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

PETITIONER:
Ashoka Kumar Thakur

RESPONDENT:
Union of India & Others

DATE OF JUDGMENT: 10/04/2008

BENCH:
Dalveer Bhandari

JUDGMENT:
J U D G M E N T

WRIT PETITION (CIVIL) NO.265 OF 2006
WITH
Writ Petition (Civil) Nos.269 AND 598 of 2006, Writ Petition (Civil) Nos.29, 35, 53, 336, 313, 335, 231, 425, 428 of 2007 AND Contempt Petition (C) No.112 of 2007 in Writ Petition (C) No.265 of 2006.
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Dalveer Bhandari, J.

1. The 93rd Amendment to the Constitution directly or indirectly affects millions of citizens of this country. It has been challenged in a number of writ petitions. This Court heard these petitions intermittently over the course of several months. Appearing on behalf of petitioners and respondents, the country's finest legal minds assisted us.

2. The fundamental question that arises in these writ petitions is: Whether Article 15(5), inserted by the 93rd Amendment, is consistent with the other provisions of the Constitution or whether its impact runs contrary to the Constitutional aim of achieving a casteless and classless society?

3. On behalf of the petitioners, Senior Advocate Mr. F.S. Nariman, eloquently argued that if Article 15(5) is permitted to remain in force, then, instead of achieving the goal of a casteless and classless society, India would be converted into a caste-ridden society. The country would forever remain divided on caste lines. The Government has sought to repudiate this argument. Petitioners' argument, however, echoes the grave concern of our Constitution's original Framers.

4. On careful analysis of the Constituent Assembly and the Parliamentary Debates, one thing is crystal clear: our leaders have always and unanimously proclaimed with one voice that our constitutional goal is to establish a casteless and classless society. Mahatma Gandhi said: "The caste system as we know is an anachronism. It must go if both Hinduism and India are to live and grow from day to day." The first Prime Minister, Pt. Jawahar Lal Nehru, said that "no one should be left in any doubt that the future Indian Society was to be casteless and classless". Dr. B. R. Ambedkar called caste "anti-national".

5. After almost four decades of independence, while participating in the Parliamentary Debate on the Mandal issue, then Prime Minister Shri Rajiv Gandhi on 6th September, 1990 again reiterated the same sentiments: "I think, nobody in this

House will say that the removal of casteism is not part of the national goal, therefore, it would be in the larger interest of the nation to get rid of the castes as early as possible". It is our bounden duty and obligation to examine the validity of the 93rd Amendment in the background of the Preamble and the ultimate goal that runs through the pages of the Constitution.

6. To attain an egalitarian society, we have to urgently remove socio-economic inequalities. All learned counsel for the petitioners asserted that we must deliver the benefits of reservation to only those who really deserve it. This can only be done if we remove the creamy layer. Learned counsel for the Union of India and other respondents opposed this assertion. The principle of creamy layer emanates from the broad doctrine of equality itself. Unless the creamy layer is removed from admissions and service reservation, the benefits would not reach the group in whose name the impugned legislation was passed \026 the poorest of the poor. Therefore, including the creamy layer would be inherently unjust.

7. Creamy layer exclusion, however, is just one of the many issues raised by the parties. I need to examine various facets of this case in order to decide the validity of the 93rd Amendment and the Central Educational Institutions (Reservation in Admission) Bill, 2006 (passed as Act 5 of 2007) (hereinafter called the "Reservation Act"). I shall focus my analysis on the following issues:

1A. Whether the creamy layer be excluded from the 93rd Amendment (Reservation Act)?

1B. What are the parameters for creamy layer exclusion?

1C. Is creamy layer exclusion applicable to SC/ST?

2. Can the Fundamental Right under Article 21A be accomplished without great emphasis on primary education?

3. Does the 93rd Amendment violate the Basic Structure of the Constitution by imposing reservation on unaided institutions?

4. Whether the use of caste to identify SEBCs runs afoul of the casteless/classless society, in violation of Secularism.

5. Are Articles 15(4) and 15(5) mutually contradictory, such that 15(5) is unconstitutional?

6. Does Article 15(5)’s exemption of minority institutions from the purview of reservation violate Article 14 of the Constitution?

7. Are the standards of review laid down by the U.S. Supreme Court applicable to our review of affirmative action under Art 15(5) and similar provisions?

8. With respect to OBC identification, was the Reservation Act’s delegation of power to the Union Government excessive?

9. Is the impugned legislation invalid as it fails

to set a time-limit for caste-based reservation?

10. At what point is a student no longer Educationally Backward and thus no longer eligible for special provisions under 15(5)?

11. Would it be reasonable to balance OBC reservation with societal interests by instituting OBC cut-off marks that are slightly lower than that of the general category?

8. I have carefully examined the pleadings and written submissions submitted at length. Admittedly, the provisions of the Constitution and the Preamble lead to the irresistible conclusion that the Nation has always wanted to achieve a casteless and classless society. If we permit this impugned legislation to be implemented, I am afraid, instead of a casteless and classless India, we would be left with a caste-ridden society.

9. The first place where caste can be eradicated is the classroom. It all starts with education. In other words, if you belong to a lower caste but are well qualified, hardly anyone would care about your caste. Free and compulsory education is now a fundamental right under Article 21A. The State is duty bound to implement this Article on a priority basis. There has been grave laxity in its implementation. This laxity adversely affects almost every walk of life. In my opinion, nothing is more important for the Union of India than to implement this critical Article.

10. I direct the Union of India to set a time-limit within which this Article is going to be completely implemented. This time-limit must be set within six months. In case the Union of India fails to fix the time-limit, then perhaps this work will also have to be done by the Court.

11. The Union of India should appreciate in proper prospective that the root cause of social and educational backwardness is poverty. All efforts have to be made to eradicate this fundamental problem. Unless the creamy layer is removed, the benefit would not reach those who are in need. Reservation sends the wrong message. Everybody is keen to get the benefit of backward class status. If we want to really help the socially, educationally and economically backward classes, we need to earnestly focus on implementing Article 21A. We must provide educational opportunity from day one. Only then will the casteless/classless society be within our grasp. Once children are of college-going age, it is too late for reservation to have much of an effect. The problem with the Reservation Act is that most of the beneficiaries will belong to the creamy layer, a group for which no benefits are necessary. Only non-creamy layer OBCs can avail of reservations in college admissions, and once they graduate from college they should no longer be eligible for post-graduate reservation. 27% is the upper limit for OBC reservation. The Government need not always provide the maximum limit. Reasonable cut off marks should be set so that standards of excellence greatly effect. The unfilled seats should revert to the general category.

12. These issues first arise out of the text of the impugned Amendment. Reservation for Socially and Educationally Backward Classes of Citizens (SEBCs) was introduced by the 93rd Amendment. Article 15(5) states:

"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 educational institutions including private educational institutions, whether aided or unaided by the State, other than minority educational institutions referred to in clause (1) of article 30."

? Excluding the Creamy Layer from receiving special benefits:

13. Affirmative action is employed to eliminate substantive social and economic inequality by providing opportunities to those who may not otherwise gain admission or employment. Articles 14, 15 and 16 allow for affirmative action. To promote Article 14 egalitarian equality, the State may classify citizens into groups, giving preferential treatment to one over another. When it classifies, the State must keep those who are unequal out of the same batch to achieve constitutional goal of egalitarian society.

? Arguments of the Union of India in regard to the creamy layer:

14. Mr. G.E. Vahanvati, learned Solicitor General and Mr K. Parasaran, Senior Advocate appearing for the Government contend that creamy layer exclusion is a bad policy. They argue that if you exclude the creamy layer, there would be a shortage of candidates who can afford to pay for higher education. This argument harms rather than helps the Government. It cannot be seriously disputed that most of the college-going OBCs belong to the creamy layer for whom reservations are unnecessary; they have the money to attend good schools, tuitions and coaching courses for entrance exams. Naturally, these advantages result in higher test scores vis-'-vis the non-creamy layer OBCs. The result is that creamy OBCs would fill the bulk of the OBC quota, leaving the non-creamy no better off than before. If the creamy get most of the benefit, why have reservations in the first place? Learned Senior Counsel for petitioners, Mr. Harish Salve, is justified in arguing that before carrying out Constitutional Amendments the Union of India must clearly target its beneficiaries. He rightly submitted that we should not make law first and thereafter target the law's beneficiaries. Failure to exclude the creamy layer is but one example of this problem.

15. The Government further submitted that the creamy layer should be included to ensure that enough qualified candidates fill 27% of the seats reserved to OBCs. The Oversight Committee disagreed. The Committee relied on data from Karnataka to disprove the contention that seats go unfilled when the creamy is excluded: "\005 the apprehension that seats will not be filled up if the creamy layer is excluded has been comprehensively shown to be unfounded." [See: Oversight Committee, Vol. 1, Sept. 2006, p. 69, para 1.7.] We shall later review the Oversight Committee opinion in greater detail.

? The reasons for which the creamy layer should be excluded:

16. At the outset, I note that the Parliament rejected the Hindi version of the Reservation Act. The Hindi version of the Reservation Act would have expressly excluded the creamy layer. [See: Prof. Rasa Singh Rawat's comments in the Parliamentary

Debate on the Reservation Act, 14 December 2006]

17. The Parliament eventually passed the English version in which the creamy layer is not mentioned, making its intention clear. It wanted to include the creamy layer. For all practical purposes, it did so. Therefore, I will treat it as included. Counsel for the Union of India argued that it is still theoretically possible for the executive to exclude the creamy layer. Much is possible in theory. Given the executive's failure to take action since the time the Act was passed, I find this argument unavailing.

18. With the Parliament's intention in view, I will deal in some detail with the reasons as to why the creamy layer should be excluded from reservation. I do so because I want to emphasize that the creamy layer must never be included in any affirmative action legislation. It also becomes imperative to gather the original Framers' and the Framers' intention. At the outset, we recognise a distinction between the original Framers and the Framers, i.e., Members of the First Parliament. Members of the Constituent Assembly and the First Parliament were one in the same. But the distinction is necessary to the extent that the First Parliament deviated from its constitutional philosophy. By examining the debate on Article 15(4), I may ascertain whether the Framers wanted to exclude the creamy layer.

19. The First Parliament believed that "economic" was included in the "social" portion of "socially and educationally backward." Prime Minister Nehru said as much:
"One of the main amendments or ideas put forward is in regard to the addition of the word "economical". Frankly, the argument put forward, with slight variation, I would accept, but my difficult is this that when we chose those particular words there, "for the advancement of any socially and educationally backward classes", we chose them because they occur in article 340 and we wanted to bring them bodily from there. Otherwise I would have had not the slightest objection to add "economically". But if I added "economically" I would at the same time not make it a kind of cumulative thing but would say that a person who is lacking in any of these things should be helped. "Socially" is a much wider word including many things and certainly including economically. Therefore, I felt that "socially and educationally" really cover the ground and at the same time you bring out a phrase used in another part of the Constitution in a slightly similar context." (See: the Parliamentary Debates on First Amendment Bill, 1 June 1951, p. 9830.)

Had it not been for a desire to achieve symmetry in drafting, "economically" would have been included. Had this been done, the creamy layer would have been excluded ab initio.

20. In the 15(4) debate, Shri M.A. Ayyangar's wanted to add "economic" to ensure that the rich SEBCs would not receive special provisions.
"I thought "economic" might be added so that rich men may not take advantage of this provision. In my part of the country there are the Nattukkottai Chettiars who do not care to have English education, but they are the richest of the lot \005 should there be special reservation for them?" (See: The Parliamentary Debates on First Amendment Bill, 1 June 1951, p.

9817.)
(emphasis added).

This hesitation aside, Shri M.A. Ayyangar was satisfied that the term "economic" was included in the term "social." The Framers were worried about creamy layer inclusion, albeit under a different name. They wanted to ensure that the "richest of the [backward] lot" would not benefit from special provisions. With their sentiment on our side, we are even more confident that we should strike out in the direction that strikes down laws that include the creamy layer.

? Including the creamy layer means unequals are treated as equals in violation of the right to equality under Articles 14, 15 and 16.

21. In the present case, Dr. Rajeev Dhavan, the learned Senior Counsel and Mr. S.K. Jain, the learned counsel vehemently argued on behalf of petitioners that it is precisely because equality is at issue that the creamy layer must be removed. The creamy layer has been the subject matter of a number of celebrated judgments of this Court. In a seven Judge Bench in State of Kerala & Another v. N. M. Thomas & Others (1976) 2 SCC 310, Justice Mathew, in his concurring judgment, dealt with the right to equality in the following words:
"66. The guarantee of equality before the law or the equal opportunity in matters of employment is a guarantee of something more than what is required by formal equality. It implies differential treatment of persons who are unequal. Egalitarian principle has therefore enhanced the growing belief that Government has an affirmative duty to eliminate inequalities and to provide opportunities for the exercise of human rights and claims. \005\005\005"
(emphasis added)

22. In Indra Sawhney & Others v. Union of India & Others (1992) Supp (3) SCC 217, (hereinafter referred to as Sawhney I), this Court has aptly observed that reservation is given to backward classes until they cease to be backward, and not indefinitely. This Court in para 520 (Sawant, J.) has stated as under:
"Society does not remain static. The industrialisation and the urbanisation which necessarily followed in its wake, the advance on political, social and economic fronts made particularly after the commencement of the Constitution, the social reform movements of the last several decades, the spread of education and the advantages of the special provisions including reservations secured so far, have all undoubtedly seen at least some individuals and families in the backward classes, however small in number, gaining sufficient means to develop their capacities to compete with others in every field. That is an undeniable fact. Legally, therefore, they are not entitled to be any longer called as part of the backward classes whatever their original birthmark. It can further hardly be argued that once a backward class, always a backward class. That would defeat the very purpose of the special provisions made in the Constitution for the advancement of the backward classes, and for enabling them to come to the level of and to compete with the forward classes,

as equal citizens."
(emphasis supplied).

23. For our purposes, creamy layer OBCs and non-creamy layer OBCs are not equals when it comes to moving up the socio-economic ladder by means of educational opportunity. Failing to remove the creamy layer treats creamy layer OBCs and non-creamy layer OBCs as equals. In the same paragraph, Justice Sawant stated that "\005 to rank [the creamy layer] with the rest of the backward classes would \005 amount to treating the unequals equally..." violating the equality provisions of the Constitution.

24. According to the Kerala Legislature, there was no creamy layer in Kerala. The legislation was challenged in Indra Sawhney v. Union of India & Others (2000) 1 SCC 168, (hereinafter referred to as Sawhney II). The Court struck the two provisions that barred creamy layer exclusion, concluding that non-inclusion of the creamy-layer and inclusion of forward castes in reservation violates the right to equality under Article 14 and the basic structure.

25. In Sawhney II at para 65, the Court had gone to the extent of observing that not even the Parliament, by constitutional amendment, could dismantle the basic structure by including the creamy layer in reservation:
"What we mean to say is that the Parliament and the legislature in this country cannot transgress the basic feature of the Constitution, namely, the principle of equality enshrined in Article 14 of which Article 16(1) is a facet. Whether the creamy layer is not excluded or whether forward castes get included in the list of backward classes, the position will be the same, namely, that there will be a breach not only of Article 14 but of the basic structure of the Constitution. The non-exclusion of the creamy layer or the inclusion of forward castes in the list of backward classes will, therefore, be totally illegal. Such an illegality offending the root of the Constitution of India cannot be allowed to be perpetuated even by constitutional amendment."

26. By definition, the creamy and non-creamy are unequal when it comes to schooling. Relative to their non-creamy counterparts, the creamy have a distinct advantage in gaining admission. While the creamy and non-creamy are given equal opportunity to gain admission in the reserved category, this equality exists in name only. Will the OBC daughter of a Minister, IAS officer or affluent business owner attend better schools than her non-creamy counterpart? Yes. Will she go to private tuitions unaffordable to her non-creamy counterpart? Certainly. And where will she cram for the all-decisive entrance exams? In a coaching center? Of course. Will she come home from school to find a family member waiting? Probably. And when she seeks help from her parents, are they educated and able to give superior assistance with schoolwork? Most likely.

27. I take judicial notice of these anecdotes, for they flesh out a simple fact: she has all the resources that her non-creamy counterpart lacks. It is no surprise that she will outperform the non-creamy. On average, her lot will take the reserved seats.

28. I cannot consider the OBC Minister’s daughter and the non-creamy OBC as equals in terms of their chances at earning a

university seat; nor can I allow them to be treated equally. To lump them in the same category is an unreasonable classification. Putting them in head-to-head competition for the same seats violates the right to equality in Articles 14, 15 and 16.

29. In its conclusion at para 122, M. Nagaraj & Others v. Union of India & Others (2006) 8 SCC 212, a Constitution Bench of this Court while dealing with Article 16(4A) and 16(4B) with regard to SC and ST observed as under:-
"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."

It was contended that Nagraj is obiter in regard to creamy layer exclusion. According to Nagraj, reservation in promotion for SC/ST is contingent on exclusion of the creamy layer. (paras 122, 123 and 124). The contention of the Union of India cannot be accepted. The discussion regarding creamy layer is far from obiter in Nagraj. If the State fails to exclude the SC/ST creamy layer, the reservation must fall. Placing this contingency in the conclusion makes the discussion of creamy layer part of the ratio.

30. In sum, creamy layer inclusion violates the right to equality. That is, non-exclusion of creamy layer and inclusion of forward castes in reservation violates the right to equality in Articles 14, 15 and 16 as well as the basic structure of the Constitution.

? If you belong to the creamy layer, you are not SEBC.

31. One of the prominent questions raised in the writ petitions is whether creamy layer OBCs should be considered socially and educationally backward under the provisions of Article 15(5). While interpreting this provision, a basic syllogism must govern our decision. If you belong to the creamy layer, you are socially advanced and cannot be given the benefit of reservation. (See: Sawhney I).

32. Once one is socially advanced, he cannot be socially and educationally backward. He who is socially forward is likely to be educationally forward as well. If either condition (social or educational) goes unmet, one cannot qualify for the benefit of reservation as SEBC. Being socially advanced, the creamy layer is not socially backward pursuant to Articles 15(4) and 15(5) of the Constitution.

33. Even the text of Articles 15(4) and 15(5) provides for creamy layer exclusion. In this sense, one could say that the term "creamy layer" is synonymous with "non-SEBC".

34. Similar interpretation is given to "backward classes" under Article 16(4). The Parliament could not reasonably make reservation for non-backwards. Such a Bill on the face of it would violate the Constitution. In Sawhney I, the Government of India issued an O.M. on 13 August 1990, reserving 27% of Government posts to SEBCs. Writing for the majority, at para 792 of page 724, Justice Reddy explained that the creamy layer was not SEBC.
"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"

Even though the O.M. was silent on the issue of creamy layer, Justice Reddy excluded the creamy layer at para 859(3)(d). The O.M. could not go into effect until the creamy layer was excluded. [para 861(b)]. Exclusion was only in regard to OBC; SC/ST were not touched. (para 792). In Sawhney I, the entire discussion was confined only to Other Backward Classes. Similarly, in the instant case, the entire discussion was confined only to Other Backward Classes. Therefore, I express no opinion with regard to the applicability of exclusion of creamy layer to the Scheduled Castes and Scheduled Tribes.

? Creamy Layer OBCs are not educationally backward

35. In addition to social backwardness, the text of 15(5) demands that recipients are also educationally backward. Even though the creamy layer's status as socially advanced is sufficient to disqualify them for preferential treatment, the creamy layer from any community is usually educated and will want the same for its children. They know that education is the key to success. For most, it made them. People belonging to this group do not require reservation.

7 Creamy Layer Inclusion Robs the Poor and Gives to the Rich:

36. In a number of judgments, the view has been taken that the creamy layer's inclusion takes from the poor and gives to the rich.

37. Our Courts in following cases had taken the same view. [See: N.M Thomas (supra), para 124 (seven-Judge Bench); K.C. Vasanth Kumar & Another v. State of Karnataka, 1985 (Supp) SCC 714, paras 2, 24 and 28 (five-Judge Bench); Sawhney I., paras 520, 793 and 859(3)(d) (nine-Judge Bench); Ashoka Kumar Thakur v. State of Bihar & Others (1995) 5 SCC 403, paras 3, 17 and 18 (two-Judge Bench); Sawhney II, paras 8-10, 27, 48 and 65-66 (three-Judge Bench); Nagaraj (supra), paras, 120-124 (five-Judge Bench); Nair Service Society v. State of Kerala, (2007) 4 SCC 1; paras 31 and 49-54 (two-Judge Bench)].

38. In Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India & Others (1981) 1 SCC 246, Justice Iyer had this to say about the creamy layer:

"92. \005 Maybe, some of the forward lines of the backward classes have the best of both the worlds and their electoral muscle qua caste scares away even radical parties from talking secularism to them. We are not concerned with that dubious brand. In the long run, the recipe for backwardness is not creating a vested interest in backward castes but liquidation of

handicaps, social and economic, by constructive projects. All this is in another street and we need not walk that way now.

94. \005 Nor does the specious plea that because a few harijans are better off, therefore, the bulk at the bottom deserves no jack-up provisions merit scrutiny. A swallow does not make a summer. Maybe, the State may, when social conditions warrant, justifiably restrict harijan benefits to the harijans among the harijans and forbid the higher harijans from robbing the lowlier brethren."

39. Creamy layer inclusion was not enough to strike an entire provision in this case. He suggests that creamy layer exclusion is an issue to be dealt with at a later time.

"98. The argument that there are rich and influential harijans who rob all the privileges leaving the serf-level sufferers as suppressed as ever. The Administration may well innovate and classify to weed out the creamy layer of SCs/STs but the court cannot force the State in that behalf."

Thus, Justice Iyer does not mandate creamy layer exclusion; rather, he leaves the question to the State.

40. Apart from judicial pronouncements, the Oversight Committee suggested that failure to exclude the creamy layer would lead to unfair results. The Committee was cautious to reach a conclusion.

41. In its Report, it stated that "\005 the decision taken was to leave the matter to the Government of India, keeping in mind the fact that the 'creamy layer' is not covered in the Reservation Act, 2006." (See: Oversight Committee, Vol. 1, p. 33 and 4.2.)

42. Before "leaving" the matter to the Government, the Committee nevertheless made its recommendation: "In case it is decided not to exclude the 'creamy layer', the poorest among the OBCs will be placed at a disadvantage." (emphasis added). (See: Oversight Committee at Appendix I in its Report at p. 70, para 1.13). At page 69 of Vol. I of its Report, the Committee offered data to support this conclusion:

"1.6: Appendix-2 examines in detail the status of the socio-economic development of OBCs in respect of such parameters as relate to poverty, health, education, unemployment, workforce participation, land ownership etc. The analysis of the NSS data clearly brings out that inclusion of the creamy layer will result in reserved seats getting pre-empted by the OBCs from the top two deciles at the cost of the poorer income deciles of the OBCs. Thus almost all rural OBCs as well as Urban OBCs from the Northern, Central and Eastern regions of India will be deprived of the intended benefits of reservation.

[emphas is added]

1.7: On the other hand, it was argued that if the creamy layer of OBCs is denied access to reservation in education pari-passau with the principle applied in the case of employment, the reserved seats may not get filled up, again defeating the purpose of bringing in

reservation for the OBCs. In a case study from Karnataka (included in Annexure X), it has been clearly shown that the OBC quotas have been utilized without any compromise with academic excellence in a situation where the creamy layer has been excluded. The apprehension that seats will not be filled up if the creamy layer is excluded has been comprehensively shown to be unfounded. The case study shows that the performance of students from below the creamy layer is outstanding and much better than general category students."

43. The Committee could have played it safe. Despite some opposition, the Committee included its opinion on the matter. And that opinion is unequivocal: the creamy must be excluded.

44. What is allegedly for the poor goes to the rich. Is that reasonable? Trumpeted by the Parliament as a "\005boost to the morale of the downtrodden" and "\005 in the right direction of ensuring social justice to other backward classes \005" and "ensuring social justice to those weaker sections \005", Article 15(5) dupes those who actually need preferential treatment. (See: Prof. Basudeb Barman, M.P., the Parliamentary Debates, p. 531, December 21, 2005; Prof. M. Ramadass, M.P., at p. 510; and Shri C.K. Chandrappan, M.P., at p. 494 respectively). For the poorest of the poor, reservation in college is an empty promise. Few of the financially poor OBCs attend high school, let alone college. Instead of rewarding those that complete Plus 2, the 93rd Amendment (Art 15(5)) poses another barrier: they will have to compete with the creamy layer for reserved seats.

45. As explained, the poor lack the resources to compete with the creamy, who "snatch away" those seats. {N. M. Thomas (supra), para 124 (Iyer, J.)}. With the creamy excluded, poor OBCs would compete with poor OBCs \026 the playing field levelled. As it stands, the Amendment and Act serve one purpose: they provide a windfall of seats to the rich and powerful amongst the OBCs. It is unreasonable to classify rich and poor OBCs as a single entity. As noted, this violates the Article 14 right to equality.

46. Unless the creamy layer is removed, OBCs cannot exercise their group rights. The Union of India and other respondents argued that creamy layer exclusion is wrong because the text of the 93rd Amendment bestows a benefit on "classes", not individuals. While it is a group right, the group must contain only those individuals that belong to the group. I first take the entire lot of creamy and non creamy layer OBCs. I then remove the creamy layer on an individual basis based on their income, property holdings, occupation, etc. What is left is a group that meets constitutional muster. It is a group right that must also belong to individuals, if the right is to have any meaning. If one OBC candidate is denied special provisions that he should have received by law, it is not the group's responsibility to bring a claim. He would be the one to do so. He has a right of action to challenge the ruling that excluded him from the special provisions afforded to OBCs. In this sense, he has an individual right. Group and individual rights need not be mutually exclusive. In this case, it is not one or the other but both that apply to the impugned legislation.

7 Whether the Creamy Layer exists outside India?:

47. An interesting question arises: does the concept of creamy

layer exist outside India? A 2003 study carried out in the United States suggests that it does. The study by William Bowen, former president of Princeton University, found that when you look at students with the same Scholastic Aptitude Test (SAT) scores, certain groups have a better chance of being admitted to college. "The New Affirmative Action," by David Leonhardt, New York Times, 30 September 2007, p. 3. All things being equal, one's chance of gaining admission is augmented by belonging to one of the preferred groups. Individuals belonging to these groups are given preferential treatment over those who do not.

48. The study demonstrated that Black, Latino and Native-Americans with the same SAT scores as White or Asian students had a 28% better chance than the White or Asian students at gaining admission; those whose parents attended the college had a 20% advantage over those whose parents did not; and the poor received no advantage whatsoever over the rich. (See: New York Times article, p. 3.)

49. The statistics indicate that the failure to exclude the creamy layer ultimately leads to a situation in which deserving students are excluded. When we revert to the Indian scenario, as long as the Government gives handouts to certain groups, the creamy layer therein will "lap" them up. A scheme in which the poor receive no advantage can be remedied by excluding the creamy layer.

50. Even the Mandal Commission, which was established in 1979 with a mandate to identify the socially and educationally backward, admitted that the creamy layer was robbing fellow OBCs of reservation. In reference to Tamil Nadu, it said: "In actual operation, the benefits of reservation have gone primarily to the relatively more advanced castes amongst the notified backward classes." (See: P.37, 8.13 of the Report of the Backward Classes Commission, First Part, Vols. 1-2, 1980). It also stated that: "it is no doubt true that the major benefits of reservation\005..will be cornered by the more advanced sections\005.." but reasoned that this was acceptable because reform is presumably slow and should start with the more advanced of the backward. (See: Page 62, para 13.7 (recommendations)).

51. In N. M. Thomas & Others case (supra), Krishna Iyer, J. in his concurring judgment in para 124 noted that the research conducted by the A.N. Sinha Institute of Social Studies, Patna, had revealed a dual society among harijans in which a tiny elite gobbles up the benefits.

7 Severing the Creamy Layer

52. Technically speaking, I am severing the implied inclusion of the creamy layer. It is severable for two reasons. First, a nine-Judge Bench in Sawhney I severed a similar provision wherein the creamy layer was not expressly included, upholding the rest of the O.M.'s reservation scheme. Second, because the Parliament must have known that Sawhney I had excluded the creamy layer, it seems likely that the Parliament also realized that this Court may do the same. A cursory review of the Parliamentary Debates regarding Article 15(5) clearly reveals that the Parliament discussed the Sawhney I judgment in detail. (See: for example, comments made by Shri Mohan Singh, p.474 and Shri Devendra Prasad, pages 478-479 on 21 December 2005). Had the Parliament insisted on creamy layer inclusion, it could have said as much in the text of 15(5). Instead, the Parliament left the text of 15(5) silent on the issue, delegating the issue of OBC identification to the executive in Section 2(g) of the

Reservation Act.

53. The test for severability asks a subjective question: had the Parliament known its provision would be struck would it still have passed the rest of the legislation? (See: R.M.D. Chamarbaugwalla & Another v. Union of India & Another, AIR 1957 SC 628 at page 637 at para 23). It is never easy to say what the Parliament would have done had it known that part of its amendment would be severed. Nevertheless, I find it hard to imagine that the Parliament would have said, "if the creamy is excluded, the rest of the OBCs should be denied reservation in education." It seems unlikely that it would have been an all-or-nothing proposition for the Parliament, when the very goal of the impugned legislation of promoting OBC educational advancement does not depend on creamy layer inclusion. For these reasons, I sever or exclude the implied inclusion of the creamy layer.

7 Identification of Creamy Layer

54. Income as the criterion for creamy layer exclusion is insufficient and runs afoul of Sawhney I. (See: page 724 at para 792). Identification of the creamy layer has been and should be left to the Government, subject to judicial direction. For a valid method of creamy layer exclusion, the Government may use its post-Sawhney I criteria as a template. (See: O.M. of 8-9-1993, para 2(c)/Column 3, approved by this Court in Ashoka Kumar Thakur (supra), para 10). This schedule is a comprehensive attempt to exclude the creamy layer in which income, Government posts, occupation and land holdings are taken into account. The Office Memorandum is reproduced hereunder:

"No. 36012/22/93- Estt (SCT)
Government of India
Ministry of Personnel, Public Grievances & Pension
(Department of Personnel & Training)
New Delhi, the 8th September, 1993
OFFICE MEMORANDUM
Subject: Reservation for Other Backward Classes in Civil Posts and Services under the Government of India \026 Regarding.

The undersigned is directed to refer to this Department's O.M. No.36012/31/90-Estt(SCT) dated 13th August, 1990 and 25th September, 1991 regarding reservation for Socially and Economically Backward Classes in Civil Posts and Services under the Government of India and to say that following the Supreme Court judgment in Indra Sawhney v. Union of India & Others (Writ Petition (Civil) No.930 of 1990) the Government of India appointed an Expert Committee to recommend the criteria for exclusion of the socially advanced persons/sections from the benefits of reservation for Other Backward Classes in civil posts and services under Government of India.

2. Consequent to the consideration of the Expert Committee's recommendation 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 percent) of the vacancies in civil posts and services under the Government of India, to be filled through direct recruitment, shall be reserved for the Other Backward Classes. Detailed instructions relating to the procedure to be followed for enforcing reservation will be issued separately.

(b) Candidates belonging to OBCs 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%.

(c) (i) The aforesaid reservation shall not apply to persons/sections mentioned in column 3 of the Schedule to this Office Memorandum.

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

(d) The OBCs for the purpose of the aforesaid reservation 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 Government's Lists. A list of such castes and communities is being issued separately by the Ministry of Welfare.

(e) The aforesaid reservation shall take immediate effect. However, this will not apply in vacancies where the recruitment process has already been initiated prior to the issue of this order.

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 by the Ministry of Finance respectively from the date of this Office Memorandum.

SCHEDULE

Description of Category	To whom rule of exclusion will apply.
I.	
CONSTITUTIONAL POSTS	
Son(s) and daughter(s) of	
(a) President of India;	
(b) Vice President of India;	
(c) Judges of the Supreme Court and of the High Courts;	
(d) Chairman & Members of UPSC and of the State Public Service Commission; Chief Election Commissioner; Comptroller & Auditor General of India;	
(e) Persons holding Constitutional positions of like nature.	
II.	
SERVICE CATEGORY	
A. Group A/Class 1 officers of the All India Central and State Services (Direct Recruits)	

Son(s) and daughter(s) of

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

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

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

(d) parents, either of whom is a Class I officer and such parent dies or suffers permanent incapacitation and before such death or such incapacitation has had the benefit of employment in any International Organisation like UN, IMF, World Bank, etc. for a period of not less than 5 years.

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

(f) Provided that the rule of exclusion shall not apply in the following cases :-

(a) Sons and daughters of parents either of whom or both of whom are Class-I officers and such parent(s) dies / die or suffer permanent incapacitation.

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

Group B/Class II officers of the Central & State Services (Direct Recruitment)
Son(s) and daughter(s) of

(a) parents both of whom are Class II officers.

(b) parents of whom only the husband is a Class II officer and

he gets into Class I at the age of 40 or earlier.

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

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

(e) parents, of whom the wife is a Class I officer (Direct Recruit or pre-forty promoted) and the husband is a Class II officer and the husband dies or suffers permanent incapacitation.

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

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

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

C. Employees in Public Sector Undertakings etc.
The criteria enumerated in A & B above in this Category will apply mutatis mutandi to officers holding equivalent or comparable posts in PSUs, banks, Insurance Organisations, Universities, etc. and also to equivalent or comparable posts and positions under private employment,
Pending the evaluation of the posts on equivalent or

comparable basis in these institutions, the criteria specified in Category VI below will apply to the officers in these Institutions.

III.

ARMED FORCES INCLUDING PARAMILITARY FORCES

(Persons holding civil posts are not included)

Son(s) and daughter(s) of parents either or both of whom is or are in the rank of Colonel and above in the Army and to equivalent posts in the Navy and the Air Force and the Para Military Forces;

Provided that:-

(i) if the wife of an Armed Forces Officer is herself in the Armed Forces (i.e., the category under consideration) the rule of exclusion will apply only when she herself has reached the rank of Colonel;

(ii) the services ranks below Colonel of husband and wife shall not be clubbed together:

(iii) if the wife of an officer in the Armed Forces is in civil employment, this will not be taken into account for applying the rule of exclusion unless the falls in the service category under item No.II in which case the criteria and conditions enumerated therein will apply to her independently.

IV.
PROFESSIONAL CLASS AND THOSE ENGANGED IN TRADE AND INDUSTRY

(I) Persons engaged in profession as a doctor, lawyer, Chartered Accountant, Income-Tax Consultant, financial or

management consultant, dental surgeon, engineer, architect, computer specialist, film artists and other film professional, author, playwright, sports person, sports professional, media professional or any other vocations of like status. Criteria specified against Category VI will apply:

(II) Persons engaged in trade, business and industry

Criteria specified against Category VI will apply:

Criteria specified against Category VI will apply:

Explanation:

(i) Where the husband is in some profession and the wife is in a Class II or lower grade employment, the income / wealth test will apply only on the basis of the husband's income.

(ii) If the wife is in any profession and the husband is in employment in a Class II or lower rank post, then the income/wealth criterion will

apply only on the basis of the wife's income and the husband's income will not be clubbed with it.

V.

PROPERTY OWNERS

A. Agricultural holdings

Son(s) and daughter(s) of persons belonging to a family (father, mother and minor children) which owns

(a) only irrigated land which is equal to or more than 85% of the statutory ceiling area, or

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

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

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

B. Plantations

(i) Coffee, tea, rubber,

etc.

(ii) Mango, citrus, apple plantations etc.

Criteria of income/wealth specified in Category VI below will apply.

Deemed as agricultural holding and hence criteria at A above under this Category will apply.

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

Criteria specified in Category VI below will apply.

Explanation: Building may be used for residential, industrial or commercial purpose and the like two or more such purposes.

VI.
INCOME/WEALTH
TEST
Son(s) and daughter(s) of

(a) Persons having gross 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 years.

(b) Persons in Categories I, II, III and VA who are not disentitled to the benefit of reservation but have income from other sources of wealth which will bring them within the income/wealth criteria mentioned in (a) above.

Explanation:

(i) Income from salaries or agricultural land shall not be clubbed;

(ii) The income criteria in terms of rupee will be modified taking into account the change in its value every three years. If the situation,

however, so demands, the interregnum may be less.

Explanation: Wherever the expression "permanent incapacitation" occur in this schedule, it shall mean incapacitation which results in putting an officer out of service.

Smt. Sarita Prasad
Joint Secretary to the Government of India."

55. In sum, the schedule excludes the children of those who hold constitutional posts, e.g., the children of the President of India, Supreme Court Judges, Chairman and Members of UPSC and others are excluded. Class 1 Officers' children are not eligible for OBC perks either. When both parents are Class-II Officers, their children are excluded. The same criteria that apply to Class-I and II officers apply to children of parents who work at high levels within the private sector. Agricultural owners are excluded when their irrigated holdings are more than or equal to 85% of the statutory ceiling. The O.M. further excludes persons having a gross annual income of Rs.2.5 lakh or more. The Government raised the income limit from Rs.1 to Rs.2.5 lakh on 09.03.2004 vide O.M. 36033/3/2004.

56. The creamy layer schedule of the O.M. dated 8.9.93, in my opinion, is not comprehensive. This should be revised periodically - preferably once in every 5 years, in order to ensure that creamy layer criteria take changing circumstances into account.

57. Apart from the people who have been excluded vide the office memo, I urge the Government to make it more comprehensive. The Government should consider excluding the children of sitting and former Members of Parliament (MP) and Members of Legislative Assemblies (MLA) from special benefits. If constitutional authorities have been excluded from benefits because of their status or resources, the same should apply to children of former and sitting MPs and MLAs. I hope the judiciary will not have to involve itself in this matter.

2. Applying Article 21A to the Reservation Act

58. On 18 December 2006, in the Rajya Sabha Debate on the Reservation Act, Member of Parliament and former Governor, Dr. P.C. Alexander summed up what would become one of Petitioners' arguments. Should Rs.17,000 crores be spent on implementing the Reservation Act for higher education when primary/secondary schooling is in such bad shape? Dr. Alexander stated:
"Sir, this spending Rs.17,000 crores or whatever amount is needed for adding seats in the Engineering colleges, IIMs and IITs is reversing our priorities. If you have the money for education, spend it on schools. Spend it on the rural areas for primary schools; spend it on the schools, which are poorly starved in the urban areas. Instead of doing that, you

spend it by adding to the numbers because you want to appease the so-called poorer sections in the higher castes. So, we have taken care of you and you tell the backward classes we are taking care of all of you. This is where we land ourselves in trouble. We have cash resources. They should be spent where priorities are fixed clearly in our eyes and we don't want to do that."

Spending on higher at the expense of lower education raises the specter of conflict with Article 21A. By the 86th Amendment, Article 21A was inserted in our Constitution. Article 21A reads as follows:
"The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine."

59. Under Article 21A, it is a mandatory obligation of the State to provide free and compulsory education to all children aged six to fourteen. In order to achieve this constitutional mandate, the State has to place much greater emphasis on allocating more funds for primary and secondary education. There is no corresponding constitutional right to higher education. The entire Nation's progress virtually depends upon the proper and effective implementation of Article 21A.

60. This Court in Unni Krishnan, J.P. & Others v. State of Andhra Pradesh & Others (1993) 1 SCC 645 para 166 held as under:
"\005 right to education is implicit in and flows from the right to life guaranteed by Article 21. That the right to education has been treated as one of transcendental importance in the life of an individual [and] has been recognized not only in this country since thousands of years, but all over the world. \005 without education being provided to citizens of this country, the objectives set forth in the Preamble to the Constitution cannot be achieved. The Constitution would fail."

This observation encouraged the Parliament to insert Article 21A into the Constitution.

61. In Unni Krishnan (supra), Justice Reddy observed that the quality of education in Government schools was extremely poor and that the schools were woefully inadequate to the needs of the children. He noted that many countries spend 6% to 8% of Gross Domestic Product on education. Our expenditure on education is just 4% of GDP.

62. Though an improvement over past performance, the overall education picture leaves much to be desired. The bad news is really bad. Even where we have seen improvement, there is still failure. A survey by Pratham, an NGO, fleshes out the acute problems found in rural schools. (See: ASER 2007 \026 Rural Annual Status of Education Report for 2007, published on January 16, 2008). The survey covered 16,000 villages. As Pratham indicates, there are an estimated 140 million children in the age group 6 to 14 years in primary schools. Of these 30 million cannot read, 40 million can recognize a few alphabets, 40 million can read some words, and 30 million can read paragraphs. Over 55 million of these children will not complete four years of school, eventually adding to the illiterate population of India. The national literacy rate is 65%.

63. 24 districts with more than 50,000 out of school children means we have failed 24 times over. 71 districts in which there are 60 students per teacher is just as bad, if not worse. According to Pratham (and in line with the Ministry of HRD's six-month review), the number of out of school children has hovered around 7,50,000. [page 6]. Moreover, it goes without saying that children need proper facilities. Today, just 59% of schools can boast of a useable toilet. [page 49].

64. The quality of education is equally troubling. For standards I and II, only 78.3% of students surveyed could recognize letters and read words or more in their own language. [page 47]. In 2006, it was even worse \026 only 73.1% could do so. It is disheartening to peruse the statistics for standards III to V, where only 66.4% could read Standard I text or more in their own language in 2007. [page 47]. As Pratham stated at page 7: "What should be more worrying though, is the fact that in class 2, only 9 percent children can read the text appropriate to them, and 60 percent cannot even recognise numbers between 10 and 99."

65. In the third to fifth standards, 40% of students surveyed could not subtract. The latest figures indicate that 58.3% children in the fifth standard read at the level appropriate for second Standard students. [page 32]. In both 2005 and 2007, only 74.1% of enrolled children were in attendance. [page 49].

66. The learned Solicitor General, Mr Vahanvati, submitted that the Government has now placed sufficient emphasis on primary education. In 2001-2002, the Government launched Sarva Shiksha Abhiyan (SSA). This national programme's goal is to universalize elementary education. It supplements Governmental spending on education. As the Solicitor General explained, it was founded on the idea that education for those between the ages of six to fourteen is a fundamental right. In this way, SSA seeks to fulfill the Government's obligation under Article 21A to provide free and compulsory education to this age group. Some of the SSA's accomplishments merit mention.

67. By March 2007, 2,03,577 toilets had been constructed or were under construction, covering 87% of the goal; more than six crore free textbooks had been supplied \026 96% of the goal; 1,93,220 new schools had been completed or were under construction, i.e., 80% of the desired mark. The learned Solicitor General further provided that enrolment for all districts in 2004-05 for classes I-V was 11,82,96,540. In 2005-06, the number increased to 12,46,15,546. A similar increase was seen in Classes VI-VII/VIII: from 3,77,17,490 to 4,36,67,786. The total number of teachers increased from 36,67,637 in 2003-04 to 46,90,176 in 2005-06.

68. It is the learned Solicitor General's contention that SSA was responsible for many of the gains cited above. This includes the improved statistics on the student-teacher ratio, out of school children and enrollment rate for girls.

69. While the Government is on the right track with regard to improving the infrastructure of our system, books and buildings only go so far. They are necessary but not sufficient for achieving the ultimate goals of (1) keeping children in school, (2) ensuring that they learn how to think critically and (3) ensuring that they learn skills that will help them secure gainful employment. The quality of education provided in the majority of primary schools is woeful. That is why I find it necessary to

review Government spending on education \026 especially at the primary/secondary level.

70. Undoubtedly, the Government has allocated more funds of late for education, but we need to have far more allocation of funds and much greater emphasis on free and compulsory education. Anything less would flout Article 21A's mandate. According to H.R.D. Annual Reports read with the Union of India Budget 2008-09, we spend roughly seven times as much on the individual college student than the individual primary or secondary student.

Spending per Student: Comparing that which is spent on each primary/secondary student versus each higher education student

Year & Level of Schooling	Estimated # of Enrolled Students*	Total Rs. Allocated**	Expenditure per student in Rs.
2006-2007 School Education/ Literacy	219083879	168970000000	771
2006-2007 Tertiary Education	11777296	69120900000	5868
2007-2008 School Education/ Literacy	219083879	231913500000	1059
2007-2008 Tertiary Education	11777296	63973600000	5432
2008-2009 School Education/ Literacy	219083879	278500000000	1271
2008-2009 Tertiary Education	11777296	108528700000	9215

* = Estimated number of students for primary/secondary level is taken from 2004-2005 Annual Report, p. 250 at http://www.education.nic.in/AR/AR0607-en.pdf. In the same Annual Report, 11777296 students were enrolled in higher education in 2004-2005. For consistency's sake, I have used the 2004-2005 estimates. I have found no information that suggests that enrolment for one has significantly outpaced the other.

** = Government of India, Expenditure Budget Vol. 1, 2008-2009, p. 6, Total Expenditure of Ministries/Departments (school education/literacy and higher education have been added).

71. In a country where only 18% of those in the relevant age group make it to higher education, this is incredible. See NSSO 1999-2000. It is not suggested that higher education needs to be neglected or that higher education should not receive more funds, but there has to be much greater emphasis on the primary education. Our priorities have to be changed. Nothing is really more important than to ensure total compliance with Article 21A. How can a sizeable portion of the population be precluded from realizing the benefits of development when almost everyone acknowledges that the children are our future?

72. Education for children up to the age of fourteen years should be free. This has also been suggested in the recommendations of the Kothari Commission on Education in 1966. Taking the country's rampant poverty into account, free education up to the age 14 years is absolutely imperative. There is no other way for the poor to climb their way out of this predicament.

73. Mr. P.P. Rao, learned Senior Advocate, rightly submitted that when you lack a school building, teachers, books and proper facilities, your schooling might be "free" but it is not an "education" in any proper sense. Adequate number of schools must be established with proper infrastructure without further delay. In order to achieve the constitutional goal of free and compulsory education, we have to appreciate the reality on the ground. A sizeable section of the country is still so poor that many parents are compelled to send their children to work. The State must carve out innovative policies to ensure that parents send their children to school. The Mid-Day Meal Scheme will go a long way in achieving this goal. But, apart from Mid-Day Meals, the Government should provide financial help to extremely poor parents.

74. In addition to free education and/or other financial assistance, they should also be given books, uniforms and any other necessary benefits so that the object of Article 21A is achieved. Time and again, this Court, in a number of judgments, has observed that the State cannot avoid its constitutional obligation on the ground of financial inabilities. (See: Hussainara Khatoon & Others (III) v. Home Secretary, State of Bihar, Patna (1980) 1 SCC 98, 107 at para 10).

75. In Vasanth Kumar (supra) at para 150, Justice Venkataramiah suggested that the State provide preferential treatment such as tuition, scholarships, free boarding and lodging, etc. According to UNESCO's Education for All, Global Monitoring Report (2008) at page 115, at least fourteen countries have cash-transfer programmes that target poor households with school-age children. The largest programme is in Brazil, where 46 million people receive an education transfer of up to $44 USD monthly per household in extreme poverty with children below age 16. According to the Report, the programme has reduced drop-out rates by up to 75% among beneficiaries in its more recent stage.

76. Such a programme is not foreign to India. According to UNICEF, the State of Gujarat put the idea of financial incentives for youth into action:

"Figures indicate that the school enrolment drive of the state Government supported by incentives like Vidyalaxmi bond of Rs.1,000 given to each girl who completes primary education and 60 kg of wheat for tribal girls attending school, has met with significant

success. In addition to the various incentives by the Government, many a corporate houses and community have also come forward to motivate parents and children by donating school bags, uniforms, stationery, etc. As a result, the drop-out rate has come down from 35.31 % in 1997-1998 to 3.24% in 2006-2007 in class 1-5. In girls, this rate has dropped from 38.95% to 5.97 in the same time period."

77. In January 2008, Haryana Chief Minister Mr. Bhupinder Singh Hooda unfurled an incentive scheme for SC students in which students would receive a one-time payment in addition to a monthly stipend for attending school. (See: "Incentives announced to curb dropout rate", The Tribune, 5 Jan. 2008). The relevant portion is mentioned hereinbelow:
"Secretary, education, Rajan Gupta said a one-time allowance of Rs.740 to Rs.1,450 would be given to SC students from class I to XII. \005 Under the monthly incentive scheme, boys and girls studying in class I to V would be given Rs100 and Rs.150, respectively, per month and boys and girls of class VI to VIII Rs.150 and Rs.200. Similarly, boys and girls of class IX to XII would be given Rs.200 and Rs.300, respectively, and boys and girls studying science subjects in class XI and XII Rs.300 and Rs.400, respectively. \005 This monthly incentive to the students would be deposited in their bank accounts to maintain transparency in the scheme, he added."

78. In the name of transparency, students' attendance records could be made available to administrators and parents. Students would be paid to attend school. They would receive a sum for each day of school that they attended. If you only attend 7 out of 10 school days, you would only receive 70% of the stipend.

79. Ultimately, this is the most important aspect of implementing Article 21A, incentives should be provided to parents so that they are persuaded to send their children to school. More than punishment, creative incentive programmes will go a long way in the implementation of the fundamental right enshrined under Article 21A.

7 Historical Perspective on Compulsory Education:

80. Almost two centuries ago, Clause 43 of The Charter Act of 1813 made education a State responsibility. [See: "Free and Compulsory Education: Genesis and Execution of Constitutional Philosophy", Dr. P.L. Mehta and Rakhi Poonga, Deep and Deep Publications, New Delhi (1997)]. [pages 42-47]. The Hunter Commission (1882-83) was the first to recommend universal education in India. Thereafter, the Patel Bill, 1917 was the first compulsory education legislation. It proposed to make education compulsory from ages 6 to 11.

81. The Government of India Act, 1935 provided that "education should be made free and compulsory for both boys and girls." Free and compulsory education got a further boost when the Zakir Hussain Commission recommended that the State should provide it. The 1944 Sargent Report strongly recommended free and compulsory education for children aged six to fourteen. By 1947, primary education had been made

compulsory in 152 urban areas and 4995 rural areas.

82. The State has been making some endeavour to provide free and compulsory education since 1813 in one form or the other. When the original Framers gathered at the Constituent Assembly, their desire to provide free and compulsory education was well established. The real question in the Debate was whether the original Framers would make free and compulsory education justiciable or not. They oscillated between the options, first placing it in the fundamental rights and later moving it to the directive principles of State policies under Article 45 of the Constitution.

83. Over 50 years later, the Parliament revisited the subject. The Parliamentary debate on Article 21A offers a glimpse into the history of compulsory education in other countries. The then Minister of Human Resource Development, Dr. M.M. Joshi, referred to the speech of Shri Gopal Krishna Gokhale on compulsory education. While debating a bill in the imperial legislative council in 1911, Shri Gokhale said that in most countries:
"\005elementary education is both compulsory and free, and in a few, though the principle of compulsion is not strictly enforced or has not been introduced it is either wholly or for the most part gratitutious, in India alone it is neither compulsory nor free. Thus in Great Britain and Ireland, France, Germany, Switzerland, Austria, Hungary, Italy, Belguim, Norway, Sweden, the United States of America, Canada, Australia and Japan it is compulsory and free. \005. In Spain, Portugal, Greece, Bulgaria, Servia and Rumania, it is free, and in theory, compulsory, though compulsion is not strictly enforced." [Lok Sabha Debates, 28 November, 2001, Vol.20, page 476].

84. In 1948, the United Nations made its own pronouncement on compulsory education. Article 26(1) of the Universal Declaration of Human Rights made free and compulsory education a lofty if not enforceable goal. While many states consider it an authoritative interpretation of the United Nations Charter, the Declaration is not a treaty and is not intended to be legally binding. Article 26(1) states:
"Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit."

85. Our original Framers put a similar emphasis on the matter, placing free and compulsory education in the Directive Principles. The un-amended Article 45 provided that:
"The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years."

86. At this juncture, I deem it appropriate to refer to the Parliamentary Debate on the aspect of free and compulsory education. In the Lok Sabha debate of 28 November 2001 at Vol. 20, Shri M.V.V.S. Murthi, at page 499, stated:

"Unless the Government makes primary education compulsory, no village can develop. If I say what they

are doing in Andhra Pradesh, some Members may again cry foul. In Andhra Pradesh, we are having Education Committees. If there are any dropouts, the Committee will go to the village and find out the reason as to why they have dropped out. It is very important."

87. The Report of the Kothari Commission, 1964-1966, headed by Prof. D. S. Kothari, provided important recommendations on compulsory education. Nevertheless, the circumstances of the day compelled it to soften its suggestions. The Nation was relatively poor and could not afford drastic increases in education spending. Some excerpts of this report are reproduced as under:

"5.01. \005But in any given society and at a given time, the decisions regarding the type, quantity and quality of educational facilities depend partly upon the resources available and partly upon the social and political philosophy of the people. Poor and traditional societies are unable to develop even a programme of universal primary education. But rich and industrialized societies provide universal secondary education and expanding and broad-based programmes of higher and adult education. Feudal and aristocratic societies emphasize education for a few. But democratic and socialistic societies emphasize mass education and equalization of educational opportunities. The principal problem to be faced in the development of human resources, therefore, is precisely this: How can available resources be best deployed to secure the most beneficial form of educational development? How much education, of what type or level of quality, should society strive to provide and for whom?

5.03 Increasing the Educational Level of Citizens. In the next two decades the highest priority must be given to programmes aimed at raising the educational level of the average citizen. Such programmes are essential on grounds of social justice, for making democracy viable and for improving the productivity of the average worker in agriculture and industry. The most crucial of these programmes is to provide, as directed by Article 45 of the Constitution, free and compulsory education of good quality to all children up to the age of 14 years. In view of the immense human and physical resources needed, however, the implementation of this programme will have to be phased over a period of time."

88. When Article 21A was introduced, some Members of Parliament argued that financially poor parents who fail to send their children to school should not be punished and that the word "compulsion" in this Article should be understood to apply exclusively to the State.

89. Let me examine this argument. The 86th Amendment made three changes to the Constitution. It added Articles 21A and 51A(k) and amended Article 45. I turn my focus to Article 51A(k). In addition to rejecting an amendment that would have neutered compulsory education, the Parliament made a positive gesture. Though it never passed legislation seeking to implement compulsory education, it had not completely ignored the subject. From Article 51A(k), it becomes clear that parents would be responsible for sending their children to school. Article 51A read with 51A(k) is reproduced as under:

"It shall be the duty of every citizen of India \026 who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years."

90. Just as Article 51A(a) does not penalize disrespect of the National Flag, Article 51A(k) does not penalize parents/guardian for failing to send children to school. There is, of course, legislation that gives teeth to Article 51A(a). (See: The Prevention of Insults to National Honour Act, 1971, Section 3A).

91. Article 51A(k) indicates that it is parents, not the State, who are responsible for making sure children wake up on time and reach school. Thus, Article 21A read with Article 51A(k) distributes an obligation amongst the State and parents: the State is concerned with free education, parents with compulsory. Notwithstanding parental duty, the State also has a role to play in ensuring that compulsory education is feasible \026 a topic I will cover below.

92. The Central Government has made some effort to fulfill its obligation under Article 21A with regard to "free education." Sarva Shiksha Abhiyan is one such example. When it comes to "compulsory education," the Central Government has made no such effort. The Parliament has not passed any legislation. The executive has not issued any order. What we have is a patchwork of different State and Union Territory laws. These States/UTs (and NCR) include:

Assam, Andhra Pradesh, Bihar, Chhatisgarh, Goa, Gujarat, Haryana, Himachal Pradesh, Jammu & Kashmir, Karnataka, Kerala, Madhya Pradesh, Maharashtra, Orissa, Punjab, Rajasthan, Sikkim, Tamil Nadu, Uttar Pradesh, West Bengal, Delhi, Andaman & Nicobar Islands.

93. The majority of the States and Union Territories levy very small fines on parents. I note that these laws do not go into effect with one unexcused absence. Notice is given to the parents, giving them time to remedy the problem. Of course, enforcement is almost always a different story.

94. In contrast to the relatively light aforementioned sentences, the Compulsory Education Bill, 2006 introduced in the Rajya Sabha would provide six months imprisonment as a penalty for those who preclude children from going to school. If this Bill becomes law, Section 7 would dictate the following:

"If any person including parents of children prevents any boy or girl child from going to school or causes hindrance or obstruction in any way, he shall be punishable with imprisonment, which may extend to six months."

95. It seems that the Bill simultaneously targets employers and parents. Employers would be punished when they hire a child to work too much or during school hours. Similarly, parents would also be punished for allowing this to happen. The Bill would also provide for scholarships, free hostel facilities and other incentives, "whenever necessary" and "as may be prescribed".

96. In Bandhua Mukti Morcha v. Union of India & Others, (1997) 10 SCC 549 at page 557 at para 11, the Court explained why education should be compulsory. In essence, a citizen is only free when he can make a meaningful challenge to his fellow citizens or Government’s attempt to curtail his natural freedom. For this to happen, he needs a certain degree of education. This

is why Article 21A may be the most important fundamental right. Without it, a citizen may never come to know of his other rights; nor would he have the resources to adequately enforce them. The relevant passage at para 11 reads as under:-

"A free educated citizen could meaningfully exercise his political rights, discharge social responsibilities satisfactorily and develop a spirit of tolerance and reform. Therefore, education is compulsory. Primary education to the children, in particular, to the child from poor, weaker sections, Dalits and Tribes and minorities is mandatory. The basic education and employment-oriented vocational education should be imparted so as to empower the children within these segments of the society to retrieve them from poverty and, thus, develop basic abilities \005 to live a meaningful life \005 Compulsory education, therefore, to these children is one of the principal means and primary duty of the State for stability of the democracy, social integration and to eliminate social tensions."

97. In contrast to Article 51A(k), State and Union Territory laws and Parliamentary intent with regard to Article 21A, the Court in Mukti Morcha was inclined to suggest, not hold, that the State was exclusively responsible for compulsory education. It went on to reaffirm M.C. Mehta v. State of Tamil Nadu & Others (child labour matter) (1996) 6 SCC 756. In that case, the Court took up the issue of child labour in hazardous fields when it learnt of an accident in a cracker factory in Sivakasi.

98. The said case at para 28 identified poverty as the root cause of child labour:

"Of the aforesaid causes, it seems to us that \005 poverty is basic reason which compels parents of a child, despite their unwillingness, to get it employed. The Survey Report of the Ministry of Labour (supra) had also stated so. Otherwise, no parents, specially no mother, would like that a tender-aged child should toil in a factory in a difficult condition, instead of its enjoying its childhood at home under the paternal gaze."

99. In other words, parents send children to work because parents have no other choice. Food comes first. If the State does not provide extra income so as to remove the incentive to send children to work, it is wasting its time on mere gesture. The Court in para 29 concluded that action must be taken:

"It may be that [child labour] would be taken care of to some extent by insisting on compulsory education. Indeed, Neera [Burns] thinks that if there is at all a blueprint for tackling the problem of child labour, it is education. Even if it were to be so, the child of a poor parent would not receive education, if per force it has to earn to make the family meet both the ends. Therefore, unless the family is assured of income aliunde, problem of child labour would hardly get solved; and it is this vital question which has remained almost unattended. We are, however, of the view that till an alternative income is assured to the family, the question of abolition of child labour would really remain will-o'-the-wisp." (emphasis added).

100. It is interesting to note that compulsory education has been

introduced in one form or the other in various countries. From the historical experience of these nations, we learn that the legislation pertaining to compulsory education has played an important role in improving educational outcomes.

7 Compulsory education's roots in the United States

101. Compulsory education has had a long history outside of India. In 1852, the State of Massachusetts enacted the first compulsory attendance law in the United States; though compulsory education laws existed much earlier in many states, the first dating back to 1642 in Massachusetts. "Were Compulsory Attendance and Child Labor Laws Effective? (See: An analysis from 1915 to 1939." (2001) at p. 2. Prof. Adriana Lleras-Muney of Princeton University.)

7 Reasons from abroad for implementing compulsory education:

102. Prof. Lleras-Muney explains that those who advocated for compulsory education believed that universal education was necessary to promote democracy and guarantee a common American culture. (Page 11). Given the influx of immigrants, some of whom came from undemocratic countries, many supporters of legislation viewed compulsory education as an instrument for assimilation.

103. Other reasons cited by compulsory education proponents in the United States included the reduction of crime, racism and inequality. Prof. Oreopoulos of the University of Toronto cites to sources that make it appear as though the reasons for adopting compulsory education in Canada mirrored those cited in the United States: the emphasis was on good citizenship and economic development:

"Archibald Macallum, an Ontario teacher, summarized the latter argument vigorously in an 1875 report favouring the introduction of compulsory schooling in Canada: 'Society has suffered so cruelly from ignorance, that its riddance is a matter of necessity, and by the universal diffusion of knowledge alone can ignorance and crime be banished from our midst; in no other way can the best interests of society be conserved and improved than by this one remedy \026 the compulsory enforcement of this great boon \026 the right of every Canadian child to receive that education that will make him a good, loyal subject, prepared to serve his country in the various social functions which he may be called on to fill during his life; and prepare him, through grace, for the life to come' (Annual Report of the Ontario Teachers' Association, 1875, as cited in Prentice and Houston 1975, 175\0266). (See: The Canadian Journal of Economics, Vol. 39, No.1, February (2006) "The compelling effects of compulsory schooling: the evidence from Canada," Prof. Oreopoulos, at page 23)."

7 Empirical data indicating that compulsory education has a positive effect:

104. Prof. Oreopoulos provides data that show the fruits of imposing education on citizens. Crime may be lowered, health

improved and civic activity increased. Compulsory education may also lead to a substantial increase in income for individuals. Moreover, compulsory education, if it does not cause, may at least contribute to an increase in bilingualism and employment and a reduction in poverty. The relevant portion is reproduced hereunder:

"(Page 24). Other papers find evidence of social returns, but for non-pecuniary outcomes. Lochner and Moretti (2002), for example, find that compulsory schooling lowers crime, while Lleras-Muney (2002) finds a correlation with improved health. In studies of the United States and United Kingdom, Dee (2003) and Milligan, Moretti, and Oreopoulos (2003) estimate that tighter restrictions on leaving school early correspond to increased levels of civic activity (like voting and discussing politics). \005 My analysis suggests that students compelled to complete an extra grade of school have historically experienced an average increase of 9\02615% in annual income.

(Page 48). I find that the introduction of tighter provincial restrictions on leaving school between 1920 and 1990 raised average grade attainment and incomes. Students compelled to attend an extra year of school experienced an average increase in annual income of about 12%. I also find that compulsory schooling is associated with significant benefits in terms of other socio-economic outcome measures ranging from bilingualism, employment, and poverty status. These results hold up against many specifications checks and are entirely consistent with previous studies."

105. In addition to increased income, Prof. Lleras-Muney found that legally requiring a child to attend school for one more year increased educational attainment by roughly five percentage points. (Page 8). Educational attainment refers to time spent in school.

7 Example of compulsory education statutes

106. The causes of low enrolment, high drop-out rates and frequent truancy in the U.S. and India differ, but the consequences thereof do not. In either case, citizens who lack education are at an extreme disadvantage. In India, poverty has been identified as the ultimate cause of lackluster enrolment and attendance rates. Children are compelled to work. In developed countries like the United States or Canada, children rarely fail to attend school because of economic constraints. Instead, a number of different factors may contribute to truancy. High school students may drop out "\005 because they detest school, lack motivation, or anticipate little reward from graduation." (See: The Canadian Journal of Economics, "The compelling effects of compulsory schooling: the evidence from Canada," Prof. Oreopoulos, p. 23, (quoting from Eckstein, Zvi, and Kenneth I. Wolpin (1999) "Why youths drop out of high school: the impact of preferences, opportunities, and abilities," Econometrica 67, 1295\026 339).

107. As I detail below, students and parents in the United States often face the same fines when students fail to attend school. Fines for students make more sense when low self-control is the reason for which they fail to attend school. At the same time, punishing Indian students who have no choice but to work would make no sense. Such a punishment should not be

borrowed from the United States.

108. In many jurisdictions in the United States, the attendance officer is responsible for enforcing compulsory attendance laws for his area or school. Given the overwhelming problem of sub-par enrolment and attendance in India, we doubt that one school official could sufficiently do the work of inspecting places of employment for children who have violated attendance laws.

109. Indeed, existing legislation in India already envisages the employment of attendance officers. The Delhi Primary Education Act, 1960, Sec. 7. Yet, there is nothing to suggest that these employees have adequately dealt with truancy. As mentioned, this is, in part, due to the economic conditions in which many parents find themselves. Financial assistance or incentives must be given. Only then, may the Government actively enforce compulsory attendance legislation.

110. We must also remember that it is not only the child who fails to attend but also the child who fails to enroll that has violated an attendance law.

111. Before taking issue with State/Union Territory compulsory education statutes, I note that education has traditionally been reserved for the States. Only in 1976, vide the 42nd Amendment of the Constitution, did education become a part of Concurrent List of Schedule 7. In its 165th Report, the Law Commission of India has also recommended enactment of Central Legislation in this respect. Putting education in the Concurrent List turns out to be a positive development, given the States' failure to provide effective legislation.

112. The States' laws fail on two accounts. First, they are too lenient to have a deterrent effect. Second, the legislation is not adequately enforced, in part, because it does not require police officers to do the job. If we analyze the legislation passed by different States, another conclusion becomes obvious: no State has provided for an adequate punishment whose effect would be to deter citizens from committing a violation.

113. It is necessary to reproduce some of the various compulsory education laws of the States.

114. Under Section 7 of The Tamil Nadu Compulsory Elementary Education Act, 1994:

"Every parent or guardian of a child of school age who fails to discharge his duty under section 4 [duty of parent to cause child to attend elementary school] shall be punishable with fine which may extend to one hundred rupees."

115. Section 18(1) of The Delhi Primary Education Act, 1960 states:

"If any parent fails to comply with an attendance order passed under Section 13, he shall be punishable with fine not exceeding two rupees, and, in the case of continuing contravention, with an additional fine not exceeding fifty naye paise for every day during which such contravention continues after conviction for the first of such contraventions. Provided that the amount of fine payable by any one person in respect of any child in any one year shall not exceed fifty rupees."

116. Analysis of these State laws reveals that they are weak in character and perhaps have never been implemented. If we compare these laws with their sister statutes in United States, we realize that the U.S. laws are far stronger.

117. In Wisconsin, parents who fail to send their children to

school may have to pay a fine of not more than $500 or face imprisonment for not more than 30 days or both. [Wisconsin Statute Sections 118.15(1)(a) and 118.15(5)(a)1.a]. For a second or subsequent offense, they may face a fine of not more than $1,000 or imprisonment for not more than 90 days or both. [Wisconsin Statute Sections 118.15(1)(a) and 118.15(5)(a)1.b]. Alternatively, they may be sentenced to perform community service. [Wisconsin Statute Sections 118.15(1)(a) and 118.15(5)(a)2] .
Unlike Wisconsin, Tamil Nadu and Delhi's laws have no teeth.

118. The other main problem is implementation of these laws. Neither the State Governments nor their police agencies are at all serious about implementing these compulsory laws. There are hardly any cases where even fines have been imposed. Some form of compulsory education has been on the statute books since 1917. We have seen Western countries enforce these laws. Most Western countries enjoy almost universal literacy while 35% of our population is illiterate. While a robust financial incentive programme may not have been possible in 1917, it is today. If we wish to develop further, we must educate each and every citizen aged six to fourteen.

119. In order to give effect to the constitutional right under Article 21A, it is imperative that the Central Government pass suitable legislation. The fine should be suitably increased. Imprisonment should be a sentencing option as well. The current patchwork of State/UT legislation on compulsory education is insufficient. Small monetary fines do not go far enough to ensure the implementation of Article 21A.

120. A disclaimer is attached to these recommendations. The recommendations for the enforcement of compulsory education are contingent upon the implementation of a financial incentive program that would make education viable for the poor. The carrot must come before the stick. If there is no financial incentive program in place, the Government cannot expect the poorest of the poor to send their children to school.

121. The Parliament should criminally penalize those parents who receive financial benefits and, despite such payments, send their children to work and penalize those employers who preclude children from attending school or completing homework. It has become necessary that the Government set a realistic target within which it must fully implement Article 21A regarding free and compulsory education for the entire country. The Government should suitably revise budget allocations for education. The priorities have to be set correctly. The most important fundamental right may be Article 21A, which, in the larger interest of the nation, must be fully implemented. Without Article 21A, the other fundamental rights are effectively rendered meaningless. Education stands above other rights, as one's ability to enforce one's fundamental rights flows from one's education. This is ultimately why the judiciary must oversee Government spending on free and compulsory education.

122. At the same time, spending is an area in which the judiciary must not overstep its constitutional mandate. The power of the purse is found in Part V, Chapter II of the Constitution, which is dedicated to the Parliament. (See: Articles 109 and 117 for "Money Bills.") Nevertheless, it remains within the judiciary's scope to ensure that the fundamental right under Article 21A of Part III is upheld. In M.C. Mehta v. Union of India (vehicular pollution) (1998) 6 SCC 63, this Court did not

ignore the Article 21 right to life when deadly levels of pollution put the right at stake. Nor will this Court ignore the Article 21A right to education, when a dearth of quality schooling put it in jeopardy. The Government's education programmes and expenditures, wanting in many respects, are an improvement over past performance. They nearly fall short of the constitutional mark. Lackluster performance in primary/secondary schools is caused in part because Government places college students on a higher pedestal. Money will not solve all our education woes, but a correction of priorities in step with the Constitution's mandate will go a long way.

7 Opposition to Compulsory Education

123. "Compulsory" connotes enforcement. The Parliament rejected an amendment that would have saved parents from penal penalties. If education were not compulsory, who checks in with parents who have sent their children to work? If no authorities inquire, the message is clear: We, the State, do not care if your child goes to school. Taking the opposing view, Shri G.M. Banatwalla wanted to make sure parents were not punished:
"\005this word 'compulsion' needs to be properly defined. The word, 'compulsion' is not to be related to the student or the parents. Parents cannot be penalized for being too poor to send their children to school. The word, 'compulsion' has to be understood in relation to the State and the obligation of the State to provide for free education. p. 523." (See: The Parliamentary Debates on Article 21A, p. 523, 28 November 2001 at Vol. 20, No. 6-10)
124. The Parliament had the opportunity to accept such a definition of "compulsory." But they chose otherwise. Amendment number four, moved by Shri G.M. Banatwalla at p. 548, stated that:
"Provided that in making any law to provide for free and compulsory education under this article, the State shall not\005 (b) enforce any penal sanctions on a parent or guardian."

125. Of paramount importance, this Amendment was "negatived." [See p. 548]. Those who wanted a safe-haven from penal sanction for parents lost. From this vote, we know that the Parliament intended to allow for future legislation that would impose penal sanctions for violations of legislation under Article 21A.

7 Conclusion on Free and Compulsory Education

126. Given that so many children drop out of, or are absent from, school before they turn fourteen, "free education" alone cannot solve the problem. The current patchwork of laws on compulsory education is insufficient. Monetary fines do not go far enough to ensure that Article 21A is upheld.

127. A carrot-and-stick approach appears to be the best way to implement Article 21A. Financial incentive programmes have worked well in other countries. We should follow their lead. Once that is done, the Government should strictly enforce effective compulsory education laws. Such a policy is bound to pay off.

In sum, the Central Government should enact legislation that:
(a) provides low-income parents/guardians with

financial incentives such that they may afford to send their children to school;

(b) criminally penalizes those who receive financial incentives and despite such payment send their children to work;

(c) penalizes employers who preclude children from attending school or completing homework;

(d) the penalty should include imprisonment; the aforementioned Bill would serve as an example. The State is obligated under Article 21A to implement free and compulsory education in toto;

(e) Until we have achieved the object of free and compulsory education, the Government should continue to increase the education budget;

(f) the Parliament should set a deadline by which time free and compulsory education will have reached every child. This must be done within six months.

128. With regard to (a), the state cannot cite budgetary constraints or lack of resources as an excuse for failing to provide financial assistance/incentives to poor parents. See Hussainara Khatoon (supra), at page 107, para 10.

129. Article 21A's reference to "education" must mean something. This conclusion is bolstered by the Parliament's Statement of Objects and Reasons for Article 21A:

"The Constitution of India in a Directive Principle contained in article 45, has made a provision for free and compulsory education for all children up to the age of fourteen years within ten years of promulgation of the Constitution. We could not achieve this goal even after 50 years of adoption of this provision. The task of providing education to all children in this age group gained momentum after the National Policy of Education (NPE) was announced in 1986. The Government of India, in partnership with the State Governments, has made strenuous efforts to fulfill this mandate and, though significant improvements were seen in various educational indicators, the ultimate goal of providing universal and quality education still remains unfulfilled. In order to fulfill this goal, it is felt that an explicit provision should be made in the Part relating to Fundamental Rights of the Constitution.

1. With a view to making right to free and compulsory education a fundamental right, the Constitution (Eighty-third Amendment) Bill, 1997 was introduced in the Parliament to insert a new article, namely, article 21A conferring on all children in the age group of 6 to 14 years the right to free and compulsory education. The said Bill was scrutinized by the Parliament Standing Committee on Human Resource Development and the subject was also dealt with in its 165th Report by the Law Commission of India.

2. After taking into consideration the report of the Law Commission of India and the recommendations of the Standing Committee of the Parliament, the

proposed amendments in Part III, Part IV and Part IVA of the Constitution are being made which are as follows \005

3. The Bill seeks to achieve the above objects"

130. The Article seeks to usher in "the ultimate goal of providing universal and quality education." (emphasis supplied). Implied within "education" is the idea that it will be quality in nature. Current performance indicates that much improvement needs to be made before we qualify "education" with "quality." Of course, for children who are out school, even the best education would be irrelevant. It goes without saying that all children aged six to fourteen must attend school and education must be quality in nature. Only upon accomplishing both of these goals, can we say that we have achieved total compliance with Article 21A.

131. Though progress has been made, the Parliament's observation upon passing Art 21A still applies: the goal of providing universal and quality education "\005 still remains unfulfilled."

3. Does the 93rd Amendment violate the Basic Structure of the Constitution by imposing reservation on unaided institutions?

132. Imposing reservation on unaided institutions violates the basic structure by obliterating citizens' 19(1)(g) right to carry on an occupation. Unaided entities, whether they are educational institutions or private corporations, cannot be regulated out of existence when they are providing a public service like education. That is what reservation would do. That is an unreasonable restriction. When you do not take a single paisa of public money, you cannot be subjected to such restriction. The 93rd Amendment's reference to unaided institutions must be severed.

133. No unaided institution filed a writ petition in this case. Had either this Court or respondents had an objection, they could have raised it at any time during the proceedings. We listened to the parties for months. We received voluminous written submissions from the parties, yet no objection was made with regard to the fact that no unaided institution had filed a writ petition. While we would usually implead a party if we felt their presence was necessary to the resolution of the dispute, the facts of this case are peculiar. The best lawyers in the country argued the case for both sides, and a brief from an unaided institution would not have added much if anything to the substance of the arguments. The Government will likely target unaided institutions in the future. At that time, this Court will have to go through this entire exercise de novo to determine if unaided institutions should be subject to reservation. Such an exercise would unnecessarily cause further delay. The fate of lakhs of students and thousands of institutions would remain up in the air. (See: Minerva Mills Ltd. & Others v. Union of India & Others (1980) 3 SCC 625). Therefore, looking to the extraordinary facts, I have decided to proceed with this aspect of the matter in the larger public interest.

134. Amendments by their very nature are often enabling provisions. If they clear the way for future legislation that would in fact violate the basic structure, the Court need not wait for a potential violation to become an actual one. It can strike the entire amendment ab initio. The question of potential width was resolved in Minerva Mills (supra), paras 38-39. The Court acknowledged that it generally does not anticipate constitutional issues before they arise, but it held that circumstances required

it to act before unconstitutional provisions could be passed under the authority of an unconstitutional amendment.

"38. But, we find it difficult to uphold the preliminary objection because, the question raised by the petitioners as regards constitutionality of Sections 4 and 55 of the 42nd Amendment is not an academic or a hypothetical question. The 42nd Amendment is there for anyone to see and by its Sections 4 and 55 amendments have been made to Articles 31-C and 368 of the Constitution. An order has been passed against the petitioners under Section 18-A of the Industries (Development and Regulation) Act, 1951, by which the petitioners are aggrieved."

"39. Besides there are two other relevant considerations which must be taken into account while dealing with the preliminary objection. There is no constitutional or statutory inhibition against the decision of questions before they actually arise for consideration. In view of the importance of the question raised and in view of the fact that the question has been raised in many a petition, it is expedient in the interest of justice to settle the true position. Secondly, what we are dealing with is not an ordinary law which may or may not be passed so that it could be said that our jurisdiction is being invoked on the hypothetical consideration that a law may be passed in future which will injure the rights of the petitioners. We are dealing with a constitutional amendment which has been brought into operation which, of its own force, permits the violation of certain freedoms through laws passed for certain purposes. We, therefore, overrule the preliminary objection and proceed to determine the point raised by the petitioners."

[emphasis added]

There is not one precise definition of the width test, however. The test asks if an amendment is so wide that in effect (actual or potential), it goes beyond the Parliament's amending power. Kesavananda, paras 531-532: "But that the real consequences can be taken into account while judging the width of the power is settled. The Court cannot ignore the consequences to which a particular construction can lead \005" To make such a determination, it follows that the Court should ask whether an amendment infringes constitutional limitations as opposed to those evolved from mere common law. (See: Nagaraj, para 103).

135. As a preliminary matter, I turn to the cases by which the basic structure doctrine has been established. It has been stated that, "Kesavananda had propounded the doctrine, the Indira Gandhi Election case had upheld it, and Minerva engraved it on stone." (See: Granville Austin, "Working a Democratic Constitution", at page 506].

136. Kesavananda and its progeny provide that an amendment to the Constitution must not alter the Constitution's basic structure. To reach a conclusion regarding a basic structure challenge, I employ the following general standard: an amendment alters the basic structure if its actual or potential effect would be to damage a facet of the basic structure to such an extent that the facet's original identity is compromised.

137. To determine if legislation infringes constitutional

limitations and is thus invalid, we use the two-step effect test (also known as the impact or rights test). Step One requires us to first ask if legislation affects a facet of the basic structure.

If it does, then at Step Two we ask if the effect on the facet of the structure is to such an extent that the facet's original identity has been altered. Applying the effect test is another way of saying that the form of an amendment is irrelevant; it is the consequence thereof that matters. (See: Kesavanda at para 532 and I.R. Coelho v. State of Tamilnadu (2007) 2 SCC 1 at Conclusion (ii) at page 111).

138. The terms "abridge" and "abrogate" have been employed by this Court to distinguish between acceptable and unacceptable legislation. Whether legislation abridges or abrogates is a question of degree. Using these terms is another way of asking whether the legislation had such an effect that it changed the basic structure of the Constitution. If legislation merely abridges the basic structure, the structure's identity remains. The legislation is upheld. In this sense, the Parliament may take away or destroy fundamental rights by amending the Constitution, provided that the basic structure is not altered.

139. If it abrogates the basic structure, the structure and thus the Constitution lose their identities. The legislation must be struck down. This is determined on a case-by-case basis by applying the effect test (impact/rights tests). (See: Coehlo). I further note that a total deprivation of fundamental rights, even in one limited area, may amount to an abrogation of the basic structure. (See: Minerva Mills, para 59).
7 Step One: Does Article 15(5) affect a facet of the basic structure?

140. In the instant case, Article 15(5) expressly precludes the application of Article 19(1)(g). Whenever reservations are implemented under Article 15(5), citizens are stripped of their fundamental rights under Article 19(1)(g). By excluding Article 19(1)(g), Article 15(5) obviously affects Article 19(1)(g), a facet of the basic structure of the Constitution. Step One is therefore cleared. What is more, Article 19(1)(g) belongs to the Golden Triangle \026 Articles 14, 19 and 21 are the three fundamental rights that stand above the rest. Writing for the majority in Minerva Mills, Justice Chandrachud provides an eloquent justification for shielding the Golden Triangle from attack. To achieve a more egalitarian society, individual liberty must be protected:
"Para 74 of Minerva Mills: 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. They are Articles 14, 19 and 21. Article 31C has removed two sides of that golden triangle which affords to the people of this country an assurance that the promise held forth by the Preamble will be performed by ushering an egalitarian era through the discipline of fundamental rights, that is, without emasculation of the rights to liberty and equality which alone can help preserve the dignity of the individual."

141. The Golden Triangle's significance becomes clear when we consider that Government may suspend Article 14 and 19 rights in order to implement an emergency. (See: Articles 358 and 359) (prior to the 44th Amendment, all Part III rights could be

curtailed during emergency; this Amendment precludes the State from denying Articles 20 and 21 to citizens during emergency). In a sense, democracy is only restored when the Triangle is returned to the citizens. Without the Triangle, democracy is impossible:

"para 63\005 Every State is goal-oriented and claims to strive for securing the welfare of its people. The distinction between the different forms of Government consists in that a real democracy will endeavour to achieve its objectives through the discipline of fundamental freedoms like those conferred by Articles 14 and 19. Those are the most elementary freedoms without which a free democracy is impossible and which must therefore be preserved at all costs. Besides, as observed by Brandies, J., the need to protect liberty is the greatest when Government's purposes are beneficent. If the discipline of Article 14 is withdrawn and if immunity from the operation of that article is conferred, not only on laws passed by the Parliament but on laws passed by the State Legislatures also, the political pressures exercised by numerically large groups can tear the country asunder by leaving it to the legislature to pick and choose favoured areas and favourite classes for preferential treatment."

142. United States Supreme Court Justice Brandeis' word of caution is relevant to today's dispute wherein the Government trumpets reservation in higher education as an answer to our age-old problems of poverty and caste. At first blush, it sounds as if reservation in higher education would help the backward help themselves. The road out of poverty is paved with education. However, the "devil is the details." With elementary freedom on the line, I must carefully scrutinize those details.

143. The right to freedom under Article 19 has been long recognized as a natural and inalienable right that belongs to all citizens. Indeed, what would Independence mean without it? Chief Justice Sikri cites the following passage in Kesavananda at para 300:

"That article (Article 19) enumerates certain freedoms under the caption "right to freedom" and deals with those great and basic rights which are recognised and guaranteed as the natural rights inherent in the status of a citizen of a free country." (Per Patanjali Sastri, C.J., in State of West Bengal v. Subodh Gopal Bose [1954] S.C.R. 587, 596)."

144. With fundamental rights in jeopardy, I shall review the cases in which the basic structure doctrine has been implemented to invalidate constitutional amendments. By looking at these cases synoptically, we get a sense as to how much damage the basic structure can withstand before crumbling. In Kesavananda, the second part of Article 31C precluded courts from reviewing whether a law under Article 39(b) or (c) promoted the policy for which it was enacted. This violated the basic structure. Article 31C was introduced by the 25th Amendment.

145. In Indira Nehru Gandhi v. Raj Narain & Another (1975) Supp SCC 1, the Court struck Article 329A(4) as violative of the basic structure. This provision appropriated the Court's power to adjudicate election laws, encroaching on the judiciary in violation of separation of powers. See Justice Matthew's opinion at para 325. It was introduced by the 39th Amendment. In

Minerva Mills, the Court held sections 4 and 55 of the 42nd Amendment in violation of the basic structure. Section 4 sought to expand 31C such that all laws giving effect to Directive Principles, not just those intended to promote Article 39(b) or (c), would be immune to an Article 14 or 19 challenge. Section 55 would have barred judicial review of constitutional amendments.

146. In P. Sambamurthy v. State of A.P. (1987) 1 SCC 362, the Court invalidated Article 371-D(5), finding that the Parliament had violated the rule of law and consequently the basic structure, by removing judicial review from the High Court and placing it in the hands of one of the parties \026 the State Government. In L. Chandra Kumar v. Union of India (1997) 3 SCC 261, the Court held that Articles 323A-2D and 323B-3D violated the basic structure in that they removed judicial review of the High Courts and Supreme Court under Articles 226/227 and 32, respectively. These articles were introduced by the 42nd Amendment to empower the Parliament or the State Legislatures to establish Tribunals for various substantive areas of law: tax, labour, criminal, etc.

147. Two broad themes surface from these cases. When judicial review is barred, democracy evaporates. And when Fundamental Rights are at stake, they must be harmonized with, not made subject to, the Directive Principles. Sections 4 and 55 of the 42nd Amendment were especially egregious violations of the basic structure. Had Section 4 been upheld, citizens' fundamental rights would have been at the mercy of one organ of Government. "If Governments always could be trusted, there would have been no need for Fundamental rights." Mr Palkhivala in oral arguments in Kesavananda, quoting from the learned Mr H.M. Seervai, who was opposing counsel in that case. Mr Palkhivala was reading from Seervai, H.M., "Fundamental Rights: A Basic Issue," published in three installments in the Times of India, 14, 15, 16 February 1955. (See: Granville Austin at pages 263-264 in "Working a Democratic Constitution")

148. Government cannot be trusted; that is precisely why we divide its powers into separate organs. If it could be trusted, there would be no need for co-equal branches in which power is shared. Separation of powers is an axiom of democracy.

149. Had Section 55 of the 42nd Amendment been upheld, the basic structure of the Constitution could have been destroyed by a single slash. Future constitutional amendments would not have been reviewed. The impugned Amendment looks rather mild in comparison to the damage that would have been wrought by the 42nd Amendment. The impugned legislation limits one fundamental right in one limited circumstance. Yet an amendment need not be as invidious as the 42nd Amendment for us to invalidate it. If the standard were that high, amendments could destroy the basic structure or the essence of the Constitution by a thousand slashes.

150. Since Kesavananda's time, many amendments have been passed and many challenges under the basic structure have been made. This Court has used caution and has refrained from using the doctrine, even when it may have been justified. For example, there were grounds for striking the entire 10th Schedule as violative of the basic structure in Kihoto Hollohan v Zachillhu & Others 1992 Supp (2) SCC 651. Rather than resort to the basic structure, this Court made a narrow ruling on procedural grounds. (See: S.P. Sathe, Judicial Activism in India: Transgressing Borders and Enforcing Limits, 2nd Edn., 2002 (Oxford University Press) pages 92-93). The Court upheld the

10th Schedule, only severing a paragraph from the same. I agree that an abundance of caution ought to be taken before employing the basic structure doctrine. The violation must truly abrogate the basic structure. Anything short of this standard must be upheld \026 the will of the people, through their elected representatives, heard.

151. Before making such a determination, it is prudent to briefly revisit the rulings of two landmark cases: P.A. Inamdar & Others v. State of Maharashtra & Others, (2005) 6 SCC 537; T.M.A. Pai Foundation & Others v. State of Karnataka & Others (2002) 8 SCC 481. In Inamdar (supra), paras 26-27 (seven-Judge Bench), unaided (minority and non-minority) professional institutions filed petitions to determine, inter alia, whether the State could impose quotas on unaided (minority and non-minority) institutions. A seven-Judge Bench was constituted such that Islamic Academy's clarification of Pai could be reviewed. Islamic Academy was a five-Judge Bench. Given that Pai was an eleven-Judge Bench, Inamdar could clarify but not overrule Pai.

152. At para 124, Inamdar held that the State cannot impose quotas on unaided (minority and non-minority) institutions. To do so would nationalize seats, contrary to Pai. (See: Inamdar at para 125). In dictum, Pai suggested that the State could compel unaided institutions to admit a reasonable percentage of students via reservation. (Pai, para 68). Inamdar clarified this point, stating that Pai should be read to mean that the State and unaided institutions may enter into consensual agreement regarding reservation. (See: Inamdar at para 126). Unaided institutions (minority and non-minority) can admit as they choose, provided their process is fair, transparent, non-exploitative and merit-based. Inamdar stated:

"124: So far as appropriation of quota by the State and enforcement of its reservation policy is concerned, we do not see much of difference between non-minority and minority unaided educational institutions. We find great force in the submission made on behalf of the petitioners that the States have no power to insist on seat sharing in the unaided private professional educational institutions by fixing a quota of seats between the management and the State. The State cannot insist on private educational institutions which receive no aid from the State to implement State's policy on reservation for granting admission on lesser percentage of marks, i.e. on any criterion except merit.

125. As per our understanding, neither in the judgment of Pai Foundation nor in the Constitution Bench decision in Kerala Education Bill, which was approved by Pai Foundation, there is anything which would allow the State to regulate or control admissions in the unaided professional educational institutions so as to compel them to give up a share of the available seats to the candidates chosen by the State, as if it was filling the seats available to be filled up at its discretion in such private institutions. This would amount to nationalization of seats which has been specifically disapproved in Pai Foundation. Such imposition of quota of State seats or enforcing reservation policy of the State on available seats in unaided professional institutions are acts constituting serious encroachment on the right and autonomy of

private professional educational institutions.

Such appropriation of seats can also not be held to be a regulatory measure in the interest of minority within the meaning of Article 30(1) or a reasonable restriction within the meaning of Article 19(6) of the Constitution. Merely because the resources of the State in providing professional education are limited, private educational institutions, which intend to provide better professional education, cannot be forced by the State to make admissions available on the basis of reservation policy to less meritorious candidate. Unaided institutions, as they are not deriving any aid from State funds, can have their own admissions if fair, transparent, non-exploitative and based on merit."

To the extent that Islamic Academy had approved of quotas in unaided institutions, a scheme in which the States could fix quota for seat sharing between management and the State, Islamic was overruled. [Inamdar at para 130]

153. In T.M.A. Pai Foundation (supra) para 2 (eleven- Judge Bench), private educational institutions, aided and unaided, filed writ petitions to challenge regulations that impeded their rights. They wanted to establish and administer educational institutions, unfettered by Government interference. [para 2]. Reading Article 29(2) and 30(1) harmoniously, the six-Justice majority held that (1) unaided institutions could admit students free of Government interference, as long as their admission process was transparent and merit-based; (2) minority aided institutions may still admit their own students, contingent upon admitting a reasonable number of non-minority students per the percentage provided by the State Government.

154. For our purposes, it is important to note that education falls within the meaning of "occupation" under 19(1)(g). This is so because a large number of persons are employed as teachers and administrative staff. For them, education is an occupation. Pai stated:
"20: "Article 19(1)(g) employs four expressions, viz., profession, occupation, trade and business. Their fields may overlap, but each of them does have a content of its own. Education is per se regarded as an activity that is charitable in nature [See The State of Bombay v. R.M.D. Chamarbaugwala, \005 Education has so far not been regarded as a trade or business where profit is the motive. Even if there is any doubt about whether education is a profession or not, it does appear that education will fall within the meaning of the expression "occupation". Article 19(1)(g) uses the four expressions so as to cover all activities of a citizen in respect of which income or profit is generated, and which can consequently be regulated under Article 19(6).

25 The establishment and running of an educational institution where a large number of persons are employed as teachers or administrative staff, and an activity is carried on that results in the imparting of knowledge to the students, must necessarily be regarded as an occupation, even if there is no element of profit generation. It is difficult to comprehended that education, per se, will not fall under any of the four expressions in Article 19(1)(g).

"Occupation" would be an activity of a person undertaken as a means of livelihood or a mission in life. ..."

[emphasis added]

155. Stripping private unaided institutions of their right to select students would be unreasonable:

"para 40: Any system of student selection would be unreasonable if it deprives the private unaided institution of the right of rational selection, which it devised for itself, subject to the minimum qualification that may be prescribed and to some system of computing the equivalence between different kinds of qualifications, like a common entrance test. Such a system of selection can involve both written and oral tests for selection, based on principle of fairness."

156. Like Article 15(5) in the instant case, Unni Krishnan effectively nationalized education. Pai overturned Unni Krishnan. (See: para 45).

"38: The scheme in Unni Krishnan's case has the effect of nationalizing education in respect of important features, viz., the right of a private unaided institution to give admission and to fix the fee. By framing this scheme, which has led to the State Governments legislating in conformity with the scheme the private institutions are undistinguishable from the Government institutions; curtailing all the essential features of the right of administration of a private unaided educational institution can neither be called fair or reasonable."

157. Pai traces the autonomy of institutions back to Chitralekha and Rajendran. The proposition is simple: he who funds or runs the institution holds the power to select students. The State cannot ask these institutions to abridge this right in exchange for affiliation/recognition. The relevant paragraphs are reproduced hereunder:

"36: The private unaided educational institutions impart education, and that cannot be the reason to take away their choice in matters, inter alia, of selection of students and fixation of fees. Affiliation and recognition has to be available to every institution that fulfills the conditions for grant of such affiliation and recognition. The private institutions are right in submitting that it is not open to the Court to insist that statutory authorities should impose the terms of the scheme as a condition for grant of affiliation or recognition; this completely destroys the institutional autonomy and the very objective of establishment of the institution.

42. In R. Chitralekha and Anr. v. State of Mysore and Ors.[citation omitted], while considering the validity of a viva-voce test for admission to a Government medical college, it was observed at page 380 that colleges run by the Government, having regard to financial commitments and other relevant considerations, would only admit a specific number of students. It had devised a method for screening the applicants for admission. While upholding the order so issued, it was observed that "once it is conceded, and it is not disputed before us, that the State Government can run medical and engineering colleges, it cannot be

denied the power to admit such qualified students as pass the reasonable tests laid down by it. This is a power which every private owner of a College will have, and the Government which runs its own Colleges cannot be denied that power." (italics added by Pai; underscore is mine).

43. Again, in Minor P. Rajendran v. State of Madras and Ors \005 , it was observed at page 795 that "so far as admission is concerned, it has to be made by those who are in control of the Colleges, and in this case the Government, because the medical colleges are Government colleges affiliated to the University. In these circumstances, the Government was entitled to frame rules for admission to medical colleges controlled by it subject to the rules of the university as to eligibility and qualifications." The aforesaid observations clearly underscore the right of the colleges to frame rules for admission and to admit students. The only requirement or control is that the rules for admission must be subject to the rules of the university as to eligibility and qualifications. The Court did not say that the university could provide the manner in which the students were to be selected.

61. In the case of unaided private schools, maximum autonomy has to be with the management with regard to administration, including the right of appointment, disciplinary powers, admission of students and the fees to be charged."

158. Unaided institutions may admit students of their choice, subject to an objective and rational procedure of selection. They might admit a small percentage of students belonging to the weaker sections of the society by granting those sections freeships or scholarships, if not granted by the Government. [See: Pai at para 53]. Given a transparent and reasonable selection process, it is up to the institution to define "merit" according to its own values. Pai stated:
"65. The reputation of an educational institution is established by the quality of its faculty and students, and the educational and other facilities that the colleges has to offer. The private educational institutions have a personality of their own, and in order to maintain their atmosphere and traditions, it is but necessary that they must have the right to choose and select the students who can be admitted to their courses of studies. If is for this reason that in the St. Stephen's College case, this Court upheld the scheme whereby a cut-off percentage was fixed for admission, after which the students were interviewed and thereafter selected. While an educational institution cannot grant admission on its whims and fancies, and must follow some identifiable or reasonable methodology of admitting the students, any scheme, rule or regulation that does not give the institution the right to reject candidates who might otherwise be qualified according to say their performance in an entrance test, would be an unreasonable restriction under Article 19(6), though appropriate guidelines/modalities can be prescribed for holding the entrance test a fair manner. Even when students are required to be selected on the basis of merit, the ultimate decision to grant admission to the

students who have otherwise qualified for the grant of admission must be left with the educational institution concerned. However, when the institution rejects such students, such rejection must not be whimsical or for extraneous reasons."

159. The Court distinguishes between reasonable and unreasonable regulations by asking which functions lie at the heart of an institution's autonomy. Regulations that strike at the core of autonomy are unreasonable. For example, prescribing minimum qualifications for teachers is a reasonable regulation; actually selecting the teachers is not.
"55. But the essence of a private educational institution is the autonomy that the institution must have in its management and administration. There, necessarily, has to be a difference in the administration of private unaided institutions and the Government-aided institutions. Whereas in the latter case, the Government will have greater say in the administration, including admissions and fixing of fees, in the case of private unaided institutions, maximum autonomy in the day-to-day administration has to be with the private unaided institutions. Bureaucratic or Governmental interference in the administration of such an institution will undermine its independence. While an educational institution is not a business, in order to examine the degree of independence that can be given to a recognized educational institution, like any private entity that does not seek aid or assistance from the Government, and that exists by virtue of the funds generated by it, including its loans or borrowings, it is important to note that the essential ingredients of the management of the private institution include the recruiting students and staff, and the quantum of fee that is to be charged."

160. The same argument was framed in similar terms in St. Stephen's College v. University of Delhi, 1992 (1) SCC 558. In that case, the Court distinguished regulations based on whether they directly or indirectly affected management. Those that indirectly affected management were reasonable; those that directly affected the management of the institution were not. [Pai at para 125].

161. In St. Stephen's, this Court referred to the earlier decisions, and with regard to Article 30(1) observed at page 596, paragraph 54, as follows:
"\005 But the standards of education are not a part of the management as such. The standard concerns the body politic and is governed by considerations of the advancement of the country and its people. Such regulations do not bear directly upon management although they may indirectly affect it. The State, therefore has the right to regulate the standard of education and allied matters."

162. Once a private institution (non-minority) takes aid, it is subject to (1) reservation and (2) regulation of administration and maintenance of the institution. Pai stated:
"71: "While giving aid to professional institutions, it would be permissible for the authority giving aid to prescribe by rules or regulations, the conditions on the basis of which admission will be granted to

different aided colleges by virtue of merit, coupled with the reservation policy of the state. \005

72: "Once aid is granted to a private professional educational institution, the Government or the state agency, as a condition of the grant of aid, can put fetters on the freedom in the matter of administration and management of the institution. The state, which gives aid to an educational institution, can impose such conditions as are necessary for the proper maintenance of the high standards of education as the financial burden is shared by the state. \005"

163. I now query if the Parliament may subject Article 19(1)(g) to Article 15(5), when this Court has held that reservation in unaided institutions is an unreasonable restriction that cannot be saved by Article 19(6).

164. I answer this question in the affirmative. The structure of our Constitution permits fundamental rights, and even the Golden Triangle of Articles 14, 19 and 21, to be abridged in limited circumstances. To say that subjecting Articles 19(1)(g) to 15(5) violates the basic structure per se is to ignore the examples in which the most fundamental of rights is limited. Article 16(4) expressly limits the right to formal equality in 16(1), a specific facet of Article 14. In this light, Article 16(4) impliedly limits the general right to formal equality in Article 14. The right to equality is expressed in the negative in 15(1): the State shall not discriminate based on religion, race, caste, etc. In other words, the State shall treat citizens of different religions, races and castes equally. Like Article 16(4), Article 15(4) limits 15(1) -- another facet of Article 14 formal equality -- such that egalitarian equality may be pursued. Generally speaking, Articles 15(3) and (4) and 16(4) allow the State to impose affirmative action programs on the public sector. Such provisions necessarily limit the right to formal equality. If the right to equality, considered by some as a basic postulate of the Constitution, has been limited, a fortiori Article 19(1)(g) can be too.

165. Along these lines, I could turn to Articles 31A, 31B and 31C for further support. Those Articles exclude challenges under Articles 14 and 19. In agreement with Dr. Dhavan's submission, I decline to rely on Articles 31A, 31B and 31C for support. As explained in Minerva Mills, the Court had previously upheld Article 31A out of concern for stare decisis. The Court never approved of the exclusion of Articles 14 and 19 on a principled basis. Nor did it make a ruling as to whether the exclusion violated the basic structure. (See: para 71-72 of Minerva Mills. See also para 43 of Waman Rao, (1981) 2 SCC 362).

166. A basic structure challenge becomes an issue of institutional competence. Is it for the legislature to decide what is a reasonable restriction under 19(1)(g) read with 19(6)? Or is it for the judiciary? It is well established that the Parliament, expressing the will of the people, may enact amendments to overrule a judgment of this Court. The First Parliament added Article 15(4) to the Constitution to overrule State of Madras v. Champakam Dorairajan, AIR 1951 SC 226. Other examples include the 77th Amendment, which overruled Sawhney I by adding Article 16(4-A); the 81st Amendment further overruled Sawhney I by adding Art 16 (4-B); the 82nd Amendment overruled S. Vinod Kumar & Another v. Union of India & Another (1996) 6 SCC 580 by amending Article 335; and the 85th Amendment overruled Virpal Singh Chauhann and Ajit Singh I by amending Article 16(4-A), (1995) 6 SCC 684 and

(1996) 2 SCC 715, respectively. Nevertheless, the duty to interpret the content of our fundamental rights has been left to the Courts. "The important point to be noted is that the content of a right is defined by the Courts. The final word on the content of the right is of this Court." (Nagaraj at para 21). (emphasis added). While the Parliament may amend the Constitution, it cannot alter the Constitution's basic structure. (See: Kesavananda, Indira Nehru Gandhi (Election Case), Minerva Mills, Sambamurthy, L. Chandra Kumar and Coelho).

7 Step Two: Does Article 15(5) affect Article 19(1)(g) to such an extent that Article 19(1)(g)'s original identity has been altered?

167. In other words, does Art 15(5) in effect merely abridge or completely abrogate Article 19(1)(g). If the former, 15(5) stands. If the latter, it falls. As noted above, Coelho directs me to apply the impact/rights test to determine whether the basic structure has been violated. [See Coehlo at Conclusion (ii) at page 111]. Thus, my query is whether to consider the impact on the entire constitutional framework, or to examine the effect on citizens engaged in unaided education as an occupation. I think it is the latter. I am not concerned here with those engaged in education in aided institutions. One is naturally subject to greater regulation when one relies on Government funding. (See: Pai/Inamdar). Individual liberty and freedom, as protected by the Golden Triangle, must carry greater weight for those who set off on their own and refuse Government money.

168. This brings me to the question as to how large I should draw the circle when I ask who is affected by reservation in unaided institutions. Justice Chandrachud provides that "[a] total deprivation of fundamental rights, even in a limited area, can amount to abrogation of fundamental right just as a partial deprivation in every area can." (See: Minerva Mills, para 59).

169. Freedom under Article 19 belongs to individual citizens. Article 19(1)(g) provides that "all citizens shall have the right to practice any profession, or to carry on any occupation, trade or business." The reference to "all citizens" means that each and every individual citizen possesses Article 19 rights. For the impugned legislation to fall, it need not touch every sphere of society. If even one individual's freedom has been curtailed, this Court is duty bound to entertain his or her claim. It is he or she who possesses the Article 19(1)(g) right to carry on an occupation.

170. If 15(5) were implemented, the educator in unaided institutions would still have students to educate. I use "educator" in the broadest sense of the term and include teachers, professors, lecturers, faculty, staff, administrators and those who finance institutions. Without one of the aforementioned, the institution cannot function properly.

171. Though affected by reservation, the educator still has a job. His occupation remains intact. Students will come. Classes will commence. Marks will be distributed. The greatest impact on the educator is that neither he nor his institution will choose whom to teach.

172. Almost half of the time (49.5%), the State would decide for them. Selecting students or employees goes to the heart of an organization's autonomy. The essence of an unaided educational institution is the freedom to manage its affairs, according to Pai at paragraph 55. That is, "\005 the essential ingredients of the management of the private institution include the recruiting [of]

students and staff \005 ." The same argument was framed in similar terms (at para 54) in St. Stephen's College (regulations imposing standards of education upheld, because they "\005 do not bear directly upon management although they may indirectly affect it \005"). This Court has stated in Pai as clarified by Inamdar that subjecting unaided institutions is an unreasonable restriction. As noted, Article 19(6) provides no safe haven for reservations.

173. The Government-imposed selection of students in turn has wide-ranging consequences for unaided institutions and their educators. I am required to examine the effect of the impugned Amendment. At least four problems will likely arise:
(1) academic standards suffer;
(2) attracting and retaining good faculty becomes more difficult;

(3) the incentive to establish a first rate unaided institution is diminished;

(4) and ultimately the global reputation of our unaided institutions is severely compromised.

174. First, once the State tells them whom to teach, standards of excellence will suffer. This is because those institutions will no longer be able to admit the highest-scoring students. As good as some of our institutions are, they do not teach blank slates. The best universities are the best, in part, because they attract the best students. The same can be said for almost any organization. In the case of higher education, the universities that admit the best will likely churn out the best. The precise extent to which the university made the best so good cannot be qualified. The point is that universities alone cannot produce qualified job candidates. Forced to admit students with lower marks, the university's final product will not be as strong. Once the creamy is excluded, cut-off marks would likely drop considerably in order to fill the 27% quota for non creamy layer OBCs. When the creamy layer is not removed, as in the case of Tamil Nadu, the difference in cut off marks for the general and backward categories may be insignificant. (See para 408 of Sawhney I). Of course, the extent to which standards of excellence would suffer would vary by institution. As I mention below, I urge the Government to set OBC cut off marks no lower than 10 marks below that of the general category. This is only a recommendation, however. It may never be adopted.

175. Second, reservations weaken the incentive to establish unaided institutions: if the State usurps the right to select students, would one still spend the time and money to establish an unaided institution? The question is all the more relevant today. Counsel for petitioners posit that tomorrow's knowledge economy requires a well-educated populace. "Well-educated" does not imply a string of degrees from less than taxing institutions. Rather, it means that one will possess the skills, knowledge and creativity to compete globally. Our unaided institutions must remain places where these traits are refined.

176. Third, those inclined to teach the brightest students have even less of a reason to leave private sector jobs for the teaching profession or to join the profession in the first place. "Brightest" would come with an asterisk. They would be the brightest available under the Government's reservation scheme. These potential teachers may ask themselves: how will I teach a class in which half the students are advanced relative to the other

half? In many institutions, the shortage of top-rate faculty will only get worse. Fourth, reservations may have a negative impact on students seeking employment in the burgeoning knowledge economy. Recruiters have begun to trickle into campuses. They hail from domestic as well as international entities, and they too may take note of reservations in unaided institutions. The effect on educators, from the top down, would be felt. For them, little more than a semblance of occupation would remain.

177. Given the dramatic effect that reservations would have on educators, the unaided institutions in which they teach and, consequently, society as a whole, Article 19(1)(g) has been more than abridged. When education is effectively nationalized, freedom stands obliterated. The identity of the Constitution is altered when unreasonable restrictions make a fundamental right meaningless. The 93rd Amendment's imposition of reservation on unaided institutions has abrogated Article 19(1)(g), a basic feature of the Constitution, in violation of our Constitution's basic structure. Therefore, I sever the 93rd Amendment's reference to "unaided" institutions as ultra vires of the Constitution.

178. The case law on severability asks the following question: had the Parliament known its provision would be severed would it still have passed the rest of the legislation? (See: R.M.D. Chamarbaugwalla (supra)).

179. At page 943 of R.M.D. Chamarbaugwalla (supra), the Court relied in part on The State of Bombay & Another v. F.N. Balsara (1951) SCR 682, where the question at issue was whether the Bombay Prohibition Act was valid: Sections 12 and 13 of the Act imposed restrictions on the possession, consumption and sale of liquor, which had been defined in s. 2(24) of the Act as including "(a) spirits of wine, methylated spirits, wine, beer, toddy and all liquids consisting of or containing alcohol, and (b) any other intoxicating substance which the Provincial Government may, by notification in the Official Gazette, declare to be liquor for the purposes of this Act". Certain medicinal and toilet preparations had been declared liquor by notification issued by the Government under s. 2(24)(b). The Act was attacked in its entirety as violative of the rights protected by Art. 19(1)(f). But this Court held that the impugned provisions were unreasonable and therefore void in so far as medicinal and toilet preparations were concerned, but valid as to the rest. Then, the contention was raised that "as the law purports to authorise the imposition of a restriction on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right, it is not possible to uphold it even so far as it may be applied within the constitutional limits, as it is not severable". In rejecting this contention, the Court observed:

'These items being thus treated separately by the legislature itself and being severable, and it is not being contended, in view of the directive principles of State policy regarding prohibition, that the restrictions imposed upon the right to possess or sell or buy or consume or use those categories of properties are

unreasonable, the impugned sections must be held valid so far as these categories are concerned.'

This decision is clear authority that the principle of severability is applicable even when Act's invalidity arises by reason of its contravention of constitutional limitations."

180. At page 944, the court in R.M.D. Chamarbaugwalla sought guidance from American case law on severability: "In discussing the effect of a severability clause, Brandies, J. observed in Dorchy v. State of Kansas (1924) 264 US 286 that it "provides a rule of construction, which may sometimes aid in determining that intent. But it is an aid merely; not an inexorable command". The weight to be attached to a classification of subjects made in the statute itself cannot, in our opinion, be greater than that of a severability clause."

181. The court in R.M.D Chambarbaugwalla went on to cite Patanjali Sastri, C.J., in The State of Bombay & Another v. The United Motors (India) Ltd. & Others (1953) SCR 1069: "dealing with the contention that a law authorizing the imposition of a tax on sales must be declared to be wholly void because it was bad in part as transgressing constitutional limits observed:

'It is a sound rule to extend severability to include separability in enforcement in such cases, and we are of opinion that the principle should be applied in dealing with taxing statutes in this country.'"

182. Here, I believe the Parliament would have gone forward without unaided institutions. While some Members of Parliament sought to overrule Pai and Inamdar, the Parliament's actions speak louder than its words. Once it had passed Article 15(5), it limited itself to imposing greater reservations on aided institutions. Had unaided institutions been the Parliament's priority, it could have included them in the Reservation Act. It seems that the Parliament's intent is to pass as much reservation as possible. That would explain why it has gone forward with 27% reservation for OBCs without confirming that at least 27% of the population is OBC. For these reasons, I conclude that had the Parliament known that unaided institutions were going to be severed, it would have nevertheless carried out its reservation scheme for aided institutions.

4. The Casteless and Classless Society versus Caste-based Reservation:

183. The caste system is peculiar to this country. Perhaps the entire society has been divided on the basis of caste. This social problem can be compared to some extent with that of American society. In the U.S., the problem of racial discrimination has existed for centuries. The cases of affirmative action decided in the United States are relevant. They show us how that society has dealt with the problem of racial discrimination. At the outset, I would like to make it clear that decisions of foreign countries are not binding on Indian courts. Indian Courts have not adopted American

standards of review. But the judgments delivered by U.S. courts on affirmative action have great persuasive value and they may provide broad guidelines as to how we should tackle our prevailing condition. A large number of English laws have been inherited by India and America. English and American cases are frequently cited by our courts. We need to keep our window open and permit the light of knowledge to enter from any source. In this light, I shall refer to some US decisions.

7 Affirmative Action cases and standards of review from the United States:

184. In 1978, Regents of the University of California v. Bakke put an end to reservation ("quotas") in education (reserving 16 out of 100 seats for minorities in medical school deemed unconstitutional). (438 U.S. 265). Justice Powell's concurring judgment is considered the key opinion in the case.

185. Justice Powell concluded that diversity was a compelling State interest that could withstand strict scrutiny. Relying on Bakke, the court later reaffirmed preferential treatment in college admissions as a means to ensure diversity in the classroom \026 racial diversity being just one among many types of diversity ("overcoming personal adversity and family hardship" was another form of diversity), (See: Grutter v. Bollinger, 539 U. S. 306, 338 (2003)). The Grutter Case insisted that universities make an individualized evaluation of a student seeking admission, rather than one that mechanically accepted or rejected students on the basis of race. (Grutter at 337). Such an evaluation would ensure that race was only considered as one type of diversity, rather than a pretext for achieving racial balance. Quotas could not be covertly installed in the name of diversity. This reasoning led the court to strike down an admission scheme that automatically assigned more points to minority students than to residents of the State or to athletes, for example. (Gratz v. Bollinger, 539 U.S. 244, 270).

186. Justice O'Conner for the majority in Grutter came to a very significant conclusion. She suggested that there was time limit on preferential treatment for certain races as a means of promoting diversity. Justice O'Connor stated: "we expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."

187. In Parents Involved in Community Schools v. Seattle School District No.1 et al, reported in 168 Lawyers Ed. 2d 508 & 517 (2007), school districts used a student's race to assign that student to a particular school within the district. In Seattle, this was done to achieve racial balance amongst the district's schools. One school should not be overwhelmingly white, another all non-white. Unlike the system approved in Grutter, race was not just one among many types of diversity that was considered by the district in assigning students. Seattle at 525. Instead, it was, at times, the decisive factor. The court held the programmes unconstitutional. Chief Justice Roberts summed up the plurality's view on racial classifications: "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race."

188. This was far from a complete victory for the plurality. In his concurring opinion, Justice Kennedy found the programmes unconstitutional. However, he would not go so far as to treat all racial balancing as per se unconstitutional. He considered the plurality opinion to represent "\005 an all-too-unyielding insistence that race cannot be a factor in instances, when, in [his] view, it

may be taken into account." (Seattle at 565).

189. Justice Kennedy found that schools have a compelling interest to prevent racial isolation or achieve a diverse student population. (Seattle at 572). Like Justice Powell's concurring opinion in Bakke, Justice Kennedy's concurring opinion leaves the door open for further use of racial classification for so-called benign purposes in school admissions.

190. More important than any one case are the standards by which the court scrutinized discriminatory legislation. Of course, Indian courts have not accepted the principles of narrow tailoring and strict scrutiny. Nevertheless, we should seek guidance from any corner and permit the light from any quarter.

191. Whenever legislation is challenged as unconstitutional, courts must ask themselves how much deference they will give to the legislature. The answer is that it depends on the nature of the impugned legislation. The United States Supreme Court has evolved three standards of review for Government action that treats different people differently. The first is the rational basis standard. When the classification is rationally related to any legitimate Government purpose, the court defers to the State and upholds the classification. This is the most deferential of the three standards. The second standard is intermediate scrutiny, which is less deferential to Government. Here, the court asks whether the classification is substantially related to any important Government purpose. The third and highest level of review is known as strict scrutiny, whereby the court requires that the classification are narrowly tailored to a compelling state interest. Strict scrutiny test is the least deferential to Government.

192. Of the classifications on which there is case law, the one that most closely resembles caste is race. This is because both are immutable traits. They are used by the powerful, or those seeking power, to justify oppression. Racism and casteism have long haunted both Nations. In the United States, race raises red flags. It is often, though not always, reviewed under strict scrutiny: "Government action dividing people by race is inherently suspect because such classifications promote 'notions of racial inferiority and lead to a politics of racial hostility,' (Croson at 102 L. Ed. 2d 854) and "racial classifications are simply too pernicious to permit any but the most exact connection between the justification and the classification." (Gratz v. Bollinger, 539 U.S. 244, 270 (quoting J. Stevens' dissent in Fullilove v. Klutznick, 448 U.S. 448, 537)).

193. Legislation whose text does not classify based on race is considered facially neutral. When facially neutral legislation has a disproportionate impact on a particular race, American courts ask whether it was passed with an intention to discriminate. If no intention is found, the rational basis test applies. [See: Hernandez v New York, 500 U.S. 352 (1991) (quoting from Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 264-265 (1977)]:
"A court addressing this issue must keep in mind the fundamental principle that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."

See also Washington v. Davis, 426 U.S. 229, 239 (1976). The exception to this rule is Yick Wo v. Hopkins, 118 U.S. 356 (1886), where extreme disproportionate impact warranted greater scrutiny. Where there is disproportionate impact and discriminatory intention, then even facially neutral legislation triggers strict scrutiny. However, in this framework, affirmative action classifies on the face of legislation and automatically gets strict scrutiny treatment.

194. As I have observed, American courts carefully review racial classifications. Given that the 93rd Amendment on its face discriminates against general category students, we should give it careful scrutiny. The Article 14 right to formal equality deserves as much. If 49.5% caste-based reservation was upheld in Sawhney I for Government employment, it follows that 49.5% caste-based reservation is permitted in aided educational institutions. While I compelled by Sawhney I to hold that the impugned legislation passes careful scrutiny with respect to reservation in aided institutions, its implementation is contingent upon the directions given in this opinion.

7 The Framers' ultimate goal: the Classless and Casteless society:

195. Did the original Framers intend to provide caste-based reservation in education to the lower classes? No, the original Framers did not. Soon after the Constitution was adopted, the very same Framers acted quickly to permit reservation for SC/ST/SEBCs in education by adding Art 15(4), vide the First Amendment, to the Constitution. In doing so, they deviated from their own goal \026 the casteless society would have to wait. In Sawhney I, the Court upheld this decision and bound us to a certain degree on this point. I have no choice but to uphold the impugned legislation by which the Government may still identify SEBCs, in part, by using caste.

196. Caste-based reservation was initially a temporary measure that was to only last for ten years. The original Framers considered caste-based reservation a necessary evil. Thus, they limited it in time. Extending this time limit has only exacerbated casteism.

197. The Parliamentary Debates clearly reflect that the ultimate aim of reservation was a casteless and classless society for India. To this end, reservation should only be given for a specific period of time. If these reservations or benefits have to continue perpetually, then the basic goal of achieving casteless and classless society would never be accomplished.

198. The need for caste-based reservation has "worn out" over time. Evidence for the proposition that caste is no longer a valid determinant of one's ability to move up in society is strong. More than the way society judges you based on caste, the relevant question is whether caste precludes you from rising. If caste doesn't, then what does? The answer is simple: money.

199. Income is a much better determinant of educational achievement than caste. The table below was derived from the Reproductive Child and Health Survey, 2002-2004 (600,000 households surveyed).

Average years of schooling:

	SC	OBC	Upper caste Hindu
Poorest Rural Quintile	1.6	1.7	2.2
Richest Rural Quintile	5.1	5.5	6.1

For the upper caste, caste barely helps. These numbers indicate that it is one's income, not caste, that makes a real difference in determining how much schooling one completes. Therefore, if income be the bar to education, economic criteria should be the means by which we identify beneficiaries of special provisions under Article 15(5).

7 No original intent to provide caste-based quotas in education:

200. As drafters, the original Framers were prolific. They made our Constitution the world's longest \026 removing as many doubts as possible and in that way limiting the Court's role. The Constitution contains a number of Articles that reserve seats for various groups. The original Framers, however, imposed various limitations on reservation. These limitations provide insight into the original Framers' compromise between formal and substantial/egalitarian equality.

201. Reservation is only provided for certain groups (SC, ST and backward classes) in certain areas of the public sector. (See: Article 16(4) (reservation of posts in Government service for backward classes), Article 330 (reservation of seats for SC and ST in the Lok Sabha) and Article 332 (reservation of seats for SC and ST in Legislative Assemblies of the States)).

202. Dr Ambedkar stated that "the report of the Minorities Committee provided that all minorities should have two benefits or privileges, namely representation in the legislatures and representation in the services." (emphasis added) (See: CAD, 26 August 1949, vol. 9, p. 702). Given this limitation, we must take extra caution when reviewing the constitutionality of adding additional benefits.

203. Article 334 fixed a 10-year time limit on the legislative reservations provided in Articles 330 and 332. In the discussion regarding draft Article 292, Sardar Hukam Singh said, "we are accepting this reservation of seats [in legislative bodies] as an unavoidable evil for the present, thought it is only for the Scheduled Castes and scheduled tribes." (See: p. 645, Constituent Assembly Debates, Vol. 9, 24 August 1949).

204. Shri Singh's comment sums up the limitations on legislative reservation. OBC/SEBCs were excluded, and reservations were limited in time. Unlike the legislative reservations, Article 16(4) contains no fixed time limit. It does, however, preclude the State from making reservations in Government service if the backward classes are adequately represented. The idea is that, at some point in time, the backward classes would no longer need reservations.

205. In discussing draft Article 10 (Article 16(4) of the Constitution), Pandit Hirday Nath Kunzru stated:

"We are all aware that when the Report of the Minorities Committee was considered by the House, the entire House was anxious that reservations of whatever kind should be done away with as quickly as possible. \005 whatever protection might be considered necessary now, should be granted temporarily only, so that the population of the county might become fully integrated, and no community or class might be tempted to claim special advantage for itself." (CAD Vol.7 dated 30th November 1948, p. 681)"

(emphasis supplied)

Instead of moving to remove reservations, the Parliament has gone the other way by extending time limits and adding beneficiaries. Article 15(5) is just the latest example.

206. While the original Framers went out of their way to put SC/ST in the Parliament and State Assemblies and SC/ST/backward classes in Government service, they did not reserve a single classroom seat. Instead, Article 29(2) prohibited caste-based discrimination in admissions, and Article 15(2) prohibited caste-based discrimination in general. Education was to remain reservation-free.

207. When preferential treatment was given in regard to education, it was limited to educational grants. There was no question of doling out reservations for special groups. Article 337 provided educational grants to Anglo-Indian schools for the benefit of that community. In the spirit of conciliation, the original Framers allowed the grants that were already going to those schools to continue for 10 years. (See: p 936-941 of Constituent Assembly Debates, Vol. 8 1949).

208. Rather than advocate for reservation, the original Framers preferred free/compulsory education and scholarships. In the debate on Draft Article 294, Shri Brajeshwar Prasad stated that reservation in legislative bodies would fail to uplift SC/ST. Instead, he suggested that:

"it should be laid down clearly in express terms that \005 free education shall be imparted to them. \005 [and] for the tribals and Harijans provision must be made in the constitution that free agricultural lands should be given to them. If we cannot give any one of these, I am quite clear in my own mind that by giving them a few seats here and there, their economic condition and their educational level will in no way be improved. (CAD, Vol. 9, 24 August 1948, pages 663-664)" (emphasis supplied)

209. Shri Prasad's comments are relevant because he recognizes the limited effect of reservation. Rather than reserve seats for a few, he advocated for free education for all.

210. In the debate regarding Article 15 of the Constitution, Syed Abdur Rouf summed up the essence of the provision: "The intention of this article is to prohibit discrimination against citizens." (See: p. 650 of CAD, Vol.7, 29 Nov 1948). This intention was only qualified for women and children. In fact, the original Framers rejected an amendment that would have watered down Article 15's prohibition against discrimination. Prof. K. T. Shah sought special protection for SC/ST. He wanted to ensure that Article 15 would allow SC/ST to benefit from affirmative action. To this end, he introduced an amendment that would have altered 15(3) to read as follows: "Nothing in this article shall prevent the State from making any special provision for women and children or for the Scheduled Castes or backward tribes, for their advantage, safeguard or betterment." (Shah amendment in italics). Prof. Shah proposed the amendment:

"\005 so that any special discrimination in favour of them may not be regarded as violating the basic principles of equality for all classes of citizens in the country. They need and must be given for some time to come at any rate, special treatment in regard to education, in regard to opportunity for employment, and in many other cases where their present inequality, the present backwardness is only a hindrance to the rapid development of the country. \005 equality is not to be equality of name only or on paper

only, but equality of fact. [pages 655-656 CAD, Vol. 7, 29 November 1948]."
(emphasis supplied)

211. Relevant to the instant case, he explains that his amendment would allow the State to provide SC/ST special treatment in regard to education. In other words, Prof. Shah effectively wanted the equivalent to 15(4) and 15(5) but did not get it. His amendment was negated. (p. 664 of Constituent Assembly Debates, Vol. 7, 29 November, 1948).

212. Dr. Ambedkar disagreed with Prof. Shah on the limited ground that it would have given States the green light to segregate SC/ST from general category students:
"The object which all of us have in mind is that the Scheduled Castes and Scheduled tribes should not be segregated from the general public. For instance, none of us, I think, would like that a separate school should be established for the Scheduled Castes \005 If these words are added, it will probably give a handle for a State to say, 'Well, we are making special provision for the Scheduled Castes.' To my mind they can safely say so by taking shelter under the article if it is amended in the manner the Professor wants it."
[page 661, CAD, Vol. 7, 29 November 1948].

213. Dr Ambedkar did not reject the Shah amendment because it would have allowed the States to implement affirmative action for SC/ST in education. He was concerned that special provisions would lead to negative discriminatory action in the guise of affirmative action. Whether or not this would have happened is unclear, but his concern seems well placed. A similar problem arises today, when the general category looks down upon or questions the qualifications of SC/ST/OBC professionals. Though the individual may have earned admission on marks alone, others may presume that reservation was a factor. Such a belief, regardless of veracity, cannot bode well for the career prospects of SC/ST/SEBCs. Irrespective of the reason for which the Shah amendment was rejected, the original Framers contemplated special provisions for SC/ST that would have included education. At the end of the day, they decided that only women and children should benefit from discriminatory provisions.

214. Article 15(4) and the Shah amendment only differ in that Article 15(4) provides special provisions to SC/ST and SEBC, while Shah only gave the same to SC/ST. Of course, if the original Framers rejected special provisions for SC/ST, they would have done the same with respect to SEBC/SC/ST. In sum, by limiting Article 15(3) to women and children and rejecting an amendment equivalent to Article 15(4), the original Framers' intent was clear: no special provisions for backward classes (SEBC/SC/ST) in education were to dilute Article 15(1)'s prohibition against discrimination based on caste.

215. In the instant case, the Union of India argued that Article 15(4), the First Amendment to the Constitution, reflects the intent of the original Framers because it was passed by the same members that drafted the original Constitution. In the Parliamentary debates in 1951, Prime Minister Nehru argued in favour amending the Constitution. He and other Framers, as distinguished from the original Framers who had drafted the original Constitution, did not hide their disapproval of Champakam Dorairajan (supra). Article 15(4) was to overturn

that judgment. To justify Article 15(4), which represented a dramatic departure from equality as envisaged in Articles 15(2), (3) and 29(2), Pandit Nehru said that Article 15(4) would give effect to "what \005 was really intended or should be intended." Yet, the original Framers, as explained above, had no intention of providing special provisions for SC/ST in education (and a fortiori if not for them, nor for SEBC). What "should be intended" is a far cry from what they specifically enacted and specifically rejected. It follows that Article 15(4) deviated from the original Framers' original intent.

7 Limitations on Reservation must be seen in the light of providing a casteless society:

216. Seeking to remove the blight created by caste, the original Framers were social reformers. "The social revolution meant 'to get (India) out of the medievalism based on birth, religion, custom, and community and reconstruct her social structure on modern foundations of law, individual merit, and secular education'." (See: Granville Austin, Indian Constitution: Cornerstone of a Nation at page 26, 1st Ed, 1972, Oxford University press: (quoting from: K. Santhanam (an Assembly member) in Magazine Section, The Hindustan Times New Delhi, 8 September 1946).

217. India's first President Rajendra Prasad assured the Nation that the assembly and the Government's aim was to "end poverty and squalor \005 to abolish distinction and exploitation and to ensure decent conditions of living". [Cornerstone at page 27, fn. 5 (quoting from Prasad in CAD V, I, 2)]. The original Framers took steps to abolish caste-based distinction. For example, they outlawed untouchability in Article 17, promised all equal treatment before the law in Article 14, prohibited discrimination based on caste in 15(1) and 29(2) and selected joint over separate electorates. The legislative reservations for SC/ST were an exception to overarching goal of creating a casteless society; that is why they were set to expire in 1960. With respect to electorates, Granville Austin explains:

"Desiring above all to promote national unity, members of the Constitutional Assembly rejected these devices by substituting direct elections for indirect in lower houses, by rejecting separate electorates in favour of joint electorates and by abolishing \005 except for Scheduled Castes and Tribes \005 reserved seats. The Assembly believed, in Jenning's words, that 'to recognize communal claims . . . is to strengthen communalism'. [see: Austin, p. 323 of Cornerstone.]"
(emphasis added)

The same can be said today. Reservation based on caste strengthens communalism. Non-SEBCs naturally seek SEBC status so that they may capture SEBC benefits. Upper castes, denied a seat, harbor ill will against lower castes who gain admission (whether it was by merit or not).

218. These feelings are the basis for discriminatory action. On 16 September 2006, The Hindu reported: "While medical students at the All India Institute of Medical Sciences (AIIMS) have complained of caste discrimination, now doctors from the reserved category at the Guru Teg Bahadur Hospital (GTBH) too have written about 'biased attitude towards reserved category junior residents'."

219. Discrimination is not the only problem exacerbated by reservation. Given that reserved category students gain

admission with lower marks, it also stands to reason that they would exhibit less confidence in their studies when pitted against the general category. In her work on the unintended consequences of preferential treatment for minorities in college admissions in the United States, Marie Gryphon, a policy analyst for the Cato Institute (Washington, D.C.), writes: "\005recent research shows that affirmative action impedes academic achievement by undermining minority students' confidence. \005

Preferences harm students' self-images, and this harm has practical costs in terms of grades and graduation rates. Both studies build on earlier work by Stanford University sociologist Claude Steele, who coined the term "stereotype threat" to refer to the decline in performance suffered by members of groups who become afraid of confirming negative group stereotypes. Steele tested his theory by giving standardized exams to groups of white and African-American undergraduates at Stanford University.

Testers told some groups that the exam evaluated psychological factors related to testing, and that it was not a measure of ability. They told other groups that the exam measured their intellectual abilities, and in some instances had them indicate their race on the exam. The African-American students who had been implicitly "threatened" with the stereotype of minority academic inferiority did markedly worse on the exam than black students in the other groups. \005

Even minority students who do not need preferences respond to an environment characterized by the relative academic weakness of minorities by worrying about confirming a negative stereotype. [Researchers] also determined that vulnerability to Claude Steel's stereotype threat is related to lower grades earned by minority students." (See: p. 9-10 (internal citations omitted), Executive Summary, No. 540, April 6, 2005, "The Affirmative Action Myth.")

The point is that affirmative action produces consequences that may outweigh its supposed benefits.

220. To rid ourselves of reservation and its unintended consequences like casteism, we must focus our efforts on strengthening education at the primary and secondary level. Only then will we achieve the casteless/classless society the original Framers envisaged. And only then will there be reason to scrap reservation altogether.

221. In his speeches to the Parliament regarding 15(4), Prime Minister Nehru could not have been clearer: "After all the whole purpose of the Constitution, as proclaimed in the Directive Principles is to move towards what I may say a casteless and classless society" \005 and in an attempt to achieve an egalitarian society, "\005 we want to put an end to all those infinite divisions that have arisen in our social life; I am referring to the caste system and other religious divisions, call them by whatever name you like." (emphasis added). [Parliamentary Debates on 13 June, 1951 and 29 May, 1951 respectively].

7 If reservation is allowed, then how can a casteless society still be realized?

222. This raises the issue of how beneficiaries of special provisions are to be classified. As mentioned above, Mr Salve and other learned counsel for petitioners pleaded that the Government cannot go forward with the Reservation Act when it has yet to identify its beneficiaries. No one can say with certainty what percentage of the population is OBC, yet the Government is content with giving OBCs 27% of the seats in universities. We do not know what proportion of the population is OBC because the census does not count OBCs. It has been Central Government policy practically since Independence to avoid the question. Eminent American Professor Mark Galanter writes that the absence of caste data was the deliberate policy of Sardar Patel, the Home Minister until 1950. Mr. Patel rejected caste tabulation as a device to confirm the British theory that India was a caste-ridden country and as an expedient "to meet the needs of administrative measures dependent on caste division" (See: Professor Marc Galanter, (1978)"Who are the OBCs?" An Introduction to a Constitutional Puzzle. 13 Economic and Political Weekly 1812 at page 1824 at footnote 78 (quoting from Mr. Patel's 1950 address to the census conference). Taking an OBC census is horrifying because it encourages Government to enact policy on the basis of caste. Doing so only furthers the caste-divide, contrary to our constitutional aim. This has been recognized since 1950. If the Central Governments have consistently rejected an OBC census because it would promote casteism, how can this Central Government make reservation on the same ground? It is one thing to ask a citizen his caste, it is even worse to grant or reject his college application on that ground. The Government is between a rock and a hard place. The only way out is to use exclusively economic criteria. This would negate the need for a caste-based census while ensuring that reservation go to the poor, the group for which the Reservation Act was purportedly passed. The Parliament eventually settled on enabling States to provide provisions for "socially and educationally backward classes." Article 15(4). This Court has interpreted "backward classes" to include caste as one of the criteria of classification under Article 16(4). Sahwney I, para 859(3)(b). In other words, caste falls under class according to Sawheny I, para 859(3)(a).

7 Economic criteria allows for reservation on grounds other than caste:

223. Despite the goal of a casteless society, the Parliament allowed for caste-based reservation and, consequently, caste-based discrimination. Ultimately, they subjected Articles 29(2) and Article 15 to Article 15(4). Dr. Ambedkar saw no choice but to discriminate based on caste, stating that "if you make a reservation in favour of what are called backward classes which are nothing else but 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."

224. In draft article 10, Dr. Ambedkar tried to reconcile the view of those who were in favour of equality of opportunity with the demand of certain communities who remained neglected and who wanted to have a share in the administration. In doing so, he was clear that the concept of equality, which is the very basis of democracy, should not be violated. Part of his compromise meant that reservation had to remain reasonable. Explaining his views on the matter, he said:

"Supposing, for instance, we were to concede in full the demand of those communities who have not been so far employed in the public services to the fullest extent, what would really happen is, we shall be

completely destroying the first proposition upon which we are all agreed, namely, that there shall be an equality of opportunity. Let me give an illustration. Supposing, for instance, reservations were made for a community or a collection of communities, the total of which came to something like 70 per cent of the total posts under the State and only 30 per cent are retained as the unreserved. Could anybody say that the reservation of 30 per cent as open to general competition would be satisfactory from the point of view of giving effect to the first principle, namely, that there shall be equality of opportunity? It cannot be in my judgment. Therefore the seats to be reserved, if reservation is to be consistent with sub-clause (1) of Article 10, must be confined to a minority of seats. (see CAD, Vol.7, 30th November, 1948 pp 701-02)."

225. On 17th November, 1949, the Constituent Assembly began the third reading of the Constitution Bill. While replying to the debate, Dr. Ambedkar stated:
"This anxiety is deepened by the realization of the fact that in addition to our old enemies in the form of castes and creeds we are going to have many political parties with diverse and opposing political creeds. Will Indians place the country above their creed or will they place creed above country? I do not know. But this much is certain that if the parties place creed above country, our independence will be put in jeopardy a second time and probably be lost forever. This eventuality we must all resolutely guard against. We must be determined to defend our independence with the last drop of our blood. (See: CAD on 25th November, 1949 pp 977-978)"
(emphasis supplied).

226. Exhibiting tunnel vision, our First Parliament failed to look beyond caste. Another option was available, an option that adhered to the original Framers' ideals. Contrary to Dr Ambedkar's view, it was possible to provide reservation to backward classes without discriminating based on caste. Economic criteria target the poorest of the poor, irrespective of caste. As noted, these criteria also simultaneously remove the creamy layer.

227. One of the other prominent advocates of reservation later realised that the policy did more harm than good. Prime Minister Nehru wrote the following letter to the Chief Ministers on June 27th, 1961:
"I have referred above to efficiency and to our getting out of our traditional ruts. This necessitates our getting out of the old habit of reservations and particular privileges being given to this caste or that group. The recent meeting we held here, at which the chief ministers were present, to consider national integration, laid down that help should be given on economic considerations and not on caste. It is true that we are tied up with certain rules and conventions about helping Scheduled Castes and Tribes. They deserve help but, even so, I dislike any kind of reservation, more particularly in service. I react strongly against anything which leads to inefficiency and second-rate standards. I want my country to be a first class country in everything. The moment we encourage the second-rate, we are lost.

The only real way to help a backward group is to give opportunities for good education. This includes technical education, which is becoming more and more important. Everything else is provision of some kind of crutches which do not add to the strength or health of the body. We have made recently two decisions which are very important: one is, universal free elementary education, that is the base; and the second is scholarships on a very wide scale at every grade of education to bright boys and girls, and this applies not merely to literary education, but, much more so, to technical, scientific and medical training. I lay stress on bright and able boys and girls. I have no doubt that there is a vast reservoir of potential talent in this country if only we can give it opportunity.

But if we go in for reservations on communal and caste basis, we swamp the bright and able people and remain second-rate or third-rate. I am grieved to learn of how far this business of reservation has gone based on communal consideration. It has amazed me to learn that even promotions are based sometimes on communal and caste considerations. This way lies not only folly, but disaster. Let's help the backward groups by all means, but never at the cost of efficiency. How are we going to build our public sector or indeed any sector with second-rate people?"

7 Upon expiry of the time limit, the criteria for identifying OBCs should only be economic in nature because our ultimate aim is to establish a casteless and classless society

228. I am not the first to propose economic criteria as the exclusive means of identifying SEBCs. In Vasanth Kumar's case, counsel sought an opinion from the Court regarding reservations in employment and education for SC/STs and OBCs. The opinion would guide the Karnataka Government in implementing reservation. [para 1]. It serves our purposes to review their thorough analysis of the identification issue.

229. The Court in Vasanth Kumar observed as under:
"24. ... No one is left in any doubt that the future Indian Society was to be casteless and classless. Pandit Jawaharlal Nehru the first Prime Minister of India said that Mahatma Gandhi has shaken the foundations of caste and the masses have been powerfully affected. But an even greater power than Gandhi is at work, the conditions of modern life \027 and it seems at last this hoary and tenacious ralic of past times must die. (Discovery of India by Pandit Nehru, Ch VI, p 234) Mahatma Gandhi, the Father of the Nation said, "The caste system as we know is an anachronism. It must go if both Hinduism and India are to live and grow from day to day". In its onward march towards realising the constitutional goal, every attempt has to be made to destroy caste stratification. Article 38(2) enjoins the State to strive to minimise the inequality in income and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations. Article 46 enjoins duty to promote with special care the educational and economic interests of the weaker sections of the people, and in

particular, of the Scheduled Castes and Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation. Continued retention of the division of the society into various castes simultaneously introduces inequality of status. And this inequality in status is largely responsible for retaining inequality in facilities and opportunities, ultimately resulting in bringing into existence an economically depressed class far transcending caste structure and caste barrier. The society therefore, was to be classless casteless society. In order to set up such a society, steps have to be taken to weaken and progressively eliminate caste structure. Unfortunately, the movement is in the reverse gear. Caste stratification has become more rigid to some extent, and where concessions and preferred treatment schemes are introduced for economically disadvantaged classes, identifiable by caste label, the caste structure unfortunately received a fresh lease of life. In fact there is a mad rush for being recognised as belonging to a caste which by its nomenclature would be included in the list of socially and educationally backward classes. ... Rane Commission took note of the fact that there was an organised effort for being considered socially and educationally backward castes. Rane Commission recalled the observations in Balaji case [(1963) Supp (1) SCR 439] that "Social backwardness is on the ultimate analysis the result of poverty to a very large extent". \005 The Commission came to an irrefutable conclusion that amongst certain castes and communities or class of people, only lower income groups amongst them are socially and educationally backward. \005"

230. In this judgment, this Court further observed that if State patronage for preferred treatment accepts caste as the only insignia for determining social and educational backwardness, the danger looms large that this approach alone would legitimize and perpetuate the caste system. Caste-based reservation does not go well with our secular character as enshrined in the Preamble to the Constitution.

231. That said, the majority in Sawhney I later sided with Justice Chinnappa Reddy's view: caste can be a factor in identifying SEBCs. This view should not hold the day forever. Eventually, the words of Justice Desai should be revived.

232. Justice Desai wanted to achieve two goals with one fell swoop of the pen. Had his opinion prevailed (1) the creamy layer would have been removed ensuring that the truly deserving get the benefit and (2) the casteless society would have been furthered. To these ends, he would have applied economic criteria to remove the creamy layer and simultaneously rid reservation of caste.

233. He explained that poverty is the bane of Indian society. Given rampant poverty, it comes as no surprise that "\005 the bank balance, the property holding and the money power determine the social status of the individual and guarantee the opportunities to rise to the top echelon." [Vasanth Kumar at para 27]. As a result, the way "\005wealth is acquired has lost significance." And "upper caste does not enjoy the status or respect \005 any more even in rural areas what to speak of highly westernised urban society." Finally, his Lordship recognized that creamy layer exclusion is inherently linked with identification based on economic criteria, i.e., "occupation, income and land

holdings":
"30. \005 If economic criterion for compensatory discrimination or affirmative action is accepted, it would strike at the root cause of social and educational backwardness, and simultaneously take a vital step in the direction of destruction of caste structure which in turn would advance the secular character of the Nation. This approach seeks to translate into reality the twin constitutional goals: one, to strike at the perpetuation of the caste stratification of the Indian Society so as to arrest progressive movement and to take a firm step towards establishing a casteless society; and two, to progressively eliminate poverty by giving an opportunity to the disadvantaged sections of the society to raise their position and be part of the mainstream of life which means eradication of poverty."

234. Economic criteria must include occupation and land holdings because income alone is insufficient. To decrease the likelihood that the undeserving evade identification, it is wise to employ more than one criterion.

235. In Vasanth Kumar, Justice Chinnappa Reddy departs from Justice Desai's use of economic criteria as the sole means of identification. Nevertheless, he recognizes that " \005 attainment of economic equality is the final and only solution to the besetting problems." In Justice Chinnappa Reddy's opinion, it is easier to classify based on caste than economic criteria:
"80: Class poverty, not individual poverty, is therefore the primary test. Other ancillary tests are the way of life, the standard of living, the place in the social hierarchy, the habits and customs, etc. etc. Despite individual exceptions, it may be possible and easy to identify socially backwardness with reference to caste, with reference to residence, with reference to occupation or some other dominant feature. Notwithstanding our antipathy to caste and sub-regionalism, these are facts of life which cannot be wished away. If they reflect poverty which is the primary source of social and educational backwardness, they must be recognised for what they are along with other less primary sources."

It all depends on how one defines "class." Once economic criteria remove the relatively wealthy families (from all castes and communities), a "class" will remain. This "class" is known as "the poor." The class would share the same characteristic, irrespective of caste. They would all lack money.

236. In a number of judgments, this Court has spelt out our constitutional philosophy regarding caste. On numerous occasions, this Court has proclaimed that the cherished goal of the Nation is to realise a casteless society. In Shri V. V. Giri v. Dippala Suri Dora & Others (1960) 1 SCR 426 at 442, the Court observed as under:-
"\005\005..The history of social reform for the last century and more has shown how difficult it is to break or even to relax the rigour of the inflexible and exclusive character of the caste system. It is to be hoped that this position will change, and in course of time the cherished ideal of casteless society truly based on

social equality will be attained under the powerful impact of the doctrine of social justice and equality proclaimed by the Constitution and sought to be implemented by the relevant statutes and as a result of the spread of secular education and the growth of a rational outlook and of proper sense of social values; but at present it would be unrealistic and utopian to ignore the difficulties which a member of the depressed tribe or caste has to face in claiming a higher status amongst his co-religionists. It is in the light of this background that the alternative plea of the appellant must be considered."

237. In N M. Thomas (supra), a seven Judge Bench observed as under:
"This consummation is accomplished only when the utterly depressed groups can claim a fair share in public life and economic activity, including employment under the State, or when a classless and casteless society blossoms as a result of positive State action."

238. In his dissenting opinion, in Sawhney I Justice Kuldip Singh observed as under:
"339. Secularism is the basic feature of the Indian Constitution. It envisages a cohesive, unified and casteless society. ... The prohibition on the ground of caste is total, the mandate is that never again in this country caste shall raise its head. Even access to shops on the ground of caste is prohibited. The progress of India has been from casteism and egalitarianism from feudalism to freedom.

340. The caste system which has been put in the grave by the framers of the Constitution is trying to raise its ugly head in various forms. Caste poses a serious threat to the secularism and as a consequence to the integrity of the country. Those who do not learn from the events of history are doomed to suffer again."

239. In Akhil Bhartiya Soshit Karamchari Sangh (Railway) (supra), it was observed as under::
"14. These forces nurtured the roots of our constitutional values among which must be found the fighting faith in a casteless society, not by obliterating the label but by advancement of the backward \005

240. Returning to Vasanth Kumar, one of Justice Reddy's arguments deals with the level of effort required to identify the poor compared to the effort expended on identifying caste. In the current context, a number of factors, including economic, are measured to determine SEBC status. (See: the National Commission of Backward Classes' Guidelines for considerations of Requests for inclusion and complaints of under-inclusion in the Central List of Other Backward Classes).

241. The National Commission for Backward Classes aside, I have set out to eventually install a system that only takes cognizance of economic criteria. Using purely economic criteria would lighten the identification load, as ascertaining caste would no longer be required. Respondents and others level a common criticism against the exclusive use of economic criteria. Most of the country is poor.

242. Thus, too many people would be eligible for the benefit.

This is only a problem if you hand out reservations based on the group's proportion of the total population. Such a reservation would be excessively unreasonable and would likely violate the Balaji cap of 50% [see M.R. Balaji & Ors. v. State of Mysore [(1963) Supp (1) SCR 439]. If economic reservation were limited to a reasonable number, it could be upheld.

243. In addition to the problem of extending the benefit to too many, Reddy, J. cannot contemplate the idea of bestowing reservation on an economically poor Brahmin. "The idea that poor Brahmins may also be eligible for the benefits of Articles 15(4) and 16(4) is too grotesque even to be considered." He says that they are not "socially backward", thus they should not receive the benefit. But can one call a Brahmin sweeper, poor by occupation, socially forward? To do so would be a stretch.

244. The majority in Sawhney I reiterates Justice Chinnappa Reddy's message in Vasanth Kumar. They rejected the sole use of economic criteria to exclude the creamy layer, deeming it to be just one measure of advancement. Justice Jeevan Reddy qualified that sentiment to an extent. If income were extremely high, it could be the sole factor. In such a case, income alone would ensure that one were socially forward. Justice Jeevan Reddy was convinced that caste mattered more than money \026 especially in rural areas. He makes his point by way of example at para 792:
"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)?"

245. Unless the carpenter became a factory owner, where his income would be a reflection of his status, Justice Reddy would answer his own question in the negative. This is where we part ways. Today, the NRI carpenter's children will have likely attended the best schools, tuitions and coaching classes that money can buy. These children do not need special provisions. That is why I am removing the creamy layer, calling for a time-limit on caste-based reservation and urging the Government to use exclusively economic criteria to identify OBCs who may avail of special provisions.

246. The United States Supreme Court has taken a similar position with regard to setting a time-limit on race-based affirmative action. As mentioned above, Justice Sandra Day O'Connor opined that there may be a time-limit to promoting diversity via preferential treatment for certain races: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." (See: Grutter at 343).

247. In our context, one need not look past the Parliament's affinity with extending time-limits on reservation to see that only the judiciary can put a stop to caste-based reservation. Article 334 originally said that reservation for SC/ST/Anglo-Indians in the Lok Sabha and State Legislative Assemblies would expire on the Constitution's tenth birthday. The Parliament later substituted "ten" for "thirty years" vide the 45th Amendment. When that was to expire, the Parliament extended it for another ten years vide the 62nd Amendment. When that was to expire, it extended it for another ten years vide the 79th Amendment. History has shown that it is not politically feasible for the

Parliament to say "no" to reservation \026 especially when caste is involved.

248. Nevertheless, I have noted that Sawhney I rejects purely economic criteria (occupation/income/property holdings/or similar measures of economic power) with respect to classification under 16(4). [para 859, 4(a)]. Sawhney I's nine-Judge holding precludes us from striking the impugned legislation to the extent that it has not yet ruled out the use of caste-based criteria for identifying SEBC status. It also precludes us from forcing the Government to wean itself off caste-based reservation by a certain date. In order to achieve a casteless and classless society, after a lapse of ten years, special preference or reservation should be granted only on the basis of economic criteria as long as grave disparity and inequality persist.

7 Secularism is Part of the Basic Structure

249. To be clear, there is no claim arising out of the goal to promote a casteless society. No right of action exists. The right of action is found in secularism. Though not explicitly found in the un-amended Constitution, the original Framers made it clear that India was to be a secular democracy. Discrimination based on religion is prohibited by Articles 14, 15(1) and 15(2), 16(1) and 16(2), 29(2) and 325. The original Framers went out of their way to ensure that minorities would be able to maintain their identity. (See: Articles 28, 29 and 30). Article 27 precludes the state from adopting a state religion, whereas Article 25 grants citizens the right to profess, practice and propagate religion. With rights come responsibilities. One of them is found at Article 51A(3), which instructs citizens "\005 to promote harmony and spirit of brotherhood amongst all people \005 transcending religious \005 diversities."

250. Relying on these provisions, Bommai (1994) 3 SCC 1 at para 304 declared secularism "\005.a constitutional goal and a basic feature of the Constitution as affirmed in Kesavananda Bharati and Indira N. Gandhi v. Raj Narain. Any step inconsistent with this constitutional policy is, in plain words, unconstitutional." The Court reasoned that the original Framers adopted Articles 25, 26 and 27 so as to further secularism. (See: Bommai at para 28 (Ahmadi, J.)). Secularism was very much embedded in their constitutional philosophy. [para 29]. During the Constituent Assembly Debates, Pandit Laxmikantha Mitra stated (as quoted at para 28 of Bommai):

"By secular State, as I understand it, it is meant that the State is not going to make any discrimination whatsoever on the ground of religion or community against any person professing any particular form of religious faith. \005 no citizen \005 will have any preferential treatment \005 simply on the ground that he professed a particular form of religion."

This is relevant today because quotas are state-sponsored discrimination against those who are not deemed SEBCs - caste being a by-product of religion. Though affirmative action is allowed, there is a point at which it violates secularism. Finally, I note that the 42nd Amendment, which formally inserted secularism into the Preamble, merely made what was already implicit explicit. (See Bommai at para 29).

7 Conclusion on the Casteless Society

251. In conclusion, the First Parliament, by enacting Article 15(5), deviated from the original Framers' intent. They passed an amendment that strengthens, rather than weakens casteism. If

caste-based quotas in education are to stay, they should adhere to a basic tenet of secularism: they should not take caste into account. Instead, exclusively economic criteria should be used. For a period of ten years, other factors such as income, occupation and property holdings etc. including caste, may be taken into consideration and thereafter only economic criteria should prevail. Sawhney I has tied our hands. I nevertheless believe that caste matters and will continue to matter as long as we divide society along caste-lines. Caste-based discrimination remains. Violence between castes occurs. Caste politics rages on. Where casteism is present, the goal of achieving a casteless society must never be forgotten. Any legislation to the contrary should be discarded.

5. Are Articles 15(4) and 15(5) mutually contradictory, such that 15(5) is unconstitutional?

252. While contradictory, I am able to read them harmoniously. Learned senior counsel for petitioners, Mr. K.K. Venugopal, argued that Articles 15(5) and 15(4) are inconsistent to the extent that 15(5) exempts minority institutions from reservation and 15(4) incorporates aided minority institutions in the reservation scheme. Because both provisions contain "non-obstante clauses", they render each other void. He further submitted that the Court is in the position of having to choose between them in regard to this inconsistency. He provided three tests of statutory interpretation that give us guidance in resolving such a conflict.

253. First, if the Court cannot harmonize the two provisions, it must invalidate the one that completely destroys the other's purpose. Sarwan Singh & Another v. Kasturi Lal (1977) 1 SCC 750, pages 760-761, at para 20). In the instant case, one of the express purposes of 15(5) was to exempt minority institutions and thus avoid conflict with Article 30(1). This is found in the text of Article 15(5) itself.

254. With nothing in the text of 15(4) to guide us, we turn to its Statement of Objects and Reasons:
"\005\005The Act also amplifies Article 15(3) so as to ensure that any special provisions that the State may make for the educational, economic or social advancement of any backward class citizens may not be challenged on the ground of being discriminatory. "

255. Thus, Article 15(4) was not passed with an express intention to include minority institutions; nor did it arise out of a case in which minority institutions were a party. Then again, it was open to the First Parliament to exclude minority institutions from the beginning. Articles 15(4) and 15(5)'s purposes do not necessarily conflict. I find the first test inconclusive and thus turn to the other ones. The second test asks which provision came into effect at a later date (i.e., was "later in time?")? That which is later shall prevail. Here, 15(5) was enacted later in time. In J.K. Cotton Spinning and Weaving Mills Co. Ltd. v. State of Uttar Pradesh & Others AIR 1961 SC 1170 at page 1174, para 9, I find the third test; it provides that the specific clause must trump the general. Article 15(5) is specific in that it refers to special provisions that relate to admission in educational institutions, whereas 15(4) makes no such reference to the type of entity at which special provisions are to be enjoyed.

256. Because 15(5) is later in time and specific to the question presented, it must neutralize 15(4) in regard to reservation in education. Mr K. Parasaran, learned senior counsel for the

respondents, correctly pointed out that constitutional articles are to be read harmoniously, not in isolation. (See: T.M.A. Pai (supra) at page 582, para 148). Our interpretation is harmonious because Article 15(4) still applies to other areas in which reservation may be passed.

6. Does Article 15(5)'s exemption of minority institutions from the purview of reservation violate Article 14 of the Constitution?

257. Given the inherent tension between Articles 29(2) and 30(1), I find that the overriding constitutional goal of realizing a casteless/classless society should serve as a tie-breaker. We will take a step in the wrong direction if we subject minority institutions (even those that are aided) to reservation.

258. Minority aided institutions were subject to a limited form of reservation. In order to preserve the minority character of the institution, reservation could only be imposed to a reasonable extent. Minority aided institutions could select their own students, contingent upon admitting a reasonable number of non-minority students per the percentage provided by the State Government. This conclusion was derived from two conflicting constitutional articles. Of course, I am only concerned with minority aided institutions because I have already determined that the State shall not impose reservation on unaided institutions (minority or non-minority).

259. Article 30(1) provides that "all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice." Article 29(2) states that "no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them."

260. In other words, 30(1) by itself would allow minority aided institutions to reject all non-minority candidates, and 29(2) by itself would preclude the same as discrimination based solely on religion. Yet neither provision exists by itself. Rather than disturb the Constitution, this Court struck a compromise and diluted each provision in order to uphold both. Reading Articles 30(1) and 29(2) harmoniously, Kerala Education Bill provided that once minority institutions receive aid, a sprinkling of outsiders must be admitted.

261. "Sprinkling" ensured that the minority character of the institution would not be lost. In regard to the "sprinkled" seats, minority institutions cannot discriminate based on religion in violation of Article 29(2). At the same time, if the State compelled aided minority institutions to take too many non-minority students, the institution would be "minority" in name only. But what does "too many" mean? Can "sprinkling" be quantified? Clearing up the ambiguity, St. Stephen's held that minority institutions must make 50% of their seats available to outsiders and that admission for the other 50% (its own community) must be done on merit. Pai later rejected the rigidity attached to this fixed percentage. Along these lines, Pai returned to a more flexible standard, one akin to "sprinkling" in Kerala Education Bill: the moment a minority institution takes aid, it has to admit non-minority students to a reasonable extent, whereby the character of the institution was maintained and yet citizens' Article 29(2) rights were not subverted. (Also see: Pai at para 149).

Thus, two admission pools were created for aided minority

institutions: minority and non-minority. In the minority pool, merit was to be observed. From the non-minority pool, reservations for the weaker sections may be made while the remaining seats, if any, would be distributed based on merit to non-minority students.

"\005 It would be open to the state authorities to insist on allocating a certain percentage of seats to those belonging to weaker sections of society, from amongst the non-minority seats." [Pai at para 152].

262. With regard to the percentage of reservation, the State Governments were to determine the percentage of non-minority seats according to the needs of that State. As a compliment to reservation, aided minority institutions were also subject to regulation of administration and management. Pai declared at para 72 as noted above that:

"Once aid is granted to a private professional educational institution, the Government or the state agency, as a condition of the grant of aid, can put fetters on the freedom in the matter of administration and management of the institution. The state, which gives aid to an educational institution, can impose such conditions as are necessary for the proper maintenance of the high standards of education as the financial burden is shared by the state. \005"

263. In addition to the general power to impose conditions that seek to maintain high standards or "excellence in education," the State could implement the same under a related but different rationale. That is, said regulations could be upheld in the name of national interest. [Pai at para 107]. Yet the Government could not destroy the minority character of an institution. [para 107]. Nor could it obliterate the establishment or administration of a minority institution. [para 107]. A balance was to be struck between (a) maintaining academic quality and (b) preserving the minority right to establish/administer educational institutions. Regulations that embraced these two objectives were considered reasonable. [Pai at para 122].

264. A question of great import is whether Article 30 was designed to put minorities on equal or higher footing than non-minorities. This question played out in detail in a debate between Khare, C.J. and Justice Sinha in Islamic Academy. Writing for the majority, Chief Justice Khare takes issue with Pai. The Chief Justice says that Pai has wrongly categorized minority rights as equal to those of the non-minority. He has a point. Minorities can establish and administer institutions for their communities per Article 30; non-minorities cannot. His Lordship observed: (para 9 page 723)

"\005We 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 a 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\005"

Relying on St. Xavier’s case (1975) 1 SCR 173, Pai concluded

that the object of Article 30 was to ensure minorities of equal treatment and nothing more.

265. It was observed in St. Xaviers College case, at page 192, 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." The minority institutions must be allowed to do what the non-minority institutions are permitted to do. [Pai at para 138].

266. In contrast to the majority in Islamic, Justice Sinha concludes that Article 30(1) raises minorities to an equal platform and no higher. Relevant portion is reproduced hereinbelow:

"The statement of law contained in paras 138 and 139 is absolutely clear and unambiguous and no exception can be taken thereto. The doubt, if any, that the minorities have a higher right in terms of Article 30(1) of the Constitution of India may be dispelled in clearest terms inasmuch as the right of the minorities and non-minorities is equal. Only certain additional protection has been conferred under Article 30(1) of the 'Constitution of India to bring the minorities on the same platform as that of non-minorities as regards the right to establish and administer an educational institution for the purpose of imparting education to members of their own community whether based on religion or language. [see: Islamic Academy at para 105]."

267. Justice Sinha considers it constitutionally immoral to discriminate against non-minorities in the guise of protecting the constitutional rights of minorities. [See: Islamic Academy at para 118]. Even in the face of Articles that provide preferential treatment to minority or weaker sections, e.g., 30(1), 15(4) and 16(4), the right to equality must mean something.

268. Justice Khare, as he then was, concludes that original Framers conferred Article 30(1) on minorities in order to instill in them a sense of confidence and security. [Pai at page 615 at para 229]. Their right to establish and administer educational institutions could not be usurped by mere legislation. Khare, J. stated at para 229 p.615:-

"Thus, while maintaining the rule of non-discrimination envisaged by Article 29(2), the minorities should have also right to give preference to the students of their own community in the matter of admission in their own institution. Otherwise, there would be no meaningful purpose of Article 30(1) in the Constitution. True, the receipt of State aid makes it obligatory on the minority educational institution to keep the institution open to non-minority students without discrimination on the specified grounds. But, to hold that the receipt of State aid completely disentitles the management of minority educational institutions from admitting students of their community to any extent will be to denude the essence of Article 30 of the Constitution. It is, therefore, necessary that the minority be given preferential rights to admit students of their own community in their own institutions in a reasonable measure otherwise there would be no meaningful purpose of Article 30 in the Constitution."

269. Minorities possess one right or privilege that non-minorities do not: establishing and administering institutions for their community. The right to admit your own students in aided minority institutions was subject to admitting a reasonable number of outsiders. In the instant case, aided minority institutions stand to benefit from the Reservation Act: instead of having to admit a reasonable number of outsiders they would be exempted from reservation. However, their non-minority counterparts would not. Does this elevate their status? While it does to a certain extent, however, we must also keep our constitutional goal and philosophy in mind. Given the ultimate goal of furthering a classless/casteless society, there is no need to go out on a limb and rewrite them into the Amendment. Such a ruling would subject even more institutions to caste-based reservation. This would be a step back for the Nation, furthering the caste divide. I refuse to go in that direction.

7) Are the standards of review laid down by the U.S. Supreme Court applicable to our review of affirmative action under Article 15(5) and similar provisions?

270. As noted above, U.S. law is, of course, not binding but does have great persuasive value. This is because their problem of race is akin to our problem of caste. Where others have reviewed similar issues in great detail, it behooves us to learn from their mistakes as well as accomplishments.

Mr. R. Venkataraman, former President of India in a foreword to a book of eminent constitutional expert Dr. L.M. Singhvi "Democracy And Rule of Law : Foundation And Frontiers", has aptly observed which reads as under:

"Society progresses only by exchange of thoughts and ideas. Imagine what a sorry state the world would have been in had not thoughts and ideas spread to all corners of the globe. Throughout history, philosophers, reformers, thinkers, and scholars have recorded their thoughts, regardless of whether they were accepted or not in their times, and thus contributed towards progress of humankind. India was the first to encapsulate this seminal global thought. The Rig Veda says:

Ano bhadrah Krtavo yantu Viswatah

Let noble thought come to us from every side."

8) With respect to OBC identification, was the Reservation Act’s delegation of power to the Union Government excessive?

271. It is not an excessive delegation. I agree with the Chief Justice’s reasoning at para 185 of his judgment.

9) Is the impugned legislation invalid as it fails to set a time-limit for caste-based reservation?

272. It is not invalid because it fails to set a time-limit. Given the Parliament’s history of extending time-limits on other reservation schemes, there is much force to the argument that the Parliament will forever continue to extend reservations. As noted above, it is consistent with our constitutional goal of achieving a classless/casteless society that a time-limit be set. But I am bound by Sawhney I and believe that only a larger bench could

make such a ruling. A larger bench could certainly hold that only economic criteria could be used to identify SEBCs and that it should be done by a certain date.

10) At what point is a student no longer Educationally Backward and thus no longer eligible for special provisions under 15(5)?

273. Once a candidate graduates from a university, he must be considered educationally forward. Senior counsel for petitioners, Mr. P.P. Rao, contended that those who have completed Plus 2 should be considered educationally forward. In other words, they would no longer be eligible for reservation in university or post-graduate studies. There is some force in this argument where only 18% in the relevant age-group have completed Plus 2. From this vantage point, this means that they are educationally elite. But the answer to most questions in law is not so simple. The answer often depends on the circumstances surrounding the issue. In the marketplace, a candidate who has completed higher secondary education cannot be considered "forward". The real value of the higher secondary degree is that it is a prerequisite for college admissions. The general quality of education imparted upto Plus 2 is of extremely indifferent quality and apart from that, today some entry-level Government positions only accept college graduates. One is educationally backward until the candidate has graduated from a university. Once he has, he shall no longer enjoy the benefits of reservation. He is then deemed educationally forward. For admission into Master's programmes, such as, Master of Engineering, Master of Laws, Master of Arts etc., none will be a fortiori eligible for special benefits for admission into post graduation or any further studies thereafter.

11. Would it be reasonable to balance OBC reservation with societal interests by instituting OBC cut-off marks that are slightly lower than that of the general category?

274. Balaji (supra) concluded that reservation must be reasonable. The Oversight Committee has made a

recommendation that will ensure the same. At page 34 of Volume I of its Report, the Oversight Committee recommended that institutions of excellence set their own cut off marks such that quality is not completely compromised. Cut offs or admission thresholds as suggested by the Oversight Committee are reproduced:

"4.4.2 The Committee recognizes that those institutions of higher learning which have established a global reputation (e.g. IITs, IIMs, IISc, AIIMS and other such exceptional quality institutions), can only maintain that if the highest quality in both faculty and students is ensured. Therefore, the committee recommends that the threshold for admission should be determined by the respective institutions alone, as is done today, so that the level of its excellence is not compromised at all.

4.4.3 As regards 'cut-offs' in institutions other than those mentioned in para 7, these may be placed somewhere midway between those for SC/ST and the unreserved category, carefully, calibrated so that the principles of both equity and excellence can

be maintained.

4.4.4 The Committee strongly feels that the students who currently tend to get excluded must be given every single opportunity to raise their own levels of attainment, so that they can reach their true potential. The Government should invest heavily in creating powerful, well designed and executed remedial preparatory measures to achieve this objective fully."

275. Standards of excellence however should not be limited to the best aided institutions. The Nation requires that its citizens have access to quality education. Society as a whole stands to benefit from a rational reservation scheme.

276. Finding 68% reservation in educational institutions excessive, Balaji at pages 470-471 (supra) admonished States that reservation must be reasonable and balanced against other societal interests. States have "\005 to take reasonable and even generous steps to help the advancement of weaker elements; the extent of the problem must be weighted, the requirements of the community at large must be borne in mind and a formula must be evolved which would strike a reasonable balance between the several relevant considerations." To strike such a balance, Balaji slashed the impugned reservation from 68 to less than 50%.

277. Balaji thus serves as an example in which this Court sought to ensure that reservation would remain reasonable. We heed this example. There should be no case in which the gap of cut off marks between OBC and general category students is too large. To preclude such a situation, cut off marks for OBCs should be set no lower than 10 marks below the general category.

278. To this end, the Government shall set up a committee to look into the question of setting the OBC cut off at nor more than 10 marks below that of the general category. Under such a scheme, whenever the non-creamy layer OBCs fail to fill the 27% reservation, the remaining seats would revert to general category students.

SUMMARY OF FINDINGS

1A. Whether the creamy layer be excluded from the 93rd Amendment (Reservation Act)?

Yes, it must. The 93rd amendment would be ultra vires and invalid if the creamy layer is not excluded.
See paras 22, 25, 27, 30, 34, 35, 43, 44.

1B. What are the parameters for creamy layer exclusion?

For a valid method of creamy layer exclusion, the Government may use its post-Sawhney I criteria as a template.

(See: Office Memorandum dated 8-9-1993, para 2(c)/Column 3). I urge the Government to periodically revise the O.M. so that changing circumstances can be taken into consideration while keeping our constitutional goal in view.

I further urge the Government to exclude the children of former and present Members of the Parliament and Members of Legislative Assemblies and the said O.M. be amended accordingly.

See paras 55-57.

1C. Is creamy layer exclusion applicable to SC/ST?

In Indra Sawhney-I, creamy layer exclusion was only in regard to OBC. Justice Reddy speaking for the majority at para 792 stated that "this discussion is confined to Other Backward Classes only and has no relevance in the case of Scheduled Tribes and Scheduled Castes". Similarly, in the instant case, the entire discussion was confined only to Other Backward Classes. Therefore, I express no opinion with regard to the applicability of exclusion of creamy layer to the Scheduled Castes and Scheduled Tribes.
See para 34.

2. Can the Fundamental Right under Article 21A be accomplished without great emphasis on primary education?

No, it cannot.

An inversion in priorities between higher and primary/secondary education would make compliance with Article 21A extremely difficult. It is not suggested that higher education needs no encouragement or that higher education should not receive more funds, but there has to be much greater emphasis on primary education. Our priorities have to be changed. Nothing is really more important than to ensure total compliance of Article 21A. Total compliance means good quality education is imparted and all children aged six to fourteen regularly attend schools. I urge the Government to implement the following:

The current patchwork of laws on compulsory education is insufficient. Monetary fines do not go far enough to ensure that Article 21A is implemented. The Central Government should enact legislation that:

(a) provides low-income parents/guardians with financial incentives such that they may afford to send their children to schools;

(b) criminally penalizes those who receive financial incentives and despite such payment send their children to work;

(c) penalizes employers who preclude children from attending schools;

(d) the penalty should include imprisonment; the aforementioned Bill would serve as an example.

The State is obligated under Article 21A to implement free and compulsory education in toto.

(e) until we have accomplished for children from six to fourteen years the object of free and compulsory education, the Government should continue to increase the education budget and make earnest efforts to ensure that children go to schools and receive quality education;

(f) The Parliament should fix a deadline by which time free and compulsory education will have reached every child. This must be done within six months, as the right to free and compulsory education is perhaps the most important of all the fundamental rights. For without education, it becomes extremely difficult to exercise other fundamental rights.

See paras 126-131.

3. Does the 93rd Amendment violate the Basic Structure of the Constitution by imposing reservation on unaided institutions?

Yes, it does. Imposing reservation on unaided institutions violates the Basic Structure by stripping citizens of their fundamental right under Article 19(1)(g) to carry on an occupation. T.M.A. Pai and Inamdar affirmed that the establishment and running of an educational institution falls under the right to an occupation. The right to select students on the basis of merit is an essential feature of the right to establish and run an unaided institution. Reservation is an unreasonable restriction that infringes this right by destroying the autonomy and essence of an unaided institution. The effect of the 93rd Amendment is such that Article 19 is abrogated, leaving the Basic Structure altered. To restore the Basic Structure, I sever the 93rd Amendment's reference to "unaided" institutions.

See paras 132-182.

4. Whether the use of caste to identify SEBCs runs afoul of the casteless/classless society, in violation of Secularism.

Sawhney I compels me to conclude that use of caste is valid. It is said that if reservation in education is to stay, it should adhere to a basic tenet of Secularism: it should not take caste into account. As long as caste is a criterion, we will never achieve a casteless society. Exclusively economic criteria should be used. I urge the Government that for a period of ten years caste and other factors such as occupation/income/property holdings or similar measures of economic power may be taken into consideration and thereafter only economic criteria should prevail; otherwise we would not be able to achieve our constitutional goal of casteless and classless India.

See paras 194, 195, 231, 248, 251.

5. Are Articles 15(4) and 15(5) mutually contradictory, such that 15(5) is unconstitutional?

I am able to read them harmoniously.

See paras 252-256.

6. Does Article 15(5)'s exemption of minority institutions from the purview of reservation violate Article 14 of the Constitution?

Given the inherent tension between Articles 29(2) and 30(1), I find that the overriding constitutional goal of realizing a casteless/classless society should serve as a tie-breaker. We will take a step in the wrong direction if minority institutions (even those that are aided) are subject to reservation.
See paras 268-269.

7) Are the standards of review laid down by the U.S. Supreme Court applicable to our review of affirmative action under Art 15(5) and similar provisions?

The principles enunciated by the American Supreme Court, such as, "Suspect Legislation" "Narrow Tailoring" "Strict Scrutiny" and "Compelling State necessity" are not strictly applicable for challenging the impugned legislation.

Cases decided by other countries are not binding but do have great persuasive value. Let the path to our constitutional goals be enlightened by experience, learning, knowledge and wisdom from any quarter. In the words of Rigveda, let noble thoughts come to us from every side.
See para 183.

8) With respect to OBC identification, was the Reservation Act's delegation of power to the Union Government excessive?

It is not an excessive delegation. With respect to this issue, I agree with the reasoning of the Chief Justice in his judgment.

9) Is the impugned legislation invalid as it fails to set a time-limit for caste-based reservation?

It is not invalid because it fails to set a time-limit.
See para 272.

10) At what point is a student no longer Educationally Backward and thus no longer eligible for special provisions under 15(5)?

Once a candidate graduates from a university, the said candidate is educationally forward and is ineligible for special benefits under Article 15(5) of the Constitution for post graduate and any further studies thereafter.

See para 273.

11. Would it be reasonable to balance OBC reservation with societal interests by instituting OBC cut-off marks that are slightly lower than that of the general category?

It is reasonable to balance reservation with other societal interests. To maintain standards of excellence, cut off marks for OBCs should be set not more than 10 marks out of 100 below that of the general category.
See paras 274-278.

These Writ Petitions and Contempt Petition are accordingly disposed of. In the facts and circumstances, the parties are to bear their own costs.