REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 8170 OF 2009

Indian Medical Association …Appellant

Versus

Union of India & Ors. …Respondents

WITH

CIVIL APPEAL NO. 8171 OF 2009

Indian Medical Association …Appellant

Versus

Army College of Medical Sciences & Ors. …Respondents

WITH

WRIT PETITION (CIVIL) NO. 192 OF 2010

Ashima Mutneja …Appellant

Versus

Guru Gobind Singh
Indraprastha University & Ors. ...Respondents

WITH

WRIT PETITION (CIVIL) NO. 320 OF 2009

Rachit Gupta & Ors. …Appellants

Versus

Guru Gobind Singh
Indraprastha University & Anr. ...Respondents

WITH

WRIT PETITION (CIVIL) NO. 528 OF 2009

Ashima Mutneja …Appellant

Versus

Guru Gobind Singh
Indraprastha University & Anr. ...Respondents

JUDGEMENT

B.SUDERSHAN REDDY,J:

Where the mind is without fear and the head is held high
Where knowledge is free
Where the world has not broken up into fragments
By narrow domestic walls
Where words come out from the depth of truth

Where tireless striving stretches its arms towards perfection
Where the clear stream of reason has not lost its way
Onto the dreary desert sand of dead habit
Where the mind is led forward by thee
Into ever-widening thought and action
Into that heaven of freedom, my Father, let my country awake.

- Poet Laureate, Rabindranath Tagore

I.

2. The vexed question of access to education has hounded India from times immemorial. The futile pleadings of an Ekalavya for a teacher, that could not even be suppressed in the recesses of our cultural consciousness, to the modern day demands for exclusion from portals of knowledge of the "others", deemed to be unfit even if lip service of acknowledgement is paid that such "unfitness" may be due to no fault of theirs but is rather on account of their social, economic and cultural circumstances, gouges our very national soul. Even as higher levels of knowledge becomes vital for survival, and its technologies become capable of empowering those who belong to groups, that historically and in the present have been excluded from the liberating prowess of knowledge, this country seems to witness, as in the past, a resurgence in demands that knowledge be parceled out, through tight fisted notions of excellence, and concepts of merit that pander to the early advantages of already empowered groups.

3. For much of our history, most of our people were told that they were excluded, for no fault of theirs in this and here, but on account of some past mistakes. Hope was restricted to the duty that was supposed to attach itself to station ascribed by a cruel fate, cast as cosmic justice. This order that parceled knowledge, by grades of ascribed status, chiefly of birth and of circumstances beyond the control of the young, weakened this country. It weakened our country because it reduced the pool of those who were to receive higher levels of knowledge to only a small portion of the upper crust. This in turn weakened our method of knowing and creating new knowledge - knowledge of the deductive kind was extolled primarily for its elegance, and its practical significance derided, and soon enough turned into metaphysics of mysticism that palliated the deprived with paens of a next life. This weakened our ability to apply knowledge to practical affairs of all segments of population, and effectively shut off the feed back loop that practice by users could have provided, so that new knowledge could be generated. Our practical knowledge ossified, and deductive knowledge became ever more ready to justify the worth of the high and the mighty, for such justification brought status to the peddlers of mysticism and enabled the high and the mighty to evade questions of accountability to the masses.

4. It was that truth that our national poet spoke about when he prayed that knowledge would be free. It was that truth that the makers of modern India, those great souls, who could see the causes for past events, and foresee the needs of the future, tried to inscribe in our Constitution. It is not any wonder that our first Prime Minister in the excitement of the first seconds of freedom from foreign rule spoke about our "tryst with destiny" to the Constituent Assembly, and yet in the same breath also added "now the time comes when we shall redeem our pledge, not wholly or in full measure, but very substantially." As Amartya Sen points out those were heady times, of promises made and of hope kindled[1]. And we, as a nation, promised ourselves that our huddled masses, condemned to rot in squalor, ignorance and powerlessness on account of the incessant exploitation by the elites, and on account of enforced hierarchies of social stature and worth, will never again acknowledge as a teacher, a person who will say that he will teach only members of this group, and not that group. To each and every group, and to each and every individual in those groups, we promised that never again would we allow social circumstances of the groups they belonged to be a factor in our assessment of their social worth. We gave our people the hope that we, the upper crust of India will change, and that their patience and tolerance of our inhumanity, over many millennia in the past and for a few decades more into the future, will soon be rewarded by our humanization.

[1] The Argumentative Indian – Writings on Indian History, Culture and Identity, Picador (2006)

History says, Don't hope
On this side of the grave,
But then, once in a lifetime
The longed-for tidal wave
Of justice can rise up,
And hope and history rhyme.[2]

5. We formed our nation-state to make sure that hope and history, as an actuality of experience of our people – all of our people, belonging to all of the groups into which they belonged to – would indeed rhyme. That is what our Constitution promises. And that is the motive force that informs the basic structure of our Constitution. Our fealty to that motive force is as sacred a promise that we as a nation have ever made to ourselves. Every other commitment can be assessed only on the touchstone of that motive force that balances hope and actuality of history, with hope progressively, and rapidly, being transcribed into actuality of real equality.

6. In contrast to the above, a strange interpretation has been pressed upon us in this instant matter. On the one hand it is contended that the State has to be denied the power to achieve an egalitarian social order and promote social justice with respect to deprived segments of the population, by imposing reservations on private unaided educational institutions, on the ground that this Court has held that private non-minority unaided educational institutions cannot be compelled to select students of lower

[2] Seamus Heaney, The Cure at Troy: A Version of Sophocles' Philoctetes, (London Faber and Faber, 1991); cited in Sen, Amartya, The Idea of Justice (Allen Lane, 2009).

merit as defined by marks secured in an entrance test, notwithstanding the fact that the State may have come to a rational conclusion that such underachievement is on account of social, economic or cultural deprivations and consequent denial of admissions to institutions of higher education deleterious to national interest and welfare. On the other hand it is contended that private unaided non-minority educational institutions, established by virtue of citizens claimed right to the charitable occupation, "education", an essential ingredient of which is the unfettered right to choose who to admit, may define their own classes of students to select, notwithstanding the fact that there may be other students who have taken the same entrance test and scored more marks. It would appear that we have now entered a strange terrain of twilight constitutionalism, wherein constitutionally mandated goals of egalitarianism and social justice are set aside, the State is eviscerated of its powers to effectuate social transformation, even though inequality is endemic and human suffering is widely extant particularly amongst traditionally deprived segments of the population, and yet private educational institutions can form their own exclusive communes for the imparting of knowledge to youngsters, and exclude all others, despite the recognized historical truth that it is such rules of exclusion have undermined our national capacity in the past.

7. The main issues that present themselves to us in these matters before us relate to the following:

(1) Can the executive abrogate a legislatively mandated and specified social justice program in the field of education?

(2) Do private non-minority unaided professional educational institutions have the right to pre define a social group and admit into their institutions from only those social groups and exclude all other students the opportunity of being considered for admission into such educational institutions?

It is against the background of the ark of hope that our Constitution is, that we have to answer the above questions.

II

Facts of the Case:

The Private Non-Minority Unaided Professional Educational Institution

8. The private educational institution, started and managed by the Army Welfare Education Society ("AWES"), named Army College of Medical Sciences ("ACMS"), located in the National Capital Territory of Delhi ("NCT of Delhi"), seeks to admit only students who are wards or children of

current and former army personnel and widows of army personnel (henceforth, we will be referring this entire group as "wards of army personnel" for ease of use).

9. AWES, it is stated, is a charitable trust that has been set up to cater to the educational needs of wards of Army personnel, both current and former, and widows of Army personnel. It is stated that the operation of its educational institutions is funded purely from regimental funds, which have been recognized to be private funds and not that of the Indian Army. AWES was given on lease, an extent of a little over 25 acres of land in the NCT of Delhi under the control and possession of Ministry of Defence in order to enable it to start ACMS, and meet the regulatory requirement regarding extent of land that a private medical college ought to have for its college campus. In addition, ACMS has also been provided the facility of using the Army Hospital in NCT of Delhi, both for its scholars to fulfill the necessary clinical training at such an hospital, and also to fulfill the regulatory requirement that a medical college possess access to a general hospital of sufficient number of beds as assurance of availability of facilities to meet the curricular requirements.

10. It is also stated that the wards of army personnel suffer from extensive disadvantages that children of the regular civilian population do not face. It is of course well recognized that army personnel are, by the

very nature of their job, deputed to serve in various inhospitable terrains, or in regions with scant facilities. Such assignments imply non-availability of proper educational facilities for their wards in large periods of the critical growing periods of the children. Further, in order to facilitate the education of the children, personnel of army are also compelled to maintain dual homes, where the member of the army personnel is in one place, and his family resides in another place. This places tremendous economic hardships, which could be conceived as also imposing hardships in being able to secure any special coaching or training for the children. Further, the absence of the father figure could also imply a certain imbalance in family lives. All these contribute to lowered educational attainments of wards of army personnel, relative to the civilian population, and hence lowered performance in qualifying examinations for various educational institutes at the college level, particularly the professional colleges. It is also contended that the seats reserved for Defence personnel, at college level, also do not satisfy the needs of children and army wards because of paucity of total seats and stringent domicile requirements enacted by State legislatures.

The admission policy of the private non-minority unaided professional educational institution.

11. ACMS, in the year 2008, began to admit students. It sought to do this by a set of rules framed by itself, and which may be briefly stated as follows:

(a) That only those students who have the relevant qualifying high school education and who have taken the common entrance test conducted by appropriate authorities for admission to medical colleges in the NCT of Delhi, and have secured the minimal qualifying marks in such a test, shall be eligible to apply to ACMS;

(b) Of the students satisfying (a) above, only those who are wards or children of former and current army personnel and widows of army personnel (including those who have died in service) shall be eligible for admission;

(c) that within the group of students satisfying conditions (a) and (b) above, admission based on strict inter-se ranking, based on marks secured in the common entrance test shall be followed for admitting students; and

(d) there shall not be any distinction whatsoever, on the basis of social, economic or cultural background amongst the group comprising the wards of army personnel.

The relevant laws of the affiliating university and the State Government applicable to private unaided non-minority professional educational institutions.

12. At this preliminary stage it would appear that the admission policy of ACMS to have been undertaken in the teeth of two different sets of laws which are applicable: (a) the State act, "Guru Gobind Singh Indraprastha University Act, 1998" ("GGSIU Act 1998") that led to the establishment of the university granting affiliation to ACMS, the Guru Gobind Singh Indraprastha University ("GGSIU"), and the various ordinances promulgated by the Board of Management ("BoM") of GGSIU; and (b) the "The Delhi Professional Colleges or Institutions (Prohibition of Capitation Fee, Regulation of Admission, Fixation of Non-Exploitative Fee And Other Measures to Ensure Equity And Excellence) Act, 2007 ("Delhi Act 80 of 2007"). The relevant portions of the applicable laws are reproduced below.

Section 6 of GGSIU Act, 1998 provides as follows:

> *"(1) The University shall be open to persons of either sex and of whatever race, creed, caste or class, and it shall not be lawful for the University to adopt or impose on any person any test whatsoever of religious belief or profession or political opinion in order to entitle him to be appointed as a teacher of the University or to hold any office therein or to be admitted as a student of the University, or to graduate thereat, or to enjoy or exercise any privilege thereof;*
>
> *(2) Nothing in this section shall be deemed to prevent the University from making any special provision for the appointment or admission of women or of persons belonging to the weaker sections of the society, and in*

particular, of persons belonging to the Scheduled Castes and the Scheduled Tribes."

13. The Board of Management of GGSIU, pursuant to Sections 27 and 6(2) of GGSIU Act, 1998, enacted Ordinance 30; vide Board of Management Resolution No. 31.5 dated August 25, 2006, entitled Reservation Policy for the Self-Financing Private Institutions affiliated with the Guru Gobind Singh Indraprastha University. The said Ordinance 30 states that "for making special provisions for the advancement of weaker sections of the society, and in particular of persons belonging to the Scheduled Castes and Scheduled Tribes" certain percentage of seats shall be reserved by every affiliated college. The reservations were as follows: (i) Scheduled Castes (15%); (ii) Scheduled Tribes (0.5%); (iii) Defence Category (5%); (iv) Physically Handicapped (3%); and (v) Supernumerary Seats for Kashmiri Migrants (one seat). The said reservations, it is explicitly acknowledged were being provided for pursuant to Clause 5 of Article 15 of the Constitution, which was inserted by Constitution (Ninety Third Amendment) Act, 2005, which became effective on 20-1-2006. Ordinance 30 of GGSIU also specifically left out educational institutions that are owned by minorities from being subject to the reservations policy enunciated by it.

14. In addition to the above, as is the norm in rest of the Country wherein educational institutions are subjected to the laws of the legislature with territorial jurisdiction in which such educational institutions are located, ACMS is also subject to the laws of the NCT of Delhi, the territorial jurisdiction in which ACMS is located. In particular the applicable laws would be as cited below.

The preamble of Delhi Act 80 of 2007 states that it is:

> "*An Act to provide for prohibition of capitation fee, regulation of Admission, fixation of non-exploitative fee,* ***allotment of seats*** *to Scheduled Castes, Scheduled Tribes and other socially and economically backward classes and other measures to ensure equity and excellence in professional education in the National Capital Territory of Delhi and for matters connected therewith or incidental thereto*".

Section 2 of Delhi Act 80 of 2007 provides that:

> "*The provisions of this Act shall apply to – (a) Unaided institutions affiliated to a University imparting education in degree, diploma and certificate courses.*"

Section 12 of Delhi Act 80 of 2007 provides that:

> "**Allocation and Reservation of Seats:**
>
> *(1) In every institution, except the minority institution -*

(a) subject to the provisions of this Act; ten percent of the total seats in an unaided institution shall be allocated as management seats;

(b) eighty five percent of the total seats, except the management seats, shall be allocated for Delhi students and the remaining fifteen percent seats for the outside Delhi students or such other allocation as the Government may make by notification in the official Gazette, direct;

(c) supernumerary seats for non-resident Indians and any other category shall be as may be prescribed.

(2) In the seats mentioned in sub-section (1), an institution shall reserve-

(a) seventeen percent seats for the candidate belonging to the Scheduled Castes category, one percent seats for the candidates belonging to the Scheduled Tribes category and such percentage of seats, for any other category including other Backward Classes as may be prescribed;

(b) for seats not mentioned as allocated for Delhi students in sub-section (1), fifteen percent seats for candidates belonging to the Scheduled Caste category, seven and a half percent seats for the candidates belonging to the Scheduled Tribes category and such percentage of seats, for any other category as may be prescribed.

(c) *Subject to clause (a) and clause (b) above, three percent seats for persons with disabilities as provided in the Persons with Disabilities (Equal Opportunities Protection of Rights and Full Participation) Act, 1995 (1 of 1996) and such percentage of seats for the wards of defence personnel an any other category, as may be prescribed."*

15. Further, Delhi Act 80 of 2007 also provides in Section 13 that all institutions "*shall, subject to the provisions of this Act, make admission through a common entrance test to be conducted by the designated agency, in such manner, as may be prescribed", and in Section 14 that any "admission made in contravention of the provisions of this Act, or the rules made thereunder, shall be void*."

16. However, ACMS based its admission policy on certain exemptions granted by the Government of Delhi exempting ACMS' admissions from the operation of provisions of Delhi Act 80 of 2007 with respect to allocations, as between Delhi and non-Delhi students, reservations as mandated in Sub-section (2) of Section 12, and the requirement that all admissions, in such reserved categories and with respect to remaining seats, be based on inter-se merit as determined by marks secured in the common entrance test. Such exemptions it is claimed have been granted in exercise of powers allegedly provided in Clause (b) of Sub-section (1) of Section 12 of the Delhi Act 80 of 2007. The said exemption specifically allowed ACMS to admit only wards of army personnel in accordance with ACMS's admission policy earlier noted herein. One of the peculiar aspects of the granted exemption seems to be that ACMS is mentioned to be the "Army" in the notification.

17. The admission policy of ACMS was challenged in a slew of writ petitions. The writ petitioners, students who otherwise would be eligible to be considered for admission to ACMS, and Indian Medical Association, challenged the above admission policy in writ petitions filed in the Delhi High Court inter-alia contending that: (1) TMA Pai Foundation v. State of Karnataka[3], as further explained in P.A. Inamdar v. State of Maharashtra[4], specifically mandated that all admissions to private unaided non-minority professional institutions be only based on merit, which is to be taken as inter-se ranking of all the students who have taken the common entrance test; (2) even according to the rules and regulations of GGSIU or the Delhi Act 80 of 2007, they would have secured an admission in ACMS if it had followed the principle of inter-se ranking, based on marks secured in the common entrance test, of all the students applying to ACMS if ACMS had not proscribed all non-wards of army personnel from applying; and (3) in fact ACMS is an aided educational institution, in as much as it has received massive aid from the State, in the form of expensive land and access to Army Base Hospital in Delhi to meet the curricular requirements of clinical training in a general hospital that is required by every medical college, per regulations of the Medical Council of India.

18. In this regard, the defence of ACMS, and its parent society, AWES, in the High Court has been that the exemptions granted to it by the

[3] (2002) 8 SCC 481
[4] (2005) 6 SCC 537

Government of Delhi were lawful, and hence they were well within the law in admitting students only from the wards of army personnel as identified by its admission policy. Further ACMS, and AWES, also claim that in any event the ratio of TMA Pai, as further explained by P.A. Inamdar, is that, contrary to what the writ petitioners were claiming, they have an unfettered right, under Article 19(1)(g), to choose its own pre-defined "source" of students. Further, ACMS and AWES claim that in as much as such a choice is not a "reservation" per se, but only choice of "source" as rightly recognized by TMA Pai (supra), and P.A. Inamdar (supra), and further because such a source is only being delineated on the basis of occupation and not on the basis of religion, race, caste, sex or place of birth or any of them, and inter-se ranking within the "source" is based on qualifying marks in the common entrance test, and the admission policy is otherwise transparent, fair and non-exploitative the admission policy of ACMS ought to be upheld. In addition, it is also submitted that in as much as wards of army personnel suffer educational disadvantages, in comparison with the civilian population, and this affects the morale of army personnel, it would be in the national interest to allow ACMS and AWES to effectuate such admissions. Further, it is also claimed that such a right has been recognized previously by the courts in India. Further, with respect to it being an unaided educational institution, it was argued that ACMS is run purely out of regimental funds that have been held to be private funds, and

not belonging to the Indian Army. Moreover, it is also claimed that the lease granted to it by the Army and the Ministry of Defense, in whose possession the public land, was for an initial period of thirty years, extendable to ninety nine years, to which effect the Ministry of Defense has "in principle" agreed to. Moreover, the access to Base Hospital of the Army in NCT of Delhi was only for a temporary period, and that an exclusive hospital for ACMS would soon be built. To this extent it was submitted that ACMS is not an "aided institution" under Delhi Act 80 of 2007 as its day to day funds are met through fees and regimental funds. Further, it was also submitted that MCI has accepted the temporary arrangements with respect to hospital facilities, and has granted a conditional permission, which could be revoked if ACMS fails to meet the requirement of having its own hospital as required by regulations.

19. It appears that neither the writ petitioners nor ACMS and AWES sought to challenge the Constitutional validity of Delhi Act 80 of 2007 or of Ordinance 30 of GGSIU. It would appear that both parties proceeded under the assumption that Delhi Act 80 of 2007 and Ordinance 30 of GGSIU would be applicable but for exemptions granted by Government of Delhi. This train of thought seems to have also affected the decisions of the learned Single Judge and the Division Bench of the High Court of Delhi, which decisions we broadly summarise below.

The learned single judge found that the claimed power to exempt, by the Government of Delhi, under clause (b) of Sub-section (1) of Section 12 of Delhi Act 80 of 2007 to be applicable as regards only the 15% of seats remaining after the seats allocated to management quota. Thereupon, using various rationale, including the judgments of this Court in TMA Pai, P.A. Inamdar, and Islamic Academy of Education v State of Karnataka[5], engaged in an astonishing sequence of logic that twisted and turned, and finally found that 79% of the seats could be filled by wards of Army personnel, and the remaining 21% by students belonging to the general category. The legislatively mandated allotment of seats for various reserved categories, including but not limited to Scheduled Castes and Scheduled Tribes, was completely ignored.

On appeal by both sides, the Division Bench embarked upon a different mode of reasoning. In the first instance it held that the enactment of Delhi Act 80 of 2007, implies that Ordinance 30 of GGSIU has lost its relevance. Further, analyzing Section 12 of Delhi Act 80 of 2007, the Division Bench found that there is nothing in it that prohibits ACMS and AWES to admit only wards of army personnel in all its seats, the Division Bench upheld the admission policy of ACMS. In this regard, the Division Bench also over-ruled the finding of learned Single Judge that the ratio of

[5] (2003) 6 SCC 697

TMA Pai (supra)as explained in P.A. Inamdar(supra), implied that ACMS needs to admit a "sprinkling" of students from the general category.

It is against the judgment of the Division Bench that appeals by way of special leave petitions have been filed.

III

The Submissions of the Appellants:

20. The learned Counsel for Appellants, Dr. Aman Hingorani, submitted that ACMS is not an unaided institution, and further it is also posited that ACMS and its parent society be construed to be an "instrumentality of the State" under Article 12. To this effect the following facts were pointed out: (i) that a little over 25 acres extent of expensive land has been given on lease by Ministry of Defence, Union of India, in the Cantonment of Delhi; access has been provided to the Base Hospital; and further that affairs of AWES and of ACMS are substantially and wholly managed by regular officers of the Indian Army and headed by the Chief of Army Staff; and (ii) that regulations of Medical Council of India ("MCI") do not permit grant of permission for setting up of medical colleges unless the Society setting up such a college owns such land and has its own hospital of requisite number of beds, and further that the permission was granted by MCI on the ground

that ACMS was in fact a governmental entity. It was contended that in such an event, the admissions to ACMS ought to be on the same principles followed by the Armed Forces Medical College, Pune. It is also contended that even if ACMS be deemed to not be an instrumentality of the State, it could not be construed as an unaided institution, on account of the massive aid by Ministry of Defence, merely because its day to day expenses are taken care of by fees from students and regimental funds. The implication pressed by Dr. Hingorani was that, in such a case Delhi Act 80 of 2007 would not be applicable at all, as it is intended to be applicable to unaided private professional institutions, and furthermore the exemptions granted by the Government of Delhi from the operation of Delhi Act 80 of 2007, and relied on by ACMS and AWES, in making the admissions in the manner it has would also not be applicable. The applicable law, consequently, would be Ordinance 30 of GGSIU, which provides that an upper limit on reservations to be 5% for wards of defense personnel.

21. The learned Counsel for the Appellants also contended that, even if ACMS were deemed to be both a private and an unaided professional institution, the exemption granted by Delhi Government in allowing ACMS to admit only wards of Army personnel to 100% of its seats is ultra vires. In this regard it was pointed out that sub-section (2) of Section 12 of Delhi Act 80 of 2007 vide clause (a) provides for specified reservations for

Scheduled Castes and Scheduled Tribes, and further, through rules enacted pursuant to Section 23(g), the Government of Delhi has fixed the percentage of reservations for wards of Defence personnel, as enabled by clause (c) of Sub-section (2) of Section 12, at 5%. It was contended that there is no provision in Delhi Act 80 of 2007 that allows Government of Delhi to grant the exemption from the operation of the requirement of merit based admissions, i.e., ranking based on marks secured in the common entrance test, from within the entire class of students who have qualified in the common entrance test and from the operation of the reservations as provided therein. Further, it was also pointed out that the power being claimed, vide clause (b) of Sub-section 1 of Section 12 of Delhi Act 80 of 2007, by Government of Delhi to grant such an exemption is only the power to vary the percentage of allocable seats as between Delhi and non-Delhi students, and not to allocate all the seats in ACMS to wards of Army personnel. Moreover, it was also contended that in as much as private unaided educational institutions are essentially rendering services that the State ought to be rendering, and wherein such services are "public services," admitting only wards of Army personnel in all the seats in ACMS would be a violation of Article 14 and Article 15.

22. In this regard, it was also argued by Dr. Hingorani that even reservations cannot be to the extent of 100%, in as much as such

reservations would amount to a violation of Article 14, and in any event any reservations with respect of constitutionally permissible classes would need statutory or executive provision. In the event, the permission granted by Government of Delhi to allow ACMS to admit only wards of Army personnel amounts to a super-reservation and violates Article 14.

23. It was also argued by the learned Counsel that the grant of permission to ACMS, to admit only wards of Army personnel, without regard to the claim of those students who have secured more marks would be a violation of the ratio of TMA Pai, as explained in Islamic Academy, and P.A. Inamdar. The learned counsel submitted that the Constitution Bench in Islamic Academy, in the course of interpreting Para 68 of the TMA Pai judgment, held that the percentage of seats that the management of an educational institution can fill up, could never be 100%. In this regard, it was also contended that this Court, in P.A. Inamdar, was only trying to ascertain whether, after TMA Pai, the State could impose its own reservation policy on private unaided professional colleges. It was submitted by the learned Counsel, that while P.A. Inamdar has held that imposition of reservations by the State would be an unreasonable restriction when imposed on non-minority private unaided educational institutions, it cannot be said that P.A. Inamdar stands for the proposition that private non-minority private unaided professional educational

institutions could select students from a pre-defined group from within the entire general category, thereby disregarding the students in the general category who have received higher marks. Apart from that, the holding in Islamic Academy that a quota that can be filled up by the management at its sole discretion could never be to the extent of 100%, has not been overruled by P.A. Inamdar. Consequently, it must be taken that the ratio in Islamic Academy holds the field with regard to such questions. It was also further contended that this Court in P.A. Inamdar has held that professional colleges stand on an entirely different footing, and that the requirement that admissions strictly be on the basis of merit, as determined by marks in a common entrance test, in fact takes precedence over other considerations including the rights of managements of professional unaided non-minority colleges to select students according to their choice.

24. The learned Counsel while conceding that wards of Army personnel may form a constitutionally permissible class entitled to horizontal reservations under Article 15(1); nevertheless, relying on D.N. Chanchala v. State of Mysore[6] it was argued that such a horizontal reservation ought to be kept at the least level possible, so that it does not whittle competitive selection in the general category completely. In this regard it was pointed out that horizontal reservations, even for 18.49 million disabled, forming

[6] (1971) 2 SCC 293

1.8% of India's population, is only 3%. In any event, wards of Army personnel already enjoy a wide variety of preferential treatments, including reservations across the country, as a part of reservations provided to wards of all Defence personnel. In the instant case 5% reservations are provided for wards of Defence personnel, under Ordinance 30 of GGSIU, and also pursuant to the rules of Delhi Government, pursuant to Section 23(g) of Delhi Act 80 of 2007 and the power granted by the enabling provisions in clause (c) of Sub-section (2) of Section 12. To grant an exemption in favour of ACMS, in contravention of specific statutory provisions, and to the exclusion of all other constitutional claimants to special treatment, as also the claim of general students to equality, would violate the discipline imposed by Articles 14 and 15 of the Constitution.

The Submissions of the Respondents:

25. Learned Senior Counsel, Mr. K.K. Venugopal, and Mr. Jaideep Gupta, appearing for the Respondents, dispute the contentions of the Appellants that ACMS is an instrumentality of the State, and also further dispute that ACMS is an aided institution. Pointing to the fact that AWES is a charitable trust, set up purely with the object of promoting the welfare of wards of Army personnel, and the fact that only regimental funds are used in day to day affairs of ACMS, it was contended that AWES and ACMS ought not to be treated as an instrumentality of the State. It was also further contended

that in both the decisions of the High Courts, by the learned Single Judge and the Division Bench, ACMS has been found to be an unaided educational institution, per the definition of such institutions in Delhi Act 80 of 2007, and hence ought not to be disturbed. Further, it was also submitted that ACMS conducted its admissions on the basis of exemptions granted by Government of Delhi, and as such meet the statutory requirements also.

26. Learned Senior Counsel, Mr. K.K. Venugopal submitted that admissions being effectuated by ACMS ought to be recognized as being based purely on inter-se merit i.e., marks received in common entrance test by wards of Army personnel and that no reservations of seats were being made on the basis of caste, race, religion, residence/domicile, backwardness or any such criteria. Tracing the history of the law as applicable to reservations and admissions to colleges, in case law from Unnikrishnan J.P. v. State of A.P.[7], through TMA Pai, Islamic Academy, to finally P.A. Inamdar, he submitted that P.A. Inamdar holds the field, in as much as it over-ruled parts of Islamic Academy, and explained the eleven judge bench decision of this court in TMA Pai. His main contention was that this court in P.A. Inamdar has found that a private unaided non-minority educational institution is entitled, under sub-clause (g) of clause (1) of Article 19, to the same rights as a private unaided minority institution under Clause (1) of Article 30: i.e., in as much as minorities have the right

[7] (1993) 1 SCC 645

to choose students entirely from a "source" of their choice, non-minorities should also have the same right to be able to pre-define a source from the general pool and admit qualified students only from such a pre-defined source. In particular he relied on paras 127 and 137 of P.A. Inamdar. Specifically he relied on the following observation in para 127: "*Nowhere in Pai Foundation either in the majority or in the minority opinion, have we found any justification for imposing seat-sharing quota by the State on unaided private professional educational institutions and reservation policy of the State or State quota or management seats."* The learned Senior Counsel submitted that according to P.A. Inamdar only a consensual agreement can be arrived at between private unaided professional institutions regarding seat sharing, and the State could not unilaterally demand any such sharing. In this regard, the learned Senior Counsel was equating the demand by the Appellants that the State should permit admissions to professional unaided non-minority professional colleges only on the basis of marks secured in the common entrance test to a demand by the State of a "quota" of seats by the State for imposition of reservations or for that matter any other purpose. Further, given the issues faced by Army personnel, it was submitted that a larger public interest is involved in the armed forces personnel having comfort and security that their wards can get a fair opportunity for securing admissions into professional colleges.

27. The learned Senior Counsel, Mr. Jaideep Gupta contended that the right to set up educational institutions, whether minority or non-minority, pursuant to sub-clause (g) of clause (1) of Article 19, includes the right to admit students of their choice from a "source" within the general pool, so long as the procedure adopted is transparent, fair and non-exploitative. As far as merit is concerned, it would then be that so long as inter se merit within that "source" is concerned, the State ought not to have the power to insist that as far as non-minority educational institutions only select students from the entire general pool on the basis of marks secured on the common entrance test. He also contended that the admission policy of ACMS, in choosing to admit eligible wards of Army personnel in all of its seats, is an instance of selecting a "source" and not a reservation at all. To this extent he also submitted that where a particular class is a source of admission, the principles relating to reservations would not apply to the same where, the class itself is well defined and rational. The learned Senior Counsel, Mr. Jaideep Gupta submitted that this Court in P.A. Inamdar, interpreting TMA Pai, has held that the essential ingredients of freedom of management of private non-minority unaided educational institutions include the right to admit students and recruit staff, and determine the quantum of fee to be charged, and that they cannot be regulated, either with respect to minority or non-minority educational institutions. In

addition he also submitted that Clause (5) of Article 15, inserted by the 93rd Constitutional (Amendment) Act, 2005, in so far that it enables special provisions by the State with respect to admission of Scheduled Castes, Scheduled Tribes and Socially and Educationally Backward Classes in private non-minority unaided institutions, would be unconstitutional and violative of the basic structure of the Constitution. In particular he relied on the sole opinion of Bhandari J., in Ashoka Kumar Thakur v. Union of India[8] that enabling provisions of clause (5) of Article 15, in so far as they relate to private non-minority unaided educational institutions, to be violative of basic structure of the Constitution, and argued that we adopt the same rationale and conclusions.

IV

28. Based on the facts, the decision of the High Court, the applicable laws, the affidavits of the Medical Council of India & Government of Delhi and the submissions made before us by the Counsel appearing for the parties, we now turn to frame the questions to be answered. It would appear that there are two sets of issues that need to be addressed. The first would be a preliminary set of issues, wherein the question of whether ACMS is an instrumentality of the State or an aided institution or an unaided institution would have to be answered, so that we could then determine which laws would be applicable. As argued by the learned

[8] (2008) 6 SCC 1

Counsel for Appellants, the Delhi Act 80 of 2007 would be applicable with respect to the matters on hand, if ACMS is an unaided non-minority educational institution. If that be the status of ACMS, then we'd have to next consider whether the exemptions granted by the Delhi Government are valid.

29. It is also noted that at no stage of the proceedings, whether before the High Court or in this court, have the Respondents challenged the constitutional validity of Delhi Act 80 of 2007, and specifically the allocations and reservations as mandated by Section 12 therein. The said Act was enacted, after the 93rd Constitutional (Amendment) Act, 2005 inserted clause (5) of Article 15 into the Constitution. Both the Title and the Preamble of Delhi Act 80 of 2007 specifically state that it was an Act to ensure equity for Scheduled Caste, Scheduled Tribes and other weaker segments of the population. Consequently, clause (5) of Article 15's enabling provisions with respect to making "special provisions" in regard to admission of Scheduled Castes, Scheduled Tribes, and Socially and Educationally Backward Classes to private unaided non-minority educational institutions would extend a protective umbrella with regard to allocations and reservations in Section 12 of Delhi Act 80 of 2007. If we find below that it is Delhi Act 80 of 2007 which is applicable, and further find that the exemptions granted by Delhi Government to be invalid, then

provisions of Delhi Act 80 of 2007 with respect to reservations would have to apply with the full force that they were intended to be.

30. Only thereafter, would it be logical to proceed to examine whether the interpretations urged by the Appellants, or the Respondents, with regard to decisions of this Court in TMA Pai, P.A. Inamdar, and Islamic Academy, that would apply with respect to seats that are unaffected by reservations specified in sub-section (2) of Section 12 and allocation of seats, as between Delhi and non-Delhi students, specified in sub-section (1) of Section 12 of the said Act. It is to be noted that the said Act specifically mandates that all admissions to ACMS would have to be made in accordance with merit of students, based on marks secured in the common entrance test. With respect to those students covered by various categories such as Scheduled Castes, Scheduled Tribes and other constitutionally permissible classes, as delineated in Sub-section (2) of Section 12, and as applicable with respect to categories described in Sub-section (1) of Section 12, the rule of inter-se merit, based on marks secured in common entrance test by students falling into each category, would apply. That would also mean, then, that with respect to seats not covered by provisions of Sub-section (2) of Section 12, they would have to be filled in accordance with rule of merit based on marks secured by general category of students not covered by Sub-section (2) of Section 12.

If however, the interpretation of the ratio of decision by this Court in TMA Pai, as further explained in P.A. Inamdar pressed by the learned Senior Counsel appearing for the Respondents turns out to be the correct one, then we would have to hold that ACMS has the right to fill all of the seats in ACMS not covered by sub-section (2) of Section 12 with wards of Army personnel who have qualified in the appropriate common entrance test.

31. In light of the above, we frame the following specific questions:

Preliminary:

1. Is ACMS an instrumentality of the State or an aided institution?
2. If the answer to Question 1 above is no, then whether the exemptions granted by Delhi Government are valid?

Substantial:

3. If the answers to both questions 1 and 2 above are no, whether ACMS can admit only wards of Army personnel to the seats not covered by reservations mandated by Delhi Act 80 of 2007, without any regard to the merit of other Delhi or non-Delhi students who may have secured higher marks in the appropriate common entrance test?

V

Analysis

Preliminary Questions:

Question 1:

32. Is ACMS an instrumentality of the State or an aided institution?

We note that with respect to the issues of whether ACMS is an instrumentality of the State, and whether ACMS is an aided or unaided institution, that at both stages of proceedings in the High Court, the conclusion reached was that Respondents were neither an instrumentality of the State, nor could ACMS be held to be an aided educational institution. Such determinations always present issues of fact and of law. We are disinclined to over-rule the findings of the High Court in this regard, which also corresponds to the decisions of the learned Single Judge. We are also disinclined to go into the said issues primarily because we do not believe that the fact that ACMS is deemed to be an unaided non-minority educational institution would have a bearing on the relief being sought by the Appellants.

33. In this light, we also opine that the Division Bench was correct in holding that Ordinance 30 of GGSIU to be inapplicable in this case on

account of enactment of Delhi Act 80 of 2007. This is so, because Delhi Act 80 of 2007 is a later enactment, much more general, containing a complete code covering the entire terrain of admissions of students to professional unaided non-minority institutions affiliated to all universities in NCT of Delhi, including GGSIU, with specific provisions therein regarding allocation of seats between Delhi and non-Delhi students, and reservations applicable in terms of those students falling within constitutionally permissible classes. However, the expression used by the Division Bench, that Ordinance 30 has "lost its relevance": to the extent that it may suggest a loss of general relevance is not correct. Considerable care ought to be exercised in delineating the applicability of unrepealed sections of a previous statute, even if they conflict with the provisions of a later statute with respect to some specific terrain of activities. After all, Ordinance 30 of GGSIU may be applicable with respect to many other situations, not involving the terrain covered by Delhi Act 80 of 2007. In this regard it would be appropriate to cite the words of Mudholkar J., judgment in Municipal Council, Palai v. T.J. Joseph[9]:

> *"It is undoubtedly true that the legislature can exercise the power of repeal by implication. But it is equally well-settled that there is a presumption against an implied repeal. Upon the assumption that the legislation enacts laws with complete knowledge of all existing laws pertaining to the same subject the failure to add a repealing clause indicates that the intent was not to repeal existing legislation. This*

[9] 1963 AIR 1561 = (1964) 2 SCR 87

> *presumption will be rebutted if the provisions of the new Act are so inconsistent with the old ones that the two cannot stand together*."

Question 2:

34. In light of the fact that we have decided to proceed on the basis that ACMS is a private non-minority unaided professional institution, we now turn to the issue of the validity of the exemptions granted by Delhi Government from the operation of Delhi Act 80 of 2007. By permitting ACMS to allocate all its seats to wards of Army personnel, albeit ones who had taken and qualified the common entrance test, the Delhi Government effectively suspended the operation of the provisions of the Act with regard to selection of students solely on merit from the general category, and also the provisions that mandated allotment and reservation of seats to various constitutionally permissible classes, including but not limited to Scheduled Classes and Scheduled Tribes.

35. At the very beginning of this portion of this judgment, we wish to make an observation based on the text of both the Cabinet Decision, and the Notification of Government of Delhi, on which reliance is placed by ACMS and AWES to admit only students of Army personnel. The texts state that an approval was being granted, in the case of Cabinet Decision, and that permission was being granted, in the case of the Notifications, that

hundred percent seats in ACMS may be allocated for "admission towards of Army personnel" as per the policy "followed by" the Indian Army. First question that arises is as to how wards of Army personnel could be deemed to be "Army personnel"? Did ACMS and AWES apply for permission of admittance of personnel of the Indian Army and then turn around and use the exemption granted to admit "wards of Army personnel"? Or is it the case that the Government of Delhi did not apply its mind at all, or that applied its mind in the absence of relevant facts? We are perturbed by the degree of casualness, evident from above, with which exemptions from the operation of vital aspects of a law enacted by the legislature seemed to have been undertaken. In any event, we will proceed on the assumption that the Government of Delhi intended that the exemption be granted with respect to "wards of Army personnel" as opposed to "Army personnel" and examine whether the exemptions granted are valid or not.

36. We find that the High Court has erred in its interpretation of Sub-section (1) of Section 12, and indeed the very thrust of Delhi Act 80 of 2007. One of the cardinal principles of interpretation is to look for the purpose that the Act seeks to achieve, and in this regard what is also crucial is the relationship of each clause or sub-clause to the other. The strict lexicographical arrangement of sub-clauses, one after the other,

ought not to be taken to mean that the one following is of lesser importance.

37. Reading Section 12 of Delhi Act of 2007 synoptically, we find that Sub-section (2) of Section 12 pervades the entire space of how seats are to be allocated. In fact, the preamble to the Act, states that it is being enacted to provide for "allotment" of seats to *"Scheduled Castes, Scheduled Tribes …….. and other measures to ensure equity and excellence in professional education in the National Capital Territory of Delhi"* (emph. Supp.). Consequently, it must be read that sub-section (2) of Section 12 is one of the primary sections of the Act and that it would act upon the provisions of Sub-section (1) of Section 12. Sub-section (2) of Section 12 provides that with respect to seats in sub-section (1) of Section 12, an institution shall reserve as provided for in sub-sections (a), (b) and (c) of sub-section (2) of Section 12 that follow. Clearly the phrase "[I]n the seats mentioned in sub-section (1)" at the beginning of sub-section (2) of Section 12 reveals the intent of the legislature that the specific reservations provided for Scheduled Castes and Scheduled Tribes and other provisions that may be made with respect to other weaker segments and other permissible categories of classes, shall be applied with respect to each and every category of seats identified in sub-section (1) of Section 12. Looking at sub-section (2) of Section 12 closely, this would mean that

not only are reservation of seats, for instance with respect to Scheduled Castes and Scheduled Tribes, to be made with respect to Delhi students, non-Delhi students, and also with respect to all students admitted under the management quota.

38. Instead of appreciating the primordial importance of sub-section (2) of Section 12 of the Delhi Act 80 of 2007, the Division Bench finds that there is *"nothing in Section 12 of the Delhi Act 80 of 2007 which prohibits the appellants from making 100% allocation in favour of army/ex-army personnel and war widows"*. If indeed that be so, and ACMS admits all wards of army personnel from outside Delhi, then what exactly is the status of reservations that have been specifically mandated in sub-section (2) of Section 12 of the Act by the legislature of NCT of Delhi with respect to Scheduled Castes and Scheduled Tribes and any other Backward Classes and other constitutionally permissible classes? Logically in accordance with the interpretation of the Division Bench, the benefits intended to be provided to students belonging to various weaker segments and thereby achieve greater social welfare through achievement of broader goals of social justice by the legislature would be obliterated. This would be tantamount to grant of powers to set at nought a policy specifically enacted by the legislature, thereby turning on its head, as it were, every known principle of our constitutional law.

39. Furthermore, by permitting ACMS to admit only students of wards of army personnel, notwithstanding the fact there could be others who have taken the common entrance test, and have secured more marks than the wards of Army personnel, the exemptions granted by Delhi Government also set at naught the legislative intent to ensure excellence by mandating that all admissions be made on the basis of inter-se merit within each of the categories of students. The general category would comprise of all students who have taken the common entrance test, and other wise satisfy the conditions of sub-section (1) of Section 12 of the Delhi Act 80 of 2007, after the seats reserved pursuant to sub-section (2) of Section 12 are reserved i.e., allocated for the described constitutionally permissible categories therein. The said Act clearly specifies that its objective is to achieve excellence, and one of the methods specified to achieve the same is of admitting students on the basis of inter-se merit in each of the categories specified in Section 12. The grant of permission to ACMS to admit students who may have scored lower marks than others, both within the general category and also in the reserved categories, results in defeat of the aims, objects and purposes of the Act, and the entire fabric and scheme of the Act gets frustrated. Nowhere in the Act do we find any powers granted to the government to not implement the Act. Nor does the Act state anywhere that the Government of Delhi could suspend the

implementation of the provisions with respect to reservations for weaker segments, and also simultaneously give the merit of the students scoring higher marks than wards of Army personnel a go by. To put it pithily, there is no power conferred on Government of Delhi to grant any exemption in favour of any institution from the operation of any of the provisions of the Act.

40. The Government of Delhi in its affidavit claims that its powers to provide such exemptions also flow from Article 162 of the Constitution. In relevant part Article 162 states "[S]ubject to the provisions of this Constitution the executive power of a State shall extend to the matters to which the Legislature of the State has power to make law." We simply fail to see how a Government that claims to be functioning in accordance with the Constitution of India, in which democracy has been deemed to be a basic feature of the Constitution, can claim the power under Article 162 to set at nought a declared, specified and mandated policy legislated by the legislature. In a constitutional democracy, with a parliamentary form of government, the executive may initiate a policy in a legislative bill to be enacted by the legislature or in the absence of legislative action in a particular field, enact policy that may be akin to law. However, the executive has to be answerable to the legislature. That is why it has been stated in no uncertain terms, that while we do not follow a strict separation

of powers as in the United States, executive functions have been deemed to be what remain after legislative and judicial function have been taken away. (See Ram Jawaya Kapur v. State of Punjab[10]) Further, the cited portion of Article 162 has been interpreted by this Court to mean that the State Executive has the power to make any regulation or order which shall have the effect of law so long as it does not contravene any legislation by the State Legislature already covering the field. (See State of A.P. v. Lavu[11]) In the instant case, the legislature of NCT of Delhi has specifically set out a clear policy with respect to reservations for Scheduled Castes and Scheduled Tribes and other weaker sections of the population. The duty of the executive is to implement that policy, and not to abrogate it.

41. The Government of Delhi also seeks to claim legitimacy of the decision by the Cabinet of Delhi and the Notification by Lieutenant Governor granting ACMS permission to admit 100% of the seats to wards of army personnel to the text of sub-section (b) of sub-section (1) of Section 12. The interpretation of the said sub-section sought to be pressed upon us is as follows: That the first part of said sub-section ought to be read as "eighty five percent of the total seats except the management seats, shall be allocated for Delhi students and the remaining 15% percent of seats for outside Delhi students", followed by an "or", and then the

[10] AIR 1955 SC 549: (1955) 2 SCR 225
[11] (1971) 1 SCC 607

second part "such other allocation as the Government by notification in the Official Gazette Direct". Such an interpretation it is claimed gives the government the power to vary the entire allocation of seats, and therefore the exemption granted by it to ACMS to admit only wards of Army personnel ought to be upheld.

42. We simply fail to see how. At best, even if we were to accept, *arguendo*, the interpretation pressed into service by the Government of Delhi, the best result that would follow would be that Government of Delhi has been given the power to vary the allocation of seats between Delhi and non-Delhi students, belonging to all sections and within the broadest class of those who have taken the common entrance test and qualified. It cannot be read to mean that a power has been granted to Government of Delhi to create entire new classes of students from within those eligible for admission to professional institutions by itself, and exclude all those students who are not members of such classes, notwithstanding that they may fall in the categories of Delhi or non- Delhi students.

43. Further, we also hold that such an interpretation to be strained. This is so for two reasons. One, the fact that the word "and" is always used as a conjunction between the first part of a sentence and the second part of a sentence, and the word "or" is used to denote an alternative in a series of exclusive arrangements. Consequently, we hold that the correct

interpretation of sub-section (b) of Section 12(1) is as follows: first part - "Eighty five percent of the total seats except the management seats, shall be allocated for Delhi students" followed by the conjunction "and" and then the second part - "the remaining fifteen percent seats for outside Delhi students or such other allocation as the Government may by notification in Official Gazette direct." Therefore, it can only mean that the powers of Delhi Government are limited to the extent of varying the percentage of seats reserved for non-Delhi students, up to a maximum of 15%. Apart from the above grammatical construction, we are led to such an understanding for additional reasons. This is the legislature of Delhi, that is legislating for the denizens of NCT of Delhi, with a primary responsibility for their welfare. Further, in as much as clause (a) of sub-section (2) of Section 12 provides that 17% of seats be reserved for Scheduled Castes, 1% of seats be reserved for Scheduled Tribes, and an unspecified percentage of seats be reserved for other Backward classes who are also denizens of Delhi, the legislature of Delhi would have taken into account the needs of Scheduled Castes and Scheduled Tribes in Delhi. The discretion to vary the 15% reserved for non-Delhi citizens was in all likelihood to enable the Government of Delhi to increase the percentage of seats allocated to denizens of Delhi, in the event a sizeable number of other backward classes of students also need to be accommodated in the professional colleges of Delhi. By fixing a number, 15%, for non-Delhi

students, the legislature intended to set a maximal limit on the number of non-Delhi students who could be admitted, and specified the percentage of seats that could be allocated to Scheduled Castes, Scheduled Tribes and other weaker sections which could be reduced in the event that Government of Delhi needed to accommodate the special exigencies of the needs of denizens of Delhi, including but not limited to its backward classes.

44. The Government of Delhi has also claimed that a distinction needs to be drawn between "allocation" as used in sub-section (1) of Section 12 and "reservation" as used in sub-section (2) of Section 12. The claim of Government of Delhi is that the power to "allocate" between Delhi and non-Delhi students or some other classes is prior to "reservation" of seats as between general category of students, and moreover that such an allocation would mean a power to allocate all the seats not just to non-Delhi students, but even an entirely new class. This plea of Government of Delhi is untenable and unsustainable as the same is not supported by any of the provisions of the Delhi Act 80 of 2007 and in fact runs counter to them. One of primary purposes of the act, the goal that it seeks to achieve, is described in terms of "allotment" of seats to Scheduled Castes, Scheduled Tribes and other weaker segments. The word allot, in its verb form, is defined by the Concise Oxford Dictionary[12] to include the meaning

[12] Eight Edition, Oxford University Press (1990)

of the act to give or apportion to, distribute officially to. Allotment is what results from such an act i.e., an apportionment. The word "reserve" is defined to also include the meaning of "order to be specifically retained or allocated for a particular person", and the word "reservation" is the act or an instance of reserving or being reserved. The word "allocate" is defined to include the meanings of an act to assign or devote something for a purpose or to a person. Consequently, it can only be surmised that while the words allocation was used in the said Act in the context of apportionment of seats between Delhi and non-Delhi students, the word "reservation" was used to mean to allocate a certain percentage of seats, in both groups formed by eligible Delhi and non-Delhi students, for Scheduled Castes, and Scheduled Tribes and other weaker sections of the population and other constitutionally permissible classes. The use of those two words, allocation and reservation in Section 12, in as much as they overlap in their meaning, and the fact that they together delineate the seats to be allotted to Scheduled Castes and Scheduled Tribes and other weaker sections and constitutionally permissible classes, implies that we cannot infer from the use of the word "allotment" in sub-section (1) of Section 12, the kind of power claimed to vary allotment in clause (b) of sub-section (1) of Section 12 as provided therein and thereby also set at naught the intent of legislature of Delhi to allot seats for Scheduled Castes, Scheduled tribes, and other weaker sections, and further, also set at

naught its intent that at least 85% of seats that remain after 10% of management seats are set aside, be allocated to students of Delhi, also be set at naught. Consequently, the defense by Government of Delhi of the exemptions it granted to ACMS, on the use of different words, allotment in sub-section (1) of Section 12, and reservations in sub-section (2) of Section 12, also fails.

45. Thus we find that the exemption granted by the Government of Delhi allowing ACMS to fill 100% of its seats by wards of army personnel violates the basic principles of democratic governance, of the constitutional requirement that executive implement the specific and mandatory policy legislated by the legislature, and violates the provisions of Delhi Act 80 of 2007. In fact, the actions of the Government of Delhi, for the aforesaid reasons are wholly arbitrary, without any basis in law, and ultra vires. Section 14 of the said Act specifies that any admission made in contravention of the provisions of the Act or the rules made thereunder, shall be void, and further Section 18 provides that those making admissions in contravention of the provisions of Delhi Act 80 of 2007 may be punished by imprisonment up to three years or a fine up to Rupees one Crore or both. Such provisions clearly demonstrate the intent of the legislature that its policy, as specified in the Act, and the purposes of the Act, not be derogated from in any manner. The said provisions of the Act

are mandatory in nature. The Government of Delhi has clearly acted on the basis of a misplaced belief of its powers, under the Act, a misunderstanding of the statutory language of the Act, and its relevant provisions, and also in complete contravention of constitutional principles.

46. In light of the above, we have to hold that Delhi Act 80 of 2007, and Section 12, including both sub-sections (1) and (2) are clearly applicable, with respect to admission of students to ACMS.

VI

Substantive Questions:

Question 3:

47. Whether ACMS can admit only wards of Army personnel to the seats not covered by reservations mandated by Delhi Act 80 of 2007, without any regard to the merit of other Delhi or non-Delhi students who may have secured higher marks in common entrance test?

48. Having resolved the preliminary issues in Part V above, we now turn our attention to the issue of whether ACMS has an unfettered right to define its own source of students with respect to all the seats remaining after setting aside the seats for categories of students covered by sub-

section (2) of Section 12, read with sub-section (1) of Section 12 of the Act.

49. The main contentions of learned Senior Counsel, Mr. K.K. Venugopal and Mr. Jaideep Gupta, have been that the ratio of TMA Pai, as explained in P.A. Inamdar, stands for the propositions that (a) the rights of non-minority unaided educational institutions under sub-clause (g) of Clause (1) of Article 19 are exactly the same as the rights of minority unaided educational institutions under Clause (1) of Article 30; and hence (b) non-minority professional educational institutions, such as ACMS, should be deemed to have the right to define their own "source" from within the general pool of students taking the common entrance test, so long as the classification is not based on any of the constitutionally impermissible basis' such as religion, race, caste, place of birth or sex. Further, it was also contended that in as much as the admission policy thereafter proceeds in a transparent, fair and non-exploitative manner, the admission policy of ACMS should be upheld. Additionally it was also submitted by the learned Senior Counsel that allowing ACMS to pursue such an admission policy would be in the national interest.

50. At this stage we wish to make a necessary and a primordially important observation that has troubled us right throughout this case. The primordial premise of the arguments by unaided educational institutions in

claiming an ability to choose students of their own choice, in case after case before this court, was on the ground that imposition of reservations by the State would impede their right to choose the most meritorious on the basis of marks secured in an objective test. It would appear that, having unhorsed the right of the State to impose reservations in favor of deprived segments of the population, even though such reservations would be necessary to achieve the Constitutionally mandated goals of social justice and an egalitarian order, unaided institutions are now seeking to determine their own delimited "sources" of students to the exclusion of everybody else. The fine distinctions made by learned Senior Counsel, Mr. Jaideep Gupta, that an allocation when made by the State is reservation, as opposed to allocations made by private educational institutions in selecting a source do not relate to the fundamental issue here: when the state delimits, and excludes some students who have secured more marks, to achieve goals of national importance, is sought to be projected as contrary to Constitutional values, and impermissibly reducing national welfare by allowing those with lesser marks to be selected into professional colleges; and at the same time, such a delimitation by a private educational institution, is supposedly permissible under our Constitution, and we are not then to ask what happens to that very same national interest and welfare in selecting only those students who have secured the highest marks in a common entrance test. We are reminded of the story of

the camel that sought to protect itself from the desert cold, and just wanted to poke its head into the tent. It appears that the camel is now ready to fully enter the tent, in the desert, and kick the original inhabitant out altogether.

51. In any case we examine these propositions below, as we are unable to convince ourselves that this Court would have advocated such an illogical position, particularly given our history of exclusion of people, on various invidious grounds, from portals of education and knowledge. Surely, in as much as this Constitution has been brought into force, as a constitutive document of this nation, on the promise of justice – social, economic and political, and equality – of status and opportunity, for all citizens so that they could live with dignity and fraternal relations amongst groups of them, it would be surprising that this Court would have unhorsed the State to exclude anyone even though it would lead to greater social good, because marks secured in an entrance test were sacrosanct, and yet give the right to non-minority private educational institutions to do the same. The knots of legal formalism, and abandonment of the values that the Constitution seeks to protect, may lead to such a result. We cannot believe that this Court would have arrived at such an interpretation of our Constitution, and in fact below we find that it has not.

52. It would appear that both learned Senior Counsel, Mr. K.K. Venugopal and Mr. Jaideep Gupta are relying on paragraphs 127 and 137 in P.A. Inamdar to substantiate their claim that all that is needed by ACMS is to ensure that their admission procedures are fair, transparent and non-exploitative. Mr. K.K. Venugopal submits that there can be a consensual agreement between the State and the private unaided institution, regarding seat sharing, but the State cannot unilaterally demand any such share. Further, Mr. Jaideep Gupta claims that by admitting only students who are wards of army personnel, on an all India basis, what ACMS is actually doing is only defining a "source" of students and not reserving any seats.

53. We cite some additional paragraphs, including the paragraphs relied on by learned Senior Counsel from the judgment of this Court in P.A. Inamdar to test the above propositions. In particular we cite below paras 127, 136, 137 and 138: in extenso (and emph. supp in cited paragraphs):

> *"127. Nowhere in Pai Foundation either in the majority or the minority opinion, have we found any justification for imposing seat sharing quota by the State on unaided private professional educational institutions and reservation of the State, or State quota seats or management seats.*
>
> *136. "Whether minority or non-minority institutions, there may be more than one similarly situated institution imparting education in any one discipline, in any State. The same aspirant seeking admission to take education in*

any one discipline of education shall have to purchase admission forms from several institutions and appear at several admission tests conducted at different places on the same or different dates and ther may be clash of dates, If the same candidate is required to appear in several tests, he would be subjected to unnecessary and avoidable expenditure and inconvenience. There is nothing wrong in an entrance test being held for one group of institutions imparting same or similar education. Such institutions situated in one State or in more than one State may join together and hold a common entrance test or the State may itself or through an agency arrange for holding of such test. Out of such common merit list the successful candidates can be identified and chosen for being allotted to different institutions depending on the courses of study offered, and number of seats, the kind of minority to which the institution belongs and other relevant factors. Such an agency conducting the common entrance test ("CET" for short) must be one enjoying utmost credibility and expertise in the matter. ***This would better ensure the fulfillment of twin objects of transparency and merit.*** *CET is necessary in the interest of achieving the said objectives and also for saving the student community from harassment and exploitation. Holding of such common entrance test followed by centralized counseling or, in other words, single window system regulating admissions does not cause any dent in the right of the minority unaided educational institutions to admit students of their choice. Such choice can be exercised from out of the list of successful candidates prepared at CET without altering the order of merit inter-se of the students so chosen."*

137. Pai Foundation has held that minority unaided institutions can legitimately claim unfettered fundamental right to choose the students to be allowed admission and the procedure therefore subject to its being fair, transparent and non-exploitative. The same principle applies to non-minority unaided institutions. There may be a single institution imparting a particular type of education which is not being imparted by any other institutions and having its own admission procedure fulfilling the test of being fair, transparent and non-exploitative. All institutions imparting same or similar professional education can join together for holding a common entrance test satisfying the

> *above said triple tests. The State can also provide a procedure of holding a common entrance test in the interest of securing fair and merit based admissions and preventing maladministration. The admission procedure so adopted by a private institution or group of institutions, if it fails to satisfy all or any of the triple tests, indicated hereinabove, can be taken over by the State substituting its own procedure. The second question is answered accordingly.*
>
> *138. It needs to be specifically stated that having regard to the larger interest and welfare of the student community to promote merit, achieve excellence and curb malpractices, it would be permissible to regulate admissions by providing a centralized and single-window procedure.* ***Such a procedure to a large extent, can secure grant of merit based admissions on a transparent basis****. Till regulations are framed, the Admission Committee can oversee admissions so as to ensure that merit is not the casualty."*

54. By examining paragraphs 127 and 137 in the larger context of paragraphs 135, 137 and 138, it would appear that this Court's emphasis was on the right of private educational institutions to admit students on the basis of "merit" as determined by marks secured in an entrance test. To this extent, the above paragraphs would stand for the proposition that both minority and non-minority unaided institutions have the right to admit students who have secured higher marks in the entrance test, and not an equivalence between minority and non-minority institutions to engraft their own "sources" or "classes" of students from within the general pool. The rights of minority unaided educational institutions to select students, based on merit, is with respect to students who belong to that same minority. It

is not a right to define a source as such. We turn to excavate the rights of minority unaided educational institutions, and non-minority unaided educational institutions in the larger body of judgment P.A. Inamdar to get a more synoptic understanding of the ratio in that judgment.

55. In paragraph 124 of P.A. Inamdar it is stated that the majority did not "see much of a difference between non-minority and minority unaided educational institutions". That expression "much of a difference" gives the clue that there is an actual difference between the rights of minority unaided institutions under clause (1) of Article 30, and the rights of non-minority unaided institutions under sub-clause (g) of Clause (1) of Article 19. We will address that issue a little later by gleaning the differences between minority and non-minority institutions enunciated in P.A. Inamdar. By using the expression "much of a difference" the Court did not mean a complete absence of difference. If the expression, by itself, were taken out of context, it could be understood in two ways: (i) that there is not much of a difference in terms, between the two kinds of institutions under consideration, based on an overall quantitative assessment of all the rights put together, with a few differences that would still have operational significance; or that (ii) in all respects the two classes of educational institutions are more or less the same, with the differences being minor and not leading to any operational significance. We hold that it is in the

former sense that the said expression was used. By noticing the phrase "much of a difference" out of context it might appear that this Court surmised that there were no substantive differences as such, in terms of operational significance as to the groups from which the non-minority and minority unaided educational institutions could select students from, notice of the context, the specific issue that the Court was dealing at that point in the judgment, leads to a different conclusion. The issue that the Court was dealing with was with respect to whether the State could compel unaided educational institutions to choose students with lesser percentage of marks in order to implement its reservation policies. The last sentence of para 124 clarifies this: "The State cannot insist on private educational institutions which receive no aid from the State to implement the State's policy on reservation for granting admission on lesser percentage of marks i.e., on any criterion except merit." Minority institutions have to choose from their own minority group who are otherwise qualified, and non-minority institutions have to choose from the entire group who are otherwise qualified. The modality of choosing within those groups has to be on the basis of inter-se ranking determined in accordance with marks secured in the common entrance test. When we look at the following paragraph, no. 125 in P.A. Inamdar, it might also appear that the State is not entitled to impose a state quota, whereby the private unaided institutions are compelled to give up a share of 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 Court made the observation that such an act, of imposition of a quota, would be an encroachment on the freedoms granted pursuant to Article 30(1) to minority institutions, and an unreasonable restriction under Article 19(1)(g) read with Article 19(6) when imposed on non-minority educational institutions. The Court was not suggesting that insistence, by the State, on making merit based selections within the groups, general category for the non-minority institutions, and the specific minority group to which the minority educational institution belonged, from which the two kinds of institutions were expected to select students from, amounts to an imposition of a State quota. The context of the discussion was of imposition of reservations on private unaided non-minority educational institutions. This is borne out by the last sentence in paragraph 125, where it is stated "*[M]erely 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 candidates."***

56. The jurisprudence of TMA Pai with respect to unaided non-minority educational institutions, as explained by P.A. Inamdar, clearly seems to be

that private unaided educational institutions seek to provide better professional education, and hence they should not be saddled with less meritorious students, i.e., those who get lesser marks in a qualifying examination such as a common entrance test, by imposition of reservations. With respect to minority educational institutions, the imposition of reservations or the imposition of the duty to select non-minorities beyond a sprinkling would be an encroachment of freedom guaranteed by clause (1) of Article 30. With respect to non-minority unaided institutions, imposition of reservations was deemed to be an unreasonable restriction on the freedom to engage in the occupation of "education" pursuant to sub-clause (g) of clause (1) of Article 19. In as much as Clause (5) of Article 15 is now part of the Constitution, reservations by the State for "socially and educationally backward classes" without the creamy layer, and for Scheduled Castes and Scheduled Tribes are now constitutionally permissible categories of state imposition on non-minority educational institutions. The status of constitutional permissibility removes the basis for finding reservations to be an unreasonable restriction in the freedom to select students only on the basis of merit with respect to all the seats in a non-minority unaided educational institution. Consequently, the unaided non-minority educational institutions would have to comply with the State mandated reservations, selecting students within the specified reservation categories on the basis of inter-se merit.

The question then is whether with respect to the remaining seats, can the state insist that non-minority private unaided institutions select the most meritorious students, as determined by the marks secured in the qualifying test? The answer to that question is in the affirmative. As we have seen above that in paragraph 136 in P.A. Inamdar it was held that a Common Entrance Test "***would better ensure the fulfillment of twin objectives of transparency and merit"*** and further on in para 138, it stated again "***[I]t needs to be specifically stated that having regard to the larger interests and welfare of the student community to promote merit, achieve excellence and curb malpractices, it would be permissible to regulate admission by providing a centralized and single window procedure. Such a procedure, can secure grant of merit-based admissions on a transparent basis."***

57. Clearly, the continuing concern expressed by the Seven Judge Bench in Inamdar, echoes the concern of this Court in TMA Pai: the need to ensure merit, as determined by the marks secured on the qualifying exam, is taken care of and thereby achieve academic excellence. In the post clause (5) Article 15 scenario, we are looking at all the seats that are available in the non-reserved category. Those seats have to be filled by non-minority institutions on the basis of merit of students, i.e., ranking determined in accordance with marks secured, in the general category,

comprising of the entire set of students who have taken the qualifying examination and secured the minimal marks.

58. It should be clear from the above that simply taking a few stray sentences from here and there in P.A. Inamdar and asserting from those sentences a ratio or a categorical holding would be an incorrect appreciation and leads to an inaccurate assessment of what this Court actually said and meant. The judgments of this Court in TMA Pai, Islamic Academy and in P.A. Inamdar are long, dealing with extremely complex issues of law and fact, and diverse zones of similarities and dissimilarities between the various types of educational institutions being considered, both by the ownership structure – such as minority or non-minority, and aided or unaided -, as well as by the level of education being sought to be imparted. On top of that the issues related to whether recognition and affiliation was being sought or not. So, before arriving at an applicable principle from within those huge judgments, for particular cases that courts deal with, it is imperative that context of observations be closely scrutinized, and also follow the many lines of delineation of many different ratios and principles. To this extent the structure that this Court in P.A. Inamdar gleaned from the judgment of this Court in TMA Pai provides some pathways for these complex interpretational tasks that are imposed on courts dealing with many specific aspects of the wider universe of facts

and law considered by this Court. And depending on the level of judicial review, the nature of judicial review, the courts may also have to take a look at the wider universe of facts and laws not taken into account by this Court in TMA Pai, Islamic Academy and P.A. Inamdar. The majority of the questions dealt with in TMA Pai related to minority institutions. In this regard, P.A. Inamdar, gleans three kinds of minority institutions that were dealt with in TMA Pai: (a) minority educational institutions, unaided nor seeking recognition or affiliation; (b) minority educational institution asking for affiliation or recognition; and (c) minority educational institutions receiving State aid, whether seeking recognition and affiliation or not. To this broad classification, P.A. Inamdar finds that TMA Pai has considered three parallel non-minority educational institutions also: (a1) non-minority educational institutions, neither seeking aid nor recognition or affiliation; (b1) non-minority educational institutions, seeking recognition or affiliation but no aid; and (c1) non-minority educational institutions receiving State aid, whether seeking recognition or affiliation or not. To the matrix of parallel institutions, P.A. Inamdar also gleans from TMA Pai, another dimension on which to differentiate educational institutions: by level of education, general collegiate education, professional graduate level education and post-graduate level of education. It is within this labyrinthine maze that this court sought to find similarities and differences between minority educational institutions and non-minority educational

institutions. Consequently, care must be taken in interpreting P.A. Inamdar, and a few stray sentences here and there ought not to be taken to indicate an actual holding or ratio. In P.A. Inamdar itself, the seven judge bench cautioned that such dependence on stray sentences would lead us astray. We have to delve into the foundations and the architectural super-structure erected by P.A. Inamdar to eke out the correct ratio applicable to the facts of the instant case.

59. In paragraph 91, of P.A. Inamdar, this Court enunciated one of the main holdings of TMA Pai as: "the right to establish an educational institution, for charity or for profit, being an occupation is protected by Article 19(1)(g)". In this regard, in as much as the majority in the 11 judge bench in TMA Pai, along with those who partly dissented and partly concurred, clearly held that education could be an occupation under Article 19(1)(g) only when charitable in nature, we are of the opinion, and hold, that the observation in para 91 in P.A. Inamdar that education can be an occupation imbued with profit motive is not the ratio of the decision. One sentence or a phrase or an expression cannot be torn out of context and be characterized as the ratio decidendi.

60. That apart, a question is raised in para 91 of P.A. Inamdar. If the right to start and operate educational institutions is a general right for all citizens, why did the framers of the Constitution have to enact Article

30(1)? It is observed in para 91 that the "reasons are too obvious to require elaboration……" and that it was "intended to instill confidence in minorities against any executive or legislative encroachment on their right to establish and administer educational institutions of their choice". It is also further noted in para 91 that though Article 30(1) is styled as a right, it is more in the nature of protection for minorities. The following cited text of the opinion in paras 91, 92 and 93 from P.A. Inamdar are critical:

> *"91. …… But for Article 30, an educational institution, even though based on religion or language, could have been controlled or regulated by law enacted under clause (6) of Article 19, and so, Article 30 was enacted as a guarantee to the minorities that so far as the religious minorities are concerned, educational institutions of their choice will enjoy protection from such legislation….. The minorities being numerically less qua non-minorities, may not be able to protect their religion or language and such cultural values and their educational institutions will be protected under Article 30 at the stage of law making. However, merely because Article 30(1) has been enacted minority educational institutions do not become immune from the operation of regulatory measures because the right to administer does not include the right to maladminister.*
>
> *92. As an occupation, right to impart education is a fundamental right under Article 19(1)(g), and therefore, subject to control by clause (6) of Article 19. This right is available to all citizens without drawing a distinction between minority and non-minority. Such a right is, generally speaking subject to laws imposing reasonable restrictions in the interest of general public. In particular laws may be enacted on the following subjects: (i) the professional or technical qualifications necessary for practicing any profession or carrying on*

any occupation, trade or business; (ii) the carrying on by State of any trade, business, industry or service whether to the exclusion, complete or practical of citizens or otherwise. Care is taken of minorities, religious or linguistic, by protecting their right to establish and administer educational institutions of their choice under Article 30. To some extent, what may be permissible by way of restriction under Article 19(6) may fall foul of Article 30. This is the additional protection which Article 30(1) grants to the minorities.

93. The employment of expressions "right to establish and administer" and "educational institutions of their choice" in Article 30(1) gives the right a very wide amplitude. Therefore, a minority educational institution has a right to admit students of its own choice, it can as a matter of its own free will admit students of non-minority community. However, non-minority students cannot be forced upon it. The only restriction on the free will of the minority educational institutions admitting students belonging to a non-minority community is, as spelt out by Article 30 itself, that the manner and number of such admission should not be violative of the minority character of the institution.

94. Aid and affiliation or recognition, both by the State, bring in some amount of regulation as a condition of receiving grant or recognition. The scope of such regulations, as spelt out by a six-Judge Bench decision in Rev. Sidhajbhai case[13] and a nine-Judge Bench case in St. Xavier's[14] must satisfy the following tests: (a) regulation is reasonable and rational; (b) it is regulative of the essential character of the institution and is conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it; (c) it is directed towards maintaining excellence of education and efficiency of administration so as to prevent it from falling in standards. These tests have met the approval of Pai Foundation."

[13] Rev. Sidhajbhai Sabhai v. State of Gujarat (1963) 3 SCR 837
[14] Ahemdabad St. Xavier's College Society v. State of Gujarat (1974) 1 SCC 717

61. A clear set of distinctions emerge between educational institutions that are started and operated by minorities and non-minorities. The level of regulation that the State can impose under Clause (6) of Article 19 on the freedoms enjoyed pursuant to sub-clause (g) of Clause (1) of Article 19 by non-minority educational institutions would be greater than what could be imposed on minority institutions under Article 30(1) continuing to maintain minority status by admitting mostly students of the minority to which the minority institution claims it belongs to, except for a sprinkling of non-minority students. The critical difference in regulation that would be higher in the case of non-minority educational institutions is that they only select students from the general pool, and based on merit as determined by marks secured in qualifying examinations. The ability to choose from a smaller group within the general pool, becomes available only to those who are constitutionally protected under Clause (1) of Article 30. Even that ability to choose from within the smaller group is not really a right to choose a "source". The source is given. The source can only be the minority to which the minority educational institution claims it belongs to. Once the choice is exercised to be an educational institution that serves a minority, the source itself is given by Clause (1) of Article 30 and depends on whether the group claiming to be a minority is actually a minority or not, as determined at the State level. Neither AWES nor ACMS, are

protected by any constitutional provision that allows it to choose to be an educational institution serving only a small class of students from within the general pool. If indeed Army personnel now constitute a "Socially and Educationally Backward Class", then under Clause (5) of Article 15, it is for the State to determine the same, and provide by law, for reservations of wards of Army personnel, in consonance with the constitutional jurisprudence extant with regard to how a Socially and Educationally Backward Class is to be delineated, for instance by removal of the creamy layer, and that the extent of reservations to be provided ought not to exceed certain levels etc. That has not happened in this instant matter. Consequently, all of the permissible restrictions and regulations under Clause (6) of Article 19 that non-minority institutions would be subject to would also be applicable with respect to ACMS. These regulations would also include a determination of how students in the non-reserved category of seats, in the post 93rd Amendment scenario, be admitted: on the basis of merit, determined by marks secured on the common entrance test. Maintenance of overall academic standards, which apparently can be properly achieved only if high importance is placed on admitting students on the basis of ranking determined by marks secured in entrance tests, is necessarily a State concern, which it may relax only in respect of those groups that it is constitutionally permitted to relax for. In the case of minority educational institutions, that relaxation is on account of Clause (1)

of Article 30 provided minority educational institutions are maintaining their minority status by admitting mostly minority students except for a sprinkling of non-minorities; and with respect to non-minority educational institutions, only with respect to statutorily determined percentage of seats for Scheduled Caste, Scheduled Tribes, and Socially and Educationally Backward Classes as enabled by Clause (5) of Article 15 and other constitutionally permissible classes. With respect to Socially and Educationally Backward Classes, such classes can be determined only after excluding the creamy layer, as held by this Court in Ashoka Kumar Thakur.

62. To the above we need to add another dimension. In P.A. Inamdar, another fine distinction is drawn between professional and non-professional educational institutions. We now turn to paragraphs 104 and 105 of P.A. Inamdar below:

> *"104 Article 30(1) speaks of "educational institutions" generally and so does Article 29(2). These articles do not draw any distinction between an educational institution dispensing theological education or professional or non-professional education. However, the terrain of thought as has developed through successive judicial pronouncements, culminating in Pai Foundation is that looking at the concept of education, in the backdrop of the constitutional provisions, professional educational institutions constitute a class by themselves as*

distinguished from educational institutions imparting non-professional education. It is not necessary for us to go deep into this aspect of the issue posed before us in as much as Pai Foundation has classified that merit and excellence assume special significance in the context of professional studies. Though merit and excellence are not anathema to non-professional education, the need for merit and excellence therein is not of the degree as is called for in the context of professional education.

105. Dealing with unaided minority educational institutions, Pai Foundation holds that Article 30 does not come in the way of the State stepping in for the purpose of securing transparency and recognition of merit in the matter of admissions……. However, a distinction is to be drawn between unaided minority educational institution at the level of schools and undergraduate colleges on the one side and institutions of higher education, in particular those imparting professional education, on the other side. In the former, the scope of merit-based selection is practically nil and hence may not call for regulation. But in the case of the latter, transparency, and merit have to be unavoidably taken care of and cannot be compromised. Those could be regulatory measures for ensuring educational standards …….. The source of this distinction between two types of educational institutions referred to hereinabove is to be found in the principle that right to administer does not include a right to maladminister."

63. What stands out therefore, is that even though it is quite clearly and explicitly stated that maintenance of merit as determined by marks secured in qualifying examinations is an absolute necessity under Clause (6) of Article 19 for those enjoying the freedoms only under sub-clause (g) of Clause (1) of Article 19, the protection of clause (1) of Article 30 to minorities is extended to choosing those with merit, based on marks on the qualifying examinations, amongst their own minority group. There is no choice of "source" here. The choice is only with respect to being a minority or a non-minority educational institution. If the choice is exercised that the promoters wish to start a minority educational institution, the source immediately gets affixed, by clause (1) of Article 30 and a determination of who falls within that minority group. The educational institution does not do that. The State does that, following a constitutionally mandated and permissible process. In that sense, even there it is the State which delineates the "source" so that the protections of Clause (1) of Article 30 indeed flow to the minorities that the State was expected to protect. Consequently, this attempt to define an equivalence between non-minorities and minorities, and then come up with the idea that minorities can choose or create a "source" from within the general pool, and hence the non-minorities should be free to also create their own "sources" has to be deemed to be illogical, and based on a weird interpretation of the

Constitution and the reality on the ground. The non-minority educational institutions have the basic freedom to choose: those students who are the most meritorious as determined on the basis of marks secured in a common entrance test with respect to filling up the seats that are not covered by reservations for Scheduled Castes, Scheduled Tribes, and "Socially and Educationally Backward Classes" pursuant to clause (5) of Article 15. Consequently choice of students by non-minority educational institutions can only be from the general pool with respect to non-reserved seats. They cannot make further distinctions of their own accord.

64. In light of the above we have to conclude that non-minority private unaided professional colleges do not have the right to choose their own "source" from within the general pool. The equivalence between minority and non-minority unaided institutions, apart from that distinction because of clause (1) of Article 30, was to be on the basis that both are subject to reasonable restrictions pursuant to clause (6) of Article 19, that neither minority nor non-minority institutions could maladminister their educational institutions, especially professional institutions, that affect the quality of education, and by choosing students arbitrarily from within the sources that they are entitled to choose from. In the case of non-minority institutions, especially professional institutions, the "source" can only be the general pool, and selection has to be based on inter-se ranking of

students who have qualified and applying or opting to choose to be admitted to such non-minority educational institutions. In the case of minority educational institutions, the "source" can be delimited to the particular minority the institution belongs to. To hold otherwise would be illogical, even if one were to assume that what is afforded to minority institutions is only a protection rather than a full fledged right. The protection under clause (1) of Article 30 is granted to minority institutions so long as they maintain their minority status. If the non-minority educational institutions could choose their own sources, minorities which are assured equal protections as non-minorities should certainly have that right too. The added protections to minority educational institutions makes sense only in the event that non-minorities are restricted to choosing from the general pool, and minorities from the delimited source of their own minority. Otherwise Clause (1) of Article 30 would become meaningless.

65. Consequently, we hold that the arguments of learned Senior Counsels, Mr. K.K. Venugopal and Mr. Jaideep Gupta that ACMS as a non-minority professional institution has the right to delimit a source of students are unpersuasive. ACMS has only the right to choose students from within the general pool. Further, in as much as this court in P.A. Inamdar found the judgment in Islamic Academy to be incorrect in presuming that there could state quotas and management quotas, we

would also have to find that the 10% management quota described in clause (a) of sub-section (1) of Section 12 to be suspect.

66. With regard to the proposition that the exemptions granted to ACMS to fill up all of its seats only with wards of army personnel on account of national interest has also been noted by us. However, given the ratio of P.A. Inamdar, we are unable to grant any relief on that count. We do recognize that it may indeed be the case that army personnel, particularly those at the lower end of the hierarchy in the army, and their families, may be suffering from great hardships. It would indeed be, and ought to be a matter of considerable national distress if persons who have agreed to lay down their lives, for the sake of national security, are not extended an empathetic understanding of their needs and aspirations. However, the ratio of the judgments in TMA Pai, Islamic Academy and P.A. Inamdar, by larger benches of this Court, leaves us with no options with respect to holding that ACMS may select only those students who have scored higher marks in the common entrance test with respect to seats remaining after taking into account reserved seats. This is notwithstanding what we may perceive to be an odious and an inherently unjust situation. If any special provisions need to be made to protect the wards of Army personnel, this may possibly be done by the State, by laws protected by Clause (5) of

Article 15. The private society, of former and current army personnel by themselves cannot unilaterally choose to do the same.

67. Prior to the enactment of 93rd Constitutional (Amendment) Act 2005, whereby Clause (5) was inserted into Article 15 of our Constitution, the ratio in TMA Pai, as further explained by P.A. Inamdar, would have foreclosed any options for the society and this country to relax the strict requirement that all admissions be on the basis of "merit based on marks secured in qualifying examinations." The other option would have been for Courts to find, in the interests of justice, to expand the "doing complete justice" jurisprudence under Article 142 to correct such instances of injustice, which raises its own problems. If we find that every unaided educational institution can define its own source, then we run head long into a situation wherein the entire field of higher education is carved up into "gated communities", with each new educational institution defining its own source in whichever manner it may choose to, as long as overt and invidious constitutional grounds of classification are not resorted to. How will the scholars in those colleges interact with people from other communities, other social backgrounds, so that they can perceive and conceive the manner in which they may have to apply what they are learning to solve the problems in the wider social context of India? Where would such classifications stop? Would members of the judiciary, both

higher and lower, then determine that they will start many law colleges which will only admit wards of such members of the judiciary? Would Indian Administrative Officers, along with some slightly lower level in the administrative rung then have a similar right? Would the members of the police force also then get such rights? Would NASSCOM or a group of software companies say that they want to start software engineering colleges that will open their portals only to those who belong to NASSCOM? Where will this stop? How will this nation take the burden of such walled and divided portals of knowledge? What will become of the prayer of our national poet laureate, that knowledge be free and where the world is not broken up into fragments of narrow domestic walls? Have we set ourselves on the path to such divisiveness, at the very source of the one force that could liberate us and unite us, and make us a more egalitarian society? If we were to uphold the logic of the learned Senior Counsel appearing for the Respondents, which we cannot under the ratio of TMA Pai, and P.A. Inamdar, but under "complete justice jurisprudence" of Article 142, then we would have set ourselves on a slippery slope, whereby the entire field of higher education would comprise of "gated communes" or some new and perverse form of caste system, where existing advantages, of occupations, social and economic stature, would get ossified only within a small segment of the population. Surely, fundamental rights have been granted to the citizens, to be free and build a better society or at least refrain from

actions that would create further walls of social division.

VII

68. One last thing remains.

69. As we had noted earlier, the Constitutional validity of Delhi Act 80 of 2007 was never raised, either by the Appellants or the Respondents, in any of the proceedings earlier. For the first time, before us, the learned Senior Counsel, Mr. Jaideep Gupta has raised the question of whether the provisions of clause (5) of Article 15 violate the basic structure of the Constitution in so far as they relate to enablement of the making of "special provisions", by law, with respect to admissions of Scheduled Castes, Scheduled Tribes, and Socially and Educationally Backward Classes into private unaided non-minority educational institutions. This would obviously raise an issue regarding applicability of Delhi Act 80 of 2007 in the instant matter. We are hence, required to look at this issue too. In pressing the challenge of basic structure doctrine against clause (5) of Article 15, the learned Senior Counsel relied on the opinion of our learned brother Justice Dalveer Bhandari in Ashoka Kumar Thakur, on the provisions of clause (5) of Article 15 that are applicable with respect to private unaided non-minority educational institutions. We note the specific text of the constitutional provisions below, and thereafter briefly

summarise the opinion of Bhandari J, which learned Senior Counsel adopts wholesale as his submissions.

Clause (5) of Article 15 states as follows:

> *"Nothing in this article or in sub-clause (g) of clause (1) of Article 19 shall prevent the State from making any special provisions, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled tribes insofar as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30."*

70. In Ashoka Kumar Thakur, apart from Bhandari J., the other four learned judges did not evaluate the issue of whether the provisions in clause (5) of Article 15, as applicable to unaided non-minority educational institutions, violate the basic structure of the Constitution. This was on the grounds that no unaided educational institutions were before this Court. The majority, including Bhandari J., held that the same provisions in so far as they relate to governmental and private aided institutions to be valid and not in violation of the basic structure. However, Bhandari J., opined that in as much as reservations would be imminent, pursuant to clause (5) of Article 15, the same ought to be tested because the content of freedoms enunciated by this Court, in TMA Pai, and P.A. Inamdar, were likely to be destroyed. It was granted that, even though this Court had held in TMA

Pai, as explained in P.A. Inamdar, that imposition of reservations on non-minority unaided educational institutions to be unreasonable restrictions under clause (6) of Article 19 on the freedoms granted by sub-clause (g) of clause (1) of Article 19 to pursue the charitable occupation of starting, operating, financing, working and teaching in non-minority unaided educational institutions, the same could be subjected, by a constitutional amendment, to the provisions of clause (5) of Article 15. Nevertheless, it was reasoned that in as much as the freedoms of citizens to engage in the occupation of education was under potential threat, and further because the occupation of education was one of the activities covered by freedoms that were part of the "Golden Triangle", as enunciated in Minerva Mills Ltd. V Union of India[15], it was posited that the details be examined as to the degree of abridgment of the freedom of the "educators" to start, operate, manage, finance, work in and teach in non-minority educational institutions.

71. The main conclusion reached was that "educators" who do not take a "paisa of public money" ought to be free from restrictions of State imposed reservations. Further, it was also opined that even though non-minority unaided educational institutions would continue to exist, and educators would have their occupation, the "greatest impact on the educator is that neither he nor his institution will choose whom to teach", in as much as in

[15] (1980) 3 SCC 625

"49.5%" of the time the State would determine, through a policy of reservations, who the educators would teach. In this regard, the test for violation of basic structure doctrine was conducted by an impact and effects test (or what is called as a "rights test"), claiming that the observations of I.R. Coelho v. State of Tamil Nadu[16] in para 151 (ii) mandated such a test. In the first phase, the so called impact stage, it was determined that clause (5) of Article 15 would indeed affect the "identity" of the freedom of private citizens to engage in the charitable occupation of starting, operating, managing, working in, financing and teaching in non-minority unaided educational institutions. To this extent, the observations in TMA Pai were relied on to trace the contours of the outline of the "identity" of the freedom under sub-clause (g) of clause (1) of Article 19. The test of violation of basic structure doctrine was further stated to be whether the identity of the freedom of educators in non-minority unaided educational institutions under sub-clause (g) of clause (1) of Article 19 was "compromised" by clause (5) of Article 15. It was also held that even if the freedom to choose students of one educator was affected, then the identity of the freedom to engage in the said occupation guaranteed by sub-clause (g) of clause (1) of Article 19 itself would have been compromised, and consequently the provisions in clause (5) of Article 15 in as much as they affect non-minority unaided educational institutions would have to be deemed to be unconstitutional and violative of the basic structure.

[16] (2007) 2 SCC 1

Thereafter an "effect" test was conducted, and by noting that imposition of reservations would immediately (1) make academic standards suffer; (2) affect the ability of attracting and retaining good quality faculty; (3) the incentive to establish a first-rate unaided educational institution is made difficult; and (4) ultimately the global reputation of educational institutions would be damaged, it was held that freedom of "educators" in non-minority unaided educational institutions would have been compromised and hence abrogated. Further, it is determined that sub-clause (g) of clause (1) of Article 19 to itself be a basic feature of the Constitution, and it is further observed that:

> "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….. The identity of the Constitution is altered when unreasonable restrictions make a fundamental right meaningless…. Imposition of reservations on unaided institutions has abrogated Article 19(1)(g), a basic feature of the Constitution."

72. The learned Senior Counsel, Mr. Jaideep Gupta, has pressed upon us to follow the same methodology and find that clause (5) of Article 15 abrogates the basic structure of the constitution, and consequently declare those aspects of Delhi Act 80 of 2007 that impose reservations to be unconstitutional. We state our response very simply: we are not persuaded by the same, and for the reasons discussed hereafter with humility and

utmost respect beg to differ from the view taken by our esteemed brother Bhandari J.

73. Clause (5) of Article 15 is an enabling provision and inserted by the 93rd Constitutional (Amendment) Act, 2005 by use of powers of amendment in Article 368. The 93rd Constitutional (Amendment) Act, 2005 was in response to this Court's explanation, in P.A. Inamdar, of the ratio in TMA Pai, that imposition of reservations on non-minority unaided educational institutions, covered by sub-clause (g) of clause (1) of Article 19, to be unreasonable restrictions and not covered by clause (6) of Article 19. The purpose of the Amendment was to clarify or amend the constitution in a manner that what was held to be unreasonable would now be reasonable by virtue of the Constitutional status given to such measures. The correct approach would then be to test whether powers of amendment in Article 368 do extend to imposing restrictions on a right, which otherwise would have been held to be "unreasonable" on account of a judgment of this Court. Once that test is conducted and found to be not violating the basic structure of the Constitution, the grounds on which this Court had previously found the reservations to be unreasonable would vanish. This is even more so, when the amendment, and the consequent legislation, cannot and do not seem to be directed at completely eliminating the possibility of private citizens engaging in that activity, the right to charge appropriate fees is protected, and moreover the existing

jurisprudence does not allow, normally an imposition of reservations above 50%. If we were to be guided by the submissions in this regard by the learned Senior Counsel we find that we would have to invert the logic of the basic structure doctrine, state the propositions of the test in a tautological manner and consequently convince ourselves that there is great danger to constitutional identity by virtue of legislations that could plausibly be enacted by the State by virtue of the enabling provisions of clause (5) of Article 15 with respect to non-minority unaided educational institutions. We find that if we were to do that, we would have set ourselves on the path to ineradicably alter the identity of our Constitution, damage its very purposes and the national project, and wipe out decades worth of jurisprudence with regard to the importance of Directive principles of State Policy, thereby bringing back the principles enunciated in the case of I.C. Golaknath v. State of Punjab[17], that none of the fundamental rights can be abridged or affected in any manner, which was set aside by this Court in Keshavananda Bharati v. State of Kerala.[18]

74. In this regard we also opine that if we adopt the interpretation of para 151(ii) of I.R. Coelho that it mandates a "rights test" we would end up misinterpreting the modality of testing a Constitutional amendment on the anvil of the basic structure doctrine as enunciated by this Court in that

[17] (1967) 2 SCR 762
[18] (1973) 4 SCC 225.

case itself. In this regard, a basic distinction was drawn by this Court, in I.R. Coelho, as between "rights test" and "essence of rights" test, and it was stated in para 142 that:

> *"There is also a difference between the "rights test" and the "essence of rights" test. Both form part of application of the basic structure doctrine. When in a controlled Constitution conferring limited power of amendment, an entire chapter is made inapplicable,* the "essence of right" test as applied in M. Nagaraj Case will have no applicability. In such a situation, to judge the validity of law, it is the "right test" which is more appropriate."

75. Paragraph 151(ii) in I.R. Coelho, when read by itself, may suggest that an effect and impact test be used; however we are unable to do so because of what was stated in para 142 of I.R. Coelho stated above. This is on account of the fact that if we were to take the concluding answer given to a specific question, and conflating the same to the status of a ratio applicable to all other general or specific facts, we run the risk of not recognizing the rationale by which the Court had arrived at the final answers. This has a deleterious effect on law. The broader principles that are applied, in a specific manner to particular fact patterns located in the specific questions that the courts set out to answer, would then be obliterated, and the narrow application that the Court finds for a specific situation, which is but an instance of the broader principle, the genus, would have taken over. Moreover, in the preceding paragraph 150, this

Court enunciated that it is the constitutional validity of the Ninth Schedule laws which have to be adjudged by applying the "direct impact and effect test i.e. rights test." Consequently, if we were to just take the text of para 151 (ii) by itself as the ratio, then we would also run the risk of not recognizing the multiple principles enunciated in the conclusion itself. Hence, we find it necessary to cite below sub-paras (i), (ii), (iii), (iv) and (v) of Para 151 of I.R. Coelho below (emph. supplied), and thereafter derive the principle that is applicable in the instant matter:

> "(i) *A law that abrogates or abridges rights guaranteed by Part III of the Constitution may violate the basic structure or it may not. If former is the consequence of the law, whether by amendment of any article or by an insertion in the Ninth Schedule, such law will have to be invalidated in exercise of judicial review power of the Court. The validity or invalidity would be tested on the principles laid down in this judgment.*
>
> (ii) *The majority judgment in Keshavananda Bharati case read with Indira Gandhi case*[19] *requires the validity of each new constitutional amendment to be judged on its own merits. The actual effect and impact of the law on the rights guaranteed under Part III has to be taken into account for determining whether or not it destroys basic structure, The impact test would determine the validity of the challenge.*
>
> (iii) *All amendments to the Constitution made on or after 24-4-1973 by which the Ninth Schedule is amended by inclusion of various laws therein shall have to be tested on the touchstone of the basic or essential features of the Constitution as reflected in Article 21 read with Article 14, Article 19, and the principles underlying them. To put it*

[19] Indira Nehru Gandhi v Raj Narain, 1975 Supp SCC 1

differently even though an Act is put in the Ninth Schedule, its provisions would be open to attack on the ground that they destroy or damage the basic structure if the fundamental right or rights taken away or abrogated pertains to or pertain to the basic structure.

(iv) *Justification for conferring protection, not blanket protection, on the laws included in the Ninth Schedule by constitutional amendments shall be a matter of constitutional adjudication by examining the nature and extent of infraction of a fundamental right by a statute, sought to be constitutionally protected, and on the touchstone of the basic structure doctrine as reflected in Article 21 read with Article 14 and Article 19 by application of the "rights test" and "essence of the right" test taking the synoptic view of the Articles in Part III as held in Indira Gandhi case.*[20] *Applying the above tests to the Ninth Schedule laws, if the infraction affects the basic structure then such law(s) will not get the protection of the Ninth Schedule*.

(v) *This is our answer to the question referred to us vide order dated 14-9-1999 in I.R. Coelho v. State of T.N"*

76. It should be pointed out that I.R. Coelho judgment was delivered to answer the question, as pointed out in para 5, as to whether it is "*permissible for the Parliament under Article 31-B to immunize legislation from fundamental rights by inserting them into the Ninth Schedule, and if so, what is its effect on the power of judicial review of the Court*". In para 78 of I.R. Coelho it was noted that the "*real crux of the problem is to the extent and nature of immunity under Article 31-B can validly provide*". The question of immediate purport was whether Article 31-B provided a blanket protection such that legislative enactments which destroy the basic

[20] 1975 Supp SCC 1

structure could be included in the Ninth Schedule, and thereby become immune from the test of basic structure itself.

77. One of the incidental questions that this Court in I.R. Coelho sought to answer was whether, pursuant to Keshavananda, none of the fundamental rights were to be considered to be a part of the basic structure. This was so, in the light of the opinion of Khanna, J., in Keshavananda, which seemed to suggest that fundamental rights were not to be treated as a part of the basic structure. However, in light of Khanna J's, clarification in the Indira Nehru Gandhi v Raj Narain[21] case, that his opinion in Keshavananda could not be read to mean that none of the fundamental rights could be treated as a part of basic structure, this Court in I.R. Coelho in para 97, held that "*the rights and freedoms created by the fundamental rights chapter can be taken away or destroyed by amendment of the relevant article, but subject to the limitation of the basic structure doctrine*". In para 98 it was observed by this Court that "*the first aspect to be borne in mind is that each exercise of the amending power inserting laws into the Ninth Schedule entails a complete removal of the fundamental rights chapter vis-à-vis the laws that are added to the Ninth Schedule. Secondly, insertion in the Ninth Schedule is not controlled by any defined criteria or standards by which the exercise of power may be evaluated. The consequence of insertion is that it nullifies entire Part III of*

[21] 1975 Supp SCC 1.

the Constitution. There is no constitutional control on such nullification…….. The supremacy of the Constitution mandates all constitutional bodies to comply with the provisions of the Constitution. It also mandates a mechanism for testing the validity of legislative acts through an independent organ viz. the judiciary." Thus, it appears that what was exercising the collective mind of the Nine Judge Bench in I.R. Coelho was the breadth of protections that were being sought and placed on laws included in the Ninth Schedule: from any standards or values of the Constitution itself, including complete evisceration of Part III and judicial review. In fact this is borne out by para 103 wherein it was observed that *"[T]he absence of guidelines for exercise of such power means the absence of constitutional control which results in destruction of constitutional supremacy and creation of parliamentary hegemony and absence of full power of judicial review to determine the constitutional validity of such exercise."*

78. It would be pertinent to note that the provisions of new clause (5) of Article 15 do not purport to take away the power of judicial review, or even access to courts through Articles 32 or 226. Neither do the provisions of clause (5) of Article 15 mandate that the field of higher education be taken over by the State itself, either to the partial or total exclusion, of any private non-minority unaided educational institutions, a power that was

most certainly granted under clause (6) of Article 19, which had been inserted by the 1st Constitutional Amendment in 1951. The purport of its provisions is that sub-clause (g) clause (1) of Article 19 should not be read to mean that if the State were to make "special provisions" with respect to admission of Scheduled Castes, Scheduled Tribes, and Socially and Educationally Backward Classes to non-minority unaided educational institutions the same should not be deemed to be unreasonable. A small portion, of one of the activities of one particular occupation in the entire field of occupations that are a part of the guaranteed freedoms by sub-clause (g) of clause (1) of Article 19, is to be restricted. Further, such an amendment was necessary, as stated in the Statement of Objects and Reasons of the Constitution (one Hundred and Fourth Amendment) Bill 2005 (which became the 93rd Constitutional (Amendment) Act, 2005), to promote the "educational advancement of the socially and educationally backward classes of citizens….The Scheduled Castes and Scheduled Tribes in matters of admission of students belonging to these categories in unaided educational institutions other than minority educational institutions." It was also stated that greater access to higher education, including professional education to students belonging to weaker segments is a matter of major concern, and that the number of seats available in aided or State maintained institutions, particularly in respect of professional education, was limited in comparison to those in private

unaided institutions. Furthermore, in as much as Article 46, a Directive Principle of State Policy, commands that the State promote with special care the educational and economic interests of the weaker sections of the population and protect them from social injustice, it was stated that access to education to be important to ensure advancement of persons belonging to Scheduled Castes, Scheduled Tribes and the Socially and Educationally Backward Classes.

79. In this regard, I.R. Coelho makes some very important observations, about the equality code and egalitarian content of fundamental rights that we opine have a direct bearing on the issues of basic structure review of clause (5) Article 15. In particular after noting that Part III "has a key role to play in the application" of the basic structure doctrine (para 100), the Court went on to state para 101:

> *"Regarding the status and stature in respect of fundamental rights in constitutional scheme, it is to be remembered that fundamental rights are those rights of citizens or those negative obligations of the State which do not permit encroachment on individual liberties. The state is to deny no one equality before the law. The object of fundamental rights is to foster the social revolution by creating a society egalitarian to the extent that all citizens are to be equally free from coercion or restriction by the State.* ***By enacting fundamental rights and directive principles which are negative and positive obligations of the State, the Constituent Assembly made it the responsibility of the Government to adopt a middle path between individual liberty and public good. Fundamental rights and directive***

> ***principles have to be balanced. The balance can be tilted in favour of the public good. The balance however cannot be over-turned by completely overriding individual liberty. This balance is an essential feature of the Constitution***." (emph. Supp.)

80. Further, it was also stated in, in para 102, that in evaluating the permissibility of an amendment, one needs to look at, as done in Waman Rao v. Union of India,[22] how far the amendment is "consistent with the original; you cannot by an amendment transform the original into the opposite of what it is. For that purpose, a comparison is undertaken to match the amendment with the original. Such a comparison can yield fruitful results even in the rarefied sphere of constitutional law." In other places, as in para 105, it is noted that "*Economic growth and social equity are two pillars of our Constitution, which are linked to the rights of an individual (right to equal opportunity), rather than in the abstract. Some of the rights in Part III constitute fundamentals of the Constitution like Article 21 read with Articles 14 and 15 which represent secularism etc., As held in Nagaraj[23] egalitarian equality exists in Article 14 read with Articles 16(4), (4-A), (4-B) and, therefore, its wrong to suggest that equity and justice finds place only in the directive principles*." (emph. supp'd). Upon discussing various aspects such as the fact that extensive discussions were held in Keshavananda with respect to status of property as a fundamental

[22] (1981) 2 SCC 362
[23] M. Nagaraj v Union of India (2006)8 SCC 202

right, that in the Indira Gandhi case Chandrachud, J., posits that equality embodied in Article 14 is part of the basic structure of the Constitution, that in Minerva Mills it was held that Articles 14, 19 and 21 clearly form part of the basic structure of the Constitution and cannot be abrogated, it is concluded in para 114 that "the result of the aforesaid discussion is that since basic structure of the constitution includes some of the fundamental rights, ***any law granted Ninth Schedule protection deserves to be tested against these principles. If*** **the law infringes the essence of any fundamental rights, or any other aspect of the basic structure** then it will be struck down. The extent of abrogation and limit of abridgment shall have has to be examined in each case." (emph. supp.)

81. Consequently, it appears that in I.R. Coelho this Court recognized that there are different kinds of constitutional amendments. The kinds of amendments whereby laws are placed in the Ninth Schedule only enjoy a "fictional immunity" and they would have to be tested by using the direct impact and effect test i.e., "rights test" or even the essence of each fundamental right that has been deemed to be a part of the basic structure. The laws placed in the Ninth Schedule are ordinarily enacted, and then placed in Ninth Schedule by a constitutional amendment, simpliciter, and enjoy only a "fictional immunity" pursuant to Article 31-B. This is in contrast to the situation where a Constitutional amendment

effectuates changes in the main provisions of the Constitution, particularly in Part III. In such a constitutional amendment, the "essences of rights" test used in M. Nagaraj, wherein the essences of the rights are identified across entire equality, freedom and judicial review codes, i.e., "over-arching principles" of such codes, and then the particular Constitutional amendment is evaluated as to whether it completely changes the very "identity" of the entire Constitution itself. Those "over-arching principles" are what gives the Constitution its identity, and when they are destroyed would the identity of the Constitution have been changed completely.

82. This is made very clear by what this Court in I.R. Coelho perceived to be the status of the nature of immunity granted by Article 31-B: *"Article 31-B gives validation based on fictional immunity. In judging the validity of constitutional amendment*" i.e., the amendment that places a state law in the Ninth Schedule "*we have to be guided by the impact test*." (see para 149) "*The basic structure doctrine requires the State to justify the degree of invasion of fundamental rights…*" Further on in para 150 the Court concludes "*The result of the aforesaid discussion is that the constitutional validity of the Ninth Schedule laws can be adjudged by applying the direct impact and effect test i.e., rights test, which means the form of an amendment is not the relevant factor, but the consequences thereof*."

83. The above cited paragraph lends further support to our earlier observation that this Court in I.R. Coelho has made an essential distinction between the kinds of constitutional amendments that are effected by placement of State laws in the Ninth Schedule versus the kinds of constitutional amendments that change aspects of the Constitution itself. This is further supported by the fact that in para 133 the Court recognized that the laws placed in the Ninth Schedule do not become a part of the main body of the Constitution, and that they become a part of Ninth Schedule and "derive validity on account of the exercise undertaken by Parliament to include them… This exercise has to be tested every time it is undertaken". Secondly, it must also be noticed, that state legislatures cannot amend the constitution. It was conclusively held in I.R. Coelho, in para 148, that "*fictional validation based on the power of immunity exercised by Parliament under Article 368 is not compatible with basic structure doctrine and, therefore, the laws that are included in the Ninth Schedule have to be examined individually for determining whether the constitutional amendments by which they are put in the Ninth Schedule damage or destroy the basic structure of the Constitution*." This was so because post Keshavananda decision, this Court had specified that some of the fundamental rights are also a part of the basic structure because of their importance. Consequently, a direct impact and effect test i.e., "rights test" and "essence of right" i.e., the essence of the fundamental right that

has been affected has to be conducted in the case of laws included in the Ninth Schedule by virtue of the constitutional amendments, simpliciter, whereas with respect to constitutional amendments of an article in the Constitution itself had to be tested in accordance with the essences of rights i.e., "over-arching principles" test as enunciated in M. Nagaraj. This is further borne out by sub-para (i) of paragraph 151 cited earlier when read with para 142, and taking the entire judgment in I.R. Coelho into account.

84. A few observations are merited with regard to the very carefully crafted principles laid down in the sub-para (i) of para 151 in I.R. Coelho. The first point is that a law that abrogates or abridges rights guaranteed by Part III may or may not violate the basic structure. This means that there could be laws that could abrogate some fundamental rights in Part III, and yet may not lead to a violation of the basic structure doctrine. The second sentence in sub-para (i) states emphatically that if a law abrogates or abridges a fundamental right and also violates the basic structure then it must be set aside. At this stage it is not yet clear whether the law is a constitutional amendment exercised under Article 368 to make an amendment to the main body of the constitutional text, or the law is an amendment that places laws in the Ninth Schedule, whereby such laws in the Ninth Schedule do not become a part of the Constitution as such. That

clarification comes from the next sentence: "The validity or invalidity would be tested on the principles laid down in this judgment". That sentence clearly indicates that the same has to be determined in accordance with the principles laid down in the entire judgment and not just in the conclusion. That principle was unequivocally laid down in para 142 that had been cited earlier, which recognizes that the test of Constitutional amendments on the anvil of the basic structure doctrine would have to be in accordance with the test delineated in M. Nagaraj.

85. In light of the above discussion, we are of the opinion that it is impermissible for us to apply the direct impact and effects test to evaluate whether clause (5) of Article 15 provisions with respect to admissions to unaided non-minority educational institutions violate the basic structure. By no stretch of imagination could the provisions of Clause (5) of Article 15 be deemed to be so wide as to eliminate an entire chapter of fundamental rights, or permit complete evisceration of even the freedom to engage in one of the occupations of the many occupations guaranteed by clause (g) of clause (1) of Article 19. The correct test would be the "essences of rights" test, i.e., the "over-arching principles" test as enunciated in M. Nagaraj[24], to which we turn below.

[24] (2006) 8 SCC 212

86. In M. Nagaraj, Kapadia J., (as he then was) speaking for the Court, recognized that one of the cardinal principles of constitutional adjudication is that the mode of interpretation ought to be the one that is purposive and conducive to ensure that the constitution endures for ages to come. Eloquently, it was stated that the *"Constitution is not an ephemeral legal document embodying a set of rules for the passing hour"*. In M. Nagaraj this Court recognized that fundamental rights are not those which exist only by virtue of the State recognizing them to be so, but rather that the Constitution transcribes them as limitations on the power of the State. This would mean that not merely or solely are the negative rights to be conceived as natural, given and pre-existing, but the positive rights, which cast an obligation on the State to achieve egalitarian and social justice objectives, that behoove to the benefit of individuals and groups would also have to be recognized as natural, given and pre-existing. It is also recognized that the content of the fundamental right granted to a citizen has to be determined by the judiciary; and variations effectuated by the State have to meet the test of reasonableness as enunciated by this Court in Minerva Mills, which effectively set aside the narrow construction of A.K. Gopalan v State of Madras[25] that as long as the variation and the extent of such variation of a granted fundamental right is effectuated by "law" it could not be questioned. However, it was also recognized that the judiciary cannot use a narrow and pedantic exposition of the text of the fundamental

[25] 1950 SCR 88

right to determine the contents thereof. Further, the Court in M. Nagaraj recognized that the standard of judicial review of a constitutional amendment, on the touchstone of the doctrine of the basic structure, is an entirely different exercise than review of state legislation with respect to its impact on a specific fundamental right. Analysing the rationale and mode of analysis of the Court in S.R. Bommai v. Union of India[26], it was stated, in para 23, that "*it is important to note that the recognition of a basic structure in the context of amendment provides an insight that there are, beyond the words of particular provisions, systematic principles underlying and connecting the provisions of the Constitution. These principles give coherence to the Constitution and make it an organic whole…. These principles are part of constitutional law even if they are not expressly stated in the form of rules. An instance is the principle of reasonableness which connects Article 14, 19 and 21. Some of these principles may be so important and fundamental, as to qualify as "essential features" or part of the "basic structure" of the Constitution, that is to say, they are not open to amendment. However, it is only by linking provisions to such overarching principles that one would be able to distinguish essential from less essential features of the Constitution*." (emphasis added). It was further specified that certain principles, such as federalism, socialism, secularism and reasonableness "are beyond the words of a particular

[26] (1994) 3 SCC 1

provision. They are systematic and structural principles underlying and connecting various provisions of the Constitution."

87. The modality of the "essences of rights test" was enunciated in para 25 of M. Nagaraj as follows: " *In order to qualify as an essential feature, it must be first established that the said principle is a part of constitutional law binding on the legislature. Only, thereafter, is the second step to be taken, namely whether, whether the principle is so fundamental as to bind even the amending power of Parliament i.e., to form a part of the basic structure….. To sum up: in order to qualify as an essential feature, a principle is to be first established as part of constitutional law and as such binding on the legislature. Only then, can it be examined whether it is so fundamental as to bind even the amending powers of Parliament i.e., to form part of the basic structure of the Constitution. This is the standard of review of constitutional amendments in the context of the doctrine of the basic structure*." And further on, in para 26, the Court also recognized that the doctrine of basic structure has emanated from the German Constitution and notes that in that jurisprudence the overarching principle that connects, and informs all other values is the principle of human dignity. With respect to our Constitution it was noted that *"axioms like secularism, democracy, reasonableness, social justice, etc., are over-arching principles which provide linking factor for the principle of fundamental rights like*

Article 14, 19 and 21. These principles" i.e., the over-arching principles, "are beyond the amending power of Parliament." (emph. suppd.)

88. From the above we can glean that evaluation of whether a particular amendment has amended those "over-arching principles" is the test for basic structure. It is not the specific instances of expression of contents of a fundamental right, as stated by the courts prior to an amendment which are to become the anvil of the test of basic structure when the amending power is exercised and a main element of the provisions of the Constitution is altered. Rather, the courts have to be careful in assessing whether those over-arching principles themselves are abrogated. By no stretch of imagination could one claim that truncation of one of the activities that were deemed to have been one of the many essential features of one of the occupations of the many occupations that are guaranteed by one of clauses of the freedom code, by itself could constitute an over-arching principle, and further that such a principle has been abrogated. It is not the change in the identity of any one element of the conspectus of activities of one occupation in a plethora of occupations that itself forms a part of the many different kinds of freedoms that leads to the violation of the basic structure doctrine; but rather whether the over-arching principles, that connect one fundamental right to the other that are so abrogated as to change the very identity of the Constitution which is the true test to

evaluate whether a constitutional amendment has violated the basic structure doctrine. In this regard, the Court in M. Nagaraj further goes on to pithily state that the standard to be applied in evaluating whether an amendment has also modified the over-arching principles, that inform each and every fundamental right and link them, is to find whether because of such a change we have a completely different constitution. In particular, summarizing the various opinions in Keshavananda Bharati[27], it was stated:

> *"To conclude, the theory of basic structure is based on the concept of constitutional identity. The basic structure jurisprudence is a preoccupation with constitutional identity…. The word "amendment" postulates that the old Constitution survives without a loss of its identity despite the change and it continues even though it has been subjected to alteration. This is the constant theme of opinions in the majority decision in Keshavananda Bharati. To destroy its identity is to abrogate the basic structure of the Constitution..…… The main object behind the theory of constitutional identity is continuity and within that continuity of identity, changes are admissible depending upon the situation and circumstances of the day."* (emphasis added, para 28).

89. The prevention of destruction of the "constitutional identity" is the chief rationale in using the basic structure doctrine in instances of constitutional amendment such as the one we are concerned with in the instant matter. Constitutional identity, and continuance of such an identity are the primordial issues, and the identity ought not to be destroyed. Often

[27]. (1973) 4 SCC 225

a problem is encountered with issues of identity. The issue of change in identity, and debates about it can take extremely abstract and metaphysical form as with regards to the Ship of Theseus[28] or the Theseus' Paradox. In the classical narrative, in the metaphysical speculations about the paradox, reference is with respect to the ship in which Theseus, and other youth of Athens, returned from Crete having killed a minotaur that demanded sacrifice of Greek youth every year. Because the ship was of such importance, Athenians preserved it in the harbor for generations, replacing its boards that had become dilapidated by new ones, where at one point all the boards had been replaced. This apparently led to the fertile Greek minds, prone as they were to metaphysical speculation, to ask whether the ship, after every part had been replaced by another newer part, was indeed the same ship or not. For the formalists, the identity had changed because none of the original parts were there; and in fact the extreme amongst them claimed that the identity had changed when the first part was itself changed. For the functionalists, the ship was identically the same because the parts that replaced the worn out parts were of the same quality, shape and size and performed exactly the same functions as previously specified. In either case, both the puritanical originalists delighted in the squabble without there being any pragmatic resolution.

[28] Plutarch: Theseus, trans. John Dryden.

90. Unfortunately, we as constitutional adjudicators do not have the luxury of facile metaphysical speculations, and imposing conclusions arrived thereupon on this country, by ignoring the practical impact of the ship and the larger purposes that it is supposed to serve. Indeed our ship, the Constitution, was never intended to remain in the harbour and was intended to set sail. The narrative of our Ship of Theseus takes a different form for us.

91. We liken our Constitution to the Ship of Theseus, with the difference that the ship itself has been provided with sufficient wood, and tools to fashion new boards, and it was to actually set sail. The Ship of our Nation, the Constitution, set sail on its journey in 1950, on uncharted oceans of time, circumstances and challenges. We set sail with a ship as it was then designed, nevertheless knowing that certain features were quintessential to being a ship that could sail such oceans; and we set sail towards a target, almost like Columbus, with the understanding that sailing in a particular direction would get us to a particular destination. We even promised ourselves, that notwithstanding our prior history of bickering, of degradation of humans amongst us by ascribed status, and of economic poverty, we would have, by the time of reaching our goal, ensured that certain invaluable qualities, such as dignity, fraternity, security and integrity of our nation-state, inform all aspects of social order. In fact the

achievement of those qualities was to be the goal. The directions we were given were that if we strive to achieve, in actual fact, JUSTICE, social, economic and political; LIBERTY of thought, expression, belief, faith and worship; and EQUALITY of status and opportunity; within the context of organizing our polity as a secular, socialist and a democratic republic, and the State itself, necessarily follows certain principles of policy, we would achieve those goals. We were enjoined to roam the high seas until we achieved a state of acceptable achievement of those goals, neither knowing the length of time nor the length of that journey. In fact we also knew, that achievement of those goals was never going to be a matter of some quantitative assessment of those goals, but always a maintenance of the path towards, and sustaining what we may have already achieved. We also knew that along that journey, many of the boards, and indeed even certain parts of the main structure may appear to be or actually become a detriment to our progress. Hence, we were also given liberty to change some of those parts, in terms of replacing those parts with exact same ones, or mostly similar ones, or even radically differently designed ones. The caveat was that, if the changes were such that the destination could not be reached, or that the motive force for powering the journey would become truncated, or debates could not be conducted within the settled principles of civility, or that on the course of that journey too many were actually getting pushed off the ship, or that the changes were such that the

ship would turn into a tiny raft, in which the people on the margins would necessarily get pushed into the ocean, etc., the ship of our nation, the Constitution, would sink. If inappropriate changes were made, the ship would sink; and if the appropriate changes were to not be made the ship would sink. Neither wrong action, nor abstinence from action was permissible.

92. In this regard, this Court, charged with the responsibility of ultimately interpreting the design of the structure of that ship, stated thus:

> *"[C]onstitutional adjudication is like no other decision-making. There is a moral dimension to every major constitutional case: the language of the text is not necessarily a controlling factor. Our Constitution works because of its generalities; and because of the good sense of the judges when interpreting it. It is that informed freedom of action of judges that helps to preserve and protect our basic document of governance."* (para 30 of M. Nagaraj).

93. Proceeding on the rationale as enunciated in the cited paragraphs, this Court in M. Nagaraj, then enunciated that the "*theory of the basic structure is based on the principle that a change in a thing does not involve its destruction and destruction of a thing is a matter of substance and not of form. Therefore one has to apply the principle of over-arching principle to be gathered from the scheme and the placement and the*

structure of an article in the Constitution. For example, the placement of Article 14 in the equality code; the placement of Article 19 in the freedom code; the placement of Article 32 in the code giving access to the Supreme Court".

94. Yet, the question remains? How do we discern whether a particular aspect is a part of the basic structure or not? In M. Nagaraj, this Court reaffirmed the working test laid down by Chandrachud J., in Indira Nehru Gandhi:

> *"For determining whether a particular feature of the Constitution is a part of the basic structure, one has to perforce to examine in each individual case the place of the particular feature in the scheme of our Constitution, its object and purpose, and the consequences of its denial on the integrity of the Constitution as a fundamental instrument of country's governance."*

95. In this regard, it was noted in M. Nagaraj that concepts like "equality", "representative democracy" etc., are delineated over various articles. "*Basically Part III of the Constitution consists of equality code, the freedom code and the right to move the courts. It is true that equality has several facets. However, each case has to be seen in the context of the placement of an article which embodies the foundational value of equality*."

96. Two consequences follow from the above: our earlier assessment, that the test we are to apply in instances like the addition of clause (5) to

Article 15, is not about truncation of one activity that was previously deemed by this court to be one of the essential features of one of the many occupations that are a part of one of the many freedoms guaranteed in the freedom code; and that we not only have to assess the negative impact, but also the positive impact of an amendment. This follows from the realization that while we may classify aspects important for that ship to sail towards its goals into neat analytical categories, the ship itself, and the nation it carries functions in accordance with the action and reaction of each category upon other categories. Consequently, we must take into account the fact that the changes that are made may while truncating one small element, may also be strengthening many other elements, and thereby strengthening the very basic structure of the Constitution. Thus care needs to be exercised to avoid rhetorical flourishes about the importance of one small activity that may be truncated in order to achieve larger purposes. Obviously, some small activities could be of primordial importance. Some rights may be important, but not of primordial importance, and their importance has to be assessed in terms of their place in the overall context of constitutional values, and goals.

97. If indeed one essential activity of the many essential ones that form the freedom to engage in one of the occupations of the many occupations that are a part of the many freedoms guaranteed by the Constitution,

conflicts with an amendment that intends to strengthen the process of achievement of one of the main navigational tools and thereby the goals of the nation-state itself, should such an amendment be declared to be unconstitutional and against the basic structure? Shouldn't one also look at the damage that such a declaration can cause to many of the other basic features of the Constitution, and also the loss of diverse strengths that such an amendment is likely to impart to many other essential or basic features of our Constitution? We opine that by not undertaking an assessment of such factors we would almost certainly lead to erroneous judgments that would destroy the basic structure of the Constitution. In the present context what is involved is a judicial review of an amendment to the Constitution that seeks to strengthen the egalitarian aspects of our social order. Consequently, the conflict, in the instant case, has to be evaluated in terms of whether disallowing the amendment might damage, significantly, the prospects of promoting intrinsic and inherent parts of our equality code – the egalitarian and social justice components – that are essential elements of our basic structure. Such a test would give us a more nuanced appreciation of how setting aside, as violative of the basic structure, the provisions of clause (5) of Article 15 with respect to admissions to non-minority unaided educational institutions, would impact our Constitution, as a fundamental instrument in country's governance.

98. Consequently, in evaluating whether the provisions of clause (5) of Article 15 with respect to unaided private educational institutions violate the basic structure doctrine the questions to carry out the test would be as follows: (1) the place of clause (5) in Article 15 in the context of the equality code; (2) its importance with respect to the Constitution as an instrument of governance, including the mandatory, though not justiciable, provisions of Directive Principles of State Policy, and the goals of ensuring dignity for all citizens, with fraternity amongst groups of them, thereby ensuring the unity and integrity of the nation; and (3) an assessment of the importance of the right of the educators to only admit students based on their choice, and thereby, also possess, the consequential right to disregard the impact of social, educational, cultural and economic disadvantages suffered by groups and individuals in those groups, in terms of access to higher education, and the damage that such a disregard might do to the very purpose of the occupation, and the broader objectives of the nation that such an occupation is to serve.

99. It is now a well settled principle of our constitutional jurisprudence that Article 14 does not merely aspire to provide for our citizens mere formal equality, but also equality of status and of opportunity. The goals of the nation-state are the securing for all of its citizens a fraternity assuring the dignity of the individual and the unity of the nation. While Justice –

social, economic and political is mentioned in only Article 38, it was also recognized that there can be no justice without equality of status and of opportunity (See M. Nagaraj). As recognized by Babasaheb Ambedkar, at the moment that our Constitution just set sail, that while the first rule of the ship, in the form of formal equality, was guaranteed, inequality in terms of access to social and economic resources was rampant and on a massive scale, and that so long as they individually, and the social groups they were a part of, continue to not access to social and economic resources that affords them dignity, they would always be on the margins of the ship, with the ever present danger of falling off that ship and thereby never partaking of the promised goals of that ship. Babasaheb Ambedkar with great foresight remarked that unless such more fundamental inequalities, that foster conditions of injustice, and limit liberty of thought and of conscience, are eradicated at the earliest, the ship itself would be torn apart.

100. In this regard, it was recognized early on as we, as a nation-state, set sail that while revolutionary change, using the force and might of the State, might actually bring about the realization of that state of equality much faster. However, it was also recognized that the violence it would unleash could potentially destroy our nation-state itself, and the end goal may be the creation of a State that would not be conducive for other

cherished values of peace, harmony, co-existence, and a democratic set up in which reasoned and reasonable argument and debate would inform our social, political and economic choices. Some may say that this was a compromise, that in fact the framers of our constitution made the wrong choice, and that we should have opted for a revolutionary mode of change, if necessary by shedding of bloodshed of our own people. Some others argue that we should have opted for a pure market economy, right from the beginning, so that the inefficient governmental regulations would not have hindered our economic progress. However, they seldom have answers as to when, or over what time frame could it be conceived that a state of equality of status and opportunity, and social, economic and political justice would inform all walks of our lives, so that each and every citizen would be enabled to lead a life with dignity, that both promotes fraternity and also is promoted by such a fraternity, and of active participation, to the fullest extent of their natural talents, to participate in full measure in the making of choices, social, political and economic. Nor do the free market proponents answer whether the operation of the laissez-faire free markets would not lead to a perpetuation of ever widening disparities between the haves and the have-nots. Historical human experience militated against a trust in any such answer even if it were given.

101. Consequently, the State was given the responsibility to balance the exigencies of the needs, between social justice and formal equality, between a command and control economy and a private sector with freedom to make its choices within a regulated environment, keeping in mind the larger needs of the nation, between the imperative to promote economic growth, and development in its classical sense, in which the progress of people was measured on all dimensions of human dignity. Indeed, these imperatives of statecraft, of governance of the nation state, were even transcribed into fundamental, though non-justiciable, Directive Principles of State Policy. The fact that they were made non-justiciable was not to deny their absolute essentiality, but rather that the legislatures, and the executive under the supervision of the elected representatives, were best placed to make choices with regard to issues of policy, while the judiciary endowed with the responsibility of interpreting and upholding the Constitution. An important and particular aspect of our Constitution that should always be kept in mind is that various aspects of social justice, and an egalitarian social order, were also inscribed, not as exceptions to the formal content of equality but as intrinsic, vital and necessary components of the basic equality code itself. To the extent there was to be a conflict, on account of scarcity, it was certainly envisaged that the State would step in to ensure an equitable distribution in a manner that would be conducive to common good; nevertheless, if the state was to transgress beyond a

certain limit, whereby the formal content of equality was likely to be drastically abridged or truncated, the power of judicial review was to curtail it. However, as long as the policy initiatives of the State were in consonance with principles of equity and justice inherent within the equality code, and indeed even the freedom code, via Article 21's guarantee of the right to life, and for promotion of freedom of expression and thought, especially to promote excellence in our debates and arguments in the political sphere so that democratic richness could be better served, or were framed in pursuance of the Directive Principles of State Policy, that were based on reasonable and intelligible classifications, the courts were to have no further place in entering the field of policy choices. The courts could of course, also, impose positive constitutional obligations on the State, where the abnegation of those positive and affirmative obligations, encoded within fundamental rights itself, were so gross as to constitute a fraud on the face of the Constitution.

102. Given the magnitude of the task of the State, and immense human tragedies that could continue to occur unabated or even increase, and conditions of inequalities could intensify even further, beyond the unconscionable levels at which they already are, it can only be surmised that the power of the State to frame policies in furtherance of the national goals, including the goals of social justice, achievement of human dignity of

all people and groups of people, improved access to better articulation of thoughts and aspirations by individuals and groups of people in the democratic processes and in social choices made in their communities, and equality of status and opportunity with respect to social, economic and physical resources i.e., all material resources that are useful for productive activities, as granted and used within the limits of the constitutional vision and design, to achieve such tasks to be commensurate, is indeed an essential element of governance. Derogation of such powers, through a whittling down by judicial fiat, below the level at which the Constitutional structure, provisions and vision provides would necessarily be an alteration of the very identity of our Constitution.

103. In a recent decision, GVK Industries Ltd v. ITO[29] by a Constitutional Bench, it was held:

> *"One of the foundational elements of the concept of basic structure is it would give the stability of purpose, and the machinery of Government to be able to pursue the constitutional vision into indeterminate and unforeseeable future…. Our Constitution charges various organs of the State with affirmative responsibilities of protecting the interests of, the welfare of and security of the nation. Legislative powers are granted to enable the accomplishment of the goals of the nation……. Consequently, it is imperative that the powers so granted to various organs of the State are not restricted impermissibly by judicial fiat such that it leads to inabilities*

[29] (2011) 4 SCC 36

> *of the organs of the State in discharging their constitutional responsibilities. Powers that have been granted, and implied by, and borne by the constitutional text have to be perforce admitted…"*

104. To be sure, powers granted to the State are not unlimited, and indeed our constitutional jurisprudence specifies that Part III is one such zone of limitation. The rigour and discipline of fundamental rights, granted to citizens are to be the checks on the power of the State. Fundamental rights are indeed vital for the survival of our society, and provide guarantees that protect our citizens against totalitarianism, are conducive for full expression of human creativity, and in fact foundational for human dignity. Further, the substance of justice is inscribed into such fundamental rights, that are both substantive and procedural and are available to all the citizens, along with powers granted to the State to realize social justice and real and "in fact" equality of status and opportunity for those who are disadvantaged. Consequently, it cannot be taken to mean that the zone of limitation would then operate to frustrate the obligations of the State, to achieve goals of social justice and egalitarian order, by placing primordial importance on formal equality and freedom. Formal rights of some power cannot become the foundation to whittle away powers that are necessarily implied in order to achieve national goals. The question is of balance, and it is the act of balancing between the compulsions cast upon the State by the

moral, political and legal imperatives of the status of vast chunks of our people in disadvantaged and deprived positions that could only be deemed to be egregious and unconscionable by any notions of empathetic conscience, and the imperatives that all the rest also be provided meaningful levels of protections guaranteed by fundamental rights. It is not without reason that Fundamental Rights and Directive Principles of State Policy along with the grant of power to the State to achieve intrinsic egalitarian and social justice aspects inscribed on many of the fundamental rights themselves, that have been called the twin wheels of the chariot of national progress. In this regard it has been held in Keshavananda that harmony between Directive Principles of State Policy and Fundamental Rights is one of the most important of elements of the basic features or structures of the Constitution.

105. In this respect, the placement of clause (5) of Article 15 in the equality code, by the 93rd Constitutional Amendment is of great significance. It clearly situates itself within the broad egalitarian objectives of the Constitution. In this sense, what it does is that it enlarges as opposed to truncating, an essential and indeed a primordial feature of the equality code. Furthermore, both M. Nagaraj and Ashoka Kumar Thakur stand for the proposition that enlargement of the egalitarian content of the equality code ought not to necessarily be deemed as a derogation from the

formal equality guaranteed by Article 14, 15(1) or 16(1). Achievement of such egalitarian objectives within the context of employment or of education, in the public sector, as long as the measures do not truncate elements of formal equality disproportionately, were deemed to be inherent parts of the promise of real equality for all citizens. As stated succinctly in M. Nagaraj, it is an issue of proportionality. "Concept of proportional equality expects the State to take affirmative action in favour of disadvantaged sections of the society within the framework of liberal democracy" and further that "[U]nder the Indian Constitution, while basic liberties are guaranteed and individual initiative is encouraged, the State has got the role of ensuring that no class prospers at the cost of other class and ***no person suffers because of drawbacks which is not of his but social***." With regard to distribution of social opportunities and social benefits, Kapadia J. (as he then was) notes that some define "social justice in terms of rights", and some others, like Friedrich Hayek in terms of "desert" without any regard to the relative advantages or disadvantages as between individuals, and some others, socialists, on the basis of needs. With regard to these three different rationale, this Court recognized that all three have to be accommodated under the equality code, with those fulfilling the "desert based" criteria located under formal equality zone, and those fulfilling the "need based" or the "disadvantaged based" criteria under the zone covered by proportional equality. To this we need to add

another important point. The critical aspect of the authenticity of constitutional claims of the disadvantaged, on whose behalf State exercises its power, is the fact that it is social circumstances which have prevented those individuals from performing to their full potential, and thereby compete on a level playing field with those who might satisfy the "desert based" criteria. In fact the very notion that unequals ought not to be treated as equals is also founded on the notion that those with lesser or lower background opportunities could not be expected to match the performance of those with much better opportunities. The fact that it is the State that seeks to enhance through its policies, such rights of disadvantaged, because it has the duty to ensure their realization, cannot be taken to mean that every element of every individual right of the less disadvantaged could be used to frustrate the realization of those rights.

106. A brief historical excursus, into our constitutional jurisprudence, would also be necessary at this stage to realize that the egalitarian conception is inbuilt in the equality code. In M.R. Balaji v State of Mysore[30], Article 15(4) was treated as an exception to Article 15(1). However, in Devadasan v. Union of India[31], decided a year later, the Court found that reservations to appointments and posts would not violate Article 14. Devadasan, followed the ruling of M.R. Balaji and held that

[30] AIR 1963 SC 649
[31] AIR 1964 SC 179

excessiveness of reservations under Article 16(4) is an issue to be recognized. Subba Rao, J, in his dissenting opinion opined that Article 16(4) was not an exception but "preserved a power untrammeled by the other provisions of the Article." The decisive break came in *State of Kerala v. N.M. Thomas*[32] in which Article 16(4) was held to not be an exception to Article 16(1), laying down the principle that State action in pursuit of egalitarianism cannot in principle be seen as antithetical to broader codes of equality, but rather a means to realize true equality of status and opportunity amongst hitherto excluded groups. This position found its resounding acceptance in Indra Sawhney v Union of India[33], in which it was held in no uncertain terms that egalitarianism is an intrinsic element of conception of equality under Articles 14.

107. A purely technical argument may be made that this Court in Indra Sawhney had reflected upon egalitarianism in the context of Article 16(4) and public employment, and hence ought not to be seen as a part of our constitutional jurisprudence with respect to admissions to private unaided educational institutions. This may be a case of splitting hairs to deny the validity of an over-arching principle. In countless cases, involving the private sector, this Court has held that legislation to achieve social and economic justice cannot be held to be a violation of fundamental rights.

[32] AIR 1976 SC 490
[33] (1992) Supp (3) SCC 217

(See: State of Karnataka v Ranganatha Reddy[34]) What they could be and ought to be tested on was the anvil of reasonableness of classification, and extent of intrusion, where the Constitution itself did not specifically provide for untrammeled power to completely eliminate the private sector from a particular field of activity. This Court's decisions in M. Nagaraj, and equally importantly, Ashoka Kumar Thakur, have unequivocally held, based on Indra Sawhney, that the concept of egalitarianism is an essential and vital element of the equality code, and in Ashoka Kumar Thakur that principle was applied in the context of education. The Court refused, in Ashoka Kumar Thakur, to look at whether clause (5) of Article 15 as applied to non-minority private unaided colleges would violate the basic structure, on the ground that no private unaided college was before it. However, that does not mean that the principles enunciated in Ashoka Kumar Thakur, that egalitarianism was an intrinsic part of our equality code with respect to the field of education could be limited only with respect to public and aided institutions.

108. We opine that the same principles which this Court found to be applicable in finding egalitarianism to be a part of the equality code, at the level of being essential features informing the entire equality code, per force have to also be applied to the context of private sector unaided educational institutions. When we speak of egalitarianism being an

[34] (1977) 4 SCC 471

essential and a necessary component of the equality code, which is a finding that this Court arrived at in Indra Sawhney, M. Nagaraj and in Ashoka Kumar Thakur, we cannot in the same breath then turn around and say that the same concerns, of national purpose, goal and objectives that inform the constitutional identity miraculously disappear in the context of the private sector. It is indeed true that the extent of State involvement in the field of higher education has dramatically declined on account of its own financial position. At least a part of the problem of the financial situation of the State could be reasonably linked to increasing privatization and liberalization of the economy, and one of the essential elements of that process of privatization has been the demand of the private sector that the State reduce its deficits, even as tax rates were cut, by reducing its involvement in various social welfare activities. This has had an impact on the ability of the State to invest as much as it could have in education, including higher education. An essential understanding was that because the private sector would expand even in areas such as higher education, the burden on the State of providing such services would decline. The burden of the State does not comprise merely of the burden of its financial outlays. The burden of the State obviously also comprises of the positive obligations imposed on it, on account of the egalitarian component of the equality code, the directive principles of State policy, and the national goals of achievement of an egalitarian order and social justice for individuals and

amongst groups that those individuals are located in. If the State had clearly articulated that its goal was to withdraw from such crucial and vital fields, such as higher education, and that it was also not expecting the private sector to carry any of the burdens of ensuring an egalitarian order and realize the goal of social justice in at least some measure, then the dimensions of constitutional litigation on that front could very well have taken a different shape, and questions about whether such actions constitute a fraud on the face of the Constitution could certainly have gained great salience.

109. Certainly, the State has the power under clause (6) of Article 19, to totally or partially exclude the participation of private sector in the field of higher education. As TMA Pai stated, having allowed the private sector into the field of education, including higher education, it would be unreasonable, pursuant to clause (6) of Article 19, for the State to fix the fees and also impose reservations on private unaided educational institutions. Nevertheless, if we take into consideration the width of the original powers under clause (6) of Article 19, one would necessarily have to find that the State would at least have the power to make amendments to the Constitution to partially resurrect some of those powers that it had possessed to control access to higher education, and achieve goals of egalitarianism and social justice. What the State had done was to allow private sector to function in the field of higher education, to supplement

the role of the State in the field which has been recognized even in TMA Pai. The power of the State to allow such participation of the private sector could only have existed if the State had the power to devise policies based on circumstances to promote general welfare of the country, and the larger public interest. The same cannot be taken to mean that a constitutional amendment has occurred, in a manner that fundamental alteration has occurred in the basic structure itself, whereby the State is now denuded of its obligations to pursue social justice and egalitarian ideals, inscribed as an essential part of our constitutional identity, in those areas which the State feels that even resources in the private sector would need to be used to achieve those goals. The argument that the policies of liberalization, privatization and globalization (LPG) have now cut off that power of the State are both specious, and fallacious. Such policies are only instances of the broader powers of the State to craft policies that it deems to serve broader public interests. One cannot, and ought not to deem that the ideologies of LPG have now stained the entire Constitutional fabric itself, thereby altering its very identity.

110. In the first place, it is not a completely well accepted principle that liberalization, privatization and globalization has led to the welfare or that it has been an unalloyed good of everyone. As very prominent thinkers and policy specialists have been arguing for nearly two decades, that the unthinking and extreme beliefs in LPG have led to many deleterious

impacts globally, cannot be ignored. (See the work of Nobel Laureate, Joseph Stiglitz: Globalization and its Discontents[35]). Another Nobel Laureate, Kenneth Arrow, and renowned economists such as Samuel Bowles and Steven Durlauf have also posited that the ideological notions that all governmental programs to achieve egalitarian goals are ineffective has fundamentally eroded the very culture of nations, and the moral and constitutional commitments of the policy makers to pursue such goals, with the "dismal prognosis of immutable inequality."[36] Moreover, it is also very well recognized that markets, instead of eradicating discriminations and disadvantages, may in fact perpetuate the same. (See Cass R. Sunstein, "Free Markets and Social Justice"[37], and also *Reservation and Private Sector: Quest for Equal Opportunity and Growth*, Ed. Sukhadeo Thorat, Aryama and Prasant Negi)[38]. The falsity of the knee jerk beliefs that markets are necessarily efficient, and will necessarily find optimal and just solutions for all problems, was again provided by the recent global financial crisis. That unregulated laissez faire free markets would only lead to massive market failures, even with respect to those aspects in which markets are supposed to function efficiently, such as wealth generation has to be accepted as a fundamental truth. With respect to other social values and goals, it has also been shown that the complete evisceration of the

[35] W.W. Norton and Company (2002).
[36] Meritocracy and Economic Inequality, Oxford University Press.
[37] Oxford University Press (1997)
[38] Rawat Publications (2005)

power of the State to regulate the private sector would lead to massive redistributions of incomes, assets and resources in favour of the few, as against the multitude, thereby generating even greater inequalities. This would also suppress the ability of the State to exercise moral authority, and force, to keep competing interests, spread across groups, regions, and classes, from degenerating into a war of all against all. The necessity of such a role for the State should not be doubted, nor its Constitutional duty whittled down. This potential danger, and consequences, of evisceration of the role of the State was anticipated by the farmers of our Constitution. That is the reason why, the Preamble specifically articulates that ensuring the dignity of human beings, and fraternity amongst groups of people, to be vital for the integrity and security of the nation.

111. Article 38 of the Constitution mandates that "the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of national life." This is a clear transcribing of a promise made in the Preamble, to all the people of our country, and in particular those who were socially disadvantaged, and who continue to be disadvantaged, that justice shall inform all institutions of our national life. What does Article 38 mean, when it talks about "institutions informing our national life"? Clearly higher education, and more particularly professional educational institutions imparting education in the medical, technical &

engineering, scientific, managerial and legal fields, are to be recognized as being vital to the national well being, and determine the character of life, and social order throughout the nation. Each and every particular educational institution is a part of a large scale national endeavour to educate our youngsters. The word "institution" is capable of many meanings. It could be used in a narrow sense; however, it is also used, for instance, to refer to a broad class of fields of human and organizational endeavours: we talk about press and the media as an institution, we talk about legislative field as an institution, we talk about the executive as an institution, and indeed we talk about the judiciary, and the organizations engaged in the act of dispensing justice, collectively as an institution. We talk about universities, and seats of higher learning, collectively as an institution. At this level of generality, certainly the entire field of "higher education" is to be conceived as an institution informing our national life. The educated youngsters coming out of the portals of our each individual college enter into jobs that may require different degrees of discretionary judgment, which in turn may also affect the lives of other people, including those in socially and educationally disadvantaged groups. Consequently, we have to necessarily hold that Article 38 necessarily includes within its conception of "institutions informing our national life", all institutions that perform the role of imparting higher education.

112. However, we must hasten to add that this conception of social justice is to be found not just in Article 38, in part IV of our constitution. The same concern for social justice is also reflected in Clause 2 of Article 15 which states that: "No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subjected to any disability, liability, restriction or condition with regard to – (a) access to shops, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds, or dedicated to the use of general public." Further, Clause 4 of Article 15 specifies that "Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes".

113. The purport of Article 15 (2) can be gathered from the Constituent Assembly debates. Babasaheb Ambedkar elucidated on the same saying that "To define the word 'shop' in the most generic term one can think of is to state that 'shop' is a place where the owner is prepared to offer his service to anybody who is prepared to go there seeking his service. …. Certainly it will include anybody who offers his services. I am using it in a generic sense. I should like to point out therefore that the word 'shop' used here is not used in the limited sense of permitting entry. It is used in the

larger sense of requiring the services if the terms of service are agreed to."[39] In as much as education, pursuant to TMA Pai, is an occupation under sub-clause (g) of clause (1) of Article 19, and it is a service that is offered for a fee that takes care of all the expenses of the educational institution in rendering that service, plus a reasonable surplus, and is offered to all those amongst the general public, who are otherwise qualified, then such educational institutions would also be subject to the discipline of clause (2) of Article 15. In this regard, the purport of the above exposition of clause (2) of Article 15, when read in the context of egalitarian jurisprudence inherent in Articles 14, 15, 16 and Article 38, and read with our national aspirations of establishing a society in which Equality of status and opportunity, and Justice, social, economic and political, would imply that the private sector which offers such facilities ought not to be conducting their affairs in a manner which promote existing discriminations and disadvantages.

There are two potential interpretations of the use of the word "only" in clause (2) of Article 15[40]. One could be an interpretation that suggests that the particular private establishment not discriminate on the basis of enumerated grounds and not be worried about the consequences. Another interpretation could be that the private establishment not just refrain from the particular form of overt discrimination but also ensure that the

[39] Constituent Assembly Debates – Vol. VII.
[40] Mahendra P. Singh, "V.N. Shukla's Constitution of India", 11th Ed. (Eastern Book Company, 2008)

consequences of rules of access to such private establishments do not contribute to the perpetration of the unwarranted social disadvantages associated with the functioning of the social, cultural and economic order. Whether sub-clause (a) of clause (2) of Article 15 is self-executory or not is irrelevant in the context of reservations. If the State does enact "special provisions" for the advancement of socially and educationally backward classes, it does so in order to prevent the perpetuation of social and educational backwardness in certain classes of people generation after generation.

114. If a publicly offered service follows a particular rule that achieves the same or similar consequences as the proscribed discrimination, and tends to perpetuate the effects of such discrimination, then it would violate the principle of substantive equality. In the case of admissions to colleges, it is an acknowledged fact, in both TMA Pai, and in fact even by Bhandari J., in his opinion in Ashoka Kumar Thakur, that the test of merit, based on some qualifying examinations or a common entrance test, actually is particularly prone to rewarding an individual who has had access to better schools, family lives, social exposure and means to coaching classes. This would mean that many of the youngsters, who hail from disadvantaged backgrounds are severely handicapped in demonstrating their actual talents. This would be even more so in the case of Scheduled Castes and Scheduled Tribes. Given that social and educational, background of the

parents, and of general community members, has an important bearing on how well the youngsters learn and advance, it would only mean that complete dependence on such tests which do not discriminate and grade, in terms of real merit relative to peers in similar circumstances, but on the basis of so called absolute abilities, we would end up selecting more students from better social and educational backgrounds, thereby foreclosing or substantially truncating the possibility of individuals in such disadvantaged groups from being able to gain access to a vital element of modern life that grants dignity to the individuals, and thereby to the group as a whole, both in this generation, and in future generations. In light of the specific command of Article 38, of infusing our institutions of national life with social justice, we hold that a proper construction of clause (2) of Article 15 would in fact be to prohibit a complete dependence on such context (social and educational backwardness) insensitive tests. When viewed against this perspective, it would have to be discerned that reservations based on social and educational backwardness would in fact promote the selection of those who are truly meritorious amongst each group, on account of their demonstrated ability to be in the higher rungs of achievement within comparable situations of life's circumstances and disadvantages. Such systems, with the same normative imperatives are used in other countries, and in fact more economically successful countries, with a demonstrated record of immense scientific and technical

achievements over the past hundred years: for example, the United States of America. Peer group norm referenced grading is extensively used there. The idea is simple: that given a minimal level of achievement of competence, grading as between similarly situated and provisioned individuals would reflect both true talents and also individual variations in behaviour such as hard work, diligence, the ability to overcome challenges etc.

115. Even if one were to assume that at some conceivable level, some youngsters from Socially and Educationally Backward Classes or Scheduled castes and Scheduled Tribes are actually relatively less proficient, at the entry point, than those belonging to the upper crust of India, there could be other mitigating factors. It is perfectly plausible to assume that youngsters who were socially deprived of appropriate scholastic content in earlier years, do make it up and narrow the gap over time.[41]

116. In addition, there are many other advantages that one could conceptualise that could emanate from social redistribution, of access to higher education, including professional education, in favour of disadvantaged groups. One talks about a knowledge economy that requires us to continuously ensure that we push the brightest amongst all of us to the top or be available in the labour market. However, the supply constraints of skilled labour, including professionals, and college educated

[41] Introduction in Meritocracy and Economic Inequality, ed by Arrow, Samuel Bowles and Steven Durlauf.

graduates is also a major problem. We start with one perfectly reasonable assumption that undergirds all of our equality jurisprudence: that we would find, as a matter of pure genotype, equal levels of talent, and abilities, including those needed for scholastic abilities, in all social groups, and other divisions such as religion or gender. This is not just a scientifically proven fact, notwithstanding the efforts of misguided racist and junk science, but also a veritable ontological and ethical assumption. This would mean that unless this pool is expanded, to identify and provide opportunities for the best performers across all those groups, we would not have exploited our human resources as well as we could. This would in turn mean that the economic gains that were possible if the imperfections in the supply side of the labor market had been overcome, have been lost on account of such imperfections, and also would continue to be lost in the future.[42]

117. In addition to the above, we also need to be very careful about certain arguments that are raised in the context of reservations. These arguments suggest that reservations would weaken India's capacity to innovate, and retain its competitive edge in the high tech industries. It would appear that there are at least two problems associated with this. One problem seems to be the implicit assumption that those who have

[42] . Sukhadeo Thorat, Aryama and Prasant Negi (Eds.) *Quest for Equal Opportunity and Growth* (2007).

benefited from reservations have not participated, and that such students in the future will not participate, in innovative contexts. No empirical data, which has been systematically collected, and is free of implicit cognitive biases against reservations, to the best of our knowledge, has ever been placed before any court of law. To the contrary, proponents of reservations point out to the fact that certain regions of the country, which have had reservations for nearly hundred years, in fact have witnessed an explosion of private unaided colleges in technical & engineering, and scientific fields, and also arguably are the regions in which high tech industry is flourishing. The argument that academic standards in our institutions of higher education need to be high may be valid; nevertheless, we would also need to be careful in assessing whether any decline in standards, if any, has been on account of students in reserved categories entering institutions of higher education, or on account much wider systemic weaknesses in the field of higher education, including the way our universities are managed, and the levels of research conducted or not conducted. Without separating such causal factors, it would be constitutionally impermissible, and indeed unethical to lay the blame for any loss of academic standards on students in reserved categories.

118. Setting aside the question of whether candidates who have been enabled to secure admission to professional colleges have participated in innovation in the high tech context, we also address a more fundamental

issue. The very notion of innovation implicit in such arguments reveals a fundamental flaw. Innovation occurs across diverse fields, in diverse contexts, and with respect to diverse social needs. Two aspects need to be recognized in this. There is a fundamental distinction between invention and innovation. An invention is a new technical solution to a specific technical problem. Joseph Schumpeter[43] distinguishes this from innovation, which implies productisation of that technical solution, in the form that actually meets the needs of customers or consumers, located across various regions, with varying degrees of specificity. In order to be able to innovate, there is a need to ensure that the innovation process is informed about the social needs, circumstances, and cultural factors that could affect the effectiveness of the innovation in the field. Within the universal class of innovations one would also find need to innovate in a manner that meets the requirements that are specific to geographic area, particular social group or even according to the level of prior technological adaptation in particular facet of social or economic life of a community. Some technological inventions, say general technologies, may not need much of user inputs, and a one size fits all solution may be fine for most people. However, some innovations may need to be highly specific, and tailored to specific circumstances. Another layer of complexity could be visualized: innovation, particularly when it is based on specific information, that is more likely to be gained through long years of exposure to specific crafts,

[43] Capitalism, Socialism and Democracy, Martino Fine Books (2010).

problems, social patterns etc. Such information tends to be "sticky" – i.e., it is not easily specifiable and transferable, is specific to people who actually have had the relevant exposure, and may need to be addressed at the location of the problem. Further, it would also mean that unless the putative innovator actually knows what the problems are, in a region, or specifically to a community, he or she would not even know that the problem really exists to begin the process of adapting technical inventions to solve those particular problems. In as much as the innovator does not belong to such communities, even if they are broadly aware of the problem, they may not have sufficient "sticky" knowledge about it to innovate an appropriate product or service or solution to effectively solve such problems. (See: Eric von Hippel, Democratizing Innovation[44])

119. Given above, we address the issue of various innovations that may be required at the lower levels of social strata in India. One may need to apply technology for a particular localized problem, say in remote villages, such as a network or a web interface that allows women to pictorially navigate certain sites to find out the best prices for their produce. To design such a web interface, the designer would need to know the language of the end user, as well as the particular culture, and levels of cultural identification of the end users. Additional factors may also be surmised such as knowledge of cultural variations, particular social mores

[44] MIT Press (2006).

and problems emanating from such mores. Would a person who has a broad exposure to emerging or new technologies, as well as the level of knowledge that is imparted at graduate level engineering courses, and who is also more aware of the local problems, or community specific problems be in a better position to engage in the innovative tasks appropriate for such a situation? It is entirely conceivable that the youngsters who have entered collegiate level courses, based on reservations, may be more adept at adapting existing technical solutions to particular problems because of their background. Most certainly one could conceive of situations in which such youngsters by virtue of their social backgrounds may be the only ones who would have the knowledge that a problem exists, or the cultural and emotional commitment to acknowledge that such problems also need to be addressed and solved, for both personal gain as well as social gain. How do we compare the social value of such activities, which may be getting enhanced on account of youngsters from socially and educationally backward classes and Scheduled Castes and Scheduled Tribes being admitted to colleges, both professional and non-professional, as against the value generated from being employed in some multi-national company? Why should the Constitutional discourse undervalue the importance of the former? Are the lives of people from socially disadvantaged backgrounds to be deemed to be not a constitutional concern? The fact that the former may not be quantifiable, or in popular

and elite culture not acknowledged, does not mean that they are less valuable.

120. We can conceive tremendous gains in another respect also. Increasingly, with technological advances, the choices made by societies with respect to which technology is chosen for implementation, which technology is discarded, which technology is promoted and the costs, both direct and indirect, such as environmental externalities, would have a tremendous impact on social and economic aspects, that range from global to local in impact. The implementation of such technologies has an impact on multiple constitutional rights, from Article 21 to issues of hidden bias against the lower classes. If the people in these socially and educationally backward classes, and in Scheduled Castes and Tribes are to engage in these debates, about the choices being made, assess the impacts on their own lives, and articulate, then surely they would also require youngsters from amongst themselves who could understand the vast changes taking place in the socio-economic organizations, on account of rapid technological changes, and explain to them, or understand them and articulate their hopes, fears and aspirations. This would mean that apart from Article 21 implications for the dignity of lives of other members of such disadvantaged groups, there are also implications about Article 19 freedoms themselves. These rights are extended to all citizens, and one of the fundamental reasons why they are extended is to ensure that every

citizen is capable of engaging in a civil, reasoned, and reasonable debate about social, economic and political choices. This would obviously deepen and enrich the democratic processes of this country, and thereby make it more stable.

121. In a recent judgment, this Court, has explicitly recognized that the meaning and purport of each article of the Constitution has to be gleaned from the text of the article, and also the meaning of that text as it may be further informed and transformed by other provisions in the other parts of the Constitution. The meaning and extent of a fundamental right cannot be gleaned only from the specific text of that particular amendment; rather it needs to be gleaned from the matrices of inter-relationships, with other fundamental rights and provisions in other parts of the Constitution, thereby recognizing the transformations effectuated on each other [GVK Industries Limited (supra)]. In that sense, the nature of judicial review of a constitutional amendment, in which over-arching principles informing all of the fundamental rights have to be gleaned and subjected to the test of abrogation of basic structure, comprises a particular form of constitutional interpretation in which the essences of each of those over-arching principles has to be gleaned and an amendment to the constitution has to be evaluated as being lawful or unlawful, in terms of implied limitations of power, as it effects those essences.

122. In light of the above we find that by the insertion of Clause (5) of Article 15, the 93rd Constitutional Amendment has empowered the State to enact legislations that may have very far reaching beneficial consequences for the nation. In point of fact, each and every one of the beneficial consequences we have discussed as being possible, would enhance the social justice content of the equality code, provide for enhancements of social and economic welfare at the lower end of the social and economic spectrum which can only behoove to the benefit of all the citizens thereby promoting the values inherent in Article 21, promote more informed, reasoned and reasonable debate by individuals belonging to various deprived segments of the population in the debates and formation of public opinion about choices being made, and the course that political and institutional constructs are taking in this country. Consequently we find that clause (5) of Article 15 strengthens the social fabric in which the Constitutional vision, goals and values could be better achieved and served. Or in terms of the analogy to Ship of Theseus, Clause (5) of Article 15 may be likened to a necessary replacement and in fact an enhancement in the equality code, so that it makes our national ship, the Constitution, more robust and stable.

123. At present, statistics[45] reveal that we just about manage to provide access to about 11% or so of the college going age group with access to

[45].Devesh Kapur & Pratap Bhanu Mehta, Morgaging the Future? Indian Higher Education (2007)

higher education. Coupled with this, the role of the State, which a lot of the disadvantaged people feel is in the hands of the upper crust (including the creamy layer of such groups), in higher education is increasingly dwindling in terms of seats provided through state funding or aid. For instance nearly 85% or more of all engineering seats are in the private sector and about 50% in the field of medicine; and the number of aided and government colleges in other fields have just not kept pace. If a vast majority of our youngsters, especially those belonging to disadvantaged groups, are denied access in the higher educational institutions in the private sector, it would mean that a vast majority of youngsters, notwithstanding a naturally equal distribution of talent and ability, belonging to disadvantaged groups would be left without access to higher education at all. That would constitute a state of social emergency with a potential for conflagration that would be on an unimaginable scale.

124. Indeed at one level the recommendation of Bhandari J., in Ashoka Kumar Thakur that high quality institutions catering to the primary and secondary schooling needs of socially and educationally disadvantaged groups, and scheduled castes and scheduled tribes have to be increased on a war footing is a sound one. This need has been felt for a long time and yet the State, which a lot of those youngsters might perceive to be in the hands of the upper crust, has not done enough. However, the argument

that access to excellent schooling for all our children, including those from disadvantaged backgrounds, ought to be provided cannot be turned on its head, and then used to deny the necessity of reservations in higher education today. Many youngsters from such disadvantaged backgrounds, who are getting into institutions of higher education today on account of reservations, may at best be characterized as only being insignificantly or at best marginally less proficient than the students in the unreserved categories at the starting point. If their social and educational disadvantages are taken into account, it would not be unreasonable to conclude that they may in fact be more meritorious and deserving of access to higher education. It would be unjust to keep denying their claims for access and justice, on promises made and unkept, and new promises that may take too long to fulfill, even if one were to assume that they would in fact be fulfilled. Promises are not enough to avert social catastrophes.

125. One of the things that has exercised our minds has been that in the debates in popular discourse of the elite in India it is assumed that imposition of reservations on private unaided educational institutions would have a great and deleterious impact on the freedom of educators, i.e., those who promote, operate, finance and teach in those private unaided educational institutions, to choose their own students. We hold that

granting such a freedom would by itself be the actual problem. Our societal hierarchy, and in fact one of the sustaining forces of caste system, and caste like structures in even other religious groups, apart from endogamy, lack of relative vertical and occupational mobility, has been the normative assumption that only some amongst us, belonging to certain social groups, deserve to study and gain the knowledge that truly provides ability to critically evaluate and attempt to change their world. Caste system may have been many things, but it was also about systematic exclusion from portals of knowledge. To allow that to happen again, now, in the garb of a right of the educator to choose his/her own students, and a formal pretense of non-discrimination while turning a blind eye to the discrimination inherent in the system of selection for entry, which does not test real talent or ability would tantamount to a desecration of all constitutional values.

126. The learned Senior Counsel, also seemed to be advocating the position that we ought to assume that TMA Pai, as explained in P.A. Inamdar, is the final word with respect to the content of sub-clause (g) of clause (1) of Article 19 even in the context of a basic structure review. This we hold leads us into a tautological cul de sac. However, we believe the methodology adopted by us, as enunciated in M. Nagaraj case, and as gleaned from our constitutional jurisprudence, would over come such an impasse. A tautology is one in which the assumption contains all the

elements of the conclusion in a logical argument. The tautology in the basic structure review urged upon us is this: Premise 1: Any derogation from any of the essential features of any kind of activity guaranteed freedom under sub-clause (g) of clause (1) of Article 19 would constitute an abrogation of the basic structure of the Constitution; Premise 2: the freedom of unaided educational institutions to not be subject to reservations with respect to admission of students is an essential aspect of the freedom to pursue the occupation of starting, operating, teaching in and managing educational institutions; and ergo, Conclusion: reservations would necessarily destroy the basic structure of the Constitution.

127. The power of tautological arguments is that they sound very reasonable. However, what we should look for is not the reasonableness of the tautological arguments, within the context of the argument itself. Rather, the structure of the tautological arguments have to be examined with respect to the assumptions made, and the world that has been ignored, before accepting such arguments to be valid and persuasive.

128. In the first place, the assumption that sub-clause (g) of clause (1) of Article 19 protections offered to private citizens, as enunciated by TMA Pai, and elaborated by P.A. Inamdar, to be the ultimate word with respect to what the contents of such activities are is inapposite, in the context of a Basic Structure test. Notwithstanding the fact that it is acknowledged that

the Constitution can be amended in accordance with Article 368 to take away the basis of a judgment of this Court, the proposed methodology would have us adopting the view that the starting point for the evaluation of impact of clause (5) of Article 15 with respect to the basic structure would also have to accept the views expressed by this court in TMA Pai to be given and deemed to be immutable, as if carved in stone.

129. In the first place, we note that in neither of the two judgments, were features of the protections afforded to private unaided educational institutions evaluated in terms of the basic structure doctrine. Except for two references, in two paragraphs in a judgment spanning 450 paragraphs in total, TMA Pai does not speak of the basic structure doctrine at all. In paragraph 8, the said expression is mentioned, but it is a recitation of the submissions made by one of the litigants in the case. This shows that in fact the basic structure doctrine was argued by opponents of reservations as one of the grounds to deem reservations to be unconstitutional. The Court obviously did not proceed on that ground. Instead, it chose to do so only on the grounds of the contents of sub-clause (g) of clause (1) of Article 19. In terms of M. Nagaraj's ratio, what we have is a finding of this court in TMA Pai that freedoms of private unaided educational institutions under sub-clause (g) of clause (1) of Article 19 extends to the concept of being free from imposition of reservations, but not an analysis or finding

about the status of that specific freedom, i.e., freedom to be free from reservations, within the freedom code itself, much less an analysis of how that freedom to be free from reservations relates to the equality code, and constitutional identity in terms of its institutions of governance. Indeed, we do not even find that this Court has engaged in an analysis of the relationship of that right to be free from reservations in light of the powers granted to the State, under sub-clause (ii) of clause (6) of Article 19 to even abrogate, partially or wholly, the participation of private citizens in any of the activities guaranteed by sub-clause (g) of clause (1) of Article 19. In as much as the issue of the content of the freedoms of non-minority unaided institutions came about collaterally, and were not the main issue under consideration, and notwithstanding the fact that this Court did issue an authoritative ruling with respect to such institutions under sub-clause (g) of clause (1) of Article 19. We also find that this Court did not engage in any discussion with respect to right to life under Article 21, nor to sub-clause (a) of clause (1) of Article 19 and its impact over all on the principles, and the actual processes, of democracy, which would certainly include within itself the rights of people of all segments, regions and groups to possess the appropriate level of knowledge to be able to debate, discuss and influence social, political and economic choices of institutions. Such choices could have a vast impact on vital aspects that inform right to life under Article 21.

130. In light of the above, we are unimpressed by the arguments that TMA Pai, as explained by P.A. Inamdar also provide the appropriate content for undertaking an "essences of rights test" i.e., an "over-arching principles" test, as enunciated by M. Nagaraj, to assess whether a Constitutional amendment, such as the 93rd Constitutional Amendment, violates the Basic Structure. Indeed we are acutely aware that TMA Pai, is an eleven judge bench judgment, and P.A. Inamdar to be a seven judge bench judgment. However, the very eloquent silence of the two benches as to whether the contents they have read into sub-clause (g) of clause (1) of Article 19 to constitute a basic feature of the Constitution, is itself a clear indication that this Court, in those judgments was not engaging in that type of analysis. This Court, through another constitutional bench, Islamic Academy, had also exhaustively examined the ratio in TMA Pai, and there is not even a whisper therein that there is any indication in TMA Pai, that the right of private unaided educational institutions to be free from reservations would constitute a right of such magnitude that its partial truncation would abrogate the basic structure of our Constitution and change its very identity. What TMA Pai did was essentially to engage in a "reasonableness standard" test based on the text of Article 19(1)(g). Nothing more.

131. This Court, in P.A. Inamdar, warns us that "certain recitals, certain observations and certain findings in" TMA Pai are "contradictory inter se…. There are several questions which have remained unanswered….". Certainly, the issue of whether the State can impose reservations, on private non-minority unaided educational institutions, pursuant to a Constitutional amendment, are not even raised in TMA Pai. Moreover, while some aspects of the contents of education as an occupation have been noted, many other aspects have not been evaluated, especially in light of the goals of egalitarian social order, and ensuring of social justice, richness of democratic processes and attitudes that inform them, and ultimately dignity of vast swaths of humanity. Hence, to depend on the analysis in TMA Pai, with regard to the constitutional status of the contents of the rights of non-minority unaided educational institutions, in the context of a basic structure review would not only be inapposite, but also lead the Court down the wrong path.

132. In light of the above, we are necessarily compelled to look at those unexamined aspects, including the contents of the very occupation that is guaranteed by sub-clause (g) of clause (1) of Article 19. This is imperative because a test of a constitutional amendment on the anvil of the basic structure doctrine using the "essences of rights" test i.e., the "over-arching

principles test" is an entirely different exercise from a mere "unreasonableness test" undertaken by this Court in TMA Pai.

133. This Court, in TMA Pai, declared the establishment of educational institutions by citizens to be an "occupation" as comprehended in the text of sub-clause (g) of clause (1) of Article 19. In doing so, the Court cited approvingly, and extensively, from Corpus Juris Secondum. In particular, the word "occupation" is stated to be a very "comprehensive term, which includes every species of the genus, and encompasses the incidental, as well as the main, requirements of one's vocation, calling, or business." Consequently, it would necessarily mean that in describing "education" as an occupation, the Court, in TMA Pai, certainly meant that it needs to be comprehended in its entirety, even if for the specific purposes of the questions it set out to answer in that particular case, the Court did not deal with all such incidental and other requirements of the calling.

134. The Court also cited approvingly the observations of the University Education Commission, headed by Dr. Radhakrishnan as its Chairman, and in particular the following is very important: "Liberal Education – All education is expected to be liberal. It should free us from the shackles of ignorance, prejudice and unfounded belief. If we are incapable of achieving the good life, it is due to the faults in our inward being, to the darkness in

us. The process of education is the slow conquering of this darkness. To lead us from darkness to light, to free us from every kind of domination except that of reason, is the aim of education.(emphasis supplied)" This obviously implies that the darkness of ignorance, prejudice and unfounded belief, wherever it may be found, including amongst the socially and educationally disadvantaged classes, and those who have been subjected to grossly inhuman deprivations and unjust discriminations, such as Scheduled Castes and Scheduled Tribes, has to be eliminated. Not just equality, but freedom itself would lose any meaning and content, if such darkness were to pervade amongst large swaths of our people. Certainly, in as much as the word "occupation" comprehends within itself all incidental, as well as the main requirements of the vocation, we ought to reasonably be able to conclude that education as an occupation would certainly have to comprehend as one of its chief goals the tasks to which liberal education, in so far that all education is liberal education, has to necessarily serve.

135. Furthermore, certain other aspects of education as an occupation also have to be taken into account to assess the nature of content of the rights granted to "educators" under sub-clause (g) of clause (1) of Article 19. Note should also be made of the fact that the Court in TMA Pai has specifically characterized the nature of the occupation to be "charitable",

and in fact specifically notes that private educational institutions have been started by educationists, philanthropists etc. This was so because "[E]ducation is a recognized head of charity."

136. A charitable activity, is also a philanthropic activity. Charity, the basis on which the charitable activity is undertaken, such as the setting up of, managing and operating educational institutions, is defined to include the following meanings: giving voluntarily to those in need, an institution or an organization for helping those in need, kindness & benevolence, tolerance in judging others and love of one's fellow men. In a similar vein, philanthropy involves a love of mankind[46]. If one were to take a synoptic view of history of mankind, one would realize that educational institutions, as formal structures for learning, were invariably started by the State, or by citizens who had a great love for their fellow human beings. In societies which were homogenous, and not hierarchically ordered, this love extended to all its members. The idea was that equipping as many youngsters as possible with knowledge would strengthen the society, bring in the benefits of enlightenment that darkness, caused by ignorance, prejudices and unfounded beliefs, denies to the individuals as well as the society. No philanthropist, with love for mankind, would want to educate a person who says that he or she wants to be enlightened only for personal benefit or for using the knowledge gained to perpetuate injustices in the society or

[46] The Concise Oxford Dictionary (1990)

strengthen inequality. Of course TMA Pai, by declaring that reasonable fees has to be collected, to cover capital costs, day to day operations etc., has brought in an element of financial viability. However, one should not then view that TMA Pai would have intended, when it accepted that education as an occupation could only be charitable in nature, that it would also be devoid of intrinsic and essential qualities such as love for mankind as the motivating factors in starting educational institutions.

137. However, in hierarchical societies, marked by endemic inequalities, and where hierarchy had ossified, this "love of mankind", which was the primary, and inherent, motive of education as a charitable or a philanthropic occupation, was extended only to individuals who belonged to the communities to which such philanthropists belonged to. Time, knowledge, and philosophical constructs that inform our love for mankind change. Even societies in which race was used to impose horrific economic and social conditions on those who belonged to enslaved races, have changed. Great universities, such as Harvard which many decades ago did not admit students from formerly enslaved races, or women, or those with other disadvantages, have with the march of time recognized that the very notion of education as a philanthropic activity would lose its motive force, and the essentiality of its purpose, of imparting liberal education that leads people from darkness to light and that is inner soul would be derogated from if individuals from other races, or women, or those who face social

disadvantages are also not provided access. In this regard, many universities have also come to the view that one of their essential purposes lies in providing higher education to ensure that in every sphere of social action, in which choices are made that impact differentially on different segments of the society, there be diversity of representation from all segments of the society. This is recognized as necessary to enrich and strengthen democratic processes, by bringing diversity of views and ensuring that debate occurs in a reasoned and reasonable manner, which in turn integrates the society and polity. Knowledge has expanded by leaps and bounds, and not all of it can be taught at the stage of secondary school education. The ability to engage with this expanding knowledge, to auto-didactically keep pace with such expanding frontiers, is typically provided only at collegiate level.[47] This implies that unless access is provided on a wide scale, across all swath of the population, the debates about social, political, economic and technological choices would be uninformed, and therefore also likely to be unreasoned and unreasonable, thereby threatening the democratic process and social integration that is vital for fraternity and unity of the nation threatened. Noting the pernicious influence of marketplace throngs that seek to subordinate the higher status of higher education, Frank Newman, Laura Couturier and Jamie Scurry write that from "the establishment of the first college in America in 1636, there has been an understanding that higher education, though it clearly

[47] Learning To Be: The World of Education Today and Tomorrow – Unesco Paris 1972

provides private benefits, also served community needs….. steadily expanded from preparation of young men for leadership…. to preparation of a broad share of population for participation in the workforce and civic life…" (See The Future of Higher Education – Rhetoric, Reality and the Risks of the Market[48]).

138. Moreover, great universities have also begun to recognize that merit cannot be assessed purely on past performance, in exams or as revealed by grades. They recognize that a more composite manner of evaluation ought to be implemented. For these reasons, they look at not merely the marks secured at the qualifying level, or aptitude tests. They also evaluate the desirability of admitting students on the basis of recommendations of their teachers, the statements of purposes written by prospective students, and consider many other factors such as background experiences. For instance a demonstrated desire to undertake social service, or being part of activities that demonstrate an acknowledgement of social responsibility are also taken into account. There are three reasons why they do that.

139. One is that grades and marks, at the secondary level may not necessarily indicate why a youngster has scored a certain level of marks or not, thereby not being a substantially accurate measure of ability to pursue studies at the collegiate level. The second relates to expectations of

[48] Jossey Bass, 1st Ed (2004)

universities as to how knowledge gained would be used by the wider society and its impact on society. Those multiple other means provides them, obviously not perfectly, but a more granulated and textured view about the background of the youngster, the particular circumstances under which the youngster was expected to study, and yet achieved what he or she achieved.

140. The third is the recognition that knowledge is generated and applied in diverse social contexts. Consequently, from a pedagogic and educational perspective, it is felt that having a diverse student body would enable the scholars to interact, learn about the diversities in life, and social worlds, and appreciate the diverse points of views and needs. This obviously enhances the learning environment for students, and is viewed as an essential component of the environment of the university in which all students from diverse backgrounds would study. It is viewed as a necessary component of the "knowledge inputs" and also an essential aspect of learning to be. We must recognize that many Indians, essentially from the upper crust, would not have had the opportunity to study in such universities, which are centers of great academic excellence, if those universities, educationists, and their philanthropists who had financed such institutions had stuck to archaic notions of inherent inequality amongst human beings, and insisted only on the demonstrated ability to get high marks. Our students were selected because they had demonstrated an

ability to excel within the background of our current socio-economic circumstances, and their academic accomplishments may or may not have been equivalent to what youngsters in similar cohorts in those nations, and indeed all across the World, actually accomplished. It was also felt that it was important for other students in such universities to interact with Indians, learn about our ancient culture, our lives and our circumstances, and view the knowledge they were gleaning from text books, whether sciences, social sciences or humanities, from the perspective of entire humanity, including India.

141. Knowledge is the vital force that unites people. Knowledge is generated in diverse circumstances, in the practical arenas that range from a highly technical and clinical laboratory, to the humble farmer, or a hut dweller eking out a bare subsistence. It is an accumulated gift of humanity to itself. The knowledge that non-minority educational institutions seek to impart, is not knowledge that they have created. That knowledge was shared by people who have generated such knowledge out of love for humanity. Knowledge is shared by human beings all over the world out of love for humanity. Knowledge was passed down from the dark and forgotten past, out of love for humanity. To attempt to convert that knowledge into "gated communities of exclusion" would be to sow the seeds of destruction of humanity. Non-minority educational institutions claim that they ought to have the right to choose only those who have

demonstrated a certain level of proficiency in tests, where the differences between those who get selected and those who are discarded may be insignificant, or do not take into account the impact of differences in social and educational backgrounds on the performances in those tests. They also claim the right to be free from any state based imposition of reservations, thereby denying any social responsibility in ensuring that those who are the best within the socially and educationally backward classes, and Scheduled Castes and Scheduled Tribes. To claim a right to distribute it only to a few, who are selected on the basis of tests which do not reveal the true talents spread across diverse groups, and communities in this country, is to destroy the very foundation by which such non-minority educational institutions are given access to knowledge. To partake of knowledge, from the common pool, that is a gift of humanity, including our common ancestors, to all of humanity, and then to deny the responsibility to share it with the best amongst youngsters who are located in diverse groups would be a betrayal of humanity.

142. Knowledge is also power. It empowers the individual. It also empowers the group to which that individual belongs to, and has culturally been induced to show greater affinity for. Consequently, the propagation of knowledge only amongst certain groups, whether done deliberately, or done on supposed objective tests of merit that are context and background insensitive, would lead to massive imbalances in the level of power to

understand, and articulate, amongst social groups. Let us not deny the truth. We were a horrifically divided society. We may have progressed a bit. Yet we remain endemically unequal, as between groups. Caste, gender, and class still are the structural impediments to the realization of a truly egalitarian society. The inherited social, educational, cultural, political and economic disadvantages of vast swaths of humanity in our country are propagated across generations. A system that predominantly results in giving access to only certain groups would necessarily work towards sustenance of those inequalities. This will have an immediate, and necessarily, a deleterious impact on the quality of our social and political discourse, in our assessment of the problems that our society confronts and which of those problems ought to be prioritized for social action. It will also hinder the development of abilities amongst students graduating from those gated institutions of higher education that are vital to be able to interact with other Indians, less fortunate than themselves and treating them with respect, and in the application of their knowledge for the betterment of communities, and larger society around themselves. Reservations, for socially and educationally backward classes and Scheduled Castes and Scheduled Tribes, would ensure that students from different social, educational, economic and cultural backgrounds get together to study, and learn about each other, and critically assess the relevance, in the manner in which knowledge is generated, disseminated,

and applied. This necessarily relates to the standards and purposes for which higher education, including professional education, is imparted. We certainly don't expect all of our students, who graduate from our colleges to go and join the "global society," whatever such a construct might mean. We obviously expect most or many of them to live and work in India. To not build the right scholastic environment, in which there is a diversity in the student body, reflecting the diversities of India, would be a fraud that our educational institutions would be perpetrating. Further, if one posits that national barriers are breaking down, and that we are all a part of some amorphous "global village", based on knowledge economy, to deny access to the best amongst various social groups in India, would be an act that destroys their prospects of living in such a global society. Either way, to allow that to happen by granting access to higher education solely or mostly to the privileged segments of our population would be to invite a cultural genocide.

143. It is not without reason that one of the great educationists of the World, Paulo Freire, characterized education as "Cultural Action For Freedom.[49]" It is an activity that all societies, and human cultures, undertake to enable their children to be free from ignorance, and dehumanization that necessarily inheres in such ignorance and perpetuated in the inegalitarian social order that ignorance creates, nourishes and sustains. Education is expected to free the youngster, from elite

[49] Harvard Educational Review (2000).

backgrounds, that perpetuate the oppression of those from deprived backgrounds, from the dehumanization that is implicit in the very acceptance of a hierarchical order of superior and inferior. One of the great dangers that a highly stratified society faces is that when the oppressed, trained to think that hierarchy, and the power to oppress are the natural order on account of the culture perpetrated by the oppressors, fight for relief from oppression, that they currently face, the cry for liberation might then turn into a liberty and a right to oppress the previous oppressor. That process dehumanizes them too. The task of education, as a cultural action for freedom, is to promote the establishment of a truly humanized society. It pays to quote Paulo Freire extensively from his work "Pedagogy of the Oppressed"[50]:

> "While the problem of humanization has always, from an axiological perspective, been humankind's central problem, it now takes the character of an inescapable concern. Concern for humanization leads at once to the recognition of dehumanization, not only as an ontological possibility but as an historical reality. And as an individual perceives the extent of dehumanization, he or she may ask if humanization is a viable possibility. Within history, in concrete, objective contexts, both humanization and dehumanization are possibilities for a person as an uncompleted being conscious of their incompletion….. But while humanization and dehumanization are real alternatives, only the first is the people's vocation. This vocation is constantly negated, yet it is affirmed by that very negation. It is thwarted by injustice, exploitation, oppression, and the violence of the oppressors; it is affirmed by the yearning of the oppressed for freedom and justice, and by their struggle to recover their lost

[50] Continuum, New York (30th Anniversary Edition, 2005)

> humanity. Dehumanization, which marks not only those whose humanity has been stolen, but also (though in a different way) those who have stolen it, is a distortion of the vocation of becoming more fully human…… This struggle is possible only because dehumanization, although a concrete historical fact, is not a given destiny but the result of an unjust order that engenders violence in the oppressors, which in turn dehumanizes the oppressed."

Elsewhere, that great scholar continues:

> "Because it is a distortion of being more fully human, sooner or later being less human leads the oppressed to struggle against those who made them so. In order for this struggle to have meaning, the oppressed must not, in seeking to regain their humanity (which is a way to create it) become in turn oppressors of the oppressors, but rather restorers of the humanity of both.

> "This, then, is the great humanistic and historical task of the oppressed: to liberate themselves and their oppressors as well. The oppressors, who oppress, exploit, and rape by virtue of their power, cannot find in this power the strength to liberate either the oppressed or themselves. Only power that springs from the weakness of the oppressed will sufficiently be strong to free both. Any attempt to "soften" the power of the oppressor in deference to the weakness of the oppressed almost always manifests itself in the form of false generosity; indeed, the attempt never goes beyond this. In order to have continued opportunity to express their "generosity," the oppressor must perpetuate injustice as well. An unjust social order must perpetuate injustice as well. An unjust social order is the permanent fount of this "generosity," which is nourished by death, despair and poverty. That is why dispensers of false generosity become desperate at the slightest threat to its source…..True generosity consists precisely in fighting to destroy the causes which nourish false charity."

144. Our non-minority unaided educational institutions, including professional educational institutions, in claiming to be engaging in a charitable occupation, and yet claiming the right to ignore the conditions of social injustice and inequality that have a bearing on academic accomplishments of students at a young age, which are the indicia of oppression, would necessarily perpetuate the conditions of lack of access to knowledge that can transform the praxis of socially and educationally disadvantaged groups. The occupation they would be engaging in would be imbued with "false charity." For the past two decades, this country has been in the throes of early "amor" with the false but mesmerizing promises of laissez faire free markets, liberalization, privatization and globalization. The State, in the throes of that false passion, believed that it would lead to generation of such wealth, that it could then take on the task of providing access to higher education to hitherto excluded classes and groups. However, that promise has turned out to be false and a mirage. It is now apparent to the State that denial of access to higher education, to socially and educationally backward classes, and Scheduled Castes and Scheduled Tribes, would potentially be dangerous to the ship of our nation, the Constitution. The 93rd Amendment, by necessitating a wider analysis of different facets of our constitutional constructs, and the ontology that it is based on, has revealed new dimensions of understanding our past, present, and how we might approach the future. The verities of historical

human experience, that passing ideological passions had buried, stand forth now, in their glorious hue of a true path to a humanized destiny. It is imperative, that our institutions of higher learning, which are a part of our national life, be freed from this false charity that can only lead to a dehumanized social order.

145. Our Constitution is based on an ontology of humanism. It is based on the recognition of the dehumanization of vast swaths of our people in a hierarchical society. It is based on the acknowledgment of the truth that as long as endemic inequalities remain entrenched, the cultural constructs of the inherited notions of hierarchy and of social worth based on social status would not disappear, and further intensify the conditions of dehumanized existence of all human beings, irrespective of their stature. The disadvantaged are obviously brutalized and dehumanized, by the very structure in which they are compelled to live in. If the masses of India were to start believing, which thankfully they do not, and hopefully will not in the future, that their dehumanized condition is immutable, then also the ship of our constitution would have lost its way. If they conclude, that dehumanization is the only normal order based on what some keep propagating, and then further conclude that the only way out for them would be to violently revolt and oppress the oppressor, the ship would sink.

146. Education is one of the principal human activities to establish a humanized order in our country. Its ontological specification is simple:

every individual, in every group, is worthy of being educated. In as much as certain resources, such as seats in institutions of higher education, including professional education, are scarce, then they have to be allocated. The allocation can only be based on the fundamental ontological assumption that those who excel, within equal social circumstances, should be rewarded with access to higher education. Any other formula of distribution of such access, would be fundamentally inhuman, and violate Article 14 of our Constitution. Given our past history of caste and gender based discrimination, and the continuation of endemic inequalities, in social, economic and cultural spheres, including education at all levels, giving freedom to an educator to choose who he or she would want to teach, and teach only those who belong to socially and educationally advanced groups, would be a curse on our constitutional project. The fact that non-minority unaided educational institutions insist on "social disadvantages blind" admission policies is proof that they are not recognizing the true purpose of education as an occupation. Hence, State intervention is a categorical imperative, both morally and within our constitutional logic.

147. In light of the above, we hold that the claimed rights of non-minority educational institutions to admit students of their choice, would not only be a minor right, but if that were in fact a right, if exercised in full measure, that would be detrimental to the true nature of education as an

occupation, damage the environment in which our students are taught the lessons of life, and imparted knowledge, and further also damage their ability to learn to deal with the diversity of India, and gain access to knowledge of its problems, so that they can appreciate how they can apply their formal knowledge in concrete social realities they will confront.

148. Consequently, given the absolute necessity of achieving the egalitarian and social justice goals that are implied by provisions of clause (5) of Article 15, and the urgency of such a requirement, we hold that they are not a violation of the basic structure, but in fact strengthen the basic structure of our constitution. Consequently, we also find that the provisions of Delhi Act 80 of 2007, with respect to various categories of reservations provided therein to be constitutionally valid.

VIII

CONCLUSIONS:

A) The Delhi Professional Colleges or Institutions (Prohibition of Capitation Fee, Regulation of Admission, Fixation of Non-Exploitative Fee And Other Measures to Ensure Equity And Excellence) Act, 2007 (Delhi Act 80 of 2007) or any provisions thereof do not suffer from any constitutional infirmities. The validity of the Delhi Act 80 of 2007, and its provisions, are accordingly upheld.

B) The Notification dated 14-08-2008 issued by the Government of National Capital Territory of Delhi permitting "the Army College of Medical Sciences, Delhi Cantonment, Delhi to allocate hundred percent seats in the said college for admission towards of Army personnel in accordance with the policy followed by the Indian Army" is ultra vires the provisions of Delhi Act 80 of 2007 and also unconstitutional. The same is accordingly set aside.

C) The admission procedures devised by Army College of Medical Sciences, Delhi Cantonment, Delhi for admitting the students in the first year MBBS course from a pre-defined source, carved out by itself and its parent society, are illegal and ultra vires the provisions of the Delhi Act 80 of 2007.

D) Clause (5) of Article 15 does not violate the basic structure of the Constitution.

RELIEF

For the aforesaid reasons the impugned judgment of the Delhi High Court is set aside. Consequently, the respondents are directed to admit the Writ Petitioners into the First Year of MBBS Course in Army College of Medical Sciences, if the Writ Petitioners still so desire, for they have been deprived of their legitimate right of admission to the course, for no fault of theirs, notwithstanding the rank secured by them in the CET. It is true

that they have appeared at the common entrance examination held long ago and qualified themselves to get admitted but were deprived of the same on account of the illegal admission policy of Army College of Medical Sciences permitted by the Government of Delhi. In the circumstances, all the respondents are accordingly directed to ensure that the Writ Petitioners are admitted into the First Year MBBS Course in the ensuing academic year by creating supernumerary seats. However, we make it clear that the admissions already made by Army College of Medical Sciences are saved and shall not be affected in any manner whatsoever.

The appeals and the writ petitions are accordingly ordered.

.....J.
[B. SUDERSHAN REDDY]

.....J.
[SURINDER SINGH NIJJAR]

NEW DELHI
May 12, 2011.