VII(a) is violative of Articles 14 and 19(1)(f) of the Constitution and is struck-down.

89. The measures in Remark VII(c) read with Remark VIII are violative of Articles 19(1) (a) and 14 of the Constitution and are struck-down. The prohibition in Remark X against common ownership unit from starting a new newspaper/periodical or a new edition is declared unconstitutional and struck-down as violative of Article 19(1)(a) of the Constitution.

90. For these reasons the petitioners succeed. The import policy for newsprint for the year 1972-73 in regard to Remarks V, VII(a), VII(c), VIII and X as indicated above is struck down.

***Secy., Ministry of Information & Broadcasting, Govt. of India v.  
Cricket Association of Bengal***

(1995) 2 SCC 161

**P.B. SAWANT, J.** - 2. It will be convenient to answer the questions of law that arise in the present case, before we advert to the factual controversy between the parties. The questions of law are:

(1) Has an organiser or producer of any event a right to get the event telecast through an agency of his choice whether national or foreign?

(2) Has such organiser a choice of the agency of telecasting, particularly when the exercise of his right, does not make demand on any of the frequencies owned, commanded or controlled by the Government or the government agencies like the Videsh Sanchar Nigam Limited (VSNL) or Doordarshan (DD)?

(3) Can such an organiser be prevented from creating the terrestrial signal and denied the facility of merely uplinking the terrestrial signal to the satellite owned by another agency whether foreign or national?

(4) What, if any, are the conditions which can be imposed by the Government Department which in the present case is the Ministry of Information and Broadcasting (MIB) for (a) creating terrestrial signal of the event, and (b) granting facilities of uplinking to a satellite not owned or controlled by the Government or its agencies?

3. On answers to these questions depend the answers to the incidental questions such as (i) whether the Government or the government agencies like DD in the present case, have a monopoly of creating terrestrial signals and of telecasting them or refusing to telecast them, (ii) whether the Government or government agencies like DD can claim to be the host broadcaster for all events whether produced or organised by it or by anybody else in the country and can insist upon the organiser or the agency for telecasting engaged by him, to take the signal only from the Government or government agency and telecast it only with its permission or jointly with it.

4. To appreciate the thrust of the above questions and the answers to them, it is necessary first to have a proper understanding of what 'telecasting' means and what its legal dimensions and consequences are. Telecasting is a system of communication either audio or visual or both. We are concerned in the present case with audio-visual telecommunication. The first stage in telecasting is to generate the audio-visual signals of the events or of the information which is sought to be communicated. When the event to be telecast takes place on the earth, necessarily the signal is generated on the earth by the requisite electronic mechanism such as the audio-visual recorder. This stage may be described as the recording stage. The events may be spontaneous, accidental, natural or organised. The spontaneous, accidental and natural events are by their nature uncontrollable. But the organised events can be controlled by the law of the land. In our country, since the organisation of an event is an aspect of the fundamental right to freedom of speech and expression protected by Article 19(1)(a), the law can be made to control the organisation of such events only for the purposes of imposing reasonable restrictions in the interest of the sovereignty and integrity of the country, the

security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence as laid down under Article 19(2) of the Constitution. Although, therefore, it is not possible to make law for prohibiting the recording of spontaneous, accidental or natural events, it is possible for the reasons mentioned in Article 19(2), to restrict their telecasting. As regards the organised events, a law can be made for restricting or prohibiting the organisation of the event itself, and also for telecasting it, on the same grounds as are mentioned in Article 19(2). There cannot, however, be restrictions on producing and recording the event on grounds not permitted by Article 19(2). It, therefore, follows that the organisation or production of an event and its recording cannot be prevented except by law permitted by Article 19(2). For the same reasons, the publication or communication of the recorded event through the mode of cassettes cannot be restricted or prevented except under such law. All those who have got the apparatus of video cassette recorder (VCR) and the television screen can, therefore, view and listen to such recorded event (hereinafter referred to, for the sake of convenience, as 'viewers'). In this process, there is no demand on any frequency or channel since there is no live telecast of the event. The only additional restriction on telecasting or live telecasting of such event will be the lack of availability of the frequency or channel.

5. Since in the present case, what is involved is the right to live telecast the event, viz., the cricket matches organised by the Cricket Association of Bengal, it is necessary to understand the various issues involved in live telecasting. It may be made clear at the outset, that there may as well be a file telecast (i.e., telecasting of the events which are already recorded by the cassette). The issues involved in file telecasting will also be more or less the same and therefore, that subject is not dealt with separately. Telecasting live or file necessarily involves the use of a frequency or a channel.

6. The telecasting is of three types, - (a) terrestrial, (b) cable and (c) satellite. In the first case, the signal is generated by the camera stationed at the spot of the event and the signal is then sent to the earthly telecasting station such as the TV centre which in turn relays it through its own frequencies to all the viewers who have TV screens/sets. In the second case, viz., cable telecasting, the cable operator receives the signals from the satellite by means of the parabolic dish antenna and relays them to all those TV screens which are linked to his cable. He also relays the recorded file programmes or cassettes through the cable to the cable-linked viewers. In this case, there is no restriction on his receiving the signals from any satellite to which his antenna is adjusted. There is no demand made by him on any frequency or channel owned or controlled by the national Government or governmental agencies. The cable operator can show any event occurring in any part of the country or the world live through the frequencies if his dish antenna can receive the same. The only limitation from which the cable TV suffers is that the programmes relayed by it can be received only by those viewers who are linked to the dish antenna concerned. The last type, viz., satellite TV operation involves the use of a frequency generated, owned or controlled by the national Government or the governmental agencies, or those generated, owned and controlled by other agencies. It is necessary to bear in mind the distinction between the frequencies generated, owned and controlled by the Government or governmental agency and those generated and owned by the other agencies. This is so because generally, as in the present case, one of the

contentions against the right to access to telecasting is that there are a limited number of frequencies and hence there is the need to utilise the limited resources for the benefit of all sections of the society and to promote all social interests by giving them priority as determined by some central authority. It follows, therefore, that where the resources are unlimited or the right to telecast need not suffer for want of a frequency, objection on the said ground would be misplaced. It may be stated here that in the present case, the contention of the MIB and DD against the right to telecast claimed by the Cricket Association of Bengal (CAB)/Board of Control for Cricket in India (BCCI) was raised only on the ground of the limitation of frequencies, ignoring the fact that the CAB/BCCI had not made demand on any of the frequencies generated or owned by the MIB/DD. It desired to telecast the cricket matches organised by it through a frequency not owned or controlled by the Government but owned by some other agency. The only permission that the CAB/BCCI sought was to uplink to the foreign satellite the signals created by its own cameras and the earth station or the cameras and the earth station of its agency to a foreign satellite. This permission was sought by the CAB/BCCI from VSNL which is the government agency controlling the frequencies. The permission again cannot be refused except under law made in pursuance of the provisions of Article 19(2) of the Constitution. Hence, as stated above, one of the important questions to be answered in the present case is whether the permission to uplink to the foreign satellite, the signal created by the CAB/BCCI either by itself or through its agency can be refused except on the ground stated in the law made under Article 19(2).

43. We may now summarise the law on the freedom of speech and expression under Article 19(1)(a) as restricted by Article 19(2). The freedom of speech and expression includes right to acquire information and to disseminate it. Freedom of speech and expression is necessary, for self-expression which is an important means of free conscience and self-fulfilment. It enables people to contribute to debates on social and moral issues. It is the best way to find a truest model of anything, since it is only through it that the widest possible range of ideas can circulate. It is the only vehicle of political discourse so essential to democracy. Equally important is the role it plays in facilitating artistic and scholarly endeavours of all sorts. The right to communicate, therefore, includes right to communicate through any media that is available whether print or electronic or audio-visual such as advertisement, movie, article, speech etc. That is why freedom of speech and expression includes freedom of the press. The freedom of the press in terms includes right to circulate and also to determine the volume of such circulation. This freedom includes the freedom to communicate or circulate one's opinion without interference to as large a population in the country, as well as abroad, as is possible to reach.

44. This fundamental right can be limited only by reasonable restrictions under a law made for the purposes mentioned in Article 19(2) of the Constitution.

45. The burden is on the authority to justify the restrictions. Public order is not the same thing as public safety and hence no restrictions can be placed on the right to freedom of speech and expression on the ground that public safety is endangered. Unlike in the American Constitution, limitations on fundamental rights are specifically spelt out under Article 19(2) of our Constitution. Hence no restrictions can be placed on the right to freedom of speech and expression on grounds other than those specified under Article 19(2).

46. What distinguishes the electronic media like the television from the print media or other media is that it has both audio and visual appeal and has a more pervasive presence. It has a greater impact on the minds of the viewers and is also more readily accessible to all including children at home. Unlike the print media, however, there is a built-in limitation on the use of electronic media because the airwaves are a public property and hence are owned or controlled by the Government or a central national authority or they are not available on account of the scarcity, costs and competition.

47. The next question to be answered in this connection is whether there can be a monopoly in broadcasting/telecasting. Broadcasting is a means of communication and, therefore, a medium of speech and expression. Hence in a democratic polity, neither any private individual, institution or organisation nor any Government or government organisation can claim exclusive right over it. Our Constitution also forbids monopoly either in the print or electronic media. The monopoly permitted by our Constitution is only in respect of carrying on a trade, business, industry or service under Article 19(6) to subserve the interests of the general public. However, the monopoly in broadcasting and telecasting is often claimed by the Government to utilise the public resources in the form of the limited frequencies available for the benefit of the society at large. It is justified by the Government to prevent the concentration of the frequencies in the hands of the rich few who can monopolise the dissemination of views and information to suit their interests and thus in fact to control and manipulate public opinion in effect smothering the right to freedom of speech and expression and freedom of information of others. The claim to monopoly made on this ground may, however, lose all its *raison d'être* if either any section of the society is unreasonably denied an access to broadcasting or the governmental agency claims exclusive right to prepare and relay programmes. The ground is further not available when those claiming an access either do not make a demand on the limited frequencies controlled by the Government or claim the frequency which is not utilised and is available for transmission. The Government sometimes claims monopoly also on the ground that having regard to all pervasive presence and impact of the electronic media, it may be utilised for purposes not permitted by law and the damage done by private broadcasters may be irreparable. There is much to be said in favour of this view and it is for this reason that the regulatory provisions including those for granting licences to private broadcasting where it is permitted, are enacted. On the other hand, if the Government is vested with an unbridled discretion to grant or refuse to grant the licence or access to the media, the reason for creating monopoly will lose its validity. For then it is the Government which will be enabled to effectively suppress the freedom of speech and expression instead of protecting it and utilising the licensing power strictly for the purposes for which it is conferred. It is for this reason that in most of the democratic countries an independent autonomous broadcasting authority is created to control all aspects of the operation of the electronic media. Such authority is representative of all sections of the society and is free from control of the political and administrative executive of the State.

48. In this country, unlike in the United States and some European countries, there has been a monopoly of broadcasting/telecasting in the Government. The Indian Telegraph Act, 1885 ("Telegraph Act") creates this monopoly and vests the power of regulating and licensing broadcasting in the Government. Further, the Cinematograph Act, 1952 and the Rules made



thereunder empower the Government to pre-censor films. However, the power given to the Government to licence and to pre-censor under the respective legislations has to be read in the context of Article 19(2) of the Constitution which sets the parameters of reasonable restrictions which can be placed on the right to freedom of speech and expression. Needless to emphasise that the power to pre-censor films and to grant licences for access to telecasting, has to be exercised in conformity with the provisions of Article 19(2). It is in this context that we have to examine the provisions of Section 4(1) of the Telegraph Act and the action of the MIB/DD in refusing access to telecast the cricket matches in the present case.

49. The relevant Section 4 of the Telegraph Act reads as follows:

“4. (1) Within India the Central Government shall have the exclusive privilege of establishing, maintaining and working telegraphs:

Provided that the Central Government may grant a licence, on such conditions and in consideration of such payments as it thinks fit, to any person to establish, maintain or work a telegraph within any part of India:

Provided further that the Central Government may, by rules made under this Act and published in the Official Gazette, permit, subject to such restrictions and conditions as it thinks fit, the establishment, maintenance and working—

(a) of wireless telegraphs on ships within Indian territorial waters and on aircraft within or above India, or Indian territorial waters, and

(b) of telegraphs other than wireless telegraph within any part of India.

(2) The Central Government may, by notification in the Official Gazette, delegate to the telegraph authority all or any of its powers under the first proviso to sub-section (1).

The exercise by the telegraph authority of any power so delegated shall be subject to such restrictions and conditions as the Central Government may, by the notification, think fit to impose.”

Section 3(1) of the Act defines ‘telegraph’ as under:

“3. (1) ‘telegraph’ means any appliance, instrument, material or apparatus used or capable of use for transmission or reception of signs, signals, writing, images, and sounds or intelligence of any nature by wire, visual or other electromagnetic emissions, radio waves or Hertzian waves, galvanic, electric or magnetic means;

*Explanation.* - ‘Radio waves’ or ‘Hertzian waves’ means electromagnetic waves of frequencies lower than 3000 giga-cycles per second propagated in space without artificial guide.”

It is clear from a reading of the provisions of Sections 4(1) and 3(1) together that the Central Government has the exclusive privilege of establishing, maintaining and working appliances, instruments, material or apparatus used or capable of use for transmission or reception of signs, signals, images and sounds or intelligence of any nature by wire, visual or other electromagnetic emissions, radio waves or Hertzian waves, galvanic, electric or magnetic means. Since in the present case the controversy centres round the use of airwaves or Hertzian waves (hereinafter will be called as “electromagnetic waves”), as is made clear by Explanation to Section 3(1), the Central Government can have monopoly over the use of the

electromagnetic waves only of frequencies lower than 3000 giga-cycles per second which are propagated in space with or without artificial guide. In other words, if the electromagnetic waves of frequencies of 3000 or more giga-cycles per second are propagated in space with or without artificial guide, or if the electromagnetic waves of frequencies of less than 3000 giga-cycles per second are propagated with an artificial guide, the Central Government cannot claim an exclusive right to use them or deny its user by others. Since no arguments were advanced on this subject after the closure of the arguments and pending the decision, we had directed the parties to give their written submissions on the point. The submissions sent by them disclosed a wide conflict which would have necessitated further oral arguments. Since we are of the view that the present matter can be decided without going into the controversy on the subject, we keep the point open for decision in an appropriate case. We will presume that in the present case the dispute is with regard to the use of electromagnetic waves of frequencies lower than 3000 giga-cycles per second which are propagated in space without artificial guide.

50. The first proviso to Section 4(1) states that the Central Government may grant licence on such conditions and in consideration of such payment as it thinks fit, to any person, to establish, maintain or work a telegraph within any part of India. We are not concerned here with the permission to establish or maintain a telegraph because in the present case the permission is sought only for operating a telegraph and that too for a limited time and for a limited and specified purpose. The purpose again is non-commercial. It is to relay the specific number of cricket matches. It is only incidentally that the CAB will earn some revenue by selling its right to relay the matches organised by it. The CAB is obviously not a business or a commercial organisation nor can it be said that it is organising matches for earning profits as a business proposition. As will be pointed out later, it is a sporting organisation devoted to the cause of cricket and has been organising cricket matches both of internal and international cricket teams for the benefit of the sport, the cricketers, the sportsmen present and prospective and of the viewers of the matches. The restrictions and conditions that the Central Government is authorised to place under Section 4(1) while permitting non-wireless telegraphing can, as stated earlier, only be those which are warranted by the purposes mentioned in Article 19(2) and none else. It is not and cannot be the case of the Government that by granting the permission in question, the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or either of them will be in jeopardy or that the permission will lead to the contempt of court, defamation or incitement to an offence. On the other hand, the arguments advanced are specious and with them we will deal a little later.

51. It is then necessary to understand the nature of the respondent organisation, namely, CAB. It cannot be disputed that the BCCI is a non-profit-making organisation which controls officially organised game of cricket in India. Similarly, Cricket Association of Bengal (CAB) is also non-profit-making organisation which controls officially organised game of cricket in the State of West Bengal. The CAB is one of the Founder Members of BCCI. Office-bearers and Members of the Working Committees of both BCCI and CAB are all citizens of India. The primary object of both the organisations, amongst others, is to promote the game of cricket, to foster the spirit of sportsmanship and the ideals of cricket, and to impart education

through the media of cricket, and for achieving the said objects, to organise and stage tournaments and matches either with the members of International Cricket Council (ICC) or other organisations. According to CAB, BCCI is perhaps the only sports organisation in India which earns foreign exchange and is neither controlled by any governmental agency nor receives any financial assistance or grants, of whatsoever nature.

52. It cannot be disputed further that to arrange any international cricket tournament or series, it is necessary and a condition-*precedent*, to pay to the participating member-countries or teams, a minimum guaranteed amount in foreign exchange and to bear the expenses incurred for travelling, boarding, lodging and other daily expenses of the participating cricketers and the accompanying visiting officials concerned. A huge amount of expenses has also to be incurred for organising the matches. In addition, both BCCI and CAB annually incur large amount of expenses for giving subsidies and grants to its members to maintain, develop and upgrade the infrastructure, to coach and train players and umpires and to pay to them when the series and matches are played.

53. Against this background, we may now examine the questions of law raised by the parties. The contention of the Ministry of Information and Broadcasting (MIB) is that there is a difference between the implications of the right conferred under Article 19(1)(a) upon (i) the broadcaster i.e., the person operating the media, (ii) the person desiring access to the media to project his views including the organiser of an event, (iii) the viewer, and (iv) a person seeking uplinking of frequencies so as to telecast signals generated in India to other countries. The contention of CAB that denial of a licence to telecast through a media of its choice, based (according to MIB) upon the commercial interests, infringes viewers' right under Article 19(1)(a) is untenable. It is further contended that the commercial interests of the organiser are not protected by Article 19(1)(a). However, the contention of the CAB results indirectly in such protection being sought by resort to the following steps of reasoning : (a) the Board has a right to commercially exploit the event to the maximum, (b) the viewer has a right to access to the event through the television. Hence the Board has the right to telecast through an appropriate channel and also the right to insist that a private agency, including a foreign agency, should be allowed all the sanctions and permissions as may be necessary therefor.

54. According to MIB the aforesaid contention is untenable because even if it is assumed that entertainment is a part of free speech, the analogy of the right of the press under Article 19(1)(a) vis-à-vis the right under Article 19(1)(g), cannot be extended to the right of sports associations. The basic premise underlying the recognition of the rights of the press under Article 19(1)(a) is that the economic strength is vitally necessary to ensure independence of the press, and thus even the 'business' elements of a newspaper have to some extent a "free speech" protection. In other words the commercial element of the press exists to subserve the basic object of the press, namely, free dissemination of news and views which enjoys the protection of free speech. However, free speech element in telecast of sports is incidental. According to the MIB, the primary object of the telecast by the CAB is to raise funds and hence the activities are essentially of trade. The fact that the profits are deployed for promotion of sports is immaterial for the purpose.

55. It is further urged that a broadcaster does not have a right as such to access to the airwaves without a licence either for the purposes of telecast or for the purposes of uplinking. Secondly, there is no general right to a licence to use airwaves which being a scarce resource, have to be used in a manner that the interests of the largest number are best served. The paramount interest is that of the viewers. The grant of a licence does not confer any special right inasmuch as the refusal of a licence does not result in the denial of a right to free speech. Lastly, the nature of the electronic media is such that it necessarily involves the marshalling of the resources for the largest public good. State monopoly created as a device to use the resource is not per se violative of the right of free speech as long as the paramount interests of the viewers are subserved and access to the media is governed by the fairness doctrine. According to the MIB, the width of the rights under Article 19(1)(a) has never been considered to be wider than that conferred by the First Amendment to the US Constitution. It is also urged that the licensing of frequencies and consequent regulation of telecast/broadcast would not be a matter covered by Article 19(2). The right to telecast/broadcast has certain inherent limitations imposed by nature, whereas Article 19(2) applies to restrictions imposed by the State. The object of licensing is not to cast restrictions on the expression of ideas, but to regulate and marshal scarce resources to ensure their optimum enjoyment by all including those who are not affluent enough to dominate the media.

56. It is next urged that the rights of an organiser to use airwaves as a medium to telecast and thereby propagate his views, are distinct from his right to commercially exploit the event. Although it is conceded that an organiser cannot be denied access on impermissible grounds, it is urged that he cannot further claim a right to use an agency of his choice as a part of his right of free speech. In any event no person can claim to exercise his right under Article 19(1)(a) in a manner which makes it a device for a non-citizen to assert rights which are denied by the Constitution. According to MIB, it is the case of the BCCI that to promote its commercial interest, it is entitled to demand that the Government grants all the necessary licences and permissions to any foreign agency of its choice and a refusal to do so would violate Article 19(1)(a). According to MIB, this is an indirect method to seek protection of Article 19(1)(a) to the non-citizens.

57. It is then contended that a free-speech right of a viewer has been recognised as that having paramount importance by the US Supreme Court and this view is all the more significant in a country like ours. While accepting that the electronic media is undoubtedly the most powerful media of communication both from the perspective of its reach as well as its impact, transcending all barriers including that of illiteracy, it is contended that it is very cost-intensive. Unless, therefore, the rights of the viewers are given primacy, it will in practice result in the affluent having the sole right to air their views completely eroding the right of the viewers. The right of viewer can only be safeguarded by the regulatory agency by controlling the frequencies of broadcast as it is otherwise impossible for viewers to exercise their right to free speech qua the electronic media in any meaningful way.

58. Lastly, dealing with the contention raised on behalf of the CAB and BCCI that the monopoly conferred upon DD is violative of Article 19(1)(a), while objecting to the contention on the ground that the issue does not arise in the present proceedings and is not raised in the pleadings, it is submitted on behalf of MIB that the principal contentions of the

CAB/BCCI are that they are entitled to market their right to telecast an event at the highest possible value it may command and if Doordarshan is unwilling to pay as much as the highest bidder, the CAB/BCCI has the right not only to market the event but to demand as of right, all the necessary licences and permissions for the agency including foreign agency which has purchased its rights. According to MIB these contentions do not raise any free-speech issues, but impinge purely on the right to trade. As far as Article 19(1)(g) is concerned, the validity of the monopoly in favour of the Government is beyond question. Secondly, in the present case, Doordarshan did not refuse to telecast the event per se. It is then submitted that the CAB/BCCI are not telecasters. They are only organisers of the events sought to be telecast and when the agency like DD which has access to the largest number of viewers agrees to telecast the events, their right as well as the viewers' right under Article 19(1)(a) is satisfied. No organiser, it is contended, can insist that his event be telecast on terms dictated by him and refusal to agree to his term constitutes breach of his right under Article 19(1)(a). If it is accepted that the Government has not only the right but the duty to regulate the distribution of frequencies, then the only way it can be done is by creating a monopoly. A mere creation of the monopoly agency to telecast does not per se violate Article 19(1)(a) as long as the access is not denied to the media either absolutely or by imposition of terms which are unreasonable. Article 19(1)(a) proscribes monopoly in ideas and as long as this is not done, the mere fact that the access to the media is through the Government-controlled agency, is not per se violative of Article 19(1)(a). It is further urged that no material has been placed before the Court to show that the functioning of Doordarshan is such as to deny generally an access to the media and the control exercised by the Government is in substance over the content on the grounds other than those specified in Article 19(2) or a general permission to all those who seek frequencies to telecast would better subserve the principle underlying Article 19(1)(a) in the socio-economic scenario of this country and will not result in passing the control of the media from the Government to private agencies affluent enough to buy access.

59. As against these contentions of the MIB, it is urged on behalf of CAB and BCCI as follows: The right to organise a sports event inheres in the entity to which the right belongs and that entity in this case is the BCCI and its members which include the CAB. The right to produce an event includes the right to deal with such event in all manner and mode which the entity chooses. This includes the right to telecast or not to telecast the event, and by or through whom, and on what terms and conditions. No other entity, not even a department of the Government can coerce or influence this decision or obstruct the same except on reasonable grounds mentioned under Article 19(2) of the Constitution. In the event the entity chooses to televise its own events, the terms and conditions for televising such events are to be negotiated by it with any party with whom it wishes to negotiate. There is no law, bye-law, rule or regulation to regulate the conduct of the BCCI or CAB in this behalf. In the event, BCCI chooses to enter into an agreement with an agency having necessary expertise and infrastructure to produce signals, and transmit and televise the event of the quality that BCCI/CAB desires, the terms and conditions to be negotiated with such an entity, are the exclusive privilege of BCCI/CAB. No department of the Government and least of all, the MIB or DD is concerned with the same and can deny the BCCI or CAB the benefit of such right or claim, much less can the MIB or DD insist that such negotiation and finalisation only be done with it or not otherwise.

60. In the event the BCCI or CAB wishes to have the event televised outside India, what is required is that the required cameras and equipments in the field send signals to the earth station which in turn transmits the same to the appointed satellite. From the satellite, the picture is beamed back which can be viewed live by any person who has a TV set and has appropriate access to receive footprints within the beaming zone. In such case Doordarshan or the Ministry of Communications is not to provide any assistance either in the form of equipments or personnel or for that matter, in granting uplinking facility for televising the event.

61. It is further contended that the right to disseminate information is a part of the fundamental right to freedom of expression. BCCI/CAB have the fundamental right to televise the game of cricket organised and conducted by them for the benefit of public at large and in particular citizens of India who are either interested in cricket or desire to be educated and/or entertained. The said right is subject only to the regulations and restrictions as provided by Article 19(2) of the Constitution.

62. At no other stage either DD or MIB stated that reasonable restrictions as enumerated in Article 19(2) are being sought to be imposed apart from the fact that such plea could not have been taken by them in the case of telecasting sports events like cricket matches. It is urged that the sole ground on which DD/MIB is seeking to obstruct and/or refuse the said fundamental right is that DD has the exclusive privilege and monopoly to broadcast such an event and that unless the event is produced, transmitted and telecast either by DD itself or in collaboration with it on its own terms and conditions and after taking signals from it on the terms and conditions it may impose, the event cannot be permitted to be produced, transmitted and telecast at all by anybody else.

63. It is also urged that there is no exclusive privilege or monopoly in relation to production, transmission or telecasting and such an exclusivity or monopoly, if claimed, is violative of Article 19(1)(a).

64. The BCCI and CAB have a right under Article 19(1)(a) to produce, transmit, telecast and broadcast their event directly or through its agent. The right to circulate information is a part of the right guaranteed under Article 19(1)(a). Even otherwise, the viewers and persons interested in sports by way of education, information, record and entertainment have a right to such information, knowledge and entertainment. The content of the right under Article 19(1)(a) reaches out to protect the information of the viewers also. In the present case, there is a right of the viewers and also the right of the producer to telecast the event and in view of these two rights, there is an obligation on the part of the Department of Telecommunication to allow the telecasting of the event.

65. It is then contended that the grant of a licence under Section 4 of the Act is a regulatory measure and does not entitle MIB either to deny a licence to BCCI/CAB for the purposes of production, transmission and telecasting sports events or to impose any condition unrelated to Article 19(2). If such denial or imposition is made, it would amount to a prohibition. Hence the MIB is obliged and duty-bound in law to grant licence against payment of fees related to and calculated on the basis of user of time only, as has been standardized and not otherwise. Any other method applied by MIB/DD would be violative of Article

19(1)(a). The grant of licence under Section 4 of the Act has thus to be harmoniously read with the right of the citizen under Article 19(1)(a). The Constitution does not visualize any monopoly in Article 19(1)(a). Hence DD cannot claim the same nor can the commercial interest of DD or claim of exclusivity by it of generation of signals be a ground for declining permission under Section 4 of the Act. Hence the following restrictions sought to be imposed fall outside the ambit of Article 19(2) and are unconstitutional. The restrictions are:

- (a) That unless BCCI or CAB televises the matches in collaboration with DD, a licence shall not be granted.
- (b) DD alone will be the host broadcaster of the signals and BCCI/CAB or its agency must take the signal from DD alone; and
- (c) Unless the BCCI or CAB accepts the terms and conditions imposed by DD, the production of signal and transmission and telecast thereof shall not be permitted.

66. It is further contended that there is no monopoly in relation to what viewer must today view and the American decisions relied upon on behalf of MIB have no bearing on the present state of affairs. Satellite can beam directly on to television sets through dish antenna all programmes whose footprints are receivable in the country. Further, anyone can record a programme in India and then telecast it by sending the cassette out as is being done in the case of several private TV channels. Various foreign news organisations such as the BBC and the CNN record directly Indian events and then transmit their own signals after a while to be telecast by their organisations.

67. Further, the non-availability of channel is of no consequence in the present days of technological development. Any person intending to telecast/broadcast an event can do so directly even without routing the signals through the channels of DD or MIB. What is required to ensure is that the secured channels are not interfered with or overlapped. On account of the availability of innumerable satellites in the geo-stationary orbit of the Hemisphere, the signals can directly be uplinked through any of the available transponders of satellite whose footprints can be received back through appropriate electronic device. As a matter of fact, beaming zone of only 3 satellites parked 3000 kms above the surface of the earth can cover the entire Hemisphere. Moreover, due to technological developments, frequency is becoming thinner and thinner and as a result, availability of frequencies has increased enormously and at present there are millions of frequencies available. In order to ensure that none of the footprints of any satellite overlaps the footprint of other satellite, each and every satellite is parked at a different degree and angle. Hence, there is no resource crunch or inbuilt restriction on the availability of electronic media, as contended by MIB. In this connection it is also pointed out that there is a difference in the right spelt out by Article 19(1)(a) of our Constitution and that spelt out by the First Amendment of the American Constitution.

68. It is also contended that in no other country the right to televise or broadcast is in the exclusive domain of any particular body. In this connection, a reference is made to various instances in other countries where the host broadcaster has been other than the domestic network, which instances are not controverted. It is also urged that there is no policy of the Government of India as urged on behalf of the MIB that telecasting of sporting events would be within the exclusive domain and purview of DD/MIB who alone would market their rights

to other authorities in whole or in part. It is pointed out that the extract from the minutes of the meeting of the Committee of Secretaries held on 12-11-1993 relied upon by the MIB for the purpose is not a proof of such policy. The said minutes are “executive decision” of a few Secretaries of the various departments of the Government.

69. It is also urged that even public interest or interest of general public cannot be a ground for refusal or for the imposition of restrictions or for claiming exclusivity in any manner whatsoever. Such restriction, if imposed will be violative of Article 19(1)(a). To suggest that power to grant a licence shall not be exercised under any circumstances because of the policy of the Government, is arbitrary inasmuch as the power conferred is not being used for the purpose for which it has been conferred.

70. It is then contended that both BCCI and CAB are non-profit-making organisations and their sole object is to promote the game of cricket in this country and for that purpose not only proper and adequate infrastructures are required to be erected, built and maintained, but also huge expenses have to be incurred to improve the game which includes, amongst others, grant of subsidies and grants to the Member Associations, upgradation of infrastructure, training of cricketers from school level, payments to the cricketers, insurance and benevolent funds for the cricketers, training of umpires, payments to foreign participants, including guarantee money etc. The quantum of amount to be spent for all these purposes has increased during the course of time. These expenses are met from the amounts earned by the BCCI and CAB since they have no other continuous source of income. The earnings of BCCI and CAB are basically from arranging various tournaments, in-stadia advertisements and licence fee for permitting telecast and censorship. At least 70 per cent of the income earned through the advertisements and generated by the TV network while telecasting of the matches, is paid to the organiser apart from the minimum guaranteed money as is apparent from the various agreements entered by and between BCCI/CAB as well as by DD with other networks. DD in effect desires to snatch away the right of telecast for its own commercial interest through advertisement, and at the same time also demand money from the organisers as and by way of production fee.

71. Merely because an organisation may earn profit from an activity whose character is predominantly covered under Article 19(1)(a), it would not convert the activity into one involving Article 19(1)(g). The test of predominant character of the activity has to be applied. It has also to be ascertained as to who is the person who is utilising the activity. If a businessman were to put in an advertisement for simpliciter commercial activity, it may render the activity, the one covered by Article 19(1)(g). But even newspapers or a film telecast or sports event telecast will be protected by Article 19(1)(a) and will not become an activity under Article 19(1)(g) merely because it earns money from advertisements in the process. Similarly, if the cricket match is telecast and profit is earned by the licensing of telecasting right and receipts from advertisements, it will be an essential element for utilisation and fulfilment of its object. The said object cannot be achieved without such revenue.

74. It will be apparent from the contentions advanced on behalf of MIB that their main thrust is that the right claimed by the BCCI/CAB is not the right of freedom of speech under Article 19(1)(a), but a commercial right or the right to trade under Article 19(1)(g). The



contention is based mainly on two grounds, viz., there is no free-speech element in the telecast of sports and secondly, the primary object of the BCCI/CAB in seeking to telecast the cricket matches is not to educate and entertain the viewer but to make money.

75. It can hardly be denied that sport is an expression of self. In an athletic or individual event, the individual expresses himself through his individual feat. In a team event such as cricket, football, hockey etc., there is both individual and collective expression. It may be true that what is protected by Article 19(1)(a) is an expression of thought and feeling and not of the physical or intellectual prowess or skill. It is also true that a person desiring to telecast sports events when he is not himself a participant in the game, does not seek to exercise his right of self-expression. However, the right to freedom of speech and expression also includes the right to educate, to inform and to entertain and also the right to be educated, informed and entertained. The former is the right of the telecaster and the latter that of the viewers. The right to telecast sporting event will therefore also include the right to educate and inform the present and the prospective sportsmen interested in the particular game and also to inform and entertain the lovers of the game. Hence, when a telecaster desires to telecast a sporting event, it is incorrect to say that the free-speech element is absent from his right. The degree of the element will depend upon the character of the telecaster who claims the right. An organiser such as the BCCI or CAB in the present case which are indisputably devoted to the promotion of the game of cricket, cannot be placed in the same scale as the business organisations whose only intention is to make as large a profit as can be made by telecasting the game. Whereas it can be said that there is hardly any free-speech element in the right to telecast when it is asserted by the latter, it will be a warped and cussed view to take when the former claim the same right and contend that in claiming the right to telecast the cricket matches organised by them, they are asserting the right to make business out of it. The sporting organisations such as BCCI/CAB which are interested in promoting the sport or sports are under an obligation to organise the sports events and can legitimately be accused of failing in their duty to do so. The promotion of sports also includes its popularization through all legitimate means. For this purpose, they are duty-bound to select the best means and methods to reach the maximum number of listeners and viewers. Since at present, radio and TV are the most efficacious methods, thanks to the technological development, the sports organisations like BCCI/CAB will be neglecting their duty in not exploring the said media and in not employing the best means available to them to popularize the game. That while pursuing their objective of popularizing the sports by selecting the best available means of doing so, they incidentally earn some revenue, will not convert either them into commercial organisations or the right claimed by them to explore the said means, into a commercial right or interest. It must further be remembered that sporting organisations such as BCCI/CAB in the present case, have not been established only to organise the sports events or to broadcast or telecast them.

The organisation of sporting events is only a part of their various objects, as pointed out earlier and even when they organise the events, they are primarily to educate the sportsmen, to promote and popularize the sports and also to inform and entertain the viewers. The organisation of such events involves huge costs. Whatever surplus is left after defraying all the expenses is ploughed back by them in the organisation itself. It will be taking a deliberately distorted view of the right claimed by such organisations to telecast the sporting

event to call it an assertion of a commercial right. Yet the MIB has chosen to advance such contention which can only be described as most unfortunate. It is needless to state that we are, in the circumstances, unable to accept the ill-advised argument. It does no credit to the Ministry or to the Government as a whole to denigrate the sporting organisations such as BCCI/CAB by placing them on a par with business organisations sponsoring sporting events for profit and the access claimed by them to telecasting as assertion of commercial interest.

76. The second contention of MIB is based upon the propositions laid down by the US Supreme Court, viz., there are inherent limitations imposed on the right to telecast/broadcast as there is scarcity of resources, i.e., of frequencies and therefore the need to use them in the interest of the largest number. There is also a pervasive presence of electronic media such as TV. It has a greater impact on the minds of the people of all ages and strata of the society necessitating the prerequisite of licensing of the programmes. It is also contended on that account that the licensing of frequencies and consequent regulation of telecasting/broadcasting would not be a matter governed by Article 19(2). Whereas Article 19(2) applies to restrictions imposed by the State, the inherent limitations on the right to telecast/broadcast are imposed by nature.

77. In the first instance, it must be remembered that all the decisions of the US Supreme Court relied upon in support of this contention, are on the right of the private broadcasters to establish their own broadcasting stations by claiming a share in or access to the airwaves or frequencies. In the United States, there is no Central Government-owned or controlled broadcasting centre. There is only a Federal Commission to regulate broadcasting stations which are all owned by private broadcasters. Secondly, the American Constitution does not explicitly state the restrictions on the right of freedom of speech and expression as our Constitution does. Hence, the decisions in question have done no more than impliedly reading such restrictions. The decisions of the US Supreme Court, therefore, in the context of the right claimed by the private broadcasters are irrelevant for our present purpose. In the present case what is claimed is a right to an access to telecasting specific events for a limited duration and during limited hours of the day. There is no demand for owning or controlling a frequency. Secondly, unlike in the cases in the US which came for consideration before the US Supreme Court, the right to share in the frequency is not claimed without a licence. Thirdly, the right to use a frequency for a limited duration is not claimed by a business organisation to make profit, and lastly – and this is an important aspect of the present case, to which no reply has been given by the MIB - there is no claim to any frequency owned and controlled by the Government. What is claimed is a permission to uplink the signal created by the organiser of the events to a foreign satellite.

78. There is no doubt that since the airwaves/frequencies are a public property and are also limited, they have to be used in the best interest of the society and this can be done either by a central authority by establishing its own broadcasting network or regulating the grant of licences to other agencies, including the private agencies. What is further, the electronic media is the most powerful media both because of its audio-visual impact and its widest reach covering the section of the society where the print media does not reach. The right to use the airwaves and the content of the programmes, therefore, needs regulation for balancing it and as well as to prevent monopoly of information and views relayed, which is a potential danger

flowing from the concentration of the right to broadcast/telecast in the hands either of a central agency or of few private affluent broadcasters. That is why the need to have a central agency representative of all sections of the society free from controls both of the Government and the dominant influential sections of the society. This is not disputed. But to contend that on that account the restrictions to be imposed on the right under Article 19(1)(a) should be in addition to those permissible under Article 19(2) and dictated by the use of public resources in the best interests of the society at large, is to misconceive both the content of the freedom of speech and expression and the problems posed by the element of public property in, and the alleged scarcity of, the frequencies as well as by the wider reach of the media.

If the right to freedom of speech and expression includes the right to disseminate information to as wide a section of the population as is possible, the access which enables the right to be so exercised is also an integral part of the said right. The wider range of circulation of information or its greater impact cannot restrict the content of the right nor can it justify its denial. The virtues of the electronic media cannot become its enemies. It may warrant a greater regulation over licensing and control and vigilance on the content of the programme telecast. However, this control can only be exercised within the framework of Article 19(2) and the dictates of public interests. To plead for other grounds is to plead for unconstitutional measures. It is further difficult to appreciate such contention on the part of the Government in this country when they have a complete control over the frequencies and the content of the programme to be telecast. They control the sole agency of telecasting. They are also armed with the provisions of Article 19(2) and the powers of pre-censorship under the Cinematograph Act and Rules. The only limitation on the said right is, therefore, the limitation of resources and the need to use them for the benefit of all. When, however, there are surplus or unlimited resources and the public interests so demand or in any case do not prevent telecasting, the validity of the argument based on limitation of resources disappears. It is true that to own a frequency for the purposes of broadcasting is a costly affair and even when there are surplus or unlimited frequencies, only the affluent few will own them and will be in a position to use it to subserve their own interest by manipulating news and views. That also poses a danger to the freedom of speech and expression of the have-nots by denying them the truthful information on all sides of an issue which is so necessary to form a sound view on any subject. That is why the doctrine of fairness has been evolved in the US in the context of the private broadcasters licensed to share the limited frequencies with the central agency like the FCC to regulate the programming. But this phenomenon occurs even in the case of the print media of all the countries. Hence the body like the Press Council of India which is empowered to enforce, however imperfectly, the right to reply. The print media further enjoys as in our country, freedom from pre-censorship unlike the electronic media.

80. The third contention advanced on behalf of the MIB is only an extended aspect of the first contention. It is based on the same distorted interpretation of the right claimed. It proceeds on the footing that the BCCI/CAB is claiming a commercial right to exploit the sporting event when they assert that they have a right to telecast the event through an agency of their choice. It is even contended on behalf of the MIB that this amounts to a device for a non-citizen to assert rights under Article 19(1)(a) which are not available to him.

82. The fourth contention is that, as held by the US Supreme Court, the freedom of speech has to be viewed also as a right of the viewers which has paramount importance, and the said

view has significance in a country like ours. To safeguard the rights of the viewers in this country, it is necessary to regulate and restrict the right to access to telecasting. There cannot be any dispute with this proposition. We have in fact referred to this right of the viewers in another context earlier. True democracy cannot exist unless all citizens have a right to participate in the affairs of the polity of the country. The right to participate in the affairs of the country is meaningless unless the citizens are well informed on all sides of the issues, in respect of which they are called upon to express their views. One-sided information, disinformation, misinformation and non-information all equally create an uninformed citizenry which makes democracy a farce when medium of information is monopolised either by a partisan central authority or by private individuals or oligarchic organisations. This is particularly so in a country like ours where about 65 per cent of the population is illiterate and hardly 1 ½ per cent of the population has an access to the print media which is not subject to pre-censorship. When, therefore, the electronic media is controlled by one central agency or few private agencies of the rich, there is a need to have a central agency, as stated earlier, representing all sections of the society. Hence to have a representative central agency to ensure the viewers' right to be informed adequately and truthfully is a part of the right of the viewers under Article 19(1)(a). We are, however, unable to appreciate this contention in the present context since the viewers' rights are not at all affected by the BCCI/CAB, by claiming a right to telecast the cricket matches. On the other hand, the facts on record show that their rights would very much be trampled if the cricket matches are not telecast through Doordarshan, which has the monopoly of the national telecasting network. Although, there is no statistical data available (and this is not a deficiency felt only in this arena), it cannot be denied that a vast section of the people in this country is interested in viewing the cricket matches. The game of cricket is by far the most popular in all parts of the country. This is evident from the overflowing stadia at the venues wherever the matches are played and they are played all over the country. It will not be an exaggeration to say that at least one in three persons, if not more, is interested in viewing the cricket matches. Almost all television sets are switched on to view the matches. Those who do not have a TV set of their own crowd around TV sets of others when the matches are on. This is not to mention the number of transistors and radios which are on during the match-hours. In the face of these revealing facts, it is difficult to understand why the present contention with regard to the viewers' right is raised in this case when the grant of access to BCCI/CAB to telecast cricket matches was in the interest of the viewers and would have also contributed to promote their rights as well.

83. The last argument on behalf of the MIB is that since in the present case, DD has not refused to telecast the event, its monopoly to telecast cannot be challenged and in fact no such contention was raised by the BCCI/CAB. We are afraid that this will not be a proper reading of the contentions raised by BCCI/CAB in their pleadings both before the High Court and this Court. Undisputed facts on record show that Doordarshan claimed exclusive right to create host broadcasting signal and to telecast it on the terms and conditions stipulated by it or not at all. MIB even refused to grant uplinking facilities when the terrestrial signal was being created by the CAB with their own apparatus, i.e., the apparatus of the agency which they had engaged and when the use of any of the frequencies owned, controlled or commanded by DD or the Government, was not involved. Since BCCI/CAB were the organisers of the events, they had every right to create terrestrial signals of their event and to sell it to whomsoever

they thought best so long as such creation of the signals and the sale thereof was not violative of any law made under Article 19(2) and was not an abuse of the frequencies which are a public property. Neither DD nor any other agency could impose their terms for creating signals or for telecasting them unless it was sought through their frequencies. When Doordarshan refused to telecast cricket matches except on their terms, the BCCI/CAB turned to another agency, in the present case a foreign agency, for creating the terrestrial signal and telecasting it through the frequencies belonging to that agency. When Doordarshan refused to telecast the matches, the rights of the viewers to view the matches were in jeopardy. Only the viewers in this country who could receive foreign frequencies on their TV sets, could have viewed the said matches. Hence it is not correct to say that Doordarshan had not refused to telecast the events. To insist on telecasting events only on one's unreasonable terms and conditions and not otherwise when one has the monopoly of telecasting, is nothing but refusal to telecast the same. DD could not do it except for reasons of non-availability of frequencies or for grounds available under Article 19(2) of the Constitution or for considerations of public interest involved in the use of the frequencies as public property. The fact that Doordarshan was prepared to telecast the events only on its terms shows that the frequency was available. Hence, scarcity of frequencies or public interests cannot be pressed as grounds for refusing to telecast or denying access to BCCI/CAB to telecasting. Nor can Doordarshan plead encroachment on the right of viewers as a ground since the telecasting of events on the terms of Doordarshan cannot alone be said to safeguard the right of viewers in such a case and in fact it was not so.

122. We, therefore, hold as follows:

(i) The airwaves or frequencies are a public property. Their use has to be controlled and regulated by a public authority in the interests of the public and to prevent the invasion of their rights. Since the electronic media involves the use of the airwaves, this factor creates an inbuilt restriction on its use as in the case of any other public property.

(ii) The right to impart and receive information is a species of the right of freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution. A citizen has a fundamental right to use the best means of imparting and receiving information and as such to have an access to telecasting for the purpose. However, this right to have an access to telecasting has limitations on account of the use of the public property, viz., the airwaves, involved in the exercise of the right and can be controlled and regulated by the public authority. This limitation imposed by the nature of the public property involved in the use of the electronic media is in addition to the restrictions imposed on the right to freedom of speech and expression under Article 19(2) of the Constitution.

(iii) The Central Government shall take immediate steps to establish an independent autonomous public authority representative of all sections and interests in the society to control and regulate the use of the airwaves.

(iv) Since the matches have been telecast pursuant to the impugned order of the High Court, it is not necessary to decide the correctness of the said order.

(v) The High Court will now apportion between the CAB and DD the revenues generated by the advertisements on TV during the telecasting of both the series of the cricket matches, viz., the Hero Cup, and the International Cricket Matches played in India from October to December 1994, after hearing the parties on the subject.

**RIGHT OF PERSONAL LIBERTY*****Maneka Gandhi v. Union of India***

(1978) 1 SCC 248

**P.N. BHAGWATI, J.** - The petitioner is the holder of the passport issued to her on June 1, 1976 under the Passports Act, 1967. On July 4, 1977 the petitioner received a letter dated July 2, 1977 from the Regional Passport Officer, Delhi intimating to her that it has been decided by the Government of India to impound her passport under Section 10(3)(c) of the Act in public interest and requiring her to surrender the passport within seven days from the date of receipt of the letter. The petitioner immediately addressed a letter to the Regional Passport Officer requesting him to furnish a copy of the statement of reasons for making the order as provided in Section 10(5) to which a reply was sent by the Government of India, Ministry of External Affairs on July 6, 1977 stating inter alia that the Government has decided "in the interest of the general public" not to furnish her a copy of the statement of reasons for the making of the order. The petitioner thereupon filed the present petition challenging the action of the Government in impounding her passport and declining to give reasons for doing so. The action of the Government was impugned inter alia on the ground that it was mala fide, but this challenge was not pressed before us at the time of the hearing of the arguments and hence it is not necessary to state any facts bearing on that question. The principal challenge set out in the petition against the legality of the action of the Government was based mainly on the ground that Section 10(3)(c), insofar as it empowers the Passport Authority to impound a passport "in the interests of the general public" is violative of the equality clause contained in Article 14 of the Constitution, since the condition denoted by the words "in the interests of the general public" limiting the exercise of the power is vague and undefined and the power conferred by this provision is, therefore, excessive and suffers from the vice of "overbreadth". The petition also contained a challenge that an order under Section 10(3)(c) impounding a passport could not be made by the Passport Authority without giving an opportunity to the holder of the passport to be heard in defence and since in the present case, the passport was impounded by the Government without affording an opportunity of hearing to the petitioner, the order was null and void, and, in the alternative, if Section 10(3)(c) were read in such a manner as to exclude the right of hearing, the section would be infected with the vice of arbitrariness and it would be void as offending Article 14. These were the only grounds taken in the petition as originally filed and on July 20, 1977 the petition was admitted and rule issued by this Court and an interim order was made directing that the passport of the petitioner should continue to remain deposited with the Registrar of this Court pending the hearing and final disposal of the petition.

2. The hearing of the petition was fixed on August 30, 1977, but before that, the petitioner filed an application for urging additional grounds and by this application, two further grounds were sought to be urged by her. One ground was that Section 10(3)(r) is ultra vires Article 21 since it provides for impounding of passport without any procedure as required by that article, or, in any event, even if it could be said that there is some procedure prescribed under the Passports Act, 1967, it is wholly arbitrary and unreasonable and, therefore, not in compliance

with the requirement of that article. The other ground urged on behalf of the petitioner was that Section 10(3)(c) is violative of Articles 19(1)(a) and 19(1)(g) inasmuch as it authorises imposition of restrictions on freedom of speech and expression guaranteed under Article 19(1)(a) and freedom to practise any profession or to carry on any occupation, or business guaranteed under Article 19(1)(g) and these restrictions are impermissible under Article 19(2) and Article 19(6) respectively. The application for urging these two additional grounds was granted by this Court and ultimately at the hearing of the petition these were the two principal grounds which were pressed on behalf of the petitioner.

3. Before we examine the rival arguments urged on behalf of the parties in regard to the various questions arising in this petition, it would be convenient to set out the relevant provisions of the Passports Act, 1967. The position which obtained prior to the coming into force of this Act was that there was no law regulating the issue of passports for leaving the shores of India and going abroad. The issue of passports was entirely within the discretion of the executive and this discretion was unguided and unchannelled. This Court, by a majority, held that the expression "personal liberty" in Article 21 takes in the right of locomotion and travel abroad and under Article 21 no person can be deprived of his right to go abroad except according to the procedure established by law and since no law had been made by the State regulating or prohibiting the exercise of such right, the refusal of passport was in violation of Article 21 and moreover the discretion with the executive in the matter of issuing or refusing passport being unchannelled and arbitrary, it was plainly violative of Article 14 and hence the order refusing passport to the petitioner was also invalid under that article. This decision was accepted by Parliament and the infirmity pointed out by it was set right by the enactment of the Passports Act 1967. This Act, as its Preamble shows, was enacted to provide for the issue of passports and travel documents to regulate the departure from India of citizens of India and other persons and for incidental and ancillary matters. Section 3 provides that no person shall depart from or attempt to depart from India unless he holds in this behalf a valid passport or travel document. What are the different classes of passports and travel documents which can be issued under the Act is laid down in Section 4. Section 5, sub-section (1) provides for making of an application for issue of a passport or travel document or for endorsement on such passport or travel document for visiting foreign country or countries and sub-section (2) says that on receipt of such application, the passport authority, after making such inquiry, if any, as it may consider necessary, shall, by order in writing, issue or refuse to issue the passport or travel document or make or refuse to make on the passport or travel document endorsement in respect of one or more of the foreign countries specified in the application. Sub-section (3) requires the passport authority, where it refuses to issue the passport or travel document or to make any endorsement on the passport or travel document, to record in writing a brief statement of its reasons for making such order. Section 6, sub-section (1) lays down the grounds on which the passport authority shall refuse to make an endorsement for visiting any foreign country and provides that on no other ground the endorsement shall be refused. There are four grounds set out in this sub-section and of them, the last is that, in the opinion of the Central Government, the presence of the applicant in such foreign country is not in the public interest. Similarly sub-section (2) of Section 6 specifies the grounds on which alone - and on no other grounds - the passport authority shall refuse to issue passport or travel document for visiting any foreign country and amongst various grounds set out there,

the last is that, in the opinion of the Central Government the issue of passport or travel document to the applicant will not be in the public interest. Then we come to Section 10 which is the material section which falls for consideration. Sub-section (1) of that section empowers the passport authority to vary or cancel the endorsement of a passport or travel document or to vary or cancel the conditions subject to which a passport or travel document has been issued, having regard inter alia, to the provisions of sub-section (1) of Section 6 or any notification under Section 19. Sub-section (2) confers powers on the passport authority to vary or cancel the conditions of the passport or travel document on the application of the holder of the passport or travel document and with the previous approval of the Central Government. Sub-section (3) provides that the passport authority may impound or cause to be impounded or revoke a passport or travel document on the grounds set out in clauses (a) to (h). The order impounding the passport in the present case was made by the Central Government under clause (c) which reads as follows:

(c) if the passport authority deems it necessary so to do in the interest of the Sovereignty and Integrity of India, the security of India, friendly relations of India with any foreign country, or in the interests of the general public....

The particular ground relied upon for making the order was that set out in the last part of clause (c), namely, that the Central Government deems it necessary to impound the passport "in the interests of the general public". Then follows sub-section (5) which requires the passport authority impounding or revoking a passport or travel document or varying or cancelling an endorsement made upon it to "record in writing a brief statement of the reasons for making such order and furnish to the holder of the passport or travel document on demand a copy of the same unless, in any case, the passport authority is of the opinion that it will not be in the interests of the sovereignty and integrity of India, the security of India, friendly relations of India with any foreign country or in the interests of the general public to furnish such a copy". It was in virtue of the provision contained in the latter part of this sub-section that the Central Government declined to furnish a copy of the statement of reasons for impounding the passport of the petitioner on the ground that it was not in the interests of the general public to furnish such copy to the petitioner. It is indeed a matter of regret that the Central Government should have taken up this attitude in reply to the request of the petitioner to be supplied a copy of the statement of reasons, because ultimately, when the petition came to be filed, the Central Government did disclose the reasons in the affidavit in reply to the petition which shows that it was not really contrary to public interest and if we look at the reasons given in the affidavit in reply, it will be clear that no reasonable person could possibly have taken the view that the interests of the general public would be prejudiced by the disclosure of the reasons. This is an instance showing how power conferred on a statutory authority to act in the interests of the general public can sometimes be improperly exercised. If the petitioner had not filed the petition, she would perhaps never have been able to find out what were the reasons for which her passport was impounded and she was deprived of her right to go abroad. The necessity of giving reasons has obviously been introduced in sub-section (5) so that it may act as a healthy check against abuse or misuse of power. If the reasons given are not relevant and there is no nexus between the reasons and the ground on which the passport has been impounded, it would be open to the holder of the passport to



challenge the order impounding it in a Court of law and if the court is satisfied that the reasons are extraneous or irrelevant, the Court would strike down the order. This liability to be exposed to judicial scrutiny would by itself act as a safeguard against improper or mala fide exercise of power. The Court would, therefore, be very slow to accept, without close scrutiny, the claim of the passport authority that it would not be in the interests of the general public to disclose the reasons. The passport authority would have to satisfy the Court by placing proper material that the giving of reasons would be clearly and indubitably against the interests of the general public and if the Court is not so satisfied, the Court may require the passport authority to disclose the reasons, subject to any valid and lawful claim for privilege which may be set up on behalf of the Government. Here in the present case, as we have already pointed out, the Central Government did initially claim that it would be against the interests of the general public to disclose the reasons for impounding the passport, but when it came to filing the affidavit in reply, the Central Government very properly abandoned this unsustainable claim and disclosed the reasons. The question whether these reasons have any nexus with the interests of the general public or they are extraneous and irrelevant is a matter which we shall examine when we deal with the arguments of the parties. Meanwhile, proceeding further with the resume of the relevant provisions, reference may be made to Section 11 which provides for an appeal inter alia against the order impounding or revoking a passport or travel document under sub-section (3) of Section 10. But there is a proviso to this section which says that if the order impounding or revoking a passport or travel document is passed by the Central Government, there shall be no right of appeal. These are the relevant provisions of the Act in the light of which we have to consider the constitutionality of sub-section (3)(c) of Section 10 and the validity of the order impounding the passport of the petitioner.

**Meaning and content of personal liberty in Article 21**

4. The first contention urged on behalf of the petitioner in support of the petition was that the right to go abroad is part of 'personal liberty' within the meaning of that expression as used in Article 21 and no one can be deprived of this right except according to the procedure prescribed by law. There is no procedure prescribed by the Passports Act, 1967 for impounding or revoking a passport and thereby preventing the holder of the passport from going abroad and in any event, even if some procedure can be traced in the relevant provisions of the Act, it is unreasonable and arbitrary, inasmuch as it does not provide for giving an opportunity to the holder of the passport to be heard against the making of the order and hence the action of the Central Government in impounding the passport of the petitioner is in violation of Article 21. This contention of the petitioner raises a question as to the true interpretation of Article 21. What is the nature and extent of the protection afforded by this article? What is the meaning of 'personal liberty': does it include the right to go abroad so that this right cannot be abridged or taken away except in accordance with the procedure prescribed by law? What is the inter-relation between Article 14 and Article 21? Does Article 21 merely require that there must be some semblance of procedure, howsoever arbitrary or fanciful, prescribed by law before a person can be deprived of his personal liberty or that the procedure must satisfy certain requisites in the sense that it must be fair and reasonable? Article 21 occurs in Part III of the Constitution which confers certain fundamental rights.

These fundamental rights had their roots deep in the struggle for independence and, as pointed out by Granville Austin in *'The Indian Constitution - Cornerstone of a Nation'*, "they were included in the Constitution in the hope and expectation that one day the tree of true liberty would bloom in India". They were indelibly written in the subconscious memory of the race which fought for well nigh thirty years for securing freedom from British rule and they found expression in the form of fundamental rights when the Constitution was enacted. These fundamental rights represent the basic values cherished by the people of this country since the *Vedic* times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent. They weave a "pattern of guarantees on the basic-structure of human rights" and impose negative obligations on the State not to encroach on individual liberty in its various dimensions. It is apparent from the enunciation of these rights that the respect for the individual and his capacity for individual Volition which finds expression there is not a self-fulfilling prophecy. Its purpose is to help the individual to find his own liability, to give expression to his creativity and to prevent governmental and other forces from 'alienating' the individual from his creative impulses. These rights are wide ranging and comprehensive and they fall under seven heads, namely, right to equality, right to freedom, right against exploitation, right to freedom of religion, cultural and educational rights, right to property and right to constitutional remedies. Articles 14 to 18 occur under the heading 'Right to Equality', and of them, by far the most important is Article 14 which confers a fundamental right by injuncting the State not to "deny to any person equality before the law or the equal protection of the laws within the territory of India". Articles 19 to 22, which find place under the heading "Right to freedom" provide for different aspects of freedom. Clause (1) of Article 19 enshrines what may be described as the seven lamps of freedom.

It provides that all citizens shall have the right - (a) to freedom of speech and expression; (b) to assemble peaceably and without arms; (c) to form associations or unions; (d) to move freely throughout the territory of India; (e) to reside and settle in any part of the territory of India; (f) to acquire, hold and dispose of property and (g) to practice any profession or to carry on any occupation, trade or business. But these freedoms are not and cannot be absolute, for absolute and unrestricted freedom of one may be destructive of the freedom of another and in a well-ordered, civilised society, freedom can only be regulated freedom. Therefore, clauses (2) to (6) of Article 19 permit reasonable restrictions to be imposed on the exercise of the fundamental rights guaranteed under clause (1) of that article. Article 20 need not detain us as that is not material for the determination of the controversy between the parties. Then comes Article 21 Article 22 confers protection against arrest-and detention in certain cases and provides inter alia safeguards in case of preventive detention. The other fundamental rights are not relevant to the present discussion and we need not refer to them.

5. It is obvious that Article 21, though couched in negative language, confers the fundamental right to life and personal liberty. So far as the right to personal liberty is concerned, it is ensured by providing that no one shall be deprived of personal liberty except according to procedure prescribed by law. The first question that arises for consideration on the language of Article 21 is: what is the meaning and content of the words/personal liberty' as used in this article? This question incidentally came up for discussion in some of the

judgments in *A. K. Gopalan v. State of Madras* [AIR 1950 SC 27] and the observations made by Patanjali Sastri, J., Mukherjea, J., and S. R. Das, J., seemed to place a narrow interpretation on the words 'personal liberty' so as to confine the protection of Article 21 to freedom of the person against unlawful detention. But there was no definite pronouncement made on this point since the question before the Court was not so much the interpretation of the words 'personal liberty' as the inter-relation between Articles 19 and 21. It was in *Kharak Singh v. State of U. P.* [AIR 1963 SC 1295], that the question as to the proper scope and meaning of the expression 'personal liberty' came up pointedly for consideration for the first time before this Court. The majority of the Judges took the view "that 'personal liberty' is used in the article as a compendious term to include within itself all the varieties of rights which go to make up the 'personal liberties' of man other than those dealt with in the several clauses of Article 19(1). In other words, while Article 19(1) deals with particular species or attributes of that freedom, 'personal liberty' in Article 21 takes in and comprises the residue". The minority judges, however, disagreed with this view taken by the majority and explained their position in the following words: "No doubt the expression 'personal liberty' is a comprehensive one and the right to move freely is an attribute of personal liberty. It is said that the freedom to move freely is carved out of personal liberty and, therefore, the expression 'personal liberty' in Article 21 excludes that attribute. In our view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping. There is no question of one being carved out of another. The fundamental right of life and personal liberty has many attributes and some of them are found in Article 19. If a person's fundamental right under Article 21 is infringed, the State can rely upon a law to sustain the action, but that cannot be a complete answer unless the said law satisfies the test laid down in Article 19(2) so far as the attributes covered by Article 19(1) are concerned." There can be no doubt that in view of the decision of this Court in *R. C. Cooper v. Union of India*, the minority view must be regarded as correct and the majority view must be held to have been overruled. We shall have occasion to analyse and discuss the decision in *R. C. Cooper's* case a little later when we deal with the arguments based on infraction of Articles 19(1)(a) and 19(1)(g), but it is sufficient to state for the present that according to this decision, which was a decision given by the full Court, the fundamental rights conferred by Part III are not distinct and mutually exclusive rights. Each freedom has different dimensions and merely because the limits of interference with one freedom are satisfied, the law is not freed from the necessity to meet the challenge of another guaranteed freedom. The decision in *A. K. Gopalan* case gave rise to the theory that the freedoms under Articles 19, 21, 22 and 31 are exclusive - each article enacting a code relating to the protection of distinct rights, but this theory was overturned in *R. C. Cooper* case where Shah, J., speaking on behalf of the majority pointed out that "Part III of the Constitution weaves a pattern of guarantees on the texture of basic human rights. The guarantees delimit the protection of those rights in their allotted fields they do not attempt to enunciate distinct rights." The conclusion was summarised in these terms: "In our judgment, the assumption in *A. K. Gopalan* case that certain articles in the Constitution exclusively deal with specific matters - cannot be accepted as correct". It was held in *R. C. Cooper* case - and that is clear from the judgment of Shah, J., because Shah, J., in so many terms disapproved of the contrary statement of law contained in the opinions of Kania, C.J., Patanjali Sastri, J., Mahajan, J., Mukherjea, J., and S. R. Das, J., in *A. K. Gopalan* case - that even where a

person is. detained in accordance with the procedure prescribed by law, as mandated by Article 21, the protection conferred by the various clauses of Article 19(1) does not cease to be available to him and the law authorising such detention has to satisfy the test of the applicable freedoms under Article 19, clause (1). This would clearly show that Articles 19(1) and 21 are not mutually exclusive, for, if they were, there would be no question of a law depriving a person of personal liberty within the meaning of Article 21 having to meet the challenge of a fundamental right under Article 19(1). Indeed, in that event, a law of preventive detention which deprives a person of 'personal liberty' in the narrowest sense, namely, freedom from detention and thus falls indisputably within Article 22 would not require to be tested on the touchstone of clause (d) of Article 19(1) and yet it was held by a Bench of seven Judges of this Court in *Shambhu Nath Sarkar v. The State of West Bengal* [AIR 1973 SC 1425] that such a law would have to satisfy the requirement inter alia of Article 19(1), clause (d) and in *Haradhan Saha v. The State of West Bengal* [(1975) 1 SCR 778], which was a decision given by a Bench of five Judges, this Court considered the challenge of clause (d) of Article 19(1) to the constitutional validity of the Maintenance of Internal Security Act, 1971 and held that that Act did not violate the constitutional guarantee embodied in that article. It is indeed difficult to see on what principle we can refuse to give its plain natural meaning to the expression 'personal liberty' as used in Article 21 and read it in a narrow and restricted sense so as to exclude those attributes of personal liberty which are specifically dealt with in Article 19. We do not think that this would be a correct way of interpreting the provisions of the Constitution conferring fundamental rights. The attempt of the Court should be to expand the reach and ambit of the fundamental rights rather than attenuate their meaning and content by a process of judicial construction. The wavelength for comprehending the scope and ambit of the fundamental rights has been set by this Court in *R.C. Cooper* case and our approach in the interpretation of the fundamental rights must now be in tune with this wave-length. We may point out even at the cost of repetition that this Court has said in so many terms in *R.C. Cooper* case that each freedom has different dimensions and there may be overlapping between different fundamental rights and therefore it is not a valid argument to say that the expression 'personal liberty' in Article 21 *must* be so interpreted as to avoid overlapping between that article and Article 19(1).

The expression 'personal liberty' in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19. Now, it has been held by this Court in *Satwant Singh* case that 'personal liberty' within the meaning of Article 21 includes within its ambit the right to go abroad and consequently no person can be deprived of this right except according to procedure prescribed by law. Prior to the enactment of the Passports Act, 1967, there was no law regulating the right of a person to go abroad and that was the reason why the order of the Passport Officer refusing to issue passport to the petitioner in *Satwant Singh* case was struck down as invalid. It will be seen at once from the language of Article 21 that the protection it secures is a limited one. It safeguards the right to go abroad against executive interference which is not supported by law; and law here means 'enacted law' or 'state law'. Thus, no person can be deprived of his right to go abroad unless there is a law made by the State prescribing the procedure for so depriving him and the deprivation is effected strictly in accordance with such

procedure. It was for this reason, in order to comply with the requirement of Article 21, that Parliament enacted the Passports Act, 1967 for regulating the right to go abroad. It is clear from the provisions of the Passports Act, 1967 that it lays down the circumstances under which a passport may be issued or refused or cancelled or impounded and also prescribes a procedure for doing so, but the question is whether that is sufficient compliance with Article 21. Is the prescription of some sort of procedure enough or must the procedure comply with any particular requirements? Obviously, the procedure cannot be arbitrary, unfair or unreasonable. This indeed was conceded by the learned Attorney General who with his usual candour frankly stated that it was not possible for him to contend that any procedure howsoever arbitrary, oppressive or unjust may be prescribed by the law. There was some discussion in *A. K. Gopalan* case in regard to the nature of the procedure required to be prescribed under Article 21 and at least three of the learned Judges out of five expressed themselves strongly in favour of the view that the procedure cannot be any arbitrary, fantastic or oppressive procedure. Fazil Ali, J., who was in a minority, went to the farthest limit in saying that the procedure must include the four essentials set out in Prof. Willis' book on *Constitutional Law*, namely, notice, opportunity to be heard, impartial tribunal and ordinary course of procedure. Patanjali Sastri, J., did not go as far as that but he did say that "certain basic principles emerged as the constant factors known to all those procedures and they formed the core of the procedure established by law". Mahajan, J., also observed that Article 21 requires that "there should be some form of proceeding before a person can be condemned either in respect of his life or his liberty" and "it negatives the idea of fantastic, arbitrary and oppressive forms of proceedings". But apart altogether from these observations in *A. K. Gopalan* case, which have great weight, we find that even on principle the concept of reasonableness must be projected in the procedure contemplated by Article 21, having regard to the impact of Article 14 on Article 21.

#### *The inter-relationship between Articles 14, 19 and 21*

6. We may at this stage consider the inter-relation between Article 21 on the one hand and Articles 14 and 19 on the other. We have already pointed out that the view taken by the majority in *A.K. Gopalan* case was that so long as a law of preventive detention satisfies the requirements of Article 22, it would be within the terms of Article 21 and it would not be required to meet the challenge of Article 19. This view proceeded on the assumption that "certain articles in the constitution exclusively deal with specific matters" and where the requirements of an article dealing with the particular matter in question are satisfied and there is no infringement of the fundamental right guaranteed by that article, no recourse can be had to a fundamental right conferred by another article. This doctrine of exclusivity was seriously questioned in *R.C. Cooper* case and it was over-ruled by a majority of the full Court, only Ray, J., as he then was, dissenting. The majority judges held that though a law of preventive detention may pass the test of Article 22, it has yet to satisfy the requirements of other fundamental rights such as Article 19. The ratio of the majority judgment in *R.C. Cooper* case was explained in clear and categorical terms by Shelat, J., speaking on behalf of seven judges of this Court in *Shambhu Nath Sarkar v. The State of West Bengal*. The learned Judge there said:

In *Gopalan* case the majority court had held that Article 22 was a self-contained Code and therefore a law of preventive detention did not have to satisfy the requirements of Articles 19, 14 and 21. The view of Fazil Ali, J., on the other hand, was that preventive detention was a direct breach of the right under Article 19(1)(d) and that a law providing for preventive detention had to be subject to such judicial review as is obtained under clause (5) of that article. In *R.C. Cooper v. Union of India* the aforesaid premise of the majority in *Gopalan* case was disapproved and therefore it no longer holds the field. Though *Cooper* case dealt with the inter-relationship of Article 19 and Article 31, the basic approach to construing the fundamental rights guaranteed in the different provisions of the Constitution adopted in this case held the major premise of the majority in *Gopalan's* case to be incorrect.

Subsequently, in *Haradhan Saha v. State of West Bengal* also, a Bench of five Judges of this Court, after referring to the decisions in *A.K. Gopalan* case and *R.C. Cooper* case, agreed that the Maintenance of Internal Security Act, 1971, which is a law of preventive detention, has to be tested in regard to its reasonableness with reference to Article 19. That decision accepted and applied the ratio in *R.C. Cooper* case and *Shambhu Nath Sarkar* case and proceeded to consider the challenge of Article 19, to the constitutional validity of the Maintenance of Internal Security Act, 1971 and held that the Act did not violate any of the constitutional guarantees enshrined in Article 19. The law, must, therefore, now be taken to be well settled that Article 21 does not exclude Article 19 and that even if there is a law prescribing a procedure for depriving a person of 'personal liberty' and there is consequently no infringement of the fundamental right conferred by Article 21, such law, in so far as it abridges or takes away any fundamental right under Article 19 would have to meet the challenge of that article. This proposition can no longer be disputed after the decisions in *R. C. Cooper* case, *Shambhu Nath Sarkar* case and *Haradhan Saha* case. Now, if a law depriving a person of 'personal liberty' and prescribing a procedure for that purpose within the meaning of Article 21 has to stand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation, *ex-hypothesi* it must also be liable to be tested with reference to Article 14. This was in fact not disputed by the learned Attorney General and indeed he could not do so in view of the clear and categorical statement made by Mukherjea, J., in *A.K. Gopalan* case that Article 21 "presupposes that the law is a valid and binding law under the provisions of the Constitution having regard to the competence of the legislature and the subject it relates to and does not infringe any of the fundamental rights which the Constitution provides for", including Article 14. This Court also applied Article 14 in two of its earlier decisions, namely, *The State of West Bengal v. Anwar Ali Sarkar* and *Kathi Raning Rawat v. The State of Saurashtra* where there was a special law providing for trial of certain offences by a speedier process which took away some of the safeguards available to an accused under the ordinary procedure in the Criminal Procedure Code. The special law in each of these two cases undoubtedly prescribed a procedure for trial of the specified offences and this procedure could not be condemned as inherently unfair or unjust and there was thus compliance with the requirement of Article 21, but even so, the validity of the special law was tested before the Supreme Court on the touchstone of Article 14 and in one case, namely, *Kathi Raning Rawat* case, the validity was upheld and in the other, namely, *Anwar Ali Sarkar* case, it was struck down. It was held in both these cases that

the procedure established by the special law must not be violative of the equality clause. That procedure must answer the requirement of Article 14.

**The nature and requirement of the procedure under Article 21**

7. Now, the question immediately arises as to what is the requirement of Article 14: what is the content and reach of the great equalising principle enunciated in this article? There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach- No attempt should be made to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits. We must reiterate here what was pointed out by the majority in *E.P. Royappa v. State of Tamil Nadu* [(1974) 2 SCR 348], namely, that “from a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14”. Article 14 strikes at arbitrariness in State action and ensures fairness and equality of-treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be “right and just and fair” and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied.

**How far natural justice is an essential element of ‘procedure established by law**

8. The question immediately arises: does the procedure prescribed by the Passports Act, 1967 for impounding a passport meet the test of this requirement? Is it ‘right or fair or just’? The argument of the petitioner was that it is not, because it provides for impounding of a passport without affording reasonable opportunity to the holder of the passport to be heard in defence. To impound the passport of a person, said the petitioner, is a serious matter, since it prevents him from exercising his constitutional right to go abroad and such a drastic consequence cannot in fairness be visited without observing the principle of *audi alteram partem*. Any procedure which permits impairment of the constitutional right to go abroad without giving reasonable opportunity to show cause cannot but be condemned as unfair and unjust and hence, there is in the present case clear infringement of the requirement of Article 21. Now, it is true that there is no express provision in the Passports Act, 1967 which requires that the *audi alteram partem* rule should be followed before impounding a passport, but that is not conclusive of the question. If the statute makes itself clear on this point, then no more question arises. But even when the statute is silent, the law may in a given case make an implication and apply the principle stated by Byles, J., in *Cooper v. Wandsworth Board of Works* [(1861-73) All ER Rep 1554]:

A long course of decisions, beginning with Dr Bentley’s case and ending with some very recent cases, establish that, although there are no positive works in the

statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature.

The principle of *audi alteram partem*, which mandates that no one shall be condemned unheard, is part of the rules of natural justice. In fact, there are two main principles in which the rules of natural justice are manifested, namely, *nemo judex in causa sua* and *audi alteram partem*. We are not concerned here with the former, since there is no case of bias urged here. The question is only in regard to the right of hearing which involves the *audi alteram partem* rule. Can it be imported in the procedure for impounding a passport?

14. Now, as already pointed out, the doctrine of natural justice consists principally of two rules, namely, *nemo debet esse judex in propria causa*: no one shall be a judge in his own cause, and *audi alteram partem*: no decision shall be given against a party without affording him a reasonable hearing. We are concerned here with the second rule and hence we shall confine ourselves only to a discussion of that rule. The learned Attorney General, appearing on behalf of the Union of India, fairly conceded that the *audi alteram partem* rule is a highly effective tool devised by the courts to enable a statutory authority to arrive at a just decision and it is calculated to act as a healthy check on abuse or misuse of power and hence its reach should not be narrowed and its applicability circumscribed. He rightly did not plead for reconsideration of the historic advances made in the law as a result of the decisions of this Court and did not suggest that the Court should retrace its steps. That would indeed have been a most startling argument coming from the Government of India and for the Court to accede to such an argument would have been an act of utter retrogression. But fortunately no such argument was advanced by the learned Attorney General. What he urged was a very limited contention, namely, that having regard to the nature of the action involved in the impounding of a passport, the *audi alteram partem* rule must be held to be excluded, because if notice were to be given to the holder of the passport and reasonable opportunity afforded to him to show cause why his passport should not be impounded, he might immediately, on the strength of the passport, make good his exit from the country and the object of impounding the passport would be frustrated. The argument was that if the *audi alteram partem* rule were applied, its effect would be to stultify the power of impounding the passport and it would defeat and paralyse the administration of the law and hence the *audi alteram partem* rule cannot in fairness be applied while exercising the power to impound a passport. This argument was sought to be supported by reference to the statement of the law in S.A. de Smith's *Judicial Review of Administrative Action*, 2<sup>nd</sup> ed, where the learned author says at page 174 that "in administrative law a prima facie right to prior notice and opportunity to be heard may be held to be excluded by implication..... where an obligation to give notice and opportunity to be heard would obstruct the taking of prompt action, especially action of a preventive or remedial nature". Now, it is true that since the right to prior notice and opportunity of hearing arises only by implication from the duty to act fairly, or to use the words of Lord Morris of Borth-y-Gest, from 'fair-play in action', it may equally be excluded where, having regard to the nature of the action to be taken, its object and purpose and the scheme of the relevant statutory provision, fairness in action does not demand its implication and even warrants its exclusion. There are certain well recognised exceptions--to the *audi alteram partem* rule established by judicial decisions and they are summarised by S.A. de



Smith in *Judicial Review of Administrative Action*, 2<sup>nd</sup> ed. pages 168 to 179. If we analyse these exceptions a little closely, it will be apparent that they do not in any way militate against the principle which requires fair-play in administrative action. The word 'exception' is really a misnomer because in these exclusionary cases, the *audi alteram partem* rule is held inapplicable not by way of an exception to "fair-play in action", but because nothing unfair can be inferred by not affording an opportunity to present or meet a case. The *audi alteram partem* rule is intended to inject justice into the law and it cannot be applied to defeat the ends of justice, or to make the law 'lifeless, absurd, stultifying, self-defeating or plainly contrary to the common sense of the situation'. Since the life of the law is not logic but experience and every legal proposition must, in the ultimate analysis, be tested on the touchstone of pragmatic realism, the *audi alteram partem* rule would, by the experiential test, be excluded, if importing the right to be heard has the effect of paralysing the administrative process or the need for promptitude or the urgency of the situation so demands. But at the same time it must be remembered that this is a rule of vital importance in the field of administrative law and it must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands. It is a wholesome rule designed to secure the rule of law and the Court should not be too ready to eschew it in its application to a given case. True it is that in questions of this kind a fanatical or doctrinaire approach should be avoided, but that does not mean that merely because the traditional methodology of a formalised hearing may have the effect of stultifying the exercise of the statutory power, the *audi alteram partem* should be wholly excluded. The Court must make every effort to salvage this cardinal rule to the maximum extent permissible in a given case. It must not be forgotten that "natural justice is pragmatically flexible and is amenable to capsulation under the compulsive pressure of circumstances". The *audi alteram partem* rule is not cast in a rigid mould and judicial decisions establish that it may suffer situational modifications. The core of it must, however, remain, namely, that the person affected must have a reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise. That is why Tucker, L.J., emphasised in *Russel v. Duke of Norfolk* (1949) 1 All ER 109 that "whatever standard of natural justice is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case". What opportunity may be regarded as reasonable would necessarily depend on the practical necessities of the situation. It may be a sophisticated full-fledged hearing or it may be a hearing which is very brief and minimal: it may be a hearing prior to the decision or it may even be a post-decisional remedial hearing.

The *audi alteram partem* rule is sufficiently flexible to permit modifications and variations to suit the exigencies of myriad kinds of situations which may arise. This circumstantial flexibility of the *audi alteram partem* rule was emphasised by Lord Reid in *Wiseman v. Borneman* when he said that he would be "sorry to see this fundamental general principle degenerate into a series of hard and fast rules" and Lord Hailsham, L.C., also observed in *Pearlberg v. Varty* [(1971) 1 WLR 728] that the courts "have taken in increasingly sophisticated view of what is required in individual cases". It would not, therefore, be right to conclude that the *audi alteram partem* rule is excluded merely because the power to impound a passport might be frustrated, if prior notice and hearing were to be given to the person concerned before impounding his passport. The Passport Authority may proceed to impound the passport without giving any prior opportunity to the person concerned

to be heard, but as soon as the order impounding the passport is made, an opportunity of hearing, remedial in aim, should be given to him so that he may present his case and controvert that of the Passport Authority and point out why his passport should not be impounded and the order impounding it recalled. This should not only be possible but also quite appropriate, because the reasons for impounding the passport are required to be supplied by the Passport Authority after the making of the order and the person affected would, therefore, be in a position to make a representation setting forth his case and plead for setting aside the action impounding his passport. A fair opportunity of being heard following immediately upon the order impounding the passport would satisfy the mandate of natural justice and a provision requiring giving of such opportunity to the person concerned can and should be read by implication in the Passports Act, 1967. If such a provision were held to be incorporated in the Passports Act, 1967 by necessary implication, as we hold it must be, the procedure prescribed by the Act for impounding a passport would be right, fair and just and it would not suffer from the vice of arbitrariness or unreasonableness. We must, therefore, hold that the procedure 'established' by the Passports Act, 1967 for impounding a passport is in conformity with the requirement of Article 21 and does not fall foul of that article.

15. But the question then immediately arises whether the Central Government has complied with this procedure in impounding the passport of the petitioner. Now, it is obvious and indeed this could not be controverted, that the Central Government not only did not give an opportunity of hearing to the petitioner after making the impugned order impounding her passport but even declined to furnish to the petitioner the reasons for impounding her passport despite request made by her. We have already pointed out that the Central Government was wholly unjustified in withholding the reasons for impounding the passport from the petitioner and this was not only in breach of the statutory provision, but it also amounted to denial of opportunity of hearing to the petitioner. The order impounding the passport of the petitioner was, therefore, clearly in violation of the rule of natural justice embodied in the maxim *audi alteram partem* and it was not in conformity with the procedure prescribed by the Passports Act, 1967. Realising that this was a fatal defect which would void the order impounding the passport, the learned Attorney General made a statement on behalf of the Government of India to the following effect:

1. The Government is agreeable to considering any representation that may be made by the petitioner in respect of the impounding of her passport and giving her an opportunity in the matter. The opportunity will be given within two weeks of the receipt of the representation. It is clarified that in the present case the grounds for impounding the passport are those mentioned in the affidavit in reply dated August 18., 1977 of Shri Ghosh except those mentioned in para 2(xi).

2. The representation of the petitioner will be dealt with expeditiously in accordance with law.

This statement removes the vice from the order impounding the passport and it can no longer be assailed on the ground that it does not comply with the *audi alteram partem* rule or is not in accord with the procedure prescribed by the Passports Act, 1967.

**Is Section 10(3)(c) violative of Article 14?**

16. That takes us to the next question whether Section 10(3)(c) is violative of any of the fundamental rights guaranteed under Part III of the Constitution. Only two articles of the Constitution are relied upon for this purpose and they are Articles 14 and 19(1)(a) and (g). We will first dispose of the challenge based on Article 14 as it lies in a very narrow compass. The argument under this head of challenge was that Section 10(3)(c) confers unguided and unfettered power on the Passport Authority to impound a passport and hence it is violative of the equality clause contained in Article 14. It was conceded that under Section 10(3)(c) the power to impound a passport can be exercised only upon one or more of the stated grounds, but the complaint was that the ground of “interests of the general public” was too vague and indefinite to afford any real guidance to the Passport Authority and the Passport Authority could, without in any way violating the terms of the section, impound the passport of one and not of another, at its discretion. Moreover, it was said that when the order impounding a passport is made by the Central Government, there is no appeal or revision provided by the statute and the decision of the Central Government that it is in public interest to impound a passport is final and conclusive. The discretion vested in the Passport Authority, and particularly in the Central Government, is thus unfettered and unrestricted and this is plainly in violation of Article 14. Now, the law is well settled that when a statute vests unguided and unrestricted power in an authority to affect the rights of a person without laying down any policy or principle which is to guide the authority in exercise of this power, it would be affected by the vice of discrimination since it would leave it open to the authority to discriminate between persons and things similarly situated. But here it is difficult to say that the discretion conferred on the Passport Authority is arbitrary or unfettered. There are four grounds set out in Section 10(3)(c) which would justify the making of an order impounding a passport. We are concerned only with the last ground denoted by the words “in the interests of the general public”, for that is the ground which is attacked as vague and indefinite. We fail to see how this ground can, by any stretch of argument, be characterised as vague or undefined. The words “in the interests of the general public” have a clearly well defined meaning and the courts have often been called upon to decide whether a particular action is “in the interests of the general public” or in “public interest” and no difficulty has been experienced by the courts in carrying out this exercise. These words are in fact borrowed *ipsissima verba* from Article 19(5) and we think it would be nothing short of heresy to accuse the constitution-makers of vague and loose thinking.

The legislature performed a scissors and paste operation in lifting these words out of Article 19(5) and introducing them in Section 10(3)(c) and if these words are not vague and indefinite in Article 19(5), it is difficult to see how they can be condemned to be such when they occur in Section 10(3)(c). How can Section 10(3)(c) be said to incur any constitutional infirmity on account of these words when they are no wider than the constitutional provision in Article 19(5) and adhere loyally to the verbal formula adopted in the Constitution? We are clearly of the view that sufficient guidelines are provided by the words “in the interests of the general public” and the power conferred on the Passport Authority to impound a passport cannot be said to be unguided or unfettered. Moreover, it must be remembered that the exercise of this power is not made dependent on the subjective opinion of the Passport

Authority as regards the necessity of exercising it on one or more of the grounds stated in the section, but the Passport Authority is required to record in writing a brief statement of reasons for impounding the passport and, save in certain exceptional circumstances, to supply a copy of such statement to the person affected, so that the person concerned can challenge the decision of the Passport Authority in appeal and the appellate authority can examine whether the reasons given by the Passport Authority are correct, and if so, whether they justify the making of the order impounding the passport. It is true that when the order impounding a passport is made by the Central Government, there is no appeal against it, but it must be remembered that in such a case the power is exercised by the Central Government itself and it can safely be assumed that the Central Government will exercise the power in a reasonable and responsible manner. When power is vested in a high authority like the Central Government, abuse of power cannot be lightly assumed. And in any event, if there is abuse of power, the arms of the Court are long enough to reach it and to strike it down. The power conferred on the Passport Authority to impound a passport under Section 10(3)(c) cannot, therefore, be regarded as discriminatory and it does not fall foul of Article 14. But every exercise of such power has to be tested in order to determine whether it is arbitrary or within the guidelines provided in Section 10(3)(c).

**Conflicting approaches for locating the fundamental right violated: Direct and inevitable effect test.**

17. We think it would be proper at this stage to consider the approach to be adopted by the Court in adjudging the constitutionality of a statute on the touchstone of fundamental rights. What is the test or yardstick to be applied for determining whether a statute infringes a particular fundamental right? The law on this point has undergone radical change since the days of *A.K. Gopalan* case. That was the earliest decision of this Court on the subject, following almost immediately upon the commencement of the Constitution. The argument which arose for consideration in this case was that the preventive detention order results in the detention of the applicant in a cell and hence it contravenes the fundamental rights guaranteed under clauses (a),(b),(c),(d),(e) and (g) of Article 19(1). This argument was negated by Kania, C.J., who pointed out that: "The true approach is only to consider the directness of the legislation and not what will be the result of the detention, otherwise valid, on the mode of the detinue's life.....Any other construction put on the Article... will be unreasonable." These observations were quoted with approval by Patanjali Sastri, J., speaking on behalf of the majority in *Ram Singh v. State of Delhi* [AIR 1951 SC 270]. There, the detention of the petitioner was ordered with a view to preventing him from making any speeches prejudicial to the maintenance of public order and the argument was that the order of detention was invalid as it infringed the right of free speech and expression guaranteed under Article 19(1)(a). The Court took the view that the direct object of the order was preventive detention and not the infringement of the right of freedom of speech and expression, which was merely consequential upon the detention of the detinue and upheld the validity of the order. The decision in *A.K. Gopalan* case, followed by *Ram Singh* case, gave rise to the theory that the object and form of State action determine the extent of protection which may be claimed by an individual and the validity of such action has to be judged by considering whether it is "directly in respect of the subject covered by any particular article of the Constitution or

touches the said article only incidentally or indirectly”. The test to be applied for determining the constitutional validity of State action with reference to fundamental rights is: what is the object of the authority in taking the action: what is the subject-matter of the action and to which fundamental right does it relate? This theory that “the extent of protection of important guarantees, such as the liberty of person and right to property, depend upon the form and object of the State action and not upon its direct operation upon the individual’s freedom” held sway for a considerable time and was applied in *Naresh Shridhar Mirajkar v. State of Maharashtra* [AIR 1967 SC 1] to sustain an order made by the High Court in a suit for defamation prohibiting the publication of the evidence of a witness.

This Court, after referring to the observations of Kania, C.J., in *A.K. Gopalan* case and noting that they were approved by the Full Court in *Ram Singh* case, pointed out that the *object* of the impugned order was to give protection to the witness in order to obtain true evidence in the case with a view to do justice between the parties and if incidentally it overrated to prevent the petitioner from reporting the proceedings of the Court in the press, it could not be said to contravene Article 19(1)(a).

19. It was only *R.C. Cooper* case that the doctrine that the object and form of the State action alone determine the extent of protection that may be claimed by an individual and that the effect of the State action on the fundamental right of the individual is irrelevant, was finally rejected. It may be pointed out that this doctrine is in substance and reality nothing else than the test of pith and substance which is applied for determining the constitutionality of legislation where there is conflict of legislative powers conferred on Federal and State Legislatures with reference to legislative Lists. The question which is asked in such cases is: what is the pith and substance of the legislations; if it “is within the express powers, then it is not invalidated if incidentally it effects matters which are outside the authorised field”. Here also, on the application of this doctrine, the question that is required to be considered is: what is the pith and substance of the action of the State, or in other words, what is its true nature and character; if it is in respect of the subject covered by any particular fundamental right, its validity must be judged only by reference to that fundamental right and it is immaterial that it incidentally affects another fundamental right. Mathew, J., in his dissenting judgment in *Bennett Coleman & Co. v. Union of India* recognised the likeness of this doctrine to the pith and substance test and pointed out that “the pith and substance test, although not strictly appropriate, might serve a useful purpose” in determining whether the State action infringes a particular fundamental right. But in *R.C. Cooper* case, which was a decision given by the full Court consisting of eleven judges, this doctrine was thrown overboard and it was pointed out by Shah, J., speaking on behalf of the majority:

(I)t is not the object of the authority making the law impairing the right of a citizen, nor the form of action that determines the protection he can claim; it is the effect of the law and of the action upon the right which attract the jurisdiction of the Court to grant relief. If this be the true view, and we think it is, in determining the impact of State action upon constitutional guarantees which are fundamental, it follows that the extent of protection against impairment of a fundamental right is determined not by the object of the Legislature nor by the form of the action, but by its direct operation upon the individual’s rights.

We are of the view that the theory that the object and form of the State action determine the extent of protection which the aggrieved party may claim is not consistent with the constitutional scheme....

In our judgment, the assumption in *A. K. Gopalan* case that certain articles in the Constitution exclusively deal with specific matters and in determining whether there is infringement of the individual's guaranteed rights, the object and the form of the State action alone need be considered, and effect of the laws on fundamental rights of the individuals in general will be ignored cannot be accepted as correct.

The decision in *R.C. Cooper* case thus overturned the view taken in *A.K. Gopalan* case and, as pointed out by Ray, J., speaking on behalf of the majority in *Bennett Coleman* case, it laid down two inter-related propositions, namely:

First, it is not the object of the authority making the law impairing the right of the citizen nor the form of action that determines the invasion of the right. Secondly, it is the effect of the law and the action upon the right which attracts the jurisdiction of the Court to grant relief. The direct operation of the Act upon the rights forms the real test.

The decision in *Bennett Coleman* case, followed upon *R.C. Cooper* case and it is an important and significant decision, since it elaborated and applied the thesis laid down in *R. C. Cooper* case. The State action which was impugned in *Bennett Coleman* case was newsprint policy which inter alia imposed a maximum limit of ten pages for every newspaper but without permitting the newspaper to increase the number of pages by reducing circulation to meet its requirement even within the admissible quota. These restrictions were said to be violative of the right of free speech and expression guaranteed under Article 19(1)(a) since their direct and inevitable consequence was to limit the number of pages which could be published by a newspaper to ten. The argument of the Government was that the object of the newsprint policy was rationing and equitable distribution of imported newsprint which was scarce commodity and not abridgement of freedom of speech and expression. The subject-matter of the import policy was "rationing of imported commodity and equitable distribution of newsprint" and the newsprint policy did not directly and immediately deal with the right mentioned in Article 19(1)(a) and hence there was no violation of that article. This argument of the Government was negated by the majority. The majority took the view that it was not the object of the newsprint policy or its subject-matter which was determinative but its direct consequence or effect upon the rights of the newspapers and since "the effect and consequence of the impugned policy upon the newspapers" was direct control and restriction of growth and circulation of newspapers, the newsprint policy infringed freedom of speech and expression and was hence violative of Article 19(1)(a). The pith and substance theory was thus negated in the clearest term and the test applied was as to what is the direct and inevitable consequence or effect of the impugned State action on the fundamental right of the petitioner. It is possible that in a given case the pith and substance of the State action may deal with a particular fundamental right but its direct and inevitable effect may be on another fundamental right and in that case, the State action would have to meet the challenge of the latter fundamental right. The pith and substance doctrine looks only at the object and subject-matter of the State action, but in testing the validity of the State action with reference to

fundamental rights, what the Court must consider is the direct and inevitable consequence of the State action. Otherwise, the protection of the fundamental rights would be subtly but surely eroded.

20. It may be recalled that the test formulated in *R.C. Cooper* case merely refers to 'direct operation' or 'direct consequence and effect' of the State action on the fundamental right of the petitioner and does not use the word 'inevitable' in this connection. But there can be no doubt, on a reading of the relevant observations of Shah, J., that such was the test really intended to be laid down by the Court in that case. If the test were merely of direct or indirect effect, it would be an open-ended concept and in the absence of operational criteria for judging 'directness', it would give the Court an unquantifiable discretion to decide whether in a given case a consequence or effect is direct or not. Some other concept-vehicle would be needed to quantify the extent of directness or indirectness in order to apply the test. And that is supplied by the criterion of 'inevitable' consequence or effect adumbrated in the *Express Newspapers*' case. This criterion helps to quantify the extent of directness necessary to constitute infringement of a fundamental right. Now, if the effect of State action on fundamental right is direct and inevitable, then *a fortiori* it must be presumed to have been intended by the authority taking the action and hence this doctrine of direct and inevitable effect has been described by some jurists as the doctrine of intended and real effect. This is the test which must be applied for the purpose of determining whether Section 10(3)(c) or the impugned order made under it is violative of Article 19(1)(a) or (g).

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**D.K. Basu v. State of W.B.**

(1997) 1 SCC 416

**DR A.S. ANAND, J.** - The Executive Chairman, Legal Aid Services, West Bengal, a non-political organisation registered under the Societies Registration Act, on 26-8-1986 addressed a letter to the Chief Justice of India drawing his attention to certain news items published in *The Telegraph* dated 20-7-1986, 21-7-1986 and 22-7-1986 and in *the Statesman* and *Indian Express* dated 17-8-1986 regarding deaths in police lock-ups and custody. The Executive Chairman after reproducing the news items submitted that it was imperative to examine the issue in depth and to develop "custody jurisprudence" and formulate modalities for awarding compensation to the victim and/or family members of the victim for atrocities and death caused in police custody and to provide for accountability of the officers concerned. It was also stated in the letter that efforts are often made to hush up the matter of lock-up deaths and thus the crime goes unpunished and "flourishes". It was requested that the letter along with the news items be treated as a writ petition under "public interest litigation" category.

2. Considering the importance of the issue raised in the letter and being concerned by frequent complaints regarding custodial violence and deaths in police lock-up, the letter was treated as a writ petition and notice was issued on 9-2-1987 to the respondents.

4. While the writ petition was under consideration a letter addressed by Shri Ashok Kumar Johri on 29-7-1987 to the Hon'ble Chief Justice of India drawing the attention of this Court to the death of one Mahesh Bihari of Pilkhana, Aligarh in police custody was received. That letter was also treated as a writ petition and was directed to be listed along with the writ petition filed by Shri D.K. Basu. On 14-8-1987 this Court made the following order:

"In almost every State there are allegations and these allegations are now increasing in frequency of deaths in custody described generally by newspapers as lock-up deaths. At present there does not appear to be any machinery to effectively deal with such allegations. Since this is an all- India question concerning all States, it is desirable to issue notices to all the State Governments to find out whether they desire to say anything in the matter. Let notices issue to all the State Governments. Let notice also issue to the Law Commission of India with a request that suitable suggestions may be made in the matter. Notice be made returnable in two months from today."

9. The importance of affirmed rights of every human being need no emphasis and, therefore, to deter breaches thereof becomes a sacred duty of the Court, as the custodian and protector of the fundamental and the basic human rights of the citizens. Custodial violence, including torture and death in the lock-ups, strikes a blow at the rule of law, which demands that the powers of the executive should not only be derived from law but also that the same should be limited by law. Custodial violence is a matter of concern. It is aggravated by the fact that it is committed by persons who are supposed to be the protectors of the citizens. It is committed under the shield of uniform and authority in the four walls of a police station or lock-up, the victim being totally helpless. The protection of an individual from torture and abuse by the police and other law-enforcing officers is a matter of deep concern in a free



society. These petitions raise important issues concerning police powers, including whether monetary compensation should be awarded for established infringement of the Fundamental Rights guaranteed by Articles 21 and 22 of the Constitution of India. The issues are fundamental.

10. "Torture" has not been defined in the Constitution or in other penal laws. "Torture" of a human being by another human being is essentially an instrument to impose the will of the "strong" over the "weak" by suffering. The word *torture* today has become synonymous with the darker side of human civilisation.

"Torture is a wound in the soul so painful that sometimes you can almost touch it, but it is also so intangible that there is no way to heal it. Torture is anguish squeezing in your chest, cold as ice and heavy as a stone, paralyzing as sleep and dark as the abyss. Torture is despair and fear and rage and hate. It is a desire to kill and destroy including yourself." - Adriana P. Bartow

11. No violation of any one of the human rights has been the subject of so many Conventions and Declarations as "torture"- all aiming at total banning of it in all forms, but in spite of the commitments made to eliminate torture, the fact remains that torture is more widespread now than ever before. "Custodial torture" is a naked violation of human dignity and degradation which destroys, to a very large extent, the individual personality. It is a calculated assault on human dignity and whenever human dignity is wounded, civilisation takes a step backward - flag of humanity must on each such occasion fly half-mast.

12. In all custodial crimes what is of real concern is not only infliction of body pain but the mental agony which a person undergoes within the four walls of police station or lock-up. Whether it is physical assault or rape in police custody, the extent of trauma, a person experiences is beyond the purview of law.

13. "Custodial violence" and abuse of police power is not only peculiar to this country, but it is widespread. It has been the concern of international community because the problem is universal and the challenge is almost global. The Universal Declaration of Human Rights in 1948, which marked the emergence of a worldwide trend of protection and guarantee of certain basic human rights, stipulates in Article 5 that: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Despite the pious declaration the crime continues unabated, though every civilised nation shows its concern and takes steps for its eradication.

17. Fundamental Rights occupy a place of pride in the Indian Constitution. Article 21 provides "no person shall be deprived of his life or personal liberty except according to procedure established by law". Personal liberty, thus, is a sacred and cherished right under the Constitution. The expression "life or personal liberty" has been held to include the right to live with human dignity and thus it would also include within itself a guarantee against torture and assault by the State or its functionaries. Article 22 guarantees protection against arrest and detention in certain cases and declares that no person who is arrested shall be detained in custody without being informed of the grounds of such arrest and he shall not be denied the right to consult and defend himself by a legal practitioner of his choice. Clause (2) of Article 22 directs that the person arrested and detained in custody shall be produced before the

nearest Magistrate within a period of 24 hours of such arrest, excluding the time necessary for the journey from the place of arrest to the Court of the Magistrate. Article 20(3) of the Constitution lays down that a person accused of an offence shall not be compelled to be a witness against himself. These are some of the constitutional safeguards provided to a person with a view to protect his personal liberty against any unjustified assault by the State. In tune with the constitutional guarantee a number of statutory provisions also seek to protect personal liberty, dignity and basic human rights of the citizens. Chapter V of the Criminal Procedure Code, 1973 deals with the powers of arrest of a person and the safeguards which are required to be followed by the police to protect the interest of the arrested person. Section 41 CrPC confers powers on any police officer to arrest a person under the circumstances specified therein without any order or a warrant of arrest from a Magistrate. Section 46 provides the method and manner of arrest. Under this section no formality is necessary while arresting a person. Under Section 49, the police is not permitted to use more restraint than is necessary to prevent the escape of the person. Section 50 enjoins every police officer arresting any person without warrant to communicate to him the full particulars of the offence for which he is arrested and the grounds for such arrest. The police officer is further enjoined to inform the person arrested that he is entitled to be released on bail and he may arrange for sureties in the event of his arrest for a non-bailable offence. Section 56 contains a mandatory provision requiring the police officer making an arrest without warrant to produce the arrested person before a Magistrate without unnecessary delay and Section 57 echoes clause (2) of Article 22 of the Constitution of India. There are some other provisions also like Sections 53, 54 and 167 which are aimed at affording procedural safeguards to a person arrested by the police. Whenever a person dies in custody of the police, Section 176 requires the Magistrate to hold an enquiry into the cause of death.

18. However, in spite of the constitutional and statutory provisions aimed at safeguarding the personal liberty and life of a citizen, growing incidence of torture and deaths in police custody has been a disturbing factor. Experience shows that worst violations of human rights take place during the course of investigation, when the police with a view to secure evidence or confession often resorts to third-degree methods including torture and adopts techniques of screening arrest by either not recording the arrest or describing the deprivation of liberty merely as a prolonged interrogation. A reading of the morning newspapers almost everyday carrying reports of dehumanising torture, assault, rape and death in custody of police or other governmental agencies is indeed depressing. The increasing incidence of torture and death in custody has assumed such alarming proportions that it is affecting the credibility of the rule of law and the administration of criminal justice system. The community rightly feels perturbed. Society's cry for justice becomes louder.

19. The Third Report of the National Police Commission in India expressed its deep concern with custodial violence and lock-up deaths. It appreciated the demoralising effect which custodial torture was creating on the society as a whole. It made some very useful suggestions. It suggested:

“An arrest during the investigation of a cognizable case may be considered justified in one or other of the following circumstances:

(i) The case involves a grave offence like murder, dacoity, robbery, rape etc., and it is necessary to arrest the accused and bring his movements under restraint to infuse confidence among the terror-stricken victims.

(ii) The accused is likely to abscond and evade the processes of law.

(iii) The accused is given to violent behaviour and is likely to commit further offences unless his movements are brought under restraint.

(iv) The accused is a habitual offender and unless kept in custody he is likely to commit similar offences again. It would be desirable to insist through departmental instructions that a police officer making an arrest should also record in the case diary the reasons for making the arrest, thereby clarifying his conformity to the specified guidelines. ...”

The recommendations of the Police Commission reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. These recommendations, however, have not acquired any statutory status so far.

20. This Court in *Joginder Kumar v. State of U.P.* [(1994) 4 SCC 260] (to which one of us, namely, Anand, J. was a party) considered the dynamics of misuse of police power of arrest and opined:

“No arrest can be made because it is lawful for the police officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. ... No arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person’s complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter.”

21. *Joginder Kumar* case involved arrest of a practising lawyer who had been called to the police station in connection with a case under inquiry on 7-1-1994. On not receiving any satisfactory account of his whereabouts, the family members of the detained lawyer preferred a petition in the nature of habeas corpus before this Court on 11-1-1994 and in compliance with the notice, the lawyer was produced on 14-1-1994 before this Court. The police version was that during 7-1-1994 and 14-1-1994 the lawyer was not in detention at all but was only assisting the police to detect some cases. The detenu asserted otherwise. This Court was not satisfied with the police version. It is noticed that though as on that day the relief in habeas corpus petition could not be granted but the questions whether there had been any need to *detain* the lawyer for 5 days and if at all he was not in detention then why was this Court not informed, were important questions which required an answer. Besides, if there was detention for 5 days, for what reason was he detained. The Court, therefore, directed the District Judge, Ghaziabad to make a detailed enquiry and submit his report within 4 weeks. The Court voiced its concern regarding complaints of violations of human rights during and after arrest. It said:

“The horizon of human rights is expanding. At the same time, the crime rate is also increasing. Of late, this Court has been receiving complaints about violations of human rights because of indiscriminate arrests. How are we to strike a balance between the two?”

A realistic approach should be made in this direction. The law of arrest is one of balancing individual rights, liberties and privileges, on the one hand, and individual duties, obligations and responsibilities on the other; of weighing and balancing the rights, liberties and privileges of the single individual and those of individuals collectively; of simply deciding what is wanted and where to put the weight and the emphasis; of deciding which comes first - the criminal or society, the law violator or the law abider ....”

22. Custodial death is perhaps one of the worst crimes in a civilised society governed by the rule of law. The rights inherent in Articles 21 and 22(1) of the Constitution require to be jealously and scrupulously protected. We cannot wish away the problem. Any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of Article 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise. If the functionaries of the Government become law-breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchism. No civilised nation can permit that to happen. Does a citizen *shed off* his fundamental right to life, the moment a policeman arrests him? Can the right to life of a citizen be put in *abeyance* on his arrest? These questions touch the spinal cord of human rights’ jurisprudence. The answer, indeed, has to be an emphatic “No”. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, undertrials, detenus and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by law.

23. In *Nilabati Behera v. State of Orissa* [(1993) 2 SCC 746] (to which Anand, J. was a party) this Court pointed out that prisoners and detenus are not denuded of their fundamental rights under Article 21 and it is only such restrictions as are permitted by law, which can be imposed on the enjoyment of the fundamental rights of the arrestees and detenus. It was observed:

“It is axiomatic that convicts, prisoners or undertrials are not denuded of their fundamental rights under Article 21 and it is only such restrictions, as are permitted by law, which can be imposed on the enjoyment of the fundamental right by such persons. It is an obligation of the State to ensure that there is no infringement of the indefeasible rights of a citizen to life, except in accordance with law, while the citizen is in its custody. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, undertrials or other prisoners in custody, except according to procedure established by law. There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life. His liberty is in the very nature of things circumscribed by the very fact of his confinement and therefore his interest in the limited liberty left to him is rather precious. The duty of care on the part of the State is strict and admits of no exceptions. The wrongdoer is accountable and the State is responsible if the person in custody of the police is deprived of his life except according to the procedure established by law.”

24. Instances have come to our notice where the police has arrested a person without warrant in connection with the investigation of an offence, without recording the arrest, and

the arrested person has been subjected to torture to extract information from him for the purpose of further investigation or for recovery of case property or for extracting confession etc. The torture and injury caused on the body of the arrestee has sometimes resulted in his death. Death in custody is not generally shown in the records of the lock-up and every effort is made by the police to dispose of the body or to make out a case that the arrested person died after he was released from custody. Any complaint against such torture or death is generally not given any attention by the police officers because of ties of brotherhood. No first information report at the instance of the victim or his kith and kin is generally entertained and even the higher police officers turn a blind eye to such complaints. Even where a formal prosecution is launched by the victim or his kith and kin, no direct evidence is available to substantiate the charge of torture or causing hurt resulting in death, as the police lock-up where generally torture or injury is caused is away from the public gaze and the witnesses are either policemen or co-prisoners who are highly reluctant to appear as prosecution witnesses due to fear retaliation by the superior officers of the police. It is often seen that when a complaint is made against torture, death or injury, in police custody, it is difficult to secure evidence against the policemen responsible for resorting to third-degree methods since they are in charge of police station records which they do not find difficult to manipulate. Consequently, prosecution against the delinquent officers generally results in acquittal. *State of M.P. v. Shyamsunder Trivedi* [(1995) 4 SCC 262], is an apt case illustrative of the observations made by us above. In that case, Nathu Banjara was tortured at police station, Rampura during the interrogation. As a result of extensive injuries caused to him he died in police custody at the police station. The defence set up by the respondent police officials at the trial was that Nathu had been released from police custody at about 10.30 p.m. after interrogation on 13-10-1981 itself vide entry Ex. P/22-A in the Roznamcha and that at about 7.00 a.m. on 14-10-1981, a death report Ex. P/9 was recorded at the police station, Rampura, at the instance of Ramesh Respondent 6, to the effect that he had found "one unknown person" near a tree by the side of the tank wriggling with pain in his chest and that as soon as Respondent 6 reached near him, the said person died. The further case set up by SI Trivedi, Respondent 1, in charge of the police station was that after making a Roznamcha entry at 7.00 a.m. about his departure from the police station he (Respondent 1-Shyamsunder Trivedi) and Constable Rajaram respondent proceeded to the spot where the dead body was stated to be lying for conducting investigation under Section 174 CrPC. He summoned Ramesh Chandra and Goverdhan - respondents to the spot and in their presence prepared a panchnama Ex. P/27 of the dead body recording the opinion therein to the effect that no definite cause of death was known.

25. The First Additional Sessions Judge acquitted all the respondents of all the charges holding that there was *no direct evidence* to connect the respondents with the crime. The State of Madhya Pradesh went up in appeal against the order of acquittal and the High Court maintained the acquittal of Respondents 2 to 7 but set aside the acquittal of Respondent 1, Shyamsunder Trivedi for offences under Sections 218, 201 and 342 IPC. His acquittal for the offences under Sections 302/149 and 147 IPC was, however, maintained. The State filed an appeal in this Court by special leave. This Court found that the following circumstances had been established by the prosecution beyond every reasonable doubt and coupled with the

direct evidence of PWs 1, 3, 4, 8 and 18 those circumstances were consistent only with the hypothesis of guilt of the respondents and were inconsistent with their innocence:

“(i) that the deceased had been brought alive to the police station and was last seen alive there on 13-10-1981; (ii) that the dead body of the deceased was taken out of the police station on 14-10-1981 at about 2 p.m. for being removed to the hospital; ... (iv) that SI Trivedi, Respondent 1, Ram Naresh Shukla, Respondent 3, Rajaram, Respondent 4 and Ganniuddin, Respondent 5 were present at the police station and had all joined hands to dispose of the dead body of Nathu Banjara; (v) that SI Trivedi, Respondent 1 created false evidence and fabricated false clues in the shape of documentary evidence with a view to screen the offence and for that matter, the offender; (vi) SI Trivedi - respondent in connivance with some of his subordinates, respondents herein had taken steps to cremate the dead body in hot haste describing the deceased as a ‘lavaris’ though the identity of the deceased, when they had interrogated for a sufficient long time was well known to them.”

and opined that:

“The observations of the High Court that the presence and participation of these respondents in the crime is doubtful are not borne out from the evidence on the record and appear to be an unrealistic over simplification of the tell-tale circumstances established by the prosecution.”

One of us (namely, Anand, J.) speaking for the Court went on to observe:

“The trial court and the High Court, if we may say so with respect, exhibited a total lack of sensitivity and a “could not care less” attitude in appreciating the evidence on the record and thereby condoning the barbarous third-degree methods which are still being used at some police stations, despite being illegal. The *exaggerated* adherence to and insistence upon the establishment of *proof beyond every reasonable doubt*, by the prosecution, ignoring the ground realities, the fact-situations and the peculiar circumstances of a given case, as in the present case, often results in miscarriage of justice and makes the justice delivery system a suspect. In the ultimate analysis the society suffers and a criminal gets encouraged. Tortures in police custody, which of late are on the increase, receive encouragement by this type of an unrealistic approach of the courts because it reinforces the belief in the mind of the police that no harm would come to them, if a prisoner dies in the lock-up, *because there would hardly be any evidence available to the prosecution to directly implicate them with the torture*. The courts must not lose sight of the fact that death in police custody is perhaps one of the worst kind of crimes in a civilised society, governed by the rule of law and poses a serious threat to an orderly civilised society.”

This Court then suggested:

“The Courts are also required to have a change in their outlook and attitude, particularly in cases involving custodial crimes and they should exhibit more sensitivity and adopt a realistic rather than a narrow technical approach, while dealing with the cases of custodial crime so that as far as possible within their

powers, the guilty should not escape so that the victim of the crime has the satisfaction that ultimately the majesty of law has prevailed.”

26. The State appeal was allowed and the acquittal of Respondents 1, 3, 4 and 5 was set aside. The respondents were convicted for various offences including the offence under Sections 304 Part II/34 IPC and sentenced to various terms of imprisonment and fine ranging from Rs 20,000 to Rs 50,000. The fine was directed to be paid to the heirs of Nathu Banjara by way of compensation. It was further directed:

“The trial court shall ensure, in case the fine is deposited by the accused respondents, that the payment of the same is made to the heirs of deceased, Nathu Banjara, and the court shall take all such precautions as are necessary to see that the money is not allowed to fall into wrong hands and is utilised for the benefit of the members of the family of the deceased, Nathu Banjara, and if found practical by deposit in a nationalised bank or post office on such terms as the trial court may in consultation with the heirs of the deceased consider fit and proper.”

27. It needs no emphasis to say that when the crime goes unpunished, the criminals are encouraged and the society suffers. The victim of crime or his kith and kin become frustrated and contempt for law develops. It was considering these aspects that the Law Commission in its 113th Report recommended the insertion of Section 114-B in the Indian Evidence Act. The Law Commission recommended in its 113th Report that in prosecution of a police officer for an alleged offence of having caused bodily injury to a person, if there was evidence that the injury was caused during the period when the person was in the custody of the police, the Court *may presume* that the injury was caused by the police officer having the custody of that person during that period. The Commission further recommended that the court, while considering the question of presumption, should have regard to all relevant circumstances including the period of custody, statement made by the victim, medical evidence and the evidence which the Magistrate may have recorded. Change of burden of proof was, thus, advocated. In *Shyamsunder Trivedi* case this Court also expressed the hope that the Government and the legislature would give serious thought to the recommendation of the Law Commission. Unfortunately, the suggested amendment, has not been incorporated in the statute so far. The need of amendment requires no emphasis - sharp rise in custodial violence, torture and death in custody, justifies the urgency for the amendment and we invite Parliament's attention to it.

28. Police is, no doubt, under a legal duty and has legitimate right to arrest a criminal and to interrogate him during the investigation of an offence but it must be remembered that the law does not permit use of third-degree methods or torture of accused in custody during interrogation and investigation with a view to solve the crime. End cannot justify the means. The interrogation and investigation into a crime should be in true sense purposeful to make the investigation effective. By torturing a person and using third-degree methods, the police would be accomplishing behind the closed doors what the demands of our legal order forbid. No society can permit it.

29. How do we check the abuse of police power? Transparency of action and accountability perhaps are two possible safeguards which this Court must insist upon.

Attention is also required to be paid to properly develop work culture, training and orientation of the police force consistent with basic human values. Training methodology of the police needs restructuring. The force needs to be infused with basic human values and made sensitive to the constitutional ethos. Efforts must be made to change the attitude and approach of the police personnel handling investigations so that they do not sacrifice basic human values during interrogation and do not resort to questionable forms of interrogation. With a view to bring in transparency, the presence of the counsel of the arrestee at some point of time during the interrogation may deter the police from using third-degree methods during interrogation.

30. Apart from the police, there are several other governmental authorities also like Directorate of Revenue Intelligence, Directorate of Enforcement, Coastal Guard, Central Reserve Police Force (CRPF), Border Security Force (BSF), the Central Industrial Security Force (CISF), the State Armed Police, Intelligence Agencies like the Intelligence Bureau, RAW, Central Bureau of Investigation (CBI), CID, Traffic Police, Mounted Police and ITBP, which have the power to detain a person and to interrogate him in connection with the investigation of economic offences, offences under the Essential Commodities Act, Excise and Customs Act, Foreign Exchange Regulation Act etc. There are instances of torture and death in custody of these authorities as well. *Death of Sawinder Singh Grover, Re*, [1995 Supp (4) SCC 450] (to which Kuldip Singh, J. was a party) this Court took suo motu notice of the death of Sawinder Singh Grover during his custody with the Directorate of Enforcement. After getting an enquiry conducted by the Additional District Judge, which disclosed a prima facie case for investigation and prosecution, this Court directed the CBI to lodge an FIR and initiate criminal proceedings against all persons named in the report of the Additional District Judge and proceed against them. The Union of India/Directorate of Enforcement was also directed to pay a sum of Rs 2 lakhs to the widow of the deceased by way of *ex gratia* payment at the interim stage. Amendment of the relevant provisions of law to protect the interest of arrested persons in such cases too is a genuine need.

31. There is one other aspect also which needs our consideration. We are conscious of the fact that the police in India have to perform a difficult and delicate task, particularly in view of the deteriorating law and order situation, communal riots, political turmoil, student unrest, terrorist activities, and among others the increasing number of underworld and armed gangs and criminals. Many hardcore criminals like extremists, terrorists, drug peddlers, smugglers who have organised gangs, have taken strong roots in the society. It is being said in certain quarters that with more and more liberalisation and enforcement of fundamental rights, it would lead to difficulties in the detection of crimes committed by such categories of hardened criminals by soft peddling interrogation. It is felt in those quarters that if we lay too much of emphasis on protection of their fundamental rights and human rights, such criminals may go scot-free without exposing any element or iota of criminality with the result, the crime would go unpunished and in the ultimate analysis the society would suffer. The concern is genuine and the problem is real. To deal with such a situation, a balanced approach is needed to meet the ends of justice. This is all the more so, in view of the expectation of the society that police must deal with the criminals in an efficient and effective manner and bring to book those who are involved in the crime. The cure cannot, however, be worst than the disease itself.



33. There can be no gainsaying that freedom of an individual must yield to the security of the State. The right of preventive detention of individuals in the interest of security of the State in various situations prescribed under different statutes has been upheld by the courts. The right to interrogate the detenus, culprits or arrestees in the interest of the nation, must take precedence over an individual's right to personal liberty. The Latin maxim *salus populi suprema lex* (the safety of the people is the supreme law) and *salus republicae suprema lex* (safety of the State is the supreme law) coexist and are not only important and relevant but lie at the heart of the doctrine that the welfare of an individual must yield to that of the community. The action of the State, however, must be "right, just and fair". Using any form of *torture* for extracting any kind of information would neither be "right nor just nor fair" and, therefore, would be impermissible, being offensive to Article 21. Such a crime-suspect must be interrogated – indeed subjected to sustained and scientific interrogation – determined in accordance with the provisions of law. He cannot, however, be *tortured or subjected to third-degree methods* or *eliminated* with a view to elicit information, extract confession or derive knowledge about his accomplices, weapons etc. His constitutional right cannot be abridged in the manner permitted by law, though in the very nature of things there would be qualitative difference in the method of interrogation of such a person as compared to an ordinary criminal. Challenge of terrorism must be met with innovative ideas and approach. State terrorism is no answer to combat terrorism. State terrorism would only provide legitimacy to "terrorism". That would be bad for the State, the community and above all for the rule of law. The State must, therefore, ensure that various agencies deployed by it for combating terrorism act within the bounds of law and not become law unto themselves. That the terrorist has violated human rights of innocent citizens may render him liable to punishment but it cannot justify the violation of his human rights except in the manner permitted by law. Need, therefore, is to develop scientific methods of investigation and train the investigators properly to interrogate to meet the challenge.

34. In addition to the statutory and constitutional requirements to which we have made a reference, we are of the view that it would be useful and effective to structure appropriate machinery for contemporaneous recording and notification of all cases of arrest and detention to bring in transparency and accountability. It is desirable that the officer arresting a person should prepare a memo of his arrest at the time of arrest in the presence of at least one witness who may be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. The date and time of arrest shall be recorded in the memo which must also be countersigned by the arrestee.

35. We, therefore, consider it appropriate to issue the following *requirements* to be followed in all cases of arrest or detention till legal provisions are made in that behalf as *preventive measures*:

(1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.

(2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who

may either be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.

(3) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

(5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

(6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

(7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

(8) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the State or Union Territory concerned. Director, Health Services should prepare such a panel for all tehsils and districts as well.

(9) Copies of all the documents including the memo of arrest, referred to above, should be sent to the Illaqa Magistrate for his record.

(10) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

(11) A police control room should be provided at all district and State headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board.

36. Failure to comply with the requirements hereinabove mentioned shall apart from rendering the official concerned liable for departmental action, also render him liable to be punished for contempt of court and the proceedings for contempt of court may be instituted in any High Court of the country, having territorial jurisdiction over the matter.

37. The requirements, referred to above flow from Articles 21 and 22(1) of the Constitution and need to be strictly followed. These would apply with equal force to the other governmental agencies also to which a reference has been made earlier.

38. These requirements are in addition to the constitutional and statutory safeguards and do not detract from various other directions given by the courts from time to time in connection with the safeguarding of the rights and dignity of the arrestee.

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Also read *Dilip K. Basu v. State of West Bengal* [(1997) 6 SCC 642], in which the court observed:

“3. More than seven months have elapsed since the directions were issued. Through these petitions, Dr Singhvi, the learned amicus curiae, who had assisted the Court in the main petition, seeks a direction, calling upon the Director General of Police and the Home Secretary of every State/Union Territory to report to this Court compliance of the above directions and the steps taken by All India Radio and the National Network of Doordarshan for broadcasting the requirements.

4. We direct the Registry to send a copy of this application, together with a copy of this order to Respondents 1 to 31 to have the report/reports from the Director General of Police and the Home Secretary of the State/Union Territory concerned, sent to this Court regarding the compliance of the above directions concerning arrestees. The report shall indicate in a tabular form as to which of the “requirements” has been carried out and in what manner, as also which are the “requirements” which still remain to be carried out and the steps being taken for carrying out those.

5. Report shall also be obtained from the Directors of All India Radio and Doordarshan regarding broadcasts made....”

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## **FUNDAMENTAL RIGHT TO FREEDOM OF RELIGION**

### ***Seshammal v. State of Tamil Nadu***

(1972) 2 SCC 11

**D.G. PALEKAR, J.** - In these 12 petitions under Article 32 of the Constitution filed by the hereditary Archakas and Mathadhipatis of some ancient Hindu Public temples in Tamil Nadu the validity of the Tamil Nadu Hindu Religious and Charitable Endowments (Amendment) Act, 1970 (the Amendment Act, 1970), is called in question, principally, on the ground that it violates their freedom of religion secured to them under Articles 25 and 26 of the Constitution.

2. The temples with which we are concerned are Saivite and Vaishnavite temples in Tamil Nadu. Writ Petitions... are filed by the Archakas and Writ Petitions ... 1971, are filed by the Mathadhipatis to whose Math some temples are attached.

3. The State Legislature of Tamil Nadu enacted the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959, (Principal Act). It came into force on December 2, 1959. It was an Act to amend and consolidate the law relating to the administration and governance of Hindu Religious and Charitable Institutions and Endowments in the State of Tamil Nadu. It applied to all Hindu religious public institutions and endowments in the State of Tamil Nadu and repealed several Acts which had previously governed the administration of Hindu Public Religious Institutions. It is sufficient to say here that the provisions of the principal Act applied to the temples in the present petitions and the petitioners have no complaint against any of its provisions.

4. Section 55 of that Act provided for the appointment of officeholders and servants in such temples and Section 56 provided for the punishment of office-holders and servants. Section 55, broadly speaking, gave the trustee of the temple the power to appoint the office-holders or servants of the temple and also provided that where the office or service is hereditary the person next in the line of succession shall be entitled to succeed. In only exceptional cases the trustee was entitled to depart from the principle of next-in-the-line of succession, but even so, the trustee was under an obligation to appoint a fit person to perform the functions of the office or perform the service after having due regard to the claims of the members of the family.

5. Power to make rules was given to Government by Section 116(2)(xxiii) and it was open to the Government to make rules providing for the qualifications to be possessed by the officers and servants for appointment to non-hereditary offices in religious institutions, the qualifications to be possessed by hereditary servants for succession to office and the conditions of service of all such officers and servants. Under this rule-making power the State Government made the Madras Hindu Religious Institutions (Officers' and Servants) Service Rules, 1964. Under these rules an Archak or Pujari of the deity came under the definition of Ulthurai servant. 'Ulthurai servant' is defined as a servant whose duties relate mainly to the performance of rendering assistance in the performance of pujas, rituals and other services to the deity, the recitation of mantras, vedas, prabandams, thevarams and similar invocations and

the performance of duties connected with such performance of recitation. Rule 12 provided that every 'Ulthurai servant', whether hereditary or non-hereditary whose duty it is to perform pujas and recite mantras, vedas, prabandams, thevarams and other invocations shall, before succeeding, or appointment to an office, obtain a certificate of fitness for performing his office, from the head of an institution imparting instructions in Agamas and ritualistic matters and recognised by the Commissioner, by general or special order or from the head of a math recognised by the Commissioner, by general or special order, or such other person as may be designated by the Commissioner, from time to time, for the purpose. By this rule the proper worship, in the temple was secured whether the Archaka or Pujari was a hereditary Archaka or Pujari or not. Section 107 of the Act emphasized that nothing contained in the Act shall, save as otherwise provided in Section 106 and in clause (2) of Article 25 of the Constitution, be deemed to confer any power or impose any duty in contravention of the rights conferred on any religious denomination or any section thereof by Article 26 of the Constitution. Section 106 deals with the removal of discrimination in the matter of distribution of prasadam or theertham to the Hindu worshippers. That was a reform in the right direction and there is no challenge to it. The Act as a whole, it is conceded, did not interfere with the religious usages and practices of the temples.

6. The principal Act of 1959 was amended came into force on January 8, 1971. Amendments were made to Sections 55, 56 and 116 of the Principal Act. The Amendment Act was enacted as a step towards social reform on the recommendation of the Committee on untouchability, Economic and Educational Development of the Scheduled Castes. The statement of objects and reasons which are reiterated in the counter-affidavit filed on behalf of the State of Tamil Nadu is as follows:

“In the year 1969 the Committee on Untouchability, Economic and Educational Development of the Scheduled Castes has suggested in its report that the hereditary priesthood in the Hindu Society should be abolished, that the system can be replaced by an ecclesiastical organisation of men possessing the requisite educational qualifications who may be trained in recognised institutions in priesthood and that the line should be open to all candidates irrespective of caste, creed or race. In Tamil Nadu Archakas, Gurukkals and Poojaries are all Ulthurai servants in Hindu temples. The duties of Ulthurai servants relate mainly to the performance of poojas rituals and other services to the deity, the recitation of mantras, vedas, prabandas, thevarams and similar invocations and the performance of duties connected with such performance and recitations. Sections 55 and 56 of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959, provide for appointment of office-holders and servants in the religious institutions by the trustees by applying the rule of hereditary succession also. As a step towards social reform Hindu temples have already been thrown open to all Hindus irrespective of caste....”

7. In the light of the recommendations of the Committee and in view of the decision of this court in *Gazula Dasaratha Rama Rao v. State of Andhra Pradesh* [(1961) 2 SCR 931] and also as a further step towards social reform the Government considered that the hereditary principle of appointment of all office-holders in the Hindu temples should be abolished and

accordingly it proposed to amend Sections 55, 56 and 116 of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959.

8. It is the complaint of the petitioners that by purporting to introduce social reform in the matter of appointment of Archakas and Pujaris, the State has really interfered with the religious practices of Saivite and Vaishnavite temples, and instead of introducing social reform, taken measures which would inevitably lead to defilement and desecration of the temples.

**Original and amended Sections 55, 56 and 116 of the Principal Act**

<i>Unamended Section</i>	<i>Amended Section</i>
<p><b>Section 55. Appointment of officeholders and servants in religious institutions.</b>— (1) Vacancies, whether permanent or temporary, among the office-holders or servants of a religious institution shall be filled up by the trustee in cases where the office or service is not hereditary.</p>	<p><b>Section 55. Appointment of officeholders and servants in religious institutions.</b>— (1) Vacancies, whether permanent or temporary, among the office-holders or servants of a religious institution shall be filled up by the trustee in all cases.</p> <p><b><u>Explanation.</u></b>— The expression ‘office-holders or servants shall include Archakas and Poojaris’.</p>
<p>(2) In cases where the office or service is hereditary, the person next in the line of succession shall be entitled to succeed.</p>	<p>(2) No person shall be entitled to appointment to any vacancy referred to in sub-section (1) merely on the ground that he is next in the line of succession to the last holder of office.</p>
<p>(3) Where, however, there is a dispute respecting the right of succession, or where such vacancy cannot be filled up immediately, or where the person entitled to succeed is a minor without a guardian fit and willing to act as such or there is a dispute respecting the person who is entitled to act as guardian, or—</p> <p>Where the hereditary officeholder or servant, is on account of incapacity, illness or otherwise unable to perform the functions of the office or perform the service, or is suspended from his office under sub-section (1) of Section 56, the trustee may appoint a fit person to perform the functions of the office or perform the service, until the disability of the officeholder or servant ceases or another person succeeds to the office or service, as the</p>	<p>(3) Omitted.</p>

<p>case may be.</p> <p><b>Explanation.</b>– In making any appointment under this sub-section, the trustee shall have due regard to the claims of members of the family, if any, entitled to the succession.</p>	
<p>(4) Any person aggrieved by an order of the trustee under subsection (3) may, within one month from the date of the receipt of the order by him, appeal against the order to the Deputy Commissioner.</p>	<p>(4) Any person aggrieved by an order of trustee under subsection (i) may within one month from the date of receipt of the order by him appeal against the order of the Deputy Commissioner.</p>
<p><b>Section 56. Punishment of officeholders and servants in religious institutions.</b>– (1) All office-holders and servants attached to a religious institution or in receipt of any emolument or perquisite therefrom shall, whether the office or service is hereditary or not, be controlled by the trustee; and the trustee may, after following the prescribed procedure, if any, fine, suspend, remove or dismiss any of them for breach of trust, incapacity, disobedience of order, neglect of duty, misconduct or other sufficient cause.</p>	<p><b>Section 56. Punishment of officeholders and servants in religious institution.</b>– (1) All office-holders and servants attached to a religious institution or in receipt of any emolument or perquisite therefrom shall be controlled by the trustee and the trustee may after following the prescribed procedure, if any, fine, suspend, remove or dismiss any of them for breach of trust, incapacity, disobedience of orders, neglect of duty, misconduct or other sufficient cause. <i>whether the office or service is hereditary or not</i>, be controlled by the trustee; and the trustee may, after following the prescribed procedure, if any, fine, suspend, remove or dismiss any of them for breach of trust, incapacity, disobedience of orders, neglect of duty, misconduct or other sufficient cause.</p>
<p>(2) Any office-holder or servant punished by a trustee under subsection (1) may within one month from the date of receipt of order by him appeal against the order to the Deputy Commissioner.</p>	<p>(2) Any office-holder or servant punished by a trustee under subsection (1) may, within one month from the date of the receipt of the order by him, appeal against the order to the Deputy Commissioner.</p>
<p>(3) A Hereditary office-holder or servant may, within one month from the date of the receipt by him of the order of the Deputy Commissioner under sub-section (2), prefer an appeal to the Commissioner against such order.</p>	<p>(3) Omitted.</p>
<p><b>Section 116</b> - (1) The Government may, by notification, make rules to carry out the</p>	<p><b>Section 116</b> -</p>

<p>purposes of this Act.</p> <p>(2) Without prejudice to the generality of the foregoing power, such rules may provide for -</p> <p>(xxiii).- The qualifications to be possessed by the officers and servants for appointment to non-hereditary offices in religious institutions, the qualifications to be possessed by hereditary servants for succession to office and the conditions of service of all such officers and servants.</p>	<p>(xxiii).- The qualifications to be possessed by the officers and servants for appointment to offices in religious institutions and the conditions of service of all such officers and servants.</p>
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10. It is clear from a perusal of the above provisions that the Amendment Act does away with the hereditary right of succession to the office of Archaka even if the Archaka was qualified under Rule 12 of the Madras Hindu Religious Institutions (Officers and Servants) Service Rules, 1964. It is claimed on behalf of the petitioners that as a result of the Amendment Act, their fundamental rights under Article 25(1) and Article 26(b) are violated since the effect of the amendment is as follows -

(a) The freedom of hereditary succession to the office of Archaka is abolished although succession to it is an essential and integral part of the faith of the Saivite and Vaishnavite worshippers.

(b) It is left to the Government in power to prescribe or not to prescribe such qualifications as they may choose to adopt for applicants to this religious office while the Act itself gives no indication whatever of the principles on which the qualifications should be based. The statement of objects and reasons which is adopted in the counter-affidavit on behalf of the State makes it clear that not only the scope but the object of the Amendment Act is to override the exclusive right of the denomination to manage their own affairs in the matter of religion by appointing Archakas belonging to a specific denomination for the purpose of worship.

(c) The Amendment Act gives the right of appointment for the first time to the trustee who is under the control of the Government under the provision! of the Principal Act and this is the very negation of freedom of religion and the principle of non-interference by the State as regards the practice of religion and the right of a denomination to manage its own affairs in the matter of religion.

11. Before we turn to these questions, it will be necessary to refer to certain concepts of Hindu religious faith and practices to understand and appreciate the position in law. The temples with which we are concerned are public religious institutions established in olden times. Some of them are Saivite temples and the others are Vaishnavite temples, which means, that in these temples God Shiva and Vishnu in their several manifestations are worshipped. The image of Shiva is worshipped by his worshippers who are called Saivites and the image of Vishnu is worshipped by his worshippers who are known as Vaishnavites. The institution of temple worship has an ancient history and according to Dr. Kane, temples of deities had existed even in the 4<sup>th</sup> or 5<sup>th</sup> century B. C. With the construction of temples the



institution of Archakas also came into existence, the Archakas being professional men who made their livelihood, by attending on the images. Just when the cult of worship of Siva and Vishnu started and developed into two distinct cults is very difficult to say, but there can be no doubt that in the tunes of the Mahabharata these cults were separately developed and there was keen rivalry between them to such an extent that the Mahabharata and some of the Puranas endeavoured to inculcate a spirit of synthesis by impressing that there was no difference between the two deities. With the establishment of temples and the institution of Archakas, treatises on rituals were compiled and they are known as 'Agamas'. The authority of these Agamas is recognised in several decided cases and by this Court in *Sri Venkataramana Devaru v. State of Mysore* [1958 SCR 895]. Agamas are described in the last case as treatises of ceremonial law dealing with such matters as the construction of temples, installation of idols therein and conduct of the worship of the deity. There are 28 Agamas relating to the Saiva temples, the most important of them being the Kamikagama, the Karanagama and the Suprabedagama. The Vaishnavas also had their own Agamas. Their principal Agamas were the Vikhanasa and the Pancharatra. The Agamas contain elaborate rules as to how the temple is to be constructed, where the principal deity is to be consecrated, and where the other Devatas are to be installed and where the several classes of worshippers are to stand and worship. Where the temple was constructed as per directions of the Agamas the idol had to be consecrated in accordance with an elaborate and complicated ritual accompanied by chanting of mantras and devotional songs appropriate to the deity. On the consecration of the image in the temple the Hindu worshippers believe that the Divine Spirit has descended into the image and from then on the image of the deity is fit to be worshipped. Rules with regard to daily and periodical worship have been laid down for securing the continuance of the Divine Spirit. The rituals have a two-fold object. One is to attract the lay worshipper to participate in the worship carried on by the priest or Archaka. It is believed that when a congregation of worshippers participates in the worship a particular attitude of aspiration and devotion is developed and confers great spiritual benefit. The second object is to preserve the image from pollution, defilement or desecration. It is part of the religious belief of a Hindu worshipper that when the image is polluted or defiled the Divine Spirit in the image diminishes or even vanishes. That is a situation which every devotee or worshipper looks upon with horror. Pollution or defilement may take place in a variety of ways. According to the Agamas, an image becomes defiled if there is any departure or violation of any of the rules relating to worship. In fact, purificatory ceremonies have to be performed for restoring the sanctity of the shrine [1958 SCR 895 (910)]. Worshippers lay great store by the rituals and whatever other people, not of the faith, may think about these rituals and ceremonies, they are a part of the Hindu religious faith and cannot be dismissed as either irrational or superstitious. An illustration of the importance attached to minor details of ritual is found in the case of *His Holiness Peria Kocil Kelvi Appan Thiruvankata Ramanuja Pedda Jyywgarlu Varlu v. Prathivathi Bhavankaram Venkatacharlu* [73 IA 156], which went up to the Privy Council. The contest was between two denominations of Vaishnava worshippers of South India, the Vadagalais and Tengalais. The temple was a Vaishnava temple and the controversy between them involved the question as to how the invocation was to begin at the time of worship and which should be the concluding benedictory verses. This gives the measure of the importance attached by the worshippers to certain modes of worship.

The idea most prominent in the mind of the worshipper is that a departure from the traditional rules would result in the pollution or defilement of the image which must be avoided at all costs. That is also the rationale for preserving the sanctity of the Garbhagriha or the sanctum sanctorum. In all these temples in which the images are consecrated, the Agamas insist that only the qualified Archaka or Pujari shall step inside the sanctum sanctorum and that too after observing the daily disciplines which are imposed upon him by the Agamas. As an Archaka he has to touch the image in the course of the worship and it is his sole right and duty to touch it. The touch of anybody else would defile it. Thus under the ceremonial law pertaining to temples even the question as to who is to enter the Garbhagriha or the sanctum sanctorum and who is not entitled to enter it and who can worship and from which place in the temple are all matters of religion as shown in the above decision of this Court.

12. The Agamas have also rules with regard to the Archakas. In Saivite temples only a devotee of Siva, and there too, one belonging to a particular denomination or group or sub-group is entitled to be the Archaka. If he is a Saivite, he cannot possibly be an Archaka in a Vaishnavite Agama temple to whatever caste he may belong and however learned he may be. Similarly, a Vaishnavite Archaka has no place as an Archaka in a Saivite temple. Indeed there is no bar to a Saivite worshipping in a Vaishnavite temple as a lay worshipper or vice versa. What the Agamas prohibit is his appointment as an Archaka in a temple of a different denomination. Dr. Kane has quoted the Brahmapurana on the topic of Punah-pratistha (Re-consecration of images in temples) at page 904 of his History of Dharmasastra referred to above. The Brahmapurana says that “when an image is broken into two or is reduced to particles, is burnt, is removed from its pedestal, is insulted, has ceased to be worshipped, is touched by beasts like donkeys or falls on impure ground or is worshipped with mantras of other deities or is rendered impure by the touch of outcastes and the like - in these ten contingencies, God ceases to indwell therein”. The Agamas appear to be more severe in this respect. Shri R. Parthasarathy Bhattacharya, whose authority on Agama literature is unquestioned, has filed his affidavit in Writ Petition No. 442 of 1971 and stated in his affidavit, with special reference to the Vaikhanasa Sutra to which he belongs, that according to the texts of the Vaikhanasa Shastra (Agama), persons who are the followers of the four Rishi traditions of Bhrgu, Atri, Marichi and Kasyapa and born of Vaikhanasa parents are alone competent to do puja in Vaikhanasa temples of Vaishnavites. They only can touch the idols and perform the ceremonies and rituals. None others, however high placed in society as pontiffs or Acharyas, or even other Brahmins could touch the idol, do puja or even enter the Garbha Griha. Not even a person belonging to another Agama is competent to do puja in Vaikhanasa temples. That is the general rule with regard to all these sectarian denominational temples. It is, therefore, manifest that the Archaka of such a temple besides being proficient in the rituals appropriate to the worship of the particular deity, must also belong, according to the Agamas, to a particular denomination. An Archaka of a different denomination is supposed to defile the image by his touch and since it is of the essence of the religious faith of all worshippers that there should be no pollution or defilement of the image under any circumstance, the Archaka undoubtedly occupies an important place in the matter of temple worship. Any State action which permits the defilement or pollution of the image by the touch of an Archaka not authorised by the Agamas would violently interfere with the religious faith

and practices of the Hindu worshipper in a vital respect, and would, therefore, be prima facie invalid under Article 25(1) of the Constitution.

13. This Court in *Sardar Syedna Taker Saifuddin Saheb v. State of Bombay* [1962 Supp 2 SCR 496], has summarised the position in law as follows:

“The content of Articles 25 and 26 of the Constitution came up for consideration before this Court in the *Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirta Swamiar of Sri Shirvr Matt* [1954 SCR 1005], *Mahant Jagannath Ramanuj Das v. State of Orissa* [1954 SCR 1046] *Sri Venkataramana Deoaru v. State of Mysore* [1958 SCR 895] *Durgah Committee, Ajmer v. Syed Hussain Ali* [(1962) 1 SCR 383] and several other cases and the main principles underlying these provisions have by these decisions been placed beyond controversy. The first is that the protection of these articles is not limited to matters of doctrine or belief they extend also to acts done in pursuance of religion and therefore contain a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion. The second is that what constitutes an essential part of a religious or religious practice has to be decided by the courts with reference to the doctrine of a particular religion and include practices which are regarded by the community as a part of its religion.”

15. Section 55 of the Principal Act as it originally stood and Rule 12 of the Madras Hindu Religious Institutions (Officers and Servants) Service Rules, 1964, ensured, so far as temples with hereditary Archakas were concerned, that there would be no defilement of the image. By providing in sub-section (2) of Section 55 that “in cases, where the office or service is hereditary, the person next in the line of succession shall be entitled to succeed”, it ensured the personal qualification of the Archaka that he should belong to a particular sect or denomination as laid down in the Agamas. By Rule 12 it also ensured that the Archaka would be proficient in the mantras, vedas, prabandams, thevaramas, etc., and thus be fit for the performance of the puja, in other words, that he would be a person sufficiently qualified for performing the rituals and ceremonies. As already shown an image becomes defiled if there is any departure or violation of any of the rules relating to worship, and this risk is avoided by insisting that the Archaka should be an expert in the rituals and the ceremonies. By the Amendment Act the principle of next-in-the-line of succession is abolished. Indeed it was the claim made in the statement of objects and reasons that the hereditary principle of appointment of office-holders in the temples should be abolished and that the office of an Archaka should be thrown open to all candidates trained in recognised institutions in priesthood irrespective of caste, creed or race. The trustee, so far as the amended Section 55 went, was authorised to appoint anybody as an Archaka in any temple whether Saivite or Vaishnavite as long as he possessed a fitness certificate from one of the institutions referred to in Rule 12. Rule 12 was a rule made by the Government under the Principal Act. That rule is always capable of being varied or changed.

It was also open to the Government to make no rule at all or to prescribe a fitness certificate issued by an institution which did not teach the Agamas or traditional rituals. The result would, therefore, be that any person, whether he is a Saivite or Vaishnavite or not, or whether he is proficient in the rituals appropriate to the temple or not, would be eligible for

appointment as-an Archaka and the trustee's discretion in appointing the Archaka without reference to personal and other qualifications of the Archaka would be unbridled. The trustee is to function under the control of the State because under Section 27 of the principal Act the trustee was bound to obey all lawful orders issued under the provisions of the Act by the Government, the Commissioner, the Deputy Commissioner or the Assistant Commissioner. It was submitted that the innocent looking amendment brought the State right into the sanctum sanctorum through the agency of the trustee and the Archaka.

16. It has been recognised for a long time that where the ritual in a temple cannot be performed except by a person belonging to a denomination, the purpose of worship will be defeated. In that case the claimants to the temple and its worship were Brahmins and the daughter's sons of the founder and his nearest heirs under the Hindu law. But their claim was rejected on the ground that the temple was dedicated to the sect following the principles of Vallabli Archarya in whose temples only the Gossains of that sect could perform the rituals and ceremonies and, therefore, the claimants had no right either to the temple or to perform the worship. In view of the Amendment Act and its avowed object there was nothing, in the petitioners' submission, to prevent the Government from prescribing a standardised ritual in all temples ignoring the Agamic requirements, and Archakas being forced on temples from denominations unauthorised by the Agamas. Since such a departure, as already shown, would inevitably lead to the defilement of the image, the powers thus taken by the Government under the Amendment Act would lead to interference with religious freedom guaranteed under Articles 25 and 26 of the Constitution.

17. The force of the above submissions made on behalf of the petitioners was not lost on the learned Advocate General of Tamil Nadu who appeared on behalf of the State. He, however, side-tracked the issue by submitting that if we were to consider in isolation only the changes introduced in Section 55 by the Amendment Act the situation as described on behalf of the petitioners could conceivably arise. He did not also admit that he was bound by either the statement of objects and reasons or the reiteration of the same in the counter-affidavit filed on behalf of the State. His submission was that we have to take the Principal Act as it now stands after the amendment and see what is the true effect of the same. He contended that the power given to the trustee under the amended Section 55 was not an unqualified power because, in his submission, that power had to be read in the context of Section 28 which controlled it. Section 28(1) provides as follows:

“Subject to the provisions of the Tamil Nadu Temple Entry Authorisation Act, 1947, the trustee of every religious institution is bound to administer its affairs and to apply its funds and properties in accordance with the terms of the trust, the usage of the institution and all lawful directions which a competent authority may issue in respect thereof and as carefully as a man of ordinary prudence would deal with such affairs, funds and properties if they were his own.”

18. The learned Advocate General argued that the trustee was bound under this provision to administer the affairs of the temple in accordance with the terms of the trust and the usage of the institution. If the usage of the institution is that the Archaka or Pujari of the temple must be of a particular denomination, then the usage would be binding upon him and he would be bound to make the appointment under Section 55 in accordance with the usage of

appointing one from the particular denomination. There was nothing in Section 55, in his submission, which released him from his liability to make the appointment in accordance with the said usage. It was true that the principle of the next-in-line of succession was not binding on him when making the appointment of a new Archaka, but in his submission, that principle is no part of the usage, the real usage being to appoint one from the denomination. Moreover the amended section, according to him, does not require the trustee to exclude in every case the hereditary principle if a qualified successor is available and there was no reason why the trustee should not make the appointment of the next heir, if found competent. He, however, agreed, that there was no such legal obligation on the trustee under that section. He further contended that if the next-in-line of succession principle is regarded as a usage of any particular temple it would be merely a secular usage on which legislation was competent under Article 25(2)(a) of the Constitution. Going further, he contended that if the hereditary principle was regarded as a religious practice that would be also amenable to legislation under Article 25(2)(6) which permits legislation for the purpose of social welfare and reform. He invited attention to the *Report of the Hindu Religious Endowments Commission* (1960-1962) headed by Dr. C.P. Ramaswami Aiyar and submitted that there was a crying need for reform in this direction since the hereditary principle of appointment of Archakas had led to grave malpractices practically destroying the sanctity of worship in various religious institutions.

19. We have found no any difficulty in agreeing with the learned Advocate General that Section 28(1) of the Principal Act which directs the trustee to administer the affairs of the temple in accordance with the terms of the trust or the usage of the institution, would control the appointment of the Archaka to be made by him under the amended Section 55 of the Act. In a Saivite or a Vaishnavite temple the appointment of the Archaka will have to be made from a specified denomination, sect or group in accordance with the directions of the Agamas governing those temples. Failure to do so would not only be contrary to Section 28(1) which requires the trustee to follow the usage of the temple, but would also interfere with a religious practice the inevitable result of which would be to defile the image. The question, however, remains whether the trustee, while making appointment from the specified denomination, sect or group in accordance with the Agamas, will be bound to follow the hereditary principle as a usage peculiar to the temple. The learned Advocate-General contends that there is no such invariable usage. It may be that, as a matter of convenience, an Archaka's son being readily available to perform the worship may have been selected for appointment as an Archaka from times immemorial. But that, in his submission, was not a usage. The principle of next-in-line of succession has failed when the successor was a female or had refused to accept the appointment or was under some disability. In all such cases the Archaka was appointed from the particular denomination, sect or group and the worship was carried on with the help of such a substitute. It, however, appears to us that it is now too late in the day to contend that the hereditary principle in appointment was not a usage. For whatever reasons, whether of convenience or otherwise, this hereditary principle might have been adopted, there can be no doubt that the principle had been accepted from antiquity and had also been fully recognised in the unamended Section 55 of the Principal Act. Sub-section (2) of Section 55 provided that where the office or service is hereditary, the person next in the line of succession shall be entitled to succeed and only a limited right was given under sub-section (3) to the trustee to

appoint a substitute. Even in such cases the explanation to sub-section (3) provided that in making the appointment of the substitute the trustee should have due regard to the claims of the members of the family, if any, entitled to the succession. Therefore, it cannot be denied as a fact that there are several temples in Tamil Nadu where the appointment of an Archaka is governed by the usage of hereditary succession. The real question, therefore, is whether such a usage should be regarded either as a secular usage or a religious usage. If it is a secular usage, it is obvious, legislation would be permissible under Article 25(1)(a) and if it is a religious usage it would be permissible if it falls squarely under sub-section 25(1)(b).

20. Mr. Palkhivala on behalf of the petitioners insisted that the appointment of a person to a religious office in accordance with the hereditary principle is itself a religious usage and amounted to a vital religious practice and hence falls within Articles 25 and 26. In his submission, priests, who are to perform religious ceremonies may be chosen by a temple on such basis as the temple chooses to adopt. It may be election, selection, competition, nomination, or hereditary succession. He, therefore, contended that any law which interferes with the aforesaid basis of appointment would violate religious freedom guaranteed by Articles 25 and 26 of the Constitution. In his submission the right to select a priest has an immediate bearing on religious practice and the right of a denomination to manage its own affairs in matters of religion. The priest is more important than the ritual and nothing could be more vital than choosing the priest. Under the pretext of social reform, he contended, the State cannot reform a religion out of existence and if any denomination has accepted the hereditary principle for choosing its priest that would be a religious practice vital to the religious faith and cannot be changed on the ground that it leads to social reform. Mere substitution of one method of appointment of the priest by another was, in his submission, no social reform.

21. It is true that a priest or an Archaka when appointed has to perform some religious functions but the question is whether the appointment of a priest is by itself a secular function or a religious practice. Mr. Palkhivala gave the illustration of the spiritual head of a math belonging to a denomination of a Hindu sect like the Shankaracharya and expressed horror at the idea that such a spiritual head could be chosen by a method recommended by the State though in conflict with the usage and the traditions of the particular institution. Where, for example, a successor of a Mathadhipati is chosen by the Mathadhipati by giving him mantradeeksha or where the Mathadhipati is chosen by his immediate disciples, it would be, he contended, extraordinary for the State to interfere and direct that some other mode of appointment should be followed on the ground of social reform. Indeed this may strike one as an intrusion in the matter of religion. But we are afraid such an illustration is inapt when we are considering the appointment of an Archaka of a temple. The Archaka has never been regarded as a spiritual head of any institution. He may be an accomplished person, well versed in the Agamas and rituals necessary to be performed in a temple but he does not have the status of a spiritual head. Then again the assumption made that the Archaka may be chosen in a variety of ways is not correct. The Dharam-karta or the Shebait makes the appointment and the Archaka is a servant of the temple. It has been held in *K. Seshadri Aiyangar v. Ranga Bhattar* [ILR 35 Mad 631] that even the position of the hereditary Archaka of a temple is that of a servant subject to the disciplinary power of the trustee. The trustee can enquire into the conduct of such a servant and dismiss him for misconduct. As a

servant he is subject to the discipline and control of the trustee as recognised by the unamended Section 56 of the Principal Act which provides “all office-holders and servants attached to a religious institution or in receipt of any emolument or perquisite therefrom shall, whether the office or service is hereditary or not, be controlled by the trustee and the trustee may, after following the prescribed procedure, if any, fine, suspend, remove or dismiss any of them for breach of trust, incapacity, disobedience of orders, neglect of duty, misconduct or other sufficient cause.” That being the position of an Archaka, the act of his appointment by the trustee is essentially secular. He owes his appointment to a secular authority. Any lay founder of a temple may appoint the Archaka. The Shebaites and Managers of temples exercise essentially a secular function in choosing and appointing the Archaka. That the son of an Archaka or the son’s son has been continued in the office from generation to generation does not make any difference to the principle of appointment and no such hereditary Archaka can claim any right to the office. Thus the appointment of an Archaka is a secular act and the fact that in some temples the hereditary principle was followed in making the appointment would not make the successive appointments anything but secular. It would only mean that in making the appointment the trustee is limited in respect of the sources of recruitment. Instead of casting his net wide for selecting a proper candidate, he appoints the next heir of the last holder of the office. That after his appointment the Archaka performs worship is no ground for holding that the appointment is either a religious practice or a matter of religion.

22. In view of sub-section (2) of Section 55, as it now stands amended, the choice of the trustee in the matter of appointment of an Archaka is no longer limited by the operation of the rule of next-in-line of succession in temples where the usage was to appoint the Archaka on the hereditary principle. The trustee is not bound to make the appointment on the sole ground that the candidate, is the next-in-line of succession to the last holder of office. To that extent, and to that extent alone, the trustee is released from the obligation imposed on him by Section 28 of the principal Act to administer the affairs in accordance with that part of the usage of a temple which enjoined hereditary appointments. The legislation in this respect, as we have shown, does not interfere with any religious practice or matter of religion and, therefore, is not invalid.

23. We shall now take separately the several amendments which were challenged as invalid. Section 2 of the Amendment Act amended Section 55 of the principal Act and the important change which was impugned on behalf of the petitioners related to the abolition of the hereditary principle in the appointment of the Archaka. We have shown for reasons already mentioned that the change effected by the Amendment is not invalid. The other changes effected in the other provisions of the principal Act appear to us to be merely consequential. Since the hereditary principle was done away with the words “whether the office or service is hereditary or not” found in Section 56 of the Principal Act have been omitted by Section 3 of the Amendment Act. By Section 4 of the latter Act clause (xxiii) of subsection (2) in Section 116 is suitably amended with a view to deleting the reference to the qualifications of hereditary and non-hereditary offices which was there in clause (xxiii) of the principal Act. The change is only consequential on the amendment of Section 55 of the principal Act. Sections 5 and 6 of the Amendment Act are also consequential on the

amendment of Sections 55 and 56. These are all the sections in the Amendment Act and in our view the Amendment Act as a whole must be regarded as valid.

24. It was, however, submitted before us that the State had taken power under Section 116(2), clause (xxiii) to prescribe qualifications to be possessed by the Archakas and, in view of the avowed object of the State Government to create a class of Archakas irrespective of caste, creed or race, it would be open to the Government to prescribe qualifications for the office of an Archaka which were in conflict with Agamas. Under Rule 12 of the Madras Hindu Religious Institutions (Officers and Servants) Service Rules, 1964 proper provision has been made for qualifications of the Archakas and the petitioners have no objection to that rule. The rule still continues to be in force. But the petitioners apprehend that it is open to the Government to substitute any other rule for Rule 12 and prescribe qualifications which were in conflict with Agamic injunctions. For example at present the Ulthurai servant whose duty it is to perform pujas and recite vedic mantras etc, has to obtain the fitness certificate for his office from the head of institutions which impart instructions in Agamas and ritualistic matters. The Government, however, it is submitted, may hereafter change its mind and prescribe qualifications which take no note of Agamas and Agamic rituals and direct that the Archaka candidate should produce a fitness certificate from an institution which does not specialise in teaching Agamas and rituals. It is submitted that the Act does not provide guidelines to the Government in the matter of prescribing qualifications with regard to the fitness of an Archaka for performing the rituals and ceremonies in these temples and it will be open to the Government to prescribe a simple standardized curriculum for pujas in the several temples ignoring the traditional pujas and rituals followed in those temples. In our opinion the apprehensions of the petitioners are unfounded. Rule 12 referred to above still holds the field and there is no good reason to think that the State Government wants to revolutionize temple worship by introducing methods of worship not current in the several temples. The rule-making power conferred on the Government by Section 116 is only intended with a view to carry out the purposes of the Act which are essentially secular. The Act nowhere gives the indication that one of the purposes of the Act is to effect a change in the rituals and ceremonies followed in the temples. On the other hand, Section 107 of the Principal Act emphasizes that nothing contained in the Act would be deemed to confer any power or impose any duty in contravention of the rights conferred on any religious denomination or any section thereof by Article 26 of the Constitution. Similarly, Section 105 provides that nothing contained in the Act shall (a) save as otherwise expressly provided in the Act or the rules made thereunder, affect any honour, emolument or perquisite to which any person is entitled by custom or otherwise in any religious institution, or its established usage in regard to any other matter. Moreover, if any rule is framed by the Government which purports to interfere with the rituals and ceremonies of the temples the same will be liable to be challenged by those who are interested in the temple worship. In our opinion, therefore, the apprehensions now expressed by the petitioners are groundless and premature.

25. In the result these petitions fail.

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***N. Adithayan v. Travancore Devaswom Board***

(2002) 8 SCC 106

**RAJU, J.** - The question that is sought to be raised in the appeal is as to whether the appointment of a person, who is not a Malayala Brahmin, as "Santhikaran" or Poojari (priest) of the Temple in question - Kongorpilly Neerikode Siva Temple at Alangad village in Ernakulam district, Kerala State, is violative of the constitutional and statutory rights of the appellant. A proper and effective answer to the same would involve several vital issues of great constitutional, social and public importance, having, to a certain extent, religious overtones also.

2. The relevant facts, as disclosed from the pleadings, have to be noticed for a proper understanding and appreciation of the questions raised in this appeal. The appellant claims himself to be a Malayala Brahmin by community and a worshipper of the Siva Temple in question. The administration of the Temple vests with Travancore Devaswom Board, a statutory body created under the Travancore-Cochin Hindu Religious Institutions Act, 1950. One Shri K.K. Mohanan Poti was working as temporary Santhikaran at this Temple, but due to complaints with reference to his performance and conduct, his services were not regularized and came to be dispensed with by an order dated 6-8-1993. In his place, the third respondent, who figured at Rank No. 31 in the list prepared on 28-4-1993, was ordered to be appointed as a regular Santhikaran and the Devaswom Commissioner also confirmed the same on 20-9-1993. The second respondent did not allow him to join in view of a letter said to have been received from the head of the Vazhaperambu Mana for the reason that the third respondent was a non-Brahmin. The Devaswom Commissioner replied that since under the rules regulating the appointment there is no restriction for the appointment of a non-Brahmin as a Santhikaran, the appointment was in order and directed the second respondent to allow him to join and perform his duties. Though, on 12-10-1993 the third respondent was permitted to join by an order passed on the same day, the appointment was stayed by a learned Single Judge of the Kerala High Court and one Sreenivasan Poti came to be engaged on duty basis to perform the duties of Santhikaran, pending further orders. The main grievance and ground of challenge in the writ petition filed in the High Court was that the appointment of a non-Brahmin Santhikaran for the Temple in question offends and violates the alleged long-followed mandatory custom and usage of having only Malayala Brahmins for such jobs of performing poojas in the temples and this denies the right of the worshippers to practise and profess their religion in accordance with its tenets and manage their religious affairs as secured under Articles 25 and 26 of the Constitution of India. The Thanthri of a temple is stated to be the final authority in such matters and the appointment in question was not only without his consultation or approval but against his wish, too.

3. The Travancore Devaswom Board had formulated a scheme and opened a Thanthra Vedantha School at Tiruvalla for the purpose of training Santhikarans and as per the said Scheme prepared by Swami Vyomakesananda and approved by the Board on 7-5-1969 the School was opened to impart training to students, irrespective of their caste/community. While having Swami Vyomakesananda as the Director - late Thanthri Thazhman Kandarooru Sankaru and Thanthri Maheswara Bhattathiripad, Keezhukattu Illam were committee

members. On being duly and properly trained and on successfully completing the course, they were said to have been given “Upanayanam” and “Shodasa Karma” and permitted to wear the sacred thread. Consequently, from 1969 onwards persons, who were non-Brahmins but successfully passed out from the Vedantha School, were being appointed and the worshippers - the public - had no grievance or grouse whatsoever. Instance of such appointments having been made regularly also have been disclosed. The third respondent was said to have been trained by some of Kerala’s leading Thanthris in performing archanas, conducting temple ritual, pooja and all other observances necessary for priesthood in a temple in Kerala and elsewhere based on Thanthra system. Nothing was brought on record to substantiate the claim that only Malayala Brahmins would be “Santhikaran” in respect of the Siva Temple or in this particular temple. In 1992 also, as has been the practice, the Board seems to have published a notification inviting applications from eligible persons, who among other things possessed sufficient knowledge of the duties of Santhikaran with knowledge of Sanskrit also, for being selected for appointment as Santhikaran and inasmuch as there was no reservation for Brahmins, all eligible could and have actually applied. They were said to have been interviewed by the Committee of President and two members of the Board, Devaswom Commissioner and Thanthri viz. Thanthri Vamadevan Parameswaram Thatathiri and that the third respondent was one among the 54 selected out of 234 interviewed from out of the 299 applicants. Acceptance of claims to confine appointment of Santhikarans in temples or in this Temple to Malayala Brahmins, would, according to the respondent State, violate Articles 15 and 16 as well as Article 14 of the Constitution of India. As long as appointments of Santhikarans were of persons well versed, fully qualified and trained in their duties and mantras, tantras and necessary Vedas, irrespective of their caste, Articles 25 and 26 cannot be said to have been infringed, according to the respondent State.

4. Mr K. Rajendra Chowdhary, learned Senior Counsel for the appellant, while reiterating the stand before the High Court, contended that only Namboodri Brahmins alone are to perform poojas or daily rituals by entering into the sanctum sanctorum of temples in Kerala, particularly the Temple in question, and that has been the religious practice and usage all along and such a custom cannot be thrown overboard in the teeth of Articles 25 and 26, which fully protect and preserve them. Section 31 of the 1950 Act was relied upon for the same purpose. It was also contended for the appellant that merely because such a religious practice, which was observed from time immemorial, involves the appointment of a Santhikaran or priest, it would not become a secular aspect to be dealt with by the Devaswom Board de hors the wishes of the worshippers and the decisions of the Thanthri of the Temple concerned.

5. Shri R.F. Nariman, learned Senior Counsel contended that the appellant failed to properly plead or establish any usage as claimed and this being a disputed question of fact cannot be permitted to be agitated in the teeth of the specific finding of the Kerala High Court to the contrary. It was also urged that the rights and claims based upon Article 25 have to be viewed and appreciated in proper and correct perspective in the light of Articles 15, 16 and 17 of the Constitution of India and the provisions contained in the Protection of Civil Rights Act, 1955, enacted pursuant to the constitutional mandate, which also not only prevents and prohibits but makes it an offence to practise “untouchability” in any form. Accordingly, it is

claimed that no exception could be taken to the decision of the Full Bench of the Kerala High Court in the case.

7. This Court in *Commr., HRE v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* (*Shirur Mutt* case) observed that Article 25 secures to every person, subject to public order, health and morality, a freedom not only to entertain such religious belief, as may be approved of by his judgment and conscience but also to exhibit his belief in such outward acts as he thinks proper and to propagate or disseminate his ideas for the edification of others. It was also observed that what is protected is the propagation of belief, no matter whether the propagation takes place in a church or monastery or in a temple or parlour meeting. While elaborating the meaning of the words, “its own affairs in matters of religion” in Article 26(b) it has been observed that in contrast to secular matters relating to administration of its property the religious denomination or organization enjoys complete autonomy in deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold and no outside authority has any jurisdiction to interfere with their decision in such matters. In *Venkataramana Devaru v. State of Mysore* it has been held that though Article 25(1) deals with rights of individuals, Article 25(2) is wider in its contents and has reference to rights of communities and controls both Articles 25(1) and 26(b) of the Constitution, though the rights recognized by Article 25(2)(b) must necessarily be subject to some limitations or regulations and one such would be inherent in the process of harmonizing the right conferred by Article 25(2)(b) with that protected by Article 26(b).

8. In *Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan* dealing with the nature and extent of protection ensured under Articles 25(1) and 26(b), the distinction between a practice which is religious and one which is purely secular, it has been observed as follows:

“In this connection, it cannot be ignored that what is protected under Articles 25(1) and 26(b) respectively are the religious practices and the right to manage affairs in matters of religion. If the practice in question is purely secular or the affair which is controlled by the statute is essentially and absolutely secular in character, it cannot be urged that Article 25(1) or Article 26(b) has been contravened. The protection is given to the practice of religion and to the denomination’s right to manage its own affairs in matters of religion. Therefore, whenever a claim is made on behalf of an individual citizen that the impugned statute contravenes his fundamental right to practise religion or a claim is made on behalf of the denomination that the fundamental right guaranteed to it to manage its own affairs in matters of religion is contravened, it is necessary to consider whether the practice in question is religious or the affairs in respect of which the right of management is alleged to have been contravened are affairs in matters of religion. If the practice is a religious practice or the affairs are the affairs in matters of religion, then, of course, the rights guaranteed by Article 25(1) and Article 26(b) cannot be contravened.

It is true that the decision of the question as to whether a certain practice is a religious practice or not, as well as the question as to whether an affair in question is an affair in matters of religion or not, may present difficulties because sometimes practices, religious and secular, are inextricably mixed up. This is more particularly so in regard to Hindu religion because as is well known, under the provisions of ancient Smritis, all human

actions from birth to death and most of the individual actions from day to day are regarded as religious in character. As an illustration, we may refer to the fact that the Smritis regard marriage as a sacrament and not a contract. Though the task of disengaging the secular from the religious may not be easy, it must nevertheless be attempted in dealing with the claims for protection under Articles 25(1) and 26(b). If the practice which is protected under the former is a religious practice, and if the right which is protected under the latter is the right to manage affairs in matters of religion, it is necessary that in judging about the merits of the claim made in that behalf the Court must be satisfied that the practice is religious and the affair is in regard to a matter of religion. In dealing with this problem under Articles 25(1) and 26(b), Latham, C.J.'s observation in *Adelaide Co. of Jehovah's Witnesses Incorporated v. Commonwealth* [(1943) 67 CLR 116, 123] that 'what is religion to one is superstition to another', on which Mr Pathak relies, is of no relevance. If an obviously secular matter is claimed to be a matter of religion, or if an obviously secular practice is alleged to be a religious practice, the Court would be justified in rejecting the claim because the protection guaranteed by Article 25(1) and Article 26(b) cannot be extended to secular practices and affairs in regard to denominational matters which are not matters of religion, and so, a claim made by a citizen that a purely secular matter amounts to a religious practice, or a similar claim made on behalf of the denomination that a purely secular matter is an affair in matters of religion, may have to be rejected on the ground that it is based on irrational considerations and cannot attract the provisions of Article 25(1) or Article 26(b). This aspect of the matter must be borne in mind in dealing with the true scope and effect of Article 25(1) and Article 26(b)."

9. This Court, in *Seshammal v. State of T.N.* again reviewed the principles underlying the protection engrafted in Articles 25 and 26 in the context of a challenge made to abolition of hereditary right of Archaka

10. It has also been held that compilation of treatises on construction of temples, installation of idols therein, rituals to be performed and conduct of worship therein, known as "Agamas" came to be made with the establishment of temples and the institution of Archakas, noticing at the same time the further fact that the authority of such Agamas came to be judicially recognized. It has been highlighted that:

"Where the temple was constructed as per directions of the Agamas the idol had to be consecrated in accordance with an elaborate and complicated ritual accompanied by chanting of mantras and devotional songs appropriate to the deity."

Thereafter for continuing the divine spirit, which is considered to have descended into the idol on consecration, daily and periodical worship has to be made with twofold object to attract the lay worshippers and also to preserve the image from pollution, defilement or desecration, which is believed to take place in ever so many ways. Delving further into the importance of rituals and Agamas it has been observed as follows:

"Worshippers lay great store by the rituals and whatever other people, not of the faith, may think about these rituals and ceremonies, they are a part of the Hindu religious faith and cannot be dismissed as either irrational or superstitious. An

illustration of the importance attached to minor details of rituals is found in the case of *His Holiness Peria Kovil Kelvi Appan Thiruvenkata Ramanuja Pedda Jiyangarlu Varlu v. Prathivathi Bhayankaram Venkatacharlu* [(1946) 73 IA 156] which went up to the Privy Council. The contest was between two denominations of Vaishnava worshippers of South India, the Vadagalais and Tengelais. The temple was a Vaishnava temple and the controversy between them involved the question as to how the invocation was to begin at the time of worship and which should be the concluding benedictory verses. This gives the measure of the importance attached by the worshippers to certain modes of worship. The idea most prominent in the mind of the worshipper is that a departure from the traditional rules would result in the pollution or defilement of the image which must be avoided at all costs. That is also the rationale for preserving the sanctity of the *Garbhagriha* or the *sanctum sanctorum*. In all these temples in which the images are consecrated, the Agamas insist that only the qualified Archaka or Pujari shall step inside the *sanctum sanctorum* and that too after observing the daily discipline which are imposed upon him by the Agamas. As an Archaka he has to touch the image in the course of the worship and it is his sole right and duty to touch it. The touch of anybody else would defile it. Thus under the ceremonial law pertaining to temples even the question as to who is to enter the *Garbhagriha* or the *sanctum sanctorum* and who is not entitled to enter it and who can worship and from which place in the temple are all matters of religion as shown in the above decision of this Court.

The Agamas have also rules with regard to the Archakas. In Saivite temples only a devotee of Siva, and there too, one belonging to a particular denomination or group or sub-group is entitled to be the Archaka. If he is a Saivite, he cannot possibly be an Archaka in a Vaishnavite Agama temple to whatever caste he may belong and however learned he may be. Similarly, a Vaishnavite Archaka has no place as an Archaka in a Saivite temple. Indeed there is no bar to a Saivite worshipping in a Vaishnavite temple as a lay worshipper or *vice versa*. What the Agamas prohibit is his appointment as an Archaka in a temple of a different denomination. Dr Kane has quoted the Brahmapurana on the topic of *Punahpratistha* (Reconsecration of images in temples) at p. 904 of his History of Dharmasastra referred to above. The Brahmapurana says that 'when an image is broken into two or is reduced to particles, is burnt, is removed from its pedestal, is insulted, has ceased to be worshipped, is touched by beasts like donkeys or falls on impure ground or is worshipped with mantras of other deities or is rendered impure by the touch of outcastes and the like - in these ten contingencies, God ceases to indwell therein'. The Agamas appear to be more severe in this respect. Shri R. Parthasarthy Bhattacharya, whose authority on Agama literature is unquestioned, has filed his affidavit in Writ Petition No. 442 of 1971 and stated in his affidavit, with special reference to the Vaikhanasa Sutra to which he belongs, that according to the texts of the Vaikhanasa Shastra (Agama), persons who are the followers of the four Rishi traditions of Bhrgu, Atri, Marichi and Kasyapa and born of Vaikhanasa parents are alone competent to do puja in Vaikhanasa temples of Vaishnavites. They only can touch the idols and perform the ceremonies and rituals. None others, however high placed in society as pontiffs or

Acharyas, or even other brahmins could touch the idol, do puja or even enter the Garbhagriha. Not even a person belonging to another Agama is competent to do puja in Vaikhanasa temples. That is the general rule with regard to all these sectarian denominational temples. It is, therefore, manifest that the Archaka of such a temple besides being proficient in the rituals appropriate to the worship of the particular deity, must also belong, according to the Agamas, to a particular denomination. An Archaka of a different denomination is supposed to defile the image by his touch and since it is of the essence of the religious faith of all worshippers that there should be no pollution or defilement of the image under any circumstances, the Archaka undoubtedly occupies an important place in the matter of temple worship. Any State action which permits the defilement or pollution of the image by the touch of an Archaka not authorized by the Agamas would violently interfere with the religious faith and practices of the Hindu worshipper in a vital respect, and would, therefore, be prima facie invalid under Article 25(1) of the Constitution.”

11. While repelling, in the same decision, the grievance that the innocent-looking amendment brought the State right into the sanctum sanctorum, through the agency of trustees and Archaka, this Court observed as hereunder:

“By the Amendment Act the principle of next-in-the-line of succession is abolished. Indeed it was the claim made in the Statement of Objects and Reasons that the hereditary principle of appointment of office-holders in the temples should be abolished and that the office of an Archaka should be thrown open to all candidates trained in recognized institutions in priesthood irrespective of caste, creed or race. The trustee, so far as the amended Section 55 went, was authorized to appoint anybody as an Archaka in any temple whether Saivite or Vaishnavite as long as he possessed a fitness certificate from one of the institutions referred to in Rule 12. Rule 12 was a rule made by the Government under the principal Act. That rule is always capable of being varied or changed. It was also open to the Government to make no rule at all or to prescribe a fitness certificate issued by an institution which did not teach the Agamas or traditional rituals. The result would, therefore, be that any person, whether he is a Saivite or Vaishnavite or not, or whether he is proficient in the rituals appropriate to the temple or not, would be eligible for appointment as an Archaka and the trustee’s discretion in appointing the Archaka without reference to personal and other qualifications of the Archaka would be unbridled. The trustee is to function under the control of the State because under Section 87 of the principal Act the trustee was bound to obey all lawful orders issued under the provisions of the Act by the Government, the Commissioner, the Deputy Commissioner or the Assistant Commissioner. It was submitted that the innocent-looking amendment brought the State right into the sanctum sanctorum through the agency of the trustee and the Archaka.

It has been recognised for a long time that where the ritual in a temple cannot be performed except by a person belonging to a denomination, the purpose of worship will be defeated: See *Mohan Lalji v. Gordhan Lalji Maharaj* [ILR (1913) 35 All 283 (PC)]. In that case the claimants to the temple and its worship were Brahmins

and the daughter's sons of the founder and his nearest heirs under the Hindu law. But their claim was rejected on the ground that the temple was dedicated to the sect following the principles of Vallabh Acharya in whose temples only the Gossains of that sect could perform the rituals and ceremonies and, therefore, the claimants had no right either to the temple or to perform the worship. In view of the Amendment Act and its avowed object there was nothing, in the petitioner's submission, to prevent the Government from prescribing a standardized ritual in all temples ignoring the Agamic requirements, and Archakas being forced on temples from denominations unauthorized by the Agamas. Since such a departure, as already shown, would inevitably lead to the defilement of the image, the powers thus taken by the Government under the Amendment Act would lead to interference with religious freedom guaranteed under Articles 25 and 26 of the Constitution."

12. This Court repelled a challenge to the provisions in the Bombay Hindu Places of Public Worship (Entry Authorisation) Act, 1956, in *Shastri Yagnapurushdasji v. Muldas Bhundardas Vaishya* and quoted with approval the observation of Monier Williams (a reputed and recognized student of Indian sacred literature for more than forty years and played an important role in explaining the religious thought and life in India) that "Hinduism is far more than a mere form of theism resting on Brahmanism" and that

"(I)t has ever aimed at accommodating itself to circumstances, and has carried on the process of adaptation through more than three thousand years. It has first borne with and then, so to speak, swallowed, digested and assimilated something from all creeds."

This Court ultimately repelled the challenge, after advertent to the changes undergone in the social and religious outlook of the Hindu community as well as the fundamental change as a result of the message of social equality and justice proclaimed by the Constitution and the promise made in Article 17 to abolish "untouchability", observing that as long as the actual worship of the deity is allowed to be performed only by the authorized Poojaris of the temple and not by all devotees permitted to enter the temple, there can be no grievance made.

13. In *Bhuri Nath v. State of J & K*, this Court while dealing with the validity of the J&K Shri Mata Vaishno Devi Shrine Act, 1988, and the abolition of the right of Baridars to receive share in the offerings made by pilgrims to Shri Mata Vaishno Devi, observed their right to perform pooja as only a customary right coming from generations which the State can and has by legislation abolished and that the rights seemed under Articles 25 and 26 are not absolute or unfettered but subject to legislation by the State limiting or regulating any activity, economic, financial, political or secular which are associated with the religious belief, faith, practice or custom and that they are also subject to social reform by suitable legislation. It was also reiterated therein that though religious practices and performances of acts in pursuance of religious beliefs are, as much a part of religion, as further belief in a particular doctrine, that by itself is not conclusive or decisive and as to what are essential parts of religion or belief or matters of religion and religious practice is essentially a question of fact to be considered in the context in which the question arises on the basis of materials –factual or legislative or historic if need be giving a go-by to claims based merely on supernaturalism or superstitious

beliefs or actions and those which are not really, essentially or integrally matters of religion or religious belief or faith or religious practice.

14. A challenge made to the U.P. Sri Kashi Vishwanath Temple Act, 1983 and a claim asserted by a group of Saivites to the exclusive right to conduct worship and manage the temple in question came to be repelled by this Court in *Sri Adi Visheshwara of Kashi Vishwanath Temple v. State of U.P.* While taking note of the aim of the Constitution to establish an egalitarian social order proscribing any discrimination on grounds of religion, race, caste, sect or sex alone by Articles 15 to 17 in particular, it was once again reiterated as hereunder:

“28. The religious freedom guaranteed by Articles 25 and 26, therefore, is intended to be a guide to a community life and ordain every religion to act according to its cultural and social demands to establish an egalitarian social order. Articles 25 and 26, therefore, strike a balance between the rigidity of right to religious belief and faith and their intrinsic restrictions in matters of religion, religious beliefs and religious practices and guaranteed freedom of conscience to commune with his cosmos/creator and realize his spiritual self. Sometimes, practices religious or secular are inextricably mixed up. This is more particularly so in regard to Hindu religion because under the provisions of the ancient Smriti, human actions from birth to death and most of the individual actions from day to day are regarded as religious in character in one facet or the other. They sometimes claim the religious system or sanctuary and seek the cloak of constitutional protection guaranteed by Articles 25 and 26. One hinges upon constitutional religious model and another diametrically more on traditional point of view. The legitimacy of the true categories is required to be adjudged strictly within the parameters of the right of the individual and the legitimacy of the State for social progress, well-being and reforms, social intensification and national unity. Law is a tool of social engineering and an instrument of social change evolved by a gradual and continuous process. As Benjamin Cardozo has put it in his *Judicial Process*, life is not logic but experience. History and customs, utility and the accepted standards of right conduct are the forms which singly or in combination all be the progress of law. Which of these forces shall dominate in any case depends largely upon the comparative importance or value of the social interest that will be, thereby, impaired. There shall be symmetrical development with history or custom when history or custom has been the motive force or the chief one in giving shape to the existing rules and with logic or philosophy when the motive power has been theirs. One must get the knowledge just as the legislature gets it from experience and study and reflection in proof from life itself. All secular activities which may be associated with religion but which do not relate or constitute an essential part of it may be amenable to State regulations but what constitutes the essential part of religion may be ascertained primarily from the doctrines of that religion itself according to its tenets, historical background and change in evolved process etc. The concept of essentiality is not itself a determinative factor. It is one of the circumstances to be considered in adjudging whether the particular matters of religion or religious practices or belief are an integral part of the



religion. It must be decided whether the practices or matters are considered integral by the community itself. Though not conclusive, this is also one of the facets to be noticed. The practice in question is religious in character and whether it could be regarded as an integral and essential part of the religion and if the court finds upon evidence adduced before it that it is an integral or essential part of the religion, Article 25 accords protection to it. Though the performance of certain duties is part of religion and the person performing the duties is also part of the religion or religious faith or matters of religion, it is required to be carefully examined and considered to decide whether it is a matter of religion or a secular management by the State. Whether the traditional practices are matters of religion or integral and essential part of the religion and religious practice protected by Articles 25 and 26 is the question. And whether hereditary Archaka is an essential and integral part of the Hindu religion is the crucial question.

15. As observed by this Court in *Kailash Sonkar v. Maya Devi* [AIR 1984 SC 600] in view of the categorical revelations made in the Gita and the dream of the Father of the Nation Mahatma Gandhi that all distinctions based on caste and creed must be abolished and man must be known and recognized by his actions, irrespective of the caste to which he may on account of his birth belong, a positive step has been taken to achieve this in the Constitution and, in our view, the message conveyed thereby got engrafted in the form of Articles 14 to 17 and 21 of the Constitution of India, and paved the way for the enactment of the Protection of Civil Rights Act, 1955.

16. It is now well settled that Article 25 secures to every person, subject of course to public order, health and morality and other provisions of Part III, including Article 17 freedom to entertain and exhibit by outward acts as well as propagate and disseminate such religious belief according to his judgment and conscience for the edification of others. The right of the State to impose such restrictions as are desired or found necessary on grounds of public order, health and morality is inbuilt in Articles 25 and 26 itself. Article 25(2)(b) ensures the right of the State to make a law providing for social welfare and reform besides throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus and any such rights of the State or of the communities or classes of society were also considered to need due regulation in the process of harmonizing the various rights. The vision of the founding fathers of the Constitution to liberate the society from blind and ritualistic adherence to mere traditional superstitious beliefs sans reason or rational basis has found expression in the form of Article 17. The legal position that the protection under Articles 25 and 26 extends a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion and as to what really constitutes an essential part of religion or religious practice has to be decided by the courts with reference to the doctrine of a particular religion or practices regarded as parts of religion, came to be equally firmly laid down.

17. Where a temple has been constructed and consecrated as per Agamas, it is considered necessary to perform the daily rituals, poojas and recitations as required to maintain the sanctity of the idol and it is not that in respect of any and every temple any such uniform rigour of rituals can be sought to be enforced, de hors its origin, the manner of construction or

method of consecration. No doubt only a qualified person well versed and properly trained for the purpose alone can perform poojas in the temple since he has not only to enter into the sanctum sanctorum but also touch the idol installed therein. It therefore goes without saying that what is required and expected of one to perform the rituals and conduct poojas is to know the rituals to be performed and mantras, as necessary, to be recited for the particular deity and the method of worship ordained or fixed therefor. For example, in Saivite temples or Vaishnavite temples, only a person who learnt the necessary rites and mantras conducive to be performed and recited in the respective temples and appropriate to the worship of the particular deity could be engaged as an Archaka. If traditionally or conventionally, in any temple, all along a Brahmin alone was conducting poojas or performing the job of Santhikaran, it may not be because a person other than the Brahmin is prohibited from doing so because he is not a Brahmin, but those others were not in a position and, as a matter of fact, were prohibited from learning, reciting or mastering Vedic literature, rites or performance of rituals and wearing sacred thread by getting initiated into the order and thereby acquire the right to perform homa and ritualistic forms of worship in public or private temples. Consequently, there is no justification to insist that a Brahmin or Malayala Brahmin in this case, alone can perform the rites and rituals in the temple, as part of the rights and freedom guaranteed under Article 25 of the Constitution and further claim that any deviation would tantamount to violation of any such guarantee under the Constitution. There can be no claim based upon Article 26 so far as the Temple under our consideration is concerned. Apart from this principle enunciated above, as long as anyone well versed and properly trained and qualified to perform the pooja in a manner conducive and appropriate to the worship of the particular deity, is appointed as Santhikaran dehors his pedigree based on caste, no valid or legally justifiable grievance can be made in a court of law. There has been no proper plea or sufficient proof also in this case of any specific custom or usage specially created by the founder of the Temple or those who have the exclusive right to administer the affairs – religious or secular of the Temple in question, leave alone the legality, propriety and validity of the same in the changed legal position brought about by the Constitution and the law enacted by Parliament. The Temple also does not belong to any denominational category with any specialized form of worship peculiar to such denomination or to its credit. For the said reason, it becomes, in a sense, even unnecessary to pronounce upon the invalidity of any such practice being violative of the constitutional mandate contained in Articles 14 to 17 and 21 of the Constitution of India.

18. In the present case, it is on record and to which we have also made specific reference in the details of facts showing that an institution has been started to impart training to students joining the institution in all relevant Vedic texts, rites, religious observances and modes of worship by engaging reputed scholars and Thanthis and the students, who ultimately pass through the tests, are being initiated by performing the investiture of sacred thread and gayatri. That apart, even among such qualified persons, selections based upon merit are made by the Committee, which includes among other scholars a reputed Thanthri also and the quality of the candidate as well as the eligibility to perform the rites, religious observances and modes of worship are once again tested before appointment. While that be the position, to insist that the person concerned should be a member of a particular caste born of particular parents of his caste can neither be said to be an insistence upon an essential religious practice,

rite, ritual, observance or mode of worship nor has any proper or sufficient basis for asserting such a claim been made out either on facts or in law, in the case before us, also. The decision in *Shirur Mutt* case and the subsequent decisions rendered by this Court had to deal with the broad principles of law and the scope of the scheme of rights guaranteed under Articles 25 and 26 of the Constitution, in the peculiar context of the issues raised therein. The invalidation of a provision empowering the Commissioner and his subordinates as well as persons authorized by him to enter any religious institution or place of worship in any unregulated manner by even persons who are not connected with spiritual functions as being considered to violate rights secured under Articles 25 and 26 of the Constitution of India, cannot help the appellant to contend that even persons duly qualified can be prohibited on the ground that such person is not a Brahmin by birth or pedigree. None of the earlier decisions rendered before *Seshammal* case related to consideration of any rights based on caste origin and even *Seshammal* case dealt with only the facet of rights claimed on the basis of hereditary succession. The attempted exercise by the learned Senior Counsel for the appellant to read into the decisions of this Court in *Shirur Mutt* case and others something more than what it actually purports to lay down as if they lend support to assert or protect any and everything claimed as being part of the religious rituals, rites, observances and method of worship and make such claims immutable from any restriction or regulation based on the other provisions of the Constitution or the law enacted to implement such constitutional mandate, deserves only to be rejected as merely a superficial approach by purporting to deride what otherwise has to have really an overriding effect, in the scheme of rights declared and guaranteed under Part III of the Constitution of India. Any custom or usage irrespective of even any proof of their existence in pre-constitutional days cannot be countenanced as a source of law to claim any rights when it is found to violate human rights, dignity, social equality and the specific mandate of the Constitution and law made by Parliament. No usage which is found to be pernicious and considered to be in derogation of the law of the land or opposed to public policy or social decency can be accepted or upheld by courts in the country.

19. For the reasons stated supra, no exception, in our view, could be taken to the conclusions arrived at by the Full Bench of the Kerala High Court and no interference is called for with the same, in our hands. The appeal consequently fails and shall stand dismissed.

\* \* \* \* \*

***Commissioner of Police v. Acharya Jagdishwarananda Avadhuta***  
(2004) 12 SCC 770

In *Acharya Jagdishwaranand Avadhuta v. Commr. of Police* [(1983) 4 SCC 522] (the first Ananda Margi case), the question raised before the Supreme Court was “whether performance of Tandava dance in public is an essential practice of the Ananda Margi order or not”. In that case, the court held that “Tandava dance in public is not an essential rite of the Ananda Margi faith”. Subsequently, Ananda Murtiji - the founder of that order prescribed the performance of Tandava dance in public as an essential religious practice in *Carya Carya*, a book containing the relevant doctrines. Based on this, Ananda Margis sought permission of the Commissioner of Police, Calcutta to perform Tandava dance in public. The Commissioner accorded permission to take out Tandava dance without knife, live snake, trident or skull. This was challenged by the respondents before the Supreme Court by filing Writ Petitions (Civil) Nos. 1317-18 of 1987, which were disposed of with the following observation:

“We are of the view that these cases should appropriately be examined by the High Court keeping in view what has been said by this Court in the judgment in *Acharya Jagdishwaranand Avadhuta v. Commr. of Police*. Petitioners are at liberty to go before the High Court.”

**S. RAJENDRA BABU, J.** - Firstly, a Single Judge and subsequently a Division Bench of the Calcutta High Court arrived at the conclusion that taking out Tandava dance in public carrying skull, trident, etc., is an essential part of the Ananda Margi faith and the Commissioner of Police could not impose conditions to it. This decision is now under challenge. Subsequent to this, when this matter came up for consideration before the Supreme Court, a Bench of two learned Judges made an order on 13-11-1992 as follows:

“After hearing the parties for some time and having considered the decision of the three learned Judges of this Court in *Acharya Jagdishwaranand Avadhuta v. Commr. of Police* we are of the view that this is a matter which requires consideration by a Constitution Bench of this Court. Hence, we request the learned Chief Justice to constitute the Bench as early as possible for hearing of the matter.”

On 4-12-2001 a Constitution Bench of the Supreme Court considered this matter and noticed:

“(i) that the referring Bench did not express any difficulty in following the earlier judgment, and (ii) that it did not set out any substantial question of law which required the decision of a Constitution Bench since that order merely stated that the matter should be heard and decided by a Constitution Bench. The Constitution Bench felt that in those circumstances there was no justification for hearing the appeal by the Constitution Bench and therefore placed the matter back before a two learned Judges for final disposal who in their turn made a reference to a Bench of three Judges.”

The relevant question for consideration in this case is whether the High Court is correct in its finding that Tandava dance is an essential and integral part of the Ananda Margi faith based on the revised edition of *Carya Carya*. A Bench consisting of three Judges of this Court

in the *first Ananda Margi* case arrived at a unanimous conclusion on facts that Tandava dance in public is not an essential and integral part of the Ananda Margi faith. In order to arrive at this conclusion this Court *inter alia* took the following four aspects into account:

1. Shri Prabhat Ranjan Sarkar, otherwise known as Shri Ananda Murti, founded a socio-spiritual organisation claimed to have been dedicated to the service of humanity in different spheres of life such as physical, mental and spiritual, irrespective of caste, creed or colour, in the year 1955.

2. Ananda Marga contains no dogmatic beliefs and teaches yogic and spiritual science to every aspirant.

3. Tandava dance was not accepted as an essential religious rite of Ananda Margis in 1955 when that order was first established. It was introduced for the first time as a religious rite in or around 1966.

4. Ananda Marga is a religious denomination of the Shaivite order, which is a well-known segment of the Hindu religion.

6. After taking into account all the relevant facts, including the above, this Court held:

*“Ananda Marga as a religious order is of recent origin and Tandava dance as a part of religious rites of that order is still more recent. It is doubtful as to whether in such circumstances Tandava dance can be taken as an essential religious rite of the Ananda Margis . Even conceding that is so, it is difficult to accept Mr Tarkunde’s argument that taking out religious processions with Tandava dance is an essential religious rite of Ananda Margis. On the basis of the literature of the Ananda Marga denomination it has been contended that there is prescription of the performance of Tandava dance by every follower of Ananda Marga. Even conceding that Tandava dance has been prescribed as a religious rite for every follower of the Ananda Marga it does not follow as a necessary corollary that Tandava dance to be performed in public is a matter of religious rite.”* (emphasis supplied)

7. By the above finding this Court was categorical in its judgment that Tandava dance in public is not an essential part of religious rites of the Ananda Margi faith. The conclusion arrived at by this Court regarding the non-essential nature of Tandava dance to Ananda Margi faith was principally based on the fact that the order itself is of recent origin and the practice of the said dance is still more recent. The Court even went to the extent of assuming that Tandava dance was prescribed as a rite and then arrived at the conclusion that taking out Tandava dance in public is not essential to Ananda Margi faith. After arriving at the above ratio, the Court further added that:

*“In fact, there is no justification in any of the writings of Shri Ananda Murti that Tandava dance must be performed in public. At least none could be shown to us by Mr Tarkunde despite an enquiry by us in that behalf.”* (emphasis in original)

8. This observation cannot be considered as a clue to reopen the whole finding. By making that observation the Court was only buttressing the finding that was already arrived at. The learned Judges of the High Court wrongly proceeded on the assumption that the finding of this Court regarding the non-essential nature of Tandava dance to the Ananda

Margi faith is due to the non-availability of any literature or prescriptions by the founder. The High Court is under the wrong impression that an essential part of religion could be altered at any subsequent point of time.

9. The protection guaranteed under Articles 25 and 26 of the Constitution is not confined to matters of doctrine or belief but extends to acts done in pursuance of religion and, therefore, contains a guarantee for rituals, observances, ceremonies and modes of worship which are essential or integral part of religion. What constitutes an integral or essential part of religion has to be determined with reference to its doctrines, practices, tenets, historical background, etc. of the given religion. What is meant by “an essential part or practices of a religion” is now the matter for elucidation. Essential part of a religion means the core beliefs upon which a religion is founded. Essential practice means those practices that are fundamental to follow a religious belief. It is upon the cornerstone of essential parts or practices that the superstructure of a religion is built, without which a religion will be no religion. Test to determine whether a part or practice is essential to a religion is to find out whether the nature of the religion will be changed without that part or practice. If the taking away of that part or practice could result in a fundamental change in the character of that religion or in its belief, then such part could be treated as an essential or integral part. There cannot be additions or subtractions to such part because it is the very essence of that religion and alterations will change its fundamental character. It is such permanent essential parts which are protected by the Constitution. Nobody can say that an essential part or practice of one’s religion has changed from a particular date or by an event. Such alterable parts or practices are definitely not the “core” of religion whereupon the belief is based and religion is founded upon. They could only be treated as mere embellishments to the non-essential (*sic* essential) part or practices.

10. Here in this case the Ananda Margi order was founded in 1955. Admittedly, Tandava dance was introduced as a practice in 1966. Even without the practice of Tandava dance (between 1955 to 1966) the Ananda Margi order was in existence. Therefore, Tandava dance is not the “core” upon which the Ananda Margi order is founded. Had Tandava dance been the core of Ananda Margi faith, then without it Ananda Margi faith could not have existed.

11. There is yet another difficulty in accepting the reasoning of the High Court that a subsequent addition in *Carya Carya* could constitute Tandava dance as an essential part of Ananda Margi faith. In a given case it is for the court to decide whether a part or practice is an essential part or practice of a given religion. As a matter of fact if in the earlier litigations the court arrives at a conclusion of fact regarding the essential part or practice of a religion – it will create problematic situations if the religion is allowed to circumvent the decision of the court by making alteration in its doctrine. For example, in *N. Adithayan v. Travancore Devaswom Board* [(2002) 8 SCC 106] this Court found that a non-Brahmin could be appointed as a *poojari* (priest) in a particular temple and it is not essential to that temple practice to appoint only a Brahmin as *poojari*. Is it open for those temple authorities to subsequently decide that only Brahmins could be appointed as *poojaris* by way of some alterations in the relevant doctrines? We are clear that no party could ever revisit such a finding of fact. Such an attempt will result in anomalous situations and could only be treated as a circuitous way to overcome the finding of a court. If subsequent alterations in doctrine

could be allowed to create new essentials, the judicial process will then be reduced to a useless formality and futile exercise. Once there is a finding of fact by the competent court, then all other bodies are estopped from revisiting that conclusion. On this count also the decision of the High Court is liable to be set aside.

12. In the result, we respectfully adopt the finding of this Court in the *first Ananda Margi* case and allow the instant appeal. Since we find that practice of Tandava dance in public is not an essential part of Ananda Margi faith, there is no need to look into any other arguments advanced before us. The order in the writ petition as affirmed by the Division Bench is set aside and the writ petition is dismissed.

**AR. LAKSHMANAN, J.** (*Dissenting*) - **What is Tandava dance**

18. According to the Ananda Margis, Lord Shiva was the originator of Tandava dance and introduced it about six thousand five hundred years back for physical, mental and spiritual upliftment of every human being. Tandava dance is to be performed with a skull, knife and *trishul*. It is also customary to hold a *lathi* and a *damroo* and sword. Dancer may also use live snake in place of skull in daytime and fire *mashals* or *damroo* during night-time. Tandava dance lasts for a few minutes where two or three persons dance by lifting one leg to the level of chest and then bringing it down and lifting the other. Ananda Murtiji by incorporating Tandava dance in the system of beliefs of Ananda Marga wanted to bring it to its original glory. Tandava dance symbolises “life” and “death”. The skull represents death and the knife represents life. The Ananda Margis are followers of the Shaivite order within the Hindu religion and Ananda Murtiji directed performance of Tandava dance as one of the prescriptions of religious rite to be followed by an Ananda Margi in private life and public places.

19. The respondents took out a procession with human skulls, daggers, trident, etc. on 10-8-1979. According to the police, the procession was taken out violating prohibitory ban in regard to carrying of those articles in processions in public streets. In those circumstances, the Police Authorities declared the assembly unlawful and the police force was compelled to intervene. The Commissioner of Police, Calcutta made repetitive orders under Section 144 of the Code of Criminal Procedure, 1973 since August 1979, directing that no member of a procession or assembly of five or more persons should carry any firearms, explosives, swords, spears, knives, trident, *lathis* or any article which may be used as weapon of offence or any article likely to cause annoyance to the public. This order of the Police Commissioner was challenged by the General Secretary of the Ananda Marga in Writ Petition No. 903 of 1980 before the High Court of Calcutta. The Calcutta High Court, by order dated 23-9-1980, rejected the said writ petition for the reasons recorded therein. Again the Commissioner of Police, Calcutta made a fresh order under Section 144 of the Code of Criminal Procedure, 1973 on 29-3-1982 wherein the same restraints as mentioned in the earlier order were imposed and an application for permission to take out a procession on the prohibited streets accompanied with Tandava dance was rejected by him. The said order refusing permission by the Police Commissioner was challenged by filing a writ petition under Article 32 of the Constitution in this Court being registered as Writ Petitions Nos. 6890 and 7204 of 1982.

The Supreme Court passed an order in the said writ petition rejecting the same on the finding that performance of Tandava dance in procession in the public streets or in gatherings in public places was not an essential religious rite of the followers of the Ananda Marga. This Court also held as under:

The claim of Ananda Marga as a separate religion was not acceptable in view of the clear assertion that it was not an institutionalised religion but a religious denomination. Ananda Margis belong to the Shaivite order and as such they belong to the Hindu religion. Accordingly, they were not entitled to get the protection of Article 25 of the Constitution. The courts have the power to determine whether a particular rite or observance is regarded as essential by the tenets of a particular religion.

Ananda Marga as a religious order is of recent origin and Tandava dance as a part of religious rites of that order is still more recent. It is doubtful as to whether in such circumstances Tandava dance can be taken as an essential religious rite of Ananda Margis. Even conceding it is so, it is difficult to accept Mr Tarkunde's argument that taking out religious processions with Tandava dance is an essential religious rite of Ananda Margis. Even conceding that Tandava dance has been prescribed as a religious rite for every follower of Ananda Margis, it does not follow as a necessary corollary that Tandava dance to be performed in the public is a matter of religious rite. In fact, there is no justification in any of the writings of Shri Ananda Murti that Tandava dance must be performed in public. We are, therefore, not in a position to accept the contention of Mr Tarkunde that performance of Tandava dance in a procession or at public places is an essential religious rite to be performed by every Ananda Margi.

The petitioners have no fundamental right within the meaning of Article 25 or 26 to perform Tandava dance in public streets and public places.

\* \* \* \* \*



***Bijoe Emmanuel v. State of Kerala***

(1986) 3 SCC 615

**O. CHINNAPPA REDDY, J.** - The three child-appellants, Bijoe, Binu Mol and Bindu Emmanuel, are the faithful of Jehovah's Witnesses. They attend school. Daily, during the morning Assembly, when the National Anthem 'Jana Gana Mana' is sung, they stand respectfully but they do not sing. They do not sing because, according to them, it is against the tenets of their religious faith - not the words or the thoughts of the anthem but the singing of it. This they and before them their elder sisters who attended the same school earlier have done all these several years. No one bothered. No one worried. No one thought it disrespectful or unpatriotic, the children were left in peace and to their beliefs. That was until July 1985, when some patriotic gentleman took notice. The gentleman thought it was unpatriotic of the children not to sing the National Anthem. He happened to be a Member of the Legislative Assembly. So, he put a question in the Assembly. A Commission was appointed to enquire and report. We do not have the report of the Commission. We are told that the Commission reported that the children are 'law-abiding' and that they showed no disrespect to the National Anthem. Indeed it is nobody's case that the children are other than well-behaved or that they have ever behaved disrespectfully when the National Anthem was sung. They have always stood up in respectful silence. But these matters of conscience, which though better left alone, are sensitive and emotionally evocative. So, under the instructions of Deputy Inspector of Schools, the Headmistress expelled the children from the school from July 26, 1985. The father of the children made representations requesting that his children may be permitted to attend the school pending orders from the government. The Headmistress expressed her helplessness in the matter. Finally the children filed a writ petition in the High Court seeking an order restraining the authorities from preventing them from attending school. First a learned Single Judge and then a Division Bench rejected the prayer of the children. They have now come before us by special leave under Article 136 of the Constitution.

2. We are afraid the High Court misdirected itself and went off at a tangent. They considered, in minute detail, each and every word and thought of the National Anthem and concluded that there was no word or thought in the National Anthem which could offend anyone's religious susceptibilities. But that is not the question at all. The objection of the petitioners is not to the language or the sentiments of the National Anthem: they do not sing the National Anthem wherever, 'Jana Gana Mana' in India, 'God save the Queen' in Britain, the Star Spangled Banner in the United States and so on. In their words in the writ petition they say:

"The students who are Witnesses do not sing the Anthem though they stand up on such occasions to show their respect to the National Anthem. They desist from actual singing only because of their honest belief and conviction that their religion does not permit them to join any rituals except it be in their prayers to Jehovah their God."

3. That the petitioners truly and conscientiously believe what they say is not in doubt. They do not hold their beliefs idly and their conduct is not the outcome of any perversity. The petitioners have not asserted these beliefs for the first time or out of any unpatriotic sentiment.

Jehovah's Witnesses, as they call themselves, appear to have always expressed and stood up for such beliefs all the world over as we shall presently show. Jehovah's Witnesses and their peculiar beliefs though little noticed in this country, have been noticed, we find, in the *Encyclopaedia Britannica* and have been the subject of judicial pronouncements elsewhere.

4. In *The New Encyclopaedia Britannica (Macropaedia)* Vol. 10, Page 538, after mentioning that Jehovah's Witnesses are "the adherents of the apocalyptic sect organized by Charles Taze Russell in the early 1870's", it is further mentioned:

"They believe that the Watch Tower Bible and Tract Society, their legal agency and publishing arm, exemplifies the will of God and proclaims the truths of the Bible against the evil triumvirate of organized religion, the business world, and the State. . . . The Witnesses also stand apart from civil society, refusing to vote, run for public office, serve in any armed forces, salute the Flag, stand for the national anthem, or recite the pledge of allegiance. Their religious stands have brought clashes with various governments, resulting in law suits, mob violence, imprisonment, torture, and death. At one time more than 6000 Witnesses were inmates of Nazi concentration camps. Communist and Fascist States usually forbid Watch Tower activities. In the US the society has taken 45 cases to the Supreme Court and has won significant victories for freedom of religion and speech. The Witnesses have been less successful in claiming exemptions as ministers from military service and in seeking to withhold blood transfusion from their children."

5. Some of the beliefs held by Jehovah's Witnesses are mentioned in a little detail in the statement of case in *Adelaide Company of Jehovah's Witnesses v. The Commonwealth* [67 CLR 116], a case decided by the Australian High Court. It is stated:

"Jehovah's Witnesses are an association of persons loosely organized throughout Australia and elsewhere who regard the literal interpretation of the Bible as fundamental to proper religious beliefs.

Jehovah's Witnesses believe that God, Jehovah, is the supreme ruler of the universe. Satan or Lucifer was originally part of God's organization and the perfect man was placed under him. He rebelled against God and set up his own organization in challenge to God and through that organization has ruled the world. He rules and controls the world through material agencies such as organized political, religious, and financial bodies. Christ, they believe, came to earth to redeem all men who would devote themselves entirely to serving God's will and purpose and He will come to earth again (His second coming has already begun) and will overthrow all the powers of evil.

These beliefs lead Jehovah's Witnesses to proclaim and teach publicly both orally and by means of printed books and pamphlets that the British Empire and also other organized political bodies are organs of Satan, unrighteously governed and identifiable with the Beast in the thirteenth chapter of the Book of Revelation. Also that Jehovah's Witnesses are Christians entirely devoted to the Kingdom of God, which is "The Theocracy that they have no part in the political affairs of the world and must not interfere in the least manner with war between nations. They must be entirely neutral and not interfere with the drafting of men of nations they go to war.

And also that wherever there is a conflict between the laws of Almighty God and the laws of man the Christian must always obey God's law in preference to man's law. All laws of men, however, in harmony with God's law the Christian obeys. God's law is expounded and taught by Jehovah's Witnesses. Accordingly they refuse to take an oath of allegiance to the King or other constituted human authority."

9. Article 19(1)(a) of the Constitution guarantees to all citizens freedom of speech and expression, but Article 19(2) provides that nothing in Article 19(1)(a) shall prevent a State from making any law, insofar as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence. Article 25(1) guarantees to all persons freedom of conscience and the right freely to profess, practise and propagate religion, subject to order, morality and health and to the other provisions of Part III of the Constitution. Now, we have to examine whether the ban imposed by the Kerala education authorities against silence when the National Anthem is sung on pain of expulsion from the school is consistent with the rights guaranteed by Articles 19(1)(a) and 25 of the Constitution.

10. We may at once say that there is no provision of law which obliges anyone to sing the National Anthem nor do we think that it is disrespectful to the National Anthem if a person who stands up respectfully when the National Anthem is sung does not join the singing. It is true Article 51-A(a) of the Constitution enjoins a duty on every citizen of India "to abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem". Proper respect is shown to the National Anthem by standing up when the National Anthem is sung. It will not be right to say that disrespect is shown by not joining in the singing.

11. Parliament has not been unmindful of 'National Honour'. The Prevention of Insults to National Honour Act was enacted in 1971. While Section 2 deals with insult to the Indian National Flag and the Constitution of India, Section 3 deals with the National Anthem and enacts:

"Whoever, intentionally prevents the singing of the National Anthem or causes disturbance to any assembly engaged in such singing shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both."

Standing up respectfully when the National Anthem is sung but not singing oneself clearly does not either prevent the singing of the National Anthem or cause disturbance to an assembly engaged in such singing so as to constitute the offence mentioned in Section 3 of the Prevention of Insults to National Honour Act.

12. The Kerala Education Act contains no provision of relevance, Section 36, however, enables the government to make rules for the purpose of carrying into effect the provisions of the Act and in particular to provide for standards of education and courses of study. The Kerala Education Rules have been made pursuant to the powers conferred by the Act. Chapter VIII of the Rules provides for the organisation of instruction and progress of pupils. Rule 8 of Chapter VIII provides for moral instruction and expressly says Moral instruction should form

a definite programme in every school but it should in no way wound the social or religious susceptibilities of the peoples generally. The rule goes on to say that “the components of a high character” should be impressed upon the pupils. One of the components is stated to be “love of one’s country.” Chapter IX deals with discipline. Rule 6 of Chapter IX provides for the censure, suspension or dismissal of a pupil found guilty of deliberate insubordination, mischief, fraud, malpractice in examinations, conduct likely to cause unwholesome influence on other pupils etc. It is not suggested that the present appellants have ever been found guilty of misconduct such as that described in Chapter IX, Rule 6. On the other hand, the report of the Commission, we are told, is to the effect that the children have always been well-behaved, law-abiding and respectful.

13. The Kerala Education Authorities rely upon two circulars of September 1961 and February 1970 issued by the Director of Public Instruction, Kerala. The first of these circulars is said to be a Code of Conduct for teachers and pupils and stresses the importance of moral and spiritual values. Several generalisations have been made and under the head patriotism it is mentioned :

**“Patriotism**

1. Environment should be created in the school to develop the right kind of patriotism in the children. Neither religion nor party nor anything of this kind should stand against one’s love of the country.

2. For national integration, the basis must be the school.

3. *National Anthem. As a rule, the whole school should participate in the singing of the National Anthem.”*

In the second circular also instructions of a general nature are given and para 2 of the circular, with which we are concerned, is as follows:

“It is compulsory that all schools shall have the morning assembly every day before actual instruction begins. The whole school with all the pupils and teachers shall be gathered for the assembly. After the singing of the National Anthem the whole school shall, in one voice, take the National Pledge before marching back to the classes.”

14. Apart from the fact that the circulars have no legal sanction behind them in the sense that they are not issued under the authority of any statute, we also notice that the circulars do not oblige each and every pupil to join in the singing even if he has any conscientious objection based on his religious faith, nor is any penalty attached to not joining the singing. On the other hand, one of the circulars (the first one) very lightly emphasise the importance of religious tolerance. It is said there, “All religions should be equally respected.”

15. If the two circulars are to be so interpreted as to compel each and every pupil to join in the singing of the National Anthem despite his genuine, conscientious religious objection, then such compulsion would clearly contravene the rights guaranteed by Article 19(1)(a) and Article 25(1).

16. We have referred to Article 19(1)(a) which guarantees to all citizens freedom of speech and expression and to Article 19(2) which provides that nothing in Article 19(1)(a) shall prevent a State from making any law, insofar as such law imposes reasonable

restrictions on the exercise of the right conferred by Article 19(1)(a) in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence. The law is now well settled that any law which be made under clauses (2) to (6) of Article 19 to regulate the exercise of the right to the freedoms guaranteed by Article 19(1)(a) to (e) and (g) must be 'a law' having statutory force and not a mere executive or departmental instruction. In *Kharak Singh v. State of U.P.* [AIR 1963 SC 1295, 1299], the question arose whether a police regulation which was a mere departmental instruction, having no statutory basis could be said to be a law for the purpose of Article 19(2) to (6). The Constitution Bench answered the question in the negative and said:

“Though learned counsel for the respondent started by attempting such a justification by invoking Section 12 of the Indian Police Act he gave this up and conceded that the regulations contained in Chapter XX had no such statutory basis but were merely executive or departmental instructions framed for the guidance of the police officers. They would not therefore be “a law” which the State is entitled to make under the relevant clauses (2) to (6) of Article 19 in order to regulate or curtail fundamental rights guaranteed by the several sub-clauses of Article 19(1), nor would the same be “a procedure established by law” within Article 21. The position therefore is that if the action of the police which is the arm of the executive of the State is found to infringe any of the freedoms guaranteed to the petitioner the petitioner would be entitled to the relief of mandamus which he seeks, to restrain the State from taking action under the regulations.”

17. The two circulars on which the department has placed reliance in the present case have no statutory basis and are mere departmental instructions. They cannot, therefore, form the foundation of any action aimed at denying a citizen's Fundamental Right under Article 19(1)(a). Further it is not possible to hold that the two circulars were issued 'in the interest of the sovereignty and integrity of India, the security of the State, friendly relation with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence' and if not so issued, they cannot again be invoked to deny a citizen's Fundamental Right under Article 19(1)(a). In *Kameshwar Prasad v. State of Bihar* [AIR 1962 SC 1166], a Constitution Bench of the Court had to consider the validity of Rule 4-A of the Bihar Government Servants Conduct Rules which prohibited any form of demonstration even if such demonstration was innocent and incapable of causing a breach of public tranquillity. Examining the action of the Education Authorities in the light of *Kharak Singh v. State of U.P.* and *Kameshwar Prasad v. State of Bihar*, we have no option but to hold that the expulsion of the children from the school for not joining the singing of the National Anthem though they respectfully stood up in silence when the Anthem was sung was violative of Article 19(1)(a).

19. We see that the right to freedom of conscience and freely to profess, practise and propagate religion guaranteed by Article 25 is subject to (1) public order, morality and health; (2) other provisions of Part III of the Constitution; (3) any law (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; or (b) providing for social welfare and reform or the throwing open of Hindu

religious institutions of a public character to all classes and sections of Hindus. Thus while on the one hand Article 25(1) itself expressly subjects the right guaranteed by it to public order, morality and health and to the other provisions of Part III, on the other hand, the State is also given the liberty to make a law to regulate or restrict any economic, financial, political or other secular activity which may be associated with religious practice and to provide for social welfare and reform, even if such regulation, restriction or provision affects the right guaranteed by Article 25(1). Therefore, whenever the Fundamental Right to freedom of conscience and to profess, practice and propagate religion is invoked, the act complained of as offending the Fundamental Right must be examined to discover whether such act is to protect public order, morality and health, whether it is to give effect to the other provisions of Part III of the Constitution or whether it is authorised by a law made to regulate or restrict any economic, financial, political or secular activity which may be associated with religious practice or to provide for social welfare and reform. It is the duty and function of the court so to do. Here again as mentioned in connection with Article 19(2) to (6), it must be a law having the force of a statute and not a mere executive or a departmental instruction.

25. We are satisfied, in the present case, that the expulsion of the three children from the school for the reason that because of their conscientiously held religious faith, they do not join the singing of the National Anthem in the morning assembly though they do stand up respectfully when the anthem is sung, is a violation of their fundamental right 'to freedom of conscience and freely to profess, practice and propagate religion'.

26. Shri Vishwanath Iyer and Shri Poti, who appeared for the respondents suggested that the appellants, who belonged but to a religious denomination could not claim the Fundamental Right guaranteed by Article 25(1) of the Constitution. They purported to rely upon a sentence in the judgment of this court in *Acharya Jagdishwaranand v. Commissioner of Police, Calcutta* [AIR 1984 SC 51]. The question in that case was whether the Ananda Margis had a fundamental right within the meaning of Article 25 or Article 26 to perform Tandava dance in public streets and public places. The court found that Ananda Marga was a Hindu religious denomination and not a separate religion. The court examined the question whether the Tandava dance was a religious rite or practice essential to the tenets of the Ananda Marga and found that it was not. On that finding the court concluded that the Ananda Marga had no fundamental right to perform Tandava dance in public streets and public places. This sentence appears to have crept into the judgment by some slip. It is not a sequiter to the reasoning of the court on any of the issues. In fact, in the subsequent paragraphs, the Court has expressly proceeded to consider the claim of the Ananda Marga to perform Tandava dance in public streets pursuant to the right claimed by them under Article 25(1).

27. We, therefore, find that the Fundamental Rights of the appellants under Articles 19(1)(a) and 25(1) have been infringed and they are entitled to be protected. We allow the appeal, set aside the judgment of the High Court and direct the respondent authorities to re-admit the children into the school, to permit them to pursue their studies without hindrance and to facilitate the pursuit of their studies by giving them the necessary facilities.

\* \* \* \* \*

**CULTURAL AND EDUCATIONAL RIGHTS*****Islamic Academy of Education v. State of Karnataka***

(2003) 6 SCC 697

The petition filed by the petitioner and others were placed before five-judge bench which was prima facie of the opinion that Article 30 did not clothe a minority educational institution with the power to adopt its own method of selection and the correctness of the decision of this Court in *St. Stephens College v. University of Delhi* [AIR 1992 SC 1630] was doubted. It was directed that the questions that arose should be authoritatively answered by a larger Bench. The matter was, therefore, decided by a eleven-judge Bench in *T.M.A. Pai Foundation v. State of Karnataka* [AIR 2003 SC 355]. After the judgment was delivered, on 31<sup>st</sup> October 2002, the Union of India, various State governments and the educational institutions understood the majority judgment in different perspectives. Different statutes/regulations were enacted/framed by different state governments. These led to litigations in several courts. Interim orders passed therein were assailed before the Supreme Court. It is under these circumstances that the bench had been constituted so that doubts/anomalies, if any, could be clarified.

On behalf of the petitioners/applicants it was submitted that fixation of percentage of seats that could be filled in the unaided professional colleges, both minority and non-minority by the management, as done by various State Governments, was impermissible. It was further submitted that the private unaided professional educational institutions had been given complete autonomy not only as regards the admission of students but also as regards the determination of their own fee structure. These institutions could fix their own fee structure, which could include a reasonable revenue surplus for purposes of development of education and expansion of the institution, and that so long as there was no profiteering or charging of capitation fees, there could be no interference by the Government. The right to admit students was an essential facet of the right to administer, and so long as admission to the unaided educational institutions was on a fair and transparent basis and on the basis of merit, the Government could not interfere. It was submitted that these institutions were entitled to fill up all their seats by adopting/evolving a rational and transparent method of admission which ensured that merit was adequately taken care of. It was submitted that in any event the institutions should be given a choice and be allowed to admit students on the basis of ICSC or SSC or other such examinations. It was also suggested that educational institutions of a particular type may be permitted to associate themselves for the purposes of holding a common entrance test in each State. On behalf of minority institutions, it was submitted that they were entitled to fill up all the seats with students of their own community/language. On behalf of non-minority institutions, it was submitted that they also had a fundamental right to establish and administer educational institutions and that the majority judgment placed them at par with the minority institutes.

The Union of India and various State Governments and some students, however, submitted that the right to set up and administer an educational institution was not an absolute right, and this right was subject to reasonable restrictions and that this right was subject (even in respect of minority institutions) to national interest. It was submitted that imparting

education was a State function but, due to resources crunch, the States were not in a position to establish sufficient number of educational institutions. It was submitted that, because of such resources crunch, the States were permitting private educational institutions to perform State functions. It was submitted that the Union of India, the States and Universities had statutory rights to fix the fees and to regulate admission of students in order to ensure (a) that there was no profiteering; (b) capitation fees were not charged; (c) admissions were based on principles of merit; and (d) to ensure that persons from the backward classes and poorer sections of society also had an opportunity to receive education, particularly, professional education. It was submitted that if these educational institutions were permitted to have their own tests for admission, the students would be put to undue harassment and hardship inasmuch as they would have to pay for application forms in various colleges and appear for tests in various colleges. It was pointed out that even if each institution charged Rs 500 to Rs 1000, a student would ultimately have to pay a large amount by way of application fees as, in the absence of a common entrance test and admission procedure the students would have to apply to a number of colleges. The students would also have to spend for transport from and to each college and may find it difficult, if not impossible to travel, from one college to another, to appear in all the tests. It was submitted that unless it was ensured that colleges admitted students strictly on the basis of merit at a common entrance test, it would be impossible to ensure that capitation fees were not charged and that there was no profiteering. It was pointed out that some colleges did not even issue admission forms unless and until the student agreed to pay a hefty sum. It was submitted that the majority judgment clarified that Article 30 had been enacted not for the purposes of giving any special right or privileges to the minority educational institutions, but to ensure that the minorities had equal rights with the majority. It was submitted that minority educational institutions could not claim any higher or better rights than those enjoyed by the non-minority educational institutions.

**V.N. KHARE, CJI** - In view of the rival submissions the following questions arise for consideration:

- (1) whether the educational institutions are entitled to fix their own fee structure;
- (2) whether minority and non-minority educational institutions stand on the same footing and have the same rights;
- (3) whether private unaided professional colleges are entitled to fill in their seats, to the extent of 100%, and if not, to what extent; and
- (4) whether private unaided professional colleges are entitled to admit students by evolving their own method of admission.

**Question No.1**

5. So far as the first question is concerned, in our view the majority judgment is very clear. There can be no fixing of a rigid fee structure by the government. Each institute must have the freedom to fix its own fee structure taking into consideration the need to generate funds to run the institution and to provide facilities necessary for the benefit of the students. They must also be able to generate surplus which must be used for the betterment and growth of that educational institution. In paragraph 56 of the judgment it has been categorically laid down that the decision on the fees to be charged must necessarily be left to the private



educational institutions that do not seek and which are not dependent upon any funds from the government. Each institute will be entitled to have its own fee structure. The fee structure for each institute must be fixed keeping in mind the infrastructure and facilities available, the investments made, salaries paid to the teachers and staff, future plans for expansion and/or betterment of the institution etc. Of course there can be no profiteering and capitation fees cannot be charged. It thus needs to be emphasized that as per the majority judgment imparting of education is essentially charitable in nature. Thus the surplus/profit that can be generated must be only for the benefit/use of that educational institution. Profits/surplus cannot be diverted for any other use or purpose and cannot be used for personal gain or for any other business or enterprise. As, at present, there are statutes/regulations which govern the fixation of fees and as this Court has not yet considered the validity of those statutes/regulations, we direct that in order to give effect to the judgment in *TMA Pai* case the respective State governments concerned authority shall set up, in each State, a committee headed by a retired High Court judge who shall be nominated by the Chief Justice of that State. The other member, who shall be nominated by the judge, should be a Chartered Accountant of repute. A representative of the Medical Council of India ('MCI') or the All India Council for Technical Education ('AICTE'), depending on the type of institution, shall also be a member. The secretary of the State government in charge of medical education or technical education, as the case may be, shall be a member and secretary of the Committee. The Committee should be free to nominate/ co-opt another independent person of repute, so that total number of members of the Committee shall not exceed 5. Each educational Institute must place before this Committee, well in advance of the academic year, its proposed fee structure. Along with the proposed fee structure all relevant documents and books of accounts must also be produced before the Committee for their scrutiny. The Committee shall then decide whether the fees proposed by that institute are justified and are not profiteering or charging capitation fee. The Committee will be at liberty to approve the fee structure or to propose some other fee which can be charged by the institute. The fee fixed by the Committee shall be binding for a period of three years, at the end of which period the institute would be at liberty to apply for revision. Once fees are fixed by the Committee, the institute cannot charge either directly or indirectly any other amount over and above the amount fixed as fees. If any other amount is charged, under any other head or guise e.g. donations the same would amount to charging of capitation fee. The governments/appropriate authorities should consider framing appropriate regulations, if not already framed, whereunder if it is found that an institution is charging capitation fees or profiteering that institution can be appropriately penalised and also face the prospect of losing its recognition/affiliation.

6. It must be mentioned that during arguments it was pointed out to us that some educational institutions are collecting, in advance, the fees for the entire course, i.e., for all the years. It was submitted that this was done because the institute was not sure whether the student would leave the institute midstream. It was submitted that if the student left the course in midstream then for the remaining years the seat would lie vacant and the institute would suffer. In our view an educational institution can only charge prescribed fees for one semester/year. If an institution feels that any particular student may leave in midstream then, at the highest, it may require that student to give a bond/bank guarantee that the balance fees for the whole course would be received by the institute even if the student left in midstream.

If any educational institution has collected fees in advance, only the fees of that semester/year can be used by the institution. The balance fees must be kept invested in fixed deposits in a nationalised bank. As and when fees fall due for a semester/year only the fees falling due for that semester/year can be withdrawn by the institution. The rest must continue to remain deposited till such time that they fall due. At the end of the course the interest earned on these deposits must be paid to the student from whom the fees were collected in advance.

**Question No.2**

7. The next question for consideration is whether minority and non minority educational institutions stand on the same footing and have the same rights under the judgment. In support of the contention that the minority and non minority educational institutions had the same rights reliance was placed upon paragraphs 138 and 139 of the judgment. These read as follows:

138. As we look at it, Article 30(1) is a sort of guarantee or assurance to the linguistic and religious minority Institutions of their right to establish and administer educational institutions of their choice. Secularism and equality being two of the basic features of the Constitution, Article 30(1) ensures protection to the linguistic and religious minorities; thereby preserving the secularism of the country. Furthermore, the principles of equality must necessarily apply to the enjoyment of such rights. No law can be framed that will discriminate against such minorities with regard to the establishment and administration of educational institutions vis-a-vis other educational institutions. Any law or rule or regulation that would put the educational institutions run by the minorities at a disadvantage when compared to the institutions run by the others will have to be struck down. At the same time, there also cannot be any reverse discrimination. It was observed in *St. Xaviers College* case, that "the whole object of conferring the right on minorities under Article 30 is to ensure that there will be equality between the majority and the minority. If the minorities do not have such special protection, they will be denied equality." In other words, the essence of Article 30(1) is to ensure equal treatment between the majority and the minority institutions. No one type or category of institution should be disfavoured or for that matter receive more favourable treatment than another. Laws of the land, including rules and regulations, must apply equally to the majority institutions as well as to the minority institutions. The minority institutions must be allowed to do what the non minority institutions are permitted to do.

139 Like any other private unaided institutions, similar unaided educational institutions administered by linguistic or religious minorities are assured maximum autonomy in relation thereto; e.g., method of recruitment of teachers, charging of fees and admission of students. They will have to comply with the condition of recognition, which cannot be such as to whittle down the right under Article 30.

Undoubtedly at first blush it does appear that these paragraphs equate both types of educational institutions. However, on a careful reading of these paragraphs it is evident that the essence of what has been laid down is that the minority educational institutions have a guarantee or assurance to establish and administer educational institutions of their choice. These paragraphs merely provide that laws, rules and regulations cannot be such that they

favour majority institutions over minority institutions. We do not read these paragraphs to mean that non minority educational institutions would have the same rights as those conferred on minority educational institutions by Article 30 of the Constitution of India. Non minority educational institutions do not have the protection of Article 30. Thus, in certain matters they cannot and do not stand on similar footing as minority educational institutions. Even though the principle behind Article 30 is to ensure that the minorities are protected and are given an equal treatment yet the special right given under Article 30 does give them certain advantages. Just to take a few examples, the government may decide to nationalise education. In that case it may be enacted that private educational institutions will not be permitted. Non minority educational institutions may become bound by such an enactment. However, the right given under Article 30 to minorities cannot be done away with and the minorities will still have a fundamental right to establish and administer educational institutions of their choice. Similarly even though the government may have a right to take over management of a non minority educational institution the management of a minority educational institution cannot be taken over because of the protection given under Article 30. Of course we must not be understood to mean that even in national interest a minority institute cannot be closed down. Further minority educational institutions have preferential right to admit students of their own community/language. No such rights exist so far as non minority educational institutions are concerned.

**Questions Nos. 3 and 4**

8. Questions 3 and 4 pertain to private unaided professional colleges. Thus all observations in answer to questions 3 and 4 are therefore confined to such educational institutions.

9. In order to answer the third and fourth questions it is necessary to see the manner in which the majority judgment is framed and to consider certain paragraphs of the judgment. The majority judgment considered various aspects under different heads, The 3<sup>rd</sup> head is "In case of private institutions, can there be government regulations and, if so, to what extent?" This is further divided into four subheadings viz. "Private unaided non minority educational institutions"; "Private unaided professional colleges"; "Private aided professional institutions (non minority)" and "Other aided institutions". The paragraph which has been strongly relied upon is paragraph 68 which is under the sub-heading "Private unaided professional colleges". The said paragraph reads as under:

68. It would be unfair to apply the same rules and regulations regulating admission to both aided and unaided professional institutions. It must be borne in mind that unaided professional institutions are entitled to autonomy in their administration while, at the same time, they do not forgo or discard the principle of merit. It would, therefore, be permissible for the university or the government, at the time of granting recognition, to require a private unaided institution to provide for merit-based selection while, at the same time, giving the management sufficient discretion in admitting students. This can be done through various methods. For instance, a certain percentage of the seats can be reserved for admission by the management out of those students who have passed the common entrance test held by itself or by the State/university and have applied to the college concerned for

admission, while the rest of the seats may be filled up on the basis of counselling by the State agency. This will incidentally take care of poorer and backward sections of the society. The prescription of percentage *for* this purpose has to be done by the 'government according to the local needs and different percentages can be fixed for minority unaided and non-minority unaided and professional colleges. The same principles may be applied to other nonprofessional but unaided educational institutions viz., graduation and post graduation nonprofessional colleges or institutes.

Reliance was also placed on paragraphs 58 and 59 which read as follows:

58. For admission into any professional institution, merit must play an important role. While it may be normally possible to judge the merit of the applicant who seeks admission into a school, while seeking admission to a professional institution and to become a competent professional, it is necessary that meritorious candidates are not unfairly treated or put at a disadvantage by preferences shown to less meritorious but more influential applicants. Excellence in professional education would require that greater emphasis be laid on the merit of a student seeking admission, Appropriate regulations for this purpose may be made keeping in view the other observations made in this judgment in the context of admissions to unaided Institutions,

59, Merit is usually determined for admission to professional and higher education colleges, by either the marks that the student obtains at the qualifying examination or school leaving certificate stage followed by the interview, or by a common entrance test conducted by the institution, or in the case of professional colleges, by government agencies.

Based on the above paragraphs it had been submitted, on behalf of the Union of India, various State governments and students that the majority judgment makes a clear distinction between professional educational institutions (both minority and non minority) and other educational institutions i.e., schools and undergraduate colleges. The submission was that in professional institutions merit had to play an important role and that excellence in professional education required that for purposes of admission merit is determined by government agencies. It is submitted that paragraph 68 provides that in unaided professional colleges only a "certain" percentage of seats can be reserved for admission by the management. It is submitted that the said paragraph provides that it is permissible for the university or the government to require a private unaided professional institute to provide for a merit based selection. It was submitted that paragraph 68, read with paragraph 59, lays down that in unaided professional colleges merit is to be determined by a common entrance test conducted by government agencies. .

10. Paragraph 68 of the majority judgment in *Pai* case can be split into seven parts:

*Firstly*, it deals with the unaided minority or non-minority professional colleges.

*Secondly*, it will be unfair to apply the rule and regulations framed by the State government as regards the government aided professional colleges to the unaided professional colleges.

*Thirdly*, the unaided professional institutions are entitled to autonomy in their administration; while at the same time they should not forgo or discard the principles of

merit.

*Fourthly*, it is permissible for the university or the government at the time of granting recognition to require an unaided institution to provide for merit based admission while at the same time giving the management sufficient discretion in admitting students.

*Fifthly*, for unaided non-minority professional colleges certain percentage of seats can be reserved for admission by the management out of those students who have passed the common test held by itself or by the State/university and for applying to the college/university for admission, while the rest of the seat may be filled up on the basis of counselling by the State agency.

*Sixthly*, the provisions for poorer and backward sections of the society in unaided professional colleges are also to be provided for.

*Seventhly*, the prescription for percentage of seats in unaided professional colleges has to be done by the government according to the local needs. A different percentage of seats for admission can be fixed for minority unaided and non-minority unaided professional colleges.

11. Undoubtedly the majority judgment makes a distinction between private unaided professional colleges and other educational institutions, i.e., schools and undergraduate colleges. The subheading "Private unaided professional colleges" includes both minority as well as non minority professional colleges. This is also clear from a reading of paragraph 68. It appears to us that this distinction has been made (between private unaided professional colleges and other educational institutions) as the judgment recognises that it is in national interest to have good and efficient professionals. The judgment provides that national interest would prevail, even over minority rights. It is for this reason that in professional colleges, both minority and non minority, merit has been made the criteria for admission. However, a proper reading of paragraph 68, indicates that a further distinction has been made between minority and non minority professional colleges. It is provided that in cases of non minority professional colleges "a certain percentage of seats" can be reserved for admission by the management. The rest have to be filled up on bases of counselling by State agencies. The prescription of percentage has to be done by the government according to local needs. Keeping this in mind provisions have to be made for the poorer and backward sections of the society. It must be remembered that, so far as medical colleges are concerned an essentiality certificate has to be obtained before the college can be set up. It cannot be denied that whilst issuing the essentiality certificate the respective State governments take into consideration the local needs. These aspects have been highlighted in a recent decision of this Court in *State of Maharashtra v. Medical Association* [JT 2001 (10) SC 294]. Whilst granting the essentiality certificate the State government undertakes to take over the obligations of the private educational institution in the event of that institution becoming incapable of setting of the institution or imparting education therein. A reading of paragraphs 59 and 68 shows that in non minority professional colleges admission of students, other than the percentage given to the management, can only be on the basis of merit as per the common entrance tests conducted by government agencies. The manner in which the percentage given to the management can be filled in is set out hereinafter.

12. Paragraph 68 provides that a different percentage can be prescribed for unaided

minority institutions. That the same yardstick cannot be applied to both minority and non-minority professional colleges is also clear from the fact that paragraph 68 also falls under main heading "In case of private institutions, can there be government regulations and, if so, to what extent?" Paragraph 41, which is one of the first paragraph under this heading, *inter alia* provides as follows:

It is appropriate to first deal with the case of private unaided institutions and private aided institutions that are not administered by linguistic or religious minorities. Regulations that can be framed relating to minority institutions will be considered while examining the merit and effect of Article 30 of the Constitution.

Whilst discussing Article 30 under heading "To what extent the rights of aided private minority institutions to administer can be regulated" reliance has been placed, in the majority judgment, on previous judgments in the cases of *Re Kerala Education Bill* [AIR 1958 S C 956]; *Rev Sidhajibhai v. State of Bombay* [1963 (3) SCR 837]; *Rev Father Proost v. State of Bihar* [AIR 1969 S C 465] ; *State of Kerala v. Very Rev Mother Provincial* [(1970) 2 SCC 417] ; *Ahmedabad St Xaviers College Society v. State of Gujarat* [(1974) 1 SCC 717]. All these cases have recognised and upheld the rights of minorities under Article 30. These cases have held that in the guise of regulations rights under Article 30 cannot be abrogated. It has been held, even in respect of aided minority institutions that they must have full autonomy in administration of that institution. It has been held that the right to administer includes the right to admit students of their own community/language. Thus an unaided minority professional college cannot be in a worse position than an aided minority professional college. It is for this reason that paragraph 68 provides that a different percentage can be fixed for unaided minority professional colleges. The expression "different percentage for minority professional institutions" carries different meaning than the expression "certain percentage for unaided professional colleges." In fixing percentage for unaided minority professional colleges the State must keep in mind, apart from local needs, the interest/need of that community in the State. The need of that community, in the State, would be paramount vis-à-vis the local needs.

13. It must be clarified that a minority professional college can admit, in their management quota, a student of their own community/language in preference to a student of another community even though that other student is more meritorious. However, whilst selecting/admitting students of their community/language the *inter-se* merit of those students cannot be ignored. In other words whilst selecting/admitting students of their own community/language they can not ignore the *inter-se* merit amongst students of their community/language. Admission, even of members of their community/language, must strictly be on the basis of merit except that in case of their own students it has to be merit *inter-se* those students only. Further if the seats cannot be filled up from members of their community/language, then the other students can be admitted only on the basis of merit based on a common entrance test conducted by government agencies.

14. That brings us the question as to how the management of both minority and non-minority professional colleges can admit students in the quota allotted to them. Undoubtedly the majority judgment has kept in mind the sad reality that there are a large number of professional colleges which indulge in profiteering and/or charging of capitation fees. It is for

this reason that the majority judgment provides that in professional colleges admission must be on the basis of merit. As has been rightly submitted it is impossible to control profiteering/charging of capitation fees unless it is ensured that admission is on the basis of merit. Also as has been rightly pointed out if a student is required to appear at more than one entrance test it would lead to great hardship. The application fees charged by each institute, even though they may be only Rs. 500 to Rs. 1000 for each institute, would impose a heavy burden on the students who will necessarily have to apply to a number of colleges. Further as has been rightly pointed out, students would have to arrange for transport from and to and stay at various places if they have to appear for individual tests conducted by each college. If a student has to go for test, to each institute it is possible that he/she may not be able to reach, in time, the venue of a test of a particular institute. In our view what is necessary is a practical approach keeping in mind the need for a merit based selection. Paragraph 68 provides that admission by the management can be by a common entrance test held by "itself or by State/university". The words "common entrance test" clearly indicate that each institute cannot hold a separate test. We thus hold that the management could select students, of their quota, either on the basis of the common entrance tests conducted by the State or on the basis of a common entrance test to be conducted by an association of all colleges of a particular type in that State, e.g. medical, engineering or technical, etc. The common entrance test, held by the association, must be for admission to all colleges of that type in the State. The option of choosing, between either of these tests, must be exercised before issuing of prospectus and after intimation to the concerned authority and the Committee set up hereinafter. If any professional college chooses not to admit from the common entrance test conducted by the association then that college must necessarily admit from the common entrance test conducted by the State. After holding the common entrance test and declaration of results the merit list will immediately be placed on the notice board of all colleges which have chosen to admit as per this test. A copy of the merit list will also be forthwith sent to the concerned authority and the Committee. Selection of students must then be strictly on basis of merit as per that merit list. Of course, as indicated earlier, minority colleges will be entitled to fill up their quota with their own students on basis of inter-se merit amongst those students. The list of students admitted, along with the rank number obtained by the student, the fees collected and all such particulars and details as may be required by the concerned authority or the Committee must be submitted to them forthwith. The question paper and the answer papers must be preserved for such period as the concerned authority or Committee may indicate. If it is found that any student has been admitted *de-hors* merit penalty can be imposed on that institute and in appropriate cases recognition/affiliation may also be withdrawn.

15. At this juncture it is brought to our notice that several institutions, have since long, had their own admission procedure and that even though they have been admitting only students of their own community no finger has ever been raised against them and no complaints have been made regarding fairness or transparency of the admission procedure adopted by them. These institutions submit that they have special features and that they stand on a different footing from other minority non-aided professional institutions. It is submitted that their cases are not based only on the right flowing from Article 30(1) but in addition they have some special features which requires that they be permitted to admit in the manner they have been doing for all these years. A reference is made to few such institutions, i.e.,

Christian Medical College, Vellore, St. Johns Hospital, Islamic Academy of Education, etc. The claim of these institutions was disputed. However, we do not think it necessary to go into those questions. We leave it open to institutions which have been established and who have had their own admission procedure for, at least, the last 25 years to apply to the Committee set out hereinafter.

16. Lastly, it must be mentioned that it was urged by learned counsel for the appellant that paragraph 68 of the majority judgment only permits university/State to provide for merit based selection at the time of granting recognition/affiliation. It was also submitted that once recognition/ affiliation is granted to unaided professional colleges, such a stipulation cannot be provided subsequently. We are unable to accept this submission. Such a provision can be made at the time of granting recognition/affiliation as well as subsequently after the grant of such recognition/affiliation.

17. We now direct that the respective State government do appoint a permanent Committee which will ensure that the tests conducted by the association of colleges is fair and transparent. For each State a separate Committee shall be formed, The Committee would be headed by a retired judge of the High Court. The judge to be nominated by the Chief Justice of that State. The other member, to be nominated by the judge, would be a doctor or an engineer of eminence (depending on whether the institution is medical or engineering/technical). The secretary of the State in charge of medical or technical education, as the case may be, shall also be a member and act as secretary of the Committee. The Committee will be free to nominate/co-opt an independent person of repute in the field of education as well as one of the Vice Chancellors of university in that State so that the total number of persons on the Committee do not exceed five. The Committee shall have powers to oversee the tests to be conducted by the association. This would include the power to call for the proposed question paper/s, to know the names of the paper setters and examiners and to check the method adopted to ensure papers are not leaked. The Committee shall supervise and ensure that the test is conducted in a fair and transparent manner. The Committee shall have power to permit an institution, which has been established and which has been permitted to adopt its own admission procedure for the last, at least, 25 years, to adopt its own admission procedure and if the Committee feels that the needs of such an institute are genuine, to admit, students of their community, in excess of the quota allotted to them by the State government. Before exempting any institute or varying in percentage of quota fixed by the State, the State government must be heard before the Committee. It is clarified that different percentage of quota for students to be admitted by the management in each minority or non-minority unaided professional college/s shall be separately fixed on the basis of their need by the respective State governments and in case of any dispute as regards fixation of percentage of quota, it will be open to the management to approach the Committee. It is also clarified that no institute, which has not been established and which has not followed its own admission procedure for the last, at least, 25 years, shall be permitted to apply for or be granted exemption from admitting students in the manner set out hereinabove.

\* \* \* \* \*



**CIVIL SERVICES*****Union of India v. Tulsiram Patel***

(1985) 3 SCC 398

The case involved the interpretation of Articles 309, 310 and 311 of the Constitution and in particular the second proviso to clause (2) of Article 311 after its amendment by the Constitution (Forty-second Amendment) Act, 1976. All the civil servants in the case had either been dismissed or removed from service without being informed of the charges and holding any inquiry into the charges. They were not given any opportunity of being heard in respect of the charges. The dismissal or removal orders had been passed under one or more of the sub-clauses of second proviso to clause (2) of Article 311 or under similar provisions in rules made under the proviso to Article 309 or in the rules made under an Act referable to Article 309, for instance, Rule 19 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965, Rule 14 of the Railway servants (Discipline and Appeal) Rules, 1968, and Rule 37 of the Central Industrial Security Force Rules, 1969, or under such a rule read with one of the clauses of the second proviso to Article 311(2).

**Arguments of the government servants on the pleasure doctrine and the second proviso to Article 311(2):**

(1) The pleasure doctrine in England was a part of the special prerogative of the Crown and had been inherited by India from England and should, therefore, be construed strictly, that is, strictly against the government and liberally in favour of government servants.

(2) The second proviso which withdrew from government servants the safeguards provided by clause (2) of Article 311 must be also similarly construed for, unless a liberal construction were placed upon it, great hardship would result to government servants as they could be arbitrarily thrown out of employment and they and their dependents would be left without any means of subsistence.

(3) There were several stages before a government servant could be dismissed or removed or reduced in rank, namely, serving upon him of a show cause notice or a charge-sheet, giving him inspection of documents, examination of witnesses, arguments and imposition of penalty. An inquiry starts only after a show cause notice was issued and served upon a government servant. A show cause notice was thus preparatory to the holding of an inquiry and even if the entire inquiry was dispensed with, the giving of a show cause notice and asking for the explanation of the government servant with respect thereto were not excluded.

(4) It was not obligatory upon the disciplinary authority to dispense with the whole of the inquiry. Depending upon the circumstances of the case, the disciplinary authority could dispense with only a part of the inquiry.

(5) Imposition of penalty was not a part of the inquiry and once an inquiry was dispensed with, whether in whole or in part, it was obligatory upon the disciplinary authority to give an opportunity to the government servant to make a representation with respect to the penalty proposed to be imposed upon him.

(6) Article 311 was subject to Article 14. Principles of natural justice and the *audi alteram partem* rule were part of Article 14 and, therefore, a show cause notice asking for the explanation of the government servant with respect to the charges against him as also a notice to show cause with respect to the proposed penalty were required to be given by Article 14 and the not giving of such notices or either of them rendered the order of dismissal, removal or reduction in rank invalid.

**Submissions of the Union of India:**

(1) The second proviso must be construed according to its terms. It was unambiguous and did not admit of any such interpretation.

(2) Where under the second proviso, clause (2) of Article 311 was made inapplicable, there was no scope for holding any partial inquiry.

(3) In any event, the very contents of the three clauses of the second proviso showed that it was not necessary, practicable or expedient that any partial inquiry could be or should be held, depending upon which clause applies.

(4) Article 14 did not govern or control Article 311. The Constitution must be read as a whole. Article 311(2) embodied the principles of natural justice including the *audi alteram partem* rule. It thus expressly stated what was required under Article 14 as a result of the interpretation placed upon it by recent decisions of the court. Once the application of clause (2) was expressly excluded by the Constitution itself, there could be no question of making applicable what had been so excluded by seeking recourse to Article 14.

(5) Consideration of sympathy for the government servants who may be dismissed or removed or reduced in rank was irrelevant to the construction of the second proviso. The doctrine of tenure at pleasure in Article 310 and the safeguards given to a government servant under clauses (1) and (2) of Article 311 as also the withdrawal of the safeguard under clause (2) by the second proviso are all enacted in public interest and where public interest conflicts with private interest, the latter must yield to the former.

**D.P. MADON, J. - The Scope of the Pleasure Doctrine:**

47. These articles occur in Chapter I of Part XIV of the Constitution. Part XIV is entitled "Services under the Union and the States" and Chapter I thereof is entitled "Services". While Article 309 deals with the recruitment and conditions of service of persons appointed to the public services and posts in connection with the affairs of the Union or a State, Article 310 deals with the tenure of office of members of the defence services and of civil services of the Union and the States and Article 311 provides certain safeguards to persons employed in civil capacities under the Union or a State but not to members of the defence services. The first thing which is required to be noticed about Article 309 is that it itself makes no provision for recruitment or conditions of service of government servants but confers power upon the appropriate Legislature to make laws and upon the President and the Governor of a State to make rules in respect of these matters. The passing of these Acts and the framing of these rules are, however, made "*Subject to the provisions of this Constitution*". This phrase which precedes and qualifies the power conferred by Article 309 is significantly different from the qualifying phrase in Article 310(1) which is "*Except as expressly provided by this Constitution*".

50. As the making of such laws and the framing of such rules are subject to the provisions of the Constitution, if any such Act or rule violates any of the provisions of the Constitution, it would be void. Thus, as held in *Moti Ram Deka* case [*Moti Ram Deka v. G.M., NEF Railwa*, AIR 1964 SC 600], if any such Act or rule trespasses upon the rights guaranteed to government servants by Article 311, it would be void. Similarly, such Acts and rules cannot abridge or restrict the pleasure of the President or the Governor of a State exercisable under Article 310(1) further than what the Constitution has expressly done. In the same way, such Act or rule would be void if it violates any Fundamental Right guaranteed by Part III of the Constitution. Two instances of this may be given by way of illustration. In *Kameshwar Prasad v. State of Bihar* [AIR 1962 SC 1116], Rule 4-A of the Bihar Government Servants' Conduct Rules, 1956, insofar as it prohibited any form of demonstration was struck down by this Court as being violative of sub-clauses (a) and (b) of clause (1) of Article 19. In *O.K. Ghosh v. E.X. Joseph* [AIR 1963 SC 812], this Court struck down Rule 4-A of the Central Civil Services (Conduct) Rules, 1955, on the ground that it violated sub-clause (c) of clause (1) of Article 19 of the Constitution and that portion of Rule 4-A which prohibited participation in any demonstration as being violative of sub-clauses (a) and (b) of clause (1) of Article 19. Further, the application of Article 309 is excluded by certain provisions of the Constitution itself which empower authorities other than those specified in Article 309 to make appointments or to make rules relating to the conditions of service of certain classes of public service, such as, Article 146(1) with respect to the officers and servants of the Supreme Court, Article 148(5) with respect to persons serving in the Indian Audit and Accounts Department, Article 229 with respect to the officers and servants of the High Courts, and Article 324(5) with respect to Election Commissioners and Regional Commissioners.

51. Which would be the appropriate Legislature to enact laws or the appropriate authority to frame rules would depend upon the provisions of the Constitution with respect to legislative competence and the division of legislative powers. Thus, for instance, under Entry 70 in List I of the Seventh Schedule to the Constitution, Union Public Services, all-India Services and Union Public Service Commission are subjects which fall within the exclusive legislative field of Parliament, while under Entry 41 in List II of the Seventh Schedule to the Constitution, State public services and State Public Service Commission fall within the exclusive legislative field of the State Legislatures. The rules framed by the President or the Governor of a State must also, therefore, conform to these legislative powers. It is, however, not necessary that the Act of an appropriate Legislature should specifically deal with a particular service. It is sufficient if it is an Act as contemplated by Article 309 by which provision is made regulating the recruitment and conditions in a service.

53. In India for the first time a fetter was imposed upon the pleasure of the Crown to terminate the service of any of its servants by Section 96-B of the Government of India Act, 1919, but that was only with respect to the authority which could dismiss him. In that section the holding of office "during His Majesty's pleasure" was made subject to both the provisions of that Act and the rules made thereunder. Under the Government of India Act, 1935, the reference to the rules to be made under the Act was omitted and the tenure of office of a civil servant was to be "during His Majesty's pleasure except as expressly provided" by that Act. Article 310(1) adopts the same phraseology as in Section 240 of the 1935 Act. Under it also

the holding of an office is during the pleasure of the President or the Governor "Except as expressly provided by this Constitution". Therefore, the only fetter which is placed on the exercise of such pleasure is when it is expressly so provided in the Constitution itself, that is, when there is an express provision in that behalf in the Constitution. Express provisions in that behalf are to be found in the case of certain constitutional functionaries in respect of whose tenure special provision is made in the Constitution as, for instance, in clauses (4) and (5) of Article 124, with respect to Judges of the Supreme Court, Article 218 with respect to Judges of the High Court, Article 148(1) with respect to the Comptroller and Auditor-General of India, Article 324(1) with respect to the Chief Election Commissioner, and Article 324(5) with respect to the Election Commissioners and Regional Commissioners.

54. Clauses (1) and (2) of Article 311 impose restrictions upon the exercise by the President or the Governor of a State of his pleasure under Article 310(1). These are express provisions with respect to termination of service by dismissal or removal as also with respect to reduction in rank of a civil servant and thus come within the ambit of the expression "Except as expressly provided by this Constitution" qualifying Article 310(1). Article 311 is thus an exception to Article 310 and was described in *Parshotam Lal Dhingra v. Union of India* [AIR 1958 SC 36] as operating as a proviso to Article 310(1) though set out in a separate article. Article 309 is, however, not such an exception. It does not lay down any express provision which would derogate from the amplitude of the exercise of pleasure under Article 310(1). It merely confers upon the appropriate Legislature or executive the power to make laws and frame rules but this power is made subject to the provisions of the Constitution. Thus, Article 309 is subject to Article 310(1) and any provision restricting the exercise of the pleasure of the President or Governor in an Act or rule made or framed under Article 309 not being an express provision of the Constitution, cannot fall within the expression "Except as expressly provided by this Constitution" occurring in Article 310(1) and would be in conflict with Article 310(1) and must be held to be unconstitutional. Clauses (1) and (2) of Article 311 expressly restrict the manner in which a government servant can be dismissed, removed or reduced in rank and unless an Act made or rule framed under Article 309 also conforms to these restrictions, it would be void. The restriction placed by clauses (1) and (2) of Article 311 are two: (1) with respect to the authority empowered to dismiss or remove a government servant provided for in clause (1) of Article 311; and (2) with respect to the procedure for dismissal, removal or reduction in rank of a government servant provided for in clause (2). The second proviso to Article 311(2), which is the central point of controversy in these appeals and writ petitions, lifts the restriction imposed by Article 311(2) in the cases specified in the three clauses of that proviso.

55. None of these three articles (namely, Articles 309, 310 and 311) sets out the grounds for dismissal, removal or reduction in rank of a government servant or for imposition of any other penalty upon him or states what those other penalties are. These are matters which are left to be dealt with by Acts and rules made under Article 309. There are two classes of penalties in service jurisprudence, namely, minor penalties and major penalties. Amongst minor penalties are censure, withholding of promotion and withholding of increments of pay. Amongst major penalties are dismissal or removal from service, compulsory retirement and reduction in rank. Minor penalties do not affect the tenure of a government servant but the

penalty of dismissal or removal does because these two penalties bring to an end the service of a government servant. It is also now well established that compulsory retirement by way of penalty amounts to removal from service. So this penalty also affects the tenure of a government servant. Reduction in rank does not terminate the employment of a government servant, and it would, therefore, be difficult to say that it affects the tenure of a government servant. It may, however, be argued that it does bring to an end the holding of office in a particular rank and from that point of view it affects the government servant's tenure in the rank from which he is reduced. It is unnecessary to decide this point because Article 311(2) expressly gives protection as against the penalty of reduction in rank also.

**Exercise of Pleasure:**

56. A question which arises in this connection is whether the pleasure of the President or the Governor under Article 310(1) is to be exercised by the President or the Governor personally or it can be exercised by a delegate or some other authority empowered under the Constitution or by an Act or Rules made under Article 309. This question came up for consideration before a Constitution Bench of this Court in **Babu Ram Upadhyya** case (*State of U.P. v. Babu Ram* [AIR 1961 SC 751]). The majority of the Court the conclusions it had reached in the form of seven propositions. These propositions are:

(1) In India every person who is a member of a public service described in Article 310 of the Constitution holds office during the pleasure of the President or the Governor, as the case may be, subject to the express provisions therein.

(2) The power to dismiss a public servant at pleasure is outside the scope of Article 154 and, therefore, cannot be delegated by the Governor to a subordinate officer, and can be exercised by him, only in the manner prescribed by the Constitution.

(3) This tenure is subject to the limitations or qualifications mentioned in Article 311 of the Constitution.

(4) The Parliament or the Legislatures of States cannot make a law abrogating or modifying this tenure so as to impinge upon the overriding power conferred upon the President or the Governor under Article 310, as qualified by Article 311.

(5) The Parliament or the Legislatures of States can make a law regulating the conditions of service of such a member which includes proceedings by way of disciplinary action, without affecting the powers of the President or the Governor under Article 310 of the Constitution read with Article 311 thereof.

(6) The Parliament and the Legislatures also can make a law laying down and regulating the scope and content of the doctrine of "reasonable opportunity" embodied in Article 311 of the Constitution; but the said law would be subject to judicial review.

(7) If a statute could be made by Legislatures within the foregoing permissible limits, the rules made by an authority in exercise of the power conferred thereunder would likewise be efficacious within the said limits.

57. The question came to be reconsidered by a larger Bench of seven Judges in **Moti Ram Deka** case. While referring to the judgment of the majority in **Babu Ram Upadhyya** case the Court observed as follows:

What the said judgment has held is that while Article 310 provides for a tenure at pleasure of the President or the Governor, Article 309 enables the Legislature or the executive, as the case may be, to make any law or rule in regard, inter alia, to conditions of service without impinging upon the overriding power recognised under Article 310. In other words, in exercising the power conferred by Article 309, the extent of the pleasure recognised by Article 310 cannot be affected, or impaired. In fact, while stating the conclusions in the form of propositions, the said judgment has observed that the Parliament or the Legislature can make a law regulating the conditions of service without affecting the powers of the President or the Governor under Article 310 read with Article 311. It has also been stated at the same place that the power to dismiss a public servant at pleasure is outside the scope of Article 154 and, therefore, cannot be delegated by the Governor to a subordinate officer and can be exercised by him only in the manner prescribed by the Constitution. In the context, it would be clear that this latter observation is not intended to lay down that a law cannot be made under Article 309 or a rule cannot be framed under the proviso to the said article prescribing the procedure by which, and the authority by whom, the said pleasure can be exercised. This observation which is mentioned as proposition number (2) must be read along with the subsequent propositions specified as (3), (4), (5) and (6). The only point made is that whatever is done under Article 309 must be subject to the pleasure prescribed by Article 310.

58. While we are on this point we may as well advert to the decision of this Court in *Sardari Lal v. Union of India* [AIR 1971 SC 1547]. In that case it was held that where the President or the Governor, as the case may be, if satisfied, makes an order under clause (c) of what is now the second proviso to Article 311 (2) that in the interest of the security of the State it is not expedient to hold an inquiry for dismissal or removal or reduction in rank of an officer, the satisfaction of the President or the Governor must be his personal satisfaction. The correctness of this view was considered by a seven-Judge Bench of this Court in *Samsher Singh v. State of Punjab* [AIR 1974 SC 2129]. It was categorically stated in that case that the majority view in *Babu Ram Upadhyia* case was no longer good law after the decision in *Moti Ram Deka* case. Referring to these two cases the Court observed:

This Court in *State of U.P. v. Babu Ram Upadhyia* held that the power of the Governor to dismiss at pleasure, subject to the provisions of Article 311, is not an executive power under Article 154 but a constitutional power and is not capable of being delegated to officers subordinate to him. The effect of the judgment in *Babu Ram Upadhyia* case was that the Governor could not delegate his pleasure to any officer nor could any law provide for the exercise of that pleasure by an officer with the result that statutory rules governing dismissal were binding on every officer though they were subject to the overriding pleasure of the Governor. This would mean that the officer was bound by the rules but the Governor was not.

In *Babu Ram Upadhyia* case the majority view stated seven propositions at p. 701 of the report. Proposition No. 2 is that the power to dismiss a public servant at pleasure is outside the scope of Article 154 and therefore cannot be delegated by the Governor to a subordinate officer and can be exercised by him only in the manner prescribed by the Constitution. Propositions Nos. 3 and 4 are these. The tenure of a public servant is subject

to the limitations or qualifications mentioned in Article 311 of the Constitution. The Parliament or the Legislatures of States cannot make a law abrogating or modifying this tenure so as to impinge upon the overriding power conferred upon the President or the Governor under Article 310 as qualified by Article 311. Proposition No. 5 is that the Parliament or the Legislatures of States can make a law regulating the conditions of service of such a member which includes proceedings by way of disciplinary action, without affecting the powers of the President or the Governor under Article 310 of the Constitution read with Article 311. Proposition No. 6 is that the Parliament and the Legislatures also can make a law laying down and regulating the scope and content of the doctrine of “reasonable opportunity” embodied in Article 311, but the said law would be subject to judicial review. All these propositions were reviewed by the majority opinion of this Court in *Moti Ram Deka* case and this Court restated that proposition No. 2 must be read along with the subsequent propositions specified as propositions Nos. 3, 4, 5 and 6. The ruling in *Moti Ram Deka* case is that *a law can be framed prescribing the procedure by which and the authority by whom the said pleasure can be exercised. The pleasure of the President or the Governor to dismiss can therefore not only be delegated but is also subject to Article 311.* The true position as laid down in *Moti Ram Deka* case is that Articles 310 and 311 must no doubt be read together but once the true scope and effect of Article 311 is determined the scope of Article 310(1) must be limited in the sense that in regard to cases falling under Article 311(2) the pleasure mentioned in Article 310(2) must be exercised in accordance with the requirements of Article 311.

*The majority view in Babu Ram Upadhya case is no longer good law after the decision in Moti Ram Deka case.* The theory that only the President or the Governor is personally to exercise pleasure of dismissing or removing a public servant is repelled by express words in Article 311 that no person who is a member of the civil service or holds a civil post under the Union or a State shall be dismissed or removed by authority subordinate to that by which he was appointed. The words “dismissed or removed by an authority subordinate to that by which he was appointed” indicate that *the pleasure of the President or the Governor is exercised by such officers on whom the President or the Governor confers or delegates power,*

The Court then stated its conclusion as follows:

For the foregoing reasons we hold that the President or the Governor acts on the aid and advice of the Council of Ministers with the Prime Minister as the head in the case of the Union and the Chief Minister at the head in the case of State in all matters which vests in the Executive whether those functions are executive or legislative in character. Neither the President nor the Governor is to exercise the executive functions personally.

The position, therefore, is that the pleasure of the President or the Governor is not required to be exercised by either of them personally, and that is indeed obvious from the language of Article 311. Under clause (1) of that article a government servant cannot be dismissed or removed by an authority subordinate to that by which he was appointed. The question of an authority equal or superior in rank to the appointing authority cannot arise if the power to dismiss or remove is to be exercised by the President or the Governor personally. Clause (6) of the second proviso to Article 311 equally makes this clear when the power to dispense with an inquiry is conferred by it upon the authority empowered to dismiss, remove

or reduce in rank a government servant in a case where such authority is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry, because if it was the personal satisfaction of the President or the Governor, the question of the satisfaction of any authority empowered to dismiss or remove or reduce in rank a government servant would not arise. Thus, though under Article 310(1) the tenure of a government servant is at the pleasure of the President or the Governor, the exercise of such pleasure can be either by the President or the Governor acting with the aid and on the advice of the Council of Ministers or by the authority specified in Acts made under Article 309 or in rules made under such Acts or made under the proviso to Article 309; and in the case of clause (c) of the second proviso to Article 311(2), the inquiry is to be dispensed with not on the personal satisfaction of the President or the Governor but on his satisfaction arrived at with the aid and on the advice of the Council of Ministers.

**The Second Proviso to Article 311(2):**

60. Clause (2) of Article 311 gives a constitutional mandate to the principles of natural justice and the *audi alteram partem* rule by providing that a person employed in a civil capacity under the Union or a State shall not be dismissed or removed from service or reduced in rank until after an inquiry in which he has been informed of the charges against him and has been given a reasonable opportunity of being heard in respect of those charges. To this extent, the pleasure doctrine enacted in Article 310(1) is abridged because Article 311(2) is an express provision of the Constitution. This safeguard provided for a government servant by clause (2) of Article 311 is, however, taken away when the second proviso to that clause becomes applicable. The safeguard provided by clause (1) of Article 311, however, remains intact and continues to be available to the government servant. The second proviso to Article 311(2) becomes applicable in the three cases mentioned in clauses (a) to (c) of that proviso.

61. The language of the second proviso is plain and unambiguous. The keywords in the second proviso are "this clause shall not apply". By "this clause" is meant clause (2). As clause (2) requires an inquiry to be held against a government servant, the only meaning attributable to these words is that this inquiry shall not be held. There is no scope for any ambiguity in these words and there is no reason to give them any meaning different from the plain and ordinary meaning which they bear. The resultant effect of these words is that when a situation envisaged in any of the three clauses of the proviso arises and that clause becomes applicable, the safeguard provided to a government servant by clause (2) is taken away. As pointed out earlier, this provision is as much in public interest and for public good and a matter of public policy as the pleasure doctrine and the safeguards with respect to security of tenure contained in clauses (1) and (2) of Article 311.

62. Before, however, any clause of the second proviso can come into play the condition laid down in it must be satisfied. The condition for the application of each of these clauses is different. In the case of clause (a) a government servant must be guilty of conduct deserving the penalty of dismissal, removal or reduction in rank which conduct has led to him being convicted on a criminal charge. In the case of clause (b) the disciplinary authority must be satisfied that it is not reasonably practicable to hold an inquiry. In the case of clause (c) the President or the Governor of a State, as the case may be, must be, satisfied that in the interest of the security of the State, it is not expedient to hold an inquiry. When these conditions can



be said to be fulfilled will be discussed later while dealing separately with each of the three clauses. The paramount thing, however, to bear in mind is that the second proviso will apply only where the conduct of a government servant is such as he deserves the punishment of dismissal, removal or reduction in rank. If the conduct is such as to deserve a punishment different from those mentioned above, the second proviso cannot come into play at all, because Article 311(2) is itself confined only to these three penalties. Therefore, before denying a government servant his constitutional right to an inquiry, the first consideration would be whether the conduct of the concerned government servant is such as justifies the penalty of dismissal, removal or reduction in rank. Once that conclusion is reached and the condition specified in the relevant clause of the second proviso is satisfied, that proviso becomes applicable and the government servant is not entitled to an inquiry. The extent to which a government servant can be denied his right to an inquiry formed the subject-matter of considerable debate at the Bar and we, therefore, now turn to the question whether under the second proviso to Article 311(2) even though the inquiry is dispensed with, some opportunity at least should not be afforded to the government servant so that he is not left wholly without protection. As most of the arguments on this part of the case were common to all the three clauses of the second proviso, it will be convenient at this stage to deal at one place with all the arguments on this part of the case, leaving aside to be separately dealt with the other arguments pertaining only to a particular clause of the second proviso.

**The Extent of Denial of Opportunity under the Second Proviso:**

63. It was submitted on behalf of the government servants that an inquiry consists of several stages and, therefore, even where by the application of the; second proviso the full inquiry is dispensed with, there is nothing to prevent the disciplinary authority from holding at least a minimal inquiry because no prejudice can be caused by doing so. It was further submitted that even though the three clauses of the second proviso are different in their content, it was feasible in the case of each of the three clauses to give to the government servant an opportunity of showing cause against the penalty proposed to be imposed so as to enable him to convince the disciplinary authority that the nature of the misconduct attributed to him did not call for his dismissal, removal or reduction in rank. For instance, in a case falling under clause (a) the government servant can point out that the offence of which he was convicted was a trivial or a technical one in respect of which the criminal court had taken a lenient view and had sentenced him to pay a nominal fine or had given him the benefit of probation. It was further submitted that apart from the opportunity to show cause against the proposed penalty it was also feasible to give a further opportunity in the case of each of the three clauses though such opportunity in each case may not be identical. Thus, it was argued that the charge-sheet or at least a notice informing the government servant of the charges against him and calling for his explanation thereto was always feasible. It was further argued that though under clause (a) of the second proviso an inquiry into the conduct which led to the conviction of the government servant on a criminal charge would not be necessary, such a notice would enable him to point out that it was a case of mistaken identity and he was not the person who had been convicted but was an altogether different individual. It was urged that there could be no practical difficulty in serving such charge-sheet to the concerned government servant because even if he were sentenced to imprisonment, the charge-sheet or

notice with respect to the proposed penalty can always be sent to the jail in which he is serving his sentence. So far as clause (i) is concerned, it was argued that even though it may not be reasonably practicable to hold an inquiry, the explanation of the government servant can at least be asked for with respect to the charges made against him so that he would have an opportunity of showing in his written reply that he was not guilty of any of those charges. It was also argued that assuming such government servant was absconding, the notice could be sent by registered post to his last known address or pasted there. Similar arguments as in case of clause (b) were advanced with respect to clause (c). It was submitted that the disciplinary authority could never make up its mind whether to dismiss or remove or reduce in rank a government servant unless such minimal opportunity at least was afforded to the government servant. Support for these contentions was sought to be derived from (1) the language of Article 311(2) and the implications flowing therefrom, (2) the principles of natural justice including the *audi alteram partem* rule comprehended in Article 14, and (3) the language of certain rules made either under Acts referable to Article 309 or made under the proviso to that article. We will consider the contentions with respect to each of these bases separately.

64. So far as Article 311(2) was concerned, it was said that the language of the second proviso did not negative every single opportunity which could be afforded to a government servant under different situations though the nature of such opportunity may be different depending upon the circumstances of the case. It was further submitted that the object of Article 311(2) was that no government servant should be condemned unheard and dismissed or removed or reduced in rank without affording him at least some chance of either showing his innocence or convincing the disciplinary authority that the proposed penalty was too drastic and was uncalled for in his case and a lesser penalty should, therefore, be imposed upon him. These arguments, though attractive at the first blush, do not bear scrutiny.

66. The very phrase “a reasonable opportunity of showing cause against the action proposed to be taken in regard to him” in sub-section (3) of Section 240 of the Government of India Act, 1935, was repeated in clause (2) of Article 311 as originally enacted, that is, in the said clause prior to its amendment by the Constitution (Fifteenth Amendment) Act, 1963.

To summarise: the reasonable opportunity envisaged by the provision under consideration includes:

(a) an opportunity to deny his guilt and establish his innocence, which he can only do if he is told what the charges levelled against him are and the allegations on which such charges are based;

(b) an opportunity to defend himself by cross-examining the witnesses produced against him and by examining himself or any other witnesses in support of his defence; and finally

(c) an opportunity to make his representation as to why the proposed punishment should not be inflicted on him, which he can only do if the competent authority, after the inquiry is over and after applying his mind to the gravity or otherwise of the charges proved against the government servant tentatively proposes to inflict one of the three punishments and communicates the same to the government servant.

68. The question which then arises is, "Whether the Constitution (Forty-second Amendment) Act, 1976, which further amended the substituted clause (2) of Article 311 with effect from January 1, 1977, has made any change in the law?" The amendments made by this Act are that in clause (2) that portion which required a reasonable opportunity of making representation on the proposed penalty to be given to a government servant was deleted and in its place the first proviso was inserted, which expressly provides that it is not necessary to give to a delinquent government servant any opportunity of making representation on the proposed penalty. Does this affect the operation of the original proviso which, by the Constitution (Forty-second Amendment) Act, became the second proviso? Such obviously was not and could not have been the intention of Parliament. The opening words of the second proviso remain the same except that the word 'further' was inserted after the word 'provided, because the original proviso by reason of the insertion of another proviso before it became the second proviso. The words which originally found a place in clause (2), "a reasonable opportunity of showing cause against the action proposed to be taken in regard to him", do not any more feature in clause (2). All that clause (2) now provides is an inquiry in which the government servant is informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. Clause (2) taken by itself even without the first proviso does not provide, expressly or impliedly, for any opportunity to make a representation against the proposed penalty. After the Constitution (Fifteenth Amendment) Act this second opportunity formed a separate part of clause (2), which part was deleted by the Constitution (Forty-second Amendment) Act. Thus, when the second proviso states in its opening words that "Provided further that this clause shall not apply", it means that whatever safeguards are to be found in clause (2) are wholly taken away in a case where any of the three clauses of the second proviso is attracted.

70. The position which emerges from the above discussion is that the keywords of the second proviso govern each and every clause of that proviso and leave no scope for any kind of opportunity to be given to a government servant. The phrase "this clause shall not apply" is mandatory and not directory. It is in the nature of a constitutional prohibitory injunction restraining the disciplinary authority from holding an inquiry under Article 311(2) or from giving any kind of opportunity to the concerned government servant. There is thus no scope for introducing into the second proviso some kind of inquiry or opportunity by a process of inference or implication. The maxim "*expressum facit cessare taciturn*" ("when there is express mention of certain things, then anything not mentioned is excluded") applies to the case. This well-known maxim is a principle of logic and common sense and not merely a technical rule of construction. The second proviso expressly mentions that clause (2) shall not apply where one of the clauses of that proviso becomes applicable. This express mention excludes everything that clause (2) contains and there can be no scope for once again introducing the opportunities provided by clause (2) or any one of them into the second proviso. Here, however, the attempt is not merely to do something contrary to the intention of 'Parliament', that is, in our case, the Constituent Assembly, but to do something contrary to an express prohibition contained in the Constitution. The conclusion which flows from the express language of the second proviso is inevitable and there is no escape from it. It may appear harsh but, as mentioned earlier, the second proviso has been inserted in the Constitution as a matter of public policy and in public interest and for public good just as the

pleasure doctrine and the safeguards for a government servant provided in clauses (1) and (2) of Article 311 have been. It is in public interest and for public good that a government servant who has been convicted of a grave and serious offence or one rendering him unfit to continue in office should be summarily dismissed or removed from service instead of being allowed to continue in it at public expense and to public detriment. It is equally in public interest and for public good that where his offence is such that he should not be permitted to continue to hold the same rank, that he should be reduced in rank. Equally, where a public servant by himself or in concert with others has brought about a situation in which it is not reasonably practicable to hold an inquiry and his conduct is such as to justify his dismissal, removal or reduction in rank, both public interest and public good demand that such penalty should forthwith and summarily be imposed upon him; and similarly, where in the interest of the security of the State it is not expedient to hold an inquiry, it is in the public interest and for public good that where one of the three punishments of dismissal, removal or reduction in rank is called for, it should be summarily imposed upon the concerned government servant. It was argued that in a case falling under clause (b) or (c), a government servant ought to be placed under suspension until the situation improves or the danger to the security of the State has passed, as the case may be, and it becomes possible to hold an inquiry. This argument overlooks the fact that suspension involves the payment at least of subsistence allowance and such allowance is paid at public expense, and that neither public interest would be benefited nor public good served by placing such government servant under suspension because it may take a considerable time for the situation to improve or the danger to be over. Much as this may seem harsh and oppressive to a government servant, this Court must not forget that the object underlying the second proviso is public policy, public interest and public good and the Court must, therefore, repel the temptation to be carried away by feelings of commiseration and sympathy for those government servants who have been dismissed, removed or reduced in rank by applying the second proviso. Sympathy and commiseration cannot be allowed to outweigh considerations of public policy, concern for public interest, regard for public good and the peremptory dictate of a constitutional prohibition. The Court must bear in mind that the second proviso has been in the Constitution since it was originally enacted. It was not blindly or slavishly copied from Section 240(3) of the Government of India Act, 1935. Article 311 was Article 282-B of the draft Constitution of India and the draft Article 282-B was discussed and a considerable debate took place on it in the Constituent Assembly. The greater part of this debate centred upon the proviso to clause (2) of the draft Article 282-B, which is now the second proviso to Article 311. Further, the Court should also bear in mind that clause (c) of the second proviso and clause (3) of Article 311 did not feature in Section 240 of the Government of India Act, 1935, but were new provisions consciously introduced by the Constituent Assembly in Article 311. Those who formed the Constituent Assembly were not the advocates of a despotic or dictatorial form of government.

The majority of them had fought for freedom and had suffered imprisonment in the cause of liberty and they, therefore, were not likely to introduce into our Constitution any provision from the earlier Government of India Acts which had been intended purely for the benefit of a foreign imperialistic power. After all, it is not as if a government servant is without any remedy when the second proviso has been applied to him. There are two remedies open to him, namely, departmental appeal and judicial review.

102. In this connection, it must be remembered that a government servant is not wholly without any opportunity. Rules made under the proviso to Article 309 or under Acts referable to that article generally provide for a right of appeal except in those cases where the order of dismissal, removal or reduction in rank is passed by the President or the Governor of a State because they being the highest constitutional functionaries, there can be no higher authority to which an appeal can lie from an order passed by one of them. Thus, where the second proviso applies, though there is no prior opportunity to a government servant to defend himself against the charges made against him, he has the opportunity to show in an appeal filed by him that the charges made against him are not true. This would be a sufficient compliance with the requirements of natural justice.

**The Second Proviso – Clause (a)**

127. Not much remains to be said about clause (a) of the second proviso to Article 311(2). To recapitulate briefly, where a disciplinary authority comes to know that a government servant has been convicted on a criminal charge, it must consider whether his conduct which has led to his conviction was such as warrants the imposition of a penalty and, if so, what that penalty should be. For that purpose it will have to peruse the judgment of the criminal court and consider all the facts and circumstances of the case and the various factors set out in *Challappan* case. This, however, has to be done by it ex parte and by itself. Once the disciplinary authority reaches the conclusion that the government servant's conduct was such as to require his dismissal or removal from service or reduction in rank he must decide which of these three penalties should be imposed on him. This too it has to do by itself and without hearing the concerned government servant by reason of the exclusionary effect of the second proviso. The disciplinary authority must, however, bear in mind that a conviction on a criminal charge does not automatically entail dismissal, removal or reduction in rank of the concerned government servant. Having decided which of these three penalties is required to be imposed, he has to pass the requisite order. A government servant who is aggrieved by the penalty imposed can agitate in appeal, revision or review, as the case may be, that the penalty was too severe or excessive and not warranted by the facts and circumstances of the case. If it is his case that he is not the government servant who has been in fact convicted, he can also agitate this question in appeal, revision or review. If he fails in the departmental remedies and still wants to pursue the matter, he can invoke the court's power of judicial review subject to the court permitting it. If the court finds that he was not in fact the person convicted, it will strike down the impugned order and order him to be reinstated in service. Where the court finds that the penalty imposed by the impugned order is arbitrary or grossly excessive or out of all proportion to the offence committed or not warranted by the facts and circumstances of the case or the requirements of that particular government service the court will also strike down the impugned order. Thus, in *Shankar Dass v. Union of India*, this Court set aside the impugned order of penalty on the ground that the penalty of dismissal from service imposed upon the appellant was whimsical and ordered his reinstatement in service with full back wages. It is, however, not necessary that the court should always order reinstatement. The court can instead substitute a penalty which in its opinion would be just and proper in the circumstances of the case.

**The Second Proviso - Clause (b)**

128. The main thrust of the arguments as regards clause (b) of the second proviso to Article 311 (2) was that whatever the situation may be a minimal inquiry or at least an opportunity to show cause against the proposed penalty is always feasible and is required by law. The arguments with respect to a minimal inquiry were founded on the basis of the applicability of Article 14 and the principles of natural justice and the arguments with respect to an opportunity to show cause against the proposed penalty were in addition founded upon the decision in *Challappan* case. These contentions have already been dealt with and negated by us and we have further held that *Challappan* case insofar as it held that a government servant should be heard before imposing a penalty upon him was wrongly decided.

129. The next contention was that even if it is not reasonably practicable to hold an inquiry, a government servant can be placed under suspension until the situation improves and it becomes possible to hold the inquiry. This contention also cannot be accepted. Very often a situation which makes it not reasonably practicable to hold an inquiry is of the creation of the concerned government servant himself or of himself acting in concert with others or of his associates. It can even be that he himself is not a party to bringing about that situation. In all such cases neither public interest nor public good requires that salary or subsistence allowance should be continued to be paid out of the public exchequer to the concerned government servant. It should also be borne in mind that in the case of a serious situation which renders the holding of an inquiry not reasonably practicable, it would be difficult to foresee how long the situation will last and when normalcy would return or be restored. It is impossible to draw the line as to the period of time for which the suspension should continue and on the expiry of that period action should be taken under clause (b) of the second proviso. Further, the exigencies of a situation may require that prompt action should be taken and suspending the government servant cannot serve the purpose. Sometimes not taking prompt action may result in the trouble spreading and the situation worsening and at times becoming uncontrollable. Not taking prompt action may also be construed by the trouble-makers and agitators as a sign of weakness on the part of the authorities and thus encourage them to step up the tempo of their activities or agitation. It is true that when prompt action is taken in order to prevent this happening, there is an element of deterrence in it but that is an unavoidable and necessary concomitance of such an action resulting from a situation which is not of the creation of the authorities. After all, clause (b) is not meant to be applied in ordinary, normal situations but in such situations where it is not reasonably practicable to hold an inquiry.

130. The condition precedent for the application of clause (b) is the satisfaction of the disciplinary authority that “it is not reasonably practicable to hold” the inquiry contemplated by clause (2) of Article 311. What is pertinent to note is that the words used are “not reasonably practicable” and not ‘impracticable’. According to the *Oxford English Dictionary* ‘practicable’ means “Capable of being put into practice, carried out in action, effected, accomplished, or done; feasible”. *Webster’s Third New International Dictionary* defines the word ‘practicable’ inter alia as meaning “possible to practice or perform: capable of being put into practice, done or accomplished: feasible”. Further, the words used are not “not

practicable” but “not reasonably practicable”. *Webster’s Third New International Dictionary* defines the word ‘reasonably’ as “in a reasonable manner: to a fairly sufficient extent”. Thus, whether it was practicable to hold the inquiry or not must be judged in the context of whether it was reasonably practicable to do so. It is not a total or absolute impracticability which is required by clause (b). What is requisite is that the holding of the inquiry is not practicable in the opinion of a reasonable man taking a reasonable view of the prevailing situation. It is not possible to enumerate the cases in which it would not be reasonably practicable to hold the inquiry, but some instances by way of illustration may, however, be given. It would not be reasonably practicable to hold an inquiry where the government servant, particularly through or together with his associates, so terrorizes, threatens or intimidates witnesses who are going to give evidence against him with fear of reprisal as to prevent them from doing so or where the government servant by himself or together with or through others threatens, intimidates and terrorizes the officer who is the disciplinary authority or members of his family so that he is afraid to hold the inquiry or direct it to be held. It would also not be reasonably practicable to hold the inquiry where an atmosphere of violence or of general indiscipline and insubordination prevails, and it is immaterial whether the concerned government servant is or is not a party to bringing about such an atmosphere. In this connection, we must bear in mind that numbers coerce and terrify while an individual may not. The reasonable practicability of holding an inquiry is a matter of assessment to be made by the disciplinary authority. Such authority is generally on the spot and knows what is happening. It is because the disciplinary authority is the best judge of this that clause (3) of Article 311 makes the decision of the disciplinary authority on this question final. A disciplinary authority is not expected to dispense with a disciplinary inquiry lightly or arbitrarily or out of ulterior motives or merely in order to avoid the holding of an inquiry or because the Department’s case against the government servant is weak and must fail. The finality given to the decision of the disciplinary authority by Article 311(3) is not binding upon the court so far as its power of judicial review is concerned and in such a case the court will strike down the order dispensing with the inquiry as also the order imposing penalty. The case of *Arjun Chaubey v. Union of India* is an instance in point. In that case, the appellant was working as a senior clerk in the office of the Chief Commercial Superintendent, Northern Railway, Varanasi. The Senior Commercial Officer wrote a letter to the appellant calling upon him to submit his explanation with regard to twelve charges of gross indiscipline mostly relating to the Deputy Chief Commercial Superintendent. The appellant submitted his explanation and on the very next day the Deputy Chief Commercial Superintendent served a second notice on the appellant saying that his explanation was not convincing and that another chance was being given to him to offer his explanation with respect to those charges. The appellant submitted his further explanation but on the very next day the Deputy Chief Commercial Superintendent passed an order dismissing him on the ground that he was not fit to be retained in service. This Court struck down the order holding that seven out of twelve charges related to the conduct of the appellant with the Deputy Chief Commercial Superintendent who was the disciplinary authority and that if an inquiry were to be held, the principal witness for the Department would have been the Deputy Chief Commercial Superintendent himself, resulting in the same person being the main accuser, the chief witness and also the judge of the matter.

131. It was submitted that where a delinquent government servant so terrorizes the disciplinary authority that neither that officer nor any other officer stationed at that place is willing to hold the inquiry, some senior officer can be sent from outside to hold the inquiry. This submission itself shows that in such a case the holding of an inquiry is not reasonably practicable. It would be illogical to hold that the administrative work carried out by senior officers should be paralysed because a delinquent government servant either by himself or along with or through others makes the holding of an inquiry not reasonably practicable.

132. It is not necessary that a situation which makes the holding of an inquiry not reasonably practicable should exist before the disciplinary inquiry is initiated against a government servant. Such a situation can also come into existence subsequently during the course of an inquiry, for instance, after the service of a charge-sheet upon the government servant or after he has filed his written statement thereto or even after evidence has been led in part. In such a case also the disciplinary authority would be entitled to apply clause (b) of the second proviso because the word 'inquiry' in that clause includes part of an inquiry. It would also not be reasonably practicable to afford to the government servant an opportunity of hearing or further hearing, as the case may be, when at the commencement of the inquiry or pending it the government servant absconds and cannot be served or will not participate in the inquiry. In such cases, the matter must proceed *ex parte* and on the materials before the disciplinary authority. Therefore, even where a part of an inquiry has been held and the rest is dispensed with under clause (b) or a provision in the service rules analogous thereto, the exclusionary words of the second proviso operate in their full vigour and the government servant cannot complain that he has been dismissed, removed or reduced in rank in violation of the safeguards provided by Article 311(2).

133. The second condition necessary for the valid application of clause (b) of the second proviso is that the disciplinary authority should record in writing its reason for its satisfaction that it was not reasonably practicable to hold the inquiry contemplated by Article 311(2). This is a constitutional obligation and if such reason is not recorded in writing, the order dispensing with the inquiry and the order of penalty following thereupon would both be void and unconstitutional.

134. It is obvious that the recording in writing of the reason for dispensing with the inquiry must precede the order imposing the penalty. The reason for dispensing with the inquiry need not, therefore, find a place in the final order. It would be usual to record the reason separately and then consider the question of the penalty to be imposed and pass the order imposing the penalty. It would, however, be better to record the reason in the final order in order to avoid the allegation that the reason was not recorded in writing before passing the final order but was subsequently fabricated. The reason for dispensing with the inquiry need not contain detailed particulars, but the reason must not be vague or just a repetition of the language of clause (b) of the second proviso. For instance, it would be no compliance with the requirement of clause (i) for the disciplinary authority simply to state that he was satisfied that it was not reasonably practicable to hold any inquiry. Sometimes a situation may be such that it is not reasonably practicable to give detailed reasons for dispensing with the inquiry. This would not, however, per se invalidate the order. Each case must be judged on its own merits and in the light of its own facts and circumstances.



135. It was vehemently contended that if reasons are not recorded in the final order, they must be communicated to the concerned government servant to enable him to challenge the validity of the reasons in a departmental appeal or before a court of law and that failure to communicate the reasons would invalidate the order. This contention too cannot be accepted. The constitutional requirement in clause (b) is that the reason for dispensing with the inquiry should be recorded in writing. There is no obligation to communicate the reason to the government servant. As clause (3) of Article 311 makes the decision of the disciplinary authority on this point final, the question cannot be agitated in a departmental appeal, revision or review. The obligation to record the reason in writing is provided in clause (b) so that the superiors of the disciplinary authority may be able to judge whether such authority had exercised its power under clause (b) properly or not with a view to judge the performance and capacity of that officer for the purposes of promotion etc. It would, however, be better for the disciplinary authority to communicate to the government servant its reason for dispensing with the inquiry because such communication would eliminate the possibility of an allegation being made that the reasons have been subsequently fabricated. It would also enable the government servant to approach the High Court under Article 226 or, in a fit case, this Court under Article 32. If the reasons are not communicated to the government servant and the matter comes to the court, the court can direct the reasons to be produced, and furnished to the government servant and if still not produced, a presumption should be drawn that the reasons were not recorded in writing and the impugned order would then stand invalidated. Such presumption can, however, be rebutted by a satisfactory explanation for the non-production of the written reasons.

136. It was next submitted that though clause (b) of the second proviso excludes an inquiry into the charges made against a government servant, it does not exclude an inquiry preceding it, namely, an inquiry into whether the disciplinary inquiry should be dispensed with or not, and that in such a preliminary inquiry the government servant should be given an opportunity of a hearing by issuing to him a notice to show cause why the inquiry should not be dispensed with so as to enable him to satisfy the disciplinary authority that it would be reasonably practicable to hold the inquiry. This argument is illogical and is a contradiction in terms. If an inquiry into the charges against a government servant is not reasonably practicable, it stands to reason that an inquiry into the question whether the disciplinary inquiry should be dispensed with or not is equally not reasonably practicable.

137. A government servant who has been dismissed, removed or reduced in rank by applying to his case clause (b) or an analogous provision of a service rule is not wholly without a remedy. As pointed out earlier while dealing with the various service rules, he can claim in a departmental appeal or revision that an inquiry be held with respect to the charges on which the penalty of dismissal, removal or reduction in rank has been imposed upon him unless the same or a similar situation prevails at the time of hearing of the appeal or revision application. If the same situation is continuing or a similar situation arises, it would not then be reasonably practicable to hold an inquiry at the time of the hearing of the appeal or revision. Though in such a case as the government servant if dismissed or removed from service, is not continuing in service and if reduced in rank, is continuing in service with such reduced rank, no prejudice could be caused to the Government or the Department if the

hearing of an appeal or revision application, as the case may be, is postponed for a reasonable time.

138. Where a government servant is dismissed, removed or reduced in rank by applying clause (b) or an analogous provision of the service rules and he approaches either the High Court under Article 226 or this Court under Article 32, the court will interfere on grounds well established in law for the exercise of power of judicial review in matters where administrative discretion is exercised. It will consider whether clause (b) or an analogous provision in the service rules was properly applied or not. The finality given by clause (3) of Article 311 to the disciplinary authority's decision that it was not reasonably practicable to hold the inquiry is not binding upon the court. The court will also examine the charge of mala fides, if any, made in the writ petition. In examining the relevancy of the reasons, the court will consider the situation which according to the disciplinary authority made it come to the conclusion that it was not reasonably practicable to hold the inquiry. If the court finds that the reasons are irrelevant, then the recording of its satisfaction by the disciplinary authority would be an abuse of power conferred upon it by clause (b) and would take the case out of the purview of that clause and the impugned order of penalty would stand invalidated. In considering the relevancy of the reasons given by the disciplinary authority the court will not, however, sit in judgment over them like a court of first appeal. In order to decide whether the reasons are germane to clause (b) the court should put itself in the place of the disciplinary authority and consider what in the then prevailing situation a reasonable man acting in a reasonable way would have done. The matter will have to be judged in the light of the then prevailing situation and not as if the disciplinary authority was deciding the question whether the inquiry should be dispensed with or not in the cool and detached atmosphere of a courtroom, removed in time from the situation in question. Where two views are possible, the court will decline to interfere.

139. During the course of the argument a reference was made to certain High Court decisions and their citations were given. We have carefully gone through those decisions. It is, however, unnecessary to refer to them. Insofar as what was held in those decisions or nay of them is contrary to or inconsistent with what has been held by us, those decisions are not correct and are to that extent hereby overruled.

**The Second Proviso - Clause (c)**

140. We now turn to the last clause of the second proviso to Article 311(2), namely, clause (c) Though its exclusionary operation on the safeguards provided in Article 311(2) is the same as those of the other two clauses, it is very different in content from them. While under clause (b) the satisfaction is to be of disciplinary authority, under clause (c) it is to be of the President or the Governor of a State, as the case may be. Further, while under clause (b) the satisfaction has to be with respect to whether it is not reasonably practicable to hold the inquiry, under clause (c) it is to be with respect to whether it will not be expedient in the interest of the security of the State to hold the inquiry. Thus, in one case the test is of reasonable practicability of holding the inquiry, in the other case it is of the expediency of holding the inquiry- While clause (a) expressly requires that the reason for dispensing with the inquiry should be recorded in writing, clause (c) does not so require it, either expressly or impliedly.

141. The expressions “law and order”, “public order” and “security of the State” have been used in different Acts. Situations which affect “public order” are graver than those which affect “law and order” and situations which affect “security of the State” are graver than those which affect “public order”. Thus, of these situations those which affect “security of the State” are the gravest. Danger to the security of the State may arise from without or within the State. The expression “security of the State” does not mean security of the entire country or a whole State. It includes security of a part of the State. It also cannot be confined to an armed rebellion or revolt. There are various ways in which security of the State can be affected. It can be affected by State secrets or information relating to defence production or similar matters being passed on to other countries, whether inimical or not to our country, or by secret links with terrorists. It is difficult to enumerate the various ways in which security of the State can be affected. The way in which security of the State is affected may be either open or clandestine. Amongst the more obvious acts which affect the security of the State would be disaffection in the Armed Forces or para-military Forces. Disaffection in any of these Forces is likely to spread, for disaffected or dissatisfied members of these Forces spread such dissatisfaction and disaffection among other members of the Force and thus induce them not to discharge their duties properly and to commit acts of indiscipline, insubordination and disobedience to the orders of their superiors. Such a situation cannot be a matter affecting only law and order or public order but is a matter affecting vitally the security of the State. In this respect, the Police Force stands very much on the same footing as a military or a para-military Force for it is charged with the duty of ensuring and maintaining law and order and public order, and breaches of discipline and acts of disobedience and insubordination on the part of the members of the Police Force cannot be viewed with less gravity than similar acts on the part of the members of the military or para-military Forces. How important the proper discharge of their duties by members of these Forces and the maintenance of discipline amongst them is considered can be seen from Article 33 of the Constitution. Thus, the discharge of their duties by the members of these Forces and the maintenance of discipline amongst them is considered of such vital importance to the country that in order to ensure this the Constitution has conferred power upon Parliament to restrict or abrogate any of the fundamental rights in their application to them.

142. The question under clause (c), however, is not whether the security of the State has been affected or not, for the expression used in clause (c) is “in the interest of the security of the State”. The interest of the security of the State may be affected by actual acts or even the likelihood of such acts taking place. Further, what is required under clause (c) is not the satisfaction of the President or the Governor, as the case may be, that the interest of the security of the State is or will be affected but his satisfaction that in the interest of the security of the State, it is *not expedient* to hold an inquiry as contemplated by Article 311(2). The satisfaction of the President or Governor must, therefore, be with respect to the expediency or in expediency of holding an inquiry in the interest of the security of the State. The *Shorter Oxford English Dictionary*, Third Edition, defines the word ‘inexpedient’ as meaning “not expedient; disadvantageous in the circumstances, unadvisable, impolitic”. The same dictionary defines ‘expedient’ as meaning *inter alia* “advantageous; fit, proper, or suitable to the circumstances of the case”. *Webster’s Third New International Dictionary* also defines the term ‘expedient’ as meaning *inter alia* “characterized by suitability, practicality, and

efficiency in achieving a particular end: fit, proper, or advantageous under the circumstances". It must be borne in mind that the satisfaction required by clause (c) is of the Constitutional Head of the whole country or of the State. Under Article 74(1) of the Constitution, the satisfaction of the President would be arrived at with the aid and advice of his Council of Ministers with the Prime Minister as the Head and in the case of a State by reason of the provisions of Article 163(1) by the Governor acting with the aid and advice of his Council of Ministers with the Chief Minister as the Head. Whenever, therefore, the President or the Governor in the constitutional sense is satisfied that it will not be advantageous or fit or proper or suitable or politic in the interest of the security of the State to hold an inquiry, he would be entitled to dispense with it under clause (c). The satisfaction so reached by the President or the Governor must necessarily be a subjective satisfaction. Expediency involves matters of policy. Satisfaction may be arrived at as a result of secret information received by the Government about the brewing of danger to the security of the State and like matters. There may be other factors which may be required to be considered, weighed and balanced in order to reach the requisite satisfaction whether holding an inquiry would be expedient or not. If the requisite satisfaction has been reached as a result of secret information received by the Government, making known such information may very often result in disclosure of the source of such information. Once known, the particular source from which the information was received would no more be available to the Government. The reasons for the satisfaction reached by the President or Governor under clause (c) cannot, therefore, be required to be recorded in the order of dismissal, removal or reduction in rank nor can they be made public.

143. In the case of clause (b) of the second proviso, clause (3) of Article 311 makes the decision of the disciplinary authority that it was not reasonably practicable to hold the inquiry final. There is no such clause in Article 311 with respect to the satisfaction reached by the President or the Governor under clause (c) of the second proviso. There are two reasons for this. There can be no departmental appeal or other departmental remedy against the satisfaction reached by the President or the Governor; and so far as the Court's power of judicial review is concerned, the Court cannot sit in judgment over State policy or the wisdom or otherwise of such policy. The Court equally cannot be the judge of expediency or inexpediency. Given a known situation, it is not for the Court to decide whether it was expedient or inexpedient in the circumstances of the case to dispense with the inquiry. The satisfaction reached by the President or Governor under clause (c) is subjective satisfaction and, therefore, would not be a fit matter for judicial review. Relying upon the observations of Bhagwati, J., in *State of Rajasthan v. Union of India*, it was submitted that the power of judicial review is not excluded where the satisfaction of the President or the Governor has been reached mala fide or is based on wholly extraneous or irrelevant grounds because in such a case, in law there would be no satisfaction of the President or the Governor at all. It is unnecessary to decide this question because in the matters under clause (c) before us, all the materials, including the advice tendered by the Council of Ministers, have been produced and they clearly show that in those cases the satisfaction of the Governor was neither reached mala fide nor was it based on any extraneous or irrelevant ground.

154. This appeal, therefore, requires to be allowed and the writ petition filed by the respondent deserves to be dismissed.

## **AMENDMENT OF THE CONSTITUTION**

### ***I.R. Coelho v. State of T.N.***

(2007) 2 SCC 1

[The fundamental question decided in this case was whether on and after 24-4-1973 (date the judgment in *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461) when the basic structure doctrine was propounded, is it permissible for Parliament under Article 31-B to immunise legislations by inserting them into the Ninth Schedule and, if so, what was its effect on the power of judicial review of the court.]

**Y.K. SABHARWAL, C.J.** – In these matters we are confronted with a very important yet not very easy task of determining the nature and character of protection provided by Article 31-B of the Constitution of India, 1950 to the laws added to the Ninth Schedule by amendments made after 24-4-1973. The relevance of this date is for the reason that on this date the judgment in *Kesavananda Bharati v. State of Kerala* [AIR 1073 SC 1461] was pronounced propounding the doctrine of basic structure of the Constitution to test the validity of constitutional amendments.

#### **Re: Order of reference**

2. The order of reference made more than seven years ago by a Constitution Bench of five Judges is reported in *I.R. Coelho v. State of T.N.* [(1999) 7 SCC 580]. The Gudalur Janmam Estates (Abolition and Conversion into Ryotwari) Act, 1969 (the Janmam Act), insofar as it vested forest lands in the Janmam estates in the State of Tamil Nadu, was struck down by this Court in *Balmadies Plantations Ltd. v. State of T.N.* [AIR 1972 SC 2240] because this was not found to be a measure of agrarian reform protected by Article 31-A of the Constitution. Section 2(c) of the West Bengal Land Holding Revenue Act, 1979 was struck down by the Calcutta High Court as being arbitrary and, therefore, unconstitutional and the special leave petition filed against the judgment by the State of West Bengal was dismissed. By the Constitution (Thirty-fourth Amendment) Act, the Janmam Act, in its entirety, was inserted in the Ninth Schedule. By the Constitution (Sixty-sixth Amendment) Act, the West Bengal Land Holding Revenue Act, 1979, in its entirety, was inserted in the Ninth Schedule.

4. In the referral order, the Constitution Bench observed that, according to *Waman Rao v. Union of India* [AIR 1981 SC 271], amendments to the Constitution made on or after 24-4-1973 by which the Ninth Schedule was amended from time to time by inclusion of various Acts, regulations therein were open to challenge on the ground that they, or any one or more of them, are beyond the constituent power of Parliament since they damage the basic or essential features of the Constitution or its basic structure. The decisions in *Minerva Mills Ltd. v. Union of India* [AIR 1980 SC 1789] and *Bhim Singhji v. Union of India* [AIR 1981 SC 234] were also noted and it was observed that the judgment in *Waman Rao* needs to be reconsidered by a larger Bench so that the apparent inconsistencies therein are reconciled and it is made clear whether an Act or regulation which, or a part of which, is or has been found by this Court to be violative of one or more of the fundamental rights conferred by Articles

14, 19 and 31 can be included in the Ninth Schedule or whether it is only a constitutional amendment amending the Ninth Schedule which damages or destroys the basic structure of the Constitution that can be struck down. While referring these matters for decision to a larger Bench, it was observed that preferably the matters be placed before a Bench of nine Judges. This is how these matters have been placed before us.

**Development of the law**

7. The Constitution was framed after an in-depth study of manifold challenges and problems including that of poverty, illiteracy, long years of deprivation, inequalities based on caste, creed, sex and religion. The independence struggle and intellectual debates in the Constituent Assembly show the value and importance of freedoms and rights guaranteed by Part III and State's welfare obligations in Part IV. The Constitutions of various countries including that of the United States of America and Canada were examined and after extensive deliberations and discussions the Constitution was framed. The fundamental rights chapter was incorporated providing in detail the positive and negative rights. It provided for the protection of various rights and freedoms. For enforcement of these rights, unlike Constitutions of most of the other countries, the Supreme Court was vested with original jurisdiction as contained in Article 32.

8. The High Court of Patna in ***Kameshwar Singh v. State of Bihar*** [AIR 1951 Pat. 91] held that a Bihar legislation relating to land reforms was unconstitutional while the High Courts of Allahabad and Nagpur upheld the validity of the corresponding legislative measures passed in those States. The parties aggrieved had filed appeals before the Supreme Court. At the same time, certain zamindars had also approached the Supreme Court under Article 32 of the Constitution. It was, at this stage, that Parliament amended the Constitution by adding Articles 31-A and 31-B to assist the process of legislation to bring about agrarian reforms and confer on such legislative measures immunity from possible attack on the ground that they contravene the fundamental rights of the citizen. Article 31-B was not part of the original Constitution. It was inserted in the Constitution by the Constitution (First Amendment) Act, 1951. The same amendment added after the Eighth Schedule a new Ninth Schedule containing thirteen items, all relating to land reform laws, immunising these laws from challenge on the ground of contravention of Article 13 of the Constitution. Article 13, *inter alia*, provides that the State shall not make any law which takes away or abridges the rights conferred by Part III and any law made in contravention thereof shall, to the extent of the contravention, be void.

10. The constitutional validity of the First Amendment was upheld in ***Sankari Prasad Singh Deo v. Union of India*** [AIR 1952 SC 458].

11. The main object of the amendment was to fully secure the constitutional validity of zamindari abolition laws in general and certain specified Acts in particular and save those provisions from the dilatory litigation which resulted in holding up the implementation of the social reform measures affecting large number of people. Upholding the validity of the amendment, it was held in ***Sankari Prasad*** that Article 13(2) does not affect amendments to the Constitution made under Article 368 because such amendments are made in the exercise of constituent power. The Constitution Bench held that to make a law which contravenes the

Constitution constitutionally valid is a matter of constitutional amendment and as such it falls within the exclusive power of Parliament.

12. The constitutional validity of the Acts added to the Ninth Schedule by the Constitution (Seventeenth Amendment) Act, 1964 was challenged in petitions filed under Article 32 of the Constitution. Upholding the constitutional amendment and repelling the challenge in *Sajjan Singh v. State of Rajasthan* [AIR 1965 SC 845], the law declared in *Sankari Prasad* was reiterated. It was noted that Articles 31-A and 31-B were added to the Constitution realising that State legislative measures adopted by certain States for giving effect to the policy of agrarian reforms have to face serious challenge in the courts of law on the ground that they contravene the fundamental rights guaranteed to the citizen by Part III. The Court observed that the genesis of the amendment made by adding Articles 31-A and 31-B is to assist the State Legislatures to give effect to the economic policy to bring about much needed agrarian reforms. It noted that if pith and substance test is to apply to the amendment made, 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 viz., a policy in which the party in power believes. The Court further noted that the impugned Act does not purport to change the provisions of Article 226 and it cannot be said even to have that effect directly or in any appreciable measure. It noted that the object of the Act was to amend the relevant articles in Part III which confer fundamental rights on citizens and as such it falls under the substantive part of Article 368 and does not attract the provision of clause (b) of that proviso. The Court, however, noted, that if the effect of the amendment made in the fundamental rights on Article 226 is direct and not incidental and if in significant order, different considerations may perhaps arise.

14. In *Golak Nath v. State of Punjab* [AIR 1967 SC 1643], a Bench of 11 Judges considered the correctness of the view that had been taken in *Sankari Prasad* and *Sajjan Singh*. By majority of six to five, these decisions were overruled. It was held that the constitutional amendment is “law” within the meaning of Article 13 of the Constitution and, therefore, if it takes away or abridges the rights conferred by Part III thereof, it is void. It was declared that Parliament will have no power from the date of the decision (27-2-1967) to amend any of the provisions of Part III of the Constitution so as to take away or abridge the fundamental rights enshrined therein.

15. Soon after *Golak Nath* case, the Constitution (Twenty-fourth Amendment) Act, 1971, the Constitution (Twenty-fifth Amendment) Act, 1971, the Constitution (Twenty-sixth Amendment) Act, 1971 and the Constitution (Twenty-ninth Amendment) Act, 1972 were passed.

16. By the Constitution (Twenty-fourth Amendment) Act, 1971, Article 13 was amended and after clause (3), the following clause was inserted as Article 13(4):

“13. (4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368.”

17. Article 368 was also amended and in Article 368(1), the words “in exercise of its constituent powers” were inserted.

18. The Constitution (Twenty-fifth Amendment) Act, 1971 amended the provision of Article 31 dealing with compensation for acquiring or acquisition of properties for public purposes so that only the amount fixed by law need to be given and this amount could not be challenged in court on the ground that it was not adequate or in cash. Further, after Article 31-B of the Constitution, Article 31-C was inserted.

19. The Constitution (Twenty-sixth Amendment) Act, 1971 omitted from the Constitution Article 291 (privy purses) and Article 362 (rights and privileges of rulers of Indian States) and inserted Article 363-A after Article 363 providing that recognition granted to rulers of Indian States shall cease and privy purses be abolished.

20. The Constitution (Twenty-ninth Amendment) Act, 1972 amended the Ninth Schedule to the Constitution inserting therein two Kerala Amendment Acts in furtherance of land reforms after Entry 64, namely, Entry 65 - Kerala Land Reforms Amendment Act, 1969 and Entry 66 - Kerala Land Reforms Amendment Act, 1971.

21. These amendments were challenged in *Kesavananda Bharati* case. The decision in *Kesavananda Bharati* case was rendered on 24-4-1973 by a thirteen-Judge Bench and by majority of seven to six *Golak Nath* case was overruled. The majority opinion held that Article 368 did not enable Parliament to alter the basic structure or framework of the Constitution. The Constitution (Twenty-fourth Amendment) Act, 1971 was held to be valid. Further, the first part of Article 31-C was also held to be valid. However, the second part of Article 31-C that

“no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy”

was declared unconstitutional. The 29<sup>th</sup> Constitution Amendment was held valid. The validity of the 26<sup>th</sup> Amendment was left to be determined by a Constitution Bench of five Judges.

22. The majority opinion did not accept the unlimited power of Parliament to amend the Constitution and instead held that Article 368 has implied limitations. Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution.

23. Another important development took place in June 1975, when the Allahabad High Court set aside the election of the then Prime Minister Mrs Indira Gandhi to the fifth Lok Sabha on the ground of alleged corrupt practices. Pending appeal against the High Court judgment before the Supreme Court, the Constitution (Thirty-ninth Amendment) Act, 1975 was passed. Clause (4) of the amendment inserted Article 329-A after Article 329. Sub-clauses (4) and (5) of Article 329-A read as under:

“329-A. (4) No law made by Parliament before the commencement of the Constitution (Thirty-ninth Amendment) Act, 1975, insofar as it relates to election petitions and matters connected therewith, shall apply or shall be deemed ever to have applied to or in relation to the election of any such person as is referred to in clause (1) to either House of Parliament and such election shall not be deemed to be void or ever to have become void on any ground on which such election could be declared to be void or has before such commencement, been declared to be void



under any such law and notwithstanding any order made by any court, before such commencement, declaring such election to be void, such election shall continue to be valid in all respects and any such order and any finding on which such order is based shall be and shall be deemed always to have been void and of no effect.

(5) Any appeal or cross-appeal against any such order of any court as is referred to in clause (4) pending immediately before the commencement of the Constitution (Thirty-ninth Amendment) Act, 1975, before the Supreme Court shall be disposed of in conformity with the provisions of clause (4).”

24. Clause (5) of the Amendment Act inserted after Entry 86, Entries 87 to 124 in the Ninth Schedule. Many of the entries inserted were unconnected with land reforms.

25. In *Indira Nehru Gandhi v. Raj Narain* [AIR 1975 SC 2299], the aforesaid clauses were struck down by holding them to be violative of the basic structure of the Constitution.

26. About two weeks before the Constitution Bench rendered the decision in *Indira Gandhi* case internal Emergency was proclaimed in the country. During the Emergency from 26-6-1975 to March 1977, Article 19 of the Constitution stood suspended by virtue of Article 358 and Articles 14 and 21 by virtue of Article 359. During internal Emergency, Parliament passed the Constitution (Fortieth Amendment) Act, 1976. By clause (3) of the said amendment, in the Ninth Schedule, after Entry 124, Entries 125 to 188 were inserted. Many of these entries were unrelated to land reforms.

27. Article 368 was amended by the Constitution (Forty-second Amendment) Act, 1976. It, *inter alia*, inserted by Section 55 of the Amendment Act, in Article 368, after clause (3), the following clauses (4) and (5):

“368. (4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article whether before or after the commencement of Section 55 of the Constitution (Forty-second Amendment) Act, 1976 shall be called in question in any court on any ground.

(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.”

29. During Emergency, the fundamental rights were read even more restrictively as interpreted by the majority in *ADM, Jabalpur v. Shivakant Shukla* [AIR 1976 SC 1207]. The decision in *ADM, Jabalpur* about the restrictive reading of right to life and liberty stood impliedly overruled by various subsequent decisions.

30. The fundamental rights received enlarged judicial interpretation in the post-Emergency period. Article 21 which was given strict textual meaning in *A.K. Gopalan v. State of Madras* [AIR 1950 SC 27] interpreting the words “according to procedure established by law” to mean only enacted law, received enlarged interpretation in *Maneka Gandhi v. Union of India* [AIR 1978 SC 597]. *A.K. Gopalan* was no longer good law. In *Maneka Gandhi* a Bench of seven Judges held that the procedure established by law in Article 21 had to be reasonable and not violative of Article 14 and also that fundamental rights guaranteed by Part III were distinct and mutually exclusive rights.

31. In *Minerva Mills* case the Court struck down clauses (4) and (5) of Article 368 finding that they violated the basic structure of the Constitution.

33. In *Bhim Singhji* challenge was made to the validity of the Urban Land (Ceiling and Regulation) Act, 1976 which had been inserted in the Ninth Schedule after *Kesavananda Bharati* case. The Constitution Bench unanimously held that Section 27(1) which prohibited disposal of property within the ceiling limit was violative of Articles 14 and 19(1)(f) of Part III. When the said Act was enforced in February 1976, Article 19(1)(f) was part of fundamental rights chapter and as already noted it was omitted therefrom only in 1978 and made instead only a legal right under Article 300-A.

34. It was held in *L. Chandra Kumar v. Union of India* [(1997) 3 SCC 261] that power of judicial review is an integral and essential feature of the Constitution constituting the basic part, the jurisdiction so conferred on the High Courts and the Supreme Court is a part of inviolable basic structure of the Constitution of India.

35. It would be convenient to note at one place, various constitutional amendments which added/omitted various Acts/provisions in the Ninth Schedule from Items 1 to 284. It is as under:

<i>Amendment Acts</i>	<i>Provisions added</i>	<i>Amendment Acts</i>	<i>Provisions added</i>
1 <sup>st</sup> Amendment (1951)	1-13	40 <sup>th</sup> Amendment (1976)	125-188
4 <sup>th</sup> Amendment (1955)	14-20	47 <sup>th</sup> Amendment (1984)	189-202
17 <sup>th</sup> Amendment (1964)	21-64	66 <sup>th</sup> Amendment (1990)	203-257
29 <sup>th</sup> Amendment (1971)	65-66	76 <sup>th</sup> Amendment (1994)	257-A
34 <sup>th</sup> Amendment (1974)	67-86	78 <sup>th</sup> Amendment (1995)	258-284
39 <sup>th</sup> Amendment (1975)	87-124		

### Omissions

In 1978, Item 92 (the Internal Security Act) was repealed by the parliamentary Act.

In 1977, Item 130 (the Prevention of Publication of Objectionable Matter) was repealed.

In 1978, the 44<sup>th</sup> Amendment omitted Items 87 (the Representation of People Act), 92 and 130. Many additions are unrelated to land reforms.

36. The question is as to the scope of challenge to the Ninth Schedule laws after 24-4-1973.

### Article 32

37. The significance of jurisdiction conferred on this Court by Article 32 is described by Dr. B.R. Ambedkar as follows: (*Constituent Assembly Debates*, Vol. IX, p. 953)

“most important article without which this Constitution would be a nullity”.

Further, it has been described as “the very soul of the Constitution and the very heart of it”.

38. Reference may also be made to the opinion of Patanjali Sastri, C.J., in *State of Madras v. V.G. Row* [AIR 1952 SC 196] to the following effect:

“This is especially true as regards the ‘fundamental rights’, as to which [the Supreme Court] has been assigned the role of a sentinel on the ‘qui vive’. While the Court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute.”

39. The jurisdiction conferred on this Court by Article 32 is an important and integral part of the basic structure of the Constitution of India and no Act of Parliament can abrogate it or take it away except by way of impermissible erosion of fundamental principles of the constitutional scheme, are settled propositions of Indian jurisprudence.

40. In *S.R. Bommai v. Union of India* [(1994) 3 SCC 1], it was reiterated that the judicial review is a basic feature of the Constitution and that the power of judicial review is a constituent power that cannot be abrogated by judicial process of interpretation. It is a cardinal principle of our Constitution that no one can claim to be the sole judge of the power given under the Constitution and that its actions are within the confines of the powers given by the Constitution.

#### **Principles of construction**

42. The Constitution is a living document. The constitutional provisions have to be construed having regard to the march of time and the development of law. It is, therefore, necessary that while construing the doctrine of basic structure due regard be had to various decisions which led to expansion and development of the law.

43. The principle of constitutionalism is now a legal principle which requires control over the exercise of governmental power to ensure that it does not destroy the democratic principles upon which it is based. These democratic principles include the protection of fundamental rights. The principle of constitutionalism advocates a check and balance model of the separation of powers; it requires a diffusion of powers, necessitating different independent centres of decision-making. The principle of constitutionalism underpins the principle of legality which requires the courts to interpret legislation on the assumption that Parliament would not wish to legislate contrary to fundamental rights. The legislature can restrict fundamental rights but it is impossible for laws protecting fundamental rights to be impliedly repealed by future statutes.

#### **Principles of constitutionality**

48. There is a difference between parliamentary and constitutional sovereignty. Our Constitution is framed by a Constituent Assembly which was not Parliament. It is in the exercise of law-making power by the Constituent Assembly that we have a controlled Constitution. Articles 14, 19, 21 represent the foundational values which form the basis of the rule of law. These are the principles of constitutionality which form the basis of judicial review apart from the rule of law and separation of powers. If in future, judicial review was to be abolished by a constitutional amendment, as Lord Steyn says, the principle of parliamentary sovereignty even in England would require a relook. This is how law has developed in England over the years. It is in such cases that doctrine of basic structure as propounded in *Kesavananda Bharati* case has to apply.

49. Granville Austin has been extensively quoted and relied on in *Minerva Mills*. Chandrachud, C.J., observed that to destroy the guarantees given by Part III in order to purportedly achieve the goals of Part IV is plainly to subvert the Constitution by destroying its basic structure. Fundamental rights occupy a unique place in the lives of civilised societies and have been described in judgments as “transcendental”, “inalienable” and “primordial”. They constitute the ark of the Constitution (*Kesavananda Bharati*). The learned Chief Justice held that Parts III and IV together constitute the core of commitment to social revolution and they, together, are the conscience of the Constitution. It is to be traced for a deep understanding of the scheme of the Indian Constitution. 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.” (*Minerva Mills*.) Further observes the learned Chief Justice, that the matters have to be decided not by metaphysical subtlety, nor as a matter of semantics, but by a broad and liberal approach. We must not miss the wood for the trees. A total deprivation of fundamental rights, even in a limited area, can amount to abrogation of a fundamental right just as partial deprivation in every area can. The observations made in the context of Article 31-C have equal and full force for deciding the questions in these matters. Again the observations made in para 70 are very relevant for our purposes. It has been observed that (*Minerva Mills* case):

“[I]f by a constitutional amendment, the application of Articles 14 and 19 is withdrawn from a defined field of legislative activity, which is reasonably in public interest, the basic framework of the Constitution may remain unimpaired. But if the protection of those articles is withdrawn in respect of an uncatalogued variety of laws, fundamental freedoms will become a ‘parchment in a glass case’ to be viewed as a matter of historical curiosity.”

These observations are very apt for deciding the extent and scope of judicial review in cases wherein entire Part III, including Articles 14, 19, 20, 21 and 32, stand excluded without any yardstick.

50. The developments made in the field of interpretation and expansion of judicial review shall have to be kept in view while deciding the applicability of the basic structure doctrine – to find out whether there has been violation of any fundamental right, the extent of violation, does it destroy the balance or it maintains the reasonable balance.

51. The observations of Bhagwati, J. in *Minerva Mills* case show how clause (4) of Article 368 would result in enlarging the amending power of Parliament contrary to the dictum in *Kesavananda Bharati* case. The learned Judge has said in para 85 that:

“So long as clause (4) stands, an amendment of the Constitution though unconstitutional and void as transgressing the limitation on the amending power of Parliament as laid down in *Kesavananda Bharati* case would be unchallengeable in a court of law. The consequence of this exclusion of the power of judicial review would be that, in effect and substance, the limitation on the amending power of Parliament would, from a practical point of view, become non-existent and it would

not be incorrect to say that, covertly and indirectly, by the exclusion of judicial review, the amending power of Parliament would stand enlarged, contrary to the decision of this Court in *Kesavananda Bharati* case. This would undoubtedly damage the basic structure of the Constitution, because there are two essential features of the basic structure which would be violated, namely, the limited amending power of Parliament and the power of judicial review with a view to examining whether any authority under the Constitution has exceeded the limits of its powers.”

52. In *Minerva Mills* while striking down the enlargement of Article 31-C through 42<sup>nd</sup> Amendment which had replaced the words “of or any of the principles laid down in Part IV” with “the principles specified in clause (b) or clause (c) and Article 39”, Chandrachud, J. said:

“Section 4 of the Constitution (Forty-second Amendment) Act is beyond the amending power of Parliament and is void since it damages the basic or essential features of the Constitution and destroys its basic structure by a total exclusion of challenge to any law on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 or Article 19 of the Constitution, if the law is for giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV of the Constitution.”

53. In *Indira Gandhi* case, for the first time the challenge to the constitutional amendment was not in respect of the rights to property or social welfare, the challenge was with reference to an electoral law. Analysing this decision, H.M. Seervai in *Constitutional Law of India* (4<sup>th</sup> Edn.) says that “the judgment in *Election* case breaks new ground, which has important effects on *Kesavananda Bharati* case itself”. Further the author says that:

“No one can now write on the amending power, without taking into account the effect of *Election* case.”

55. For determining whether a particular feature of the Constitution is part of its basic structure, one has per force to examine in each individual case the place of the particular feature in the scheme of our Constitution, its object and purpose, and the consequences of its denial on the integrity of the Constitution as a fundamental instrument of the country’s governance.

56. The fundamentalness of fundamental rights has thus to be examined having regard to the enlightened point of view as a result of development of fundamental rights over the years. It is, therefore, imperative to understand the nature of guarantees under fundamental rights as understood in the years that immediately followed after the Constitution was enforced when fundamental rights were viewed by this Court as distinct and separate rights. In early years, the scope of the guarantee provided by these rights was considered to be very narrow. Individuals could only claim limited protection against the State. This position has changed since long. Over the years, the jurisprudence and development around fundamental rights has made it clear that they are not limited, narrow rights but provide a broad check against the violations or excesses by the State authorities. The fundamental rights have in fact proved to be the most significant constitutional control on the Government, particularly legislative power. This transition from a set of independent, narrow rights to broad checks on State power is demonstrated by a series of cases that have been decided by this Court.

60. It is evident that it can no longer be contended that protection provided by fundamental rights comes in isolated pools. On the contrary, these rights together provide a comprehensive guarantee against excesses by State authorities. Thus post-*Maneka Gandhi* case it is clear that the development of fundamental rights has been such that it no longer involves the interpretation of rights as isolated protections which directly arise but they collectively form a comprehensive test against the arbitrary exercise of State power in any area that occurs as an inevitable consequence. The protection of fundamental rights has, therefore, been considerably widened.

62. The abrogation or abridgment of the fundamental rights under Chapter III have, therefore, to be examined on broad interpretation, the narrow interpretation of fundamental rights chapter is a thing of past. Interpretation of the Constitution has to be such as to enable the citizens to enjoy the rights guaranteed by Part III in the fullest measure.

#### Separation of powers

63. The separation of powers between Legislature, Executive and the Judiciary constitutes basic structure, has been found in *Kesavananda Bharati* case by the majority. Later, it was reiterated in *Indira Gandhi* case. A large number of judgments have reiterated that the separation of powers is one of the basic features of the Constitution.

67. The Supreme Court has long held that the separation of powers is part of the basic structure of the Constitution. Even before the basic structure doctrine became part of constitutional law, the importance of the separation of powers on our system of governance was recognised by this Court.

#### Contentions

68. In the light of aforesaid developments, the main thrust of the argument of the petitioners is that post-1973, it is impermissible to immunise Ninth Schedule laws from judicial review by making Part III inapplicable to such laws. Such a course, it is contended, is incompatible with the doctrine of basic structure. The existence of power to confer absolute immunity is not compatible with the implied limitation upon the power of amendment in Article 368, is the thrust of the contention.

69. Further, relying upon the clarification of Khanna, J., as given in *Indira Gandhi* case in respect of his opinion in *Kesavananda Bharati* case it is no longer correct to say that fundamental rights are not included in the basic structure. Therefore, the contention proceeds that since fundamental rights form a part of basic structure thus laws inserted into the Ninth Schedule when tested on the ground of basic structure shall have to be examined on the fundamental rights test.

70. The key question, however, is whether the basic structure test would include judicial review of the Ninth Schedule laws on the touchstone of fundamental rights. Thus, it is necessary to examine what exactly is the content of the basic structure test. According to the petitioners, the consequence of the evolution of the principles of basic structure is that the Ninth Schedule laws cannot be conferred with constitutional immunity of the kind created by Article 31-B. Assuming that such immunity can be conferred, its constitutional validity would

have to be adjudged by applying the direct impact and effect test which means the form of an amendment is not relevant, its consequence would be determinative factor.

71. The power to make any law at will that transgresses Part III in its entirety would be incompatible with the basic structure of the Constitution. The consequence also is, learned counsel for the petitioners contended, to emasculate Article 32 (which is part of fundamental rights chapter) in its entirety - if the rights themselves (including the principle of rule of law encapsulated in Article 14) are put out of the way, the remedy under Article 32 would be meaningless. In fact, by the exclusion of Part III, Article 32 would stand abrogated qua the Ninth Schedule laws. The contention is that the abrogation of Article 32 would be per se violative of the basic structure. It is also submitted that the constituent power under Article 368 does not include judicial power and that the power to establish judicial remedies which is compatible with the basic structure is qualitatively different from the power to exercise judicial power. The impact is that on the one hand the power under Article 32 is removed and, on the other hand, the said power is exercised by the legislature itself by declaring, in a way, the Ninth Schedule laws as valid.

75. To begin with, we find it difficult to accept the broad proposition urged by the petitioners that laws that have been found by the courts to be violative of Part III of the Constitution cannot be protected by placing the same in the Ninth Schedule by use of device of Article 31-B read with Article 368 of the Constitution. In *Kesavananda Bharati* case the majority opinion upheld the validity of the Kerala Act which had been set aside in *Kunjukutty Sahib v. State of Kerala* and the device used was that of the Ninth Schedule. After a law is placed in the Ninth Schedule, its validity has to be tested on the touchstone of basic structure doctrine. In *State of Maharashtra v. Man Singh Suraj Singh Padvi* a seven-Judge Constitution Bench, post-decision in *Kesavananda Bharati* case upheld the Constitution (Fortieth Amendment) Act, 1976 which was introduced when the appeal was pending in the Supreme Court and thereby included the regulations in the Ninth Schedule. It was held that Article 31-B and the Ninth Schedule cured the defect, if any, in the regulations as regards any unconstitutionality alleged on the ground of infringement of fundamental rights.

76. It is also contended that the power to pack up laws in the Ninth Schedule in absence of any indicia in Article 31-B has been abused and that abuse is likely to continue. It is submitted that the Ninth Schedule which commenced with only 13 enactments has now a list of 284 enactments. The validity of Article 31-B is not in question before us. Further, mere possibility of abuse is not a relevant test to determine the validity of a provision. The people, through the Constitution, have vested the power to make laws in their representatives through Parliament in the same manner in which they have entrusted the responsibility to adjudge, interpret and construe law and the Constitution including its limitation in the judiciary. We, therefore, cannot make any assumption about the alleged abuse of the power.

#### **Validity of Article 31-B**

78. We have examined various opinions in *Kesavananda Bharati* case but are unable to accept the contention that Article 31-B read with the Ninth Schedule was held to be constitutionally valid in that case. The validity thereof was not in question. The constitutional amendments under challenge in *Kesavananda Bharati* case were examined assuming the

constitutional validity of Article 31-B. Its validity was not in issue in that case. Be that as it may, we will assume Article 31-B as valid. The validity of the 1<sup>st</sup> Amendment inserting in the Constitution, Article 31-B is not in challenge before us.

**Kesavananda Bharati case**

80. The contention urged on behalf of the respondents that all the Judges, except Sikri, C.J., in *Kesavananda Bharati* case held that the 29<sup>th</sup> Amendment was valid and applied *Jeejeebhoy* case is not based on correct ratio of *Kesavananda Bharati* case. Six learned Judges (Ray, Palekar, Mathew, Beg, Dwivedi and Chandrachud, JJ.) who upheld the validity of 29<sup>th</sup> Amendment did not subscribe to the basic structure doctrine. The other six learned Judges (Sikri, C.J., Shelat, Grover, Hegde, Mukherjea and Reddy, JJ.) upheld the 29<sup>th</sup> Amendment subject to it passing the test of basic structure doctrine. The 13<sup>th</sup> learned Judge (Khanna, J.), though subscribed to basic structure doctrine, upheld the 29<sup>th</sup> Amendment agreeing with six learned Judges who did not subscribe to the basic structure doctrine. Therefore, it would not be correct to assume that all Judges or Judges in majority on the issue of basic structure doctrine upheld the validity of 29<sup>th</sup> Amendment unconditionally or were alive to the consequences of basic structure doctrine on 29<sup>th</sup> Amendment.

81. Six learned Judges otherwise forming the majority, held 29<sup>th</sup> Amendment valid only if the legislation added to the Ninth Schedule did not violate the basic structure of the Constitution. The remaining six who are in minority in *Kesavananda Bharati* case insofar as it relates to laying down the doctrine of basic structure, held 29<sup>th</sup> Amendment unconditionally valid.

82. While laying the foundation of basic structure doctrine to test the amending power of the Constitution, Khanna, J. opined that the fundamental rights could be amended, abrogated or abridged so long as the basic structure of the Constitution is not destroyed but at the same time, upheld the 29<sup>th</sup> Amendment as unconditionally valid. Thus, it cannot be inferred from the conclusion of the seven Judges upholding unconditionally the validity of 29<sup>th</sup> Amendment that the majority opinion held fundamental rights chapter as not part of the basic structure doctrine. The six Judges who held the 29<sup>th</sup> Amendment unconditionally valid did not subscribe to the doctrine of basic structure. The other six held 29<sup>th</sup> Amendment valid subject to it passing the test of basic structure doctrine.

83. Khanna, J. upheld the 29<sup>th</sup> Amendment in the following terms: (*Kesavananda Bharati* case)

“1536 . We may now deal with the Constitution (Twenty-ninth Amendment) Act. This Act, as mentioned earlier, inserted Kerala Act 35 of 1969 and Kerala Act 25 of 1971 as Entries 65 and 66 in the Ninth Schedule to the Constitution. I have been able to find no infirmity in the Constitution (Twenty-ninth Amendment) Act.”

84. In his final conclusions, with respect to the Twenty-ninth Amendment, Khanna, J. held as follows: (*Kesavananda Bharati* case).

“1537. (xv) The Constitution (Twenty-ninth Amendment) Act does not suffer from any infirmity and as such is valid.”



85. Thus, while upholding the Twenty-ninth Amendment, there was no mention of the test that is to be applied to the legislations inserted in the Ninth Schedule. The implication that the respondents seek to draw from the above is that this amounts to an unconditional upholding of the legislations in the Ninth Schedule.

86. They have also relied on observations by Ray, C.J., as quoted below, in *Indira Gandhi*. In that case, Ray, C.J. observed:

“152. The Constitution (Twenty-ninth Amendment) Act was considered by this Court in *Kesavananda Bharati* case. The Twenty-ninth Amendment Act inserted in the Ninth Schedule to the Constitution Entries 65 and 66 being the Kerala Land Reforms Act, 1969 and the Kerala Land Reforms Act, 1971. *This Court unanimously upheld the validity of the Twenty-ninth Amendment Act.* The view of seven Judges in *Kesavananda Bharati* case is that Article 31-B is a constitutional device to place the specified statutes in the Schedule beyond any attack that these infringe Part III of the Constitution. *The 29<sup>th</sup> Amendment is affirmed in Kesavananda Bharati case by majority of seven against six Judges.*

153. Second, the majority view in *Kesavananda Bharati* case is that the 29<sup>th</sup> Amendment which put the two statutes in the Ninth Schedule and Article 31-B is not open to challenge on the ground of either damage to or destruction of basic features, basic structure or basic framework or on the ground of violation of fundamental rights.” (emphasis supplied)

88. On the issue of how the 29<sup>th</sup> Amendment in *Kesavananda Bharati* case was decided, in *Minerva Mills*, Bhagwati, J. has said thus:

“The validity of the Twenty-ninth Amendment Act was challenged in *Kesavananda Bharati* case, but by a majority consisting of Khanna, J. and the six learned Judges led by Ray, J. (as he then was), it was held to be valid. Since all the earlier constitutional amendments were held valid on the basis of unlimited amending power of Parliament recognised in *Sankari Prasad* case and *Sajjan Singh* case and were accepted as valid in *Golak Nath* case and the Twenty-ninth Amendment Act was also held valid in *Kesavananda Bharati* case, though not on the application of the basic structure test, and these constitutional amendments have been recognised as valid over a number of years and moreover, the statutes intended to be protected by them are all falling within Article 31-A with the possible exception of only four Acts referred to above, I do not think, we would be justified in reopening the question of validity of these constitutional amendments and hence we hold them to be valid. But, all constitutional amendments made after the decision in *Kesavananda Bharati* case would have to be tested by reference to the basic structure doctrine, for Parliament would then have no excuse for saying that it did not know the limitation on its amending power.”

89. To us, it seems that the position is correctly reflected in the aforesaid observations of Bhagwati, J. and with respect we feel that Ray, C.J., is not correct in the conclusion that the 29<sup>th</sup> Amendment was unanimously upheld. Since the majority which propounded the basic structure doctrine did not unconditionally uphold the validity of the 29<sup>th</sup>

Amendment and six learned Judges forming the majority left that to be decided by a smaller Bench and upheld its validity subject to it passing basic structure doctrine, the factum of validity of the 29<sup>th</sup> Amendment in *Kesavananda Bharati* case is not conclusive of matters under consideration before us.

90. In order to understand the view of Khanna, J. in *Kesavananda Bharati*, it is important to take into account his later clarification. In *Indira Gandhi*, Khanna, J. made it clear that he never opined that fundamental rights were outside the purview of basic structure and observed as follows:

“251. There was a controversy during the course of arguments on the point as to whether I have laid down in my judgment in *Kesavananda Bharati* case that fundamental rights are not a part of the basic structure of the Constitution. As this controversy cropped up a number of times, it seems apposite that before I conclude I should deal with the contention advanced by learned Solicitor General that according to my judgment in that case no fundamental right is part of the basic structure of the Constitution. I find it difficult to read anything in that judgment to justify such a conclusion. What has been laid down in that judgment is that no article of the Constitution is immune from the amendatory process because of the fact that it relates to a fundamental right and is contained in Part III of the Constitution.

252. The above observations clearly militate against the contention that according to my judgment fundamental rights are not a part of the basic structure of the Constitution. I also dealt with the matter at length to show that the right to property was not a part of the basic structure of the Constitution. This would have been wholly unnecessary if none of the fundamental rights was a part of the basic structure of the Constitution.”

91. Thus, after his aforesaid clarification, it is not possible to read the decision of Khanna, J. in *Kesavananda Bharati* so as to exclude fundamental rights from the purview of the basic structure. The import of this observation is significant in the light of the amendment that he earlier upheld. It is true that if the fundamental rights were never a part of the basic structure, it would be consistent with an unconditional upholding of the Twenty-ninth Amendment, since its impact on the fundamental rights guarantee would be rendered irrelevant. However, having held that some of the fundamental rights *are* a part of the basic structure, any amendment having an impact on fundamental rights would necessarily have to be examined in that light. Thus, the fact that Khanna, J. held that some of the fundamental rights were a part of the basic structure has a significant impact on his decision regarding the Twenty-ninth Amendment and the validity of the Twenty-ninth Amendment must necessarily be viewed in that light. His clarification demonstrates that he was not of the opinion that all the fundamental rights were not part of the basic structure and the inevitable conclusion is that the Twenty-ninth Amendment, even if treated as unconditionally valid, is of no consequence on the point in issue in view of peculiar position as to majority abovenoted.

92. Such an analysis is supported by Seervai, in his book *Constitutional Law of India* (4<sup>th</sup> Edn., Vol. III), as follows:

“Although in his judgment in *Election* case, Khanna, J. clarified his judgment in *Kesavananda* case, that clarification raised a serious problem of its own. The problem was: in view of the clarification, was Khanna, J. right in holding that Article 31-B and Schedule IX were unconditionally valid? Could he do so after he had held that the basic structure of the Constitution could not be amended? As we have seen, that problem was solved in *Minerva Mills* case by holding that Acts inserted in Schedule IX after 25-4-1973 were not unconditionally valid, but would have to stand the test of fundamental rights.” \* \* \* \* \*

But while the clarification in *Election* case simplifies one problem – the scope of the amending power – it raises complicated problems of its own. Was Khanna, J. right in holding Article 31-B (and Schedule IX) unconditionally valid by holding the 29<sup>th</sup> Amendment unconditionally valid? And was he right when he held the substantive part of Article 31-C unconditionally valid? An answer to these questions requires an analysis of the function of Article 31-B and Schedule IX. Taking Article 31-B and Schedule IX first, their effect is to confer validity on laws already enacted which would be void for violating one or more of the fundamental rights conferred by Part III (fundamental rights). But if the power of amendment is limited by the doctrine of the basic structure, a grave problem immediately arises. The thing to note is that though such Acts do not become a part of the Constitution, by being included in Schedule IX *they owe their validity to the exercise of the amending power. Can Acts, which destroy the secular character of the State, be given validity and be permitted to destroy a part of the basic structure as a result of the exercise of the amending power?* That, in the last analysis, is the real problem; and it is submitted that if the doctrine of the basic structure is accepted, there can be only one answer. If Parliament, exercising constituent power cannot enact an amendment destroying the secular character of the State, neither can Parliament, exercising its constituent power, permit Parliament or the State Legislatures to produce the same result by protecting laws, enacted in the exercise of legislative power, which produce the same result. To hold otherwise would be to abandon the doctrine of the basic structure in respect of fundamental rights, for every part of that basic structure can be destroyed by first enacting laws which produce that effect, and then protecting them by inclusion in Schedule IX. Such a result is consistent with the view that fundamental rights are not part of the basic structure; it is wholly inconsistent with the view that some fundamental rights are a part of the basic structure, as Khanna, J. said in his clarification. In other words, the validity of the 25<sup>th</sup> and 29<sup>th</sup> Amendments raised the question of applying the law laid down as to the scope of the amending power when determining the validity of the 24<sup>th</sup> Amendment. If that law was correctly laid down, it did not become incorrect by being wrongly applied. Therefore the conflict between Khanna, J.’s views on the amending power and on the unconditional validity of the 29<sup>th</sup> Amendment is resolved by saying that he laid down the scope of the amending power correctly but misapplied that law in holding Article 31-B and Schedule IX unconditionally valid. Consistently with his view that some fundamental rights were part of the basic structure, he ought to have joined the 6 other Judges in holding that the 29<sup>th</sup> Amendment was valid, but the Acts included in Schedule IX would have to

be scrutinised by the Constitution Bench to see whether they destroyed or damaged any part of the basic structure of the Constitution, and if they did, such laws would not be protected." (portion in italics is emphasis in original, portion underlined is emphasis supplied herein)

93. The decision in *Kesavananda Bharati* regarding the Twenty-ninth Amendment is restricted to that particular amendment and no principle flows therefrom.

94. We are unable to accept the contention urged on behalf of the respondents that in *Waman Rao* case Chandrachud, J., and in *Minerva Mills* case Bhagwati, J. have not considered the binding effect of majority judgments in *Kesavananda Bharati* case. In these decisions, the development of law post-*Kesavananda Bharati* case has been considered. The conclusion has rightly been reached, also having regard to the decision in *Indira Gandhi* case that post-*Kesavananda Bharati* case or after 24-4-1973, the Ninth Schedule laws will not have the full protection. The doctrine of basic structure was involved in *Kesavananda Bharati* case but its effect, impact and working was examined in *Indira Gandhi* case, *Waman Rao* case and *Minerva Mills* case. To say that these judgments have not considered the binding effect of the majority judgment in *Kesavananda Bharati* case is not based on a correct reading of *Kesavananda Bharati*.

95. On the issue of equality, we do not find any contradiction or inconsistency in the views expressed by Chandrachud, J. in *Indira Gandhi* case, by Krishna Iyer, J. in *Bhim Singh* case and Bhagwati, J. in *Minerva Mills* case. All these judgments show that violation in individual case has to be examined to find out whether violation of equality amounts to destruction of the basic structure of the Constitution.

96. Next, we examine the extent of immunity that is provided by Article 31-B. The principle that constitutional amendments which violate the basic structure doctrine are liable to be struck down will also apply to amendments made to add laws in the Ninth Schedule in the view expressed by Sikri, C.J. Substantially similar separate opinions were expressed by Shelat, Grover, Hegde, Mukherjea and Reddy, JJ. In the four different opinions six learned Judges came substantially to the same conclusion. These Judges read an implied limitation on the power of Parliament to amend the Constitution. Khanna, J. also opined that there was implied limitation in the shape of the basic structure doctrine that limits the power of Parliament to amend the Constitution but the learned Judge upheld the 29<sup>th</sup> Amendment and did not say, like the remaining six Judges, that the Twenty-ninth Amendment will have to be examined by a smaller Constitution Bench to find out whether the said amendment violated the basic structure theory or not. This gave rise to the argument that fundamental rights chapter is not part of basic structure. Khanna, J. however, does not so say in *Kesavananda Bharati* case. Therefore, *Kesavananda Bharati* case cannot be said to have held that fundamental rights chapter is not part of basic structure. Khanna, J. while considering the Twenty-ninth Amendment, had obviously in view the laws that had been placed in the Ninth Schedule by the said amendment related to the agrarian reforms. Khanna, J. did not want to elevate the right to property under Article 19(1)(f) to the level and status of basic structure or basic framework of the Constitution, that explains the ratio of *Kesavananda Bharati* case. Further, doubt, if any, as to the opinion of Khanna, J. stood resolved on the clarification given in *Indira Gandhi* case by the learned Judge that in *Kesavananda Bharati* case he never held

that fundamental rights are not a part of the basic structure or framework of the Constitution.

97. The rights and freedoms created by the fundamental rights chapter can be taken away or destroyed by amendment of the relevant article, but subject to limitation of the doctrine of basic structure. True, it may reduce the efficacy of Article 31-B but that is inevitable in view of the progress the laws have made post-**Kesavananda Bharati** case which has limited the power of Parliament to amend the Constitution under Article 368 of the Constitution by making it subject to the doctrine of basic structure.

98. To decide the correctness of the rival submissions, the first aspect to be borne in mind is that each exercise of the amending power inserting laws into the Ninth Schedule entails a complete removal of the fundamental rights chapter vis-à-vis the laws that are added in the Ninth Schedule. Secondly, insertion in the Ninth Schedule is not controlled by any defined criteria or standards by which the exercise of power may be evaluated. The consequence of insertion is that it nullifies entire Part III of the Constitution. There is no constitutional control on such nullification. It means an unlimited power to totally nullify Part III insofar as the Ninth Schedule legislations are concerned. The supremacy of the Constitution mandates all constitutional bodies to comply with the provisions of the Constitution. It also mandates a mechanism for testing the validity of legislative acts through an independent organ viz. the judiciary.

99. While examining the validity of Article 31-C in **Kesavananda Bharati** case it was held that the vesting of power of the exclusion of judicial review in a legislature including a State Legislature, strikes at the basic structure of the Constitution. It is on this ground that second part of Article 31-C was held to be beyond the permissible limits of power of amendment of the Constitution under Article 368.

100. If the doctrine of basic structure provides a touchstone to test the amending power or its exercise, there can be no doubt and it has to be so accepted that Part III of the Constitution has a key role to play in the application of the said doctrine.

101. Regarding the status and stature in respect of fundamental rights in constitutional scheme, it is to be remembered that fundamental rights are those rights of citizens or those negative obligations of the State which do not permit encroachment on individual liberties. The State is to deny no one equality before the law. The object of the fundamental rights is to foster the social revolution by creating a society egalitarian to the extent that all citizens are to be equally free from coercion or restriction by the State. By enacting fundamental rights and directive principles which are negative and positive obligations of the States, the Constituent Assembly made it the responsibility of the Government to adopt a middle path between individual liberty and public good. Fundamental rights and directive principles have to be balanced. That balance can be tilted in favour of the public good. The balance, however, cannot be overturned by completely overriding individual liberty. This balance is an essential feature of the Constitution.

102. Fundamental rights enshrined in Part III were added to the Constitution as a check on the State power, particularly the legislative power. Through Article 13, it is provided that the State cannot make any laws that are contrary to Part III. The framers of the Constitution have built a wall around certain parts of fundamental rights, which have to remain forever,

limiting ability of majority to intrude upon them. That wall is the “basic structure” doctrine. Under Article 32, which is also part of Part III, the Supreme Court has been vested with the power to ensure compliance with Part III. The responsibility to judge the constitutionality of all laws is that of judiciary. Thus, when power under Article 31-B is exercised, the legislations made completely immune from Part III results in a direct way out of the check of Part III, including that of Article 32. It cannot be said that the same Constitution that provides for a check on legislative power, will decide whether such a check is necessary or not. It would be a negation of the Constitution. In *Waman Rao* case while discussing the application of basic structure doctrine to the first amendment, it was observed that the measure of the permissibility of an amendment of a pleading is how far it is consistent with the original; you cannot by an amendment transform the original into opposite of what it is. For that purpose, a comparison is undertaken to match the amendment with the original. Such a comparison can yield fruitful results even in the rarefied sphere of constitutional law.

103. Indeed, if Article 31-B only provided restricted immunity and it seems that original intent was only to protect a limited number of laws, it would have been only exception to Part III and the basis for the initial upholding of the provision. However, the unchecked and rampant exercise of this power, the number having gone from 13 to 284, shows that it is no longer a mere exception. The absence of guidelines for exercise of such power means the absence of constitutional control which results in destruction of constitutional supremacy and creation of parliamentary hegemony and absence of full power of judicial review to determine the constitutional validity of such exercise.

104. It is also contended for the respondents that Article 31-A excludes judicial review of certain laws from the applications of Articles 14 and 19 and that Article 31-A has been held to be not violative of the basic structure. The contention, therefore, is that exclusion of judicial review would not make the Ninth Schedule law invalid. We are not holding such law per se invalid but, examining the extent of the power which the legislature will come to possess. Article 31-A does not exclude uncatalogued number of laws from challenge on the basis of Part III. It provides for a standard by which laws stand excluded from judicial review. Likewise, Article 31-C applies as a yardstick the criteria of sub-clauses (b) and (c) of Article 39 which refers to equitable distribution of resources.

105. The fundamental rights have always enjoyed a special and privileged place in the Constitution. Economic growth and social equity are the two pillars of our Constitution which are linked to the rights of an individual (right to equal opportunity), rather than in the abstract. Some of the rights in Part III constitute fundamentals of the Constitution like Article 21 read with Articles 14 and 15 which represent secularism, etc. As held in *Nagaraj* egalitarian equality exists in Article 14 read with Articles 16(4), (4-A), (4-B) and, therefore, it is wrong to suggest that equity and justice finds place only in the directive principles.

106. Parliament has power to amend the provisions of Part III so as to abridge or take away fundamental rights, but that power is subject to the limitation of basic structure doctrine. Whether the impact of such amendment results in violation of basic structure has to be examined with reference to each individual case. Take the example of freedom of press which, though not separately and specifically guaranteed, has been read as part of Article 19(1)(a). If Article 19(1)(a) is sought to be amended so as to abrogate such right (which we

hope will never be done), the acceptance of the respondent's contention would mean that such amendment would fall outside the judicial scrutiny when the law curtailing these rights is placed in the Ninth Schedule as a result of immunity granted by Article 31-B. The impact of such an amendment shall have to be tested on the touchstone of rights and freedoms guaranteed by Part III of the Constitution. In a given case, even abridgement may destroy the real freedom of the press and, thus, be destructive of the basic structure. Take another example. The secular character of our Constitution is a matter of conclusion to be drawn from various articles conferring fundamental rights; and if the secular character is not to be found in Part III, it cannot be found anywhere else in the Constitution because every fundamental right in Part III stands either for a principle or a matter of detail. Therefore, one has to take a synoptic view of the various articles in Part III while judging the impact of the laws incorporated in the Ninth Schedule on the articles in Part III. It is not necessary to multiply the illustrations.

107. After enunciation of the basic structure doctrine, full judicial review is an integral part of the constitutional scheme. Khanna, J. in *Kesavananda Bharati* case was considering the right to property and it is in that context it was said that no article of the Constitution is immune from the amendatory process. We may recall what Khanna, J. said while dealing with the words "amendment of the Constitution". His Lordship said that these words with all the wide sweep and amplitude cannot have the effect of destroying or abrogating the basic structure or framework of the Constitution. The opinion of Khanna, J. in *Indira Gandhi* clearly indicates that the view in *Kesavananda Bharati* case is that at least some fundamental rights do form part of the basic structure of the Constitution. Detailed discussion in *Kesavananda Bharati* case to demonstrate that the right to property was not part of the basic structure of the Constitution by itself shows that some of the fundamental rights are part of the basic structure of the Constitution. The placement of a right in the scheme of the Constitution, the impact of the offending law on that right, the effect of the exclusion of that right from judicial review, the abrogation of the principle or the essence of that right is an exercise which cannot be denied on the basis of fictional immunity under Article 31-B.

108. In *Indira Gandhi* case Chandrachud, J. posits that equality embodied in Article 14 is part of the basic structure of the Constitution and, therefore, cannot be abrogated by observing that the provisions impugned in that case are an outright negation of the right of equality conferred by Article 14, a right which more than any other is a basic postulate of our Constitution.

109. Dealing with Articles 14, 19 and 21 in *Minerva Mills* case it was said that these clearly form part of the basic structure of the Constitution and cannot be abrogated. It was observed that three articles of our Constitution, and only three, stand between the heaven of freedom into which Tagore wanted his country to awake and the abyss of unrestrained power. These articles stand on altogether different footing. Can it be said, after the evolution of the basic structure doctrine, that exclusion of these rights at Parliament's will without any standard, cannot be subjected to judicial scrutiny as a result of the bar created by Article 31-B? The obvious answer has to be in the negative. If some of the fundamental rights constitute a basic structure, it would not be open to immunise those legislations from full judicial scrutiny either on the ground that the fundamental rights are not part of the basic structure or

on the ground that Part III provisions are not available as a result of immunity granted by Article 31-B. It cannot be held that essence of the principle behind Article 14 is not part of the basic structure. In fact, essence or principle of the right or nature of violation is more important than the equality in the abstract or formal sense. The majority opinion in **Kesavananda Bharati** case clearly is that the principles behind fundamental rights are part of the basic structure of the Constitution. It is necessary to always bear in mind that fundamental rights have been considered to be heart and soul of the Constitution. Rather these rights have been further defined and redefined through various trials having regard to various experiences and some attempts to invade and nullify these rights. The fundamental rights are deeply interconnected. Each supports and strengthens the work of the others. The Constitution is a living document, its interpretation may change as the time and circumstances change to keep pace with it. This is the ratio of the decision in **Indira Gandhi** case.

114. The result of the aforesaid discussion is that since the basic structure of the Constitution includes some of the fundamental rights, any law granted Ninth Schedule protection deserves to be tested against these principles. If the law infringes the essence of any of the fundamental rights or any other aspect of the basic structure then it will be struck down. The extent of abrogation and limit of abridgment shall have to be examined in each case.

115. We may also recall the observations made in **Special Reference No. 1 of 1964** as follows:

*[W]hether or not there is distinct and rigid separation of powers under the Indian Constitution, there is no doubt that the Constitution has entrusted to the judiciary in this country the task of construing the provisions of the Constitution and of safeguarding the fundamental rights of the citizens. When a statute is challenged on the ground that it has been passed by a legislature without authority, or has otherwise unconstitutionally trespassed on fundamental rights, it is for the courts to determine the dispute and decide whether the law passed by the legislature is valid or not. Just as the legislatures are conferred legislative authority and their functions are normally confined to legislative functions, and the functions and authority of the executive lie within the domain of executive authority, so the jurisdiction and authority of the judiciary in this country lie within the domain of adjudication. If the validity of any law is challenged before the courts, it is never suggested that the material question as to whether legislative authority has been exceeded or fundamental rights have been contravened, can be decided by the legislatures themselves. Adjudication of such a dispute is entrusted solely and exclusively to the judiciary of this country.*

116. We are of the view that while laws may be added to the Ninth Schedule, once Article 32 is triggered, these legislations must answer to the complete test of fundamental rights. Every insertion into the Ninth Schedule does not restrict Part III review, it completely excludes Part III at will. For this reason, every addition to the Ninth Schedule triggers Article 32 as part of the basic structure and is consequently subject to the review of the fundamental rights as they stand in Part III.



**Extent of judicial review in the context of amendments to the Ninth Schedule**

117. We are considering the question as to the extent of judicial review permissible in respect of the Ninth Schedule laws in the light of the basic structure theory propounded in **Kesavananda Bharati** case. In this connection, it is necessary to examine the nature of the constituent power exercised in amending a Constitution.

118. We have earlier noted that the power to amend cannot be equated with the power to frame the Constitution. This power has no limitations or constraints, it is primary power, a real plenary power. The latter (*sic* former) power, however, is derived from the former (*sic* latter). It has constraints of the document viz. Constitution which creates it. This derivative power can be exercised within the four corners of what has been conferred on the body constituted, namely, Parliament. The question before us is not about power to amend Part III after 24-4-1973. As per **Kesavananda Bharati** power to amend exists in Parliament but it is subject to the limitation of doctrine of basic structure. The fact of validation of laws based on exercise of blanket immunity eliminates Part III in entirety hence the “rights test” as part of the basic structure doctrine has to apply.

121. As already stated, in **Indira Gandhi** case for the first time, the constitutional amendment that was challenged did not relate to property right but related to free and fair election. As is evident from what is stated above that the power of amending the Constitution is a species of law-making power which is the genus. It is a different kind of law-making power conferred by the Constitution. It is different from the power to frame the Constitution i.e., a plenary law-making power as described by Seervai in **Constitutional Law of India** (4<sup>th</sup> Edn.).

122. The scope and content of the words “constituent power” expressly stated in the amended Article 368 came up for consideration in **Indira Gandhi** case. Article 329-A(4) was struck down because it crossed the implied limitation of amending power, that it made the controlled Constitution uncontrolled, that it removed all limitations on the power to amend and that it sought to eliminate the golden triangle of Article 21 read with Articles 14 and 19.

123. It is **Kesavananda Bharati** case read with clarification of Khanna, J. in **Indira Gandhi** case which takes us one step forward, namely, that fundamental rights are interconnected and some of them form part of the basic structure as reflected in Article 15, Article 21 read with Article 14, Article 14 read with Articles 16(4), (4-A), (4-B), etc., **Bharati** and **Indira Gandhi** cases have to be read together and if so read the position in law is that the basic structure as reflected in the above articles provide a test to judge the validity of the amendment by which laws are included in the Ninth Schedule.

124. Since power to amend the Constitution is not unlimited, if changes brought about by amendments destroy the identity of the Constitution, such amendments would be void. That is why when entire Part III is sought to be taken away by a constitutional amendment by the exercise of constituent power under Article 368 by adding the legislation in the Ninth Schedule, the question arises as to the extent of judicial scrutiny available to determine whether it alters the fundamentals of the Constitution. Secularism is one such fundamental, equality is the other, to give a few examples to illustrate the point. It would show that it is impermissible to destroy Articles 14 and 15 or abrogate or en bloc eliminate these

fundamental rights. To further illustrate the point, it may be noted that Parliament can make additions in the three legislative lists, but cannot abrogate all the lists as it would abrogate the federal structure.

125. The question can be looked at from yet another angle also. Can Parliament increase the amending power by amendment of Article 368 to confer on itself the unlimited power of amendment and destroy and damage the fundamentals of the Constitution? The answer is obvious. Article 368 does not vest such a power in Parliament. It cannot lift all restrictions placed on the amending power or free the amending power from all its restrictions. This is the effect of the decision in *Kesavananda Bharati* case as a result of which secularism, separation of power, equality, etc., to cite a few examples, would fall beyond the constituent power in the sense that the constituent power cannot abrogate these fundamentals of the Constitution. Without equality the rule of law, secularism, etc. would fail. That is why Khanna, J. held that some of the fundamental rights like Article 15 form part of the basic structure.

126. If constituent power under Article 368, the other name for amending power, cannot be made unlimited, it follows that Article 31-B cannot be so used as to confer unlimited power. Article 31-B cannot go beyond the limited amending power contained in Article 368. The power to amend Ninth Schedule flows from Article 368. This power of amendment has to be compatible with the limits on the power of amendment. This limit came with *Kesavananda Bharati* case. Therefore, Article 31-B after 24-4-1973 despite its wide language cannot confer unlimited or unregulated immunity.

127. To legislatively override entire Part III of the Constitution by invoking Article 31-B would not only make the fundamental rights overridden by directive principles but it would also defeat fundamentals such as secularism, separation of powers, equality and also the judicial review which are the basic features of the Constitution and essential elements of rule of law and that too without any yardstick/standard being provided under Article 31-B.

128. Further, it would be incorrect to assume that social content exists only in directive principles and not in the fundamental rights. Articles 15 and 16 are facets of Article 14. Article 16(1) concerns formal equality which is the basis of the rule of law. At the same time, Article 16(4) refers to egalitarian equality. Similarly, the general right of equality under Article 14 has to be balanced with Article 15(4) when excessiveness is detected in grant of protective discrimination. Article 15(1) limits the rights of the State by providing that there shall be no discrimination on the grounds only of religion, race, caste, sex, etc., and yet it permits classification for certain classes, hence social content exists in fundamental rights as well. All these are relevant considerations to test the validity of the Ninth Schedule laws.

129. Equality, rule of law, judicial review and separation of powers form parts of the basic structure of the Constitution. Each of these concepts are intimately connected. There can be no rule of law, if there is no equality before the law. These would be meaningless if the violation was not subject to the judicial review. All these would be redundant if the legislative, executive and judicial powers are vested in one organ. Therefore, the duty to decide whether the limits have been transgressed has been placed on the judiciary.

130. Realising that it is necessary to secure the enforcement of the fundamental rights,

power for such enforcement has been vested by the Constitution in the Supreme Court and the High Courts. Judicial review is an essential feature of the Constitution. It gives practical content to the objectives of the Constitution embodied in Part III and other parts of the Constitution. It may be noted that the mere fact that equality, which is a part of the basic structure, can be excluded for a limited purpose, to protect certain kinds of laws, does not prevent it from being part of the basic structure. Therefore, it follows that in considering whether any particular feature of the Constitution is part of the basic structure— rule of law, separation of powers - the fact that limited exceptions are made for limited purposes, to protect certain kind of laws, does not mean that it is not part of the basic structure.

133. Every amendment to the Constitution whether it be in the form of amendment of any article or amendment by insertion of an Act in the Ninth Schedule, has to be tested by reference to the doctrine of basic structure which includes reference to Article 21 read with Article 14, Article 15, etc. As stated, laws included in the Ninth Schedule do not become part of the Constitution, they derive their validity on account of the exercise undertaken by Parliament to include them in the Ninth Schedule. That exercise has to be tested every time it is undertaken. In respect of that exercise the principle of compatibility will come in. One has to see the effect of the impugned law on one hand and the exclusion of Part III in its entirety at the will of Parliament.

134. In *Waman Rao* it was accordingly rightly held that the Acts inserted in the Ninth Schedule after 24-4-1973 would not receive the full protection.

**Exclusion of judicial review if compatible with the doctrine of basic structure – concept of judicial review**

135. Judicial review is justified by combination of “the principle of separation of powers, rule of law, *the principle of constitutionality* and the reach of judicial review” (*Democracy Through Law* by Lord Styen, p. 131).

136. The role of the judiciary is to protect fundamental rights. A modern democracy is based on the twin principles of majority rule and the need to protect fundamental rights. According to Lord Styen, it is job of the judiciary to balance the principles ensuring that the Government on the basis of number does not override fundamental rights.

**Application of doctrine of basic structure**

137. In *Kesavananda Bharati* case the discussion was on the amending power conferred by unamended Article 368 which did not use the words “constituent power”. We have already noted the difference between original power of framing the Constitution known as constituent power and the nature of constituent power vested in Parliament under Article 368. By addition of the words “constituent power” in Article 368, the amending body, namely, Parliament does not become the original Constituent Assembly. It remains a Parliament under a controlled Constitution. Even after the words “constituent power” are inserted in Article 368, the limitations of doctrine of basic structure would continue to apply to Parliament. It is on this premise that clauses (4) and (5) inserted in Article 368 by the 42<sup>nd</sup> Amendment were struck down in *Minerva Mills* case.

138. The relevance of *Indira Gandhi* case, *Minerva Mills* case and *Waman Rao* case lies

in the fact that every improper enhancement of its own power by Parliament, be it clause (4) of Article 329-A or clauses (4) and (5) of Article 368 or Section 4 of the 42<sup>nd</sup> Amendment has been held to be incompatible with the doctrine of basic structure as they introduced new elements which altered the identity of the Constitution or deleted the existing elements from the Constitution by which the very core of the Constitution is discarded. They obliterated important elements like judicial review. They made directive principles en bloc a touchstone for obliteration of all the fundamental rights and provided for insertion of laws in the Ninth Schedule which had no nexus with agrarian reforms. It is in this context that we have to examine the power of immunity bearing in mind that after *Kesavananda Bharati* case Article 368 is subject to implied limitation of basic structure.

139. The question examined in *Waman Rao* case was whether the device of Article 31-B could be used to immunise the Ninth Schedule laws from judicial review by making the entire Part III inapplicable to such laws and whether such a power was incompatible with basic structure doctrine. The answer was in the affirmative. It has been said that it is likely to make the controlled Constitution uncontrolled. It would render the doctrine of basic structure redundant. It would remove the golden triangle of Article 21 read with Article 14 and Article 19 in its entirety for examining the validity of the Ninth Schedule laws as it makes the entire Part III inapplicable at the will of Parliament. This results in the change of the identity of the Constitution which brings about incompatibility not only with the doctrine of basic structure but also with the very existence of limited power of amending the Constitution. The extent of judicial review is to be examined having regard to these factors.

140. The object behind Article 31-B is to remove difficulties and not to obliterate Part III in its entirety or judicial review. The doctrine of basic structure is propounded to save the basic features. Article 21 is the heart of the Constitution. It confers right to life as well as right to choose. When this triangle of Article 21 read with Article 14 and Article 19 is sought to be eliminated not only the “essence of right” test but also the “rights test” has to apply, particularly when *Kesavananda Bharati* and *Indira Gandhi* cases have expanded the scope of basic structure to cover even some of the fundamental rights.

141. The doctrine of basic structure contemplates that there are certain parts or aspects of the Constitution including Article 15, Article 21 read with Articles 14 and 19 which constitute the core values which if allowed to be abrogated would change completely the nature of the Constitution. Exclusion of fundamental rights would result in nullification of the basic structure doctrine, the object of which is to protect basic features of the Constitution as indicated by the synoptic view of the rights in Part III.

142. There is also a difference between the “rights test” and the “essence of right” test. Both form part of application of the basic structure doctrine. When in a controlled Constitution conferring limited power of amendment, an entire chapter is made inapplicable, “the essence of right” test as applied in *M. Nagaraj* case will have no applicability. In such a situation, to judge the validity of the law, it is the “rights test” which is more appropriate. We may also note that in *Minerva Mills* and *Indira Gandhi* cases elimination of Part III in its entirety was not in issue. We are considering the situation where the entire equality code, freedom code and right to move court under Part III are all nullified by exercise of power to grant immunisation at will by Parliament which, in our view, is incompatible with the implied

limitation of the power of Parliament. In such a case, it is the rights test that is appropriate and is to be applied. In *Indira Gandhi* case it was held that for the correct interpretation, Article 368 requires a synoptic view of the Constitution between its various provisions which, at first sight, look disconnected. Regarding Articles 31-A and 31-C (validity whereof is not in question here) having been held to be valid despite denial of Article 14, it may be noted that these articles have an indicia which is not there in Article 31-B.

143. Part III is amendable subject to basic structure doctrine. It is permissible for the legislature to amend the Ninth Schedule and grant a law the protection in terms of Article 31-B but subject to right of citizen to assail it on the enlarged judicial review concept. The legislature cannot grant fictional immunities and exclude the examination of the Ninth Schedule law by the court after the enunciation of the basic structure doctrine.

144. The constitutional amendments are subject to limitations and if the question of limitation is to be decided by Parliament itself which enacts the impugned amendments and gives that law a complete immunity, it would disturb the checks and balances in the Constitution. The authority to enact law and decide the legality of the limitations cannot vest in one organ. The validity to the limitation on the rights in Part III can only be examined by another independent organ, namely, the judiciary.

145. The power to grant absolute immunity at will is not compatible with basic structure doctrine and, therefore, after 24-4-1973 the laws included in the Ninth Schedule would not have absolute immunity. Thus, validity of such laws can be challenged on the touchstone of basic structure such as reflected in Article 21 read with Article 14 and Article 19, Article 15 and the principles underlying these articles.

146. It has to be borne in view that the fact that some articles in Part III stand alone has been recognised even by Parliament, for example, Articles 20 and 21. Article 359 provides for suspension of the enforcement of the rights conferred by Part III during Emergencies. However, by the Constitution (Forty-fourth Amendment) Act, 1978, it has been provided that even during Emergencies, the enforcement of the rights under Articles 20 and 21 cannot be suspended. This is the recognition given by Parliament to the protections granted under Articles 20 and 21. No discussion or argument is needed for the conclusion that these rights are part of the basic structure or framework of the Constitution and, thus, immunity by suspending those rights by placing any law in the Ninth Schedule would not be countenanced. It would be an implied limitation on the constituent power of amendment under Article 368. Same would be the position in respect of the rights under Article 32, again, a part of the basic structure of the Constitution.

147. The doctrine of basic structure as a principle has now become an axiom. It is premised on the basis that invasion of certain freedoms needs to be justified. It is the invasion which attracts the basic structure doctrine. Certain freedoms may justifiably be interfered with. If freedom, for example, is interfered with in cases relating to terrorism, it does not follow that the same test can be applied to all the offences. The point to be noted is that the application of a standard is an important exercise required to be undertaken by the Court in applying the basic structure doctrine and that has to be done by the Courts and not by prescribed authority under Article 368. The existence of the power of Parliament to amend the

Constitution at will, with requisite voting strength, so as to make any kind of laws that excludes Part III including power of judicial review under Article 32 is incompatible with the basic structure doctrine. Therefore, such an exercise if challenged, has to be tested on the touchstone of basic structure as reflected in Article 21 read with Article 14 and Article 19, Article 15 and the principles thereunder.

148. The power to amend the Constitution is subject to the aforesaid axiom. It is, thus, no more plenary in the absolute sense of the term. Prior to *Kesavananda Bharati* the axiom was not there. Fictional validation based on the power of immunity exercised by Parliament under Article 368 is not compatible with the basic structure doctrine and, therefore, the laws that are included in the Ninth Schedule have to be examined individually for determining whether the constitutional amendments by which they are put in the Ninth Schedule damage or destroy the basic structure of the Constitution. This Court being bound by all the provisions of the Constitution and also by the basic structure doctrine has necessarily to scrutinise the Ninth Schedule laws. It has to examine the terms of the statute, the nature of the rights involved, etc., to determine whether in effect and substance the statute violates the essential features of the Constitution. For so doing, it has to first find whether the Ninth Schedule law is violative of Part III. If on such examination, the answer is in the affirmative, the further examination to be undertaken is whether the violation found is destructive of the basic structure doctrine. If on such further examination the answer is again in affirmative, the result would be invalidation of the Ninth Schedule law. Therefore, first the violation of rights of Part III is required to be determined, then its impact examined and if it shows that in effect and substance, it destroys the basic structure of the Constitution, the consequence of invalidation has to follow. Every time such amendment is challenged, to hark back to *Kesavananda Bharati* upholding the validity of Article 31-B is a surest means of a drastic erosion of the fundamental rights conferred by Part III.

149. Article 31-B gives validation based on fictional immunity. In judging the validity of constitutional amendment we have to be guided by the impact test. The basic structure doctrine requires the State to justify the degree of invasion of fundamental rights. Parliament is presumed to legislate compatibly with the fundamental rights and this is where judicial review comes in. Greater the invasion into essential freedoms, greater is the need for justification and determination by Court whether invasion was necessary and if so, to what extent. The degree of invasion is for the Court to decide. Compatibility is one of the species of judicial review which is premised on compatibility with rights regarded as fundamental. The power to grant immunity, at will, on fictional basis, without full judicial review, will nullify the entire basic structure doctrine. The golden triangle referred to above is the basic feature of the Constitution as it stands for equality and rule of law.

150. The result of the aforesaid discussion is that the constitutional validity of the Ninth Schedule laws on the touchstone of basic structure doctrine can be adjudged by applying the direct impact and effect test i.e., rights test, which means the form of an amendment is not the relevant factor, but the consequence thereof would be determinative factor.

151. In conclusion, we hold that:

(i) A law that abrogates or abridges rights guaranteed by Part III of the Constitution may violate the basic structure doctrine or it may not. If former is the consequence of the

law, whether by amendment of any article of Part III or by an insertion in the Ninth Schedule, such law will have to be invalidated in exercise of judicial review power of the Court. The validity or invalidity would be tested on the principles laid down in this judgment.

(ii) The majority judgment in *Kesavananda Bharati* case read with *Indira Gandhi* case requires the validity of each new constitutional amendment to be judged on its own merits. The actual effect and impact of the law on the rights guaranteed under Part III has to be taken into account for determining whether or not it destroys basic structure. The impact test would determine the validity of the challenge.

(iii) All amendments to the Constitution made on or after 24-4-1973 by which the Ninth Schedule is amended by inclusion of various laws therein shall have to be tested on the touchstone of the basic or essential features of the Constitution as reflected in Article 21 read with Article 14, Article 19, and the principles underlying them. To put it differently even though an Act is put in the Ninth Schedule by a constitutional amendment, its provisions would be open to attack on the ground that they destroy or damage the basic structure if the fundamental right or rights taken away or abrogated pertains or pertain to the basic structure.

(iv) Justification for conferring protection, not blanket protection, on the laws included in the Ninth Schedule by constitutional amendments shall be a matter of constitutional adjudication by examining the nature and extent of infraction of a fundamental right by a statute, sought to be constitutionally protected, and on the touchstone of the basic structure doctrine *as reflected in Article 21 read with Article 14 and Article 19* by application of the “rights test” and the “essence of the right” test taking the synoptic view of the articles in Part III as held in *Indira Gandhi* case. Applying the above tests to the Ninth Schedule laws, if the infraction affects the basic structure then such law(s) will not get the protection of the Ninth Schedule.

This is our answer to the question referred to us vide order dated 14-9-1999 in *I.R. Coelho v. State of T.N.*

(v) If the validity of any Ninth Schedule law has already been upheld by this Court, it would not be open to challenge such law again on the principles declared by this judgment. However, if a law held to be violative of any rights in Part III is subsequently incorporated in the Ninth Schedule after 24-4-1973, such a violation/infraction shall be open to challenge on the ground that it destroys or damages the basic structure as indicated in Article 21 read with Article 14, Article 19 and the principles underlying thereunder.

(vi) Action taken and transactions finalised as a result of the impugned Acts shall not be open to challenge.

152. We answer the reference in the above terms and direct that the petitions/appeals be now placed for hearing before a three-Judge Bench for decision in accordance with the principles laid down herein.

**T H E E N D**