REPORTABLE

IN THE SUPREME COURT OF INDIA

ORIGINAL/CIVIL APPELLATE JURISDICTION

WRIT PETITION (CIVIL) NO. 55 OF 2019

JANHIT ABHIYAN …PETITIONER(S)

VERSUS

UNION OF INDIA …RESPONDENT(S)

WITH

T.C. (Civil) No. 8 of 2021

W.P. (Civil) No. 596 of 2019

W.P. (Civil) No. 446 of 2019

W.P. (Civil) No. 427 of 2019

W.P. (Civil) No. 331 of 2019

W.P. (Civil) No. 343 of 2019

W.P. (Civil) No. 798 of 2019

W.P. (Civil) No. 732 of 2019

W.P. (Civil) No. 854 of 2019

T.C. (Civil) No. 12 of 2021

T.C. (Civil) No. 10 of 2021

T.C. (Civil) No. 9 of 2021

W.P. (Civil) No. 73 of 2019

W.P. (Civil) No. 72 of 2019

W.P. (Civil) No. 76 of 2019

W.P. (Civil) No. 80 of 2019

W.P. (Civil) No. 222 of 2019

W.P. (Civil) No. 249 of 2019

W.P. (Civil) No. 341 of 2019

T.P. (Civil) No. 1245 of 2019

T.P. (Civil) No. 2715 of 2019

T.P. (Civil) No. 122 of 2020

S.L.P. (Civil) No. 8699 of 2020

T.C. (Civil) No. 7 of 2021

T.C. (Civil) No. 11 of 2021

W.P. (Civil) No. 69 of 2019

W.P. (Civil) No. 122 of 2019

W.P. (Civil) No. 106 of 2019

W.P. (Civil) No. 95 of 2019

W.P. (Civil) No. 133 of 2019

W.P. (Civil) No. 178 of 2019

W.P. (Civil) No. 182 of 2019

W.P. (Civil) No. 146 of 2019

W.P. (Civil) No. 168 of 2019

W.P. (Civil) No. 212 of 2019

W.P. (Civil) No. 162 of 2019

W.P. (Civil) No. 419 of 2019

W.P. (Civil) No. 473 of 2020

W.P. (Civil) No. 493 of 2019

J U D G M E N T

J.B. PARDIWALA, J. :

1. I have had the benefit of carefully considering the lucid and erudite judgment delivered by my learned Brother Justice Ravindra Bhat taking the view that Sections 2 and 3 resply of the Constitution (One Hundred and Third Amendment) Act, 2019 which inserted clause (6) in Article 15 and clause (6) in Article 16 respectively are unconstitutional and void on the ground that they destroyed and are violative of the basic structure of the Constitution. My esteemed Brother Justice Bhat has taken the view that the State's compelling interest to fulfil the objective set out in the Directive Principles, through special provisions on the basis of economic criteria, is legitimate; that reservation or special provisions have so far been provided in favour of historically disadvantaged communities cannot be the basis of contending that the other disadvantaged groups who have not been able to progress due to the ill effects of abject poverty should remain so and the special provisions should not be made by way of affirmative action or even reservation on their behalf. My learned esteemed Brother Justice Bhat has concluded that therefore the special provisions based on objective economic criteria, is *per se* not violative of the basic structure. However, my esteemed Brother Justice Bhat thought fit to declare clause (6) of Article 15 as unconstitutional essentially on the ground that the exclusion clause therein and the classification could be termed as arbitrary resulting in hostile discrimination of the poorest sections of the society who are socially and educationally backward and/or subjected to caste discrimination.

2. In so far as clause (6) of Article 16 is concerned, my esteemed Brother Justice Bhat struck it down on two counts – first, the same is violative of the equality code particularly the principle of non-discrimination and non-exclusion which forms an inextricable part of the basic structure of the Constitution and,

secondly, although the "economic criteria" *per se* is permissible in relation to access of public goods (under Article 15), yet the same is not true for Article 16 as the goal of which is empowerment through representation of the community.

3. On the other hand, my esteemed Brother Justice Dinesh Maheshwari, in his separate judgment, has taken the view that clause (6) in Article 15 and clause (6) in Article 16 do not violate the basic structure of the Constitution in any manner and are valid.

4. Having gone through both the sets of judgments, I regret my inability to agree with my esteemed Brother Justice Bhat that clause (6) in Article 15 and clause (6) in Article 16 are unconstitutional and void. Whereas, I agree with the final decision taken by my esteemed Brother Justice Dinesh Maheshwari that the impugned amendment is valid, I would like to assign my own reasons as I have looked into the entire issue from a slightly different angle.

5. *"The Judgment of this Court in His Holiness Keshvananda Bharati Sripadagalvaru and others v. State of Kerala and another, AIR 1973 SC 1461, which introduced the concept of Basic Structure in our constitutional jurisprudence is the spontaneous response of an activist Court after working with our Constitution for about 25 years. This Court felt that in the absence of such a stance by the constitutional Court there are clear tendencies that the tumultuous tides of democratic majoritarianism of our country may engulf the constitutional values of our nascent democracy. The judgement in Kesavananda Bharti (supra) is possibly an "auxiliary precaution against a possible tidal wave in the vast ocean of Indian democracy". ……. But we must have a clear perception of what the Basic Structure is. It is hazardous to define what is the Basic Structure of the Constitution as what is basic does not remain static for all time to come….."*

[See : ***J&K National Panthers Party v. The Union of India & Ors***, (2011) 1 SCC 228]

6. The idea of equality is the heart and soul of the Indian Constitution. India achieved independence on the 15th of August, 1947 after a long political struggle in which a number of patriots laid down their lives and countless suffered to secure self-government and to throw off the foreign yoke. But self-government was not an end in itself. It was a means to an end. They struggled and suffered not merely to be ruled by their chosen representatives in the place of foreign rulers, but to achieve the basic human rights and freedom and to secure social, economic and political justice so as to build up a welfare State from which poverty, ignorance and disease may be banished and to lay the foundation of a strong and independent country which may command respect in the world.

7. A Constituent Assembly was formed to draw up a Constitution which was ultimately adopted on the 26th January, 1950. The aspirations of the people are reflected in the Preamble of the Constitution which reads thus:-

> *"WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN, SOCIALIST, SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:*
>
> *JUSTICE, social, economic and political;*
>
> *LIBERTY of thought, expression, belief, faith and worship;*
>
> *EQUALITY of status and of opportunity;*
>
> *and to promote among them all*
>
> *FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;*
>
> *IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION."*

8. The Preamble of our Constitution promises equality, which is explained in detail in Articles 14 and 15 resply as enshrined in Part III of the Constitution. Equality, as contemplated under our constitutional system, is 'among equal and similarly situated'. Equality in general cannot be universally applied and is subject

to the condition and restriction as spelt out in the Constitution itself. The Preamble to the Constitution referred to above does not grant any power but it gives the direction and purpose to the Constitution. It outlines the objective of the whole Constitution. The Preamble contains the fundamentals of the Constitution. It serves several important purposes, as for example: -

(1) It contains the enacting clause which brings the Constitution into force.

(2) It declares the great rights and freedoms which the People of India intended to secure to all its citizens.

(3) It declares the basic type of Government and polity which is sought to be established in the country.

(4) It throws light on the source of the Constitution, viz. the People of India.

9. Articles 14, 15 and 16 resply deal with the various facets of the right to equality. Article 14 provides for equality before law and prohibits the State from denying to any person, equality before law or equal protection of laws. Article 15 provides for prohibition of discrimination against any citizen on grounds only of religion, race, caste, sex or place of birth or any of them, but permits special provisions being made for women and children or for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes. Article 16 guarantees equality of opportunity in matters of public employment to the citizens of India.

10. These three Articles form part of the same Constitutional code of guarantees and, in the sense, supplement to each other. Article 14 on the one hand, and Articles 15 and 16 resply on the other, have frequently

been described as being the genesis and the species respectively.

11. I propose to look into the constitutional validity of the Constitution (103rd Amendment) Act, 2019 in the first instance, as if there is nothing like Articles 15(6) and 16(6) resply in the Constitution. It would be profitable to look into the various relevant provisions (Articles) of the Constitution of India:-

> "***14. Equality before law***.─*The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.*
>
> ***15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth***.─*(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.*
> *(2) No citizen shall, on ground only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to*─
> *(a) access to shops, public restaurants, hotels and places of public entertainment; or*
> *(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of general public.*
> *(3) Nothing in this article shall prevent the State from making any special provision for women and children.*
> *(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.*
> *(5) Nothing in this article or in sub-clause (g) of the clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.*

(6) Nothing in this article or sub-clause (g) of clause (1) of article 19 or clause (2) of article 29 shall prevent the State from making,—
(a) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5); and
(b) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5) in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30, which in the case of reservation would be in addition to the existing reservations and subject to a maximum of ten per cent. of the total seats in each category.
Explanation.—For the purposes of this article and article 16, "economically weaker sections" shall be such as may be notified by the State from time to time on the basis of family income and other indicators of economic disadvantage.

***16. Equality of opportunity in matters of public employment**.—(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.*
(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.
(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.
(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.
(4A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

(4B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent. reservation on total number of vacancies of that year.
(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.
(6) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any economically weaker sections of citizens other than the classes mentioned in clause (4), in addition to the existing reservation and subject to a maximum of ten per cent. of the posts in each category.

x x x x

21-A. Right to education.―*The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.*

x x x x

25. Freedom of conscience and free profession, practice and propagation of religion.―*(1) Subject to public order, morality and health and to the other provision of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.*
(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law―
(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;
(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I.─The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.

Explanation II.─In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to Hindu religious institutions shall be construed accordingly.

***26. Freedom to manage religious affairs**.─Subject to public order, morality and health, every religious denomination or any section thereof shall have the right─*

(a) to establish and maintain institutions for religious and charitable purposes;
(b) to manage its own affairs in matters of religion;
(c) to own and acquire movable and immovable property; and
(d) to administer such property in accordance with law.

x x x x

***29. Protection of interests of minorities**.─(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.*

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

***30. Right of minorities to establish and administer educational institutions**.─(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.*

(1A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

x *x* *x* *x*

> ***46. Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections****.―The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."*

12. The Constitution of India was framed by the Constituent Assembly after long drawn debates. Many of the Members of the Constituent Assembly themselves were actively and directly involved in the struggle for freedom. They, therefore, brought in framing the Constitution their experience of movement for liberation from the colonial rule. The Constitution was framed at a time when the memories of violation of human and fundamental rights at the hands of colonial rulers were fresh. So was fresh in the mind of the people the Nazi excesses during the time of Second World War. Declaration of separate chapter of fundamental rights with special focus on equality and personal liberties was thus inevitable. The framers of the Constitution, thus, dedicated a whole chapter (Part III) for fundamental rights. While doing so, important provisions were made in Part IV pertaining to the Directive Principles of State Policy, making detailed provisions laying down a road-map for bringing about a peaceful social revolution through Constitutional means and for the Governments to bear in mind those principles while framing future governmental policies. Article 37 contained in Part IV provides that the provisions contained in that Part shall not be enforceable by any court, but it makes it clear that the principles laid down therein are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply those principles in making laws. Interplay of fundamental rights and directive principles of state policy has occupied

the minds of this Court on several occasions.

13. Article 15, as originally framed, did not contain clauses (4) and (5). Clause (4) in fact was introduced through the First Constitution Amendment in the year 1951. This was necessitated due to a judicial pronouncement of the Supreme Court in the case of ***The State of Madras v. Sm. Champakam Dorairajan & Another***, AIR 1951 SC 226 : (1951) SCR 525.

14. In Article 15, there are two words of very wide import – (1) "discrimination" and (2) "only". The expression "discriminate against", according to the Oxford Dictionary means, "to make an adverse distinction with regard to; to distinguish favourably from others". The true purport of the word "discrimination" has been very well explained by this Court in a Constitution Bench decision of five Judges in ***Kathi Raning Rawat v. State of Saurashtra***, reported in AIR 1952 SC 123: -

> *"**7.** All legislative differentiation is not necessarily discriminatory. In fact, the word "discrimination" does not occur in Art. 14. The expression "discriminate against" is used in Art. 15(1) and Art. 16(2), and it means, according to the Oxford Dictionary, "to make an adverse distinction with regard to; to distinguish unfavourably from others". Discrimination thus involves an element of unfavourable bias and it is in that sense that the expression has to be understood in this context. If such bias is disclosed and is based on any of the grounds mentioned in Arts. 15 and 16, it may well be that the statute will, without more, incur condemnation as violating a specific constitutional prohibition unless it is saved by one or other of the provisos to those articles. But the position under Art. 14 is different...."*

15. The principle has been consistently followed in subsequent decisions. Reference may be made, in this respect, in the case of ***Ashutosh Gupta v. State of Rajasthan***, AIR 2002 SC 1533.

16. A very important decision on the significance of the word "only" (as used in Article 29(2) also relating to fundamental rights) is that of the Full Bench in ***Srimathi Champakam Dorairajan and Another v. The State of Madras***, reported in AIR 1951 Madras 120. In that case the Madras Government, finding that there were not sufficient vacancies for admission of students to Medical College, issued a circular making, what it considered, an equitable division of the vacancies available among the various classes of citizens of the State. Out of every 14 seats, 6 were to be filled by non-Brahmin Hindus, 2 to backward Hindu communities, 2 to Brahmins, 2 to Harijans, 1 to Anglo-Indians and Indian Christians and 1 to Muslims. The circular was challenged by various persons on the ground that it decided admission to persons only on the ground of religion or caste. It was sought to support the circular on the ground that the denial was not only on the ground of religion or caste, but as a matter of public policy based upon the provisions of Article 46 together with the paucity of the vacancies. It was held that much significance could not be attached to the word 'only' because even reading the Article without that word, the result would be the same. It was further held that the circular was bad because it infringed the clear and unambiguous terms of Article 15(1) since it discriminated against citizens only on the ground of religion, race, caste, sex, place of birth or any of them. The judgment states:-

> *"**15**….."Discriminate against" means "make an adverse distinction with regard to"; "distinguish unfavourably from others" (Oxford Dictionary). What the article says is that no person of a particular religion or caste shall be treated unfavourably when compared with persons of other religions and castes merely on the ground that they belong to a particular religion or caste. Now what does the Communal G.O. purport to do? It says that a limited number of seats only are allotted to persons of a particular caste, namely Brahmins. The qualifications which would enable a*

> *candidate to secure one of those seats would necessarily be higher than the qualifications which would enable a person of another caste or religion, say, Harijan or Muslim to secure admission….."*

It was, therefore, held that the Communal G.O. was void.

17. This decision was upheld by the Supreme Court on appeal in ***The State of Madras v. Sm. Champakam Dorairajan & another*** (supra). Their Lordships say:-

> *"**11.** It is argued that the petitioners are not denied admission only because they are Brahmins but for a variety of reasons, e.g. (a) they are Brahmins, (b) Brahmins have an allotment of only two seats out of 14 and (c) the two seats have already been filled up by more meritorious Brahmin candidates. This may be true so far as these two seats reserved for the Brahmins are concerned but this line of argument can have no force when we come to consider the seats reserved for candidates of other communities, for so far as those seats are concerned, the petitioners are denied admission into any of them not on any ground other than the sole ground of their being Brahmins and not being members of the community for whom those reservations have been made. The classification in the Communal G.O. proceeds on the basis of religion, race and caste. In our view, the classification made in the Communal G.O. is opposed to the Constitution and constitutes a clear violation of the fundamental rights guaranteed to the citizen under Art. 29(2)….."*

18. In view of the aforesaid, the Parliament intervened & introduced clause (4) to Article 15 which provided that if any action was taken by the State to make special provisions for the advancement of the communities specified therein, that could not be challenged on the ground that it contravened Article 15(1). In other words, a specific exception was made to the provisions of Article 15(1) in regard to the backward communities mentioned in Article 15(4). This amendment also shows how a progressive democratic legislature does not hesitate even to

amend the Constitution with a view to harmonise the fundamental rights of the individual citizen with the claims of social good.

19. Thus, the decisions of this Court in ***Champakam Dorairajan*** (supra) and ***Kathi Raning Rawat*** (supra) establish the proposition that, while classification is permissible, it cannot be based on any of the factors mentioned in the Articles 15 and 16 resply. So far as this proposition of law is concerned, it still holds good even after the pronouncement of this Court in the case of ***Indra Sawhney and Others v. Union of India and Others*** reported in 1992 Supp (3) SCC 217 : AIR 1993 SC 477.

20. Article 16 of the Constitution guarantees equality of opportunity in matters of public employment to all the citizens. Article 16(1) provides that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Clause (2) of Article 16 further amplifies this equality of opportunity in public employment, by providing that no citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State. Clause (4) of Article 16 reads thus:

> *"(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State."*

21. Article 21 pertains to protection of life and personal liberty and provides that no person shall be deprived of his life or personal liberty except according to the procedure established by law. This important guarantee, though seemingly plain, has been interpreted by this Court as to include variety of rights which would form part of right to life and personal liberty, without enjoyment of which the rights, like the right to life and personal liberty would be meaningless and nugatory. Right to education has been recognised as one of the facets of

Article 21 long before it was codified as one of the fundamental rights separately guaranteed under Article 21-A of the Constitution.

22. The Constitution of India was amended by the Eighty-sixth Amendment Act, 2002, to include the right to education as a fundamental right under Article 21-A providing that "the State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine."

23. Article 29 guarantees protection of interests of minorities and reads as under:-

> *"**29. Protection of interests of minorities.**—(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.*
>
> *(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them."*

24. Article 30 pertains to the right of minorities to establish and administer educational institutions. Clause (1) thereof provides that all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

25. Article 46 contained in Part IV provides that the State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

26. The Constitution of India places immense importance on the fundamental rights for which a separate chapter was dedicated while framing the Constitution itself. The fact that Article 32 guaranteeing the right to move the Supreme Court for appropriate proceedings for the enforcement of

rights conferred in Part III itself is contained in the fundamental rights and thus made a fundamental right, is a strong indication that such rights were considered sacrosanct. However, it has always been recognised while framing the Constitution as well as while interpreting the same that no right of a citizen can be absolute and every right would have reasonable restriction. Article 19, for example, while guaranteeing various individual freedoms to citizens contains various clauses limiting enjoyment of such rights under specified conditions. Likewise, though Article 14 in plain terms provides that the State shall not deny to any person equality before the law or the equal protection of the laws, since the earliest days of interpretation of the Constitution, it has been recognised that this does not imply that there shall be one law which must apply to every person and that every law framed must correspondingly cover every person. In legal terminology, it means though Article 14 prohibits class legislation, the same does not prevent reasonable classification. It is, of course, true that for the classification to be valid and to pass the test of reasonableness twin tests laid down by this Court, time and again, must be fulfilled. Such tests are that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and that the differentia must have a rational relation to the object sought to be achieved by the statute in question.

27. Article 14 guarantees equality in very wide terms and is worded in negative term preventing the State from denying any person equality before law or the equal protection of the laws within the territory of India. Article 15(1), on the other hand, prevents the State from discriminating against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Clause (2) of the Article further provides that no citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with

regard to access to shops, public restaurants, use of wells, tanks, bathing ghats, etc. of public resort maintained wholly or partly out of State funds or dedicated to the use of general public. Article 16, in turn, pertains to equality of opportunity in matters of public employment. Clause (1) of Article 16, as already noted, guarantees equality of opportunity to all citizens in matters of employment or appointment to any office under the State. Clause (2) thereof, further amplifies that no citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for or discriminated against in respect of, any employment or office under the State.

28. Thus, Articles 14, 15 and 16 resply are all different facets of concept of equality. In different forms, such Articles guarantee equality of opportunity and equal treatment to all the citizens while specifically mandating that the State shall not discriminate against the citizens only on the grounds of religion, race, caste, sex, descent, place of birth or any of them. Like Article 14, neither Article 15(1) nor Article 16(1) prohibits reasonable classification. In other words, the clauses of Articles 15 and 16 respectively guaranteeing non-discrimination on the grounds only of religion, race, caste, sex, place of birth or equality of opportunity for all citizens in matters of public employment prohibit hostile discrimination, but not reasonable classification. As in Article 14, as well in Article 15(1), if it is demonstrated that special treatment is meted out to a class of citizens, not only on the ground of religion, race, caste, sex, place of birth or any of them, but due to some special reasons and circumstances, the enquiry would be, does such a classification stand the test of reasonableness and in the process, it would be the duty of the court to examine whether such classification fulfills the above noted twin conditions, namely, it must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and that the differentia must have a

rational relation to the object sought to be achieved by the statute in question. (See :- ***Adam B. Chaki v. Government of India,*** Writ Petition (PIL) No. 20 of 2011 (Guj).)

29. In the case of ***Mohammad Shujat Ali and others v. Union of India and others***, AIR 1974 SC 1631, a Constitution Bench of this Court in the context of concept of equality flowing from Articles 14 and 16 resply of the Constitution observed that Article 16 is an instance or incident of guarantee of equality enshrined in Article 14. It gives effect to the doctrine of equality in the spheres of public employment. The constitutional code of equality and equal opportunity, however, does not mean that the same laws must be applicable to all persons. It was held and observed as under:-

> *"**23.** Now we proceed to consider the challenge based on infraction of Articles 14 and 16 of the Constitution. Article 14 ensures to every person equality before law and equal protection of the laws and Article 16 lays down that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Article 16 is only an instance or incident of the guarantee of equality enshrined in Article 14 : It gives effect to the doctrine of equality in the spheres of public employment. The concept of equal opportunity to be found in Article 16 permeates the whole spectrum of an individual's employment from appointment through promotion and termination to the payment of gratuity and pension and gives expression to the ideal of equality of opportunity which is one of the great socio-economic objectives set out in the Preamble of the Constitution. The constitutional code of equality and equal opportunity, however, does not mean that the same laws must be applicable to all persons. It does not compel the State to run "all its laws in the channels of general legislation". It recognises that having regard to differences and disparities which exist among men and things, they cannot all be treated alike by the application of the same laws. "To recognise marked differences that exist in fact is living law; to disregard practical differences and concentrate on some abstract identities is lifeless logic." Morey v. Doud, 354 U.S.*

457, p. 473. The Legislature must necessarily, if it is to be effective at all in solving the manifold problems which continually come before it, enact special legislation directed towards specific ends and limited in its application to special classes of persons or things. "Indeed, the greater part of all legislation is special, either in the extent to which it operates, or the objects sought to be attained by it." (1889) 134 US 594.

***24.** We thus arrive at the point at which the demand for equality confronts the right to classify. For it is the classification which determines the range of persons affected by the special burden or benefit of a law which does not apply to all persons. This brings out a paradox. The equal protection of the laws is a "pledge of the protection of equal laws." But laws may classify. And, as pointed out by Justice Brewer, "the very idea of classification is that of inequality". The court has tackled this paradox over the years and in doing so, it has neither abandoned the demand for equality nor denied the legislative right to classify. It has adopted a middle course of realistic reconciliation. It has resolved the contradictory demands of legislative specialization and constitutional generality by a doctrine of reasonable classification. This doctrine recognises that the legislature may classify for the purpose of legislation but requires that the classification must be reasonable. It should ensure that persons or things similarly situated are all similarly treated. The measure of reasonableness of a classification is the degree of its success in treating similarly those similarly situated. "The Equal Protection of the Laws", 37 California Law Review, 341.*

***25.** <u>But the question is : what does this ambiguous and crucial phrase "similarly situated" mean? Where are we to look for the test of similarity of situation which determines the reasonableness of a classification? The inescapable answer is that we must look beyond the classification to the purpose of the law</u>. A reasonable classification is one which includes all persons or things similarly situated with respect to the purpose of the law. There should be no discrimination between one person or thing and another, if as regards the subject-matter of the legislation their position is substantially the same. This is sometimes epigrammatically described by saying that what the constitutional code of equality and equal opportunity requires is that among equals, the law should be equal and that like should be treated alike. <u>But the basic principle</u>*

underlying the doctrine is that the legislature should have the right to classify and imposed special burdens upon or grant special benefits to persons or things grouped together under the classification, so long as the classification is of persons or things similarly situated with respect to the purpose of the legislation, so that all persons or things similarly situated are treated alike by law. The test which has been evolved for this purpose is — and this test has been consistently appliedby this Court in all decided cases since the commencement of the Constitution — that the classification must be founded on an intelligible differentia which distinguishes certain persons or things that are grouped together from others and that differentia must have a rational relation to the object sought to be achieved by the legislation." [Emphasis supplied]

30. While doing so, a note of caution was sounded that the fundamental guarantee is of equal protection of the laws and the doctrine of classification is only a subsidiary rule evolved by the courts to give a practical content to that guarantee by accommodating it with the practical needs of the society and it should not be allowed to submerge and drown the precious guarantee of equality.

31. In the case of ***State of Kerala and Another v. N.M. Thomas and Others***, (1976) 2 SCC 310, Mathew, J. observed that Articles 16(1) and 16(2) resply of the Constitution do not prohibit prescription of a reasonable classification for appointment or for promotion. Any provision as to qualification for employment or appointment to an office reasonably fixed and applicable to all would be consistent with the doctrine of equality of opportunity under Article 16(1). It was observed that classification is reasonable if it includes all persons who are similarly situated with respect to the purpose of the law.

32. In the case of ***Indra Sawhney*** (supra), B.P. Jeevan Reddy, J. in his majority opinion, observed in para 733 that Article 16(1) is a facet of Article 14. Just as Article 14 permits reasonable classification so does Article 16(1).

33. In a judgment of the Constitution Bench of this Court, in the case of ***E.P.***

Royappa v. State of Tamil Nadu and Another**,** AIR 1974 SC 555, Bhagwati, J. in the context of co-relation between Article 14 and Article l6 of the Constitution observed as under: -

> *"**85.** The last two grounds of challenge may be taken up together for consideration. Though we have formulated the third ground of challenge as a distinct and separate ground it is really in substance and effect merely an aspect of the second ground based on violation of Arts.14 and 16. Article 16 embodies the fundamental guarantee that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Though enacted as a distinct and independent fundamental right because of its great importance as a principle ensuring equality of opportunity in public employment which is so vital to the building up of the new classless egalitarian society envisaged in the Constitution, Art. 16 is only an instance of the application of the concept of equality enshrined inArticle 14. In other words, Art. 14 is the genus while Art. 16 is a species. Article 16 gives effect to the doctrine of equality in all matters relating to public employment. The basic principle which, therefore, informs both Arts. 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle? Itis a founding faith, to use the words of Bose, J., "a way of life", and itmust not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative ofArticle 14, and if it affects any matter relating to public employment, it is also violative of Art. 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action mustbe based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant*

considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Arts. 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice: in fact the latter comprehends the former. Both are inhibited by Arts. 14 and 16."

34. Similar observations were made also in the context of co-relation between Articles 14 and 16 resply in the case of ***Govt. of Andhra Pradesh v. P.B. Vijaykumar and another*,** AIR 1995 SC 1648. It was observed thus:

*"**6.** This argument ignores Article 15(3). The interrelation between Articles 14, 15 and 16 has been considered in a number of cases by this Court. Art. 15 deals with every kind of State action in relation to the citizens of this country. Every sphere of activity of the State is controlled by Article 15(1). There is, therefore, no reason to exclude from the ambit of Article 15(1) employment under the State. At the same time Article 15(3) permits special provisions for women. Both Arts. 15(1) and 15(3) go together. In addition to Art. 15(1) Art. 16(1), however, places certain additional prohibitions in respect of a specific area of State activity viz. employment under the State. These are in addition to the grounds of prohibition enumerated under Article 15(1) which are also included under Article 16(2). There are, however, certain specific provisions in connection with employment under the State under Article 16. Article 16(3) permits the State to prescribe a requirement of residence within the State or Union Territory by parliamentary legislation; while Article 16(4) permits reservation of posts in favour of backward classes. Article 16(5) permits a law which may require a person to profess a particular religion or may require him to belong to a particular religious denomination, if he is the incumbent of an office in connection with the affairs of the religious or denominational institution. Therefore, the prohibition against discrimination of the grounds set out in Article 16(2) in respect of any employment or office under the State is qualified by clauses 3,4 and 5 of Article*

16. Therefore, in dealing with employment under the State, it has to bear in mind both Articles 15 and 16 — the former being a more general provision and the latter, a more specific provision. Since Article 16 does not touch upon any special provision for women being made by the State, it cannot in any manner derogate from the power conferred upon the State in this connection under Article 15(3). This power conferred by Article 15(3) is wide enough to cover the entire range of State activity including employment under the State."

35. In the case of ***State of Kerala v. N.M. Thomas*** (supra), A.N. Ray, CJ also advanced this theory, observing that there is no denial of equality of opportunity unless the person who complains of discrimination is equally situated with the person or persons who are alleged to have been favoured. Article 16(1) does not bar a reasonable classification. It was observed as under:-

*"**27.** There is no denial of equality of opportunity unless the person who complains of discrimination is equally situated with the person or persons who are alleged to have been favoured. Article 16(1) does not bar a reasonable classification of employees or reasonable tests for their selection (State of Mysore v. V. P. Narasing Rao (1968) 1 SCR 407 : AIR 1968 SC 349 : (1968) 2 LLJ 120).*

***28.** This equality of opportunity need not be confused with absolute equality. Article 16(1) does not prohibit the prescription of reasonable rules for selection to any employment or appointment to any office. In regard to employment, like other terms and conditions associated with and incidental to it, the promotion to a selection post is also included in the matters relating to employment and even in regard to such a promotion to a selection post all that Article 16(1) guarantees is equality of opportunity to all citizens. Articles 16(1) and (2) give effect to equality before law guaranteed by Article 14 and to the prohibition of discrimination guaranteed by Article 15(1). Promotion to selection post is covered by Article 16(1) and (2).*

x x x x

***30.** Under Article 16(1) equality of opportunity of employment means equality as between members of the same class of employees and not equality between members of separate, independent class.*

The Roadside Station Masters and Guards are recruited separately, trained separately and have separate avenues of promotion. The Station Masters claimed equality of opportunity for promotion vis-a-vis the guards on the ground that they were entitled to equality of opportunity. It was said the concept of equality can have no existence except with reference to matters which are common as between individuals, between whom equality is predicated. The Roadside Station Masters and Guards were recruited separately. Therefore, the two form distinct and separate classes and there is no scope for predicating equality or inequality of opportunity in matters of promotion. (See All India Station Masters and Assistant Station Masters' Association v. General Manager, Central Railway (1960) 2 SCR 311 : AIR 1960 SC 384). The present case is not to create separate avenues of promotion for these persons.

31. *The rule of parity is the equal treatment of equals in equal circumstances. The rule of differentiation is enacting laws differentiating between different persons or things in different circumstances. The circumstances which govern one set of persons or objects may not necessarily be the same as those governing another set of persons or objects so that the question of unequal treatment does not really arise between persons governed by different conditions and different sets of circumstances. The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position and the varying needs of different classes of persons require special treatment. The Legislature understands and appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based upon adequate grounds. The rule of classification is not a natural and logical corollary of the rule of equality, but the rule of differentiation is inherent in the concept of equality. Equality means parity of treatment under parity of conditions. Equality does not connote absolute equality. A classification in order to be constitutional must rest upon distinctions that are substantial and not merely illusory. The test is whether it has a reasonable basis free from artificiality and arbitrariness embracing all and omitting none naturally falling into that category."*

36. Education, by now, which is well recognised through judicial pronouncements and outside, is perhaps the most fundamental requirement of

development. Without access to quality basic education, it would be impossible in the modern world to expect any individual, race, class or community to make any real advancement. While recognising the role of education to achieve development and to provide equality of opportunity, the Courts have also recognised that the State has an important role, in fact an obligation, to provide quality basic education to all the citizens. Long before the Constitution was amended by introduction of Article 21-A, providing for free and compulsory education to children between age of 6 and 14 years, this Court had been expanding this principle through purposive interpretation and meaningful construction of guarantee to life and liberty enshrined under Article 21 of the Constitution. In case of ***Mohini Jain (Miss) v. State of Karnataka and Others,*** (1992) 3 SCC 666, this Court observed as under: -

> *"**9.** The directive principles which are fundamental in the governance of the country cannot be isolated from the fundamental rights guaranteed under Part III. These principles have to be read into the fundamental rights. Both are supplementary to each other. The State is under a constitutional mandate to create conditions in which the fundamental rights guaranteed to the individuals under Part III could be enjoyed by all. Without making "right to education" under Article 41 of the Constitution a reality the fundamental rights under Chapter III shall remain beyond the reach of large majority which is illiterate.*
>
> *x x x x*
>
> ***12**. "Right to life" is the compendious expression for all those rights which the Courts must enforce because they are basic to the dignified enjoyment of life. It extends to the full range of conduct which the individual is free to pursue. The right to education flows directly from right to life. The right to life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education. The State Government is under an obligation to make endeavour to provide educational facilities at all levels to its citizens.*

__13.__ The fundamental rights guaranteed under Part III of the Constitution of India including the right to freedom of speech and expression and other rights under Article 19 cannot be appreciated and fully enjoyed unless a citizen is educated and is conscious of his individualistic dignity.

__14.__ The "right to education", therefore, is concomitant to the fundamental rights enshrined under Part III of the Constitution. The State is under a constitutional mandate to provide educational institutions at all levels for the benefit of the citizens. The educational institutions must function to the best advantage of the citizens. <u>Opportunity to acquire education cannot be confined to the richer section of the society. Increasing demand for medical education has led to the opening of large number of medical colleges by private persons, groups and trusts with the permission and recognition of State Governments</u>. The Karnataka State has permitted the opening of several new medical colleges under various private bodies and organisations. These institutions are charging capitation fee as a consideration for admission. Capitation fee is nothing but a price for selling education. The concept of 'teaching shops' is contrary to the constitutional scheme and is wholly abhorrent to the Indian culture and heritage. As far back as December 1980 the Indian Medical Association in its 56th All India Medical Conference held at Cuttack on December 28-30, 1980 passed the following resolutions:

"The 56th All India Medical Conference views with great concern the attitude of State Governments particularly the State Government of Karnataka in permitting the opening of new medical colleges under various bodies and organisations in utter disregard to the recommendations of Medical Council of India and urges upon the authorities and the Government of Karnataka not to permit the opening of any new medical college, by private bodies.

It further condemns the policy of admission on the basis of capitation fees. This commercialisation of medical education endangers the lowering of standards of medical education and encourages bad practice."" [Emphasis supplied]

37. In the case of ***Unni Krishnan, J.P. and Others v. State of Andhra Pradesh and Others***, (1993) 1 SCC 645, the decision in the case of ***Mohini Jain***

(supra) came up for consideration before a larger Bench of this Court. While not approving the judgment in toto, the above concept was further expanded and refined. It was observed as under: -

> *"**168.** In Brown v. Board of Education [98 L Ed 873 : 347 US 483 (1954)] Earl Warren, C. J., speaking for the U.S. Supreme Court emphasised the right to education in the following words:*
>
> > *"Today, education is perhaps the most important function of State and local governments .... It is required in the performance of our most basic responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."*
>
> ***169.** In Wisconsin v. Yoder [32 L Ed 2d 15 : 406 US 205 (1971)] the court recognised that:*
>
> > *"Providing public schools ranks at the very apex of the function of a State."*
>
> *The said fact has also been affirmed by eminent educationists of modern India like Dr Radhakrishnan, J. P. Naik, Dr Kothari and others.*
>
> ***170.** It is argued by some of the counsel for the petitioners that Article21 is negative in character and that it merely declares that no person shall be deprived of his life or personal liberty except according to the procedure established by law. Since the State is not depriving the respondents'-students of their right to education, Article 21 is not attracted, it is submitted. If and when the State makes a law taking away the right to education, would Article 21 be attracted, according to them. This argument, in our opinion, is really born of confusion; at any rate, it is designed to confuse the issue. The first question is whether the right to life guaranteed by Article 21 does take in the right to education or not. It is then that the second question arises whether the State is taking away that right. The mere fact that the State is not taking away the right as at present does not mean that right to education is not included within the right to life. The content of the right is not determined by perception of threat. The content of right to life is not to be*

determined on the basis of existence or absence of threat of deprivation. The effect of holding that right to education is implicit in the right to life is that the State cannot deprive the citizen of his right to education except in accordance with the procedure prescribed by law.

***171.** In the above state of law, it would not be correct to contend that Mohini Jain [Mohini Jain v. State of Karnataka, (1992) 3 SCC 666] was wrong insofar as it declared that "the right to education flows directly from right to life". But the question is what is the content of this right? How much and what level of education is necessary to make the life meaningful? Does it mean that every citizen of this country can call upon the State to provide him education of his choice? In other words, whether the citizens of this country can demand that the State provide adequate number of medical colleges, engineering colleges and other educational institutions to satisfy all their educational needs? Mohini Jain [Mohini Jain v. State of Karnataka, (1992) 3 SCC 666] seems to say, yes. With respect, we cannot agree with such a broad proposition. The right to education which is implicit in the right to life and personal liberty guaranteed by Article 21 must be construed in the light of the directive principles in Part IV of the Constitution. So far as the right to education is concerned, there are several articles in Part IV which expressly speak of it. Article 41 says that the "State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want". Article 45 says that "the State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years". Article 46 commands that "the State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation". Education means knowledge — and "knowledge itself is power". As rightly observed by John Adams, "the preservation of means of knowledge among the lowest ranks is of more importance to the public than all the property of all the rich men in the country". (Dissertation on Canon and Feudal Law, 1765) It is this concern which seems to underlie Article 46. It is the tyrants and bad rulers who are afraid of spread of education and knowledge among the deprived classes. Witness Hitler railing against universal education. He said: "Universal education is the*

most corroding and disintegrating poison that liberalism has ever invented for its own destruction." (Rauschning, The Voice of Destruction: Hitler speaks.) A true democracy is one where education is universal, where people understand what is good for them and the nation and know how to govern themselves. The three Articles 45, 46 and 41 are designed to achieve the said goal among others. It is in the light of these Articles that the content and parameters of the right to education have to be determined. Right to education, understood in the context of Articles 45 and 41, means: (a) every child/citizen of this country has a right tofree education until he completes the age of fourteen years, and (b) after a child/citizen completes 14 years, his right to education is circumscribed by the limits of the economic capacity of the State and its development. We may deal with both these limbs separately.

***172.** Right to free education for all children until they complete the age of fourteen years (Art.45). It is noteworthy that among the several articles in Part IV, only Article 45 speaks of a time-limit; no other article does. Has it no significance? Is it a mere pious wish, even after 44 years of the Constitution? Can the State flout the said direction even after 44 years on the ground that the article merely calls upon it to "endeavour to provide" the same and on the further ground that the said article is not enforceable by virtue of the declaration in Article 37. Does not the passage of 44 years — more than four times the period stipulated in Article 45 — convert the obligation created by the article into an enforceable right? In this context, we feel constrained to say that allocation of available funds to different sectors of education in India discloses an inversion of priorities indicated by the Constitution. The Constitution contemplated a crash programme being undertaken by the State to achieve the goal set out in Article 45. It is relevant to notice that Article 45 does not speak of the "limits of its economic capacity and development" as does Article 41, which inter alia speaks of right to education. What has actually happened is — more money is spent and more attention is directed to higher education than to — and at the cost of — primary education. (By primary education, we mean the education, which a normal child receives by the time he completes 14 years of age.) Neglected more so are the rural sectors, and the weaker sections of the society referred to in Article 46. We clarify, we are not seeking to lay down the priorities for the government — we are only emphasising the constitutional policy as disclosed by Articles 45, 46 and 41. Surely the wisdom of these constitutional provisions is beyond question. This inversion of*

priorities has been commented upon adversely by both the educationists and economists.

173. *Gunnar Myrdal, the noted economist and sociologist, a recognised authority on South Asia, in his book 'Asian Drama' (Abridged Edition — published in 1972) makes these perceptive observations at page 335:*

> *"But there is another and more valid criticism to make. Although the declared purpose was to give priority to the increase of elementary schooling in order to raise the rate of literacy in the population, what has actually happened is that secondary schooling has been rising much faster and tertiary schooling has increased still more rapidly. There is a fairly general tendency for planned targets of increased primary schooling not to be reached, whereas targets are over-reached, sometimes substantially, as regards increases in secondary and, particularly, tertiary schooling. This has all happened in spite of the fact that secondary schooling seems to be three to five times more expensive than primary schooling, and schooling at the tertiary level five to seven times more expensive than at the secondary level.*
>
> *What we see functioning here is the distortion of development from planned targets under the influence of the pressure from parents and pupils in the upper strata who everywhere are politically powerful. Even more remarkable is the fact that this tendency to distortion from the point of view of the planning objectives is more accentuated in the poorest countries, Pakistan, India, Burma and Indonesia, which started out with far fewer children in primary schools and which should therefore have the strongest reasons to carry out the programme of giving primary schooling the highest priority. It is generally the poorest countries that are spending least, even relatively, on primary education, and that are permitting the largest distortions from the planned targets in favour of secondary and tertiary education."*

174. *In his other book Challenge of World Poverty (published in 1970, Chapter 6 'Education') he discusses elaborately the reasons for and the consequences of neglect of basic education in this country. He quotes J.P. Naik, (the renowned educationist, whose Report of the Education Commission, 1966 is still considered to be the most authoritative study of the education scene in India)*

as saying "Educational development ... is benefitting the 'haves' more than the 'have nots'. This is a negation of social justice and 'planning' proper" — and our Constitution speaks repeatedly of social justice [Preamble and Article 38(1)]. As late as 1985, the Ministry of Education had this to say in para 3.74 of its publication Challenge of Education — A Policy Perspective. It is stated there:

> *"3.74. Considering the constitutional imperative regarding the universalisation of elementary education it was to be expected that the share of this sector would be protected from attribution (sic). Facts, however, point in the opposite direction. From a share of 56 per cent in the First Plan, it declined to 35 per cent in the Second Plan, to 34 per cent in the Third Plan, to 30 per cent in the Fourth Plan. It started going up again only in the Fifth Plan, when it was at the level of 32 per cent, increasing in Sixth Plan to 36 per cent, still 20 per cent below the First Plan level. On the other hand, between the First and the Sixth Five Year Plans, the share of university education went up from 9 per cent to 16 per cent."*

***175.** Be that as it may, we must say that at least now the State should honour the command of Article 45. It must be made a reality — at least now. Indeed, the National Education Policy 1986 says that the promise of Article 45 will be redeemed before the end of this century. Be that as it may, we hold that a child (citizen) has a fundamental right to free education up to the age of 14 years."*

38. The decision of this Court in the case of ***Unni Krishnan*** (supra) was later on overruled in a larger Bench decision in the case of ***T.M.A. Pai Foundation and Others v. State of Karnataka and Others***, (2002) 8 SCC 481, but on a different point.

39. In the case of ***Society for Unaided Private Schools of Rajasthan v. Union of India and Another***, (2012) 6 SCC 1, this Court considered the validity of the Right of Children to Free and Compulsory Education Act, 2009 insofar as it made the provisions therein applicable to unaided non-minority schools. S.H. Kapadia, CJ, speaking for the majority, observed as under:

> *"**27.** At the outset, it may be stated, that fundamental rights have two aspects—they act as fetters on plenary legislative powers and, secondly, they provide conditions for fuller development of our people including their individual dignity. Right to live in Article 21 covers access to education. But unaffordability defeats that access. It defeats the State's endeavour to provide free and compulsory education for all children of the specified age. To provide for free and compulsory education in Article 45 is not the same thing as to provide free and compulsory education. The word "for" in Article 45 is a preposition. The word "education" was read into Article 21 by the judgments of this Court. However, Article 21 merely declared "education" to fall within the contours of right to live.*
>
> ***28.** To provide for right to access education, Article 21-A was enacted to give effect to Article 45 of the Constitution. Under Article 21-A, right is given to the State to provide by law "free and compulsory education". Article 21-A contemplates making of a law by the State. Thus, Article 21-A contemplates right to education flowing from the law to be made which is the 2009 Act, which is child-centric and not institution-centric. Thus, as stated, Article 21-A provides that the State shall provide free and compulsory education to all children of the specified age in such manner as the State may, by law, determine. The manner in which this obligation will be discharged by the State has been left to the State to determine by law. The 2009 Act is thus enacted in terms of Article 21-A. It has been enacted primarily to remove all barriers (including financial barriers) which impede access to education."*

40. I am conscious of the fact that the economically weaker sections of the citizens are not declared as socially and economically backward classes (SEBCs) for the purpose of Article 15(4) of the Constitution. However, for the purpose of judging the validity of the impugned amendment, this, in my view, would not be of any consequence. One should take notice of the fact that Article 16(4) of the Constitution refers to backward class of citizens, which in the opinion of the State, is not adequately represented in the services under the State. In such a case, it is provided that nothing in that Article shall prevent the State from

making any provision for the reservation of appointments or posts in favour of such backward classes of the citizens. On the other hand, Article 15(4) refers to socially and educationally backward classes of citizens along with the Scheduled Castes or the Scheduled Tribes and provides that nothing in that Article or Article 29(2) shall prevent the State from making any special provision for the advancement of such classes. Article 16(4) pertains to backward class of citizens for the purpose of making reservation in public employment. Article 15(4), on the other hand, refers to socially and educationally backward classes for the purpose of making any special provision by the State for the advancement of such classes. While affirmative action implied in Article 16(4) is restricted to reservation in employment, Article 15(4) has a wider canvass and reach by virtue of the pronounced purpose of making special provision.

41. Such a distinction between the two provisions was noticed by this Court in the case of ***Indra Sawhney*** (supra) wherein Reddy, J. speaking for the majority, observed as under:

> *"(c) Whether the backwardness in Article 16(4) should be both social and educational?*
>
> ***786****. The other aspect to be considered is whether the backwardness contemplated in Article 16(4) is social backwardness or educational backwardness or whether it is both social and educational backwardness. Since the decision in Balaji (M.R. Balaji v. State of Mysore, 1963 Supp 1 SCR 439: AIR 1963 SC 649) it has been assumed that the backward class of citizens contemplated by Article 16(4) is the same as the socially and educationally backward classes, Scheduled Castes and Scheduled Tribes mentioned in Article 15(4). Though Article 15(4) came into existence later in 1951 and Article 16(4) does not contain the qualifying words "socially and educationally"preceding the words "backward class of citizens" the same meaning came to be attached to them. Indeed, it was stated in Janki Prasad Parimoo (Janki Prasad Parimoo v. State of J & K, (1973) 1 SCC 420: 1973 SCC (L&S) 217: (1973) 3 SCR 236) (Palekar, J speaking for the Constitution Bench) that:*

> *"Article 15(4) speaks about 'socially and educationally backward classes of citizens' while Article 16(4) speaks only of 'any backward class citizens'. However, it is now settled that the expression 'backward class of citizens' in Article 16(4) means the same thing as the expression 'any socially and educationally backward class of citizens' in Article 15(4). In order to qualify for being called a 'backward class citizen' he must be a member of a socially and educationally backward class. It is social and educational backwardness of a class which is material for the purposes of both Articles 15(4) and 16(4)."*

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

> *level whatsoever — insisting upon educational backwardness may not be quite appropriate."* (Emphasis supplied)

42. Despite such legal distinction drawn by this Court between the "backward classes" referred to in Article 16(4) and "socially and educationally backward classes" referred to in Article 15(4) of the Constitution, in the practice which has developed over a period of time, such distinction has been virtually obliterated. It is an undisputed position that the State has been categorising various classes and communities as socially and educationally backward classes (SEBCs) often referred to in popular term as the Other Backward Classes or OBCs. Such list is common for both the benefits envisaged under Article 16(4) of the Constitution as well as Article 15(4). In other words, it is this very list of SEBCs which is utilised by the State organs for the purpose of granting reservation in public employment in terms of Article 16(4) of the Constitution. This very classification of the SEBC status also qualifies the member of the community to reservation in education including professional courses which would flow from the provisions made in Article 15(4) of the Constitution.

43. Though previously Articles 15(4) and 16(4) resply were seen as exception of the equality enshrined in the Articles 15(1) and 16(1) respectively, this understanding of the constitutional provisions underwent a major change in the decision in ***N.M. Thomas*** (supra). Mathew J, observed as under:-

> *"**78.** I agree that Article 16(4) is capable of being interpreted as an exception to Article 16(1) if the equality of opportunity visualized in Article 16(1) is a sterile one, geared to the concept of numerical equality which takes no account of the social, economic, educational background of the members of scheduled castes and scheduled tribes. If equality of opportunity guaranteed under Article 16(1) means effective material equality, then Article 16(4) is not an exception to Article 16(1). It is only an emphatic way of putting the extent to which equality of opportunity could be carried viz., even upto the point of making reservation."*

44. This change in the approach was noticed and amplified by this Court in the larger Bench judgment in the case of ***Indra Sawhney*** (supra). It was observed as under: -

> "***741.*** *In Balaji [M.R. Balaji v. State of Mysore,1963 Supp 1 SCR 439 : AIR 1963 SC 649] it was held — "there is no doubt that Article 15(4) has to be read as a proviso or an exception to Articles 15(1) and 29(2)". It was observed that Article 15(4) was inserted by the First Amendment in the light of the decision in Champakam [State of Madras v. Smt Champakam Dorairajan, 1951 SCR 525 : AIR 1951 SC 226], with a view to remove the defect pointed out by this court namely, the absence of a provision in Article 15 corresponding to clause (4) of Article 16. Following Balaji [M.R. Balaji v. State of Mysore, 1963 Supp 1 SCR 439 : AIR 1963 SC 649] it was held by another Constitution Bench (by majority) in Devadasan [T. Devadasan v. Union of India, (1964) 4 SCR 680 : AIR 1964 SC 179 : (1965) 2 LLJ 560] — "further this Court has already held that clause (4) of Article 16 is by way of a proviso or an exception to clause (1)". Subba Rao, J, however, opined in his dissenting opinion that Article 16(4) is not an exception to Article 16(1) but that it is only an emphatic way of stating the principle inherent in the main provision itself. Be that as it may, since the decision in Devadasan [T. Devadasan v. Union of India, (1964) 4 SCR 680 : AIR 1964 SC 179 : (1965) 2 LLJ 560] , it was assumed by this Court that Article 16(4) is an exception to Article 16(1). This view, however, received a severe setback from the majority decision in State of Kerala v. N.M. Thomas [(1976) 2 SCC 310 : 1976 SCC (L&S) 227 : (1976) 1 SCR 906]. Though the minority (H.R. Khanna and A.C. Gupta, JJ) stuck to the view that Article 16(4) is an exception, the majority (Ray, CJ, Mathew, Krishna Iyer and Fazal Ali, JJ) held that Article 16(4) is not an exception to Article 16(1) but that it was merely an emphatic way of stating a principle implicit in Article 16(1). (Beg, J took a slightly different view which it is not necessary to mention here.) The said four learned Judges — whose views have been referred to in para 713 — held that Article 16(1) being a facet of the doctrine of equality enshrined in Article 14 permits reasonable classification just as Article 14 does. In our respectful opinion, the view taken by the majority in Thomas [(1976) 2 SCC 310 : 1976 SCC (L&S) 227 : (1976) 1 SCR 906] is the correct one. We too believe that Article 16(1) does permit reasonable classification for ensuring attainment of the equality of opportunity assured by it. For assuring equality of opportunity, it may well be*

necessary in certain situations to treat unequally situated persons unequally. Not doing so, would perpetuate and accentuate inequality. Article 16(4) is an instance of such classification, put in to place the matter beyond controversy. The "backward class of citizens" are classified as a separate category deserving a special treatment in the nature of reservation of appointments/posts in the services of the State. Accordingly, we hold that clause (4) of Article 16 is not exception to clause (1) of Article 16. It is an instance of classification implicit in and permitted by clause (1). The speech of Dr Ambedkar during the debate on draft Article 10(3) [corresponding to Article 16(4)] in the Constituent Assembly — referred to in para 693 — shows that a substantial number of members of the Constituent Assembly insisted upon a "provision (being) made for the entry of certain communities which have so far been outside the administration", and that draft clause (3) was put in in recognition and acceptance of the said demand. It is a provision which must be read along with and in harmony with clause (1). Indeed, even without clause (4), it would have been permissible for the State to have evolved such a classification and made a provision for reservation of appointments/posts in their favour. Clause (4) merely puts the matter beyond any doubt in specific terms.

***742.** Regarding the view expressed in Balaji [M.R. Balaji v. State of Mysore, 1963 Supp 1 SCR 439 : AIR 1963 SC 649] and Devadasan [T. Devadasan v. Union of India, (1964) 4 SCR 680 : AIR 1964 SC 179 : (1965) 2 LLJ 560], it must be remembered that at that time it was not yet recognised by this Court that Article 16(1) being a facet of Article 14 does implicitly permit classification. Once this feature was recognised the theory of clause (4) being an exception to clause (1) became untenable. It had to be accepted that clause (4) is an instance of classification inherent8 in clause (1). Now, just as Article 16(1) is a facet or an elaboration of the principle underlying Article 14, clause (2) of Article 16 is also an elaboration of a facet of clause (1). If clause (4) is an exception to clause (1) then it is equally an exception to clause (2). Question then arises, in what respect if clause (4) an exception to clause (2), if 'class' does not means 'caste'. Neither clause (1) nor clause (2) speak of class. Does the contention mean that clause (1) does not permit classification and therefore clause (4) is an exception to it. Thus, from any point of view, the contention of the petitioners has no merit."*

45. In that context, this Court answered the question whether Article 16(4) is exhaustive of the very concept of reservation. It was held that though Article

16(4) is exhaustive for reservation in favour of backward classes and no further special treatment is permissible in their favour outside of Article 16(4), Article 16(4) itself is not exhaustive of the concept of reservation. It was held that Article 16(1) itself, of course, in very exceptional situations and not for all and sundry reasons permits reservations. The contention that Article 16(1) permits preferential treatment and not reservation was thus rejected.

46. According to the Constitutional scheme, the right to education forms part of the right to life under Article 21 and the right to education is incorporated separately and in clear terms as an independent fundamental right in the form of Article 21-A. That Article is couched in the language which is mandatory insofar as the State is obliged to provide free and compulsory education to all children of the age of 6 to 14 years. The matter of free and compulsory primary education has been perceived to be so important even at the time of drafting of the Constitution that Articles 45 and 46 resply were incorporated in Part IV of the Constitution to lay the principles fundamental in the governance of the country and they were made the duty of the State to apply those principles in making laws by virtue of Article 37. Now that right to education is not only declared as fundamental right of every child, but the State has been obliged to provide free and compulsory education, no authority which is the State within the definition contained in Article 12 could legitimately renege on the constitutional covenant. The phrase "free and compulsory education" in Article 21-A clearly makes it obligatory on the State to not only provide necessary funds and facilities for free, but also compulsory education. Thus, the State is under an obligation to apply the provisions contained in Articles 45 and 46 resply to provide childhood care and primary education and promote with special care the educational and economic interests of the weaker sections of the people and protect them from social injustice. (See : ***Adam B. Chaki*** (supra))

CONSTITUTIONAL VALIDITY OF CLAUSE (5) IN ARTICLE 15

47. The constitutional validity of clause (5) in Article 15 of the Constitution introduced by the Constitution (93rd Amendment) Act, 2005 was made the subject matter of challenge before this Court in ***Pramati Educational and Cultural Trust (Registered) and Others v. Union of India and Others***, (2014) 8 SCC 1.

48. The constitutional validity of clause (5) in Article 15 was essentially challenged on the ground that the same is violative of Article 19(1)(g) of the Constitution, inasmuch as it compels the private educational institutions to give up a share of the available seats to the candidates chosen by the State and such appropriation of seats would not be a regulatory measure and not a reasonable restriction on the right under Article 19(1)(g) of the Constitution within the meaning of Article 19(6) of the Constitution. It was further argued that clause (5) of Article 15 of the Constitution, as its very language, indicates would not apply to the minority educational institutions referred to in clause (1) of Article 30 of the Constitution. It was argued that thus it violated Article 14 because the aided minority institutions and unaided minority institutions cannot be treated alike. It was also argued that clause (5) of Article 15 of the Constitution is discriminatory and violative of the equality clause in Article 14 of the Constitution, which is a basic feature of the Constitution.

49. On the other hand, while defending clause (5) of Article 15 of the Constitution, it was argued on behalf of the Union of India that clause (5) of Article 15 of the Constitution is only an enabling provision empowering the State to make a special provision, by law, for the advancement of socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes insofar as such special provisions relate to their admission to educational institutions including the private educational institutions. It was also argued that Article 15(5) is consistent with the socialistic goals set out in the

Preamble and the Directive Principles in Part IV and to ensure the march and progress of the weaker sections resulting in progress to socialistic democratic State establishing the egalitarian ethos/egalitarian equality which is the mandate of the Constitution and has also been recognised by this Court in the case of ***M. Nagaraj and Others v. Union of India and Others***, (2006) 8 SCC 212 : AIR 2007 SC 71. It was argued that this Court in ***M.R. Balaji and Others v. State of Mysore*** (1963) Supp 1 SCR 439, disagreed with the judgment in the ***State of Madras v. Sm. Champakam Dorairajan*** (supra) and upheld that Article 46 of the Constitution charges the State with promoting with special care the educational and economic interests of the weaker sections of the society. The underlying logic behind the judgment in ***M.R. Balaji*** (supra) has logically flown from the mandate of Article 15(4), Article 16(4), Article 38, Article 45 and Article 46 resply and that Article 15(5) is only a continuation of that process. Much emphasis was laid on the fact that when the elementary education has been made a fundamental right, in order to make that objective more meaningful, it was also necessary for the State to ensure that even in higher education, there must be affirmative equality by providing chances or opportunities to the socially and educationally backward classes.

50. The Constitution Bench, in ***Pramati Educational and Cultural Trust*** (supra), after due consideration of the rival contentions canvassed on either side and while upholding the validity of clause (5) of Article 15 of the Constitution, held as under:

> *"**29.** We may now examine whether the Ninety-third Amendment satisfies the width test. A plain reading of clause (5) of Article 15 would show that the power of a State to make a law can only be exercised where it is necessary for advancement of socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes and not for any other purpose. Thus, if a law is made by the State only to appease a class of citizen which is not socially or educationally backward or which is not a Scheduled Caste or Scheduled Tribe, such a law will be beyond the powers of*

the State under clause (5) of Article 15 of the Constitution. A plain reading of clause (5) of Article 15 of the Constitution will further show that such law has to be limited to making a special provision relating to admission to private educational institutions, whether aided or unaided, by the State. Hence, if the State makes a law which is not related to admission in educational institutions and relates to some other aspects affecting the autonomy and rights of private educational institutions as defined by this Court in T.M.A. Pai Foundation [T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481], such a law would not be within the power of the State under clause (5) of Article 15 of the Constitution. In other words, power in clause (5) of Article 15 of the Constitution is a guided power to be exercised for the limited purposes stated in the clause and as and when a law is made by the State in purported exercise of the power under clause (5) of Article 15 of the Constitution, the Court will have to examine and find out whether it is for the purposes of advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes and whether the law is confined to admission of such socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes to private educational institutions, whether aided or unaided, and if the Court finds that the power has not been exercised for the purposes mentioned in clause (5) of Article 15 of the Constitution, the Court will have to declare the law as ultra vires Article 19(1)(g) of the Constitution. In our opinion, therefore, the width of the power vested on the State under clause (5) of Article 15 of the Constitution by the constitutional amendment is not such as to destroy the right under Article 19(1)(g) of the Constitution.

***30.** We may now examine the contention of Mr Nariman that clause (5) of Article 15 of the Constitution fails to make a distinction between aided and unaided educational institutions and treats both aided and unaided alike in the matter of making special provisions for admission of socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes. The distinction between a private aided educational institution and a private unaided educational institution is that private educational institutions receive aid from the State, whereas private unaided educational institutions do not receive aid from the State. As and when a law is made by the State under clause (5) of Article 15 of the Constitution, such a law would have to be examined whether it has taken into account the fact that private unaided educational institutions are not aided by the State and has made provisions in the*

law to ensure that private unaided educational institutions are compensated for the admissions made in such private unaided educational institutions from amongst socially and educationally backward classes of citizens or the Scheduled Castes and the Scheduled Tribes. In our view, therefore, a law made under clause (5) of Article 15 of the Constitution by the State on the ground that it treats private aided educational institutions and private unaided educational institutions alike is not immune from a challenge under Article 14 of the Constitution. Clause (5) of Article 15 of the Constitution only states that nothing in Article 15 or Article 19(1)(g) will prevent the State to make a special provision, by law, for admission of socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes to educational institutions including private educational institutions, whether aided or unaided by the State. Clause (5) of Article 15 of the Constitution does not say that such a law will not comply with the other requirements of equality as provided in Article 14 of the Constitution. Hence, we do not find any merit in the submission of the Mr Nariman that clause (5) of Article 15 of the Constitution that insofar as it treats unaided private educational institutions and aided private educational institutions alike it is violative of Article 14 of the Constitution.

***31.** We may now deal with the contention of Mr Divan that clause (5) of Article 15 of the Constitution is violative of Article 14 of the Constitution as it excludes from its purview the minority institutions referred to in clause (1) of Article 30 of the Constitution and the contention of Mr Nariman that clause (5) of Article 15 excludes both unaided minority institutions and aided minority institutions alike and is thus violative of Article 14 of the Constitution.*

x x x x

***34.** Clause (5) of Article 15 of the Constitution enables the State to make a special provision, by law, for the advancement of socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes. Such admissions of socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes who may belong to communities other than the minority community which has established the institution, may affect the right of the minority educational institutions referred to in clause (1) of Article 30 of the Constitution. In other words, the minority character of the minority educational*

institutions referred to in clause (1) of Article 30 of the Constitution, whether aided or unaided, may be affected by admissions of socially and educationally backward classes of citizens or the Scheduled Castes and the Scheduled Tribes and it is for this reason that minority institutions, aided or unaided, are kept outside the enabling power of the State under clause (5) of Article 15 with a view to protect the minority institutions from a law made by the majority. As has been held by the Constitution Bench of this Court in Ashoka Kumar Thakur v. Union of India [(2008) 6 SCC 1], the minority educational institutions, by themselves, are a separate class and their rights are protected under Article 30 of the Constitution, and, therefore, the exclusion of minority educational institutions from Article 15(5) is not violative of Article 14 of the Constitution.

***35.** We may now consider the contention of Mr Divan that clause (5) of Article 15 of the Constitution is violative of secularism insofar as it excludes religious minority institutions referred to in Article 30(1) of the Constitution from the purview of clause (5) of Article 15 of the Constitution. In M. Ismail Faruqui v. Union of India [(1994) 6 SCC 360], this Court has held that: (SCC p. 403, para 37)*

"37. ... The Preamble of the Constitution read in particular with Articles 15 to 28 emphasises this aspect and indicates that ... the concept of secularism embodied in the constitutional scheme [is] a creed adopted by the Indian people…."

Hence, secularism is no doubt a basic feature of the Constitution, but we fail to appreciate how clause (5) of Article 15 of the Constitution which excludes religious minority institutions in clause (1) of Article 30 of the Constitution is in any way violative of the concept of secularism. On the other hand, this Court has held in T.M.A. Pai Foundation [T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481)] that the essence of secularism in India is the recognition and preservation of the different types of people, with diverse languages and different beliefs and Articles 29 and 30 seek to preserve such differences and at the same time unite the people of India to form one strong nation (see para 161 of the majority judgment of Kirpal, C.J., in T.M.A. Pai Foundation (T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481) at p. 587 of SCC). In our considered opinion, therefore, by excluding the minority institutions referred to in clause (1) of Article 30 of the Constitution, the secular character of India is maintained and not destroyed.

x x x x

> ***37. Educational institutions in India such as Kendriya Vidyalayas, Indian Institute of Technology, All India Institute of Medical Sciences and Government Medical Colleges admit students in seats reserved for backward classes of citizens and for the Scheduled Castes and the Scheduled Tribes and yet these government institutions have produced excellent students who have grown up to be good administrators, academicians, scientists, engineers, doctors and the like. Moreover, the contention that excellence will be compromised by admission from amongst the backward classes of citizens and the Scheduled Castes and the Scheduled Tribes in private educational institutions is contrary to the Preamble of the Constitution which promises to secure to all citizens "fraternity assuring the dignity of the individual and the unity and integrity of the nation". The goals of fraternity, unity and integrity of the nation cannot be achieved unless the backward classes of citizens and the Scheduled Castes and the Scheduled Tribes, who for historical factors, have not advanced are integrated into the mainstream of the nation. We, therefore, find no merit in the submission of Mr Nariman that clause (5) of Article 15 of the Constitution violates the right under Article 21 of the Constitution.***
>
> ***38. We accordingly hold that none of the rights under Articles 14, 19(1)(g) and 21 of the Constitution have been abrogated by clause (5) of Article 15 of the Constitution and the view taken by Bhandari, J. in Ashoka Kumar Thakur v. Union of India [(2008) 6 SCC 1] that the imposition of reservation on unaided institutions by the Ninety-third Amendment has abrogated Article 19(1)(g), a basic feature of the Constitution is not correct. Instead, we hold that the Constitution (Ninety-third Amendment) Act, 2005 inserting clause (5) of Article 15 of the Constitution is valid.***"
>
> [Emphasis supplied]

51. Thus, if Article 15(5) of the Constitution has been found to be consistent with the socialistic goals set out in the Preamble and the Directive Principles in Part IV and to ensure the march and progress of the weaker sections resulting in progress to Socialistic Democratic State establishing the egalitarian ethos/egalitarian equality which is the mandate of the Constitution and has also been approved in ***M. Nagaraj*** (supra), then clause (6) in Article 15 of the

Constitution could also be said to be consistent with the socialistic goals set out in the Preamble and the Directive Principles in Part IV. Article 15(6), brought in by way of the Constitution (103rd Amendment) Act, 2019, which provides for identical reservation for the economically weaker sections of the citizens in private unaided educational institutions. The Constitution Bench in ***Pramati Educational and Cultural Trust*** (supra) was not impressed with the challenge to Article 15(5) on the ground of breach of basic structure so far as it relates to the unaided private educational institutions.

52. Taking the aforesaid view of the matter, the Constitution Bench of this Court, in the case of ***Pramati Educational and Cultural Trust*** (supra), held that the Constitution (93rd Amendment) Act, 2005 inserting clause (5) of Article 15 of the Constitution could not be said to have altered the basic structure or framework of the Constitution and is constitutionally valid.

53. In view of the aforesaid, Article 15(6), which is the subject matter of challenge and which provides for reservation for the "EWS other than the SC, ST and OBC-NCL" in private unaided educational institutions, cannot be said to be altering the basic structure. It is constitutionally valid. However, the question whether the exclusion clause is violative of the equality code, particularly the principle of non-discrimination and non-exclusion which forms inextricable part of the basic structure of the Constitution, shall be answered by me a little later.

54. Let us remember the observations made by Mathew, J. in the case of ***N.M. Thomas*** (supra), as under:

> *"**73.** There is no reason why this Court should not also require the State to adopt a standard of proportional equality which takes account of the differing conditions and circumstances of a class of citizens whenever those conditions and circumstances stand in the way of their equal access to the enjoyment of basic rights or claims."*
>
> (Emphasis supplied)

55. It has been held by this Court in the case of ***Dalmia Cement (Bharat) Ltd. and Another v. Union of India and Others***, (1996) 10 SCC 104, that with a view to establish an egalitarian social order, the trinity, the Preamble, the Fundamental Rights in Part III and the Directive Principles of State Policy in Part IV of the Constitution delineated the social economic justice. The word "justice" envisioned in the Preamble is used in a broad spectrum to harmonise the individual right with the general welfare of the society. The Constitution is the supreme law. The purpose of law is realization of justice whose content and scope vary depending on the prevailing social environment. Every social and economic change causes change in the law. In a democracy governed by the rule of law, it is not possible to change the legal basis of social and economic life of the community without bringing about any corresponding change in the law. In ***Dalmia Cement (Bharat) Ltd.*** (supra), this Court further observed that social justice is not a simple or single idea of a society but is an essential part of complex social change to relieve the poor, etc. from the handicaps, penury, to ward them off from distress and to make their lives livable for the greater good of the society at large. Therefore, social and economic justice in the context of our Indian Constitution must, be understood in a comprehensive sense to remove every inequality and to provide equal opportunity to all citizens in social as well as economic activities and in every part of life. Economic justice means abolition of those economic conditions which ultimately result in the inequality of economic values between men leading towards backwardness.

56. In the case on hand, it was vociferously argued that the individuals belonging to the economical weaker sections may not form a class and they may be weaker as individual only. Secondly, their weakness may not be the result of the past social and educational backwardness or discrimination. The basis of such argument is the observation of Sawant, J. in ***Indra Sawhney*** (supra). All the learned counsel while criticising the impugned amendment kept reminding this Court time and again that the Constitution has never recognised economic

criteria as a mode of reservation. Reservation in employment, etc. is only meant for the socially oppressed class. Economically weaker sections of the citizens may be financially handicapped or poor but still socially, they can be said to be much advanced and cannot be compared with the socially oppressed class like the SCs/STs. Thus, the reservation for the weaker sections of the citizens has destroyed or rather abridged the basic structure of the Constitution. I shall deal with this argument of abridgement of the basic structure a little later. But, I would definitely like to say something as regards the economic criteria for the purpose of reservation.

57. In this country with a population of around 1.41 billion, the economic backwardness is not confined only to those who are covered by Article 15(4) or Article 16(4) of the Constitution. In a country where only a small percentage of the population is above the poverty line, to deny opportunities of higher education (which secures employment) and employment is to deny to those who are qualified and deserving what is or at least should be their due.

58. When the 42nd Constitutional Amendment was on the anvil, there was suggestion of inclusion of "right to work" which carries with it the natural corollary of assured employment as a fundamental right. This, understandably, could not be done in a political system which is based on mixed economy. The natural effect of reservation is to close the door of betterment or even employment to even a portion of economically weak section of community. This all the more emphasises the urgent necessity of eliminating or at least substantially reducing the causes which have contributed to the creation of socially and educationally backward section of the community, thus, creating a situation when the need of reservation would be no more. Then alone the promise of equality for all would become a reality. And, it is to be remembered that right of equality is the "Cornerstone of the Constitution" (per Khanna, J.). Chandrachud, J. says: "it is a right which more than any other is a basic postulate of our Constitution". Mathew,

J. describes it as the "most fundamental postulate of republicanism". [See : ***Padmraj Samarendra v. the State of Bihar***, Patna High Court, Special Bench, 1978 SCC OnLine Pat 64 : 1979 PLJR 258 : AIR 1979 Pat 266 at page 267]

59. In the aforesaid context, it would further be useful again to extract the observation of Iyer, J., in ***N. M. Thomas*** (supra) who concurring with A. N. Ray, CJ, observed:

> *"**149**. ....no caste, however seemingly backward, or claiming to be derelict, can be allowed to breach the dykes of equality of opportunity guaranteed to all citizens. To them the answer is that, save in rare cases of 'chill penury repressing their noble rage', equality is equality — nothing less and nothing else. The heady upper berth occupants from 'backward' classes do double injury. They beguile the broad community into believing that backwardness is being banished. They rob the need-based bulk of the backward of the 'office' advantages the nation, by classification, reserves or proffers. The constitutional dharma, however, is not an unending deification of 'backwardness' and showering 'classified' homage, regardless of advancement registered, but progressive exercising of the social evil and gradual withdrawal of artificial crutches. Here the Court has to be objective, resisting mawkish politics....."*

60. Also, the note of caution sounded by this Court in ***the State of Jammu & Kashmir v. Triloki Nath Khosa and others***, AIR 1974 SC 1, reads as follows:

> *"**56.**.....let us not evolve, through imperceptible extensions, a theory of classification which may subvert, perhaps submerge, the precious guarantee of equality. The eminent spirit of an ideal society is equality and so we must not be left to ask in wonderment: what after all is the operational residue of equality and equal opportunity?"*

61. In ***Ram Singh and Others v. Union of India***, (2015) 4 SCC 697, this Court, while considering a challenge to the notification published in the Gazette of India dated 04.03.2014 by which the Jat Community came to be included in the Central List of Backward Classes for the States of Bihar, Gujarat, Haryana, Himachal Pradesh, Madhya Pradesh, NCT of Delhi, Bharatpur and Dholpur districts of Rajasthan, Uttar Pradesh and Uttarakhand, observed very

emphatically as under:-

> *"**54.** Past decisions of this Court in M.R. Balaji v. State of Mysore [AIR 1963 SC 649 : 1963 Supp (1) SCR 439] and Janki Prasad Parimoo v. State of J&K [(1973) 1 SCC 420 : 1973 SCC (L&S) 217] had conflated the two expressions used in Articles 15(4) and 16(4) and read them synonymously. It is in Indra Sawhney case [Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] that this Court held that the terms "backward class" and "socially and educationally backward classes" are not equivalent and further that in Article 16(4) the backwardness contemplated is mainly social. The above interpretation of backwardness in Indra Sawhney [Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385] would be binding on numerically smaller Benches. We may, therefore, understand a social class as an identifiable section of society which may be internally homogeneous (based on caste or occupation) or heterogeneous (based on disability or gender e.g. transgender). Backwardness is a manifestation caused by the presence of several independent circumstances which may be social, cultural, economic, educational or even political. Owing to historical conditions, particularly in Hindu society, recognition of backwardness has been associated with caste. Though caste may be a prominent and distinguishing factor for easy determination of backwardness of a social group, this Court has been routinely discouraging the identification of a group as backward solely on the basis of caste<u>. Article 16(4) as also Article 15(4) lay the foundation for affirmative action by the State to reach out to the most deserving. Social groups who would be most deserving must necessarily be a matter of continuous evolution. New practices, methods and yardsticks have to be continuously evolved moving away from caste centric definition of backwardness. This alone can enable recognition of newly emerging groups in society which would require palliative action. The recognition of the third gender as a socially and educationally backward class of citizens entitled to affirmative action of the State under the Constitution in National Legal Services Authority v. Union of India [(2014) 5 SCC 438] is too significant a development to be ignored. In fact it is a pathfinder, if not a path-breaker. It is an important reminder to the State of the high degree of vigilance it must exercise to discover emerging forms of backwardness. The State, therefore, cannot blind itself to the existence of other forms and instances of backwardness. An affirmative action policy that keeps in mind only historical injustice</u>*

would certainly result in under protection of the most deserving backward class of citizens, which is constitutionally mandated. It is the identification of these new emerging groups that must engage the attention of the State and the constitutional power and duty must be concentrated to discover such groups rather than to enable groups of citizens to recover "lost ground" in claiming preference and benefits on the basis of historical prejudice."

[Emphasis supplied]

62. In ***State of Kerala v. R. Jacob Mathew and others***, AIR 1964 Kerala 316, Chief Justice M.S. Menon observed as follows:

> *"**9.** In these regions of human life and values the clear-cut distinctions of cause and effect merge into each other. Social backwardness contributes to educational backwardness; educational backwardness perpetuates social backwardness; and both are often no more than the inevitable corollaries of the extremes of poverty and the deadening weight of custom and tradition….."*
>
> [Emphasis supplied]

63. In ***M.R. Balaji*** (supra), Gajendrakadkar J. said that:

> *"…..Social backwardness is on the ultimate analysis the result of poverty, to a very large extent. The classes of citizens who are deplorably poor automatically become socially backward….*
>
> *x x x x*
>
> *…..However, we may observe that if any State adopts such a measure, it may afford relief to and assist the advancement of the Backward Classes in the State, because backwardness, social and educational, is ultimately and primarily due to poverty….."*
>
> [Emphasis supplied]

ECONOMIC CRITERIA FOR THE AFFIRMATIVE ACTION UNDER THE CONSTITUTION

64. What is so principally, so fundamentally wrong in singling out an economic criterion for reservation? Is it that they do not belong to a homogenous

group? Is it cast in stone that they (beneficiaries of reservation) should belong to homogenous group? Why cannot economic criterion be a ground for the State's affirmative action?

65. The aforesaid are the few questions which were put by this Bench to the learned counsel appearing for the respective petitioners. One common reply to the aforesaid questions was that the reservation is only meant for the persons falling within Article 15(4) and Article 16(4) of the Constitution and that there are other affirmative actions which can address the problem of economy, but not necessarily reservation.

66. Economic criteria can be a relevant factor for affirmative action under the Constitution. In ***N.M. Thomas*** (supra), the constitutional validity of Rule 13AA giving further exemption of two years to the members belonging to the Scheduled Tribes and Scheduled Castes in the service from passing the tests referred to in Rule 13 or Rule 13A, was questioned. The High Court struck down the rule. Allowing the State appeal, this Court held that:

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

require resort to a standard of proportional equality which requires the State, in framing legislation, to take into account the private inequalities of wealth, of education and other circumstances. [See "Developments—Equal Protection", 82 Harv L R 1165]

68. *The idea of compensatory State action to make people who are really unequal in their wealth, education or social environment, equal, in specified areas, was developed by the Supreme Court of the United States. Rousseau has said :*

It is precisely because the force of circumstances tends to destroy equality that force of legislation must always tend to maintain it. [Contract Social ii, 11.]

69. *In Griffin v. Illinois [351 US 12.] an indigent defendant was unable to take advantage of the one appeal of right granted by Illinois law because he could not afford to buy the necessary transcript. Such transcripts were made available to all defendants on payment of a similar fee ; but in practice only non-indigents were able to purchase the transcript and take the appeal. The Court said that*

there can be no equal justice where the kind of trial a man gets depends on the amount of money he has

and held that the Illinois procedure violated the equal protection clause.

The State did not have to make appellate review available at all; but if it did, it could not do so in a way ***which operated to deny access to review to defendants solely because of their indigency****. A similar theory underlies the requirement that counsel be provided for indigents on appeal. In Douglas v. California [372 US 353] the case involved the California procedure which guaranteed one appeal of right for criminal defendants convicted at trial. In the case of indigents the appellate Court checked over the record to see whether it would be of advantage to the defendant or helpful to the appellate Court to have counsel appointed for the appeal. A negative answer meant that the indigent had to appeal pro se if at all. The Court held that this procedure denied defendant the equal protection of the laws. Even though the State was pursuing an otherwise legitimate objective of providing counsel only for non-frivolous claims, it had created a situation in which the well-to-do could always have a lawyer — even for frivolous appeals — whereas the indigent could not.*

x x x x

__71.__ Though in one sense Justice Harlan is correct, when one comes to think of the real effect of his view, one is inclined to think that the opinion failed to recognise that ***<u>there are several ways of looking at equality, and treating people equally in one respect always results in unequal treatment in some other respects.</u>*** *For Mr. Justice Harlan, the only type of equality that mattered was numerical equality in the terms upon which transcripts were offered to defendants. The majority, on the other hand, took a view which would bring about equality in fact, requiring similar availability to all of criminal appeals in Griffin's case (supra) and counsel-attended criminal appeals in Douglas case (supra). To achieve this result, the Legislature had to resort to a proportional standard of equality. These cases are remarkable in that they show that* ***<u>the kind of equality which is considered important in the particular context and hence of the respect in which it is necessary to treat people equally</u>****. [See "Developments—Equal Protection", 82 Harv LR 1165.]*

x x x x

__158.__ It is no doubt true that Article 16(1) provides for equality of opportunity for all citizens in the services under the State. It is, however, well-settled that the doctrine contained in Article 16 is a hard and reeling reality, a concrete and constructive concept and not a rigid rule or an empty formula. It is also equally well-settled by several authorities of this Court that Article 16 is merely an incident of Article 14, Article 14 being the genus is of universal application whereas Article 16 is the species and seeks to obtain equality of opportunity in the services under the State. The theory of reasonable classification is implicit and inherent in the concept of equality for there can hardly be any country where all the citizens would be equal in all respects. ***<u>Equality of opportunity would naturally mean a fair opportunity not only to one section or the other but to all sections by removing the handicaps if a particular section of the society suffers from the same</u>****. It has never been disputed in judicial pronouncements by this Court as also of the various High Courts that Article 14 permits reasonable classification. But what Article 14 or Article 16 forbid is hostile discrimination and not reasonable classification. In other words, the idea of classification is implicit in the concept of equality because equality means equality to all and not merely to the advanced and educated sections of the society. It follows, therefore, that in order to provide equality of opportunity to all citizens of our country, every class of citizens must have a sense of equal participation in building up an* ***<u>egalitarian society, where there is peace and plenty, where there is complete economic freedom and</u>***

there is no pestilence or poverty, no discrimination and oppression, where there is equal opportunity to education, to work, to earn their livelihood so that the goal of social justice is achieved*.....*

x x x x

230.** Scheduled castes and scheduled tribes are castes and tribes specified by the President under Articles 341 and 342 of the Constitution to be known as such for the purposes of the Constitution. It is accepted that generally speaking these castes and tribes are backward in educational and economic fields. It is claimed that the expression "scheduled castes" does not refer to any caste of the Hindu society but connotes a backward class of citizens. A look at Article 341 however will show that the expression means a number of existing social castes listed in a schedule ; castes do not cease to be castes being put in a schedule though backwardness has come to be associated with them.* ***Article 46 requires the State to promote the economic interests of the weaker sections of the people and, in particular, of the scheduled castes and the scheduled tribes. The special reference to the scheduled castes and the scheduled tribes does not suggest that the State should promote the economic interests of these castes and tribes at the expense of other "weaker sections of the people". I do not find anything reasonable in denying to some lower division clerks the same opportunity for promotion as others have because they do not belong to a particular caste or tribe. Scheduled castes and scheduled tribes no doubt constitute a well-defined class, but a classification valid for one purpose may not be so for another *; in the context of Article 16(1) the sub-class made by Rule 13AA within the same class of employees amounts to, in my opinion, discrimination only on grounds of race and caste which is forbidden by clause (2) of Article 16....*

231.** All I have said above relates to the scope of Article 16(1) only, because Counsel for the appellant has built his case on this provision alone. Clause (4) of Article 16 permits reservation of appointments on posts in favour of backward classes of citizens notwithstanding Article 16(1) ; I agree with the views expressed by Khanna, J. on Article 16(4) which comes in for consideration incidentally in this case.* ***The appalling poverty and backwardness of large sections of the people must move the State machinery to do everything in its power to better their condition but doling out unequal favours to members of the clerical staff does not seem to be a step in that direction : tilting at the windmill taking it to be a monster serves no useful purpose.*"* [Emphasis supplied]

67. On the issue of economic criteria as an affirmative action under the Constitution, there is no difference of opinion amongst us. My esteemed Brother Justice Bhat, in his dissenting judgment has beautifully observed that the economic emancipation is a facet of economic justice which the Preamble as well as Articles 38 and 46 resply promise to all Indians. It is intrinsically linked with distributive justice – ensuring a fair share of the material resources, and a share of the progress of the society as a whole, to each individual. My esteemed Brother Justice Bhat has rightly observed that the break from the past – which was rooted on elimination of caste-based social discrimination, in affirmative action – to now include affirmative action based on deprivation, through impugned amendment, does not alter, destroy or damage the basic structure of the Constitution. On the contrary, it adds a new dimension to the constitutional project of uplifting the poorest segments of the society.

68. The following is discernable from the aforesaid: -

(1) When substantive equality is the avowed constitutional mandate, the State is obliged to provide a level playing field (***M. Nagaraj*** (supra) para 47).

(2) The test for such reasonable classification is not necessarily, or much less exclusively, the social backwardness test of Article 15(4) and Article 16(4) resply.

(3) Article 16(4) [and Article 15(4)] provision is rooted as historical reasons of exclusion from service. The provision was thus fulcrummed on the Constituent Assembly's clear intent (expressed through Dr. B.R. Ambedkar's speech) to redress the specific wrong.

(4) ***Indra Sawhney*** (supra) was limited to then existing Article 16 and construed the meaning of "socially" backward classes for the purpose of Article 16(4).

(5) ***Indra Sawhney*** (supra) was thus undertaking a "schematic

interpretation" of the Article 16(4) [subsequently held equally applicable for Article 15(4)].

(6) The Special "schematic interpretation" based on the original intent doctrine led the amendment of the Constitution and introduction of Article 16(4A) [77th Amendment], Article 16(4B) [81st Amendment] and Article 15(5) [91st Amendment] all of which have been upheld by this Court.

(7) The recuring feature of such constitutional progression is the Parliament's freedom and liberty from the "original intent" doctrine. It is the same theme that enables the Parliament to constantly innovate and improvise to better attend to the Directive Principles' mandate of Articles 38 & 46 resply or of the equality code itself.

69. The march from the past is also discernible from the judicial approach. If adequate representation in services of under-represented class was the sole purpose of Article 16(4), any person from that class would be representative of that class. When ***Indra Sawhney*** (supra) read the necessity of excluding Creamy Layer from the 'backward class' in Article 16(4) – it took note of the events 42 years post the adoption of the Constitution. It is 30 years since the seminal judgment of ***Indra Sawhney***. Time enough for the Parliament to feel the necessity of attending to another section of deprived classes.

70. Therefore, the 103rd Constitutional Amendment signifies the Parliament's intention to expand affirmative action to hitherto untouched groups – who suffer from similar disadvantages as the OBCs competing for opportunities. If economic advance can be accepted to negate certain social disadvantages for the OBCs [Creamy Layer concept] the converse would be equally relevant. At least for considering the competing disadvantages of Economically Weaker Sections. Economic capacity has been upheld as a valid basis for classification by this Court in various other contexts. It has also been implored to be considered as a relevant

facet of the 'Equality Code' provisions. The 103rd Amendment offers a basis not frowned upon by Article 15(1) or 16(2) for providing a population generic and caste/religion/community neutral criteria. It also harmonizes with the eventual constitutional goal of a casteless society. ***Indra Sawhney*** (supra) holds that the ***Chitralekha*** (supra) propounded occupation-cum-means test can be a basis of social backwardness even for the purposes of Article 16(4). Article 15(6)(b) Explanation defining EWS could be said to be fully compliant with this norm.

CONSTITUTION (103RD AMENDMENT) ACT, 2019

71. Let me now look into the Constitution (103rd Amendment) Act, 2019 which came into effect on 14th of January, 2019 amending Articles 15 and 16 resply of the Constitution by adding new clauses which empower the State to provide a maximum of 10% reservation for the "weaker sections" (EWS) of citizens other than the Scheduled Castes (SCs), Scheduled Tribes (STs) and Non-Creamy Layer of the Other Backward Classes (OBCs-NCL).

72. The Constitution (124th Amendment) Bill, 2019 reads thus:

"*THE CONSTITUTION (ONE HUNDRED AND TWENTY-FOURTH AMENDMENT) BILL, 2019*

A

BILL

further to amend the Constitution of India.

BE it enacted by Parliament in the Sixty-ninth Year of the Republic of India as follows:—

1. (1) This Act may be called the Constitution (One Hundred and Twenty-fourth Amendment) Act, 2019.
(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. In article 15 of the Constitution, after clause (5), the following

clause shall be inserted, namely:—

‘(6) Nothing in this article or sub-clause (g) of clause (1) of article 19 or clause (2) of article 29 shall prevent the State from making,—

(a) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5); and

(b) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5) in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30, which in the case of reservation would be in addition to the existing reservations and subject to a maximum of ten per cent. of the total seats in each category.

Explanation.—For the purposes of this article and article 16, "economically weaker sections" shall be such as may be notified by the State from time to time on the basis of family income and other indicators of economic disadvantage.’.

3. In article 16 of the Constitution, after clause (5), the following clause shall be inserted, namely:—

"(6) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any economically weaker sections of citizens other than the classes mentioned in clause (4), in addition to the existing reservation and subject to a maximum of ten per cent. of the posts in each category.".

The Statement of Objects and Reasons reads thus:-

“STATEMENT OF OBJECTS AND REASONS

At present, the economically weaker sections of citizens have largely remained excluded from attending the higher educational institutions and public employment on account of their financial incapacity to compete with the persons who are economically more privileged. The benefits of existing reservations under clauses (4) and (5) of article

15 and clause (4) of article 16 are generally unavailable to them unless they meet the specific criteria of social and educational backwardness.

2. The directive principles of State policy contained in article 46 of the Constitution enjoins that the State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

3. Vide the Constitution (Ninety-third Amendment) Act, 2005, clause (5) was inserted in article 15 of the Constitution which enables the State to make special provision for the advancement of any socially and educationally backward classes of citizens, or for the Scheduled Castes or the Scheduled Tribes, in relation to their admission in higher educational institutions. Similarly, clause (4) of article 16 of the Constitution enables the State to make special provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

4. However, economically weaker sections of citizens were not eligible for the benefit of reservation. With a view to fulfil the mandate of article 46, and to ensure that economically weaker sections of citizens to get a fair chance of receiving higher education and participation in employment in the services of the State, it has been decided to amend the Constitution of India.

5. Accordingly, the Constitution (One Hundred and Twenty-fourth Amendment) Bill, 2019 provides for reservation for the economically weaker sections of society in higher educational institutions, including private institutions whether aided or unaided by the State other than the minority educational institutions referred to in article 30 of the constitution and also provides for reservation for them in posts in initial appointment in services under the State.

6. The Bill seeks to achieve the above objects."

73. Thus, from the Objects and Reasons as aforesaid it is evident that the entire edifice of the impugned amendment is to fulfil the mandate of Article 46 of the

Constitution. What was looked into by the Parliament was the fact that the economically weaker sections of citizens were not eligible for the benefit of reservations. However, with a view to fulfil the mandate of Article 46 and to ensure that economically weaker sections of the citizens get a fair chance of being imparted higher education and participation in employment in the services of the State, the Constitution (103rd Amendment) Act was brought into force.

74. The reservation for the new category will be in addition to the existing scheme of 15%, 7.50% and 27% resply reservations for the SC, ST and OBC-NCL, thus, bringing the total reservation to 59.50%. An 'Explanation' appended to Article 15 states that the EWS shall be such as may be notified by the State from time to time based on the family income and other indicators of economic disadvantage. In its Office Memorandum F. No. 20013/01/2018-BC-II dated January 17, 2019, the Ministry of Social Justice and Empowerment, Government of India has stipulated that only persons whose families have a gross annual income less than Rs.8 lakhs, or agricultural land less than 5 acres, or residential flat less than 1,000 sq. ft., or residential plot less than 100 sq. yards in the notified Municipalities, or residential plot less than 200 sq. yards in the areas other than the notified Municipalities, are to be identified as EWS for the benefit of reservation.

75. What is exactly happening after the impugned amendment? Or to put it in other words, what is the effect of it?

(1) The total reservation is now to the extent of 59.50%. The hue and cry is that the same is in excess of the ceiling of 50% fixed by this Court in ***Indra Sawhney*** (supra).

(2) It excludes the Scheduled Castes (SCs), the Schedule Tribes (STs) and the Non-Creamy Layer of Other Backward Classes (OBCs-NCL). The hue and cry is that the same has

abridged the equality code. In other words, the exclusion is violative of Articles 14, 15 and 16 resply of the Constitution.

(3) Reservation of 10% of the vacancies among the open competition candidates means exclusion of those above the demarcating line from those 10% seats. In other words, the competition will now be within 40%. The hue and cry in this regard is that it is not permissible to debar a citizen from being considered for appointment to an office under the State solely on the basis of his income or property-holding.

76. In the aforesaid context, by and large, all the learned counsel who argued that the impugned judgment is unconstitutional strenuously urged before the Constitution Bench to take the view that Article 46 of the Constitution could not have been made the edifice for the impugned amendment. It was vociferously argued that Article 46 should be interpreted on the principle of *ejusdem generis*. To put in other words, it was vociferously submitted that the words "weaker sections" used in Article 46 should be read to mean only the Scheduled Castes or the Scheduled Tribes.

77. Article 46 reads as under:-

> "***46.—Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections.-*** *The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.*"

78. I found something very interesting to read in regard to Article 46 from the decision of this Court in the case of ***M/s Shantistar Builders v. Narayan Khimalal Totame and Others***, (1990) 1 SCC 520, wherein a Bench of three Judges speaking through Ranganath Misra, J. observed: -

> ***"11. …. 'Weaker sections' have, however, not been defined either in the Constitution or in the Act itself. An attempt was made in the Constituent Assembly to provide a definition but was given up. Attempts have thereafter been made from time to time to provide such definition but on account of controversies which arise once the exercise is undertaken, there has been no success. A suggestion for introducing economic criterion for explaining the term was made in the approach to the Seventh Five Year Plan (1985-1990) brought out by the Planning Commission and approved by the National Development Council and the Union Government. A lot of controversy was raised in Parliament and the attempt was dropped. In the absence of a definition perhaps a proper guideline could be indicated but no serious attention has been devoted to this aspect.***
>
> ***12. Members of the Scheduled Castes and Scheduled Tribes have ordinarily been accepted as belonging to the weaker sections. Attempt to bring in the test of economic means has often been tried but no guideline has been evolved. Undoubtedly, apart from the members of the Scheduled Castes and Scheduled Tribes, there would be millions of other citizens who would also belong to the weaker sections. The Constitution-makers intended all citizens of India belonging to the weaker sections to be benefited when Article 46 was incorporated in the Constitution. ….."***
>
> [Emphasis supplied]

79. I am of the view that the words "weaker sections" used in Article 46 cannot be read to mean only the Scheduled Castes or the Scheduled Tribes nor the same can be interpreted on the principle of *ejusdem generis*, as argued. The expression refers to all weaker sections and in particular the Scheduled Castes and the Scheduled Tribes. Inasmuch as, if we confine the meaning of the expression "weaker sections" only to the Scheduled Castes or the Scheduled Tribes or the likes, namely backward class, then it will expose the weaker

sections of citizens, other than the Scheduled Castes and the Scheduled Tribes and backward class people to exploitation without any protection from it. Sandro Galea, Dean and Robert A. Knox Professor, Boston University School of Public Health has defined Economic Justice as *"a set of moral principles for building economic institutions, the ultimate goal of which is to create an opportunity for each person to create a sufficient material foundation upon which to have a dignified, productive, and creative life beyond economics." Therefore, an economic justice argument focuses on the need to ensure that everyone has access to the material resources that create opportunities, in order to live a life unencumbered by pressing economic concerns*." Social welfare or welfare of the State is the onus of the State itself. Thus, Part IV has been given the status and expression in the Constitution which lays down the constitutional policy that the State must strive for, if the country is to develop as a welfare State. The weaker section of the people is the lowliest class of people (poorest of the poor), economically and educationally weak who have been given constitutional protection. Their welfare is paramount as can be read from the conjoint reading of Articles 21 and 46 resply of the Constitution.

80. Speaking the constitutional position in this regard, this Court in ***N.M. Thomas*** (supra) observed as under: -

> ***"126.*** *..... The Preamble to the Constitution silhouettes a 'justice-oriented' community. The Directive Principles of State Policy, fundamental in the governance of the country, enjoin on the State the promotion* ***with special care*** *the educational and economic interests of the weaker sections of the people, and, in particular, of the scheduled castes and the scheduled tribes, . . . and protect them from social injustice.*
>
> *To neglect this obligation is to play truant with Article 46. Undoubtedly, economic interests of a group — as also social justice to it — are tied up with its place in the services under the State. ..."*

81. Article 21 encompasses the right to live with dignity. The right to live with dignity is not an ordinary expression. It has serious meaning attached to it. In the words of the Allahabad High Court (Abdul Moin, J.), "our society is an amalgamation of various classes of people. Some are wealthy. Some are not wealthy. Some lead life of penance with pleasure. Some lead life of penance due to their fortune. Our Constitution endorses welfare of all classes." This is why Article 21 has been given wide connotation and expression by the courts, particularly, by this Court to give effect to the constitutional policy of welfare state. The decision of this Court in ***Unni Krishnan*** (supra) is an authority on this aspect where the Court confirmed that right to education is implicit under Article 21 and proceeded to identify the content and parameters of this right to be achieved by Articles 41, 45, and 46 resply in relation to education. Understood in this context, Article 46 gives not only solemn protection to the weaker sections of the people at par with the Scheduled Castes and the Scheduled Tribes but speaks of special care to be taken by the State of this section of people. Further, the expression "educational and economic interests" in Article 46 concludes the whole legal position in relation to Article 46 to mean that the State must endeavour to do welfare especially of this section of people. The endeavour of the State to give the weaker section of the people a life of dignity is the link between Articles 46 and 21 resply. The conjoint reading of both the provisions puts constitutional obligation on the State to achieve the goal of welfare of the weaker sections of the people by all means. Article 46 is not based on social test but on the means test. It speaks of "educational and economic interests" of "weaker sections". The expression "weaker sections" and their "economic interests" are correlative and denote the means status of the people who are to be taken care of. Although, the phrase "economic interests" is not to be read alone but in consonance with the expression "educational" used in Article 46; yet to confuse Article 46 with the "social status" would be to put a strain and nullify otherwise the pure object of Article 46. The distinction can

be explained with the aid of Article 15(4). Article 15(4) gives impetus to the social and educational "advancement" of Backward Classes or the Scheduled Castes and Scheduled Tribes. It is an enabling provision for the State to make special provisions for the socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes. The emphasis here is on the upliftment of three constitutionally earmarked classes i.e., Scheduled Castes, Scheduled Tribes and Backward classes. However, Article 46 is wide in expression. The object of welfare under Article 46 is towards those educationally and economically weak. In fact, this Court has laid down in ***M.R. Balaji*** (supra) that, "in taking executive action to implement the policy of Art. 15(4), it is necessary for the States to remember that the policy which is intended to be implemented is the policy which has been declared by Article 46 and the preamble of the Constitution." Reference in this context may also be made to ***Ashoka Kumar Thakur v. Union of India***, (2008) 6 SCC 1. [See : ***Atish Kumar v. Union of India***, Writ (C) No. 14955 of 2019, High Court of Judicature at Allahabad, Lucknow Bench].

82. Thus, it is evident from the aforesaid that there can be reservation for certain weaker sections other than the SCs/STs and socially and educationally backward classes. The impugned amendment is meant for weaker sections of the society who are economically weak and cannot afford to impart education to their children or are unable to secure employment in the services of the State.

83. Thus, in view of my aforesaid discussion, I am not impressed with the submission canvassed on behalf of the writ applicants that Article 46 of the Constitution cannot be brought in aid to defend the constitutional validity of the impugned amendment.

INTERPRETATION OF THE CONSTITUTION

84. There are certain important differences in the theory of interpretation of a Constitution contrasted with the theory of interpretation of statutes. These differences arise from the very nature and quality of a Constitution. It would be pertinent over here to make a brief reference to these differences. Although the validity of a statute can be assailed on the ground that it is *ultra vires* (beyond the powers), yet the Legislature which enacted it, the validity of the Constitution cannot be assailed on any ground whatsoever.

85. The framing of the Constitution of a State is a capital political fact and not a juridical act. No court or other authority in the State under the Constitution can, therefore, determine the primordial question whether the Constitution has been lawfully framed according to any standards. Even if a Constitution is framed under violence, rebellion or coercion, it stands outside the whole area of law, jurisprudence and justiciability. The basic principle of constitutional jurisprudence is that the Constitution is the supreme law of the land, even supreme above the law and itself governing all other laws. [*Mukharji 'The New Jurisprudence" p. 103*]. But this principle is not applicable to an amendment of the Constitution. The Constitution can be amended only in accordance with the provisions thereof by the authority empowered to do so in accordance with the procedure laid down therein. The validity of a constitutional amendment can, therefore, be challenged on the ground that it is *ultra vires*.

86. The interpretation of a Constitution involves more than a passing interest concerning the actual litigants and being a pronouncement of the Courts on the government and administration, has a more general and far-reaching consequence. Chief Justice Marshall of the American Supreme Court, therefore warned in ***Mcculloch v. Maryland,*** 4 Wheaton 316*,* "<u>We must never forget that it is a Constitution we are expounding</u>". The policy of a particular state is more

easily discernible and interpreted than the policy of a Constitution, which is a charter for government and administration of a whole nation and a country. It is that policy consideration which makes the statutory interpretation different from the interpretation of the Constitution. [Mukharji *'The New Jurisprudence', p. 105*]. More foresight in the nature of judicial statesmanship, therefore, is required in interpreting a Constitution than in construing a statute. The Constitution is not to be construed in any narrow pedantic sense [*Per Lord Wright in* ***James v. Commonwealth of Australia***, (1936) A.C. 578, 614] and a broad liberal spirit should inspire those whose duty it is to interpret it, for a Constitution, which provides for the government of a country, is a living and organic thing, which of all instruments has the greatest claim to be construed *ut res magis valeat quam pereat* (it is better for a thing to have effect than to be made void).[*Per Gwyer C.J. in* ***Central Provinces Case***, (1939) F. C. R. 18 at p. 37]. But this does not mean that a Court is free to stretch for pervert the language of a Constitution in the interests of any legal or constitutional theory, or even for the purpose of supplying omissions or for the purpose of correcting supposed errors. [*ibid*]

87. If there is an apparent or real conflict between two provisions of the Constitution, it is to be resolved by applying the principle of harmonious construction. [*Seervai 'Constitutional Law of India' pp.25-27 (Vol.I)*] Since it is impossible to make a clear-cut distinction between mutually exclusive legislative powers, it is well settled that in case of conflict, Central Law would prevail over State Law, for otherwise an absurd situation would arise if two inconsistent laws, each of equal validity, could exist side by side within the same territory. [Salmond 'Jurisprudence', p.32]

88. Stone J. of the American Supreme Court in ***United States v. Patrick B. Classic*** [1941 SCC OnLine US SC 112 : 313 US 299 (1941)] expressed the important principle of constitutional interpretation in these terms: -

> *"….in determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses. Hence we read its words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government. Cf. Davidson v. New Orleans, 96 U.S. 97, 24 L.Ed. 616; Brown v. Walker, 161 U.S. 591, 595, 16 S.Ct. 644, 646, 40 L.Ed. 819; Robertson v. Baldwin, 165 U.S. 275, 281, 282, 17 S.Ct. 326, 328, 329, 41 L.Ed. 715. If we remember that 'it is a Constitution we are expounding', we cannot rightly prefer, of the possible meanings of its words, that which will defeat rather than effectuate the Constitutional purpose."*

89. This has been sometimes called as 'flexible' or 'progressive' interpretation of the Constitution which Dr. Wynes refers to as the doctrine of 'generic interpretation'.

90. The rules of the interpretation of the Constitution have to take into consideration the problems of government, structure of a State, dynamism in operation, caution about checks and balances, not ordinarily called for in the interpretation of statutes. [Mukharji *'The New Jurisprudence', p. 106*]

91. Although a Constitution is not to be fettered by the past history, yet it is relevant for properly interpreting the Constitution. This Court accepted the logic that the Indian Constitution was not written on a 'blank slate' and because the Government of India Act, 1935 provided the basic fabric for the Indian Constitution, it was invoked to interpret the Constitution in the light of the provisions of the Act. [***M.P.V. Sundararamier & Co. v. State of A.P. and Others***, 1958 SCR 1422 : AIR 1958 SC 468]

92. The principle of *ejusdem generis*, a rule of statutory interpretation, has been applied to the Indian Constitution by this Court in the ***State of West Bengal v. Shaik Serajuddin Batley***, 1954 SCR 378. The statutory rule of interpretation expressed "*Expressio unius est exclusion alterius*" (the express mention of one person or thing is the exclusion of another) is not strictly applicable to constitutional interpretation. [Mukharji *'The New Jurisprudence', p. 110*]

93. It is the fundamental principle of construction that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the Constitution vide ***Shri Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar and Others***, 1959 SCR 279 : AIR 1958 SC 538. [Reference : Law, Judges and Justice by S.M.N. Raina, First Edn.]

94. In the case of ***R.C. Poudyal v. Union of India and Others***, 1994 Supp (1) SCC 324, this Court at p. 385, para 124 held as under:

> *"**124.** .... In the interpretation of a constitutional document, "words are but the framework of concepts and concepts may change more than words themselves". The significance of the change of the concepts themselves is vital and the constitutional issues are not solved by a mere appeal to the meaning of the words without an acceptance of the line of their growth. It is aptly said that "the intention of a Constitution is rather to outline principles than to engrave details"."*

95. In the case of ***Kihoto Hollohan v. Zachillhu and Others***, 1992 Supp (2) SCC 651, this Court at p. 676, para 27 held as under:

> *"**27.** A constitutional document outlines only broad and general principles meant to endure and be capable of flexible application to changing circumstances — a distinction which differentiates a statute from a Charter under which all statutes are made. ..."*

96. In the case of ***M. Nagaraj and Others v. Union of India and Others***, (2006) 8 SCC 212, this Court at p. 240 & p. 241, para 19 held as under:

> ***"19.** The Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adapted to the various crises of human affairs. Therefore, a purposive rather than a strict literal approach to the interpretation should be adopted. A constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that a constitutional provision does not get fossilised but remains flexible enough to meet the newly emerging problems and challenges."* [Emphasis supplied]

DOCTRINE OF BASIC STRUCTURE

97. *"Amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But the Constitution is a precious heritage; therefore, you cannot destroy its identity." [**Minerva Mills Ltd. and Ors. v. Union of India and others**,* AIR 1980 SC 1789*]*

98. The doctrine of Basic Structure includes general features of the broad democracy, supremacy of the Constitution, rule of law, separation of powers, judicial review, freedom and dignity of the individual, unity and integrity of the nation, free and fair education, federalism and secularism. The Basic Structure Doctrine admits to identify a philosophy upon which a Constitution is based. A Constitution stands on certain fundamental principles which are its structural pillars and if those pillars are demolished or damaged, the whole constitutional edifice may fall down. The metaphor of a living Constitution is usually used in its interpretive meaning i.e., that the language of the document should evolve through judicial decisions according to the changing environment of society. A Constitution's amendment process provides another mechanism for such evolution, as a 'built-in provision for growth'. *Prima facie*, the view that a Constitution must develop over a period of time supports a broad use of the

amendment power. Nevertheless, even if we conceive of the Constitution as a living tree, which must evolve with the nation's growth and develop with its philosophical and cultural advancement, it has certain roots that cannot be uprooted through the growth process. In other words, the metaphor of a living tree captures the idea of certain constraints: 'trees, after all, are rooted, in ways that other living organisms are not'. These roots are the basic principles of a given Constitution. [Reference : "Unconstitutional Constitutional Amendments : A Study of the Nature and Limits of Constitutional Amendment Powers", Yaniv Roznai, Thesis, February, 2014]

99. In the words of Carl Friedrich, a German mathematician and physicist:

> *"A constitution is a living system. But just as in a living, organic system, such as the human body, various organs develop and decay, yet the basic structure or pattern remains the same with each of the organs having its proper functions, so also in a constitutional system the basic institutional pattern remains even though the different component parts may undergo significant alterations. For it is the characteristic of a system that it perishes when one of its essential component parts is destroyed."*

100. Therefore, it is not merely a matter of which principles are more fundamental than the others. It is not an exercise of 'ranging over the constitutional scheme to pick out elements that might arguably be more fundamental in the hierarchy of values', William Harris correctly claimed, adding that: 'a Constitutional provision would be fundamental only in terms of some articulated political theory that makes sense of the whole Constitution'. The idea of a hierarchy of norms within the foundational structuralism is to examine whether a constitutional principle or institution is so basic to the constitutional order that changing it – and looking at the whole constitution - would be to change the entire constitutional identity.

101. Gary Jacobsohn, Professor of Constitutional and Comparative Law in the Department of Government and Professor of Law at the University of Texas at

Austin, argues that constitutional identity is never a static thing, as it emerges from the interplay of inevitably disharmonic elements. But changes to the constitutional identity, 'however significant, rarely culminate in a wholesale transformation of the constitution'. This is because a nation usually aims to remain faithful to a 'basic structure', which comprises its constitutional identity. 'It is changeable', Gary writes, 'but resistant to its own destruction'.

102. Yaniv Roznai in his thesis referred to above, has referred to Water Murphy who argues:

> "*Thus an "amendment" corrects or modifies the system without fundamentally changing its nature: An "amendment" operates within the theoretical parameters of the existing Constitution. A proposal to transform a central aspect of the compact to create another kind of system – for example, to change a constitutional democracy into an authoritarian state ... – would not be an amendment at all, but a re-creation of both the covenant and its people. That deed would lie outside the authority of any set of governmental bodies, for all are creatures of the people's agreement.*"

103. In other words, constitutional changes should not be tantamount to constitutional metamorphosis. Conversely, one should not confuse constitutional preservation with constitutional stagnation. As Joseph Raz writes:

> "*The law of the constitution lies as much in the interpretive decisions of the courts as in the original document that they interpret ... But ... it is the same constitution. It is still the constitution adopted two hundred years ago, just as a person who lives in an eighteenth-century house lives in a house built two hundred years ago. His house had been repaired, added to, and changed many times since. But it is still the same house and so is the constitution. A person may, of course, object to redecorating the house or to changing its windows, saying that it would not be the same. In that sense it is true that an old constitution is not the same as a new constitution, just as an old person is not the same as the same person when young. Sameness in that sense is not the sameness of identity ... It is the sameness of all the intrinsic properties of the object. ... The point of my coda is to*

warn against confusing change with loss of identity and against the spurious arguments it breeds. Dispelling errors is all that a general theory of the constitution can aspire to achieve."

STANDARD OF REVIEW

104. While considering the appropriate standards of review of the constitutional amendments vis-à-vis unamenable principles, Yaniv Roznai has suggested three different levels of standards:

1. **Minimal Effect Standard**:

105. The first option is the Minimal Effect Standard. This is the most stringent standard of the judicial review of amendments. According to this standard, any violation or infringement of an unamendable principle is prohibited no matter how severe the intensity of the infringement is, including amendments that have only a minimal effect on the protected principles. On the one hand, one may claim that the importance of the protected unamendable principles – as pillars of the constitution – necessitates the most stringent protection. If the aim of unamendability is to provide for hermetic protection of a certain set of values or institutions, then any violation of these principles ought to give rise to grounds for judicial intervention. On the other hand, such a standard would not only bestow great power to the courts, but also would place wide – perhaps too wide – restrictions on the ability to amend the constitution. The theory of unamendability should not be construed as a severe barrier to change. It should be construed as a mechanism enabling constitutional progress, permitting certain flexibility by allowing constitutional amendments, while simultaneously shielding certain core features of the constitution from amendment, thereby preserving the constitutional identity.

2. **Disproportionate Violation Standard** :

106. The intermediate standard of review is the Disproportionate Violation Standard. It is an examination of the proportionality of the violation. The principle of proportionality is nowadays becoming an almost universal doctrine in constitutional adjudication. Proportionality generally requires that a violation of a constitutional right has a 'proper purpose;' that there is a rational connection between the violation and that purpose; that the law is narrowly tailored to achieve that purpose; and that the requirements of the proportionality *stricto* (balancing) test are met. A disproportionate violation of a constitutional right would be considered unconstitutional and thus void. This standard emphasises the balancing of conflicting interests.

3. **Fundamental Abandonment Standard**:

107. Fundamental Abandonment Standard is the lowest level of scrutiny. According to this standard, only an extraordinary infringement of unamendable principles, one that changes and 'fundamentally abandons' them, would allow judicial annulment of constitutional amendments. This seems to be the approach taken by the German Constitutional Court.

108. One of the initial references to doctrine of basic features and its permanency was in ***Sajjan Singh v. State of Rajasthan***, AIR 1965 SC 845, observed, that the Constitution "formulated a solemn and dignified preamble which appears to be an epitome of the basic features of the Constitution. Can it not be said that these are indicia of the intention of the Constituent Assembly to give a permanency to the basic features of the Constitution?"

109. The doctrine actually came to be in the seminal case of ***Kesavananda Bharati*** (supra), where the Supreme Court emphasising on the essence of the basic structure held that "every provision of the Constitution can be amended

provided in the result the basic foundation and structure of the Constitution remains the same.” The concept of basic structure, as such gives coherence and durability to a Constitution, for it has a certain intrinsic force in it.

110. Inspired by the doctrine of Basic Structure enshrined in Articles 1 to 19 of the German Constitution, 1949 (“The Basic Law for the Federal Republic of Germany’), where these principles are based on the premise that democracy is not only a parliamentary form of government but also is philosophy of life based on the appreciation of the dignity, the value and the inalienable rights of each individual human being; such as that of right to life and physical integrity; equality before law; rights to personal honour and privacy; occupational freedom; inviolability of the home; right to property and inheritance. The essence of basic rights could, under no circumstance, be affected.

111. Article 20 of the Federal Republic of Germany provides that Germany is a Democratic and Social Federal State. State authority is derived from the people through elections. All Germans have right to resist anyone seeking to abolish the constitutional order, if no other remedy is available.

112. Article 79 of the Federal Republic of Germany lays down the procedure to amend the Basic Law by supplementing a particular provision or expressly amending the same. However, amendments to the Basic Law affecting the principles laid down in Articles 1 and 20 or affecting the division of federation i.e. participation of Centre and State in the legislative process are inadmissible.

113. The provisions under the German Constitution deal with rights, which are not mere values, rather, they are justiciable and capable of interpretation. Thus, those values impose a positive duty on the State to ensure their attainment as far as practicable. The State must facilitate the rights, liberties and freedoms of the individuals.

114. In India, the doctrine of Basic Structure is a judicial innovation, and it continues to evolve via judicial pronouncements of this Court. The contours of the expression have been looked into by the Court from time to time, and several constitutional features have been identified as the basic structure of the Constitution; but there is not an exhaustive definition or list of what constitutes the 'basic structure' of the Constitution - the Court decides from case to case if a constitutional feature can be regarded as basic or not.

115. ***Kesavananda Bharati*** (supra) was heard by a Full Bench of this Court consisting of 13 Judges. A majority of Judges held that the view taken in ***C. Golak Nath and Others v. State of Punjab and Another***, 1967 AIR 1643 : (1967) 2 SCR 762, that the word "law" in Article 13 included a constitutional amendment, could not be upheld. The said decision was, therefore, overruled. But the Court was sharply split on the question whether the word "amendment" in Article 368 as it stood before its amendment by the 24th Amendment included the power to alter the basic feature or to repeal the Constitution itself.

116. Six Judges led by Sikri CJ were of the view that the Constitution could not be amended so as to abrogate or emasculate the basic features of the Constitution some of which were characterized by Sikri, CJ as under: -

> ***"(1) Supremacy of the Constitution;***
> ***(2) Republican and Democratic forms of Government;***
> ***(3) Secular character of the Constitution;***
> ***(4) Separation of powers between the legislature, the executive and the judiciary;***
> ***(5) The Federal character of the Constitution."***

117. It was further held that fundamental rights could not be abrogated though reasonable abridgment of fundamental rights could be affected in public interest. According to this view, Parliament would be able to adjust fundamental rights in order to secure what the Directive Principles directed to be accomplished while maintaining the freedom and dignity of the citizens. Khanna, J. took a more liberal

view in regard to the power of amendment of the Parliament. He agreed with the above-mentioned six Judges that the power of amendment is not unlimited and made the following pertinent observations in Paragraph 1437:

> ***"1437. ….The word "amendment" postulates that the old Constitution survives without loss of its identity despite the change and continues even though it has been subjected to alternations. ………………. The words "amendment of the constitution" with all their wide sweep and amplitude cannot have the effect of destroying or abrogating the basic structure or framework of the constitution…."***

118. He was, however, of the view that subject to the retention of the basic structure or framework of the Constitution, the power of amendment is plenary and includes within itself the power to amend the various articles of the Constitution, including those relating to fundamental rights as well as those which may be said to relate to essential features. He was also of the view that the right to property does not pertain to basic structure or framework of the Constitution (vide Paragraph 1550). In short, the decision of the majority may be stated as under : -

> ***(1) Golak Nath case [AIR 1967 SC 1643 : (1967) 2 SCR 762 : (1967) 2 SCJ 486] is overruled;***
> ***(2) Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution;***
> ***(3) The Constitution (Twenty-fourth Amendment) Act, 1971, is valid;***
> ***(4) Section 2(a) and 2(b) of the Constitution (Twenty-fifth Amendment) Act, 1971 is valid;***
> ***(5) The first part of Section 3 of the Constitution (Twenty-fifth Amendment) Act, 1971, is valid. The second part, namely, "and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy" is invalid;***
> ***(6) The Constitution (Twenty-ninth Amendment) Act, 1971 is valid.***

119. Other six Judges led by Ray J. (as he then was) held that the power to amend was wide and unlimited and included the power to add, alter or repeal any provision of the Constitution. They, therefore, upheld all the Constitutional amendments.

120. Seven judges against six thought that the basic structure of the Constitution cannot be altered under the amending power although there was no agreement among themselves about the meaning and content of the so-called basic structure.

121. Sikri, CJ, observed:

> "*The expression "amendment of this Constitution" does not enable Parliament to abrogate or take away fundamental rights or to completely change the fundamental features of the Constitution so as to destroy its identity. Within these limits Parliament can amend every article.*" [***Kesavananda Bharati****,* at p. 1565.]

122. Shelat and Grover, JJ., said on the scope of amending power under Article 368 as follows:

> *"Though the power to amend cannot be narrowly construed and extends to all the articles it is not unlimited so as to include the power to abrogate or change the identity of the Constitution or its basic features;"* [***Kesavananda Bharati****,* at p. 1609-10.]

123. Hegde and Mukherjea, JJ., expressed the same opinion. They said:

> *"Though the power to amend the Constitution under Article 368 is a very wide power, it does not yet include the power to destroy or emasculate the basic elements or the fundamental features of the Constitution."* [***Kesavananda Bharati****,* at p. 1648.]

124. Reddy, J. was of the same opinion. Khanna, J. held that the amending power of Parliament is very wide under Article 368, but he also imposed certain limitations on the amending power in the name of basic structure of the Constitution. He said:

> *"....it is permissible under the power of amendment to effect changes, howsoever important, and to adapt the system to the requirements of changing conditions, it is not permissible to touch the foundation or to alter the basic institutional pattern. The words "amendment of the constitution" with all their wide sweep and amplitude cannot have the effect of destroying or abrogating the basic structure or framework of the constitution....."* [***Kesavananda Bharati****,* at p. 1860.]

He further said that:

> *".....Subject to the retention of the basic structure or framework of the Constitution, the power of amendment is plenary and would include within itself the power to amend the various articles of the Constitution. ... The power of amendment would also include within itself the power to add, alter or repeal the various articles."*
>
> [***Kesavananda Bharati****,* at p. 1903-04.]

125. Thus, it is very clear that the sense in which Khanna, J., uses the expression 'basic structure or framework of the Constitution' is very different from the sense in which six judges led by Sikri, CJ., use the expression 'essential features or basic features' of the Constitution. Fundamental rights can be abrogated by the use of the amending power according to Khanna, J., but not so according to six judges led by Sikri, C.J.

126. Ray, J. rejected the idea of any implied limitations on the amending power and thought that the power to amend is wide and unlimited. He said that:

> *"....There can be or is no distinction between essential and inessential features of the Constitution to raise any impediment to amendment of alleged essential features...."* [***Kesavananda Bharati*** at p. 1718]

127. The aforesaid opinion was also shared by Palekar, Mathew, Beg, Dwivedi and Chandrachud, JJ.

128. Thus, if ***Kesavananda Bharati*** (supra) is to be read closely and carefully, it says that there are no limitations on the exercise of Article 368 (which is a constituent power), yet it is subject to the 'Basic Structure Doctrine'. The origin

of the ‘Doctrine of Basic Features’ lies in the fear of an apprehension of constitutional collapse, and anxiety which is exceptional in the life of a Constitution. The ‘Basic Structure Doctrine’ was meant for special use in times when constitutional amendments threatened the fundamental structure of the Constitution. The special stature anticipates a careful use of the doctrine so as to ensure that its unique place is preserved. Vital as the doctrine was, even more important was to exercise some restraint and to ensure its meaningful use. The ‘Basic Structure Doctrine’ has been taken recourse to over and over again with little concern about its restrained use. Professor Satya Prateek, former Assistant Professor, O.P. Jindal Global University, in one of his essays titled ‘Today’s Promise, Tomorrow’s Constitution : ‘Basic Structure’, Constitutional Transformations And The Future Of Political Progress In India’ has very rightly stated that the doctrine has been extensively used in affecting policy decisions and its indifferent use is the root cause of the resentment that has brewed against it. Over a period of time, it has been used less for constitutional gate–keeping in times of crisis and more for decisively influencing the course which State policy might take in future. The repeated use of the doctrine of Basic Structure may impair the doctrine itself and it is likely that the idea of constitutional essentialism might not get the respect it deserves from the political institutions. Prof. Satya Prateek has beautifully explained stating that the ‘Basic Structure Doctrine’ is indeed special, it is a powerful tool we have for constitutional preservation but its special character as well as its authority is severely threatened in a culture of unresponsive use.

129. According to the widely accepted principles of constitutional interpretation, the provisions of a constitution should be construed in the widest possible manner. Constitutional law is the basic law. It is meant for people of different opinions. It should be workable by people of different ideologies and at different times. Since it provides a framework for the organisation and working

of a State in a society which keeps on changing, it is couched in elastic terms and, therefore, it has to be interpreted broadly. No generation has a right to bind the future generations by its own beliefs and values. Each generation has to choose for itself the ways of life and social organisation. Constitution should be so adaptable that each generation may be able to make use of it to realise its aspirations and ideals. An amending clause is specifically provided to adapt the Constitution according to the needs of the society and the times. In view of this, no implied limitation can be imposed on the amending power. To do so would be to defeat the very purpose of it. The Constitution-makers had before them the Constitutions of the United States, Australia, Canada, Ireland, South Africa and Germany which they were constantly referring to while discussing and drafting the amending provisions. In all these Constitutions the word 'amendment' is used in the widest possible sense. Therefore, our Constitution-makers may be presumed to have used this word in the same broad sense in the absence of any express limitations. [B.N. Rau, Table of Amending Process, *Constitutional Precedents, 1st Series* (1947) *cf.* Hari Chand, *Amending Process in the Indian Constitution* 96 (1972).]

130. Dwivedi, J., in ***Kesavanand Bharati*** (supra) said about the scope of amending power as follows:

> "*Article 368 is shaped by the philosophy that every generation should be free to adapt the Constitution to the social, economic and political conditions of its time. Most of the Constitution-makers were freedom-fighters. It is difficult to believe that those who had fought for freedom to change the social and political organisation of their time would deny the identical freedom to their descendants to change the social, economic and political organisation of their times. The denial of power to make radical changes in the Constitution to the future generation would invite the danger of extra constitutional changes of the Constitution.*
>
> *"The State without the means of some change is without means of its conservation. Without such means it might even risk the loss of that part of the Constitution which it wished the most religiously to*

preserve." [Burke, Recollections on the Revolution in France and other Writings. Oxford University Press, 1958 Reprint, p. 23.]"

131. The whole Constitution is basic law. It is not easy to distinguish which part is more basic than the other as there is no objective test to distinguish. [Ray, J., in ***Kesavananda Bharati*** (supra) at p. 1675, 1682 & 1684.] Since, there are no objective criteria to distinguish, there are bound to be subjective preferences and choices in deciding what constitutes this so-called basic structure. Even, if it were possible to distinguish essential features from non-essential features, it is not possible to assert that the essential features are necessarily eternal and immutable. [Mathew, J., ***Kesavananda Bharati*** (supra) at p. 1947.] Judging from past history one may doubt if any feature of law and society is unchangeable. What was considered fundamental by one society at one time was abandoned later as an outmoded impediment.

132. Fundamental rights, no doubt, are very important and constitute the bed-rock of civilization. But society keeps on changing with the changes in the socio-economic conditions. The limits of these rights may need constant re-definition. Even their essential content may undergo a radical transformation. To enable necessary adjustments in the legal relationships and to bring them in harmony with social realities, an amending power is provided in all Constitutions. The easier the mode of amendment, the more flexible the Constitution is. In the absence of some amending provision, a Constitution will fail to contain the social changes and is bound to break down. It is a necessary safety valve to allow radical changes through constitutional processes. If the necessary changes cannot be brought through constitutional means, revolution becomes a necessity. Thus, an unlimited amending power and a simple procedure of amendment is an effective means to bring about social revolution through law. The British Constitution offers a very good example of a flexible Constitution with an easy procedure of simple majority vote to bring about any changes in law including constitutional

law. Perhaps, this aspect of constitutional law and strong democratic traditions in Britain prompted even Marx to say that probably Britain is the only country where revolution may be brought about through peaceful and democratic means. [Friedrich Engels (ed.) Karl Marx, *Capital*, (1952. 50 Britannic Great Book Series] Thus, to have wide amending power and easy procedure of amendment is not to undervalue fundamental rights, nor is it an invitation to abolish them but is a means to preserve them through necessary adaptations in harmony with the changed social realities. Stability of fundamental rights lies not in the absence of legal power to remove them but in the social and political support for them. [Reference : ***Phantom of Basic Structure of the Constitution***, Source : Journal of the Indian Law Institute, April-June 1974, Vol. 16]

133. Mr. N. Palkhivala has summed up the effect of the majority judgment in his book titled "Our Constitution Defaced and Defiled" in the following words:

> ***"Parliament cannot, in the exercise of its amending power, alter the basic structure or framework of the constitution. For instance, it cannot abolish the sovereignty of India or the free democratic character of the republic; nor can it impair the integrity and unity of India or abolish the States. (The principle that the basic structure or framework of the Constitution cannot be altered gives a wider scope to the amending power than the principle that none of the essential features of the Constitution can be damaged or destroyed.) The Court's jurisdiction cannot be ousted as is sought to be done by Article 31C. If the Court's jurisdiction were ousted, any of the States could pass laws which might lead to the dismemberment of India."***

134. Thus, ***Kesavananda Bharati*** (supra) struck a balance between the rights of the individuals and the powers of the State to curtail those rights. It found a suitable via-media between the two rival philosophies – one favouring the complete sanctity of fundamental rights while the other supporting the complete flexibility of the Constitution. [Reference: Law, Judges and Justice – by Justice S.M.N. Raina].

135. In ***Smt. Indira Nehru Gandhi v. Shri Raj Narain***, AIR 1975 SC 2299, the Court, expanding the scope of the basic structure, held that there were four unamendable features which formed part of the basic structure, namely, "(i) India is a sovereign democratic republic; (ii) Equality of status and opportunity shall be secured to all its citizens; (iii) The State shall have no religion of its own and all persons shall be equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion and (iv) The nation shall be governed by a government of laws, not of men.” These, according to them, were "the pillars of our constitutional philosophy, the pillars, therefore, of the basic structure of the Constitution."

136. The Court also noted that the principle of free and fair elections is an essential postulate of democracy, and which, in turn, is a part of the basic structure of the Constitution. That democracy was an essential feature forming part of the basic structure. In this case, the Court struck down clause (4) of Article 329-A which provided for special provision as to elections to Parliament in the case of Prime Minister and Speaker, on the ground that it damaged the democratic structure of the Constitution. That the said clause (4) had taken away the power of judicial review of the courts as it abolished the forum without providing for another forum for going into the dispute relating to the validity of election of the Prime Minister. It extinguished the right and the remedy to challenge the validity of such an election. The complaints of improprieties, malpractices and unfair means have to be dealt with as the principle of free and fair elections in a democracy is a basic feature of the Constitution, and thus, clause (4) was declared to be impermissible piece of constitutional amendment.

137. However, the Court in this case also observed that “the concept of a basic structure, as brooding omnipresence in the sky, apart from specific provisions of the Constitution, is too vague and indefinite to provide a yardstick to determine the validity of an ordinary law.”

138. In ***Minerva Mills Ltd.*** (supra), discussing the standard to be applied to what qualifies as the basic structure, this Court held that "*….**the features or elements which constitute the basic structure or framework of the Constitution or which, if damaged or destroyed, would rob the Constitution of its identity so that it would cease to be the existing Constitution but would become a different Constitution. …** Therefore, in every case where the question arises as to whether a particular feature of the Constitution is a part of its basic structure, it would have to be determined on consideration of various factors such as the place of the particular feature in the scheme of the Constitution, its object and purpose and the consequence of its denial on the integrity of the Constitution as a fundamental instrument of country's governance…..*". The Court further held that *"Fundamental rights occupy a unique place in the lives of civilised societies and have been variously described in our Judgments as "transcendental", "inalienable" and "primordial".....they constitute the ark of the Constitution". … "....To destroy the guarantees given by Part III in order purportedly to achieve the goals of Part IV is plainly to subvert the Constitution by destroying its basic structure*".

139. In ***S.R. Bommai and others etc. etc. v. Union of India and others etc. etc.***, AIR 1994 SC 1918, expanding the list of basic features, this Court held that secularism was an essential feature of the Constitution and part of its basic structure. In this case, this Court explained the concept of basic structure of the Constitution, while dealing with the issue of exercise of the power by the Central Government under Article 356 of the Constitution.

140. In ***M. Nagraj*** (supra), the Constitution Bench of this Court dealing with the issue of basic structure observed that "axioms like secularism, democracy, reasonableness, social justice, etc. are overarching principles which provide linking factor for principles of fundamental rights like Articles 14, 19 and 21. These principles are beyond the amending power of Parliament. They pervade all

enacted laws and they stand at the pinnacle of the hierarchy of constitutional values". Such rights have to be respected and cannot be taken away.

141. The framers of the Constitution have built a wall around the fundamental rights, which has to remain forever, limiting the ability of the majority to intrude upon them. That wall is a part of basic structure. [See : ***I.R. Coelho (dead) by L.Rs. v. State of Tamil Nadu***, AIR 2007 SC 861; See also ***Kesavananda Bharati*** (supra)].

142. Thus, "for a constitutional principle to qualify as an essential feature, it must be established that the said principle is a part of the constitutional law binding on the legislature. Only thereafter, the second step is to be taken, namely, whether the principle is so fundamental as to bind even the amending power of Parliament i.e. to form a part of the basic structure." [***M. Nagaraj*** (supra)]

143. When an issue is raised regarding the basic structure, the question does arise as to whether the amendment alters the structure of the constitutional provisions. "The criterion for determining the validity of a law is the competence of the law-making authority. The competence of the law-making authority would depend on the ambit of the legislative power, and the limitations imposed thereon as also the limitations on the mode of exercise of the power." [***M. Nagaraj*** (supra)]

144. The aforesaid structure is built on the basic foundation, i.e., the dignity and freedom of the individual. This is of supreme importance. This cannot be destroyed by any form of amendment. Parliament cannot expand its power of amendment under Article 368 so as to confer on itself the power to repeal, abrogate the Constitution or damage, emasculate or destroy any of the fundamental rights or essential elements of the basic structure of the Constitution or of destroying the identity of the Constitution.

145. In ***I.R. Coelho (dead) by L.R.s*** (supra), a Nine Judge Bench of this Court laid down the concrete criteria for basic structure principle, observing:

> *"**123.** ... Since power to amend the Constitution is not unlimited,* ***if changes brought about by amendments destroy the identity of the constitution, such amendments would be void****.....*
>
> *x x x x*
>
> ***137.** ....every improper enhancement of its own power by Parliament, be it clause 4 of Article 329-A or clauses 4 and 5 of Article 368 or Section 4 of 42nd Amendment have been held to be incompatible with the doctrine of basic structure doctrine as they introduced new elements which altered the identity of the Constitution, or deleted the existing elements from the Constitution by which the very core of the Constitution is discarded....."* [Emphasis added]

146. Articles 14, 19 and 21 resply represent the fundamental values and form the basis of rule of law, which is a basic feature of the Constitution. For instance, Parliament, in exercise of its amending power under Article 368, can make additions in the three legislative lists contained in the Seventh Schedule of the Constitution, but it cannot abrogate all the lists as that would abrogate the federal structure, which is one of the basic features of the Constitution.

147. To qualify to be a basic structure it must be a "terrestrial concept having its habitat within the four corners of the Constitution." What constitutes basic structure is not like "a twinkling star up above the Constitution." It does not consist of any abstract ideals to be found outside the provisions of the Constitution. The Preamble no doubt enumerates great concepts embodying the ideological aspirations of the people but these concepts are particularised and their essential features delineated in the various provisions of the Constitution. It is these specific provisions in the body of the Constitution which determine the type of democracy which the founders of that instrument established; the quality and nature of justice, political, social and economic which they aimed to realise, the content of liberty of thought and expression which they entrenched in that document and the scope of equality of status and of opportunity which they enshrined in it. These specific provisions enacted in the Constitution alone can determine the basic structure of the Constitution. These specific provisions, either

separately or in combination, determine the content of the great concepts set out in the Preamble. It is impossible to spin out any concrete concept of basic structure out of the gossamer concepts set out in the Preamble. The specific provisions of the Constitution form the yarn from which the basic structure has to be woven.

148. In ***Supreme Court Advocates-on-Record Association and another v. Union of India,*** AIR 2016 SC 117, this Court held that there are declared limitations on the amending power conferred on Parliament which cannot be breached. Breach of a single provision of the Constitution is sufficient to render the entire legislation *ultra vires* the Constitution. The Court held that the basic structure of the Constitution includes supremacy of the Constitution, the republican and democratic form of Government, the federal character of distribution of powers, secularism, separation of powers between the Legislatures, Executive and the Judiciary, and independence of the Judiciary.

149. In ***Kuldip Nayar v. Union of India & Ors***., AIR 2006 SC 3127, this Court, while dealing with the question of political party system vis-à-vis democracy observed that "parliamentary democracy and multi-party system are an inherent part of the basic structure of Indian Constitution. It is the political parties that set up candidates at an election who are predominantly elected as Members of the State Legislatures." Further, the Court, placing reliance on ***Kesavananda Bharati*** (supra) observed that "….a Parliamentary Democracy like ours functions on the basis of the party system. The mechanics of operation of the party system as well as the system of Cabinet Government are such that the people as a whole can have little control in the matter of detailed law-making".

150. In ***Kihoto Hollohan v. Zachillhu*** (supra), the Court felt that the existence of the Tenth Schedule of the Constitution further strengthens the importance of the political parties in our democratic set-up. Rejecting the argument that the political party is not a democratic entirety, and that Whip issued under the Tenth Schedule is unconstitutional, the Court reiterated that the Parliament was

empowered to provide that the Members are expected to act in accordance with the ideologies of their respective political parties and not against it. Thus, 'Basic' means the base of a thing on which it stands and on the failure of which it falls. Hence, the essence of the 'basic structure of the Constitution' lies in such of its features, which if amended would amend the very identity of the Constitution itself, ceasing its current existence. It, as noted above is, not a "vague concept" or "abstract ideals found to be outside the provisions of the Constitution". Therefore, the meaning/extent of 'basic structure' needs to be construed in view of the specific provision(s) under consideration, its object and purpose, and the consequences of its denial on the integrity of the Constitution as a fundamental instrument of governance of the country. [Reference : paragraphs 108 to 114, paragraphs 135 to 150 from - Doctrine of Basic Structure : Contours by Dr. Justice B.S. Chauhan Former Judge, Supreme Court of India; dated 16 September, 2018]

151. In the case on hand, the entire debate on the constitutional validity of the 103rd Constitution Amendment has proceeded on the doctrine of Basic Structure. If there is one decision of this Court which explains the doctrine of Basic Structure and its reach and effects in the most lucid and simple manner, the same is the case of ***Glanrock Estate Private Limited v. State of Tamil Nadu***, (2010) 10 SCC 96. In the said case, a Bench of three Judges examined the constitutional validity of the Constitution (34th Amendment) Act, 1974 by which the Gudalur Janmam Estates (Abolition and Conversion into Ryotwari) Act, 1969 stood inserted in the Ninth Schedule to the Constitution as Item 80. It was argued on behalf of the petitioner therein that the inclusion of Janmam Act in the Ninth Schedule amounted to direct negation and abrogation of judicial review. It was argued that the Constitution (34th Amendment) Act, 1974 destroyed the basic feature of the Constitution, namely, judicial review.

152. S.H. Kapadia, CJ, speaking for the Bench, in the ***Glanrock Estate*** (supra), has explained certain concepts like the egalitarian equality, overarching principles and reading of Article 21 with Article 14.

153. The learned Judge explained that in applying the above three principles, one has to go by the degree of abrogation as well as the degree of elevation of an ordinary principle of equality to the level of overarching principles. The learned Judge reminded that the case was not one wherein the challenge was to any ordinary law of the land. The Court said that the challenge was to the constitutional amendment. In a rigid Constitution (Article 368) power to amend the Constitution is a derivative power, which is an aspect of the constituent power.

154. In the case on hand also, the challenge is to the exercise of derivative power of the Parliament in the matter of 103rd Constitution Amendment. Since the power to amend the Constitution is a derivative power, the exercise of such power to amend the Constitution is subject to two limitations, namely, the doctrine of Basic Structure and lack of legislative competence. The doctrine of Basic Structure is brought in as a window to keep the power of judicial review intact as abrogation of such a power would result in violation of basic structure. When we speak of discrimination or arbitrary classification, the same constitutes violation of Article 14 of the Constitution. This Court laid stress to keep in mind that the distinction between constitutional law and ordinary law in a rigid Constitution like ours. The said distinction proceeds on the assumption that ordinary law can be challenged on the touchstone of the Constitution. Therefore, when an ordinary law seeks to make a classification without any rational basis and without any nexus with the object sought to be achieved, such ordinary law could be challenged on the touchstone of Article 14 of the Constitution. However, when it comes to the validity of a constitutional amendment, one has to examine the validity of such amendment by asking the question as to whether such an amendment violates any overarching principle in the Constitution. What is overarching principle?

Concepts like secularism, democracy, separation of powers, power of judicial review fall outside the scope of amendatory powers of the Parliament under Article 368. If any of these were to be deleted, it would require changes to be made not only in Part III of the Constitution but also in Article 245 and the three Lists of the Constitution resulting in the change of the very structure or framework of the Constitution. When an impugned Act creates a classification without any rational basis and having no nexus with the objects sought to be achieved, the principle of equality before law is violated undoubtedly. Such an Act can be declared to be violative of Article 14. Such a violation does not require re-writing of the Constitution. This would be a case of violation of ordinary principle of equality before law. Similarly, "egalitarian equality" is a much wider concept. It is an overarching principle. The term "egalitarianism" has distinct definition that all people should be treated as equal and have the same political, economic, social and civil rights or have a social philosophy advocating the removal of economic inequalities among the people, economic egalitarianism or the decentralisation of power.

155. For the purpose of explaining "egalitarian equality" as an overarching principle, this Court in ***Glanrock Estate*** (supra) gave an illustration of the acquisition of forests. This Court observed thus:

> ***"26.*** *... This would be a case of violation of ordinary principle of equality before law.*
>
> ***27.*** *Similarly, "egalitarian equality" is a much wider concept. It is an overarching principle. Take the case of acquisition of forests. Forests in India are an important part of environment. They constitute national asset. In various judgments of this Court delivered by the Forest Bench of this Court in T.N. Godavarman Thirumulpad v. Union of India (Writ Petition No. 202 of 1995), it has been held that "inter-generational equity" is part of Article 21 of the Constitution.*

28. *What is inter-generational equity? The present generation is answerable to the next generation by giving to the next generation a good environment. We are answerable to the next generation and if deforestation takes place rampantly then inter-generational equity would stand violated.*

29. *The doctrine of sustainable development also forms part of Article 21 of the Constitution. The "precautionary principle" and the "polluter pays principle" flow from the core value in Article 21.*

30. *The important point to be noted is that in this case we are concerned with vesting of forests in the State. When we talk about inter-generational equity and sustainable development, we are elevating an ordinary principle of equality to the level of overarching principle. Equality doctrine has various facets. It is in this sense that in I.R. Coelho case [(2007) 2 SCC 1] this Court has read Article 21 with Article 14. The above example indicates that when it comes to preservation of forests as well as environment vis-à-vis development, one has to look at the constitutional amendment not from the point of view of formal equality or equality enshrined in Article 14 but on a much wider platform of an egalitarian equality which includes the concept of "inclusive growth". It is in that sense that this Court has used the expression Article 21 read with Article 14 in I.R. Coelho case [(2007) 2 SCC 1]. Therefore, it is only that breach of the principle of equality which is of the character of destroying the basic framework of the Constitution which will not be protected by Article 31-B. If every breach of Article 14, however, egregious, is held to be unprotected by Article 31-B, there would be no purpose in protection by Article 31-B.*

31. *The question can be looked at from yet another angle. Can Parliament increase its amending power by amendment of Article 368 so as to confer on itself the unlimited power of amendment and destroy and damage the fundamentals of the Constitution? The answer is obvious. Article 368 does not vest such a power in Parliament. It cannot lift all limitations/restrictions placed on the amending power or free the amending power from all limitations. This is the effect of the decision in Kesavananda Bharati [(1973) 4 SCC 225]. ..."*

156. This Court, in the aforesaid context, said that the point to be noted, therefore, is that when constitutional law is challenged, one has to apply the

"effect test" to find out the degree of abrogation. This is the "degree test" which has been referred to earlier. If one finds that the constitutional amendment seeks to abrogate core values/overarching principles like secularism, egalitarian equality, etc. and which would warrant re-writing of the Constitution, then such constitutional law would certainly violate the basic structure. In other words, such overarching principles would fall outside the amendatory power under Article 368 in the sense that the said power cannot be exercised even by the Parliament to abrogate such overarching principles. The Court proceeded to quote the observations made by Mathew, J. in ***Indira Nehru Gandhi*** (supra), that equality is a feature of rule of law and not vice-versa. The expression "rule of law" describes a society in which Government must act in accordance with law. A society governed by law is the foundation of personal liberty. It is also the foundation of economic development since investment will not take place in a country where rights are not respected. The Court said that it is in that sense that the expression "Rule of Law" constitutes an overarching principle embodied in Article 21, one aspect of which is equality.

157. As stated above, the amending power under Article 368 of the Constitution is a derivative power. The doctrine of Basic Structure provides a touchstone on which the validity of the Constitutional Amendment Act could be judged. While applying this doctrine, one need not go by the content of a "right" but by the test of justifiability under which one has to see the scope and the object of the Constitutional Amendment. The doctrine of Classification under Article 14 has several facets. Equality is a comparative concept. This Court proceeded to observe something very important. It said that *"a person is treated unequally only if that person is treated worse than others, and those others (the comparison group) must be those who are "similarly situated" to the complainant."*

158. The pivotal or seminal question that falls for my consideration is whether the "similarly situated test" is attracted in the present case so as to say that the

egalitarian equality as an overarching principle is violated and has thereby rendered clause (6) of Article 15 and clause (6) of Article 16 invalid as they exclude the SCs, STs and OBCs.

159. In ***Glanrock Estate*** (supra), K.S. Panicker Radhakrishnan, J., concurring with S.H. Kapadia, CJ, thought fit to supplement the reasonings by his separate order. Radhakrishnan, J. observed thus:

> ***"79.*** *Right to equality before law, right to equality of opportunity in matters of public employment, right to protection of life and personal liberty, right against exploitation, right to freedom of religion, etc. are all fundamental rights guaranteed under Part III of the Constitution and a common thread running through all the articles in Part III of the Constitution have a common identity committed to an overarching principle which is the basic structure of the Constitution. Rule of law is often said as closely interrelated principle and when interpreted as a principle of law, it envisages separation of powers, judicial review, restriction on the absolute and arbitrary powers, equality, liberty, etc. Separation of powers is an integral part of rule of law which guarantees independence of judiciary which is a fundamental principle viewed as a safeguard against arbitrary exercise of powers, legislative and constitutional.*
>
> ***80.*** *Doctrine of absolute or unqualified parliamentary sovereignty is antithesis to rule of law. Doctrine of parliamentary sovereignty may, at times, make rule of law and separation of powers subservient to the wish of the majority in Parliament. Parliamentary supremacy cannot be held unqualified so as to undo the basic structure.* ***Basic structure doctrine is, in effect, a constitutional limitation against parliamentary autocracy. Let us, however, be clear that the principles of equality inherent in the rule of law do not averse to the imposition of special burdens, grant special benefits and privileges to secure to all citizens justice, social and economic, and for implementing the directive principles of State policy for establishing an egalitarian society****."*
>
> [Emphasis supplied]

160. Thus, the word "amendment" postulates that the old Constitution survives without loss of its identity despite the change and continues even though it has been subjected to alteration. As a result of the amendment, the old Constitution

cannot be destroyed and done away with; it is retained though in the amended form. What then is meant by the retention of the old Constitution? It means the retention of the basic structure or framework of the Constitution. Although it is permissible under the power of amendment to effect changes, howsoever important, and to adapt the system to the requirements of changing conditions, yet it is not permissible to touch the foundation or to alter the basic institutional pattern. The words "amendment of the Constitution" with all their wide sweep and amplitude cannot have the effect of destroying or abrogating the basic structure or framework of the Constitution. It would not be competent under the garb of amendment, for instance, to change the democratic government into dictatorship or hereditary monarchy, nor would it be permissible to abolish the Lok Sabha and the Rajya Sabha.

161. Justice H.R. Khanna in one of his lectures delivered at the Delhi Study Group in New Delhi, stated something which is worth taking note of:

> *"Criticism has been levelled against the concept of basic structure that it creates uncertainty in a vital matter like the power to amend the Constitution. It is urged that unless that concept is put in precise cut and dry form, those amending the Constitution would always remain uncertain whether the constitutional amendment, even though passed by the requisite majority, would be upheld by the courts.* ***In this respect it may be stated that the majority decision of this Court in Kesavananda Bharati case contains sufficient indication by giving illustrations as to what would constitute basic structure of the Constitution. It is never desirable in constitutional matters to put either the provisions or basic propositions in cut and dry form, nor is it proper in such matters to try to be exhaustive for once you do that you forget a vital fact of life that in human affairs there can arise a variety of situations and that it is beyond any human ingenuity to pierce through the visage of time and to contrive for all types of contingencies. It is for that reason that the provision of a Constitution are couched in general terms because that fact gives the provisions flexibility, helps them to grow and enables them to adapt themselves to new situations. Rigidity is one thing which the provisions of a Constitution must shun for such rigidity can result in the break-down of the Constitution in***

> ***situations where what is needed is resilience and flexibility rather than brittleness and rigidity. Absence of formal exactitude or want of fixity of meaning is not unusual or even regrettable attribute of constitutional provision. Nor is it desirable in such matters to freeze a concept at some fixed stage of thought or time. The US Constitution was framed about 200 years ago. It was designed for a country which at that time was primarily agricultural and consisted of a small number of States. The fact that the said Constitution has stood the test of time and has proved effective for the most industrialized country consisting of a very large number of States is primarily due to the fact that the provisions of its Constitution are couched in general language.*** *As mentioned by a great master the generalities of US Constitution have helped it to grow and adapt its provisions to the varying situations. Although one can never prevent the challenge to any provision, however immaculately drafted, there can be not much doubt about the validity of most of the provisions."* [Emphasis supplied]

162. Thus, what is important from the aforesaid is that it is never desirable in constitutional matters to put either the provisions or basic propositions in cut and dry form nor is it proper in such matters to try to be exhaustive for once you do that you forget a vital fact of life that in human affairs there can arise a variety of situations and that it is beyond any human ingenuity to pierce through the visage of time and to contrive for all types of contingencies. The amending power cannot be construed in a narrow and pedantic manner. It cannot be said that no part of Part III can be abridged. What is violative of the basic structure is the withdrawal of the props on which the edifice stands, will alter the identity of the Constitution. [See : ***Kesavananda Bharati*** (supra)]. Only if a right is so abridged that it tends to affect the basic structure or essential content of the right and reduces the right only to a name, will be abridgement or ceases to be an abridgement.

163. If the economic criteria based on the economic indicator which distinguishes between one individual and another is relevant for the purpose of classification and grant of benefit of reservation under clause (6) of Article 15

as held by my esteemed Brother Justice Bhat, then merely because the SCs/STs/OBCs are excluded from the same, by itself, will not make the classification arbitrary and the amendment violative of the basic structure of the Constitution. This is where with all humility at my command I beg to differ with my esteemed Brother Justice Bhat for whom I have utmost and profound respect.

164. Article 14 has two clear facets which are invalid. One is over-classification and the other is under-classification, which is otherwise, over-inclusiveness or under-inclusiveness. The judicial review of over-classification should be undertaken very strictly. In the cases of under-classification when the complaint is either by those who are left out or those who are in i.e. that the statute has roped him in, but a similarly situated person has been left out, it would be under-inclusiveness. It is to say that you ought to have brought him in to make the classification reasonable. It is in such cases that the courts have said that 'who should be brought in' should be left to the wisdom of the legislature because it is essentially a stage where there should be an element of practicability. Therefore, the cases of under-inclusion can be reviewed in a little liberal manner. The under-inclusion argument should not be very readily accepted by the courts because the stage could be experimental. For instance, in the case on hand, the argument in the context of 103rd Constitution Amendment is that SCs, STs and OBCs have been left out, the Court would say that it is under-inclusiveness. The Legislature does not have to bring any and everybody to make it reasonable. The case on hand is not one of active exclusion. The SCs, STs and OBCs who have been left out at the first instance are telling the Court that they ought to have been included. In such circumstances, the test would be very strict, not that it would be impervious to review. Had they been included in clause (6) of Article 15 & clause (6) of Article 16 resply at any point of time and thereafter, excluded, it would be legitimate for them to argue that having treated them as one, they cannot be excluded in an arbitrary manner.

165. This Court in the ***State of Gujarat and Another v. Shri Ambika Mills Ltd. Ahmedabad and Another***, (1974) 4 SCC 656, has explained the concept of under-inclusiveness. I quote the relevant observations: -

> *“**54.** A reasonable classification is one which includes all who are similarly situated and none who are not. The question then is : what does the phrase ‘similarly situated’ mean? The answer to the question is that we must look beyond the classification to the purpose of the law. A reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law. The purpose of a law may be either the elimination of a public mischief or the achievement of some positive public good.*
>
> ***55.** A classification is under-inclusive when all who are included in the class are tainted with the mischief but there are others also tainted whom the classification does not include. In other words, a classification is bad as under-inclusive when a State benefits or burdens persons in a manner that furthers a legitimate purpose but does not confer the same benefit or place the same burden on others who are similarly situated. A classification is over-inclusive when it includes not only those who are similarly situated with respect to the purpose but others who are not so situated as well. In other words, this type of classification imposes a burden upon a wider range of individuals than are included in the class of those attended with mischief at which the law aims. Herod ordering the death of all male children born on a particular day because one of them would some day bring about his downfall employed such a classification.*
>
> ***56.** The first question, therefore, is, whether the exclusion of establishments carrying on business or trade and employing less than 50 persons makes the classification under-inclusive, when it is seen that all factories employing 10 or 20 persons, as the case may be, have been included and that the purpose of the law is to get in unpaid accumulations for the welfare of the labour. Since the classification does not include all who are similarly situated with respect to the purpose of the law, the classification might appear, at first blush, to be unreasonable. But the Court has recognized the very real difficulties under which legislatures operate — difficulties arising out of both the nature of the legislative process and of the society which legislation attempts perennially to re-shape — and it has refused to strike down indiscriminately all legislation embodying classificatory inequality here under consideration. Mr. Justice Holmes, in urging tolerance of under-inclusive classifications, stated*

> *that such legislation should not be disturbed by the Court unless it can clearly see that there is no fair reason for the law which would not require with equal force its extension to those whom it leaves untouched. [Missouri, K & T Rly v. May, 194 US 267, 269] What, then, are the fair reasons for non-extension? What should a court do when it is faced with a law making an under-inclusive classification in areas relating to economic and tax matters? Should it, by its judgment, force the legislature to choose between inaction or perfection?" [Emphasis supplied]*

166. ***Ambica Mills*** (supra) justified under-inclusiveness on the grounds of recognition of degrees of harm, administrative convenience, and legislative experimentation. Reference was made to Justice Oliver Wendell Holmes's observation in ***Missouri, K & T Rly v. May***, 194 US 267 (1904), 269, that "legislation should not be disturbed by the Court unless it can clearly see that there is no fair reason for the law which would not require with equal force its extension to those whom it leaves untouched", to state that the judiciary must exercise self-restraint in such cases.

167. The equality code in Article 14 of the Indian Constitution prescribes substantive and not formal equality. It is now a settled position that classification *per se* is not discriminatory and violative of Article 14. Article 14 only forbids class legislation and not reasonable classification. A classification is reasonable, when the following twin tests as laid down by S.R. Das, J., in ***The State of West Bengal v. Anwar Ali Sarkar***, 1952 SCR 284, are fulfilled:

(i) The classification must be based on an intelligible differentia which distinguishes persons or things that are grouped, from others left out of the group; and

(ii) The differentia must have a rational relationship to the object sought to be achieved by the statute.

168. Das J. in ***Anwar Ali Sarkar*** (supra) held that there must be some yardstick to differentiate the class included and the others excluded from the group. The

differentia used for the classification in the amendment is to promote or uplift the economically weaker sections of citizens who are otherwise not covered under Article 15(4) and Article 16(4) of the Constitution. This is keeping in mind the Directive Principles of State Policy as embodied under Article 46 of the Constitution. Therefore, there is a yardstick used for constituting the class for the purpose of the amendment. To put it in other words, the insertion of the economically weaker sections is perfectly valid as a class for the extension of special provision for their advancement for admission and for reservation in posts.

169. The broad egalitarian principle of social and economic justice for all is implicit in every Directive Principle and, therefore, a law designed to promote a directive principle, even if it comes into conflict with the formalistic and doctrinaire of equality before the law, would most certainly advance the broader egalitarian principles and desirable constitutional goal of social and economic justice for all. [See : ***Sanjeev Coke Manufacturing Co. v. Bharat Coking Coal Ltd***., (1983) 1 SCC 147]

170. Article 14 of the Constitution of India corresponds to the last portion of Section 1 of the 14th Amendment of the American Constitution, except that our Article 14 has also adopted the English doctrine of Rule of law by the addition of the words "equality before the law". However, the addition of these extra words does not make any substantial difference in its practical application. The, meaning, scope and effect of Article 14 of the Constitution of India have been discussed and laid down by this Court in the case of ***Charanjit Lal Chowdhury v. The Union of India and others***, AIR 1951 SC 41.

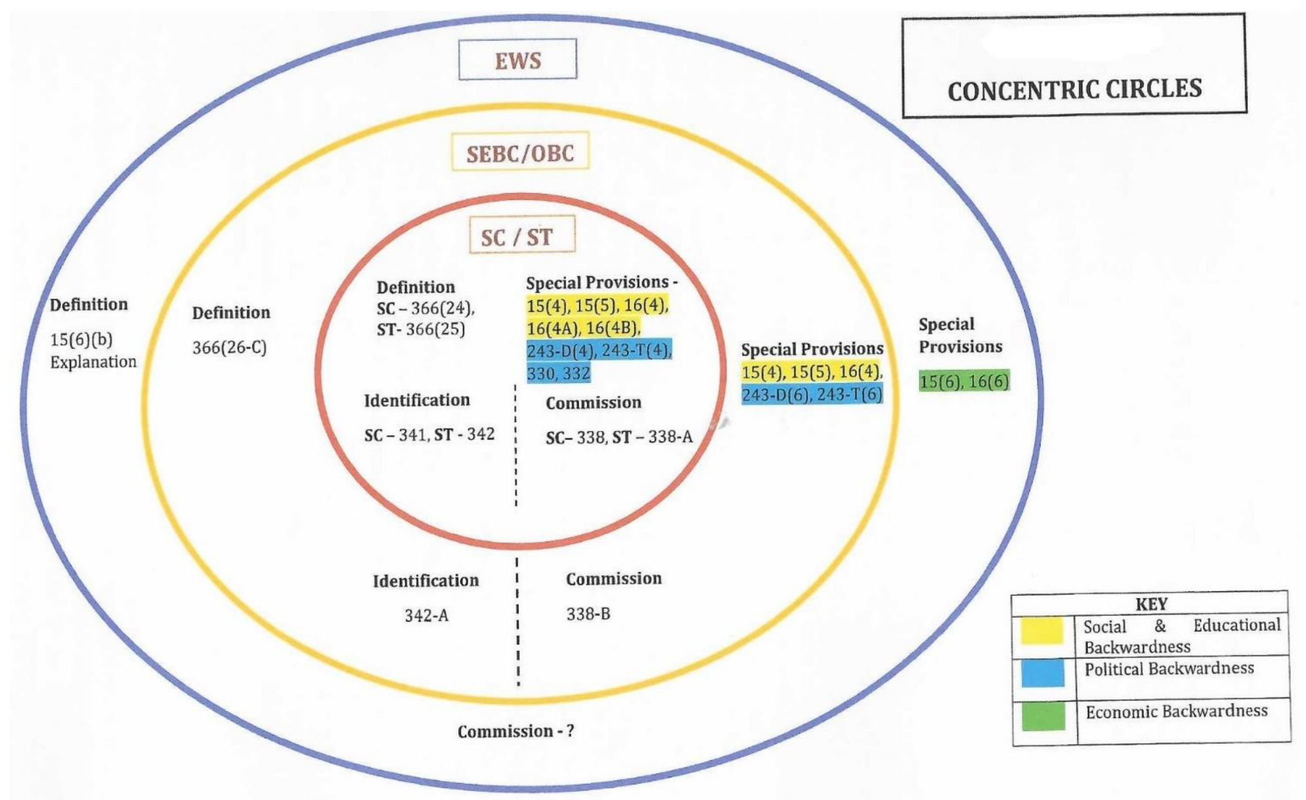
171. It could be said that this Court in ***S. Seshachalam and Others v. Chairman, Bar Council of Tamil Nadu and Others*** reported in (2014) 16 SCC 72, has taken

the view that the reasonable classification to prevent double benefits under the equality code is permissible. This Court observed thus:

> ***"28.*** *The various welfare fund schemes are in actuality intended for the benefit of those who are in the greatest need of them. The lawyers, straight after their enrolment, who join the legal profession with high hopes and expectations and dedicate their whole lives to the professions are the real deservers. Lawyers who enrol themselves after their retirement from government services and continue to receive pension and other terminal benefits, who basically join this field in search of greener pastures in the evening of their lives cannot and should not be equated with those who have devoted their whole lives to the profession.* ***For these retired persons, some amount of financial stability is ensured in view of the pension and terminal benefits and making them eligible for lump sum welfare fund under the Act would actually amount to double benefits. Therefore, in our considered view, the classification of lawyers into these two categories is a reasonable classification having a nexus with the object of the Act.***
>
> ***29. Furthermore, it is also to be noted that in view of their being placed differently than the class of lawyers who chose this profession as the sole means of their livelihood, it can reasonably be discerned that the retired persons form a separate class. As noticed earlier, the object of the Act is to provide for the constitution of a Welfare Fund for the benefit of advocates on cessation of practice. As per Section 3(2)(d) any grant made by the Government to the welfare fund is one of the sources of the Advocates' Welfare Fund. The retired employees are already in receipt of pension from the Government or other employer and to make them get another retiral benefit from the Advocates' Welfare Fund would amount to double benefit and they are rightly excluded from the benefit of the lump sum amount of the welfare fund."***
>
> [Emphasis supplied]

172. One of the arguments of Mr. Gopal Sankaranarayanan, the learned senior counsel who appeared for the petitioner in Writ Petition (Civil) No. 73 of 2019 that has appealed to me is that the SC/ST/OBCs received political reservation as well as under the Constitution and there are no ceiling limits to the extent of reservation which each of the groups can receive. On the other hand, the EWS reservation is

kept at 10% and is not extended to the political reservation, thereby providing a balance. Indisputably, the exclusion in Articles 15(6) and 16(6) resply from the benefits of EWS measures is only of the "classes mentioned" in the Articles 15(4), 15(5) and 16(4) of the Constitution. The contention that the exclusion of these groups is discriminatory overlooks the fact that by exclusion of the creamy layer, the lower economic strata of the SC/ST and OBCs are already represented in the classes covered by the Articles 15(4), 15(5) and 16(4) resply. The sketch below would make it more clear.



173. Let me go back to ***Kathi Raning Rawat*** (supra). I have referred to ***Kathi Raning Rawat*** (supra) in para 14 of my judgment. Let me reiterate the observations made in ***Kathi Raning Rawat*** (supra) which I have incorporated in para 14. I quote once again:

> *"**7.** All legislative differentiation is not necessarily discriminatory. In fact, the word "discrimination" does not occur in Art. 14. The expression "discriminate against" is used in Art. 15(1) and Art. 16(2), and it means, according to the Oxford Dictionary, "to make an adverse distinction with regard to; to distinguish unfavourably from others". Discrimination thus involves an element of unfavourable bias and it is in that sense that the expression has to be understood in this context. If such bias is disclosed and is based on any of the grounds mentioned in Arts. 15 and 16, it may well be that the statute will, without more, incur condemnation as violating a specific constitutional prohibition unless it is saved by one or other of the provisos to those articles. But the position under Art. 14 is different…."*

174. Article 15, just like Article 16, is a facet of the right to equality. That right as interpreted in the context of Article 14 is not the right to uniform or identical treatment. It is a right to be treated equally among equals. Unequal treatment of equals is as much violation of that right as equal treatment of unequals. Every difference of treatment is not inconsistent with that right just as every identical treatment is not consistent with it. For determining the consistency of such treatment with the right to equality from time to time different tests such as reasonable classification, suspect classification, or classification lying in between the two, etc. have been devised and applied. But they have not always been able to provide satisfactory explanation, particularly when it comes to affirmative action or positive equality. An all comprehensive and satisfactory test in this regard has been provided by Ronald Dworkin, an American philosopher and scholar of United States Constitutional Law, in his distinction between the right to equal treatment and the right to treatment as an equal. According to Ronald Dworkin, the latter is the fundamental right, while the former is only a derivative right. The right to treatment as an equal consists in equal respect and concern, while the right to equal treatment consists in identical treatment. But identical treatment is neither possible

nor consistent with the right to equality. Therefore, what the right to equality requires is equal concern. As long as that concern exists, the difference of treatment is consistent with the right to equality. Not every difference of treatment is *per se* inconsistent with the right to equality. Only that difference of treatment which is based on lack of equal concern is inconsistent with that right. To illustrate, different treatment on the basis of race, religion or caste is not, in itself, bad so long as equal concern or respect is shown to every race, religion or caste. It becomes vulnerable only when it is based on disrespect, contempt or prejudice to a race, religion or caste. Article 15 prohibits only such and not every difference of treatment based on religion, race, caste, sex, place of birth or any of them. This is very much obvious from the expression "discriminate against" in Article 15 of the Constitution. The State is not prohibited from treating people differently on the basis of religion, race, caste, sex or place of birth; it is prohibited from discriminating against them on these grounds. Discrimination results only when religion, race, caste, sex or place of birth or any of them is made the basis of disrespect, contempt or prejudice for difference in treatment. In other words, if difference in treatment on any of these grounds is not based on any disrespect, contempt or prejudice, it is not discriminatory and, therefore, not against Article 15(1). The same is true for Article 29(2).

175. Articles 15(1) and 29(2) resply while thus prohibiting discrimination or prejudicial or contemptuous difference of treatment on the grounds mentioned in those Articles, Article 15(4) sanctions "special provisions for the advancement of any socially and educationally backward classes ... or for the Scheduled Castes and the Scheduled Tribes". Could it be said or argued that any provision for the advancement of any socially and educationally backward class or for SCs and STs can

be termed or characterised as the one based on any prejudice, contempt or insult to any forward class? If the answer is in the negative, then why any provision for the advancement of any economically weaker section of the society excluding SCs and STs should be termed or characterised as the one based on any prejudice, contempt or insult to any backward class? The aforesaid would equally apply to Article 16 of the Constitution. [Reference : "*Are Articles 15(4) and 16(4) Fundamental Rights*" by Prof. Mahenendra P. Singh, Professor of Law, Delhi University]

176. M. Patanjali Sastri, CJ in ***Kathi Raning Rawat*** (supra) explained:

> *"**7.** All legislative differentiation is not necessarily discriminatory. In fact, the word "discrimination" does not occur in Art. 14. The expression "discriminate against" is used in Art. 15(1) and Art. 16(2), and it means, according to the Oxford Dictionary, "to make an adverse distinction with regard to; to distinguish unfavourably from others". Discrimination thus involves an element of unfavourable bias and it is in that sense that the expression has to be understood in this context. If such bias is disclosed and is based on any of the grounds mentioned in Arts. 15 and 16, it may well be that the statute will, without more, incur condemnation as violating a specific constitutional prohibition unless it is saved by one or other of the provisos to those articles. But the position under Art. 14 is different. Equal protection claims under that article are examined with the presumption that the State action is reasonable and justified. This presumption of constitutionality stems from the wide power of classification which the legislature must, of necessity, possess in making laws operating differently as regards different groups of persons in order to give effect to its policies.... "*

177. Fazal Ali, J. in his concurring judgment ***Kathi Raning Rawat*** (supra) explained the concept in the following words:

> *"**19.** I think that a distinction should be drawn between "discrimination without reason" and "discrimination with reason".*

The whole doctrine of classification is based on this distinction and on the well-known fact that the circumstances which govern one set of persons or objects, may not necessarily be the same as those governing another set of persons or objects, so that the question of unequal treatment does not really arise as between persons governed by different conditions and different sets of circumstances….”

178. In the ***State of Madhya Pradesh v. Narmada Bachao Andolan and Another***, (2011) 7 SCC 639, this Court observed quoting ***Kathi Raning Rawat*** (supra):

> *“**73.** Discrimination means an unjust, an unfair action in favour of one and against another. It involves an element of intentional and purposeful differentiation and further an element of unfavourable bias; an unfair classification. Discrimination under Article 14 of the Constitution must be conscious and not accidental discrimination that arises from oversight which the State is ready to rectify. [Vide Kathi Raning Rawat v. State of Saurashtra [AIR 1952 SC 123 : 1952 Cri LJ 805], and Video Electronics (P) Ltd. v. State of Punjab [(1990) 3 SCC 87 : 1990 SCC (Tax) 327 : AIR 1990 SC 820].”*

179. Let me also refer to a speech of the President of the Supreme Court of the United States on “Equality and Human Rights”, Oxford Equality Lecture 2018, Lady Hale dated 29th October, 2018. The speech starts stating: -

> *“Equality sounds a simple concept but the reality is very complicated. Is it about where you start – with equal opportunities - or where you end up – with equal outcomes - or something in between – like a level playing field?”*

180. Let me now refer to some relevant parts of the speech:

> *“There must be other people in an ‘analogous situation’ or ‘similarly situated’ who are treated more favourably than the complainant. In ordinary discrimination cases, now under the Equality Act 2010, the equivalent requirement, that the circumstances of the comparator must be the same or not materially different from those of the complainant, can generate a lot of argument. How different is*

different? I usually give the illustration of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11, [2003] ICR 337: the House of Lords held that the situation of a senior female police officer was not the same as the situation of male officers who had been treated more favourably, because there had been complaints against her from subordinates and not against them. This begs the question of whether the complaints themselves stemmed from discriminatory attitudes towards senior police officers. A better illustration now might be Hewage v Grampian Health Board [2012] UKSC 37, 2013 SC (UKSC) 54, where an Asian female consultant in orthodontics complained of bullying and harassment by her managers and the more favourable treatment given to white male consultants who'd made similar complaints. The Health Board tried hard to argue that their situations were different because of minor differences between them – but we did not agree.

These arguments arise because under the Equality Act it is not generally a defence to direct discrimination that the difference in treatment is justified. It is tempting, therefore, where a court or tribunal thinks that there might have been a justification to find that the cases are not the same. This is not a problem under article 14 where both direct and indirect discrimination can be justified if it is a proportionate means of achieving a legitimate aim. So the approach to comparability ought to be more relaxed, as indeed it is. As Lord Nicholls put it in R (Carson) v Secretary of State for Work and Pensions [2005] UKHL17, [2006] 1 AC 173, para 3:

> ***". . . the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact."***

Thus in most cases it comes down to justification. There is a link here with status. Discrimination on some grounds is more difficult to justify than discrimination on others. In R (RJM) v Secretary of State for Work and Pensions [2008] UKHL 63, [2009] 1 AC 311, Lord Walker produced the illuminating idea that personal characteristics are 'more like a series of concentric circles' (para 5). The inner circle is innate, largely immutable, and closely connected with personality: gender, sexual orientation, colour, race, disability. Next come nationality, language, religion and politics, which may be innate or acquired, but are all-important to personality and reflect important values protected by the European Convention. Outside those are acquired characteristics, more concerned with what people do or with what happens to them than with who they are, such as military status, residence, or past employment. He put street homelessness into that category: 'The more peripheral or debateable any suggested personal characteristic is, the less likely it is to come within the most sensitive area where discrimination is particularly difficult to justify' (para 5). So denying disability premium to street homeless was justified. Strasbourg has also put immigration status into this category (Bah v United Kingdom (2011) 31 BHRC 609).

But there is also a link with the subject matter. Discrimination in some areas is easier – much easier – to justify than in others. Generally speaking, we address justification in four questions: is there a legitimate aim; is there a rational connection between the means and the aim; could the aim be achieved by measure which would intrude less upon the fundamental right in question; and has a fair balance been struck between the end and the means? But the test to be applied in striking that balance does differ according to the subject-matter.

This brings me to the most fraught area of all – welfare benefits. Welfare benefits do more than try to ensure a level playing field on which all start equal and then make of life what they can. Welfare benefits are trying to do something to redress inequality of results: to lift people out of absolute poverty; to redress some of the disadvantage suffered by children growing up in poverty; to make reasonable adjustments to cater for disability. They are not of course trying to achieve absolute equality – just to prevent the worst effects of gross socio-economic inequalities."

181. Keeping in view the aforesaid, let me now refer to some of the observations made by this Court in ***Ashoka Kumar Thakur*** (supra):

> ***"114.*** *A survey of the conclusions reached by the learned Judges in Kesavananda Bharati case [Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225] clearly shows that the power of amendment was very wide and even the fundamental rights could be amended or altered. It is also important to note that the decision in Berubari Union and Exchange of Enclaves, Reference under Article 143(1) of the Constitution of India, In re [AIR 1960 SC 845 : (1960) 3 SCR 250] to the effect that the Preamble to the Constitution was not part of the Constitution was disapproved in Kesavananda Bharati case [Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225] and it was held that it is a part of the Constitution and the Preamble to the Constitution is of extreme importance and the Constitution should be read and interpreted in the light of the grand and noble visions envisaged in the Preamble. A close analysis of the opinions in Kesavananda Bharati case [Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225] shows that all the provisions of the Constitution, including the fundamental rights, could be amended or altered and the only limitation placed is that the basic structure of the Constitution shall not be altered. The judgment in Kesavananda Bharati case [Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225] clearly indicates what is the basic structure of the Constitution. It is not any single idea or principle like equality or any other constitutional principles that are subject to variation, but the principles of equality cannot be completely taken away so as to leave the citizens in this country in a state of lawlessness.* ***But the facets of the principle of equality could always be altered especially to carry out the directive principles of the State policy envisaged in Part IV of the Constitution****...."*
>
> ***115.*** *The basic structure of the Constitution is to be taken as a larger principle on which the Constitution itself is framed and some of the illustrations given as to what constitutes the basic structure of the Constitution would show that they are not confined to the alteration or modification of any of the fundamental rights alone or any of the provisions of the Constitution. Of course, if any of the basic rights enshrined in the Constitution are completely taken out, it may be argued that it amounts to alteration of the basic structure of the Constitution. For example, the federal character of the Constitution is considered to be the basic structure of the Constitution. There are*

large number of provisions in the Constitution dealing with the federal character of the Constitution. If any one of the provisions is altered or modified, that does not amount to the alteration of the basic structure of the Constitution. Various fundamental rights are given in the Constitution dealing with various aspects of human life. The Constitution itself sets out principles for an expanding future and is obligated to endure for future ages to come and consequently it has to be adapted to the various changes that may take place in human affairs.

116. *... as regards constitutional amendments, if any challenge is made on the basis of basic structure, it has to be examined based on* ***the basic features of the Constitution.***

117. *It may be noticed that the majority in Kesavananda Bharati case [Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225] did not hold that all facets of Article 14 or any of the fundamental rights would form part of the basic structure of the Constitution….*

118. *Equality is a multicoloured concept incapable of a single definition as is also the fundamental right under Article 19(1)(g). The principle of equality is a delicate, vulnerable and supremely precious concept for our society. It is true that it has embraced a critical and essential component of constitutional identity. The larger principles of equality as stated in Articles 14, 15 and 16 may be understood as an element of the "basic structure" of the Constitution and may not be subject to amendment, although, these provisions, intended to configure these rights in a particular way, may be changed within the constraints of the broader principle. The variability of changing conditions may necessitate the modifications in the structure and design of these rights, but the transient characters of formal arrangements must reflect the larger purpose and principles that are the continuous and unalterable thread of constitutional identity. It is not the introduction of significant and far-reaching change that is objectionable, rather it is the content of this change insofar as it implicates the question of constitutional identity.*

119. *The observations made by Mathew, J. in Indira Nehru Gandhi v. Raj Narain [1975 Supp SCC 1 : AIR 1975 SC 2299 : (1976) 2 SCR 347] are significant in this regard [**Ed.**: Quoted and paraphrased in Minerva Mills Ltd. v. Union of India, (1980) 3 SCC 625, p. 673, para 83.] :*

"83. ... 'To be a basic structure it must be a terrestrial concept having its habitat within the four corners of the Constitution.' (Indira Nehru case [1975 Supp SCC 1 : AIR 1975 SC 2299 : (1976) 2 SCR 347] , SCC p. 137, para 341)

What constitutes basic structure is not like 'a twinkling star up above the Constitution'. It does not consist of any abstract ideals to be found outside the provisions of the Constitution. The Preamble no doubt enumerates great concepts embodying the ideological aspirations of the people but these concepts are particularised and their essential features delineated in the various provisions of the Constitution. It is these specific provisions in the body of the Constitution which determine the type of democracy which the founders of that instrument established; the quality and nature of justice, political, social and economic which they aimed to realise, the content of liberty of thought and expression which they entrenched in that document and the scope of equality of status and of opportunity which they enshrined in it. These specific provisions enacted in the Constitution alone can determine the basic structure of the Constitution. These specific provisions, either separately or in combination, determine the content of the great concepts set out in the Preamble. It is impossible to spin out any concrete concept of basic structure out of the gossamer concepts set out in the Preamble. The specific provisions of the Constitution are the stuff from which the basic structure has to be woven. (Indira Nehru case [Indira Nehru Gandhi v. Raj Narain, 1975 Supp SCC 1 : AIR 1975 SC 2299 : (1976) 2 SCR 347] , SCC p. 138, para 345)"

x x x x

***121.** It has been held in many decisions that when a constitutional provision is interpreted, the cardinal rule is to look to the Preamble to the Constitution as the guiding star and the directive principles of State policy as the "book of interpretation". The Preamble embodies the hopes and aspirations of the people and directive principles set out the proximate grounds in the governance of this country.*

x x x x

***373.** Affirmative action is employed to eliminate substantive social and economic inequality by providing opportunities to those who*

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

182. I am of the view as Prof. Satya Prateek rightly puts that the enabling provisions, varying enforcement mechanisms and the State opinion on backwardness, reservation, adequate representation etc., in any circumstances cannot be recognised as the fundamental or basic structure of the Constitution. By their very nature, they are bound to change, with time, location and circumstances. On the other hand, the fundamental tenets or the core principles of the Constitution are foundational – they are at the core of its existence. They are seminal to the Constitution's functioning. The Constitution retains its existence on these foundations as they preserve the Constitution in its essence. This is not to mark out the possibilities of structural adjustments in the foundations with time. The foundations may shift, fundamental values may assume a different meaning with time but they would still remain to be integral to the constitutional core of principles, the core on which the Constitution would be legitimately sustained. (Reference: Virendra Kumar, Basic Structure of the Indian Constitution: Doctrine of Constitutionally Controlled Governance, 49:3, Journal of the Indian Law Institute, 365, 385 (2007))

183. Prof. Virendra Kumar believes that there is a difference between the fundamental rights and the values that structure such fundamental rights. He views the values to have an overarching influence and says that it is totally possible to hold that violation of the fundamental rights in certain situations, may not infringe the fundamental values in their backdrop. (Reference –Essay by Satya Prateek).

184. The *ad hoc* policies of the State directed towards achieving a larger, fundamental standard of equality, cannot by itself become fundamental. Fundamental would only be the principle and not the way these principles are sought to be realised. Such mechanisms which facilitate 'equality of opportunity in public employment' as guaranteed under Article 16 of the Constitution are *ad hoc* arrangements. They could be suitably modified with passage of time or even be done away with for a more suitable, convenient and efficient reservation policy, largely dependent on the State's own understanding of the best way to pursue the constitutional ends.

185. This Court in ***Ajit Singh and Others v. State of Punjab and Others*** *reported as (1999) 7 SCC 209* (5-Judge Bench) after quoting with approval the law laid down in its previous judgments in ***M.R. Balaji*** (supra) and ***C.A. Rajendran v. Union of India & Others*** reported as (1968) 1 SCR 721 : AIR 1968 SC 507 ruled that there is no duty on the Government to provide reservation. The Court held that both Articles 16(4) and 16(4A) resply do not confer any fundamental rights nor do they impose any constitutional duties but are only in the nature of enabling provision vesting a discretion in the State to consider providing reservation if the circumstances mentioned in those articles so warranted.

186. Each one of these Constitutional provisions that are categorised as rights under Part III has intrinsic value content. Many of these rights are a part of the mechanism geared towards realising a common constitutional principle. For example, Articles 14, 15 and 16 resply of the Constitution are committed to the common principle of equality. Reasonably then, if an amendment is to be struck down under the 'basic structure' formulation, the central principle of these inter-related provisions should be at threat. A mere violation of one of these enabling provisions would not be of much consequence under the doctrine of Basic Structure as long as such violation does not infringe upon the central thesis of

equality. Redress for marginal encroachment cannot be found under the 'Basic Structure Doctrine'. In considering the effect of an amendment on the constitutional core, it is important to keep in mind the widest ramifications of the amendment. It is imperative to contemplate and consider every way in which the 'basic structure' of the Constitution might be threatened through the impugned amendment. The amendment would stand as constitutional only after a satisfactory understanding as to its effect on the constitutional core is reached by the courts. To sustain itself, the amendment should not violate such core in the widest interpretation given to it. (Reference : Prof. Satya Prateek's essay)

187. The new concept of economic criteria introduced by the impugned amendment for affirmative action may go a long way in eradicating caste-based reservation. It may be perceived as a first step in the process of doing away with caste-based reservation. In the words of Nani A. Palkhivala, *"……The basic structure of the Constitution envisages a cohesive, unified, casteless society. By breathing new life into casteism the judgment (Mandal-Indra Sawhney) fractures the nation and disregards the basic structure of the Constitution. The decision would revitalize casteism, cleave the nation into two – forward and backward – and open up new vistas for internecine conflicts and fissiparous forces, and make backwardness a vested interest. It will undo whatever has been achieved since independence towards creating a unified, integrated nation. The majority judgment (Mandal) will revive casteism which the Constitution emphatically intended to end; and the pre-independence tragedy would be re-enacted with the roles reversed – the erstwhile underprivileged would now become the privileged…..*"

188. Baba Saheb Ambedkar recognised fraternity as a necessary principle for the survival of Indian democracy. He defined fraternity as the 'common brotherhood of all Indians'. In his revolutionary, yet undelivered speech titled

‘Annihilation of Caste’, he described fraternity as the ‘essential attitude of respect and reverence towards fellowmen’.

189. Let me remind one and all of what this Court observed almost five decades back in ***Minor A. Peeriakaruppan v. State of Tamil Nadu and Others*** [(1971) 1 SCC 38 : AIR 1971 SC 2303]:

> *“**29.** .... But all the same the Government should not proceed on the basis that once a class is considered as a backward class it should continue to be backward class for all times. Such an approach would defeat the very purpose of the reservation because once a class reaches a stage of progress which some modern writers call as take off stage then competition is necessary for their future progress. The Government should always keep under review the question of reservation of seats and only the classes which are really socially and educationally backward should be allowed to have the benefit of reservation. <u>Reservation of seats should not be allowed to become a vested interest</u>.....”* [Emphasis supplied]

190. Thus, reservation is not an end but a means – a means to secure social and economic justice. Reservation should not be allowed to become a vested interest. Real solution, however, lies in eliminating the causes that have led to the social, educational and economic backwardness of the weaker sections of the community. This exercise of eliminating the causes started immediately after the Independence i.e., almost seven decades back and it still continues. The longstanding development and the spread of education have resulted in tapering the gap between the classes to a considerable extent. As larger percentages of backward class members attain acceptable standards of education and employment, they should be removed from the backward categories so that the attention can be paid toward those classes which genuinely need help. In such circumstances, it is very much necessary to take into review the method of identification and the ways of determination of backward classes, and also, ascertain whether the criteria adopted or applied for the classification of

backward is relevant for today's conditions. The idea of Baba Saheb Ambedkar was to bring social harmony by introducing reservation for only ten years. However, it has continued past seven decades. Reservation should not continue for an indefinite period of time so as to become a vested interest.

191. In the result, I hold that the impugned amendment is valid and in no manner alters the basic structure of the Constitution.

192. I am of the view that all the petitions challenging the impugned amendment should fail.

..……………..……….J.
(J.B. PARDIWALA)

New Delhi;
November 07, 2022