# THE SUPREME COURT CASES

(2014) 8 SCC

**(2014) 8 Supreme Court Cases 1**

(BEFORE R.M. LODHA, C.J. AND A.K. PATNAIK, S.J. MUKHOPADHAYA, DIPAK MISRA AND F.M. IBRAHIM KALIFULLA, JJ.)

PRAMATI EDUCATIONAL AND CULTURAL TRUST (REGISTERED) AND OTHERS .. Petitioners;

*Versus*

UNION OF INDIA AND OTHERS .. Respondents.

Writ Petitions No. 416 of 2012† with Nos. 152 and 1081 of 2013, 60, 95, 106, 128, 144, 145, 160 and 136 of 2014, decided on May 6, 2014

***Constitutionality of 93rd Amendment inserting Cl. (5) in Art. 15***

A. **Constitution of India — Arts. 15(5) and 368 — Constitutionality of Art. 15(5) — Object of Art. 15(5) — Held, Art. 15(5) is also constitutional in relation to admission in private unaided educational institutions — Art. 15(5) already held constitutional in *Ashoka Kumar Thakur*, (2008) 6 SCC 1, in relation to State-maintained institutions and aided educational institutions — None of the rights under Arts. 14, 19(1)(g) and 21 are abrogated by cl. (5) of Art. 15 — Cl. (5) of Art. 15 is not an exception or proviso overriding Art. 15 — It is an enabling provision to effectuate equality of opportunity — Constitution (Ninety-third Amendment) Act, 2005, thus held, does not alter the basic structure or framework of the Constitution and is therefore constitutional — Constitution (Ninety-third Amendment) Act, 2005**

† Under Article 32 of the Constitution of India

B. **Constitution of India — Arts. 19(1)(g), 15(5) and 368 — Whether Art. 19(1)(g), a basic feature of the Constitution destroyed by Constitution (Ninety-third Amendment) Act, 2005 by which cl. (5) inserted in Art. 15 insofar as it impinges upon the right to choose students for admission to private aided/unaided educational institutions — Thereby whether Art. 15(5) detracts private educational institutions from being institutions of excellence — Measures under Art. 15(5), if covered by Art. 19(6) — Held, that only a small percentage of seats would be reserved under Art. 15(5) saves it from being unconstitutional — Opinion of Bhandari, J. in *Ashoka Kumar Thakur*, (2008) 6 SCC 1, overruled on this point**

C. **Constitution of India — Arts. 15(5), 19(1)(g) and 368 — Whether Art. 15(5) satisfies the "identity test" and "width test" in that it does not destroy the judicially determined identity of the fundamental right under Art. 19(1)(g) by the width of power introduced by the amendment — Whether element of voluntariness in Art. 19(1)(g) affected — Thus, whether basic structure affected — Held, power under Art. 15(5) is a guided power and its use in furtherance of its object and purpose is subject to judicial review — Hence, Art. 19(1)(g) not affected**

D. **Constitution of India — Art. 368 & Pt. III and Arts. 15(5) and 19(1)(g) — Stealthy encroachment into fundamental rights by constitutional amendment meant for beneficent purposes — Duty of court to protect fundamental right of private educational institutions under Art. 19(1)(g) from the insertion of Art. 15(5) if meant to appease SEBCs/SCs/STs for political gains**

E. **Constitution of India — Arts. 15(5) and 14 — Duty to maintain distinction between aided and unaided private educational institutions in matters of admission of SEBCs/SCs/STs — Held, law made to effectuate Art. 15(5) must provide for compensation to the unaided institutions so as not to violate Art. 14**

F. **Constitution of India — Arts. 15(5) & 14, Preamble and 30(1) — Exclusion of minority aided and unaided educational institutions referred to in Art. 30(1) from the purview of Art. 15(5), held, not discriminatory — Nor does Art. 15(5) destroy the secular character of India**

G. **Constitution of India — Arts. 15(5) and 51-A(j) r/w Art. 21 and Preamble — Duty of every citizen to strive for excellence and live with dignity if affected by Art. 15(5) denying to some the opportunity to study in educational institutions of excellence — Held, is not borne out by the experience of institutions which similarly have reserved seats — Besides, Art. 15(5) promotes fraternity and unity and integrity of the nation ordained by the Preamble**

H. **Constitution of India — Art. 15(5) & Pts. IV and III and Art. 368 — Whether balance between Pt. IV and Pt. III destroyed by Art. 15(5) which affects the basic structure — Issue raised but not decided**

*Facts* :

A three-Judge Bench by its order dated 6-9-2010 in *Society for Unaided Private Schools of Rajasthan*, (2012) 6 SCC 102, made a reference to a Constitution Bench to decide on the validity of Article 15(5) of the Constitution inserted by the Constitution (Ninety-third Amendment) Act, 2005 with effect

from 20-1-2006 and on the validity of Article 21-A of the Constitution inserted by the Constitution (Eighty-sixth Amendment) Act, 2002 with effect from 1-4-2010.

The substantial questions of law before the present Constitutional Bench were:

(*i*) Whether by inserting clause (5) in Article 15 of the Constitution by the Constitution (Ninety-third Amendment) Act, 2005, Parliament has altered the basic structure or framework of the Constitution?

(*ii*) Whether by inserting Article 21-A of the Constitution by the Constitution (Eighty-sixth Amendment) Act, 2002, Parliament has altered the basic structure or framework of the Constitution?

*Held* :

**(1)** The object of Article 15(5) is to enable the State to give equal opportunity to socially and educationally backward classes of citizens or to the Scheduled Castes and the Scheduled Tribes to study in all educational institutions other than minority educational institutions. It is to amplify the provisions of Article 15 of the Constitution as originally adopted and to provide equal opportunity in educational institutions, that clause (5) has been inserted in Article 15 by the Constitution (Ninety-third Amendment) Act, 2005. (Paras 21 and 22)

As the object of clause (5) of Article 15 of the Constitution is to provide equal opportunity to a large number of students belonging to SEBCs/SCs/STs to study in educational institutions and equality of opportunity is also the object of clauses (1) and (2) of Article 15 of the Constitution, it cannot be said that clause (5) of Article 15 of the Constitution is an exception or a proviso overriding Article 15 of the Constitution, but is an enabling provision to make equality of opportunity promised in the Preamble to the Constitution a reality. (Para 22)

*Ashoka Kumar Thakur* v. *Union of India*, (2008) 6 SCC 1, *followed*

*State of Kerala* v. *N.M. Thomas*, (1976) 2 SCC 310 : 1976 SCC (L&S) 227; *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385, *relied on*

**(2)** As clarified in *T.M.A. Pai Foundation*, (2002) 8 SCC 481, the right of private educational institutions to admit students of their choice and autonomy of administration will not be affected if a small percentage of students belonging to weaker and backward sections of the society were granted freeships or scholarships, if not granted by the Government. This was the charitable element of the right to establish and administer private educational institutions under Article 19(1)(*g*) of the Constitution. Hence, the identity of the right of private educational institutions under Article 19(1)(*g*) of the Constitution as interpreted by the Supreme Court in *T.M.A. Pai Foundation case* will not be destroyed by admissions from amongst educationally and socially backward classes of citizens as well as the Scheduled Castes and the Scheduled Tribes. (Paras 25 and 28)

*T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481, *followed*

**(3)** The reasoning in *P.A. Inamdar*, (2005) 6 SCC 537 that reservation policy for unaided educational institutions is not a reasonable restriction saved by Article 19(6) led to insertion of clause (5) of Article 15 which vests a power in the State, independent of and different from the regulatory power under clause (6) of Article 19. Hence the question for consideration is whether this new power vested in the State which enables the State to force the charitable element on a

private educational institution destroys the right under Article 19(1)(*g*) of the Constitution. (Para 27)

*P.A. Inamdar* v. *State of Maharashtra*, (2005) 6 SCC 537, *explained*

Whereas *T.M.A. Pai Foundation*, (2002) 8 SCC 481 and *P.A. Inamdar*, (2005) 6 SCC 537 establish the identity of the right of unaided private institutions under Art. 19(1)(g) with a voluntary element in matters of admission such that nominating students for admissions would be an unacceptable restriction in clause (6) of Article 19 of the Constitution, Parliament has stepped in and in exercise of its amending power under Article 368 of the Constitution inserted clause (5) in Article 15 to enable the State to make a law making special provisions for admission of socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes for their advancement and to a very limited extent affected the voluntary element of this right under Article 19(1)(*g*) of the Constitution. Hence, it cannot be held that the identity of the right of unaided private educational institutions under Article 19(1)(*g*) of the Constitution has been destroyed by clause (5) of Article 15 of the Constitution. (Paras 28 and 25)

*P.A. Inamdar* v. *State of Maharashtra*, (2005) 6 SCC 537, *held, constitutionally superseded on this point*

**(4)** As to whether the Ninety-third Amendment satisfies the width test, it is to be noted that the 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. Hence, 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. (Para 29)

However, 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. (Para 29)

**(5)** Law made in pursuance of Article 15(5) will have to satisfy Article 14 by keeping in view the distinction between aided and unaided educational institutions. So, 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 pursuance thereof. Thus clause (5) for Article 15 does not violate Article 14 on the score that it treats aided and unaided educational institutions 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. (Para 30)

**(6)** It is settled law that the minority character of an aided or unaided minority institution cannot be annihilated by admission of students from communities other than the minority community which has established the institution, and whether such admission to any particular percentage of seats will destroy the minority character of the institution or not will depend on a large number of factors including the type of institution. (Para 33)

Since 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 they 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. Hence, the exclusion of minority educational institutions from Article 15(5) is not violative of Article 14. (Para 34)

*T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481, *explained* and *followed*

*Ashoka Kumar Thakur* v. *Union of India*, (2008) 6 SCC 1, *followed*

**(7)** Again, 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. (Para 35)

*M. Ismail Faruqui* v. *Union of India*, (1994) 6 SCC 360; *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481, *relied on*

**(8)** The contention that the fundamental right under Article 21 read with Article 51-A(*j*) of the Constitution is violated by clause (5) of Article 15 of the Constitution because the striving towards excellence will not be possible if the institutions of excellence are made to admit students from SEBC/SC/ST classes, is not borne out by experience. Government institutions of excellence which admit students in seats reserved for backward classes of citizens and for the Scheduled Castes and the Scheduled Tribes have produced excellent students who have grown up to be good administrators, academicians, scientists, engineers, doctors and the like. Besides, the contention ignores the objective of securing to all citizens "fraternity assuring the dignity of the individual and the unity and integrity of the nation" set out in the Preamble. 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. Hence, Article 15(5) does not violate Article 21. (Paras 36 and 37)

It is therefore held 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. Hence, the Constitution (Ninety-third Amendment) Act, 2005 inserting clause (5) of Article 15 of the Constitution is valid. (Paras 38 and 56)

Opinion of Bhandari, J. in *Ashoka Kumar Thakur* v. *Union of India*, (2008) 6 SCC 1, *overruled on this point*

*Society for Unaided Private Schools of Rajasthan* v. *Union of India*, (2012) 6 SCC 102; *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225; *Minerva Mills Ltd.* v. *Union of India*, (1980) 2 SCC 591; *Minerva Mills Ltd.* v. *Union of India*, (1980) 3 SCC 625; *I.R. Coelho* v. *State of T.N.*, (2007) 2 SCC 1; *Mohini Jain* v. *State of Karnataka*, (1992) 3 SCC 666; *M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013;

*Boyd* v. *United States*, 29 L Ed 746 : 116 US 616 (1886); *Dwarkadas Shrinivas* v. *Sholapur Spg. & Wvg. Co. Ltd.*, AIR 1954 SC 119; *Ahmedabad St. Xavier's College Society* v. *State of Gujarat*, (1974) 1 SCC 717; *Islamic Academy of Education* v. *State of Karnataka*, (2003) 6 SCC 697; *Kerala Education Bill, 1957, In re*, AIR 1958 SC 956; *St. Stephen's College* v. *University of Delhi*, (1992) 1 SCC 558, *referred to*

I. **Constitution of India — Arts. 19(1)(a) to (g) & (2) to (6) — Voluntary element though present in all the freedoms enumerated in Art. 19(1), held, is subject to reasonable restrictions under Arts. 19(2) to (6)**

*Held* :

All freedoms under which Article 19(1) of the Constitution, including the freedom under Article 19(1)(*g*), have a voluntary element but this voluntariness in all the freedoms in Article 19(1) of the Constitution can be subjected to reasonable restrictions imposed by the State by law under Articles 19(2) to (6) of the Constitution. Hence, the voluntary nature of the right under Article 19(1)(*g*) of the Constitution can be subjected to reasonable restrictions imposed by the State by law under Article 19(6) of the Constitution. (Para 28)

***Constitutionality of 86th Amendment inserting Article 21-A and Right of Children to Free and Compulsory Education Act, 2009***

J. **Constitution of India — Arts. 21-A, 12 & 368 and Art. 19(1)(g) and Art. 30(1) — Held, insertion of Art. 21-A constitutional — Basic structure or framework of the Constitution not altered by Constitution (Eighty-sixth Amendment) Act, 2002 — Whether "State" in Art. 21-A includes private unaided educational institutions and private individuals — Thereby whether right under Art. 19(1)(g) of private unaided educational institutions abrogated — Applicability of functional test — Held, Art. 21-A casts an obligation only on the State and its instrumentalities and not on private unaided educational institutions — A new power, other than under Art. 19(6), has been vested in the State to enable it to discharge its obligation by making a law under Art. 21-A — However, Art. 21-A has to be harmoniously construed with Art. 19(1)(g) and Art. 30(1) — Thus, there is nothing in Art. 21-A which conflicts with either the right of private unaided schools under Art. 19(1)(g) or the right of minority schools under Art. 30(1) of the Constitution, but law made under Art. 21-A may affect these rights under Arts. 19(1)(g) and 30(1) — Admission of a small percentage of students may be permissible and would not infringe rights under Art. 19(1)(g) of such institutions — Element of voluntariness in Art. 19(1)(g) can be subjected to law in consonance with Art. 19(6) — However, the power under Art. 21-A of the Constitution vesting in the State cannot extend to making any law which will abrogate the right of the minorities to establish and administer schools of their choice — Words and Phrases — "State"**

K. **Education and Universities — Right of Children to Free and Compulsory Education Act, 2009 — Ss. 1(4), 2(n)(ii) & (iv), 12(1)(c) and 18(3) (as amended by Act 30 of 2012) — Constitutionality of — Held, are consistent with the fundamental right under Art. 19(1)(g) of private unaided educational institutions — But insofar as the RTE Act applies to minority schools, aided or unaided, it offends Art. 30(1) and is ultra vires the Constitution — *Society for Unaided Private Schools of Rajasthan* v. *Union of***

***India*, (2012) 6 SCC 1, overruled on this point, but affirmed on all other points — Interpretation of Statutes — External Aids — SOR relied upon**

*Held* :

The word "State" in Article 21-A can only mean the "State" which can make the law. Hence, the constitutional obligation under Article 21-A of the Constitution is on the State to provide free and compulsory education to all children of the age of 6 to 14 years and not on private unaided educational institutions. Article 21-A, however, states that the State shall by law determine the "manner" in which it will discharge its constitutional obligation under Article 21-A. Thus, a new power was vested in the State to enable the State to discharge this constitutional obligation by making a law. However, Article 21-A has to be harmoniously construed with Article 19(1)(*g*) and Article 30(1) of the Constitution. There is nothing in Article 21-A which conflicts with either the right of private unaided schools under Article 19(1)(*g*) or the right of minority schools under Article 30(1) of the Constitution, but the law made under Article 21-A may affect these rights under Articles 19(1)(*g*) and 30(1). The law so made by the State should not, therefore, be such as to abrogate the right of unaided private educational schools under Article 19(1)(*g*) of the Constitution or the right of the minority schools, aided or unaided, under Article 30(1) of the Constitution. (Para 49)

*Venkataramana Devaru* v. *State of Mysore*, AIR 1958 SC 255, *relied on*

However, admission of a small percentage of students belonging to weaker sections of the society by granting them freeships or scholarships, if not granted by the Government and the admission to some of the seats to take care of poorer and backward sections of the society may be permissible and would not be inconsistent with the rights under Article 19(1)(*g*) of the Constitution. The element of voluntariness under Article 19(1)(g) can be subjected to law made under the powers available to the State under clause (6) of Article 19. (Paras 50 and 28)

*P.A. Inamdar* v. *State of Maharashtra*, (2005) 6 SCC 537; *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481, *reconciled on this point*

Hence, by the Constitution (Eighty-sixth Amendment) Act, a new power was made available to the State under Article 21-A of the Constitution to make a law determining the manner in which it will provide free and compulsory education to the children of the age of six to fourteen years as this goal contemplated in the directive principles in Article 45 before this constitutional amendment could not be achieved for fifty years. This additional power vested by the Constitution (Eighty-sixth Amendment) Act, 2002 in the State is independent and different from the power of the State under clause (6) of Article 19 of the Constitution and has affected the voluntariness of the right under Article 19(1)(*g*) of the Constitution. By exercising this additional power, the State can by law impose admissions on private unaided schools and so long as the law made by the State in exercise of this power under Article 21-A of the Constitution is for the purpose of providing free and compulsory education to the children of the age of 6 to 14 years and so long as such law forces admission of children of poorer, weaker and backward sections of the society to a small percentage of the seats in private educational institutions to achieve the constitutional goals of equality of opportunity and social justice set out in the Preamble of the Constitution, such a law would not be destructive of the right of the private unaided educational institutions under Article 19(1)(*g*) of the Constitution. (Para 51)

It is clear from the Statement of Objects and Reasons of the Bill which was enacted as the 2009 Act that the 2009 Act intended to achieve the constitutional goal of equality of opportunity through inclusive elementary education to all and also intended that private schools which did not receive government aid should also take the responsibility of providing free and compulsory education of satisfactory quality to children from disadvantaged and weaker sections. (Para 52)

Under Section 12(1)(*c*) read with Section 2(*n*)(*iv*) of the Act, an unaided school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority is required to admit in Class I, to the extent of at least twenty-five per cent of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education till its completion. And under Section 12(2) of the 2009 Act such a school shall be reimbursed expenditure so incurred by it to the extent of per-child-expenditure incurred by the State, or the actual amount charged from the child, whichever is less, in such manner as may be prescribed. Thus, ultimately it is the State which is funding the expenses of free and compulsory education of the children belonging to weaker sections and several groups in the neighbourhood, which are admitted to a private unaided school. These provisions of the 2009 Act, are for the purpose of providing free and compulsory education to children between the age group of 6 to 14 years and are consistent with the right under Article 19(1)(*g*) of the Constitution, as interpreted by the Supreme Court in *T.M.A. Pai Foundation*, (2002) 8 SCC 481 and are meant to achieve the constitutional goals of equality of opportunity in elementary education to children of weaker sections and disadvantaged groups in our society. (Para 53)

*T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481, *relied on*

However, the power under Article 21-A of the Constitution vesting in the State cannot extend to making any law which will abrogate the right of the minorities to establish and administer schools of their choice. If the 2009 Act is made applicable to minority schools, aided or unaided, the right of the minorities under Article 30(1) of the Constitution will be abrogated. Therefore, the 2009 Act insofar it is made applicable to minority schools referred in clause (1) of Article 30 of the Constitution is ultra vires the Constitution. Thus, the majority judgment of the Supreme Court in *Society for Unaided Private Schools of Rajasthan*, (2012) 6 SCC 1 insofar as it holds that the 2009 Act is applicable to aided minority schools is not correct. (Paras 54 and 55)

*Society for Unaided Private Schools of Rajasthan* v. *Union of India*, (2012) 6 SCC 1, *overruled on this point, but affirmed on all other points*

Hence, there in no merit in the submissions made on behalf of the non-minority private schools that Article 21-A of the Constitution and the 2009 Act violate their right under Article 19(1)(*g*) of the Constitution. Thus, the Constitution (Eighty-sixth Amendment) Act, 2002 inserting Article 21-A of the Constitution does not alter the basic structure or framework of the Constitution and is constitutionally valid. (Paras 53 and 56)

*P.D. Shamdasani* v. *Central Bank of India Ltd.*, AIR 1952 SC 59; *Vidya Verma* v. *Shiv Narain Verma*, AIR 1956 SC 108 : 1956 Cri LJ 283, *cited*

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1. (2012) 6 SCC 102, *Society for Unaided Private Schools of Rajasthan* v. *Union of India* 243*a*, 243*a-b*
2. (2012) 6 SCC 1, *Society for Unaided Private Schools of Rajasthan* v. *Union of India* **(overruled on this aspect)** 244*a-b*, 261*d-e*, 262*a*, 262*c*, 263*f*, 264*b*, 265*c-d*, 270*g-h*
3. (2008) 6 SCC 1, *Ashoka Kumar Thakur* v. *Union of India* **(overruled on this point)** 243*e-f*, 245*g*, 249*g*, 250*g*, 252*e-f*, 259*e-f*, 261*a*
4. (2007) 2 SCC 1, *I.R. Coelho* v. *State of T.N.* 245*e*
5. (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013, *M. Nagaraj* v. *Union of India* 248*a*
6. (2005) 6 SCC 537, *P.A. Inamdar* v. *State of Maharashtra* 246*e-f*, 250*c-d*, 254*a*, 254*b-c*, 254*f-g*, 255*c-d*, 255*f*, 263*e-f*, 267*f*
7. (2003) 6 SCC 697, *Islamic Academy of Education* v. *State of Karnataka* 250*b-c*, 250*c*
8. (2002) 8 SCC 481, *T.M.A. Pai Foundation* v. *State of Karnataka* 244*f-g*, 246*b-c*, 246*g-h*, 248*a-b*, 248*d*, 249*a*, 249*d-e*, 250*a-b*, 250*b-c*, 250*c-d*, 250*f*, 252*g*, 253*g*, 254*a-b*, 254*b-c*, 254*c*, 254*d*, 255*c*, 255*c-d*, 255*d*, 255*f*, 256*d*, 258*a-b*, 260*b*, 260*b-c*, 263*c*, 263*e-f*, 264*a*, 265*a*, 265*a-b*, 267*e-f*, 267*f-g*, 269*d*
9. (1994) 6 SCC 360, *M. Ismail Faruqui* v. *Union of India* 249*f*, 259*g*
10. (1992) 3 SCC 666, *Mohini Jain* v. *State of Karnataka* 247*a-b*
11. (1992) 1 SCC 558, *St. Stephen's College* v. *University of Delhi* 258*d*
12. 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385, *Indra Sawhney* v. *Union of India* 252*d-e*
13. (1980) 3 SCC 625, *Minerva Mills Ltd.* v. *Union of India* 244*g-h*, 245*e*, 247*e*, 247*e-f*, 248*f*
14. (1980) 2 SCC 591, *Minerva Mills Ltd.* v. *Union of India* 245*c*
15. (1976) 2 SCC 310 : 1976 SCC (L&S) 227, *State of Kerala* v. *N.M. Thomas* 252*d*, 252*e*
16. (1974) 1 SCC 717, *Ahmedabad St. Xavier's College Society* v. *State of Gujarat* 249*c*
17. (1973) 4 SCC 225, *Kesavananda Bharati* v. *State of Kerala* 244*d*, 245*e-f*, 269*f-g*, 269*g*
18. AIR 1958 SC 956, *Kerala Education Bill, 1957, In re* 254*c*, 264*a*
19. AIR 1958 SC 255, *Venkataramana Devaru* v. *State of Mysore* 267*b-c*
20. AIR 1956 SC 108 : 1956 Cri LJ 283, *Vidya Verma* v. *Shiv Narain Verma* 262*f*
21. AIR 1954 SC 119, *Dwarkadas Shrinivas* v. *Sholapur Spg. & Wvg. Co. Ltd.* 248*e-f*
22. AIR 1952 SC 59, *P.D. Shamdasani* v. *Central Bank of India Ltd.* 262*e-f*
23. 29 L Ed 746 : 116 US 616 (1886), *Boyd* v. *United States* 248*d-e*

**SUMMARY OF ARGUMENTS**



## *I. Mr Anil B. Divan, Senior Advocate, for the petitioners*

**I.**

***The issue***

**1.** Whether the Constitution (Ninety-third Amendment) Act, 93 of 2005 which amends Article 15 by inserting clause (5) alters the basic structure or framework of the Constitution and is therefore illegal, invalid, unconstitutional and ultra vires the constituent power and void.

**II.**

***Questions to be considered***

**2.** The following questions may be considered in answering the above issue:

(*1*) Has the amendment tilted the balance between Parts III (Fundamental Rights) and IV (Directive Principles)? Is the Amendment excessive insofar as unaided non-minority institutions are concerned?

(*2*) Has it crossed the limits of constituent power (under Article 368) by (*a*) violating the Equality clause; (*b*) by undermining Secularism; and (*c*) nullifying Article 19(1)(*g*).

(*3*) Why the discrimination between unaided non-minority and minority institutions? Why should not the latter discharge the responsibility of free and compulsory education to children? Why are unaided minority educational institutions favoured? What is the rational differentia having a reasonable nexus with the object to support their classification regarding this area?

(*4*) Some subsidiary questions may also be considered:

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(*i*) What is the ratio of the *Minerva Mills case* and to what extent is it binding?

(*ii*) What is the ratio of *I.R. Coelho case* and to what extent is it binding?

(*iii*) What is the ratio of *T.M.A. Pai* read with *Inamdar* and to what extent are they binding?

(*5*) What is the meaning of the word "alter" and has the basic structure or framework been altered by the amendment by damaging, destroying the essential features of the Constitution.

(*6*) Is there reverse discrimination qua unaided, non-minority institutions?

(*7*) In view of Article 21-A, can the State by law cast an obligation on private unaided institutions (minority and non-minority) to give free and compulsory education for children (6 to 14 years)?

**III.**

***Ingredients of Article 15(5)***

**3.** (*i*) Applies to all educational institutions (schools and medical engineering or higher technical institutions);

(*ii*) Does not apply to aided or unaided minority institutions recognised by Article 30(1)

(*iii*) Applies to aided and unaided non-minority institutions;

(*iv*) Does not provide for either quantitative or qualitative limitations;

(*v*) SEBC — open-ended and vague depends on each State;

(*vi*) Equality principles [Article 15(1)] nullified/abrogated;

(*vii*) Fundamental rights under Article 19(1)(*g*) nullified/abrogated;

(*viii*) The secularism principle is abrogated/overturned by wholesale exclusion of religious minority institutions (aided and unaided).

**IV.**

***The width and the consequence***

**4.** Illustrations of the width and applicability of Article 15(5):

***Illustration I***

**4.1.** Educational institutions may be schools or professional/technical educational institutions (for short "educational institutions"). Minority educational institutions may be aided or unaided. A minority educational institution may be established and administered by a religious minority or a linguistic minority. For example, a "Kannada" institution in places other than Karnataka would be a linguistic minority educational institution. If it runs an educational institution viz. a school or professional education institution e.g. (Medicine or Engineering) outside Karnataka and it is *unaided*, it will fall within the exception in Article 15(5) "other than minority educational institution" As a result, a Kannada minority institution which is *unaided* will

**Summary of Arguments**

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not be compelled to admit students of SC/ST and SEBC in States other than Karnataka being protected by Article 15(5) exception. However, if it runs an unaided non-minority educational institution in Karnataka it will not fall within the exception in Article 15(5). This position will apply to all linguistic minorities. All unaided linguistic institutions outside their home States (where they are a linguistic majority) will be minority institutions.

***Illustration II***

**4.2.** As far as religious minorities are concerned, by and large Hindus are in a majority in all States except Punjab and some of the States in the North-East. Non-minority educational institutions established and administered by the majority community all over India (except in Punjab and some of the North-East States) will be subject to Article 15(5) and will have to implement the applicable reservations.

***Illustration III***

**4.3.** Muslims, Sikhs (except Punjab), Buddhists, Jews are in a minority in all States. Therefore, unaided religious minority educational institutions will have the benefit of the exception in Article 15(5) and will not be compelled to admit SC/ST and SEBC students. It is now settled that these educational institutions can impart general secular education.

***Illustration IV***

**4.4.** Similarly, all Christian educational institutions (except in some North-East States where they may be in majority) will enjoy the benefit of the exception mentioned in Article 15(5) and will not be compelled to admit SC/ST and SEBC students. Thus, Article 15(5) clearly violates Article 14 against the majority (non-minority) institutions subjecting them to a "quota" regime all over India except a few States e.g. Punjab and North-East States.

***Illustration V***

**4.5.** The fundamental right under Article 19(1)(*g*) applies to establishing and administering an educational institution in view of *T.M.A. Pai judgment* because even though not a trade, business or profession such activity is an occupation. However, Article 19(1)(*g*) right is subject to the making of any law imposing reasonable restrictions on the exercise of the right, in the interests of the general public. In view of the obliteration of Article 19(1)(*g*), unreasonable restrictions can be imposed and restrictions can be imposed which are not in the interests of the general public. By reason of Article 15(5) the rights of non-minority unaided private educational institutions (including schools or professional or technical educational institutions) under Article 19(1)(*g*) is wholly abrogated.

***Illustration VI***

**4.6.** In view of the complete abrogation of Article 19(1)(*g*), the legislature (Parliament as well in the States) can, by law, provide for 90% or even more of admissions in favour of SC/ST and SEBC citizens. All fetters

**Summary of Arguments**

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on legislative power are removed. The field of legislative activity is not defined either in terms of quantity (a percentage basis) or in terms of quality (excluding economically well off). Legislature can act unreasonably while purporting to act in public interest.

[*Note*.—There are no constitutional fetters/limitations as formulated in *M. Nagaraj*, (2006) 8 SCC 212, para 121 at p. 278 viz. backwardness, inadequacy of representation and efficiency in administration. Subsequently, in *Suraj Bhan Meena* v. *State of Rajasthan*, (2011) 1 SCC 467 and in *U.P. State Power Corporation* v. *Rajesh Kumar*, (2012) 7 SCC 1, this Court struck down reservation policies on the ground that it ran counter to the dictum in *M. Nagaraj* (*See* para 87 at p. 39, *per* Dipak Misra, J.)]

**5.** The phrase socially and educationally backward class (SEBC) is vague and open-ended. It can apply to indeterminate classes of citizens that suit the legislature. In other words by law, unreasonable restrictions can be imposed, even perverse restrictions can be imposed and unaided non-minority institutions will have to suffer grave injustice and blatant violation of Article 14.

**6.** However, such unreasonable restrictions will not apply to Muslim, Christian or other minority institutions and the entire burden of Article 15(5) will fall on the majority religious community (being non-Muslim, non-Christian, non-Sikhs, non-Buddhists, etc.)

**7.** This is "reverse discrimination" at its worst obviously for extraneous reasons.

**V.**

***Brief propositions****

**8.1.** 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. (Para 54 page 653);

**8.2.** The Indian Constitution is founded on the bedrock of the balance between Parts III and IV. To give absolute primacy to one over the other is to disturb the harmony of the Constitution. This harmony and balance between the fundamental rights and directive principles is an essential feature of the basic structure of the Constitution. (Para 56 page 654 of *Minerva Mills*);

**8.3.** The goals set out in Part IV have, therefore, to be achieved without the abrogation of the means provided for by Part III. Parts III and IV together constitute the core of our Constitution. (Para 57 page 654 of *Minerva Mills*);

**8.4.** On any reasonable interpretation, there can be no doubt that by the amendment introduced by Section 4 of the 42nd Amendment, Articles 14 and 19 stand abrogated at least in regard to the category of laws described in Article 31-C. (Para 58 page 655)

* The references at the end of the propositions below are to the *Minerva Mills case*, (1980) 3 SCC 625, which is discussed in detail in paras 24 et seq., below.

**Summary of Arguments**

**I. Mr Anil B. Divan, Senior Advocate, for the petitioners** *(contd.)*

**8.5.** A total deprivation of the fundamental rights, even in a limited area, can amount to abrogation of a fundamental right just as partial deprivation in every area can. (Para 59 page 655 of *Minerva Mills*);

**8.6.** Articles 14, 19 and 21 form a golden triangle and if two sides are removed the basic framework will be altered. (Para 74 pp. 660 of *Minerva Mills*);

**8.7.** The power to take away the protection of Article 14 is the power to discriminate without a valid basis for classification. By a long series of decisions this Court has held that Article 14 forbids class legislation but it does not forbid classification. The purpose of withdrawing the protection of Article 14, therefore, can only be to acquire the power to enact class legislation. (Para 61 page 656);

**8.8.** The protection to minorities under Article 30(1) is not to give minorities favoured treatment. It is to ensure equality with other institutions. *St. Xavier's case*, (1974) 1 SCC 717, Para 9 page 743; Para 77 page 772 and *T.M.A. Pai*, (2002) 8 SCC 481 Para 138, pp. 578-579.

**8.9.** By wholesale exemption of minority religious or linguistic educational institutions (aided and unaided), these institutions are treated in a favoured manner directly contrary to the principles laid down in *St. Xavier's case* and *T.M.A. Pai case*. The principle of secularism which is part of the basic structure of the Constitution is therefore, completely overturned.

***Re: Secularism***

***(i)*** (1994) 3 SCC 1 (9 Judges) — *S.R. Bommai* v. *UOI*; Ahmadi, J. (Paras 25-30, pp. 75-79); Sawant, J. (paras 145 to 149, pp. 143-147); K. Ramaswamy, J. (para 183, pp. 167-168 and para 252, pp. 206-207); Jeevan Reddy, J. (para 304, pp. 232-234 and para 434, Point 10, page 298);

***(ii)*** (1994) 6 SCC 360; *Ismail Faruqui* v. *UOI* — the *Ayodhya Babri Masjid case* — Verma, J. (paras 33-38, pp. 398-404);

***(iii)*** (2002) 8 SCC 481 — *T.M.A. Pai* v. *State of Karnataka* — ( para 138, pp. 578-579; paras 156-161, pp. 586-587); para 402, pp. 673-674 (Variava, J.).

**9.** The following paragraphs/passages in *Minerva Mills* v. *UOI*, (1980 ) 3 SCC 625 are relied upon:

Para 12 page 641; para 25 page 645; para 26 page 645; para 28, pp. 645-646; para 40, p. 649; para 41, p. 650; para 42, p. 650; para 45, p. 650; para 56, p. 654; para 57, p. 654; para 58, p. 655; para 59, p. 655; para 68, p. 658; para 70, p. 659; para 74, p. 660.

**10.** The following paras/passages from *I.R. Coelho* v. *State of T.N.*, (2007) 2 SCC 1 are relied upon:

Para 49, p. 80; para 55, p. 82; para 56, p. 82; para 101, p. 98; para 106, p. 100; para 108, p. 101; para 109, p. 101; para 118, p. 103; para 124, p. 104; para 128, p. 105; para 129, p. 105; para 139, p. 108;

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para 140, p. 108; para 142, p. 108; para 147, p. 109; para 149, p. 110; para 150, p. 111.

**VI.**

***Submissions***

**11.** The Constitution (Ninety-third Amendment) Act 93 of 2005 by inserting clause (5) in Article 15 has:

(*a*) obliterated Article 19(1)(*g*) (from the field where it operates) directly and overtly;

(*b*) obliterated Article 14 indirectly and covertly where minority unaided institutions operate, by exempting them while not exempting unaided non-minority educational institutions;

(*c*) in other words, it is a total deprivation of the fundamental rights under Article 19(1)(*g*) and Article 14 in a limited area so far as unaided non-minority educational institutions are concerned.

**12.** The summary of the judgment of the majority signed by nine Judges out of thirteen in the *Kesavananda Bharati case* protects the basic structure in the following words:

"Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution."

[*Note*.—This summary has been accepted as correct in the *Minerva Mills case*, (1980) 3 SCC 625 at para 12, p. 641.]

**13.** It is submitted that it is beyond the powers of Parliament under Article 368 to alter the basic structure or framework of the Constitution. Phraseology like damaging or destroying essential features or damaging or destroying or destructive of basic structure are only a method of arriving at the final conclusion as to whether there is an *alteration* in the basic structure or framework of the Constitution.

**14.** An alteration of the basic structure is sufficient. Destruction is not necessary. However, destruction/obliteration of essential features may result in alteration.

**15.** The effect of the exception in Article 15(5) is to give a favoured position to minority unaided educational institutions as compared to non-minority unaided educational institutions.

**16.** From *St. Xavier's case*, (1974) 1 SCC 717, the relevant passages are extracted below:

"Every section of the public, the majority as well as minority has rights in respect of religion as contemplated in Articles 25 and 26 and rights in respect of language, script, culture as contemplated in Articlen 29. The whole object of conferring the right on minorities under Article 30 is to ensure that there will be equality between the majority and the minority. If the minorities do not have such special protection they will be denied equality." (Para 9 at p. 743)

**Summary of Arguments**

**I. Mr Anil B. Divan, Senior Advocate, for the petitioners** *(contd.)*

* * *

"The idea of giving some special rights to the minorities i.e. Article 30(1) is not to have a kind of privileged or pampered section of the population but to give to the minorities a sense of security and a feeling of confidence." (Para 77, p. 772)

* * *

"Special rights for minorities were designed not to create inequality. Their real effect was to bring about equality by ensuring the preservation of the minority institutions and by guaranteeing to the minorities autonomy in the matter of the administration of those institutions. The differential treatment for the minorities by giving them special rights is intended to bring about an equilibrium, so that the ideal of equality may not be reduced to a mere abstract idea but should become a living reality and result in true, genuine equality, an equality not merely in theory but also in fact. …" (Para 77, p. 772)

**17.** This concept of equality and equilibrium between minority institutions (religious or linguistic), and non-minority institutions has been reiterated in *T.M.A. Pai Foundation*, (2002) 8 SCC 481.

"Secularism and equality being two of the basic features of the Constitution, Article 30(1) ensures protection to the linguistic and religious minorities, thereby preserving the secularism of the country. …. Any law or rule or regulation that would put the educational institutions run by the minorities at a disadvantage when compared to the institutions run by the others will have to be struck down. At the same time, there also cannot be any reverse discrimination. It was observed in *St. Xavier College case*:

"*The whole object of conferring the right on minorities under Article 30 is to ensure that there will be equality between the majority and the minority. If the minorities do not have such special protection they will be denied equality.*"

In other words, the essence of Article 30(1) is to ensure equal treatment between the majority and the minority institutions. No one type or category of institution should be disfavoured or, for that matter, receive more favourable treatment than another. Laws of the land, including rules and regulations, must apply equally to the majority institutions as well as to the minority institutions. The minority institutions must be allowed to do what the non-minority institutions are permitted to do." (Para 138, pp. 578-579)

***Re: Article 15(5) exemption and Article 30(1) classification***

**18.** The "Constitutional classification" of minority institutions made under Article 30(1) was with a specific object as explained in many cases *Ahmedabad St. Xavier's* v. *State of Gujarat*, (1974) 1 SCC 717, *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481. The object is to give

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protection to minorities to establish and administer institutions because of their numerical handicap and to instil in them a sense of security and confidence.

**19.** That constitutional classification under Article 30(1) has both a history and a context. The object of Article 15(5) is to promote amongst SC/ST/SEBC education by providing reservation in educational institutions which obligation the State is unable to discharge (Article 21-A).

***Illustrations***

**20.** In support of the object of legislation/executive order to give relief to below poverty line (BPL) citizens, can it be said that such relief can only be given to minority educational institutions because of the "constitutional classification" under Article 30(1)? The object here is to give relief to the poor. There is no intelligible differentia having a rational nexus to the object sought to be achieved. Thus, it is inappropriate to adopt the constitutional classification to support it.

**21.** A law/rule can be made that teachers cannot inflict corporal punishment on students in schools. Can exemption be given because of the "constitutional classification" under Article 30(1) for minority educational institutions? Enlarging on this point can a fine be imposed on the teacher up to Rs 50,000 in a non-minority institution but a fine only of Rs 10,000 on a teacher in a minority educational institution? Here again the "constitutional classification" breaks down because the object is to protect the child against corporal punishment and the classification does not have an intelligible differentia having a rational nexus to the object. Therefore, the classification cannot be supported.

**22.** A law/regulation may provide that toilet facilities on each floor of school buildings be available with access to disabled/handicapped child. Can an exception be made in favour of minority institutions on the ground of "constitutional classification" under Article 30(1)? The answer is clear that such a classification cannot stand because there is no intelligible differentia having a rational nexus to the object of the provision.

**23.** In other words these illustrations show that the object of the provision of law is most important. In the present case the object of Article 15(5) is to promote education amongst SC/ST and SEBC by providing reservation in educational institutions. Therefore, exempting minority educational institutions is a classification which does not fulfil the test of nexus.

***Minerva Mills* v. *Union of India, (1980) 3 SCC 625***

***Background facts***

**24.** In this case the Constitution (42nd Amendment) Act was passed during the Internal Emergency. Two amendments were the subject-matter of attack. By Section 4, Article 31-C was amended to read that "no law giving effect to the policy of the State towards securing" all or any of the principles laid down in Part IV shall be deemed to be void on the ground that it is

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inconsistent with or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31. The original Article 31-C which was upheld in *Kesavananda Bharati* mentioned "the principles specified in clause (*b*) or clause (*c*) of Article 39".

**25.** Secondly, as far as Article 368 (the amending power) was concerned, Section 55 of the Constitution 42nd Amendment Act enacted clauses (4) and (5) which provided that "no amendment of this Constitution would be called in question in any court on any ground and that there will be no limitation on the constituent power of Parliament to amend or repeal the provisions of the Constitution" [clause (5)].

***Propositions/observations/signposts (paras and pages as in SCC)***

**26.** The summary of various judgments in *Kesavananda Bharati* signed by nine out of thirteen Judges correctly reflects the majority view. (Para 12 at p. 641.)

**27.** The question for consideration is whether Section 4 of the 42nd Amendment Act has brought about a result which is basically and fundamentally different from the one arising under the unamended Article. (P. 645, para 25.)

***Petitioner's contentions***

**28.** The protection of the amended Article will therefore be available to every legislative action under the sun. Article 31-C abrogates the right to equality guaranteed by Article 14, which is the very foundation of a republican form of government and is by itself a basic feature of the Constitution. (P. 645, para 26.)

**29.** Section 4 of the 42nd Amendment Act has robbed the fundamental rights of their supremacy and made them subordinate to the directive principles of State policy as if there were a permanent emergency in operation. While Article 359 suspends the enforcement of fundamental rights during the emergency, Article 31-C virtually abrogates them in normal times. (Para 28, p. 645.)

**30.** Thus, apart from destroying one of the basic features of the Constitution, namely, the harmony between Parts III and IV, Section 4 of the 42nd Amendment Act denies to the people the blessings of a free democracy and lays the foundation for the creation of an authoritarian State. (Para 28, pp. 645-46.)

The above points were the contentions of Palkhivala.

***Observations — Findings — Propositions/signposts***

**31.** The main controversy in these petitions centres around the question whether the directive principles of State policy contained in Part IV can have the primacy over the fundamental rights conferred by Part III of the Constitution. That is the heart of the matter. (Para 40, p. 649.)

**32.** The competing claims of Parts III and IV constitute the pivotal point of the case. The 42nd Amendment Act by its Section 4 thus subordinates the

**Summary of Arguments**

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fundamental rights conferred by Articles 14 and 19 to the directive principles. (Para 40, p. 649.)

**33.** It is only if the rights conferred by these two Articles (Article 14 and 19) are not a part of the basic structure of the Constitution that they can be allowed to be abrogated by a constitutional amendment. If they are a part of the basic structure, they cannot be obliterated out of existence in relation to a category of laws described in Article 31-C or, for the matter of that, in relation to laws of any description whatsoever, passed in order to achieve any object or policy whatsoever. This will serve to bring the point that a total emasculation of the essential features of the Constitution, is by the ratio in *Kesavananda Bharati* not permissible to Parliament. (Para 41, p. 650.)

**34.** Therefore, the importance of directive principles in the scheme of our Constitution cannot be overemphasised. (Para 42, p. 650.)

**35.** But there is another competing constitutional interest which occupies an equally important place in that scheme. That interest is reflected in the provisions of Part III which confer fundamental rights, some on citizens as Articles 15, 16 and 19 do and some on all persons alike as Articles 14, 20, 21 and 22 do. (Para 43, p. 650.)

***Observations — Findings — Propositions/signposts***

**36.** Granville Austin's observations brings out the true position that Parts III and IV are like two wheels of a chariot, one no less important than the other. You snap one and the other will lose its efficacy. In other words, the Indian Constitution is founded on the bedrock on the balance between Parts III and IV. To give absolute primacy to one over the other is to disturb the harmony of the Constitution. This harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the Constitution. (Para 56, p. 654.)

**37.** One of the faiths of our founding fathers was the purity of means. The goals set out in Part IV have, therefore, to be achieved without the abrogation of the means provided for by Part III. It is in this sense that Parts III and IV together constitute the core of our Constitution and combine to form its conscience. Anything that destroys that balance between the two parts will ipso facto destroy an essential element of the basic structure of our Constitution. (Para 57, p. 654.)

**38.** On any reasonable interpretation, there can be no doubt that by the amendment introduced by Section 4 of the 42nd Amendment Act, Articles 14 and 19 stand abrogated at least in regard to the category of laws described in Article 31-C. (Page 655 para 58.)

**39.** A total deprivation of fundamental rights, even in a limited area, can amount to abrogation of a fundamental right just as partial deprivation in every area can. (Para 59, p. 655.)

**40.** The fact therefore, that some laws may fall outside the scope of Article 31-C is no answer to the contention that the withdrawal of protection

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of Articles 14 and 19 from a large number of laws destroys the basic structure of the Constitution. (Page 655 para 59.)

**41.** In fact, though the clear intendment of Article 31-C is to shut out all judicial review, the argument of the learned Additional Solicitor General calls for doubly or trebly extensive judicial review than is even normally permissible to the courts. (Para 68, p. 658.)

**42.** If by constitutional amendment, the application of Articles 14 and 19 is withdrawn from a defined field of legislative activity, which is reasonably in public interest, the basic framework of the Constitution may remain unimpaired. But if the protection of those Articles is withdrawn in respect of an uncatalogued variety of laws, fundamental freedoms will become a parchment in a glass case to be viewed as a matter of historical curiosity. (Para 70, p. 659.)

**43.** Three Articles of our Constitution, and only three, stand between the heaven of freedom into which Tagore wanted his country to awake and the abyss of unrestrained power. They are Articles 14, 19 and 21. Article 31-C has removed two sides of that golden triangle which affords to the people of this country an assurance that the promise held forth by the Preamble will be performed by ushering an egalitarian era through the discipline of fundamental rights, that is, without emasculation of the rights to liberty and equality which alone can help preserve the dignity of the individual. (Para 74, p. 660.)

***I.R. Coelho* v. *State of T.N., (2007) 2 SCC 1***

***Background facts***

**44.** In this case certain State enactments were inserted in the Ninth Schedule protected by Article 31-B by several constitutional amendments. The broad question was whether on and after 24-4-1973 (date of judgment in *Kesavananda Bharati*) it was permissible for Parliament under Article 31-B to immunise legislation and to what extent the basic structure doctrine can be applied.

***Points/observations/propositions/signposts***

**45.** The goals set out in Part IV have, therefore, to be achieved without the abrogation of the means provided for by Part III. It is in this sense that Parts III and IV together constitute the core of our Constitution and combine to form its conscience. *Anything that destroys the balance between the two parts will ipso facto destroy an essential element of the basic structure of our Constitution.* (Para 49, p. 80.)

**46.** A total deprivation of fundamental rights, even in a limited area, can amount to abrogation of a fundamental right just as partial deprivation in every area can. (Para 49, p. 80.)

**47.** For determining whether a particular feature of the Constitution is part of its basic structure, one has perforce to examine in each individual case the place of the particular feature in the scheme of our Constitution, its object

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and purpose, and the consequences of its denial on the integrity of the Constitution as a fundamental instrument of the country's governance. (Para 55, p. 82.)

**48.** The fundamental rights have in fact proved to be the most significant constitutional control on the Government, particularly legislative power. (Page 56, p. 82.)

**49.** If the doctrine of basic structure provides a touchstone to test the amending power or its exercise, there can be no doubt and it has to be so accepted that Part III of the Constitution has a key role to play in the application of the said doctrine. (Para 100, p. 98.)

**50.** By enacting fundamental rights and directive principles which are negative and positive obligations of the States, the Constituent Assembly made it the responsibility of the Government to adopt a middle path between the individual liberty and public good. Fundamental rights and directive principles have to be balanced. That balance can be tilted in favour of the public good. The balance, however, cannot be overturned completely overriding individual liberty. This balance is an essential feature of the Constitution. (Para 101, p. 98.)

**51.** Parliament has power to amend the provisions of Part III so as to abridge or take away the fundamental rights, but that power is subject to the limitation of basic structure doctrine. Whether, the impact of such amendments results in violation of basic structure has to be examined with reference to each individual case. (Para 106, p. 100.)

**52.** In *Indira Nehru Gandhi case* Chandrachud, J. posits that equality embodied in Article 14 is part of the basic structure of the Constitution and, therefore, cannot be abrogated by observing that the provisions impugned in that case are an outright negation of the right of equality conferred by Article 14, a right which more than any other is a basic postulate of our Constitution. (Para 108, p. 101.)

**53.** Dealing with Articles 14, 19 and 21 in *Minerva Mills case* it was said that these clearly form part of the basic structure of the Constitution and cannot be abrogated. (Para 109, p. 101.)

**54.** It cannot be held that essence of the principle behind Article 14 is not part of the basic structure. In fact, essence or principle of the right or nature of violation is more important than the equality in the abstract or formal sense. The majority opinion in *Kesavananda Bharati case* clearly is that the principles behind fundamental rights are part of the basic structure of the Constitution. It is necessary to always bear in mind that the fundamental rights have been considered to be the heart and soul of the Constitution. The fundamental rights are deeply interconnected. Each supports and strengthens the work of the others. (Page 101 para 109.)

**55.** The fact of validation of laws based on exercise of blanket immunity eliminates Part III in entirety hence the "rights test" as part of the basic structure doctrine has to apply. (Para 118, p. 103.)

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**56.** Secularism is one such fundamental, equality is the other, to give a few examples to illustrate the point. It would show that it is impermissible to destroy Articles 14 and 15 or abrogate or en bloc eliminate these fundamental rights. (Para 124, p. 104.)

**57.** Article 15 and 16 are facets of Article 14. Article 16(1) concerns formal equality which is the basis of the rule of law. At the same time, Article 16(4) refers to egalitarian equality. Similarly, *the general right of equality under Article 14 has to be balanced with Article 15(4) when excessiveness is detected in grant of protective discrimination*. (Para 128, p. 105.)

**58.** Equality, rule of law, judicial review and separation of powers form part of the basic structure of the Constitution. Each of these concepts are intimately connected. (Para 129, p. 105.)

**59.** Para 139 page 108 refers to golden triangle.

**60.** The doctrine of basic structure is propounded to save the basic features. Article 21 is the heart of the Constitution. It confers right to life as well as right to choose. When this triangle of Article 21 read with Article 14 and Article 19 is sought to be eliminated not only the "essence of right" test but also the "rights test" has to apply. (Para 140, p. 108.)

**61.** There is also a difference between the "rights test" and the "essence of right" test. Both form part of application of the basic structure doctrine. When in a controlled Constitution conferring limited power of amendment, an entire chapter is made inapplicable, "the essence of right" test as applied in *M. Nagaraj case* will have no applicability. In such a situation, to judge the validity of the law, it is the "rights test" which is more appropriate. (Para 142 at p. 108.)

**62.** The doctrine of the basic structure as a principle has now become an axiom. It is premised on the basis that invasion of certain freedoms needs to be justified. It is the invasion which attracts the basic structure doctrine. Certain freedoms may justifiably be interfered with. If freedom, for example, is interfered with in cases relating to terrorism, it does not follow that the same test can be applied to all the offences. (Para 147, p. 109.)

**63.** The basic structure doctrine requires the State to justify the degree of invasion of fundamental rights. Parliament is presumed to legislate compatibly with the fundamental rights and this is where judicial review comes in. Greater the invasion into essential freedoms, greater is the need for justification and determination by the Court *whether invasion was necessary and if so, to what extent*. (Para 149 at p. 110.)

**64.** The golden triangle referred to above is the basic feature of the Constitution as it stands for equality and rule of law. (Para 149, p. 110.)

**65.** The result of the aforesaid discussion is that the constitutional validity of the Ninth Schedule laws on the touchstone of basic structure doctrine can be adjudged by applying the direct impact and effect test i.e. the rights test, which means the form of an amendment is not the relevant factor,

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**I. Mr Anil B. Divan, Senior Advocate, for the petitioners** *(contd.)*

a but the consequence thereof would be a determinative factor. (Para 150, p. 111.)

***M.R. Balaji* v. *State of Mysore, 1963 Supp (1) SCR 439***

**66.** This case pertained to government orders issued in pursuance of Article 15(4). Article 15(4) had been inserted to overcome the judgment of the Supreme Court in *State of Madras* v. *Champakam Dorairajan*, 1951 b SCR 525.

**67.** Article 15(4) enables the State to make special provisions for advancement of SEBC/SC/ST. The State of Mysore made orders making reservations of 68%. This was challenged and invalidated.

**68.** In *Balaji*, was held that Article 15(4) is an exception. It was also held c that in exercising its executive power, the State while making reservations had to take into consideration "national interest and the interests of the community or society as a whole" (SCR, p. 468) and ought "not to provide for unreasonable, excessive or extravagant reservation" (SCR, p. 474). It was held that the executive power exercised by the State was a fraud on the power conferred by Article 15(4) (SCR, p. 471). *Balaji* broadly indicated that d reservation should not exceed 50% (SCR, p. 470).

**69.** This judgment was followed by *T. Devadasan* v. *Union of India*, (1964) 4 SCR 680.

**70.** The applicability of these two judgments is in doubt because of the judgment in *Indra Sawhney* v. *Union of India*, [1992 Supp (3) SCC 217], e where the view of Devadasan and Balaji that Article 15(4) was an exception, has been disapproved. Article 15(4) according to Indra Sawhney (paras 741-742 at pp. 691-692) is not an exception but is illustrative of the equality rule under Article 15(1), and carries forward the concept of equality by making a permissible classification. However, Indra Sawhney confirms the 50% rule [para 860(5) at p. 770.]

f **71.** It is submitted that the Court ought to consider whether the validity of the amendment made by insertion of Article 15(5) should be subject to various requirements and conditions precedent both quantitative and qualitative along the lines of *M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212, read with the considerations set out by Gajendragadkar, J. in the *Balaji case* ( SCR pp. 468, 471, 474).

g **72.** Article 15(5) permits reservations to be made *by law*, in contrast to Article 15(4) which does not require "law" but an executive order by the State is sufficient. This is also the requirement under Articles 16(4) and 16(4-A) and (4-B). Thus, the argument of fraud on power which was upheld in *Balaji* (p. 471) because it was an executive order may not be available to h strike down the legislation which can only be struck down as being ultra vires.

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**I. Mr Anil B. Divan, Senior Advocate, for the petitioners** *(contd.)*

***Article 30(1) — Minority institutions***

***Re: Illustrations V and VI at p. 3 of the written submissions already submitted***

**73.** In *Ahmedabad St. Xavier's College Society* v. *State of Gujarat*, (1974) 1 SCC 717, para 77 at p. 772 (*per* Khanna, J.) it has been clearly stated that the idea of giving some special rights to minorities is not to have a kind of privileged or pampered section … or were not designed to create inequality … but was to bring about equality and to bring about an equilibrium.

**74.** In *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481, paras 136 and 138 at pp. 578-579, the majority judgment approves *St. Xavier's case* and reiterates that institutions run by the minorities are not to be put at a disadvantage when compared to institutions run by others, but at the same time there can also be no reverse discrimination. The essence of Article 30(1) is to ensure equal treatment between the majority and minority institutions. No one type or category should be disfavoured or receive a more favourable treatment than the other.

**75.** In para 149, *T.M.A. Pai* deals with minority institutions under Article 30(1) receiving aid and thus, being subject to Article 29(2) and to some extent eroding one of their rights under Article 30(1). This para does not detract from the principles laid down earlier by *St. Xavier's* as approved in *T.M.A. Pai* (paras 136, pp. 578 and 138, p. 579).

***Re: Article 26(a)***

**76.** Every religious denomination or any section thereof has the fundamental right to establish and maintain institutions for religious and charitable purposes, subject to public order, morality and health. This would also include the right to run educational institutions giving secular education under "charitable purpose". [*T.M.A. Pai*, para 26 at p. 535.] This being a fundamental right e.g. the Arya Samaj as a recognised religious denomination can run schools. This is a fundamental right which can be exercised in the same manner by a non-minority denomination as exercised by minority institutions under Article 30(1). Article 15(5) will compel the Arya Samaj institution as a non-minority institution to have the applicable reservations. This creates a "disequilibrium" and gives "favourable treatment" to minority institutions covered by Article 30(1).

***Re: Article 19(1)(g)***

**77.** As held by T.M.A. Pai, running an educational institution is an occupation which is a fundamental right Article 19(1)(*g*) subject to reasonable restrictions which can be imposed under Article 19(6). This fundamental right has been overcome under Article 15(5) by the words "*Nothing in this article or in sub-clause (g) of clause (1) of Article 19*". This again has created a disequilibrium and given a preferred, pampered and

**Summary of Arguments**

**I. Mr Anil B. Divan, Senior Advocate, for the petitioners** *(contd.)*

favoured treatment to minority institutions under Article 30(1). This is to be seen in the background of the fact that the object of Article 15(5) is advancement of weaker sections viz. SEBC, SC and ST.

**78.** It is respectfully submitted that in view of the above discussion the fundamental right under Article 26(*a*) is overridden by Article 15(5), as the exception is only in respect of minority institutions covered by Article 30(1) and does not apply to unaided non-minority institutions having a fundamental right under Article 26(*a*). Thus, the disequilibrium leads not only to violation of the equality clause but also violates secularism – a part of the basic structure. It may be noted that the word „secularism. has been specifically used in para 138 (p. 579) of *T.M.A. Pai* which states as under:

> "Secularism and equality being two of the basic features of the Constitution, Article 30(1) ensures protection to the linguistic and religious minorities, thereby preserving the secularism of the country."

## *II. Dr M. Rama Jois, Senior Advocate, for the petitioners*

**1.** The petitioners submit—

*1*. That clause (5) inserted into the Constitution of India by the *Constitution (93rd Amendment) Act, 2005*,

*2*. As also Section 1(4) of the *Right of Children for Free and Compulsory Education Act, 2009* read with sub-clause (*iv*) of clause (*n*) of Section 2 read with sub-clause (*c*) of clause (1) of Section 12 thereof, which provide that an unaided school shall admit in Class I, to the extent of at least twenty-five per cent of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education till its completion,

violate the elements of basic structure of the Constitution, to wit, equality and secularism and are therefore liable to be declared unconstitutional as they bring about discrimination against unaided non-minority educational institution and in favour of minority educational institution, which is impermissible in the light of the judgment of eleven-Judge Bench in *T.M.A. Pai Foundation*, (2002) 8 SCC 481 at 578-579 para 138 and seven-Judge Bench judgment in *P.A. Inamdar* v. *State of Maharashtra*, (2005) 6 SCC 537 at 588.

**2.** In *Unni Krishnan, J.P.* v. *State of A.P.*, (1993) 1 SCC 645, decided by the Constitution Bench the Court held that:

(*a*) *Right to receive education* is part of the fundamental right "right to life" guaranteed by Article 21 of the Constitution relying on *Neetishatakam* of Bhartruhari quoted in para 166 at p. 731.

(*b*) *Right to impart education, if recognition or affiliation are sought*, is not a fundamental right within the meaning of Article 19(1)(*g*) [para 72 at p. 691].

**Summary of Arguments**

**II. Dr M. Rama Jois, Senior Advocate, for the petitioners** *(contd.)*

**3.** Pursuant to the said judgment, the Constitution (86th Amendment) Act, 2002 was passed with effect from 1-4-2010, that is, after 7 years thereafter as follows.

**3.1.** Article 21-A "Right to Education" was inserted by transposing the State's obligation to provide free and compulsory education, by law, for children aged 6 to 14 years from Part IV (unamended Article 45) to Part III;

| *Article 45 prior to the 86th Constitution Amendment Act, 2002* | *Article 21-A inserted by the 86th Constitution Amendment Act, 2002 w.e.f. 1-4-2010* |
|---|---|
| 45. *The provision for free and compulsory education for children.*— The State shall endeavour to provide, within a period of 10 years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of 14 years. | 21-A. *Right to education.*— The State shall provide free and compulsory education to all children of the age of 6 to 14 years in such manner as the State may, by law, determine. |

Thus by the new Article 21-A a new fundamental right was conferred on all children by way of imposing fundamental duty on the State to provide compulsory primary education to all children in the age group of 6 to 14 years in such manner as the State may by law determine.

**3.2.** The substituted Article 45, by a new article reads:

"*Provision for early childhood care and education to children below the age of six years.*—The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years."

**3.3.** By the Constitution (42nd Amendment) Act, new was inserted Part IV-A (Fundamental Duties chapter). Clause (*k*) was inserted as part of Article 51-A by the Constitution (86th Amendment) Act, 2002. It reads

51-A. *Fundamental duties.— It shall be the duty of every citizen of India.*— … (*k*) who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years."

**4.** State is enabled to depart from the rule of non-discrimination [engrafted under Article 15(1)] and make special provisions for the advancement of three categories only viz. Scheduled Castes, Scheduled Tribes and socially and educationally backward classes [under Articles 15(4), 16(4), etc.]. There has been no provision in the Constitution which enables the State to make special provision for the benefit of minority (religious or linguistic) and place them at a more advantageous position compared to non-minorities.

**Summary of Arguments**

**II. Dr M. Rama Jois, Senior Advocate, for the petitioners** *(contd.)*

**5.** However by the Constitution (Ninety-third Amendment) Act, 2005 clause (5) was inserted into Article 15 which reads:

> (5) Nothing in this Article or in sub-clause (*g*) of clause (1) of Article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes insofar as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, *other than the minority educational institutions referred to in clause (1) of Article 30.*

Subsequently sub-section (4) was inserted into Section 1 of 'the Right of Children to Free and Compulsory Education Act, 2009. It reads:

> (4) Subject to the provisions of Articles 29 and 30 of the Constitution, the provisions of this Act shall apply to conferment of rights on children to free and compulsory education.

The words "*other than the minority educational institutions referred to in clause (1) of Article 30*" in Article 15(5) as also Section 1(4) aforesaid are violative of the basic features of *equality* and *secularism* as they bring about discrimination against non-minority educational institutions including those established by Scheduled Castes and Scheduled Tribes and therefore liable to be declared unconstitutional in the light of the judgment in *T.M.A. Pai* and *P.A. Inamdar.*

**6.** In *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481, the 11-Judge Bench partly overruled *Unni Krishnan* and held that right to establish and administer an educational institution is an "occupation" and forms part of Article 19(1)(*g*) [para 25 at p. 535]. The Court also considered the scope and ambit of Article 30, and concluded in para 138 at pp. 578-79, that it is in the nature of protection and that "the essence of Article 30(1) is to ensure equal treatment between the majority and the minority institutions". [*See* paras 401 & 402 at pp. 673-74 and para 404 at p. 675 and para 425 at pp. 689-90.]

**7.** Agreeing with the majority Variava and Bhan, JJ. stated as follows at para 425 at p. 689:

> "It must again be remembered that Article 30 was not framed to create a special or privileged class of citizens. It was framed only for purposes of ensuring that the politically powerful majority did not prevent the minority from having their educational institutes. We cannot give to Article 30(1) a meaning which would result in making the minorities, whether religious or linguistic, a special or privileged class of citizens. We should give to Article 30(1) a meaning which would further the basic and overriding principles of our Constitution viz. equality and secularism. The interpretation must not be one which would create a further divide between citizen and citizen."

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**II. Dr M. Rama Jois, Senior Advocate, for the petitioners** *(contd.)*

This position was reiterated by the seven-Judge Bench in *P.A. Inamdar* v. *State of Maharashtra*, (2005) 6 SCC 537 [paras 124-125, p. 601]. [See also *Ahmedabad St. Xavier's College Society* v. *State of Gujarat*, (1974) 1 SCC 717 at p. 743, para 9.]

**8.** The said Article 15(5) disturb the integrity of the nation by encouraging divisive forces of linguism and communalism. This is highly injurious to national unity and integrity as observed by this Hon'ble Court thus:

> … "we find that today the integrity of the nation is threatened by the divisive forces of regionalism, linguism and communalism and regional, linguistic and communal loyalties are gaining ascendancy in national life and seeking to tear apart and destroy national integrity. We tend to forget that India is one nation and we are all Indians first and Indians last. It is time we remind ourselves what the great visionary and builder of modern India, Jawaharlal Nehru said, "Who dies if India lives; who lives if India dies?" We must realise, and this is unfortunate that many in public life tend to overlook, sometimes out of ignorance of the forces of history and sometimes deliberately with a view to promoting their self-interest, that national interest must inevitably and for ever prevail over any other considerations proceeding from regional, linguistic or communal attachments. If only we keep these basic considerations uppermost in our minds and follow the sure path indicated by the Founding Fathers of the Constitution, we do not think the question arising in this group of writ petitions should present any difficulty of solution."

[*Per* Bhagwati, J. in *Pradeep Jain* v. *Union of India*, (1984) 3 SCC 654, at p. 660.]

**9.** These provisions are therefore discriminatory and constitutionally impermissible as unaided *minority* institutions are excluded from the application of the Right of Children to Free and Compulsory Education Act, 2009, at the same time that the obligations under the Act apply to unaided *non-minority* institutions which include educational institutions established by the Scheduled Castes and Scheduled Tribes.

**10.** Therefore, the majority judgment in *Society for Unaided Private Schools of Rajasthan* v. *Union of India*, (2012) 6 SCC 1, is liable to be overruled and clause (5) of Article 15 to the extent it enables the State to discriminate against non-minority educational institutions as also Section 1(4) of the Right of Children to Free and Compulsory Education Act, 2009 inserted thereafter, which also brings about discrimination are liable to be declared unconstitutional.

**Summary of Arguments**

**II. Dr M. Rama Jois, Senior Advocate, for the petitioners** *(contd.)*

***As regards the object of primary education and establishing educational institutions, for that purpose both minorities as well as non-minorities are similarly situated***

***In view of:***

**11.** Article 29(1) which reads:

> ***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.

The contents of the Article is not consistent with the heading as pointed out by this Hon'ble Court in *Ahmedabad St. Xavier's College Society case*, (1974) 1 SCC 717, p. 743, para 9] which reads:

> "Every section of the public, the majority as well as minority has rights in respect of religion as contemplated in Articles 25 and 26 and rights in respect of language, script, culture as contemplated in Article 29. The whole object of conferring the right on minorities under Article 30 is to ensure that there will be equality between the majority and the minority."

***Read with:***

**12.** Article 21-A introduced by the Constitution (Eighty-sixth Amendment) Act, 2002 with effect from 1-4-2010, which reads:

> "***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."

This Article applies both to minorities and non-minorities.

**13.** And Article 51-A — Fundamental duties inserted by the Constitution 42nd Amendment with effect from 3-1-1977:

> "51-A. (*e*) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women.
>
> * * *
>
> 51-A. (*j*) to strive towards excellence in all spheres of individual and collective activity so that the Nation constantly rises to higher levels of endeavour and achievement.
>
> (*k*) who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years."

These duties also apply to minorities and non- minorities.

**14.** Further, Constitution is not a static document but it is a living document, its interpretation may change as the time and circumstances change to keep pace with it. [*I.R. Coelho* v. *State of T.N.*, (2007) 2 SCC p. 1,

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**II. Dr M. Rama Jois, Senior Advocate, for the petitioners** *(contd.)*

at 101, para 109 end.] Therefore, scope and ambit of Article 30 should be interpreted in the light of subsequent amendments to the Constitution, in particular in the light of Articles 21-A and 51-A(*e*).

**15.** From *1958 Kerala Education Bill* judgment [AIR 1958 SC 956; 1959 SCR 995] for nearly four decades it was being held in various judgments of this Hon'ble Court that Article 30 was a fundamental right of minorities.

**16.** However, the largest Bench on education matter in *T.M.A. Pai Foundation case* [(2002) 8 SCC 481] after an elaborate consideration of the *Constituent Assembly Debates* and the background for inserting Article 30, held that Article 30 was in the nature of protection. In other words, it is in the nature of shield not a sword and does not empower Parliament to make a law discriminating against majority as such law adversely affects the basic elements of the Constitution to wit *secularism and equality*. The clear implication of the law so declared is that clause (5) of Article 15 is ultra vires the power of Parliament to amend the Constitution and therefore unconstitutional and consequently liable to be struck down.

**17.** At *para 137* in *T.M.A. Pai Foundation case*, (2002) 8 SCC 481 this Hon'ble Court held that Article 30 is not absolute and above other provisions of law. Para 138 in *T.M.A. Pai Foundation case*, (2002) 8 SCC 481, holding *secularism* and *equality* being two of the basic features of the Constitution, no law can be framed that will discriminate against such minorities with regard to the establishment and administration of the educational institutions vis-à-vis other educational institutions, such a law if enacted will have to be struck down and at the same time there also cannot be any reverse discrimination which meant that any law-making discrimination against majority educational institutions is also liable to be struck down.

And observation at p. 689 [Variava and Bhan, JJ.] reads:

> "It must again be remembered that Article 30 was not framed to create a special or privileged class of citizens. It was framed only for purposes of ensuring that the politically powerful majority did not prevent the minority from having their educational institutes. We cannot give to Article 30(1) a meaning which would result in making the minorities, whether religious or linguistic, a special or privileged class of citizens. We should give to Article 30(1) a meaning which would further the basic and overriding principles of our Constitution viz. *equality* and *secularism*. The interpretation must not be one which would create a further divide between citizen and citizen."

**18.** Also *P.A. Inamdar* v. *State of Maharashtra*, (2005) 8 SCC 481, p. 601, paras 124-125-127 and para 20 at p. 565 thereof which reads:

> "At the very outset, we may state that our task is not to pronounce our own independent opinion on the several issues which arose for consideration in *Pai Foundation*. Even if we are inclined to disagree with

**Summary of Arguments**

**II. Dr M. Rama Jois, Senior Advocate, for the petitioners** *(contd.)*

any of the findings amounting to declaration of law by the majority in *Pai Foundation*, we cannot; that being a pronouncement by an eleven-Judge Bench, we are bound by it. We cannot express dissent or disagreement howsoever we may be inclined to do so on any of the issues."

**19.** It is appropriate to mention at this stage that the validity of Section 12(1)(*c*) of the Right of Children to Free and Compulsory Education Act, 2009 which provided for compulsory admission of 25% of intake of seats in schools was challenged in *Society for Unaided Private Schools of Rajasthan* v. *Union of India*. This was decided by a three-Judge Bench which is reported in (2012) 6 SCC 1. Though Section 12(1)(*c*) did not make any distinction between unaided minority institutions and non-minority institutions, this Hon'ble Court held that clause (5) inserted to Article 15 provided that there shall be difference between the unaided non-minority institutions and minority institutions and made the following order:

*Conclusion (according to majority):*

*64.* Accordingly, we hold that the Right of Children to Free and Compulsory Education Act, 2009 is constitutionally valid and shall apply to the following:

(*i*) a school established, owned or controlled by the appropriate Government or a local authority;

(*ii*) an aided school including aided minority school(s) receiving aid or grants to meet whole or part of its expenses from the appropriate Government or the local authority;

(*iii*) a school belonging to specified category; and

(*iv*) an unaided non-minority school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority.

*65.* However, the said 2009 Act, and in particular Sections 12(1)(*c*) and 18(3) infringes the fundamental freedom granted to unaided minority schools under Article 30(1) and, consequently, applying *R.M.D. Chamarbaugwalla* v. *Union of India*, [AIR 1957 SC 628; 1957 SCR 930], principle of severability, the said 2009 Act shall not apply to such schools.

Pursuant to the above judgment the following sub-section (4) was inserted into Section 1 of the Right of Children to Free and Compulsory Education Act, 2009:

(4) Subject to the provisions of Articles 29 and 30 of the Constitution, the provision in the Act shall apply to conferment of right on children to free and compulsory education.

By this sub-section only minority institutions were exempted from the RTE Act. The resultant position is clause (5) of Article 15 read with Section 12(1)(*c*) of the 2009 Act, is operating only against non-minority

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**II. Dr M. Rama Jois, Senior Advocate, for the petitioners** *(contd.)*

institutions. As held at para 138 in *T.M.A. Pai Foundation case* that there cannot be reverse discrimination against non-minority educational institutions also, the petitioners are entitled to the relief holding that as the impugned provisions discriminate against unaided non-minority institutions, they are unenforceable against them.

**20.** In support of this submission, the petitioners are relying on the judgment of this Hon'ble Court in *State of Kerala* v. *Mother Provincial*, [1971 SCR p. 734] in which this Hon'ble Court directed that provisions which are not enforceable against minority shall also be unenforceable against majority i.e. non-minorities. The relevant part of the judgment reads:

> "The High Court has held that the provisions (except Section 63) are also offensive to Article 19(1)(*f*) insofar as the petitioners are citizens of India both in respect of majority as well as minority institutions. This was at first debated at least insofar as majority institutions were concerned. The majority institutions invoked Article 14 and complained of discrimination. However, at a later stage of proceedings Mr Mohan Kumaramangalam stated that he had instructions to say that any provision held inapplicable to minority institutions would not be enforced against the majority institutions also. Hence it relieves us of the task of considering the matter under Article 19(1)(*f*) not only in respect of minority institutions but in respect of majority institutions also. The provisions of Section 63 affect both kinds of institutions alike and must be declared ultra vires in respect of both [pp. 746-747].

The same reasoning and analogy applies to this case as the Central Government has accepted the *Rajasthan judgment* and made the 2009 Act unenforceable against minorities by inserting sub-section (4) into the RTE Act, the petitioners are entitled to a similar order in terms of para 138 of the judgment in *T.M.A. Pai Foundation case* holding that there cannot be reverse discrimination against non-minorities.

**21.** In the submission for the State of Karnataka, it is stated regarding validity of Article 15(5) read with Section 12(1)(*c*) of the RTE Act, 2009 that as only 25% of the seats are provided for being filled up by the Government in non-minority educational institutions, their rights are not substantively affected. On the point why the same logic is not applicable to minorities, State is silent.

**22.** The petitioners also respectfully submit that by such discrimination as has been done by inserting clause (5) to Article 15, all the fundamental principles incorporated in the Preamble to the Constitution such as "*Justice*, *Liberty* and *Equality*" are denied to the majority and is also injurious to the feeling of fraternity and in particular inconsistent with noble principles incorporated in clause (*e*) of Article 51-A of the Constitution.

**Summary of Arguments**

**II. Dr M. Rama Jois, Senior Advocate, for the petitioners** *(contd.)*

**23.** For the above reasons and grounds, clause (5) inserted into Article 15 of the Constitution of India by the Constitution (Ninety-third Amendment) Act, 2002 and Section 12(*c*) of the Right of Children to Free and Compulsory Education Act, 2009 which discriminate against non-minority educational institutions are unconstitutional being violative of the two overarching principles, namely, *equality* and *secularism* which are elements of basic structure of the Constitution of India as reflected in Articles 14 and 15 thereof, as held at para 138 of the judgment in *T.M.A. Pai Foundation case* they are liable to be struck down as they cannot be enforced against non-minorities also.

***III. Mr Mukul Rohatgi, Senior Advocate through his AOR***
***Mr Govind Goel, Advocate, for the petitioners***

**I.**

***Issues***

**1.** The present writ petition involves inter alia the following issues:

(*a*) Can the obligation of the State under Article 21-A to provide free and compulsory elementary education, be construed as enabling it to impose such obligations on private unaided schools?

(*b*) Can special provisions for admission to educational institutions envisaged by Article 15(5) include admission to schools, which impart elementary education?

(*c*) Are the provisions of the Right of Children to Free and Compulsory Education Act, 2009 ("the RTE Act") insofar as they apply to unaided private schools, ultra vires Part III of the Constitution?

(*d*) Whether the Constitution (Ninety-third Amendment) Act, 2005 which inserts clause (5) to Article 15, alters the basic structure or framework of the Constitution and is therefore ultra vires the constituent power?

**II.**

***Submissions re: Article 21-A***

**2.** The Constitution (Eighty-sixth Amendment) Act, 2002 [w.e.f. 1-4-2010] inserted Article 21-A "Right to Education", by transposing the State's obligation to provide free and compulsory education, by law, for children aged 6 to 14 years from Part IV (unamended Article 45) to Part III.

***Width of Article 21-A***

**3.** The obligation under Article 21-A to provide free and compulsory elementary education is on the State alone, and that too, the one which is empowered to legislate for determining the manner of discharging such obligation. The obligation is on "State" as defined in Article 12, which cannot be said to cover a private unaided school, merely because it is recognised or affiliated, or is otherwise subject to regulatory control.

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**III. Mr Mukul Rohatgi, Senior Advocate through his AOR Mr Govind Goel, Advocate, for the petitioners** *(contd.)*

Amenability to proceedings under Article 226 on account of the "functional test" of imparting education does not cover private unaided schools within the purview of "State". [*Unni Krishnan, J.P.* v. *State of Andhra Pradesh*, (1993) 1 SCC 645, para 76 at p. 693; *Pradeep K. Biswas* v. *Indian Council of Chemical Biology*, (2002) 5 SCC 111, para 40 at p. 134; *Zee Telefilms* v. *Union of India*, (2005) 4 SCC 649, para 22-25 at pp. 679-680.]

**4.** Law which the State is enabled to enact in terms of Article 21-A, is to *determine* the manner of discharging its obligation to provide free and compulsory elementary education. By means thereof, the State cannot offload or outsource its obligation of providing free and compulsory elementary education, and rope in private unaided schools especially at the cost of their fundamental rights under Article 19(1)(*g*).

**5.** There are certain provisions in Part III, which are enforceable against non-State actors as well, such as Articles 17, 23(1) and 24, prohibiting untouchability, exploitation and child labour respectively. They are worded in absolute terms without any reference to the obligation intending to be on "State". In contrast, Article 21-A specifically obligates State to provide free and compulsory elementary education. This obligation cannot be transferred by the State to private unaided schools, which are non-State actors.

**III.**

***Inapplicability of Article 15(5) to the RTE Act***

**6.** Article 15(5) was inserted by the Constitution (Ninety-third Amendment) Act, 2005, purporting to undo the judgment of this Hon'ble Court in *P.A. Inamdar* v. *State of Maharashtra*, (2005) 6 SCC 537, interpreting the eleven-Judge Bench judgment in *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481, which enunciated the law relating to the institutional autonomy guaranteed under Article 19(1)(*g*). The judgment in *Inamdar* particularly dealt with autonomy of private unaided professional institutions in the matter of admissions, so as not to permit any reservations, except to the extent of freeships or scholarships to the students belonging to weaker sections on the basis of consensual or voluntary arrangement [*Inamdar*, paras 125-130 at pp. 601-602]. It was held that in admissions to private professional institutions, State cannot prescribe any criterion for admission, except on the basis of merit [para 124 at p. 601]. Therefore, reservations for SC/ST/SEBCs became impermissible in private unaided professional institutions.

**7.** In order to provide an exception to this rule of merit, Parliament in exercise of its constituent power, provided an enabling provision by inserting clause (5) to Article 15 by the Constitution (Ninety-third Amendment) Act, 2005 [w.e.f. 20-1-2006].

**8.** The enabling provision contained in Article 15(5) does not apply to schools imparting elementary education, and must be held to apply to

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institutions imparting higher and professional education *only*, for the following reasons:

(*a*) Having regard to the judgment in *Inamdar case*, which Parliament sought to undo [as is clear from the Parliamentary debates — *See generally*, Rajya Sabha debates dated 22-12-2005, pp. 290-408], considerable doubt is cast on the width of the phrase "educational institutions" employed in Article 15(5). It is submitted that for the purpose of removing this ambiguity, resort may be had to external aids such as the Preamble and Statement of Objects and Reasons [*Attorney General* v. *Prince Ernest Augustus of Hanover*, 1957 AC 436, applied in *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225, paras 106-109 at pp. 325-326]. From a bare perusal of the Statement of Objects and Reasons to the Constitution (Ninety-third Amendment) Act, 2005, it is clear that the enabling provision is meant for providing "*greater access to higher education including professional education to a larger number of students belonging to the socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes*".

(*b*) Moreover, the purpose of Article 15(5) enables carving out an exception to the rule of merit and since admissions at the school level are not based on merit [*T.M.A. Pai*, para 61 at p. 546], Article 15(5) can have nothing to do with admissions at the school level.

(*c*) Articles 15(5) and 21-A must be read harmoniously. Article 21-A covers the specific field with respect to elementary education, provision of Article 15(5) must be held inapplicable to the admissions to schools imparting elementary education.

**9.** Furthermore, the RTE Act is clearly not a law envisaged by Article 15(5) inasmuch as the categories for which special provisions have been made in Sections 2(*d*), (*e*) and (*ee*) of the RTE Act are much wider than those envisaged by Article 15(5). If Parliament had intended to enact a legislation as enabled by Article 15(5), it would have confined itself to providing such reservations only for SC, ST and socially and educationally backward classes. This fortifies the submission that Article 15(5) does not apply to school education to which the RTE Act pertains.

**10.** In any event, even if Article 15(5) applies to school education, it can only cover Section 12 of the RTE Act, which envisages reservation in the matter of admissions. In respect of all other provisions of the RTE Act, Article 15(5) has no applicability.

**IV.**

***Submissions re: The RTE Act, 2009***

**11.** The RTE Act, 2009 has been enacted as "a suitable legislation as envisaged in Article 21-A of the Constitution" [Statement of Objects and Reasons, Para 5]. It is submitted that it is not a law as envisaged by

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Article 15(5), and therefore, Article 19(1)(*g*) is available for testing the provisions of the RTE Act, and to determine whether the obligations imposed by the RTE Act go beyond the permissible restrictions under Article 19(6).

**12.** While Section 12(1)(*c*) of the Act pertains to 25% intake of the school, remaining provisions apply to the entire strength of the school and the reasonableness and permissibility of these restrictions has to be tested accordingly.

**13.** The RTE Act imposes obligations on all schools within the meaning of Section 2(*n*), and includes unaided private schools. However, by virtue of Section 1(4) of the Act [inserted by Amendment Act 30 of 2012], unaided minority schools are excluded from the purview of the Act. It is submitted that the following provisions contained in the Act constitute unreasonable restrictions not saved by Article 19(6) on the right of the petitioners to run, establish and administer recognised to be part of Article 19(1)(*g*) by *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481:

(*a*) *Provisions depriving right of school to admit students [Sections 4, 8, 9, 12, 13, 15]*

(*i*) Obligation to admit students chosen by appropriate Government/local authority [Sections 2(*d*), (*e*) and (*ee*)]. [*Section 12(1)(c), read with Sections 8(f), 9(e)*]

(*ii*) Obligation to admit children, irrespective of their number or proportion to the remaining students in the class appropriate to his/her age, not as per his/her learning is divorced from the object of education and therefore, discriminatory. [*Section 4*]

(*iii*) Obligation to provide special training to bring him/her on a par with other children irrespective of their number or proportion to the remaining students is without any reimbursement or compensation and thus expropriatory. [*Section 4*]

(*iv*) Screening prohibited not only at the entry level (Class I), but at all stages up to Class VIII and to any extent or proportion. [*Section 13*]

(*v*) Obligation to admit children at any time of the year. [*Section 15*]

(*b*) *Provisions interfering with the day-to-day management of school making running a school unviable [Sections 12(2), 16, 17, 19 and Schedule]*

(*i*) No performance assessment is possible — prohibition of any holding back or expulsion till Class VIII. [*Section 16*]

(*ii*) No discipline in school — "mental harassment" prohibited by *Section 17* vague and undefined.

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(*iii*) Reimbursement is illusory [*Section 12(2)*] and the financial loss cannot be offset by cross-subsidy.

(*iv*) No reimbursement for costs incurred on the following, which are resultantly required to be provided free of cost:

(*i*) Special training imparted to late entrants under Section 4.

(*ii*) Pre-school education imparted to children between 3-6 years under proviso to Section 12(1).

(*v*) Strangulating norms and standards specified in *Section 19, read with the Schedule*, pertaining to running of schools and physical facilities/infrastructure is counter-productive and defeats the goals of universalisation of education.

(*vi*) Any deviation from any provision results in withdrawal of recognition, and running an unrecognised school is made a punishable offence. [*Section 19*]

**14.** The test of reasonableness of restrictions imposed by various provisions of the RTE Act, is also required to be in consonance with the enunciation in *Chintaman Rao* v. *State of Madhya Pradesh*, 1950 SCR 759, wherein the Constitution Bench laid down that for determining reasonableness, the Court has to keep in view the object of the Act which imposes the restriction and also the proportionality of invasion on the fundamental right.

**15.** Applying these tests, these provisions like prohibition from screening while granting admission to a person in any class and the prohibition from assessing the capability to cope with a particular class are counter-productive and destructive of the right to maintain adequate quality or standard of academic excellence. Direct admission of persons without screening especially in classes other than the initial class will surely affect the quality of imparting education. Of course, a person admitted to later class without undergoing education in the previous class cannot be imparted quality education; even to impart the quality education to the remaining students of the class would not be possible as it would not be possible for the student directly admitted without any previous knowledge to pick up or appreciate instructions being imparted. Therefore, keeping in view his level of understanding or knowledge, it would become necessary for the teacher to lower the standard of instructions and so doing would adversely affect the quality of education sought to be imparted. Admission to class commensurate to age (Section 4) and not the level of learning and prohibition from holding back (Section 16) are contrary to the object of imparting quality education. Such provisions in the impugned Act per se constitute unreasonable restrictions on the right to impart quality education, and are against public interest. Similarly, the restrictions relating to prohibition of running unrecognised schools or schools unable to comply with the physical norms

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envisaged by the Act is counter-productive and contrary to the object of universalisation of education. These provisions are also required to be held inapplicable to the unaided institutions to avoid their forced closure under the pain of the statutory provisions.

**16.** Provisions of the RTE Act also suffer from the vice of invidious discrimination, and therefore violate Article 14. This is because Section 1(4) of the Act envisages exclusion of unaided minority institutions from the purview of the Act. The provisions of the Act envisaging restrictions and obligations on various schools are in the nature of general laws of the land, pertaining to social welfare, and have to apply to all schools whether managed by minorities or non-minorities [*T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481, para 136]. The Act is therefore, clearly discriminatory and violates Article 14, as there is no intelligible differentia having any rational nexus with the object sought to be achieved.

**17.** In the judgment of the Division Bench in *Society for Unaided Private Schools of Rajasthan* v. *Union of India*, (2012) 6 SCC 1, the majority merely noticed the various provisions of the Right to Education Act, 2009, but adjudicated only with respect to Section 12(1)(*c*). The conclusions, however, relate to the entire Act, without testing the validity of or reasonableness of the restrictions imposed by each provision. It is submitted that the dissenting opinion in *Society's case* lays down correct law, especially insofar as it holds that:

(*a*) Article 21-A imposes an obligation on State, not on non-State actors [para 230 at p. 83].

(*b*) Right to education of children is enforceable against all schools *except* privately managed unaided schools. Provisions for reservation as well as other provisions in the RTE Act are only directory, so far as unaided schools are concerned, except that they are bound by the law laid down in *T.M.A. Pai* and *P.A. Inamdar* [para 275 at p. 93].

(*c*) No distinction between minority and non-minority insofar as appropriation of seats/reservation policy is concerned [para 246 at p. 87].

**V.**

***Abrogation of basic structure by the Constitution (Ninety-third) Amendment Act, 2005***

**18.** Without prejudice to the argument that Article 15(5) is not applicable to schools imparting elementary education, the petitioners submit that the Constitution (Ninety-third Amendment), 2005 abrogates the basic structure of the Constitution, and is therefore ultra vires the constituent power and void. Parliament cannot exercise its constituent power under Article 368 of the Constitution, to *alter* the basic structure of the Constitution. [*Ref.*: Summary to *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225, at p.

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1007, which has been accepted as correct in *Minerva Mills* v. *Union of India*, (1980) 3 SCC 625, para 12 at p. 641]. If a constitutional amendment alters the basic structure, it is sufficient to strike it down. Damaging or destroying of basic structure is not necessary.

**19.** Parts III and IV together constitute the core of the Constitution, and to give absolute primacy to one over the other is to disturb the harmony of the Constitution. This harmony and balance between the fundamental rights and directive principles is an essential feature of the basic structure of the Constitution. A total deprivation of the fundamental rights, even in a limited area, can amount to abrogation of a fundamental right just as partial deprivation in every area can [*Minerva Mills*, paras 56-59 at pp. 654-655]. It is submitted that by obliterating Article 19(1)(*g*) completely insofar as the right of unaided educational institutions to admit students of their choice is concerned, the Constitution (Ninety-third Amendment) upsets this harmony between Parts III and IV.

**20.** Right to equality is a basic feature of the Constitution, the negation of which has been held to be impermissible by a constitutional amendment [*Indira Nehru Gandhi* v. *Raj Narain*, 1975 Supp SCC 1, paras 679-681 at pp. 257-258]. Therefore, classification having no rational nexus with the object sought to be achieved is invidious, and is not permissible even by a constitutional amendment. The Constitution (Ninety-third Amendment) abridges this rule of classification by:

(*a*) *Treating unequals equally*: Unaided and aided educational institutions are two distinct categories, as recognised by this Hon'ble Court in *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481. Article 15(5) enables the State to make laws containing special provisions with respect to admissions, in aided and unaided institutions alike.

(*b*) *Treating equals unequally*: Minority and non-minority educational institutions are to be treated equally for the purpose of imposing regulations and general laws in the public interest [*T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481, paras 135-138 at pp. 578-579]. In exempting minority institutions wholly, Article 15(5) is discriminatory, as such classification has no nexus with the object sought to be achieved.

**21.** The Constitution Ninety-third Amendment further abrogates the overarching principles of secularism and fraternity. The effect of the exception in Article 15(5) is to give a favoured position to minority unaided educational institutions as compared to non-minority unaided educational institutions. The object of Article 30(1) is to give protection to minorities to establish and administer institutions because of their numerical handicap and to instil in them a sense of security and confidence, and not to create "a kind of a privileged or pampered section of the population". The equilibrium or

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equal treatment between minorities and non-minorities, is part of the basic structure of the Constitution as it preserves equality and secularism, which is totally overturned by the exception created in Article 15(5) [*Ahmedabad St. Xavier's College Society* v. *State of Gujarat*, (1974) 1 SCC 717, para 77 at p. 772; *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481, para 138 at pp. 578-579].

**22.** The stand taken by the respondents themselves is that laws under Article 15(5) are in national interest to serve the public duty of providing inclusive education. Having regard to this, there is no reason why a general law framed under Article 15(5) in national interest must not be equally applicable to minorities and non-minorities [*T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481, para 136 at p. 578]. This is clearly reverse discrimination against non-minorities, which destroys basic features of equality, secularism and fraternity.

**23.** In view of these submissions, the word "unaided" must be deleted from Article 15(5) in order to restore equal treatment between minority and non-minority educational institutions.

### *IV. Dr Rajeev Dhavan, Senior Advocate, for the petitioners*

***Applying the basic structure test***

**I.** ***Basic structure***

**1.** The basic structure doctrine is applied to constitutional amendments to determine whether they infringe the basic structure of the Constitution including fundamental rights.

**2.** It has to be borne in mind that directive principles of State policy are:

(*a*) addressed to the State; and fundamental to the governance of the country; and cannot infringe fundamental rights;

(*b*) but have interpretative significance in giving effect to fundamental rights.

**II.** ***Applying the basic structure test to fundamental rights***

**3.** The chapter on fundamental rights includes:

(*i*) the equality code (Articles 14-18).

(*ii*) the freedom code (Articles 19-22).

(*iii*) the anti-exploitation code (Articles 23-24).

(*iv*) The religions, linguistic and cultural code (or diversity code) (Articles 25-30).

(*v*) The right to remedy code (Article 32).

**4.** The identity of each code determined is by the Supreme Court which indicates its basic structure.

**5.** Even the constituent power cannot usurp the Judicial power by directly overruling a foundational constitutional decision.

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**6.** An amendment:

(*a*) has content and width which may be imperative or permissive (i.e. enabling); and

(*b*) its impact has to be considered as to whether it affects the right and/or the essence of a right.

## III. *The amendment and rights in question*

**7.** The amendments in question are:

*Article 15(5)*

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

*Article 21-A*

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.

**8.** The rights in question concern educational aspects of:

(*a*) the equality code [Articles 14-15, 29(2)]

(*b*) the freedom code [Article 19(1)(*g*)]

(*c*) the diversity code [Article 30(1)]

**9.** It is significant that in the educational context these codes have been taken into account by *T.M.A. Pai* (2002) 8 SCC 481) and *Inamdar* (2005) 6 SCC 537—

(*a*) The charity principle

(*b*) The autonomy principle

(*c*) The voluntariness principle

(*d*) No nationalisation and cross-subsidy

(*e*) The co-optation principle

(*f*) The reasonableness principle

Together these define the *identity* of the right as a complete code bearing in mind *social* justice (charity) and other elements.

## IV. *Impact on the amendments*

### *(A) Article 15(5)*

**10.** Article 15(5) is not an extension of Articles 15(1) to (4) in that it—

(*a*) does not just empower the State, but also limits the rights of educational institutions guaranteed under Article 19(1)(g) as interpreted by the *T.M.A. Pai* decision.

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(*b*) This total nullification of a right in the freedom code by a right in the equality code, is unprecedented and even more emphatic than done by Articles 31-B and 31-C.

(*c*) Not only judicial review any recourse to that right is taken away altogether.

(*d*) Article 15(5) extends the right against the State to a right against private entities (which as Mr Nariman has explained is American law and not followed in India (*see* Nariman submission, pp. 4-10).

(*e*) Thus the *Nagaraj* proposition that Articles 16(4-A), (4-B) does not change the identity of equality of opportunity as explicated in Articles 16(1), (4), is not applicable to Article 15(5), Article 15(5) alters the identity of the equality rights in Article 15(1), (3), (4) and significantly, Article 29(2) creates a right against the State or State aided institutions and not against private institutions which, have been given protective rights under Articles 19(1)(*g*), 26 and 30(1)

(*f*) Article 15(5) permits discrimination between unaided minority and unaided non-minority institutions in a manner wholly contrary to *T.M.A. Pai* (2002).

(*g*) Taking into account the overarching principles of freedom, social justice, equality and reasonableness as applied in *Nagaraj* Article 15(5) wholly upsets the delicate balance taken into account by *T.M.A. Pai*.

*Note*.—The charity principle takes into account social justice components.

**11.** Thus, Article 15(5) must be subject to (*a*) severability and (*b*) reading down.

**12.** This means that *either*

"or in sub-clause (*g*) of clause (1) of Article 19" and "whether" and "or unaided" are deleted and treated as severable.

**13.** Alternatively, and in addition, the principle of voluntariness and autonomy would apply to "unaided non-minority" and minority institutions on a voluntary basis (in the manner invoked in *Nagaraj*).

***(B) Article 21-A***

**14.** It is submitted that:

(*a*) Article 21-A is merely a correlative to mandate the State to provide education between the ages of 6 to 14 for all persons.

(*b*) There is reason not to expand the meaning of "State" and the words "in such manner" to dilute the positive obligation of the State.

(*c*) Article 21-A does not nullify the interpretation of Articles 19(1)(*g*) and 19(6) and the concepts of "reasonableness" and "voluntariness" used to identify the rights or obligations in Articles 19(1)(*g*) and 19(6) as indicated by *T.M.A. Pai* and *Inamdar*.

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**15.** It is to be noted that the Constitution which gives enforceable mandatory and positive socio-economic rights to the citizen repose the fulfilment of the obligation exclusively in the State.

*Note*.—The South African judgments cited by Radhakrishnan, J. in *the Society case* (2012) 6 SCC 1 at paras 154-59, 162).

**V. *Enabling power as guided power***

**16.** *Nagaraj case* lays down that enabling provisions are subject to conditions without which the right itself would be defeated. Thus the enabling power gives effect to the right to receive education from the State.

**17.** The Fundamental Rights Chapter applies against the State (except possibly Articles 17, 23 and 24).

**18.** It follows that the enabling power.

(*a*) cannot be applied to non-State actors and

(*b*) is subject to the principles of autonomy and voluntariness insofar as the non-State actors are co-opted to participate in the enterprise of education.

**VI. *The Act of 2009***

**19.** The Right of Children to Free and Compulsory Education Act, 2009 (hereafter "Act of 2009") has to be interpreted in the light of the above.

***(A) Mistakes in the Society decision (2012)***

**20.** The *Society decision* is faulty in the following regards:

(*a*) Both Kapadia, C.J. and Radhakrishnan, J. decisions overlook that protection given in Article 15(5) is to both aided and unaided minorities. This is contrary to the text of Article 15(5). [Kapadia, C.J. at para 64; Radhakrishnan, J. at para 311(2).]

(*b*) Kapadia, C.J. also expands Article 15(5) to exclude boarding schools and orphanages. (Kapadia, C.J. at para 54)

(*c*) Radhakrishnan, J. excluded Madrassas and Vedic pathshalas [Radhakrishnan, J. at para 311(13).]

*Note*.—The Act has been amended to include this. This however is relatable to Article 15(5) only if "minority" in Article 15(5) is read to include aided Madrassas and Vedic schools.

**21.** Thus we can see that the judgments in that case modify Article 15(5) at will without reference to the text of Article 15(5).

**22.** If such a power exists in the Judges, it is better to follow *T.M.A. Pai case*.

***(B) Three principles underlying the Act***

**23.** There are three underlying principles that categorise the Act:

(*i*) The *neighbourhood* principle which is undefined.

(*ii*) The *compulsory co-optation* principle which is inimical to *Nagaraj* read with *T.M.A. Pai*.

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(*iii*) *Regulatory provisions* which are by and large acceptable but some provisions need to be tested.

**24.** The *neighbourhood school* is fundamental to the success of the Act but it has not been defined anywhere in the Act, though it is mentioned in various sections of the Act.

(*i*) Section 3 mentions a neighbourhood school.

(*ii*) Section 6 which speaks of duty of the Government to establish schools in the neighbourhood area.

(*iii*) Section 8(*a*)—Government is to ensure availability of a neighbourhood school.

(*iv*) Section 9(*b*)—local authority is to ensure availability of neighbourhood school.

(*v*) Section 10—duty of parent to provide education in a neighbourhood school.

**25.** In the light of the above national and international practice read with the principles of voluntariness and autonomy it is submitted:

(*i*) It is the duty of the State to provide a network of neighbourhood school.

(*ii*) There is distinction between neighbourhood school and a school in neighbourhood.

(*iii*) In Sections 3, 6, 8, 9 neighbourhood school means schools set up by local authority i.e. government school.

(*iv*) In Section 10 neighbourhood school means school in the neighbourhood.

(*v*) The word "it" in expression "it is not established" in Section 6 needs to be read down.

**26.** Once we accept that it is exclusive responsibility of the Government to provide neighbourhood school, Section 12 is excessive in the following respect:

(*a*) While the principle of proportionality is applied to aided school, Section 12(*a*) it is stated that this is subject to a minimum of 25%. This phrase needs to be struck down.

(*b*) As far as unaided school are concerned consistent with autonomy and voluntariness the word "shall" in Section 12 shall be read as "may" and the phrase to the extent of at least twenty-five per cent be struck down.

(*c*) Such an approach would be consistent with *T.M.A. Pai* and constitutional.

**27.** More generally it is to be stated that this Act will not apply to minority schools in matters of quota and other aspects.

***Weaker section***

**28.** If the above interpretation is accepted it may not be necessary to attach the concept of weaker section. But in the alternative "weaker section"

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goes beyond on SC/ST and OBC classification and overloads constitutional reservation with social and secular reservations.

***Screening and other issues***

**29.** The provision in relation to screening in Sections 2(*o*) and 13(1) cannot apply to private institutions who have a right to select their students to support the nature and character of their private schools.

**30.** The provisions of Sections 15 and 16 should be reduced applicable to government schools which provide free education to all.

***Recognition and management***

**31.** The right to regulation cannot result in conditions which affect autonomy and voluntariness, fee fixation, management and staff as held and indicated in *T.M.A. Pai*.

**32.** The provision for School Management Committee and School Development Plan (Sections 21-22) cannot apply to all private institutions as laid down in *T.M.A. Pai*.

**33.** The redressal of grievances of teachers may be to a special external body or Tribunal not Government as laid down in *T.M.A. Pai*.

**34.** In the light of this submission the phrase "other than a school specified" in sub-clause (*iv*) of clause (*n*) in Section 12 be deleted if this is not accepted.

*Note*.—These suggestions will be further elaborated and reconsidered in the reply.

**35.** *In sum*

(*a*) The co-optation principle must be voluntary.

(*b*) The extension of "weaker" section is beyond Article 13(5).

(*c*) Fee has to be fixed by the institution.

(*d*) Autonomy of management cannot be taken away.

**VII.** ***State***

**36.** The concept of "State" was reviewed in *Pradeep Kumar Biswas* v. *Indian Institute of Chemical Biology*, (2002) 5 SCC 111 to put an end to controversies about the State in respect of Part III. The test enunciated is as follows:

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

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*regulatory whether under statute or otherwise, it would not serve to make the body a State.* (emphasis supplied)

**37.** The ratio of *Biswas* was explained and applied in *Zee Telefilms Ltd.* v. *Union of India*, (2005) 4 SCC 649:

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

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

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

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

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

This test is applied as follows:

*30.* However, it is true that the Union of India has been exercising certain control over the activities of the Board in regard to organising cricket matches and travel of the Indian team abroad as also granting of permission to allow the foreign teams to come to India. But this control over the activities of the Board cannot be construed as an administrative control. At best this is purely regulatory in nature and the same according to this Court in *Pradeep Kumar Biswas case* is not a factor indicating a pervasive State control of the Board.

**38.** In *Biswas* (2002) 5 SCC 111 at para 45 reference has been made to *Rajasthan Electricity Board* (1967) 3 SCR 377. The passage extracted from the *Rajasthan case* is as follows:

"The State as defined in Article 12 is thus comprehended to include bodies *created* for the purpose of promoting the educational and economic interests of the people." (emphasis supplied)

This therefore included institutions created by the State.

**39.** However this statement in the *Rajasthan case* does not represent a view different from *Biswas*. It was stated:

"In Part IV the State has been given the same meaning as in Article 12 and one of the directive principles laid down in Article 46 is that the

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State shall promote with special care the educational and economic interests of the people. The State, as defined in Article 12 is thus comprehended to include bodies created for the purpose of promoting the educational interests of the people." (p. 386)

**40.** These passages have to be read in context. The Board was a statutory authority — wholly covered by Article 12. The Court concluded:

"The Board was clearly an authority to which the provisions of Part III of the Constitution were applicable." (p. 386)

**41.** In the *Society case* reference is made to the South African guaranteed right decisions which show that even where socio-economic rights were the exclusive responsibility was that of the State. *Society for Unaided Schools in Rajasthan* v. *Union of India* (2012) 6 SCC 1 at para 154 (*see also* paras 128-31).

**42.** The distinction between "State" and authorities performing public functions has been maintained. In the latter cases Article 226 will lie but not for enforcement of fundamental rights. Article 32 will not lie *Anandi Mukta* (1989) 2 SCC 691 at paras 15-20 especially paras 20-21.

**43.** The relationships between the public and private sectors have been the subject of many solution-oriented judgments of the Supreme Court from 1959-2006 culminating in *T.M.A. Pai*.

*Solution 1*: *Kerala Education Bill*, 1959 SCR 995
*Solution 2*: *Sidhajbhai*, (1963) 3 SCR 837
*Solution 3*: *Xavier's*, (1974) 1 SCC 717
*Solution 4*: *Lily Kurian*, (1979) 2 SCC 124
*Solution 5*: *Frank Anthony*, (1986) 4 SCC 702
*Solution 6*: *St. Stephens*, (1992) 1 SCC 558
*Solution 7*: *Unni Krishnan*, (1993) 1 SCC 645
*Solution 8*: *T.M.A. Pai*
*Solution 9*: *Inamdar* following *T.M.A. Pai*
*Solution 10*: *Society case* (contrary to *T.M.A. Pai*)

Solution 8 and 9 represent the judicial interpretation and width of Articles 14, 19, 26(*d*) and 30.

**44.** Central to the controversy is how the public partnership will work which is important to the educational enterprise as a whole at all levels:

(*i*) On the importance of the partnership [*T.M.A. Pai* (2002) 8 SCC 481 at paras 38-39, 48].

(*ii*) On education, including all levels from primary school till the top. See *T.M.A. Pai*, (2002) 8 SCC 481 paras 58, 61, 62, p. 591 (answer to Question 11).

***A plea***

**45.** Finally, the *Society case* (2012) needs re-examination. The reference to the Constitution Bench may be noted [(2012) 6 SCC 120].

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**VIII.** ***Basic submission on Articles 21-A and 15(5) [In light of M. Nagaraj v. Union of India, (2006) 8 SCC 212 and T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481)]***

**46.** It is submitted that constitutional dispensation arising out of Article 21-A of the Constitution read with other fundamental rights mandates the State

(*a*) to provide free and compulsory education to all children aged 6-14 years,

(*b*) with an option to co-opt the private schools on conditions of autonomy, voluntariness and fairness in the *least invasive manner*.

**47.** Article 15-A is valid to the extent that it is an enabling provision for the State to provide for admissions of the socially and educationally backward classes, SC and ST. However the words: "or in clause (2) of Article 19" and "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" violate the basic structure.

**48.** The basic proposition is founded on:

(*a*) The decision in *M. Nagaraj case* is that even if a constitutional amendment to the Fundamental Rights Chapter is held to be valid, its extent and exercise shall be understood along with, and subject to, the essence of the fundamental rights which are part of the basic structure.

(*b*) The decision in *T.M.A. Pai* elaborates the protected educational regime for private sector education providers under Articles 19(l)(*g*), 26(*a*) and 30 of the Constitution in the light of other provisions of the Constitution.

**IX.** ***Principles emanating from M. Nagaraj v. Union of India, (2006) 8 SCC 212***

**49.** The following principles may be deduced from *Nagaraj*:

(*a*) *Applying on the test of width and identity test*, even if a constitutional amendment is found to be valid, the exercise of power under the amendment may be subjected to conditions to protect the identity of basic structure of the rights. (See *Nagaraj,* para 102 at p. 268). On "right" and essence of a right *see Coelho*, (2007) 2 SCC 1, para 142, 151(iv).

(*b*) *The content of a right must necessarily be defined by the courts and; and perforce, the extent it forms part of the basic structure*. See *Nagaraj*, paras 21 at p. 242:

> "*21*. The important point to be noted is that the content of a right is defined by the courts. The final word on the content of the right is of this Court, Therefore, constitutional adjudication plays a very important role in this exercise. …"

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(*c*) The concept of *reasonableness* is part of the basic structure. See *Nagaraj,* paras 24-26 at p. 243:

> "*24*. The point which is important to be noted is that principles of federalism, secularism, reasonableness and socialism, etc. are beyond the words of a particular provision. They are systematic and structural principles underlying and connecting various provisions of the Constitution. They give coherence to the Constitution. They make the Constitution an organic whole. They are part of constitutional law even if they are not expressly stated in the form of rules.
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> * * *
>
> *26*. … Therefore, axioms like secularism, democracy, reasonableness, social justice, etc. are overarching principles which provide linking factor for principle of fundamental rights like Articles 14, 19 and 21. These principles are beyond the amending power of Parliament."

(*d*) Articles 14, 19 and 21 form part of the "*Golden Triangle*" basic structure rights comprising the equality and freedom codes. See *Nagaraj*, para 32 at p. 245:

> "*32*. In *Minerva Mills* [(1980) 3 SCC 625 : (1981) 1 SCR 206] Chandrachud, C.J., speaking for the majority, observed that Articles 14 and 19 do not confer any fanciful rights. They confer rights which are elementary for the proper and effective functioning of democracy. They are universally regarded by the Universal Declaration of Human Rights. If Articles 14 and 19 are put out of operation, Article 32 will be rendered nugatory. In the said judgment, the majority took the view that: (SCC p. 657, para 63)
>
> > 'The principles enunciated in Part IV are not the proclaimed monopoly of democracies alone. They are common to all polities, democratic or authoritarian. Every State is goal-oriented and [every State] claims to strive for securing the welfare of its people. The distinction between the different forms of Government consists in [the fact] that a real democracy will endeavour to achieve its objectives through the discipline of fundamental freedoms like [Articles 14 and 19. Without these freedoms, democracy is impossible. If Article 14 is withdrawn,] the political pressures exercised by numerically large groups can tear the country [apart] by leaving it to the legislature to pick and choose favoured areas and favourite classes for preferential treatment.'
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> *35*. The theory of basic structure is based on the principle that a change in a thing does not involve its destruction and destruction of a thing is a matter of substance and not of form. Therefore, one has to

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apply the test of overarching principle to be gathered from the scheme and the placement and the structure of an article in the Constitution. For example, the placement of Article 14 in the equality code; the placement of Article 19 in the freedom code; the placement of Article 32 in the code giving access to the Supreme Court. Therefore, the theory of basic structure is the only theory by which the validity of impugned amendments to the Constitution is to be judged."

*See also* para 74 at p. 660 in *Minerva Mills*, (1980) 3 SCC 625:

"*74*. Three Articles of our Constitution, and only three, stand between the heaven of freedom into which Tagore wanted his country to awake and the abyss of unrestrained power. They are Articles 14, 19 and 21. Article 31-C has removed two sides of that golden triangle which affords to the people of this country an assurance that the promise held forth by the Preamble will be performed by ushering an egalitarian era through the discipline of fundamental rights, that is, without emasculation of the rights to liberty and equality which alone can help preserve the dignity of the individual."

See also *I.R. Coelho* v. *State of T.N.*, (2007) 2 SCC 1, para 109 at p. 54:

"*109*. For example, a law nationalising all newspapers can be successfully challenged on the ground of violation of the basic structure because free press is an instrument of democratic control and accountability and is necessary for the functioning of democracy and by the abrogation of this right a basic feature of the Constitution, namely, democracy is impaired. Again, suppose a law is passed prohibiting profession and propagation of religion. Violation of Article 25 in this case would also tantamount to a violation of basic feature of the Constitution because religious freedom is an essential feature of the Constitution. A law which provides for trial of criminal offences by military or non-judicial personnel and denies legal assistance to the accused and the trial is held in camera, could be challenged on the ground that it damages the basic structure because it violates the essence of Article 21 which is a basic feature of the Constitution. …"

*Note*.—Articles 14 (equality), 19 and 21 are the locomotive rights on the basis of which Democracy, Social Justice and the economy and principles of fairness depends.

(*e*) In order to safeguard the basic structure components, the court can impose conditions and limit the exercise of power under that provision. See para 25 at p. 243:

*25*. For a constitutional principle to qualify as an essential feature, it must be established that the said principle is a part of the constitutional law binding on the legislature. Only thereafter, is the

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second step to be taken, namely, whether the principle is so fundamental as to bind even the amending power of Parliament i.e. to form a part of the basic structure, The basic structure concept accordingly limits the amending power of Parliament. To sum up; in order to qualify as an essential feature, a principle is to be first established as part of the constitutional law and as such binding on the legislature. Only then, can it be examined whether it is so fundamental as to bind even the amending power of Parliament i.e. to form part of the basic structure of the Constitution. This is the standard of judicial review of constitutional amendments in the context of the doctrine of basic structure.

(*f*) In the context of *Nagaraj* it was indicated that in order to protect the "equality code" the following conditions attach to the exercise. See *Nagaraj*, para 122 at p. 278:

> "*122*. We reiterate that the ceiling limit of 50%, the concept of creamy layer and the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency are all constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse."

*Note*.—The term "equality code" is to be found at para 35 at p. 246 and para 102 at p. 269.

(*g*) These limitations have also been applied in *Suraj Bhan Meena* v. *State of Rajasthan*, (2011) 1 SCC 467, at p. 475.

**X. *Broad summary of principles that emanate from freedom code defined in the T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481 in matters of education***

**50.** *T.M.A. Pai* lays down the essence and structure of rights in Article 19(1)(*g*) insofar as they relate to educational Institutions in compliance with:

(*a*) The charity principle
(*b*) The autonomy principle
(*c*) The voluntariness principle
(*d*) No nationalisation and cross-subsidy
(*e*) The co-optation principle
(*f*) The reasonableness principle

***(a) The charity principle***

**51.** The essential element of charity principle in *T.M.A. Pai* goes to the core of the rights laid down in *T.M.A. Pai*.

(*i*) The right to provide education is not a business but an occupation. See *T.M.A. Pai* para 25 at p. 535

> "*25*. The establishment and running of an educational institution where a large number of persons are employed as teachers or administrative staff, and an activity is carried on that results

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imparting of knowledge to the students, must necessarily be regarded as occupation, even if there is no element of profit generation. It is difficult to comprehend that education, per se, will not fall under any of the four expressions in Article 19(l)(*g*). "Occupation" would be an activity of a person undertaken as means of livelihood or mission in life. The abovequoted observations in *Sodan Singh case* correctly interpret the expression occupation in Article 19(l)(*g*)."

(*ii*) This right to occupation is necessarily charitable in nature. See *T.M.A. Pai* para 57 at p. 545

"*57*. We however, wish to emphasise one point, and that is that inasmuch as the occupation of education is, in a sense, regarded as charitable, the Government can provide regulations that will ensure excellence in education, while forbidding the charging of capitation fee and profiteering by the institution. Since the object of setting up an educational institution is by definition "charitable", it is clear that an educational institution cannot charge such a fee as is not required for the purpose of fulfilling that object. *To put it differently, in the establishment of an educational institution, the object should not be to make a profit, inasmuch as education is essentially charitable in nature. There can, however be a reasonable revenue surplus, which may be generated by educational institution for the purpose of development of education and expansion of institution*."

(emphasis supplied)

(*iii*) *Revenue plus surplus formula*: In order to ensure that institutions do not become business, the fees and budgets shall be so arranged that educational institutions meet revenue costs and servicing of loans and borrowings and monies for development. See *T.M.A. Pai* para 55-57 at pp. 544-545

"*55*. The Constitution recognises the right of the individual or religious denomination, or a religious or linguistic minority to establish an educational institution. If aid or financial assistance is not sought, then such institution will be a private unaided institution. Although, in *Unni Krishnan case* the Court emphasised the important role played by private unaided institutions and the need for private funding, in the scheme that was framed, restrictions were placed on some of the important ingredients relating to the functioning of an educational institution. There can be no doubt that in seeking affiliation or recognition, the Board or the university or the affiliating or recognising authority can lay down conditions consistent with the requirement to ensure the excellence of education. It can, for instances, indicate the quality of the teachers by prescribing the minimum qualifications that they must possess, and the courses of study and curricula. It can, for the same reasons, also

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stipulate the existence of infrastructure sufficient for its growth, as a prerequisite. But the essence of a private educational Institution is the autonomy that the institution must have in its management and administration. There, necessarily, has to be a difference in the administration of private unaided institutions and the government-aided institutions. Whereas in the latter case, the Government will have greater say in the administration, including admissions and fixing of fees, in the case of private unaided institutions, maximum autonomy in the day-to-day administration has to be with the private unaided institutions. Bureaucratic or governmental interference in the administration of such an institution will undermine its independence. *While an educational institution is not a business, in order to examine the degree of independence that can be given to a recognised educational institution, like any private entity that does not seek aid or assistance from the Government, and that exists by virtue of the funds generated by it, including its loans or borrowings, it is important to note that the essential ingredients of the management of the private institution include the recruiting students and staff, and the quantum of fee that is to be charged.*

*56.* An educational institution is established for the purpose of imparting education of the type made available by the institution. Different courses of study are usually taught by teachers who have to be recruited as per qualifications that may be prescribed. It is no secret that better working conditions will attract better teachers. More amenities will ensure that better students seek admission to that institution. One cannot lose sight of the fact that providing good amenities to the students in the form of competent teaching faculty and other infrastructure costs money. It has, therefore, to be left to the institution, if it chooses not to seek any aid from the Government, to determine the scale of fee that it can charge from the students. One also cannot lose sight of the fact that we live in a competitive world today, where professional education is in demand. We have been given to understand that a large, number of professional and other institutions have been started by private parties who do not seek any governmental aid. *In a sense, a prospective student has various options open to him/her where, therefore, normally economic forces have a role to play. The decision on the fee to be charged must necessarily be left to the private educational institution that does not seek or is not dependent upon any funds from the Government.*

*57.* We, however, wish to emphasize one point, and that is that inasmuch as the occupation of education is, in a sense, regarded as charitable, the Government can provide regulations that will ensure excellence in education, while forbidding the charging of capitation fee and profiteering by the institution. Since the object of setting up

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an educational institution is by definition "charitable", it is clear that an educational institution cannot charge such a fee as is not required for the purpose of fulfilling that object. *To put it differently, in the establishment of an educational institution, the object should not be to make a profit, inasmuch as education is essentially charitable in nature. There can, however, be a reasonable revenue surplus, which may be generated by the educational institution for the purpose of development of education and expansion of the institution*."

(emphasis supplied)

(*iv*) Oversight of this will take place through the finance committees established by *Islamic Academy of Education* v. *State of Karnataka,* (2003) 6 SCC 697 and *P.A. Inamdar* v. *State of Maharashtra,* (2005) 6 SCC 537.

(*v*) If the Institution deviates from the charity principle, its activities will become res extra commercium and unprotected by Articles 19 and 26(*a*).

***(b) Autonomy***

**52.** Autonomy is defined as follows: See *T.M.A. Pai* at p. 542

*50*. The right to establish and administer broadly comprises the following rights:

(*a*) to admit students;

(*b*) to set up a reasonable fee structure;

(*c*) to constitute a governing body;

(*d*) to appoint staff (teaching and non-teaching); and

(*e*) to take action if there is dereliction of duty on the part of any employees

**53.** *T.M.A. Pai* distinguishes between:

(*i*) ***Private unaided institution with maximum autonomy***: This Hon'ble Court has recognized that a private unaided institution enjoys maximum autonomy. The term maximum autonomy is used in paras 61 and 62 of *T.M.A. Pai*:

*61*. In the case of unaided private schools, *maximum autonomy* has to be with the management with regard to administration, including the right of appointment, disciplinary powers, admission of students and the fees to be charged. At the school level, it is not possible to grant admissions on the basis of merit. It is no secret that the examination results at all levels of unaided private schools, notwithstanding the stringent regulations of the governmental authorities, are far superior to the results of the government-maintained schools. There is no compulsion on students to attend private schools. The rush for admission is occasioned by the

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standards maintained in such schools, and recognition of the fact that State-run schools do not provide the same standards of education. The State says that it has no funds to establish Institutions at the same level of excellence as private schools. But by curtailing the income of such private schools, it disables those schools from affording the best facilities because of a lack of funds. If this lowering of standards from excellence to a level of mediocrity is to be avoided, the State has to provide the difference which, therefore, brings us back in a vicious circle to the original problem viz. the lack of State funds. The solution would appear to lie in the States not using their scanty resources to prop up institutions that are able to otherwise maintain themselves out of the fees charged, but in improving the facilities and infrastructure of State-run schools and in subsidising the fees payable by the students there. It is in the interest of the general public that more good quality schools are established; autonomy and non-regulation of the school administration in the right of appointment, admission of the students and the fee to be charged will ensure that more such Institutions are established. The fear that if a private school is allowed to charge fees commensurate with the fees affordable, the degrees would be "purchasable" is an unfounded one since the standards of education can be and are controllable through the regulations relating to recognition, affiliation and common final examinations.

*62*. There is a need for private enterprise in non-professional college education as well. At present, insufficient number of undergraduate colleges are being and have been established, one of the inhibiting factors being that there is a lack of autonomy due to government regulations. It will not be wrong to presume that the number of professional colleges is growing at a faster rate than the number of undergraduate and non-professional colleges. While it is desirable that there should be a sufficient number of professional colleges, it should also be possible for private unaided undergraduate colleges that are non-technical in nature to have *maximum autonomy* similar to a school. (emphasis supplied)

**(*ii*) *Private aided institution with lesser autonomy***: See *T.M.A. Pai* at p. 551:

"*71*. While giving aid to professional institutions, it would be permissible for the authority giving aid to prescribe by rules or regulations, the conditions on the basis of which admission will be granted to different aided colleges by virtue of merit, coupled with the reservation policy of the State. The merit may be determined either through a common entrance test conducted by the university or the Government followed by counselling, or on the basis of an

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entrance test conducted by individual institutions — the method to be followed is for the university or the Government to decide. The authority may also devise other means to ensure that admission is granted to an aided professional institution on the basis of merit. *In the case of such institutions, it will be permissible for the Government or the university to provide that consideration should be shown to the weaker sections of the society.*

*72.* Once aid is granted to a private professional educational institution, the Government or the State agency, as a condition of the grant of aid, can put fetters on the freedom in the matter of administration and management of the institution. The State, which gives aid to an educational institution, can impose such conditions as are necessary for the proper maintenance of the high standards of education as the financial burden is shared by the State. The State would also be under an obligation to protect the interest of the teaching and non-teaching staff. In many States, there are various statutory provisions to regulate the functioning of such educational institutions where the States give, as a grant or aid, a substantial proportion of the revenue expenditure including salary, pay and allowances of teaching and non-teaching staff. It would be its responsibility to ensure that the teachers working in those institutions are governed by proper service conditions. The State, in the case of such aided institutions, has ample power to regulate the method of selection and appointment of teachers after prescribing requisite qualifications for the same. Ever since *In Re, Kerala Education Bill, 1957* this Court has upheld, in the case of aided institutions, those regulations that served the interests of students and teachers. Checks on the administration may be necessary in order to ensure that the administration is efficient and sound and will serve the academic needs of the institutions. In other words, rules and regulations that promote good administration and prevent maladministration can be formulated so as to promote the efficiency of teachers, discipline and fairness in administration and to preserve harmony among affiliated institutions. At the same time it has to be ensured that even an aided institution does not become a Government-owned and controlled institution. Normally, the aid that is granted is relatable to the pay and allowances of the teaching staff. In addition, the management of the private aided institutions has to incur revenue and capital expenses. Such aided institutions cannot obtain that extent of autonomy in relation to management and administration as would be available to a private unaided institution, but at the same time, it cannot also be treated as an educational institution departmentally run by Government or as a wholly owned and controlled government

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institution and interfere with constitution of the governing bodies or thrusting the staff without reference to management.

*73*. There are a large number of educational institutions, like schools and non-professional colleges, which cannot operate without the support of aid from the State. Although these institutions may have been established by philanthropists or other public-spirited persons, it becomes necessary, in order to provide inexpensive education to the students, to seek aid from the State. In such cases, as those of the professional aided institutions referred to hereinabove, the Government would be entitled to make regulations relating to the terms and conditions of employment of the teaching and non-teaching staff whenever the aid for the posts is given by the State as well as admission procedures. Such rules and regulations can also provide for the reasons and the manner in which a teacher or any other member of the staff can be removed. In other words, the autonomy of a private aided institution would be less than that of an unaided institution."

(***iii***) ***Private unaided minority institution***: See *T.M.A. Pai* at para 139 at p. 579:

*139*. Like any other private unaided institutions, similar unaided educational institutions administered by linguistic or religious minorities are assured maximum autonomy in relation thereto; e.g. method of recruitment of teachers, charging of fees and admission of students. They will have to comply with the conditions of recognition, which cannot be such as to whittle down the right under Article 30.

(***iv***) ***Private minority unaided institution***: See *T.M.A. Pai* at p. 579:

*143*. This means that the right under Article 30(1) implies that any grant that is given by the State to the minority institution cannot have such conditions attached to it, which will in any way dilute or abridge the rights of the minority institution to establish and administer that institution. The conditions that can normally be permitted to be imposed, on the educational institutions receiving the grant, must be related to the proper utilisation of the grant and fulfilment of the objectives of the grant. Any such secular conditions so laid, such as a proper audit with regard to the utilisation of the funds and the manner in which the funds are to be utilised, will be applicable and would not dilute the minority status of the educational institutions. Such conditions would be valid if they are also imposed on other educational institutions receiving the grant.

*Note*.—Regulation only to utilise the grant: *see also* para 130 in *T.M.A. Pai*.

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***(c) The voluntariness principle***

***Para 68 of T.M.A. Pai***

**54.** The controversy is about para 68 in *T.M.A. Pai* which reads as follows:

> "*68.* It would be unfair to apply the same rules and regulations regulating admission to both aided and unaided professional institutions. It must be borne in mind that unaided professional institutions are entitled to autonomy in their administration while, at the same time, they do not forego or discard the principle of merit. It would, therefore, be permissible for the university or the Government, at the time of granting recognition, to require a private unaided institution to provide for merit-based selection while, at the same time, giving the management sufficient discretion in admitting students. This can be done through various methods. For instance, a certain percentage of the seats can be reserved for admission by the management out of those students who have passed the common entrance test held by itself or by the State/university and have applied to the college concerned for admission, while the rest of the seats may be filled up on the basis of counselling by the State agency. This will incidentally take care of poorer and backward sections of the society. The prescription of percentage for this purpose has to be done by the Government according to the local needs and different percentages can be fixed for minority unaided and non-minority unaided and professional colleges. The same principles may be applied to other non-professional but unaided educational Institutions viz. graduation and postgraduation non-professional colleges or institutes."

Although this was treated in *Islamic Academy of Education* v. *State of Karnataka,* (2003) 6 SCC 697 as compulsorily giving up seats for weaker section, in *P.A. Inamdar* v. *State of Maharashtra*, (2005) 6 SCC 537 the voluntariness principle was affirmed. See paras 125-130 in *P.A. Inamdar*:

> "*125.* As per our understanding, neither in the judgment of *Pai Foundation* nor in the Constitution Bench decision in *Kerala Education Bill* which was approved by *Pai Foundation* is there anything which would allow the State to regulate or control admissions in the unaided professional educational institutions so as to compel them to give up a share of the available seats to the candidates chosen by the State, as if it was filling the seats available to be filled up at its discretion in such private institutions. This would amount to nationalisation of seats which has been specifically disapproved in *Pai Foundation*. Such imposition of quota of State seats or enforcing reservation policy of the State on available seats in unaided professional institutions are acts constituting serious encroachment on the right and autonomy of private professional educational institutions. Such appropriation of seats can also not be held to be a regulatory measure in the interest of the minority within the meaning of Article 30(1) or a reasonable restriction within the meaning of Article 19(6) of the Constitution. Merely because the resources of the

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State in providing professional education are limited, private educational institutions, which intend to provide better professional education, cannot be forced by the State to make admissions available on the basis of reservation policy to less meritorious candidates. Unaided institutions, as they are not deriving any aid from State funds, can have their own admissions if fair, transparent, non-exploitative and based on merit.

*126.* The observations in para 68 of the majority opinion in *Pai Foundation* on which the learned counsel for the parties have been much at variance in their submissions, according to us, are not to be read disjointly from other parts of the main judgment. A few observations contained in certain paragraphs of the judgment in *Pai Foundation* if read in isolation, appear conflicting or inconsistent with each other. But if the observations made and the conclusions derived are read as a whole, the judgment nowhere lays down that unaided private educational institutions of minorities and non-minorities can be forced to submit to seat-sharing and reservation policy of the State. Reading relevant parts of the judgment on which learned counsel have made comments and counter-comments and reading the whole judgment (in the light of previous judgments of this Court, which have been approved in *Pai Foundation*) in our considered opinion, observations in para 68 merely permit unaided private institutions to maintain merit as the criterion of admission by voluntarily agreeing for seat-sharing with the State or adopting selection based on common entrance test of the State. There are also observations saying that they may frame their own policy to give freeships and scholarships to the needy and poor students, or adopt a policy in line with the reservation policy of the State to cater to the educational needs of the weaker and poorer sections of the society.

*127.* Nowhere in *Pai Foundation* either in the majority or in the minority opinion, have we found any justification for imposing seat-sharing quota by the State on unaided private professional educational institutions and reservation policy of the State or State quota seats or management seats.

*128.* We make it clear that the observations in *Pai Foundation* in para 68 and other paragraphs mentioning fixation of percentage of quota are to be read and understood as possible consensual arrangements which can be reached between unaided private professional institutions and the State.

*129.* In *Pai Foundation* it has been very clearly held at several places that unaided professional institutions should be given greater autonomy in determination of admission procedure and fee structure. State regulation should be minimal and only with a view to maintain fairness and transparency in admission procedure and to check exploitation of the students by charging exorbitant money or capitation fees.

*130.* For the aforesaid reasons, we cannot approve of the scheme evolved in *Islamic Academy* to the extent it allows the States to fix quota

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for seat-sharing between the management and the States on the basis of local needs of each State, in the unaided private educational institutions of both minority and non-minority categories. That part of the judgment in *Islamic Academy* in our considered opinion, does not lay down the correct law and runs counter to *Pai Foundation*."

***(d) No nationalisation of seats and cross-subsidy***

**55.** This Court in *T.M.A. Pai* rejected the principle of nationalisation of seats which was stated in *Unni Krishnan case*. The following passage in *T.M.A. Pai* deals with the principle of no nationalisation of seats at p. 540:

"*38.* The scheme in *Unni Krishnan case* has the effect of *nationalising education* in respect of important features viz. the right of a private unaided institution to give admission and to fix the fee. By framing this scheme, which has led to the State Governments legislating in conformity with the scheme, the private institutions are indistinguishable from the government institutions; curtailing all the essential features of the right of administration of a private unaided educational institution can neither be called fair nor reasonable.

(emphasis supplied)

**56.** Cross-subsidy: *see* para 37 in *T.M.A. Pai* at p. 539:

*"37. Unni Krishnan* judgment has created certain problems, and raised thorny issues. In its anxiety to check the commercialisation of education, a scheme of "free" and "payment" seats was evolved on the assumption that the economic capacity of the first 50% of admitted students would be greater than the remaining 50%, whereas the converse has proved to be the reality. In this scheme, the "payment seat" student would not only pay for his own seat, but also finance the cost of a "free seat" classmate. ***When one considers the Constitution Bench's earlier statement that higher education is not a fundamental right, it seems unreasonable*** *to compel a citizen to pay for the education of another, more so in the unrealistic world of competitive examinations which assess the merit for the purpose of admission solely on the basis of the marks obtained, where the urban students always have an edge over the rural students. In practice, it has been the case of the marginally less merited rural or poor student bearing the burden of a rich and well-exposed urban student*."

(emphasis added)

***(e) The Co-optation principle***

**57.** The principle of cooperation and co-optation is stated clearly in *T.M.A. Pai*: see *T.M.A. Pai* paras 39, 98 & 99:

"*39.* That private educational institutions are a necessity becomes evident from the fact that the number of Government-maintained professional colleges has more or less remained stationary, while more private institutions have been established. For example, in the State of Karnataka there are 19 medical colleges out of which there are only 4 Government-maintained medical colleges. Similarly, out of 14 dental

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colleges in Karnataka, only one has been established by the Government, while in the same State, out of 51 engineering colleges, only 12 have been established by the Government. The aforesaid figures clearly indicate the important role played by private unaided educational institutions, both minority and non-minority, which cater to the needs of students seeking professional education." (p. 500)

* * *

"*48*. Private education is one of the most dynamic and fastest growing segments of post-secondary education at the turn of the twenty-first century. A combination of unprecedented demand for access to higher education and the inability or unwillingness of the Government to provide the necessary support has brought private higher education to the forefront, private institutions, with a long history in many countries, are expanding in scope and number, and are becoming increasingly important in parts of the world that relied almost entirely on the public sector.

*49*. Not only has demand overwhelmed the ability of the Governments to provide education, there has also been a significant change in the way that higher education is perceived. The idea of an academic degree as a "private good" that benefits the individual rather than a "public good" for society is now widely accepted. The logic of today's economics and an ideology of privatisation have contributed to the resurgence of private higher education, and the establishing of private institutions where none or very few existed before. (p. 542)

**58.** *T.M.A. Pai* also suggests that the State improves its standards: see *T.M.A. Pai* para 61 at pp. 546-547

"*61*. … The State says that it has no funds to establish institutions at the same level of excellence as private schools. But by curtailing the income of .such private schools, it disables those schools from affording the best facilities because of a lack of funds. If this lowering of standards from excellence to a level of mediocrity is to be avoided, the State has to provide the difference which, therefore, brings us back in a vicious circle to the original problem viz. the lack of State funds, The solution would appear to lie in the States not using their scanty resources to prop up institutions that are able to otherwise maintain themselves out of the fees charged, but in improving the facilities and infrastructure of State-run schools and in subsidising the fees payable by the students there. It is in the interest of the general public that more good quality schools are established; autonomy and non-regulation of the school administration in the right of appointment, admission of the students and the fee to be charged will ensure that more such institutions are established. The fear that if a private school is allowed to charge fees commensurate with the fees affordable, the degrees would be "purchasable" is an unfounded one since the standards of education can be and are controllable through the regulations relating to recognition, affiliation and common final examinations."

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**59.** That *P.A. Inamdar* v. *State of Maharashtra*, (2005) 6 SCC 537, at p. 602, this Court approved the principle of voluntariness laid down in *T.M.A. Pai*. *See* paras 125-130 of *P.A. Inamdar*.

**60.** The Government/respondent has tried to read "compulsion" in para 68 of *T.M.A. Pai*, which is completely wrong.

***(f) Areas of unreasonableness identified by T.M.A. Pai***

**61.** Reasonableness insofar as it applies to education has been structured in Articles 19, 26 and 30 of the *T.M.A. Pai* lays down:

**(*i*)** On the Unni Krishnan scheme: see *T.M.A. Pai* para 35 at p. 539:

> "*35*. It appears to us that the scheme framed by this Court and thereafter followed by the Governments was one that cannot be called a reasonable restriction under Article 19(6) of the Constitution. Normally, the reason for establishing an educational institution is to impart education. The institution thus needs qualified and experienced teachers and proper facilities and equipment, all of which require capital Investment. The teachers are required to be paid properly. As pointed out above, the restrictions imposed by the scheme, in *Unni Krishnan case* made It difficult, if not impossible, for the educational institutions to run efficiently. Thus, such restrictions cannot be said to be reasonable restrictions."

***(ii) On autonomy areas: See T.M.A. Pai para 36 at p. 539***

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

***(iii) On Cross-subsidy : See T.M.A. Pai para 37 at p. 539***

> "*37*. *Unni Krishnan* judgment has created certain problems, and raised thorny issues. In its anxiety to check the commercialisation of education, a scheme of "free" and "payment" seats was evolved on the assumption that the economic capacity of the first 50% of admitted students would be greater than the remaining 50%, whereas the converse has proved to be the reality. In this scheme, the "payment seat" student would not only pay for his own seat, but also finance the cost of a "free seat" classmate. *When one considers the Constitution Bench's earlier statement that higher education is not a fundamental right*, ***it seems unreasonable to compel a citizen to pay for the education of another***, *more so in the unrealistic world of*

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*competitive examinations which assess the merit for the purpose of admission solely on the basis of the marks obtained, where the urban students always have an edge over the rural students. In practice, it has been the case of the marginally less merited rural or poor student bearing the burden of a rich and well-exposed urban student*." (emphasis added)

***(iv) On nationalisation of seats : See T.M.A. Pai para 38 at p. 540***

"*38.* The scheme in *Unni Krishnan case* has the effect of nationalising education in respect of important features viz. the right of a private unaided institution to give admission and to fix the fee. By framing this scheme, which has led to the State Governments legislating in conformity with the scheme, the private Institutions are indistinguishable from the government institutions; curtailing all the essential features of the right of administration of a private unaided educational institution can neither be called fair nor reasonable. Even in the decision in *Unni Krishnan case* it has been observed by Jeevan Reddy, J., at p. 749, para 194, as follows:

> '*194*. The hard reality that emerges is that private educational Institutions are a necessity in the present-day context. It is not possible to do without them because the Governments are in no position to meet the demand — particularly in the sector of medical and technical education which call for substantial outlays. While education is one of the most important functions of the Indian State it has no monopoly therein. Private educational institutions — including minority educational institutions — too have a role to play.' "

***(v) On autonomy: See T.M.A. Pai para 40 at p. 540***

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

***(vi) On surrendering total process of selection to the State: See T.M.A. Pai para 40 at p. 540***:

"*41.* Surrendering the total process of selection to the State is *unreasonable*, as was sought to be done in *Unni Krishnan* scheme. Apart from the decision in *St. Stephens College* v. *University of Delhi* which recognised and upheld the right of a minority aided institution to have a rational admission procedure of its own, earlier Constitution Bench decisions of this Court have, in effect, upheld

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such a right of an institution devising a rational manner of selecting and admitting students." a

***(vii) On eligibility and qualifications: See T.M.A. Pai para 43 at p. 541***:

"*43*. Again, in *Minor P. Rajendran* v. *State of Madras* it was observed at SCR p. 795 that: (AIR p. 1017, para 17)

'*So far as admission is concerned, it has to be made by those who are in control of the colleges, — in this case the Government, because the medical colleges are government colleges affiliated to the university. In these circumstances, the Government was entitled to frame rules for admission to medical colleges controlled by it subject to the rules of the university as to eligibility and qualifications*.' b c

The aforesaid observations clearly underscore the right of the colleges to frame rules for admission and to admit students. The only requirement or control is that the rules for admission must be subject to the rules of the university as to eligibility and qualifications. The Court did not say that the university could provide the manner in which the students were to be selected." d

***(viii) On fee structure: see T.M.A. Pai para 54 at p. 544***:

"*54*. The right to establish an educational institution can be regulated; but such regulatory measures must, in general, be to ensure the maintenance of proper academic standards, atmosphere and infrastructure (including qualified staff) and the prevention of maladministration by those in charge of management. *The fixing of a rigid fee structure, dictating the formation and composition of a governing body, compulsory nomination of teachers and staff for appointment or nominating students for admissions would be unacceptable restrictions*." e

***(ix) On staff services : See T.M.A. Pai para 63 at p. 547*** f

"*63*. It was submitted that for maintaining the excellence of education, it was important that the teaching faculty and the members of the staff of any educational institution performed their duties in the manner in which it is required to be done, according to the rules or instructions. There have been cases of misconduct having been committed by the teachers and other members of the staff. The grievance of the institution is that whenever disciplinary action is sought to be taken in relation to such misconduct, the rules that are normally framed by the Government or the university are clearly loaded against the management. It was submitted that in some cases, the rules require the prior permission of the governmental authorities before the initiation of the disciplinary proceeding, while In other cases, subsequent permission is required before the imposition of g h

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penalties in the case of proven misconduct. While emphasising the need for an independent authority to adjudicate upon the grievance of the employee or the management in the event of some punishment being imposed, it was submitted that there should be no role for the Government or the university to play in relation to the imposition of any penalty on the employee."

***(x) On student selection : See T.M.A. Pai para 65 at p. 548***

"*65*. The reputation of an educational institution is established by the quality of its faculty and students, and the educational and other facilities that the college has to offer. The private educational institutions have a personality of their own, and In order to maintain their atmosphere and traditions, it is but necessary that they must have the right to choose and select the students who can be admitted to their courses of studies. It is for this reason that in *St. Stephen's College case* this Court upheld the scheme whereby a cut-off percentage was fixed for admission, after which the students were interviewed and thereafter selected. While an educational institution cannot grant admission on its whims and fancies, and must follow some identifiable or reasonable methodology of admitting the students, any scheme, rule or regulation that does not give the institution the right to reject candidates who might otherwise be qualified according to, say, their performance in an entrance test, would be an unreasonable restriction under Article 19(6), though appropriate guidelines/modalities can be prescribed for holding the entrance test in a fair manner. Even when students are required to be selected on the basis of merit, the ultimate decision to grant admission to the students who have otherwise qualified for the grant of admission must be left with the educational institution concerned. However, when the institution rejects such students, such rejection must not be whimsical or for extraneous reasons."

***(xi) On regulation: See T.M.A. Pai para 66 at p. 549***

"*66*. In the case of private unaided educational institutions, the authority granting recognition or affiliation can certainly lay down conditions for the grant of recognition or affiliation; these conditions must pertain broadly to academic and educational, matters and welfare of students and teachers — but how the private unaided institutions are to run is a matter of administration to be taken care of by the management of those institutions."

***(xii) On reasonable surplus: See T.M.A. Pai para 69 at p. 549***

*69*. In such professional unaided institutions, the management will have the right to select teachers as per the qualifications and eligibility conditions laid down by the State/university subject to adoption of a rational procedure of selection. A rational fee structure

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should be adopted by the management, which would not be entitled to charge a capitation fee. Appropriate machinery can be devised by the State or university to ensure that no capitation fee is charged and that there is no profiteering, though a reasonable surplus for the furtherance of education, is permissible. Conditions granting recognition or affiliation can broadly cover academic and educational matters including the welfare of students and teachers.

***(xiii) On aided institution: See T.M.A. Pai para 72 at p. 550***

"*72.* … Such aided institutions cannot obtain that extent of autonomy in relation to management and administration as would be available to a private unaided institution, but at the same time, it cannot also be treated as an educational institution departmentally run by Government or as a wholly owned and controlled government institution and interfere with constitution of the governing bodies or thrusting the staff without reference to management."

**62.** For a regulation to be just, the control must be (*i*) reasonable (*ii*) to better the educational institution. See para 122 at p. 570 in *T.M.A. Pai*.

**XI.** ***Constitutional general and specific dispensation in educational matters***

**63.** The Constitution has general and specific dispensation in educational matters which may be considered as follows:

(*a*) The socio-economic concept

(*b*) The federal context

(*c*) Multi-religious and multi-cultural

(*d*) The obligations of the State

(*e*) The private and public partnership context

***(a) Socio-economic concept***

**64.** Although socio-economic rights have been made subject to resources available with the STATE, THE FREEDOM WITHOUT THEM IS AN ILLUSION *see* Directive Principles

(*i*) Article 45: Provision for early childhood

(*ii*) Article 46: Promotion of educational and economic interests of the Scheduled Castes, Scheduled Tribes and other weaker sections.

**65.** Dr B.R. Ambedkar in his speech in the Constituent Assembly:

"The third thing we must do is not to be content with mere political democracy. We must make our political democracy a social democracy. What does social mean? It means a way of life which recognises liberty, equality and fraternity as the principles of life. These principles of liberty, quality and fraternity are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality, equality cannot be divorced by liberty. Nor can

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liberty and equality be divorced from fraternity. Without equality, liberty would produce the supremacy of few over many. Equality without liberty would kill individual initiative. Without fraternity, liberty and equality could not become a natural course of things. It would require a constable to enforce them. We must begin by acknowledging the fact that there is complete absence of two things in Indian society. One of these is equality. On the social plane, we have in India a society based on the principle of graded inequality which means elevation for some and degradation for others. On the economic plane, we have a society in which there are some who have immense wealth as against many who live in abject poverty. On the January 26, 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognising the principle of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one man one value. How long shall we continue to live this life of contradiction? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which this assembly has so laboriously built up." (emphasis supplied)

See p. 979 of Vol. 11 of the *Constituent Assembly Debates*: Book No. 5.

**66.** It is this need and obligation of the State, which made the Framers of the Constitution, incorporate education as a goal of the State. Articles 41 and 45 of the Constitution reads as:

"**41.** ***Right to work, to education and to public assistance in certain cases***.—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 underserved want."

* * *

"**45.** ***Provision for early childhood care and education to children below the age of six years***.—The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years."

**67.** There are several State legislations which are also presently in force which are aiming to achieving the said goal. Since the goal could not be achieved, this goal which was not justiciable has now become a fundamental right against the State by way of Article 21-A, which reads as:

"**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."

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***(b) Federal context***

**68.** Initially education was subject in List II of Schedule VII of the Constitution as Entry 11.

**69.** Subsequent to 42nd amendment, education has been included as Entry 25 in List III and same reads as:

> "**25.** Education, including technical education, . medical education and universities subject to provisions of Entries 63, 64, 65 and 66 of List I; vocational and technical training of labour."

**70.** Therefore although there is no doubt that the Central legislation would prevail over the various existing State legislations which are prevailing, but the absence of repeal and savings clause in the Act would lead to a situation of contradictions between the Central and State legislations including budgetary allocation.

***(c) Multi-religious and multi-cultural***

**71.** Secularism is a part of basic structure of the Constitution:

(*i*) *M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212 (Paras 24, 26)

(*ii*) *S.R. Bommai* v. *Union of India*, (1994) 3 SCC 1 [Ahmadi, J., paras 29, 30; Ramaswamy, J., paras 178-179; Jeevan Reddy, J., paras 304 & 434(10); Sawant, J., paras 146-148.

(*iii*) *M. Ismail Faruqui (Dr)* v. *Union of India*, (1994) 6 SCC 360, at p. 403.

**72.** *T.M.A. Pai* reinforces this:

> "*156*. Our country is often depicted as a person in the form of "Bharat Mata — Mother India". The people of India are regarded as her children with their welfare being in her heart. Like any loving mother, the welfare of the family is of paramount importance for her.
>
> *157*. For a healthy family, it is important that each member is strong and healthy. But then, all members do not have the same constitution, whether physical and/or mental. For harmonious and healthy growth, it is but natural for the parents, and the mother in particular, to give more attention and food to the weaker child so as to help him/her become stronger. Giving extra food and attention and ensuring private tuition to help in his/her studies will, in a sense, amount to giving the weaker child preferential treatment. Just as lending physical support to the aged and the infirm, or providing a special diet, cannot be regarded as unfair or unjust, similarly, conferring certain rights on a special class, for good reasons, cannot be considered inequitable. All the people of India are not alike, and that is why preferential treatment to a special section of the society is not frowned upon. Article 30 is a special right conferred on the religious and linguistic minorities because of their numerical handicap and to instil in them a sense of security and confidence, even though the

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minorities cannot be per se regarded as weaker sections or underprivileged segments of the society.

*158.* The one billion population of India consists of six main ethnic groups and fifty-two major tribes; six major religions and 6400 castes and sub-castes; eighteen major languages and 1600 minor languages and dialects. The essence of secularism in India can best be depicted if a relief map of India is made in mosaic, where the aforesaid one billion people are the small pieces of marble that go into the making of a map. Each person, whatever his/her language, caste, religion has his/her individual identity, which has to be preserved, so that when pieced together it goes to form a depiction with the different geographical features of India. These small pieces of marble, in the form of human beings, which may individually be dissimilar to each other, when placed together in a systematic manner, produce the beautiful map of India. Each piece, like a citizen of India, plays an important part in making of the whole. The variations of the colours as well as different shades of the same colour in a map are the result of these small pieces of different shades and colours of marble, but even when one small piece of marble is removed, the whole map of India would be scarred, and the beauty would be lost.

*159.* Each of the people of India has an important place in the formation of the nation. Each piece has to retain its own colour. By itself, it may be an insignificant stone, but when placed in a proper manner, goes into the making of a full picture of India in all its different colours and hues.

*160.* A citizen of India stands in a similar position. The Constitution recognises the differences among the people of India, but it gives equal importance to each of them, their differences notwithstanding, for only then can there be a unified secular nation. Recognising the need for the preservation and retention of different pieces that go into the making of a whole nation, the Constitution, while maintaining, inter alia, the basic principle of equality, contains adequate provisions that ensure the preservation of these different pieces.

*161.* The essence of secularism in India is the recognition and preservation of the different types of people, with diverse languages and different beliefs, and placing them together so as to form a whole and united India. Articles 29 and 30 do not more than seek to preserve the differences that exist, and at the same time, unite the people to form one strong nation."

**73.** The Constitution specifically created a code for multi-cultural and multi-religious institution to provide for diversity and secular education. *See* Articles 25-20.

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***(d) Obligations of the State***

**74.** A brief factual background of the education in India is given below:

| | |
|---|---|
| 1870-1880 | Compulsory Education Acts passed in Britain — Demand for similar treatment for Indians. |
| 1882 | Indian Education Commission — Indian leaders demand provision for mass education and Compulsory Education Acts. |
| 1893 | Maharaja of Baroda introduces compulsory education for boys in Amreli Taluk. |
| 1906 | Maharaja of Baroda extends compulsory education to rest of the State. |
| 1911 | Gopal Krishna Gokhale makes a plea to Imperial Legislative Council for introduction of free and compulsory education. |
| 1917 | Shri Vithalbhai Patel succeeds in getting Bill passed. |
| | First law on compulsory education passed (popularly known as the Patel Act). |
| 1918-1930 | Every province in British India gets Compulsory Education Act on its statute book. |
| 1930 | Hartog Committee Recommendation for better quality (not quantity) hinders spread and development of primary education. |
| 1944 | Post-War Plan for Educational Development of India (Sargent Plan) proposes scheme for Indian to achieve universal elementary education in by 1984 (40 years). |
| 1947 | Ways and Means (Kher) Committee set up to explore ways and means of achieving UEE within ten years at lesser cost. |
| 1947 | Constituent Assembly Sub-Committee on Fundamental Rights places free and compulsory education on list of Fundamental Rights: |

"*Clause 23.—Every citizen is entitled as of right to free primary education and it shall be the duty of the State 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*."

1947 (Apr.)

Advisory Committee of the Constituent Assembly rejects free and compulsory education as a fundamental right. Sends clause to list of "non-justiciable fundamental rights" (later termed as "directive principles of State policy").

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1949 (Nov.)

Debate in Constituent Assembly removes the first line of this clause (now Article 36) i.e. "*Every citizen is entitled as a of right to free primary education and it shall be the duty of the State to*. "and replaces it with "*the State shall endeavour to*." and Dr B.R. Ambedkar, clarifies that the objective of Article 36 is not restricted to free primary education. *"The clause as it stands after the amendment is that every child shall be kept in an educational institution under training until the child is of 14 years" ... "a provision is made in Article 18 to forbid any child being employed below the age of 14 years. Obviously, if the child is not to be employed below the age of 14 years, the child must be kept occupied in some educational institution. That is the object of Article 36, and that is why I say the word "primary" is quite inappropriate."*

1950

Article 45 of the directive principles of State Policy of the newly adopted Constitution of India, provides 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*."

**75.** The concept of compulsory education by the State is not a new concept but has been in existence from British period. In 1970, when England passed legislation to make education free and compulsory, a demand was raised, in India as well to provide similar facilities. In fact the following Table shows the number of legislations passed in India before Independence to achieve the compulsory education:

1. The Bombay Primary Education (District Municipalities) Act, 1917
2. The Bengal Primary Education Act, 1919
3. The Bihar and Orissa Primary Education Act, 1919
4. The Punjab Compulsory Education Act, 1919
5. The United Provinces Primary Education Act, 1919
6. The Bombay City Primary Education Act, 1920
7. The Central Provinces Primary Education Act, 1920
8. The Madras Primary Education Act, 1920
9. The Patiala Primary Education Act, 1926
10. The Bikaner State Compulsory Primary Education Act, 1929
11. The Madras Primary Education Act, 1919
12. The Bombay City Primary Education (District Boards) Act, 1922
13. The Bombay Primary Education Act, 1923
14. The Assam Primary Education Act, 1926
15. The U.P. (District Boards) Primary Education Act, 1926.
16. The Bengal (Rural) Primary Education Act, 1930
17. The (Jammu & Kashmir) Compulsory Education Act, 1934
18. The Bombay Primary Education (Amendment) Act, 1938

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19. The Punjab Primary Education Act, 1940
20. The Mysore Elementary Education Act, 1941
21. The Travancore Primary Education Act, 1945
22. The Bombay Primary Education Act, 1947.

**76.** Various legislations were passed post Independence and are presently in force:

| *Sl. No.* | *State/UT* | *Name of the Act* |
|---|---|---|
| *1.* | Andhra Pradesh | Andhra Pradesh Education Act, 1982. |
| *2.* | Assam | The Assam Elementary Education (Provincialisation) Act, 1974 |
| *3.* | Bihar | Bihar Primary Education (Amendment) Act, 1959. |
| *4.* | Goa | The Goa Compulsory Elementary Education Act, 1995. |
| *5.* | Gujarat | Gujarat Compulsory Primary Education Act, 1961. |
| *6.* | Haryana | Punjab Primary Education Act, 1960. |
| *7.* | Himachal Pradesh | The Himachal Pradesh Compulsory Primary Education Act, 1993. |
| *8.* | Jammu and Kashmir | The Jammu and Kashmir Education Act, 1984. |
| *9.* | Karnataka | The Karnataka Education Act, 1983. |
| *10.* | Kerala | The Kerala Education Act, 1958. |
| *11.* | Madhya Pradesh | The Madhya Pradesh Primary Education Act, 1961. |
| *12.* | Maharashtra | The Bombay Primary Education Act, 1947. |
| *13.* | Punjab | Punjab Primary Education Act, 1960. |
| *14.* | Rajasthan | The Rajasthan Primary Education Act, 1964. |
| *15.* | Sikkim | The Sikkim Primary Education Act, 2000. |
| *16.* | Tamil Nadu | The Tamil Nadu Compulsory Elementary Education Act, 1994. |
| *17.* | Uttar Pradesh | United Provinces Primary Education Act, 1919. |
| *18.* | West Bengal | West Bengal Primary Education Act, 1973. |
| *19.* | Delhi | The Delhi Primary Education Act, 1960. |

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**77.** Significantly in all the legislations it is the local authority and government bodies who are under an obligation to provide compulsory education.

***(e) Private Sector and Public Sector***

**78.** As for private schools, the Kothari Commission (Section 10.77) acknowledged that:

> "The right to establish private schools for any purpose whatsoever has also been given to all citizens under clauses (*c*) and (*g*) of Article 19 which provide that all citizens shall have the right 'to form associations' and to 'practise any profession, or to carry on any occupation, trade or business' and which obviously covers the right of individuals and groups to establish and conduct educational institutions of their choice. Private schools may, therefore, be established under the provisions of the Constitution and, if they do not seek aid or recognition from the State, they will have to be treated as being outside the national system of public education."

**79.** That *T.M.A. Pai* and *P.A. Inamdar* represent the basis of which the private sector can grow through autonomy and service through voluntariness.

**XII.** ***Meaning of Article 21-A***

**80.** Article 21-A reads as:

> "**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."

**81.** While analysing the scope of Article 21-A of the Constitution, it is relevant to look into the aspects of:

(*a*) the width of Article 21-A, which mainly deals with and casts an obligation on the State i.e. the *width test*.

(*b*) The direct restriction on other rights or the identity of the rights evolving from Article 21-A i.e. the *identity test*.

**82.** Article 21-A converts a non-justiciable directive principle into a positive justiciable obligation of the State to:

(*a*) "Provide" free and compulsory education to all children of the age from six to fourteen years.

(*b*) "In such manner as the State may by law determine".

(*c*) No objection can be made to the first part of Article 21-A which is non-defeasible. However the second part of Article 21-A is vulnerable to constitutional and judicial scrutiny.

(*d*) The term "provide" used in Article 21-A only relates to "State" and means that State must provide free and compulsory education.

(*e*) The phrase "in such manner as the law may determine" neither diminishes the State's *exclusive* constitutional obligation/responsibility to provide free and compulsory education nor permits offloading this responsibility to "*non-State actors*" on conditions other than those

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permissible under the regime as held by this Hon'ble Court in *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481.

**83.** The following features of Article 21-A may be noted:

(*i*) It does not contain a non obstante clause and does not exclude the operation of the other suppliers of education.

(*ii*) The obligation to provide free and compulsory education is mandatory on the State.

(*iii*) The term "State" has to be understood as Central Government, State Government and local and other authorities as defined under Articles 12 and 36 of the Constitution.

(*iv*) Therefore unaided and aided private institutions not being "State" are not included to mandatorily or directorially fulfil the obligations imposed on the State under Article 21-A of the Constitution.

(*v*) The principle on which private institutions can be co-opted to help to fulfil the aims of Article 21-A is voluntariness and autonomy.

**XIII.** ***Constitutional limitations applicable in educational matters***

***Principles of regulation, restriction, reasonableness and proportionality applicable in educational matters***

**(A)** ***Reasonableness and the educational regime***

**84.** It has already been shown that the *T.M.A. Pai* decision itself indicates that certain restrictions are clearly unreasonable:

(*i*) *Unni Krishnan* scheme: See *T.M.A. Pai*, para 35 at p. 539.

(*ii*) *Autonomy areas*: See *T.M.A. Pai*, para 36 at p. 539.

(*iii*) Cross-subsidy: See *T.M.A. Pai*, para 37 at p. 539.

(*iv*) Nationalisation: See *T.M.A. Pai*, para 38 at p. 540.

(*v*) Autonomy: See *T.M.A. Pai*, para 40 at p. 540.

(*vi*) Surrendering total process of selection to the State: See *T.M.A. Pai*, para 40 at p. 540.

(*vii*) On eligibility and qualifications: See *T.M.A. Pai*, para 43 at p. 541.

(*viii*) On fee structure: See *T.M.A. Pai*, para 54 at p. 544

(*ix*) On staff services : See *T.M.A. Pai*, para 63 at p. 547

(*x*) On student selection : See *T.M.A. Pai*, para 65 at p. 548

(*xi*) On regulation: See *T.M.A. Pai*, para 66 at p. 549

(*xii*) Reasonable surplus: See *T.M.A. Pai*, para 69 at p. 549

(*xiii*) On aided institution: See *T.M.A. Pai*, para 72 at p. 550

**(B)** ***Regulation and the educational regime***

**85.** In the area of education of private sector education. It has been accepted that:

(*i*) universally applicable legislation and standards,

(*ii*) such as relating labour law, health and safety,

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(*iii*) will be treated as regulatory in nature as long as autonomy is not transgressed.

**86.** This Hon'ble Court in *T.M.A. Pai case* it is stated:

"*137.* It follows from the aforesaid decisions that even though the words of Article 30(1) are unqualified, this Court has held that at least certain other laws of the land pertaining to health, morality and standards of education apply. The right under Article 30(1) has, therefore, not been held to be absolute or above other, provisions of the law, and we reiterate the same. By the same analogy, there is no reason why regulations or conditions concerning, generally, the welfare of students and teachers should not be made applicable in order to provide a proper academic atmosphere, as such provisions do not in any way interfere with the right of administration or management under Article 30(1)." (p. 578)

"*107.* The aforesaid decision does indicate that the right under Article 30(1) is not so absolute as to prevent the Government from making any regulation whatsoever. As already noted hereinabove, in *Sidhajbhai Sabhai case* it was laid down that regulations made in the true interests of efficiency of instruction, discipline, health, sanitation, morality and public order could be imposed. If this is so, it is difficult to appreciate, how the Government can be prevented from framing regulations that are in the national interest, as it seems to be indicated in the passage quoted hereinabove. Any regulation framed in the national interest must necessarily apply to all educational institutions, whether run by the majority or the minority. Such a limitation must necessarily be read into Article 30. The right under Article 30(1) cannot be such as to override the national interest or to prevent the Government from framing regulations in that behalf. It is, of course, true that government regulations cannot destroy the minority character of the institution or make the right to establish and administer a mere illusion; but the right under Article 30 is not so absolute as to be above the law. It will further be seen that in *Sidhajbhai Sabhai case* no reference was made to Article 29(2) of the Constitution. This decision, therefore, cannot be an authority for the proposition canvassed before us." (p. 563)

**87.** Too much cannot be made of the appeal to national interest which cannot be equated with public interest generally but overriding regulatory aspects. But even the autonomy of educational institutions cannot be transgressed.

***Examples of regulations***

**88.** There are various examples of permissible regulations and non-transgression of autonomy in *T.M.A. Pai*: See *T.M.A. Pai,* para 124 at p. 571:

"*124.* In *Lily Kurian* v. *Sr. Lewina* this Court struck down the power of the Vice-Chancellor to veto the decision of the management to impose a penalty on a teacher. It was held that the power of the Vice-Chancellor, while hearing an appeal against the imposition of the penalty, was

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uncanalised and unguided. In *Christian Medical College Hospital Employees' Union* v. *Christian Medical College Vellore Assn.* this Court upheld the application of industrial law to minority colleges, and it was held that providing a remedy against unfair dismissals would not infringe Article 30. In *Gandhi Faiz-e-am College* v. *University of Agra* a law which sought to regulate the working of minority institutions by providing that a broad-based management committee could be reconstituted by including therein the Principal and the seniormost teacher, was valid and not violative of the right under Article 30(1) of the Constitution. In *All Saints High School* v. *Govt. of A.P.* a regulation providing that no teacher would be dismissed, removed or reduced in rank, or terminated otherwise except with the prior approval of the competent authority, was held to be invalid, as it sought to confer an unqualified power upon the competent authority. In *Frank Anthony Public School Employees' Assn.* v. *Union of India* the regulation providing for prior approval for dismissal was held to be Invalid, while the provision for an appeal against the order of dismissal by an employee to a tribunal was upheld, The regulation requiring prior approval before suspending an employee was held to be valid, but the provision, which exempted unaided minority schools from the regulation that equated the pay and other benefits of employees of recognised schools with those in schools run by the authority, was held to be invalid and violative of the equality clause. It was held by this Court that the regulations regarding pay and allowances for teachers and staff would not violate Article 30."

**89.** A list was also drawn by Sinha, J. in *Islamic Academy*, (2003) 6 SCC 697:

*122.* Article 30(1) of the Constitution does not confer an absolute right. The exercise of such right is subject to permissible State regulations with an eye on preventing maladministration. Broadly stated, there are "permissible regulations" and "impermissible regulations".

*123.* Some of the permissible regulations/restrictions governing enjoyment of Article 30(1) of the Constitution are:

(*i*) Guidelines for the efficiency and excellence of educational standards (see *Sidhajbhai* v. *State of Gujarat*, *State of Kerala* v. *Mother Provincial* and *All Saints High School* v. *Govt. of A.P.*).

(*ii*) Regulations ensuring the security of the services of the teachers or other employees (see *Kerala Education Bill, 1957, Re* and *All Saints High School* v. *Govt. of A.P.*).

(*iii*) Introduction of an outside authority or controlling voice in the matter of service conditions of employees (see *All Saints High School* v. *Govt. of A.P.*).

(*iv*) Framing rules and regulations governing the conditions of service of teachers and employees and their pay and allowances (see

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*State of Kerala* v. *Mother Provincial* and *All Saints High School* v. *Govt. of A.P.*).

(*v*) Appointing a high official with authority and guidance to oversee that rules regarding conditions of service are not violated, but, however, such an authority should not be given blanket, uncanalised and arbitrary powers (see *All Saints High School* v. *Govt. of A.P.*).

(*vi*) Prescribing courses of study or syllabi or the nature of books (see *State of Kerala* v. *Mother Provincial* and *All Saints High School* v. *Govt. of A.P.*).

(*vii*) Regulation in the interest of efficiency of instruction, discipline, health, sanitation, morality, public order and the like (see *Sidhajbhai* v. *State of Gujarat*).

*124.* Subject to what has been stated in *T.M.A. Pai Foundation* some of the impermissible regulations are:

(*i*) Refusal to affiliation without sufficient reasons (*All Saints High School* v. *Govt. of A.P.*).

(*ii*) Such conditions as would completely destroy the autonomous administration of the educational institution (*All Saints High School* v. *Govt. of A.P.*).

(*iii*) Introduction of an outside authority either directly or through its nominees in the governing body or the managing committee of minority institution to conduct the affairs of the institution (*All Saints High School* v. *Govt. of A.P.*).

(*iv*) Provision of an appeal or revision against an order of dismissal or removal by an aggrieved member of staff or provision for the Arbitral Tribunal (see *Ahmedabad St. Xavier's College Society* v. *State of Gujarat*, *Lily Kurian* v. *Sr. Lewina* and *All Saints High School* v. *Govt. of A.P.*).

**(C)** ***No right to maladministration***

**90.** Even though applied to minority institution all institutions do not have a right to maladministration. From this emerged the dual test that maladministration can be prevented provided

(*a*) the regulation is reasonable,

(*b*) enhances the institution's effective vehicle of education.

**91.** The statement that right to administer does not include the right to maladminister is traceable to the *Kerala Education Bill*, 1959 SCR 995 at p. 1062. The dual test is found in *Rev Sidhajbhai Sabhai* v. *State of Bombay*, (1963) 3 SCR 837:

"... Regulations which may be lawfully imposed either by legislative or executive action as a condition of receiving grant or of recognition must be directed to making the institution while retaining its character as

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a minority institution effective as an educational institution. Such regulation must satisfy a dual test—the test of reasonableness and the test that it is regulative of educational character of the institution and is conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it."

Contention at p. 852 and finding at p. 856.

**92.** In *T.M.A. Pai*, the dual test is summed up as:

"… It was permissible for the authorities to prescribe regulations, which must be complied with before a minority institution could seek or retain affiliation and recognition. But it was also stated that the regulations made by the authority should not impinge upon the minority character of the institution. Therefore a balance has to be kept upon the two objectives—that of ensuring the standard of excellence of the institution, and that of preserving the right of the minorities to establish and administer their educational institutions. Regulations that embraced and reconciled the two objectives could be considered to be reasonable…." (para 122 at p. 570)

See also paras 106-107 at pp. 562-563.

**93.** It is submitted with respect that dual test applies to (*a*) unaided and aided minority institutions, (*b*) unaided non-minority institutions. But the principle will apply to the aided institutions.

**(D)** ***Annihilation test***

**94.** The Court emphatically rejected the annihilation test that unless the total right is annihilated, the restriction is reasonable. In *Rev Sidhajbhai Sabhai* v. *State of Bombay*, (1963) 3 SCR 837, this argument was made and rejected:

"The Additional Solicitor General appearing on behalf of the State, contends that this Court has held in the *Kerala Education Bill case* that the State may validly impose restrictive measures in national or public interest on the right of minority to administer its educational institution notwithstanding the protection of Article 30(1) provided such measures are not annihilative of the character of the minority educational institutions." (p. 852)

* * *

"No general principle on which reasonableness or otherwise of a regulation may be tested was sought to be laid down in *Kerala Education Bill case*, therefore is not an authority for the proposition submitted by the Solicitor General that all regulative measures which are not destructive or annihilative of the character of the institution established by the minority, provided the regulations are in national or public interest are valid." (p. 856)

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**(E)** ***Article 14: Equality provisions***

**95.** The equality provisions of the Constitution are found in Articles 14-16 and other provisions of the Constitution and are part of the basic structure of the Constitution. See *M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212 at p. 246:

> "*33.* From these observations, which are binding on us, the principle which emerges is that "equality" is the essence of democracy and, accordingly a basic feature of the Constitution. This test is very important. Free and fair elections per se may not constitute a basic feature of the Constitution. On their own, they do not constitute basic feature. However, free and fair election as a part of representative democracy is an essential feature as held in *Indira Nehru Gandhi* v. *Raj Narain* (Election case). Similarly, federalism is an important principle of constitutional law. The word "federalism" is not in the Preamble. However, as stated above, its features are delineated over various provisions of the Constitution like Articles 245, 246 and 301 and the three lists in the Seventh Schedule to the Constitution.
>
> *34.* However, there is a difference between formal equality and egalitarian equality which will be discussed later on.
>
> *35.* The theory of basic structure is based on the principle that a change in a thing does not involve its destruction and destruction of a thing is a matter of substance and not of form. Therefore, one has to apply the test of overarching principle to be gathered from the scheme and the placement and the structure of an article in the Constitution, For example, the placement of Article 14 in the equality code; the placement of Article 19 in the freedom code; the placement of Article 32 in the code giving access to the Supreme Court. Therefore, the theory of basic structure is the only theory by which the validity of impugned amendments to the Constitution is to be judged."

**96.** A broad view of equality is to be found in the doctrine of classification to ensure that equality does not operate against any action reasonably tailored towards a rational classification. To that extent the elaborate principles in *Shri Ram Krishna* v. *Shri Justice S.R. Tendolkar*, 1959 SCR 279 at pp. 298-300 which is as follows:

> "A close perusal of the decisions of this Court in which the above principles have been enunciated and applied by this Court will also show that a statute which may come up for consideration on a question of its validity under Article 14 of the Constitution, may be placed in one or the other of the following five classes:
>
> (*i*) A statute may itself indicate the persons or things to whom its provisions are intended to apply and the basis of the classification of such persons or things may appear on the face of the statute or may

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be gathered from the surrounding circumstances known to or brought to the notice of the court. In determining the validity or otherwise of such a statute the court has to examine whether such classification is or can be reasonably regarded as based upon some differentia which distinguishes such persons or things grouped together from those left out of the group and whether such differentia has a reasonable relation to the object sought to be achieved by the statute, no matter whether the provisions of the statute are intended to apply only to a particular person or thing or only to a certain class of persons or things. Where the court finds that the classification satisfies the tests, the court will uphold the validity of the law, as it did in *Chiranjitial Chowdhri* v. *Union of India*, *State of Bombay* v. *F.N. Balsara*, *Kedar Nath Bajoria* v. *State of West Bengal*, *S.M. Syed Mohammad & Company* v. *State of Andhra* and *Budhan Choudhry* v. *State of Bihar*.

(*ii*) A statute may direct its provisions against one individual person or thing or to several individual persons or things but no reasonable basis of classification may appear on the face of it or be deducible from the surrounding circumstances, or matters of common knowledge. In such a case the court will strike down the law as an instance of naked discrimination, as it did in *Ameerunnissa Begum* v. *Mahboob Begum* and *Ramprasad Narain Sahi* v. *State of Bihar*.

(*iii*) A statute may not make any classification of the persons or things for the purpose of applying its provisions but may leave it to the discretion of the Government to select and classify persons or things to whom its provisions are to apply. In determining the question of the validity or otherwise of such a statute the court will not strike down the law out of hand only because no classification appears on its face or because a discretion is given to the Government to make the selection or classification but will go on to examine and ascertain if the statute has laid down any principle or policy for the guidance of the exercise of discretion by the Government in the matter of the selection or classification. After such scrutiny the court will strike down the statute if it does not lay down any principle or policy for guiding the exercise of discretion by the Government in the matter of the selection or classification, on the ground that the statute provides for the delegation of arbitrary and uncontrolled power to the Government so as to enable it to discriminate between persons or things similarly situate and that, therefore, the discrimination is inherent in the statute itself. In such a case the court will strike down both the law as well as the executive action taken under such law, as it did in *State of West Bengal* v. *Anwar Ali Sarkar*, *Dwarka Prasad Laxmi Narain* v. *State of Uttar*

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*Pradesh* and *Dhirendra Krishna Mandal* v. *Superintendent and Remembrancer of Legal Affairs*.

(*iv*) A statute may not make a classification of the persons or things for the purpose of applying its provisions and may leave it to the discretion of the Government to select and classify the persons or things to whom its provisions are to apply but may at the same time lay down a policy or principle for the guidance of the exercise of discretion by the Government in the matter of such selection or classification, the court will uphold the law as constitutional, as it did in *Kathi Raning Rawat* v. *State of Saurashtra*.

(*v*) A statute may not make a classification of the persons or things to whom their provisions are intended to apply and leave it to the discretion of the Government to select or classify the persons or things for applying those provisions according to the policy or the principle laid down by the statute itself for guidance of the exercise of discretion by the Government in the matter of such selection or classification. If the Government in making the selection or classification does not proceed on or follow such policy or principle, it has been held by this Court e.g. in *Kathi Raning Rawat* v. *State of Saurashtra* that in such a case the executive action but not the statute should be condemned as unconstitutional."

**97.** But the doctrine of classification does not exhaust the doctrine of equality. See *Col. A.S. Iyer* v. *V. Balasubramanyam*, (1980) 1 SCC 634, at p. 659:

"*57.* Sri Govindan Nair, with assertive argument, gave us anxious moments when he pleaded for minimum justice to the civilian elements. He said that the impugned rules were so designed, or did so result in the working, that all civilians, recruit or promotee, who came in with equal expectations like his military analogue, would be so outwitted at all higher levels that promotions, even in long official careers would be hopes that sour into dupes and promises that wither away as teasing illusions. In effect, even if not in intent, if a rule produces indefensible disparities, whatever the specious reasons for engrafting service weightage for the army recruits, we may have had to diagnose the malady of such frustrating inequality. After all, civilian entrants are not expendable commodities, especially when considerable civil developmental undertakings sustain the size of the service. And their contentment through promotional avenues is a relevant factor. The Survey of India is not a civil service "sold" to the military, stampeded by war psychosis. Nor does the philosophy of Article 14 or Article 16 contemplate de jure classification and de facto casteification in public services based on some meretricious or plausible differentiation. Constitutional legalistics can never drown the fundamental theses that, as

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the thrust of *Thomas case* and the tailpiece of *Triloki Nath Khosa case* bring out, equality clauses in our constitutional ethic have an equalising message and egalitarian meaning which cannot be subverted by discovering classification between groups and perpetuating the inferior-superior complex by a neo-doctrine. Judges may interpret, even make viable, but not whittle down or undo the essence of the article. This tendency, in an elitist society with a diehard caste mentality, is a disservice to our founding faith, even if judicially sanctified. Subba Rao, J., hit the nail on the head when he cautioned in *Lachhman Das* v. *State of Punjab*:

> 'The doctrine of classification is only a subsidiary rule evolved by courts to give a practical content to the said doctrine. Over-emphasis on the doctrine of classification or an anxious and sustained attempt to discover some basis for classification may gradually and imperceptibly deprive the article of its glorious content. That process would inevitably end in substituting the doctrine of classification for the doctrine of equality; the fundamental right to equality before the law and the equal protection of the laws may be replaced by the doctrine of classification.'

The quintessence of the constitutional code of equality is brought out also by Bose, J. in *Bidi Supply Co. case*:

> 'The truth is that it is impossible to be precise, for we are dealing with intangibles and though the results are clear it is impossible to pin the thought down to any precise analysis. Article 14 sets out, to my mind, an attitude of mind, a way of life, rather than a precise rule of law. It embodies a general awareness in the consciousness of the people at large of something that exists and which is very real but which cannot be pinned down to any precise analysis of fact save to say in a given case that it falls this side of the line or that, and because of that decisions on the same point will vary as conditions vary, one conclusion in one part of the country and another somewhere else; one decision today and another tomorrow when the basis of society has altered and the structure of current social thinking is different. It is not the law that alters but the changing conditions of the times and Article 14 narrows down to a question of fact which must be determined by the highest Judges in the land as each case arises.' "

**98.** In Indian law, Article 14 is also directed against arbitrariness. See *Ajay Hasia* v. *Khalid Mujib Sehravardi*, (1981) 1 SCC 722.

**99.** After *R.C. Cooper* v. *Union of India*, (1970) 1 SCC 248, it has been held that:

> (*a*) Articles 14, 19 and 21 are inter-related and assumptions of separateness in *Gopalan case* were unfounded (para 55 at p. 279).

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(*b*) First it is not the object of the authority making the law impairing the right of the citizen nor the form of action that determines the invasion of the right. Secondly, it is the effect of the law and the action upon the right which attracts the jurisdiction of the court to grant relief. The direct operation of the Act upon the rights forms the real test. See *Rustom Cavasjee Cooper* v. *Union of India*, (1970) 1 SCC 248 and *Bennett Coleman & Co.* v. *Union of India*, (1972) 2 SCC 788.

**100.** The Constitution provides affirmative action for SC/ST/OBC in Articles 15(4) and (5) as well as Articles 16(4), (4-A)(4-B) and in favour of women and children in Article 15(3).

**101.** Equality classification may also be made under Articles 14 and 15(1) under what has been called doctrine of source. *Deepak Sibal* v. *Punjab University*, (1989) 2 SCC 145; *Kumari Chitra Ghosh* v. *Union of India*, (1969) 2 SCC 228 and *D.N. Chanchala* v. *State of Mysore*, (1971) 2 SCC 293.

**102.** But it is respectfully submitted that the RTE Art has to be considered in the light of all the circumstances and its effect. Equally an Article 14 classification has also to be considered in the light of educational institutions in terms of *T.M.A. Pai*.

**103.** Since Articles 14, 19 and 21 are all parts of the basic structure, a balance is to be maintained so that the "right" or 'the essence of the right' is not taken away.

(*a*) Where the right itself (or any judicial review based on that right) is taken away, it is contrary to the basic structure. [e.g. Article 31-B as interpreted in *I.R. Coelho*, (2007) 2 SCC 1].

(*b*) Where the "essence of the right may be effected the width of that right needs to be contained by directions curtailing the width so that any exercise of the right is in line with the basic structure. [e.g. Articles 16(4-A) and 16(4-B) and *Nagaraj*, (2006) 8 SCC 212.]

*Note*.—The "right" and "essence of the right" and "reasonable restrictions" relating thereto shall draw colour from judicial interpretation.

**XIV.** ***Analysis of the Right of Children to Free and Compulsory Education Act, 2009***

**104.** There are three underlying principles that categorise the Act:

(*i*) The *neighbourhood* principle which is undefined.

(*ii*) The *compulsory co-optation* principle which is inimical to *Nagaraj* read with *T.M.A. Pai*.

(*iii*) *Regulatory provisions* which are by and large acceptable but some provisions need to be tested.

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**105.** The *neighbourhood school* is fundamental to the success of the Act but it has not been defined anywhere in the Act, though it is mentioned in various sections of the Act:

(*i*) Section 3 mentions a neighbourhood school.

(*ii*) Section 6 speaks of duty of the Government to establish schools in the neighbourhood area.

(*iii*) Section 8(*a*): Government to ensure availability of a neighbourhood school.

(*iv*) Section 9(*b*): local authority to ensure availability of neighbourhood school.

(*v*) Section 10: duty of parent to provide education in a neighbourhood school.

**106.** In the light of the above national and international practice read with the principles of voluntariness and autonomy it is submitted:

(*i*) It is the duty of the State to provide a network of neighbourhood schools.

(*ii*) There is distinction between neighbourhood school and a school in neighbourhood.

(*iii*) In Sections 3, 6, 8, 9 neighbourhood school means school set up by local authority i.e. government school.

(*iv*) In Section 10 neighbourhood school means school in the neighbourhood.

(*v*) The word "it" in expression "it is not established" in Section 6 needs to be read down.

**107.** Once we accept that it is exclusive responsibility of the Government to provide neighbourhood school, Section 12 is excessive in the following respect:

(*a*) *While the principle of proportionality is applied to aided school, Section 12(a) it is stated that this is subject to a minimum of 25%. This phrase needs to be struck down.*

(*b*) As far as unaided schools are concerned consistent with autonomy and voluntariness the word "shall" in *Section 12 shall be read as "may"* and the phrase to the extent of at least twenty-five per cent be struck down.

(*c*) Such an approach would be consistent with *T.M.A. Pai* and constitutional.

**108.** More generally it is to be stated that this Act will not apply to minority schools in matters of quota and other aspects.

***Weaker section***

**109.** If the above interpretation is accepted it may not be necessary to attach the concept of weaker section. But in the alternative "weaker section"

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goes beyond on SCT/ST and OBC classification and overloads constitutional reservation with social and secular reservations.

***Screening and other issues***

**110.** The provision in relation to screening in Sections 2(*o*) and 13(1) cannot apply to private Institutions who have a right to select their students to support the nature and character of their private schools.

**111.** The provisions of Sections 15 and 16 should be reduced applicable to government schools which provide free education to all.

***Recognition and management***

**112.** The right to regulation cannot result in conditions which affect autonomy and voluntariness, fee fixation, management and staff as held and indicated in *T.M.A. Pai*.

**113.** The provision for School Management Committee and School Development Plan (Sections 21-22) cannot apply to all private institutions as laid down in *T.M.A. Pai*.

**114.** The redressal of grievances of teachers may be to a special external body or tribunal not Government as laid down in *T.M.A. Pai*.

**115.** In the light to this submission the phrase "other than a school specified" in sub-clause (*iv*) of clause (*n*) in Section 2 be deleted but retain if this is not accepted.

**116.** *Note.*— These suggestions will be further elaborated and reconsidered in reply.

**XV. *Intention of the Right of Children to Free Education Act, 2009 (RTE Act)***

**117.** The intention of the RTE Act is to evince an intention to enact a comprehensive and complete code on free and compulsory education.

(*i*) *See* Statement of Objects and Reasons (SOR)

(*ii*) Preamble

(*iii*) Section 1(2) which extends the Act to the whole India except Jammu and Kashmir

(*iv*) Section 1(3) which leaves the Central Government to verify when the Act comes into force

(*v*) SO 428 (E) of 16-2-2010 indicates that the Act come into force from 1-4-2010

**118.** The Act indicates that the *appropriate Government* for all schools (other than a school established, owned or controlled by the Central Government or the Administrator of Union Territory) is the State Government.

(*i*) Section 2(*a*)

(*ii*) Sections 2(*n*)(*i*), (*ii*), (*iv*)

**Summary of Arguments**

**IV. Dr Rajeev Dhavan, Senior Advocate, for the petitioners** *(contd.)*

**119.** To fulfil the purpose of Section 3 of the Act (apart from Central Government school), primary duties fall on the State Government and its local authorities.

(*i*) Section 6

(*ii*) Section 8

(*iii*) Section 9

(*iv*) Section 11

**120.** The financial responsibility is shared by the State Government with the Central Government [Section 7].

**121.** It is the State Government that shall give a certificate of education *under the Act* [Sections 18 and 19].

**122.** The State Government shall prescribe the pupil—teacher ratio in school *under this Act* [Section 25 read with the Schedule].

**123.** The State Government will give grant on the basis of the school development plan *under this Act* [Section 22(2)].

**124.** The State Government shall prescribe the curriculum *under this Act* [Section 29].

**125.** The State Government shall constitute grievance redressal mechanisms *under this Act* [Section 31(3) and Section 34].

**126.** The rule-making power of the State Government is *under this Act* [Sections 38(1) and 4].

**127.** Significantly, the Central Government may issue directions to the State Government *under this Act*; and the State Government may itself issue directions to local authorities *under this Act* [Section 35].

**128.** Sanction for prosecution shall be *under this Act* [Section 36].

**129.** Local authorities within the State function with positive objectives *under this Act* [Sections 3, 9, 18, 32, 35, 37].

**130.** Thus, the State Government acts:

(*i*) as a statutory authority *under this Act*

(*ii*) acts on instructions from the Central Government under this Act.

**131.** It is submitted that the RTE Act is intended to be comprehensive from easy conceivable angle insofar as the fulfilment of providing free and compulsory education is concerned.

**XVI.** ***Powers in Respect of Free and Compulsory Education fall under Schedule VII of the Constitution***

**132.** The Constitution envisages three kinds of power reposed in the legislature:

**132.1.** Those contained in Schedule VII where they empower concurrent powers, the doctrine of repugnancy will prevail (Article 254).

**Summary of Arguments**

**IV. Dr Rajeev Dhavan, Senior Advocate, for the petitioners** *(contd.)*

**132.2.** The power to amend under Article 368 and other similar amendment powers without recourse to Article 368. These are listed in Chandrachud J.'s judgment in *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225, at para 2052 page 979:

> *2052*. The expression "amendment" was used in a large number of articles of the Constitution as originally enacted: Articles 4(1), (2), 108(4), 109(3), (4), 111, 114(2), 169(2), 196(2), 198(3) and (4), 200, 201, 204(2), 207(1), (2), (3), 240(2), 274(1), 304(*b*) and 349. A reference to the content and the subject-matter of these articles would show that in almost every one of the cases covered by these articles, "amendment" would be by way of addition, variation or repeal.

To these may be added Articles 243-M and 243-ZC.

**132.3.** Legislative power independent which is sui generis independent of the Seventh Schedule power. These include

(*i*) Article 262

(*ii*) Articles 124(1), (2-A) (5)

(*iii*) Articles 105(3), 194(3)

(*iv*) Articles 119, 203

(*v*) Articles 32(3), 35

(*vi*) Articles 323-A and 323-B

(*vii*) *In Re. Cauvery Water Dispute Tribunal*, 1993 Supp (1) SCC 96 at para 67.

(See also Articles 243-A, 243-C, 243-D, 243-F, 243-G, 243-H, 243-J, 243-K, 243-L; 243-R, 243-X, 243-V, 243-W, 243-X, 243-Z, 243-ZA, 243-ZD and 243-ZE.)

**133.** The Constitution also requires the limitation of a law (as opposed to executive action) in some articles:

(*i*) Articles 15(5), 19, 21, 21-A,

(*ii*) Article 265

(*iii*) Article 300-A

**134.** Although a law required to implement Article 21-A, that article is not the source of power which vests for the Union and State in List III Entry 25. *Alternatively*, if Article 21-A is the source of law, the principle of repugnancy (though not applicable in terms) would have to be imported to reconcile conflicts between the Union and the State Legislature.

**XVII.** ***State Legislature on Free and Compulsory Education***

**135.** The Table given below lists the State legislatures dealing with free and compulsory education. However, reservations for private schools do not exist in the statute unless they grow out of land grants or contractual

**Summary of Arguments**

**IV. Dr Rajeev Dhavan, Senior Advocate, for the petitioners** *(contd.)*

relations. The latter needs to be examined individually in each case (e.g. cases before the Delhi High Court).

| | *Free education* | *Compulsory elementary education/duty of Government* | |
|---|---|---|---|
| 1. The Punjab Primary Education Act, 1960. | S.11—No fee shall be levied from child attending government school | S. 3(1)—State Government may by order direct that primary education be compulsory. | |
| 2. The Punjab Compulsory Primary Education Act, 1994. | | S. 5—Government through school attendance authorities shall ensure that every child attends the school. | |
| 3. The Himachal Pradesh Compulsory Primary Education Act, 1953. | S. 12—No fee shall be charged in areas in which notification is in force | S. 12 | |
| 4. The Himachal Pradesh Compulsory Primary Education Act, 1997. | | S. 10—State shall make facilities for primary education availability in the State. | |
| 5. The Assam Elementary Education (Provincialisation) Act, 1974. | S. 13—No fee shall be levied from a child attending recognised school | S. 14—State may by notification declare that elementary education shall be compulsory. | |

**Summary of Arguments**

**IV. Dr Rajeev Dhavan, Senior Advocate, for the petitioners** *(contd.)*

| | | | | |
|---|---|---|---|---|
| a | 6. The Kerala Education Act, 1958. | S. 23 | S. 23—State shall provide free compulsory education to the children through the State. | |
| b | 7. The Karnataka Education Act, 1983. | S. 19—No fee shall be levied from a child attending an approved school | S. 11—State Government to direct primary education to be compulsory. | |
| c | 8. The Sikkim Primary Education Act, 2000. | | S. 4—primary education shall be compulsory in the area specified in the declaration for children ordinarily resident in that area. | |
| d | | | | |
| e | 9. The Goa Compulsory Elementary Education Act, 1995. | | S. 3—elementary education shall be compulsory for every child of school age. Government shall provide such number of schools. | |
| f | 10. The Gujarat Compulsory Primary Education Act, 1961. | S. 15(1)—No fees shall be charged within the area of compulsion in any school maintained by the State Government or the local authority in respect of a child who is entitled to get free education according to the | S. 3(1)—duty of the local authority to make schemes that provide for compulsory education for children up to such age and standard that the local authority deems fit. | |
| g | | | | |
| h | | | S. 3(2)—State Government can direct local authority to | |

**Summary of Arguments**

**IV. Dr Rajeev Dhavan, Senior Advocate, for the petitioners** *(contd.)*

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|---|---|---|---|---|
| | standards fixed by the scheme.<br>S. 15(2)—If the only school available is under private management, the local authority shall take such steps so as to make sure that the education the child receives is free. | submit to it any scheme within a specified time period for children of such age and up to such standard that the State Government deems fit. | | |
| 11. The Tamil Nadu Compulsory Elementary Education Act, 1994. | No explicit provision on exemption from payment of fees. | S. 3(1)—Subject to the provisions of the Act, elementary education to be compulsory for every child of "school age". | | |
| 12. The Bombay Primary Education Act, 1947. | S. 31—No fees to be charged within the area of compulsion in any school maintained by the Zila Parishad or the authorised municipality as the case may be. | S. 25—Duty of the Parishad Officer to prepare a scheme of compulsory education for children of such age and up to such standard as the Director may specify.<br>S. 26(1)—Authorised municipality may, by a resolution, declare its intention to create a scheme for children of such age and up | | |

**Summary of Arguments**

**IV. Dr Rajeev Dhavan, Senior Advocate, for the petitioners** *(contd.)*

| | | | |
|---|---|---|---|
| | | to such standard that the municipality may decide.<br>S. 26(2)—State Government may call upon authorised municipality to formulate the scheme according to standards set by the State Government. | |
| 13. The Himachal Pradesh Compulsory Primary Education Act, 1953 | S. 12—No fee shall be charged within an area in which a notification applies. | S. 3 (1)—State Government may by notification declare that the primary education of male children shall be compulsory in any area.<br>S. 3(2)—Where any such notification is in force, the State Government may by notification declare that the primary education of female children shall be compulsory in the whole or in any part of the area notified in sub-section (1). | |

**Summary of Arguments**

**IV. Dr Rajeev Dhavan, Senior Advocate, for the petitioners** *(contd.)*

| | | | |
|---|---|---|---|
| 14. Rajasthan Primary Education Act, 1964. | S. 15(1)—No fee shall be levied in respect of any child for attending an approved school which is under the management of the State Government or a local authority.<br>S. 15(2)—Where, in respect of any child to whom declaration under Section 4 applies and the only school which he can attend is an approved school under private management falling within sub-clause (*ii*) of clause (*b*) of Section 2, the education authority shall take such steps as it may think fit for the purpose of ensuring that the primary education which the child is to receive is free. | S. 3 (1)—Duty of Education Authority to provide for compulsory primary education for children ordinarily resident within jurisdiction, and for this purpose it shall from time to time, submit to the State Government such proposal in the form of a scheme as it may think for providing for such compulsory primary education in the whole or any part of the area within its jurisdiction for children of such ages and up to such class or standard as it may decide.<br>S. 3(2), S. 3(3), S. 3(4), S. 3(5)<br>S. 4—Primary education to be compulsory in specified areas. | S. 5—Grant-in-aid. |

**Summary of Arguments** *(contd.)*

***V. Mr Pravin Samdhani, Senior Advocate, for the petitioners***

***Propositions***

**1.** Without prejudice to and while adopting the submissions made by Mr R.F. Nariman, Dr Dhavan and Mr Anil Divan, Senior Advocates, it is submitted that:

**1.1.** *T.M.A. Pai*, (2002) 8 SCC 481, gives protection to an unaided educational institution under Article 19(1)(*g*) on four counts:

(*a*) Autonomy on right to admit students of its own choice;[1]

(*b*) Autonomy to devise their own fee structure, however, with the limited restriction not to profiteer.[2]

(*c*) Autonomy on right to establish an educational institution.[3]

(*d*) Autonomy on right to administer.[4]

**1.2.** Article 15(5) though not termed as, but is in the nature of proviso/ exception to Article 19(1)(*g*). It tinkers with the fundamental right, as declared by *T.M.A. Pai*. It is submitted that an article which tinkers with declared identified right is required to be construed strictly. Article 15(5) only deals with the aspect of "admission" to a private unaided school. Therefore, Article 15(5) cannot be read as enabling to overturn three other aspects enumerated above. Alternatively, it is submitted that an "exception" is an exception to the main provision. It only excludes what is provided in the exception. The exception does not provide for anything more than the "admission" to an unaided school to the categories of "socially and educationally backward classes" or "scheduled castes and scheduled tribes".

**1.3.** Article 21-A is placed after Article 21. Right to education is read into Article 21 by this Hon'ble Court in *Unni Krishnan* and reaffirmed by *T.M.A. Pai*[5]. On a plain reading, Article 21-A puts the obligation and the responsibility on the State to provide free education, Article 15(5) does not provide for the matter pertaining to the responsibility of payment of fee or the responsibility to incur cost for education. If Article 15(5) is read to empower the State to legislate passing the burden of contributing for the fee for socially and educationally backward classes or for the Scheduled Caste and Scheduled Tribe students, which it is submitted is obviously not enabled or permitted by Article 15(5), the same would also be in conflict with Article 21-A. If the educational institution is held under Article 15(5) or under Article 21-A, liable to bear the burden of part of the fees, it is submitted that it would amount to levying a tax inasmuch as, this would result into extraction of money from private individual (private unaided institution). Furthermore, in view of the law laid down in *T.M.A. Pai*, an educational institution is not entitled to profiteer, which would only mean that the

1 Para 50, p. 542 of *T.M.A. Pai*.
2 Para 50, p. 542 of *T.M.A. Pai*.
3 Para 50, p. 542 and para 162, p. 588 of *T.M.A. Pai*.
4 Para 50, p. 542 of *T.M.A. Pai*.
5 Q.9 & answer at page 590

**Summary of Arguments**

**V. Mr Pravin Samdhani, Senior Advocate, for the petitioners** *(contd.)*

contribution from the other students will have to be increased to sustain the deficiency/shortfall for accommodating reservation under Article 15(5), which it is submitted would not be permissible.

***Propositions on the RTE Act***

**2.** Whilst adopting the arguments of the others who have challenged the validity of the RTE Act, following additional/alternative submissions are made.

**2.1.** Section 6 of the Act casts an obligation on the appropriate government/local authority to establish neighbourhood school within a period of 3 years. Section 7 contemplates sharing of the burden for establishing the neighbourhood schools by the Central and the State Governments. The obligation to provide free education under Section 8 is cast on the appropriate Government and on the local authority under Section 9. It would thus appear that the responsibility and the obligation to establish neighbourhood school and provide free education is on the appropriate government/local authority. This is in terms of Article 21-A. The task of establishing a neighbourhood school is required to be completed within a period of 3 years from the date of the Act coming into force, which came into force on 1-4-2010. The provision for admission in "private unaided school" appears to be only transitory and for temporary period of 3 years.

**2.2.** Section 12(*c*) contemplates providing of admission to a child belonging to "weaker section and disadvantage group" in the neighbourhood and provide free and compulsory elementary education till completion. This ex facie is in conflict with Article 19(1)(*g*) and to a large extent with Article 15(5). As submitted earlier, Article 15(5) is in the nature of a proviso and/or an exception. It carves out an exception from the main provision. It only provides for carving out an exception in the case of Socially and Educationally Backward classes and Scheduled Castes and Scheduled Tribes, to the extent that the provision of Section 12(*c*) exceeds the aforementioned classes, it is submitted, it is violative of Articles 19(1)(*g*), 14 and 15(1).

**2.3.** The proviso to Section 12(*c*) would also appear to be in conflict with Article 45 as it exists today after its substitution.

**2.4.** Section 12 sub-section (2) is in conflict with Article 19(1)(*g*) and they go beyond the exception carved out under Article 15(5).

| *Date* | *Event* | *Remark* |
|---|---|---|
| 24-4-1973 | Historic judgment in *Kesavananda Bharati*, (1973) 4 SCC p. 225. | Bench strength: 13 Judges |
| 9-5-1980 | Celebrated judgment in *Minerva*, (1983) 3 SCC 625. | Bench strength: 5 Judges |
| 13-11-1980 | Judgment in *Waman Rao*, (1981) 2 SCC 362. | Bench strength: 5 Judges |
| 4-2-1993 | Judgment in *Unni Krishnan*, (1973) 1 SCC 645. | Bench strength: 5 Judges |
| 31-10-2002 | Judgment in *T.M.A. Pai*, (2002) 8 SCC 481. | Bench strength: 11 Judges. |

**Summary of Arguments**

**V. Mr Pravin Samdhani, Senior Advocate, for the petitioners** *(contd.)*

| | | |
|---|---|---|
| 12-12-2002 | Article 21-A introduced, which reads thus:<br>"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."<br>*Note*.—This came into effect from 1-4-2010. | |
| 12-12-2002 | Article 45 substituted. The substituted Article reads thus:<br>"45. *Provision for early childhood care and education to children below the age of six years.—The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.*"<br>*Note*.—This came into effect from 1-4-2010. | |
| 12-12-2002 | Article 51-A amended by adding sub-clause (*k*). The said addition reads thus:<br>"51-A(*k*).—*who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years.*"<br>*Note*.—This came into effect from 1-4-2010. | |
| 14-8-2003 | Judgment in *Islamic Academy*, (2003) 6 SCC 697. | Bench strength: 7 Judges. |
| 12-8-2005 | Judgment in *P.A. Inamdar*, (2005) 6 SCC 537. | Bench strength: 7 Judges. |
| 20-1-2006 | Article 15 was amended and clause (5) to Article 15 was added. The amended Article 15(5) reads thus:<br>"15(5).—Nothing in this Article or in sub-clause (*g*) of clause (1) of Article 19 shall prevent the State from making any special provision, by law, for the advancement of any social and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes insofar as such special provisions relate to their admission to educational institutions including private education institutions, whether aided or unaided by the State, other than the minority education institutions referred to in clause (1) of Article 30." | |
| 19-10-2006 | Judgment in *M. Nagaraj*, (2006) 8 SCC 212 | Bench strength: 5 Judges. |
| 11-1-2007 | Judgement in *Coelho*, (2007) 2 SCC p. 1. | Bench strength: 9 Judges |
| 10-4-2008 | Judgment in *Ashoka Kumar Thakur*, (2008) 6 SCC p. 1. | Bench strength: 5 Judges. |

**Summary of Arguments** *(contd.)*

## *VI. Mr V. Giri, Senior Advocate, for the petitioners*

***Violation of basic structure doctrine***

**1.** Judicial review is part of the basic structure of the Constitution. Therefore, even constitutional amendments are subject to judicial review. [*Minerva Mills* reiterated in *I.R. Coelho*.]

**2.** If judicial review is part of the basic structure and it has been so construed with reference to Article 32 of the Constitution, then, correspondingly, it can also be said that enforceability of a right included in Part III by resorting to Article 32 should be a guaranteed remedy (*Romesh Thappar* — guaranteed remedy).

**3.** Therefore, a fundamental right has to be a self-contained right and enforceable as such under Article 32 of the Constitution.

**4.** Where the enforceability of a right by recourse to Article 32 of the Constitution of India is dependent upon availability of resources with the State, it cannot partake the characteristics of a fundamental right inter alia because it would not then be possible for the Court exercising power under Article 32 of the Constitution of India to provide a guaranteed remedy for enforcement of the right.

**5.** A fundamental right would have to emanate from the Constitution and its content and enforceability cannot depend upon extraneous factors like the resources of the State, etc.

***Directive principles vis-à-vis fundamental rights***

**6.** Directives under Part IV of the Constitution of India by their very nature are not enforceable. This distinguishes them from the rights under Part III of the Constitution of India. A directive under Part IV cannot by a transposition thereof into Part III by itself acquire the content and character of a fundamental right. Article 21-A of the Constitution of India is only a paraphrasing of old Article 45.

**7.** Right to education per se is not treated as a fundamental right under the Constitution of India. It is only in *Mohini Jain* and thereafter in *Unni Krishnan* that the Supreme Court has read Right to Education into Article 21 as a facet thereof. It is submitted that to be treated as a part of Article 21 of the Constitution of India the right to education is premised as a concomitant right of Article 21. However, there are no concomitant rights to fundamental rights. There cannot be. [*All India Bank Employees Association*, (1962) 3 SCR 269 at pp. 288-90; *Maneka Gandhi*, (1978) 1 SCC 248 arising out of paras 32, 33 pp. 309-311.]

***Excessive delegation of constituent power — Article 21-A***

**8.** In Article 21-A, Parliament has legislated by providing for a delegation of the constituent power in favour of Parliament to an extent where the provisions of the statute would become an integral part of the fundamental right and therefore enforceable as such. This is also violative of the basic structure of the Constitution. Since apart from the identity of the right, the width of the same has also been left to Parliament which can

**Summary of Arguments**

**VI. Mr V. Giri, Senior Advocate, for the petitioners** *(contd.)*

enlarge, restrict, abridge or even completely obliterate the right in exercise of its legislative wisdom, in Article 21-A, the constituent power has been excessively delegated in favour of Parliament, to an extent where the width of the right is determined by parliamentary legislation.

**9.** The contours and contents of the fundamental right cannot be regulated, restricted, abridged or made dependent upon a parliamentary legislation.

**10.** In effect therefore, by Article 21-A Parliament has, given unto itself an arbitrary power to define and redefine a fundamental right, which is violative of the basic structure of the Constitution.

***Article 15(5) — Substantive power as distinguished from an enabling provision***

**11.** Article 15(5) is not merely an enabling provision. It also creates a substantive right and such right being a fundamental right could be enforced by the beneficiaries by recourse to Article 32, which provides for a guaranteed remedy in the matter of enforcement of a fundamental right. Viewed from the above perspective, the following features emerge:

**11.1.** It excludes the applicability of Article 19(1)(*g*) from being treated as one of the touchstones qua any legislation that may be made by Parliament for the purposes of giving effect to Article 15(5).

**11.2.** The validity of any legislation that may be brought in this regard can thereafter be tested only on the grounds of reasonableness within the meaning of Article 14 of the Constitution.

**11.3.** A provision in such legislation providing for reservation of seats even in private educational institutions in the matter of admissions thereto, can also be tested only on the ground of reasonableness and such a provision would also be part of the fundamental rights within the meaning of Article 15(5) of the Constitution.

**11.4.** Concomitantly, the provision providing for a reservation in the matter of education in all institutions including in private, unaided non-minority institutions would be available to be enforced against non-State actors who cannot be brought within the purview of State under Articles 12 and 13 of the Constitution.

**11.5.** The non obstante clause in Article 15(5) comprehends not only Article 19(1)(*g*) but also the remaining part of Article 15 itself. This indicates that whereas clauses (1) to (4) of Article 15 contemplate a State action, and therefore an enforcement of the same would be available against the State, Article 15(5) ropes in non-State actors also within the legislation contemplated under Article 15(5) for being enforced against.

**11.6.** A non-State actor can never be elevated to the status of State within the meaning of Articles 12 and 13. State for the purpose of Articles 12 and 13 should have the attributes thereof as delineated in the judgments of the Supreme Court, most significant amongst them being *Pradeep Kumar Biswas* and reiterated in *Zee Telefilms*.

**Summary of Arguments**

**VI. Mr V. Giri, Senior Advocate, for the petitioners** *(contd.)*

**11.7.** Article 15(5) provides for a reservation of a statutorily determined percentage of seats in every educational institution to be made available in the manner provided in that regard by the State. At the same time it does not provide for a State participation in the running of such institutions. In effect therefore, Article 15(5) provides for State taking control over a determined percentage of seats in every institution, without in the least, being obliged to participate in the maintenance of the institution as such, or contribute to the expenditures in that regard for the running of the institution. This in effect amounts to taking over of a determined percentage of seats in every institution without any corresponding liability on the part of the State. Such provision is unreasonable within the meaning of Article 14 of the Constitution and to that extent is therefore violative of the basic structure.

***Effect of Article 15(5)***

**12.** The inevitable consequence of a statutorily determined seats in every private unaided institution being taken over by the State is to dislocate or deprive those students who do not fall within the beneficial segments identified under Article 15(5) of the chance to pursue education in a manner that is legitimate but also deemed appropriate by them. If the right to education is treated as a fundamental right, then the right to education in an institution of one's choice subject to eligibility and merit would also be a part of that fundamental right.

## *VII. Mr T.R. Andhyarujina, Senior Advocate, for the petitioners*

**1.** In the context of the submissions that Article 15(5) of the Constitution abridges the basic structure of the Constitution, by differentiating between minority and non-minority private educational institution, it is necessary to note the special constitutional protection given to minority educational institutions under the Constitution.

**2.** In *Kesavananda Bharati* v. *State of Kerala*, Sikri, C.J. referred to the history of the protection given to the minorities whilst framing the Constitution and stated at p.339, para 178 as follows:

> "It seems to me that in the context of the British plan, the setting up of Minorities Sub-Committee, the Advisory Committee and the proceedings of these committees, as well as the proceedings in the Constituent Assembly mentioned above, it is impossible to read the expression "Amendment of the Constitution" as empowering Parliament to abrogate the rights of minorities."

***The law relating to Article 30(1)***

**3.** It is well-settled law that minorities have the right to administer educational establishments as they deem fit under Article 30(1). This includes rights to:

> (*a*) admit students of their choice, both minority and non-minority students.

**Summary of Arguments**

**VII. Mr T.R. Andhyarujina, Senior Advocate, for the petitioners** *(contd.)*

(*b*) charge such reasonable and non-exploitive fees as they deem fit.

(*c*) manage the schools.

(*d*) they are not obliged to make reservations in admissions for any class of students, including weaker or backward class.

This right is not subject to any law imposing reasonable restrictions as in the case of rights under Article 19.

**4.** Minority schools are however subject to regulations by the State or other competent authorities which must conform to the test of being reasonable. Such regulations are only for maintaining standards of education of the institution, health, hygiene, qualification of teachers, etc. Such regulations do not take away the essential minority character of educational institutions or take away the right to administer the school as they choose.

**5.** This legal position is authoritatively laid down by this Court in several cases of the Constitution Benches. Some of the leading cases are:

(*i*) *Kerala Education Bill reference*, 1959 SCR 995.

(*ii*) *Rev. Sidhrajbhai* v. *State of Bombay* (1963) 3 SCR 837-856-857.

(*iii*) *State of Kerala* v. *Rev. Mother Provincial*, (1970) 2 SCC 417 page 420(8), (9), (10), pp. 422-423 (14 & 15).

(*iv*) *Ahmedabad St. Xavier's College Society* v. *State of Gujarat*, (1974) 1 SCC 717 *per* Khanna, J. at pp. 763, 770, 772 and 781(90).

(*v*) *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481.

(*vi*) *P.A. Inamdar* v. *State of Maharasthra*, (2005) 6 SCC 537-599.

**6.** Khanna, J. notably has stated the character of minority rights in *Ahmedabad St. Xavier's College Society* v. *State of Gujarat*, (1974) 1 SCC 717. He held that:

> "Article 30(1) gives the right and freedom to minority school to establish and administer such educational institutions *as they choose*. The historical background of Article 30(1) shows that such provisions *enshrined a pledge* to the minorities in the Constitution and that so long as Constitution stands no tampering with those rights can be countenanced. Any attempt to do so would not be only a breach of faith; it would be constitutionally impermissible and liable to be struck down by the Courts" (pages 770-771).

Khanna, J. further stated:

> "A *liberal, generous and sympathetic approach* is reflected in the Constitution in the matter of preservation of the right of minorities so far as those educational institutions are concerned. This Court has consistently upheld the rights of minorities in those Articles and has ensured that the ambit and scope of the minority rights is not narrowed down. The same generous, liberal and sympathetic approach would weigh with the Courts in construing Articles 29 and 30 as marked in the

**Summary of Arguments**

**VII. Mr T.R. Andhyarujina, Senior Advocate, for the petitioners** *(contd.)*

deliberations of the Constitution makers in drafting those Articles and making them part of the fundamental right." (page 781, para 89).

* * *

"The *right conferred* by Article 30(1) *is in absolute terms and is not subject to restrictions as in the case of rights conferred by Article 19 of the Constitution*". (page 783, para 42)

***Unaided minority education establishment***

**7.** *Unaided minority* educational institutions have unfettered rights to admission of students under Article 30(1). The State cannot impose on them the admission of any non-minority students, even for the advancement of any socially and educationally backward classes of the citizens or for Scheduled Castes or Scheduled Tribes.

**8.** In *Ahmedabad St. Xavier's College case*, (1974) 1 SCC 717 the Court held that the general provisions restricting the right of private schools would not apply to minority institutions as they would violate the fundamental rights of minority institutions (p.752, para 45).

**9.** In *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481, it was held that unaided linguistic and religious minorities are assured maximum autonomy in relation to methods of recruitment of teachers, charging of fees and admission of students (p. 579 para 139).

**10.** Likewise in *P.A. Inamdar* v. *State of Maharasthra*, (2005) 6 SCC 537, at p. 600, para 121 and p. 601, para 124, the Court held that the essential ingredients of the management including admission of students cannot be regulated in minority unaided schools. Appropriation of seats cannot be held to be a regulatory measure in the interest of the minorities under Article 30(1). The State cannot insist on private educational institutions which receive no aid from State to implement State's policy on reservation for granting admissions.

***Aided minority educational institutions***

**11.** Article 29(2) of the Constitution states that "No citizen shall be denied admission into any educational institutions maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them".

**12.** In *Kerala Education Bill case,* 1959 SCR 995 at pp. 1051-1052 the Court held that admissions under Article 29(2) could not destroy the minority character of a minority educational institutions. The Court stated that:

"The real import of Article 29(2) and Article 30(1) seems to us to be that they clearly contemplate a minority institution with a sprinkling of outsiders admitted into it. By admitting a non-member into it the minority institution does not shed its character and cease to be a minority institution. Indeed the object of conservation of the distinct language, script and culture of a minority may be better served by propagating the same amongst non-members of the particular minority community."

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**13.** In *Rev. Sidhrajbhai* v. *State of Bombay,* (1963) 3 SCR 837, this Court held that educational institutions conducted by a minority and receiving grant-in-aid from the State could not be subjected to the government's order that *80% of the seats should be reserved for teachers nominated by Government*. The Court held that unlike Article 19 the fundamental freedom under Article 31(1) is absolute in terms and is not made subject to any reasonable restrictions of the nature the fundamental freedoms enunciated in Article 19 may be subjected to. Any law or executive direction which seeks to infringe the substance of the right under Article 30(1) would to that extent be void (pages 849-850). After referring to the *Kerala Education Bill case* the Court held that if every order which while maintaining the formal character of a minority institution destroys the power of administration is held justifiable because it is in the public or national interest, though not in its interest as an educational institution the right guaranteed by Article 30(1) will be but a "teasing illusion". The Court held that the orders of the Government regarding reservation of 80% of the seats and the threat to withhold grant-in-aid and recognition of the College, infringe fundamental freedom guaranteed to the petitioners under Article 30(1) (pages 856-857).

**14.** In *T.M.A. Pai Foundation case,* (2002) 8 SCC 481 the Court also held that *St. Stephen's case,* (1992) 1 SCC 558 at 608 para 85 rightly held that the fact Article 29(2) applies to minorities as well as non-minorities does not mean that it was intended to nullify the special right guaranteed to minority in Article 30(1). The Court held that as long as the minority educational institutions permit admission of citizens belonging to non-minority class to a reasonable extent, it would not violate Article 29(2). What would be a reasonable extent would depend on variable factors and it may not be advisable to fix any specific percentage [*see* (2002) 8 SCC 481 at 583]. The Court held that rigid percentage of 50% of non-minority stipulated in *St. Stephen's case* was not correct and the State had to properly balance the interest of all providing for such a percentage of students of a minority community to be admitted was to adequately serve the interest of the community for which the Institute was established (p. 584 para 151). The Court, also held that "*It would be open to the State authorities to insist on allocating certain percentage of citizens to those belonging to the weaker sections of the Society from amongst non-minority seats*" (pp. 584-585 at p.152).

**15.** The aforesaid cases relating to Article 30(1) and Article 29(2) of the Constitution were decided prior to the amendment of Article 15(5) of the Constitution by the Constitution (93rd Amendment) Act, 2005 w.e.f. 20-1-2006. By this amendment, the State has been given the power to make special provision by law for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes insofar as such provisions relate to their admission to educational institutions including private educational institutions, whether

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aided or unaided by the State, *other than minority educational institutions referred to in clause (1) of Article 30.*

**16.** The latter part of amended Article 15(5) now clearly states the position in law to remove all doubts that there cannot be imposition of any special provision of law for the admission of backward classes of citizens, etc. on minority educational institutions aided or unaided. Hence, provisions such as Sections 12(1)(*b*) and (*c*) of the Right of Children to Free and Compulsory Education Act, 2009 would not apply to minority educational institutions both aided and unaided. The requirement of free education in Section 12 of the Act would also not apply to minority aided or unaided schools.

**17.** The submission that Article 15(5) destroys the basic structure of equality in the Constitution by placing minority education/religious education institution on a special discriminatory status is incorrect as minority educational institutions have a special status in the Constitution and Article 15(5) recognises that status by excluding such minority educational institutions from the State's power to make a special law for admission to educational institutions for the advancement of any socially and educationally backward citizens.

**18.** In *Ashoka Kumar Thakur* v. *Union of India*, (2008) 6 SCC 1 at pp. 486 and 487, Balakrishnan, C.J. held that Article 15(5) does not violate Article 14 in excluding minority educational institutions as they were a class by themselves. As the validity of the inclusion of private unaided institutions within the purview of Article 15(5) was not raised in the case it was left open for a later decision. However, Bhandari, J. held that even though the question of private unaided institutions was not before the Court it was necessary to consider the validity of Article 15(5) and the learned Judge held that Article 15(5) by imposing reservations on unaided institutions obliterated Article 19(1)(*g*) and altered the basic structure of the Constitution (page 663 para 492 and, p. 708 para 663).

**19.** In *Sindhi Education* v. *Government of NCT*, (2010) 8 SCC 49, the Court held that the State could not impose the filling of posts in a linguistic minority school with the Scheduled Caste and Scheduled Tribe candidates by Rule 64(1)(*b*) of the Delhi School Education Act and the Rules, 1973. The Court held that the said Rule 64(1)(*b*) could not be enforced against aided minority institutions (page 100 para 90). The Court held that Rule 64(1)(*b*) could not be enforced against linguistic minority schools (page 109 paras 119-20).

**20.** In *Indian Medical Association* v. *Union of India*, (2011) 7 SCC 179, the Court rejected the argument that Article 15(5) of the Constitution abrogates the basic structure of the Constitution and consequently reservations under Delhi Act 80 of 2000 were unconstitutional. The Court

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held that the view of Bhandari, J. in *Ashoka Kumar Thakur* v. *Union of India case* on Article 15(5) was unacceptable (see p. 236 paras 122-23).

**21.** It is submitted that the judgment of this Court on the Right of Children to Free and Compulsory Education Act, 2009 delivered in *Society for Unaided Private Schools of Rajasthan* v. *Union of India*, (2012) 6 SCC has rightly held that the Act cannot apply to unaided minority schools as its application would violate Article 30(1) (pages 43-44). It is, however, respectfully submitted that the said decision erroneously restricts the inapplicability of the said Act to only unaided minority schools. It is submitted that the said Act and in particular Sections 12(*b*) and (*c*) cannot apply to minority aided schools also for the reasons stated in the earlier part of this submission and in particular because of the exclusion of all minority educational institutions in the amended Article 15(5) of the Constitution.

## *VIII. Mr Ajmal Khan, Senior Advocate, for the petitioners*

**1.** Article 30(1) of the Constitution confers on the minorities (religious and linguistic) the (*1*) right to establish educational institutions of their choice and (*2*) the right to administer such educational institution. The said right to administration comprises of the following rights:

(*i*) to choose its governing body in which the founders of the institution have faith and confidence to conduct and manage the affairs of the institution;

(*ii*) to appoint teaching staff (teachers/lecturers and headmasters/ principals) as also non-teaching staff, and to take action if there is dereliction of duty on the part of any of its employees;

(*iii*) to admit eligible students of their choice and to set up a reasonable fee structure;

(*iv*) to use its properties and assets for the benefit of the institution.

(*v*) to instruct the students in the language of their own and provide education so as to conserve the cultural identity of minorities.

[*Per* para 17, *Secy. Malankara Syrian Catholic College* v. *T. Jose*, (2007) 1 SCC 386 and *per* para 50 of *T.M.A. Pai Foundation case*, (2002) 8 SCC 481.]

**2.** The above right as conferred by Article 30(1), is an absolute right and is however subject to certain restriction or regulatory measures depending on the nature of the institution. The receipt of aid by the institution from the State does not alter the nature and character of the minorities educational institution and thus the minority institution does not cease to be so merely on receipt of aid from the State (para 161, *T.M.A. Pai Foundation*). However, any such conditions or regulatory measures, which interferes with the overall administrative control over the staff by the management or tends to interfere to the day-to-day administrations or completely deprives any of the above rights as a precondition for grant of aid or recognition is violative of

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Article 30(1) of the Constitution. [*Per* para 21 of *Secy. Malankara Syrian Catholic College* v. *T. Jose*, (2007) 1 SCC 386.]

**3.** The extent of restriction, that can be imposed on the aided minority educational institutions as per the dictum of this Court in *T.M.A. Pai Foundation case* is as follows:

1. The rights under Article 30(1) is subject to Articles 29(2) and 28 of the Constitution of India. [Paras 144 and 161 (Q4).]

2. Conditions attached to grant of aid such as:

(*i*) To regulate the proper utilisation of grant (para 143)

(*ii*) Fulfilment of the objectives of the grant

(*iii*) To ensure academic excellence and maintenance of standard of education

(*iv*) Other conditions laid in national interest based on considerations such as public safety, national security and national integrity (para 136)

(*v*) general laws that are applicable to all persons and institutions like taxation will apply to such aided institutions.

3. Such conditions ought not to dilute the minority status of the institution nor force the institution to surrender its constitutional protection (para 143).

***Protective Discrimination in Favour of Minorities — A Basic Structure of the Constitution***

**4.** The basic structure doctrine, was introduced by the Hon'ble Supreme Court in *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225. The thirteen-Judge Bench in the said case, held that Parliament does not enjoy unlimited powers to amend the Constitution but the amending power is a limited one, subject to certain basic feature in the Constitution which cannot be amended by Parliament. Though in the said case, the Court enumerated, few principles of the Constitution to be the basic structures of the Constitution, the Court clarified that the same are not exhaustive and are only enumerative. The Court also stated that the concept of basic structure is not capable of being defined in clear-cut terms. In the said judgment, the Hon'ble Supreme Court held the following to be the basic structure of the Constitution:

*Per Sikri, C.J.,*

(*i*) Supremacy of the Constitution

(*ii*) Republican and democratic forms of the Government

(*iii*) Secular character of the Constitution

(*iv*) Separation of powers between the Legislature, the Executive and Judiciary

(*v*) Federal character of the Constitution

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*Shelat and Grover, JJ.*

(*i*) Supremacy of the Constitution

(*ii*) Republican and democratic form of Government and sovereignty of the country

(*iii*) Secular and federal character of the Constitution

(*iv*) Demarcation of power between the Legislature, the Executive and the Judiciary

(*v*) Dignity of the individual secured by various freedoms and basic rights in Part III and the mandate to build a welfare State contained by Part V,

(*vi*) Unity and integrity of the nation.

*Hegde and Mukherjea, JJ.*

(*i*) Sovereignty of India

(*ii*) The democratic character of our policy

(*iii*) The unity of the country

(*iv*) Essential features of individual freedoms secured to the citizens

(*v*) Mandate to build a welfare State. However, they said these limitations are only illustrative and not exhaustive.

*Jaganmohan Reddy, J.,*

(*i*) A sovereign democratic republic and

(*ii*) Parliamentary democracy certainly constitute the basic structure

**5.** Similarly in the later judgment of this Court in *Indira Nehru Gandhi* v. *Raj Narain*, 1975 Supp SCC 1, the Court held *rule of law, judicial review and democracy implying free and fair election* to be part of basic structure of the Constitution. In *Minerva Mills Ltd.* v. *Union of India*, (1980) 3 SCC 625, the Constitution Bench of this Court held the *limited power of Parliament to amend the Constitution, the harmonious balance between fundamental rights and directive principles, fundamental rights in certain cases and judicial review* to be part of the basic structure.

**6.** Though in all the above judgments, the Court opined that the basic structure doctrine is not capable of being defined in concrete terms, but could only be identified in specific cases arising before it, this Court for the first time in *M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212 attempted to define the concept of basic structure as follows:

> "*24*. The point which is important to be noted is that principles of federalism, secularism, reasonableness and socialism, etc. are beyond the words of a particular provision. They are systematic and structural principles underlying and connecting various provisions of the Constitution. They give coherence to the Constitution. They make the Constitution an organic whole. They are part of constitutional law even if they are not expressly stated in the form of rules.

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*25.* For a constitutional principle to qualify as an essential feature, it must be established that the said principle is a part of the constitutional law binding on the legislature. Only thereafter, 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. The basic structure concept accordingly limits the amending power of Parliament. To sum up: in order to qualify as an essential feature, a principle is to be first established as part of the constitutional law and as such binding on the legislature. Only then, it can be examined whether it is so fundamental as to bind even the amending power of Parliament i.e. to form part of the basic structure of the Constitution. This is the standard of judicial review of constitutional amendments in the context of the doctrine of basic structure. … Therefore, axioms like secularism, democracy, reasonableness, social justice, etc. are overarching principles which provide linking factor for principle of fundamental rights like Articles 14, 19 and 21. These principles are beyond the amending power of Parliament.

* * *

*28.* To conclude, the theory of basic structure is based on the concept of constitutional identity. The basic structure jurisprudence is a preoccupation with constitutional identity. In *Kesavananda Bharati* v. *State of Kerala*, it has been observed that one cannot legally use the Constitution to destroy itself. It is further observed the personality of the Constitution must remain unchanged. Therefore, this Court in *Kesavananda Bharati*, while propounding the theory of basic structure, has relied upon the doctrine of constitutional identity. The word amendment postulates that the old Constitution survives without loss of its identity despite the change and it continues even though it has been subjected to alteration. This is the constant theme of the opinions in the majority decision in *Kesavananda Bharati*. To destroy its identity is to abrogate the basic structure of the Constitution."

Thus, from the above it is clear that, the basic structures of the Constitution are those principles and doctrines of constitutional law, which are so essential and unalienable parts of the Constitution, that the framers of the Constitution never intended them to be removed or altered from the Constitution. They form part of the constitutional identity, the abrogation of which would be to displace the constitutional scheme and framework. Such principles may or may not be identifiable to any specific provision in the Constitution but the principles may form the connecting link or the object behind various provisions of the Constitution.

**7.** Therefore from the above a principle in order to qualify to be regarded as basic structure:

(*i*) It should be a Principle of the constitutional law of India.

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(*ii*) It need not be a specific provision but may be the underlying principle behind one or more provisions of the Constitution, all connected by such principle.

(*iii*) Such principle should be of such a nature that the amendment of the same would result in effacement of the identity of the Constitution.

(*iv*) The fact that the Constitution framers intended to keep the said principles away from the reach of the legislatures of the day, is a positive indicia of such principle being a basic structure.

***Protective Discrimination in Favour of Minorities in the Constitution***

**8.** The framing of our Constitution, was marked by certain unfortunate happening such as the partition of British India and the communal riots that followed Independence. This created a apprehension in the minds of the minorities as to their future in a country, where the majority population practise a religion different from that of them. Moreover, the reorganisation of the States also evoked similar fears in the mind of linguistic minorities. Thus, the Constitution framers wanted to provide special measures in the nature of affirmative action, so as to assure the minorities both religious and linguistic, that they could practise and preserve their cultural identity and that they could enjoy equality of status with the majority population. In order to achieve the same, it was necessary to make provision, providing certain rights for the minorities and conferring on them the status of fundamental rights so as to protect them from being encroached by the legislature and executive which would be dominated by the majority population. Though our Constitution is based on the principle of equality, the Constitution framers devised certain protective discriminations in favour of the minority so as to ensure that the minorities are not treated as second grade citizens in the hands of popular Governments which may depend on the popular will of the majority population.

**9.** The resonating presence of the principle of protective discrimination in favour of the minority can be found in the following provisions of the Constitution:

(*i*) *Article 25* which provides for the right to freedom of profession, practise and propagation of religion.

(*ii*) *Article 26* which provides for the right to manage religious affairs which includes the right to establish and maintain institutions of religious purpose and to acquire and administer such property.

(*iii*) *Article 29* provides for the right of citizens having a distinct language, script or culture to conserve the same and the right not to be denied admission in any educational institution maintained by the State or receiving aid from the State only on the ground of religion or language.

(*iv*) The right of minorities whether based on religion or language to establish and administer educational institution of their choice under *Article 30*.

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(*v*) *Article 331* which provides for representation of Anglo-Indian community in Lok Sabha.

(*vi*) *Article 333* which provides for representation of Anglo-Indian community in State Legislatures.

(*vii*) *Articles 336 and 337* which provides special provisions for Anglo-Indian community in certain services under the State and to provide for educational grants for the benefit of Anglo-Indian community.

(*viii*) *Article 350-A* which provides for a special directive to the State to facilitate for instruction in mother tongue at primary levels.

(*ix*) *Article 350-B* which provides for appointment of a Special Officer for linguistic minorities.

All the above provisions have been provided in the Constitution in furtherance of the intention of the Founding Fathers to provide for such affirmative action so as to establish egalitarian equality between the minorities and majority population.

***Protective Discrimination in Favour of Minorities — A Basic Feature***

**10.** The principle of protective discrimination in favour of minorities as has been reflected in the provision of the Constitution referred above, form part of the basic structure of the Constitution. The protective discrimination found in our Constitution, when tested in light of the characteristics of basic structure stated above, easily qualifies to be a basic structure of our Constitution. The essential characteristics of a basic structure are as follows:

(*i*) It should be a principle of the constitutional law of India.

(*ii*) It need not be a specific provision but may be the underlying principle behind one or more provisions of the Constitution, all connected by such principle.

(*iii*) Such principle should be of such a nature that the amendment of the same would result in effacement of the identity of the Constitution.

(*iv*) The fact that the Constitution framers intended to keep said principles away from the reach of the legislatures of the day, is a positive indicia of such principle being a basic structure.

**11.** The thirteen-Judge Bench of this Court in *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225, by a majority in various parts of the judgment, indicated the importance of the special rights conferred on the minorities and as to how, it is impossible to permit Parliament to exercise its power to amend the Constitution so as to abrogate such rights:

"*Per Sikri, C.J.*

*127.* Article 30 gives further rights to minorities whether based on religion or language to establish and administer educational institutions of their choice. Article 30(2) prohibits the State from discriminating against any educational institution in granting aid to educational institutions, on the ground that it is under the management of a minority, whether based on religion or language.

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*128. As will be shown later the inclusion of special rights for minorities has great significance. They were clearly intended to be inalienable …*

* * *

*177.* The above proceedings show that the minorities were particularly concerned with the fundamental rights which were the subject-matter of discussion by the Fundamental Rights Committee.

*178.* The above brief summary of the work of the Advisory Committee and the Minorities Sub-Committee shows that no one ever contemplated that fundamental rights appertaining to the minorities would be liable to be abrogated by an amendment of the Constitution. The same is true about the proceedings in the Constituent Assembly. There is no hint anywhere that abrogation of minorities' rights was ever in the contemplation of the important members of the Constituent Assembly. It seems to me that in the context of the British plan, the setting up of Minorities Sub-Committee, the Advisory Committee and the proceedings of these Committees, as well as the proceedings in the Constituent Assembly mentioned above, it is impossible to read the expression "Amendment of the Constitution" as empowering Parliament to abrogate the rights of minorities."

**12.** Similarly, Hegde and Mukherjea, JJ., dealing with the scope of Parliament to amend the Constitution, opined as follows:

"*649. Now that we have set out the objectives intended to be achieved by our Founding Fathers, the question arises whether those very persons could have intended to empower Parliament, a body constituted under the Constitution to destroy the ideals that they dearly cherished and for which they fought and sacrificed.*

*650. If the nature of the power granted is clear and beyond doubt the fact that it may be misused is wholly irrelevant. But, if there is reasonable doubt as to the nature of the power granted then the Court has to take into consideration the consequences that might ensue by interpreting the same as an unlimited power.* We have earlier come to the conclusion that the word "amendment" is not an expression having a precise connotation. It has more than one meaning. Hence it is necessary to examine the consequence of accepting the contention of the Union and the States. Therefore let us understand the consequences of conceding the power claimed. According to the Union and the States that power, inter alia, includes the power to (1) destroy the sovereignty of this country and make this country a satellite of any other country; (2) substitute the democratic form of government by monarchical or authoritarian form of government; (3) break up the unity of this country and form various independent States; (4) destroy the secular character of this country and substitute the same by a theocratic form of government; *(5) abrogate completely the various rights conferred on the citizens as well as on the minorities;* (6) revoke the mandate given to the States to build a welfare

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State; (7) extend the life of the two Houses of Parliament indefinitely; and (8) amend the amending power in such a way as to make the Constitution legally or at any rate practically unamendable. In fact, their contention was that the legal sovereignty, in the ultimate analysis rests only in the amending power.

When a power to amend the Constitution is given to the people, its contents can be construed to be larger than when that power is given to a body constituted under that Constitution. Two-thirds of the Members of the two Houses of Parliament need not necessarily represent even the majority of the people of this country. Our electoral system is such that even a minority of voters can elect more than two-thirds of the Members of the either House of Parliament. That is seen from our experience in the past. That apart, our Constitution was framed on the basis of consensus and not on the basis of majority votes. *It provides for the protection of the minorities. If the majority opinion is taken as the guiding factor then the guarantees given to the minorities may become valueless. It is well known that the representatives of the minorities in the Constituent Assembly gave up their claim for special protection which they were demanding in the past because of the guarantee of Fundamental Rights. Therefore the contention on behalf of the Union and the States that the two-thirds of the Members in the two Houses of Parliament are always authorised to speak on behalf of the entire people of this country is unacceptable*."

Thus, the Judges in *Kesavananda Bharati case*, were alive to the importance of the protective safeguards provided by the Constitution and that they also in unequivocal terms held that allowing Parliament to abrogate such measures would be to destroy the constitutional identity and that the Constitution framers wanted to safeguard these rights even from the amendment jurisdiction of Parliament.

**13.** The eleven-Judge Bench in *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481, also on considering the importance the rights of minorities in the constitutional scheme, held the same to be a concomitant principle of the principle of equality and secularism, which have been declared to be basic structures by this Court:

"*Per majority:*

*138*. As we look at it, Article 30(1) is a sort of guarantee or assurance to the linguistic and religious minority institutions of their right to establish and administer educational institutions of their choice. Secularism and equality being two of the basic features of the Constitution, Article 30(1) ensures protection to the linguistic and religious minorities, thereby preserving the secularism of the country. Furthermore, the principles of equality must necessarily apply to the enjoyment of such rights. No law can be framed that will discriminate against such minorities with regard to the establishment and

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administration of educational institutions vis-à-vis other educational institutions. Any law or rule or regulation that would put the educational institutions run by the minorities at a disadvantage when compared to the institutions run by the others will have to be struck down."

**14.** Similarly it was also held by Ruma Pal, J., (as Her Ladyship then was) as follows:

"The history which preluded the Independence of this country and the framing of the Constitution highlights the political context in which the Constitution was framed and the political content of the "special" rights given to minorities. I do not intend to burden this judgment with a detailed reference to the historical run-up to the Constitution as ultimately adopted by the Constituent Assembly vis-à-vis the rights of the minorities and the importance that was placed on enacting effective and adequate constitutional provisions to safeguard their interests. This has been adequately done by Sikri, C.J. in *Kesavananda Bharati* v. *State of Kerala* on the basis of which the learned Judge came to the conclusion that the rights of the minorities under the Constitution formed part of the basic structure of the Constitution and were unamendable and inalienable.

I need only add that the rights of linguistic minorities assumed special significance and support when, much after Independence, the imposition of a 'unifying language' led not to unity but to an assertion of differences. States were formed on linguistic bases showing the apparent paradox that allowing for and protecting differences leads to unity and integrity and enforced assimilation may lead to disaffection and unrest. The recognition of the principle of 'unity in diversity' has continued to be the hallmark of the Constitution: a concept which has been further strengthened by affording further support to the protection of minorities on linguistic bases in 1956 by way of Articles 350-A and 350-B and in 1978 by introducing clause (1-A) in Article 30 requiring "the State, that is to say, Parliament in the case of a Central legislation or a State Legislature in the case of State legislation, in making a specific law to provide for the compulsory acquisition of the property of minority educational institutions, to ensure that the amount payable to the educational institution for the acquisition of its property will not be such as will in any manner impair the functioning of the educational institution". Any judicial interpretation of the provisions of the Constitution whereby this constitutional diversity is diminished would be contrary to this avowed intent and the political considerations which underlie this intention."

**15.** Similarly, explaining the scope of the protective measures and the intention of the Constitution framers to give it a special status in the Constitution so that the minorities are assured that they would not be crushed or annihilated by the might of the majority communities who would command a larger representation in the legislatures, H.R. Khanna, J. in

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*St. Xavier's College* v. *State of Gujarat*, (1974) 1 SCC 717, held as follows: (SCC pp. 770-71, paras 74-75 )

"*74*. Clause (1) of Article 30 gives right to all minorities, whether based on religion or language, to establish and administer educational institutions of their choice. Analysing that clause it would follow that the right which has been conferred by the clause is on two types of minorities. Those minorities may be based either on religion or on language. The right conferred upon the said minorities is to establish and administer educational institutions of their choice. The word "establish" indicates the right to bring into existence, while the right to administer an institution means the right of effectively manage and conduct the affairs of the institution. Administration connotes management of the affairs of the institution. The management must be free of control so that the founders or their nominees can mould the institution as they think fit and in accordance with their ideas of how the interest of the community in general and the institution as they think fit and in accordance with their ideas of how the interest of the community in general and the institution in particular will be best served. The words "of their choice" qualify the educational institutions and show that the educational institutions established and administered by the minorities need not be of some particular class; the minorities have the right and freedom to establish and administer such educational institutions as they choose. Clause (2) of Article 30 prevents the State from making discrimination in the matter of grant of aid to any educational institution on the ground that the institution is under the management of a minority, whether based on religion or language.

*75*. Before we deal with the contentions advanced before us and the scope and ambit of Article 30 of the Constitution, it may be pertinent to refer to the historical background. India is the second most populous country of the world. The people inhabiting this vast land profess different religions and speak different languages. Despite the diversity of religion and language, there runs through the fabric of the nation the golden thread of a basic innate unity. It is a mosaic of different religions, languages and cultures. Each of them has made a mark on the Indian polity and India today represents a synthesis of them all. The closing years of the British Rule were marked by communal riots and dissensions. There was also a feeling of distrust and the demand was made by a section of the Muslims for a separate homeland. This ultimately resulted in the partition of the country. Those who led the fight for Independence in India always laid great stress on communal amity and accord. They wanted the establishment of a secular State wherein people belonging to the different religions should all have a feeling of equality and non-discrimination. Demand had also been made before the partition by sections of people belonging to the minorities for reservation of seats and separate electorates. In order to bring about integration and

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fusion of the different sections of the population, the framers of the Constitution did away with separate electorates and introduced the system of joint electorates, so that every candidate in an election should have to look for support of all sections of the citizens. Special safeguards were guaranteed for the minorities and they were made a part of the fundamental rights with a view to instil a sense of confidence and security in the minorities. Those provisions were a kind of a charter of rights for the minorities so that none might have the feeling that any section of the population consisted of first-class citizens and the others of second-class citizens. The result was that minorities gave up their claims for reservation of seats. Sardar Patel, who was the Chairman of the Advisory Committee dealing with the question of minorities, said in the course of his speech delivered on 27-2-1947:

> "This Committee forms one of the most vital parts of the Constituent Assembly and one of the most difficult tasks that has to be done by us is the work of this committee. Often you must have heard in various debates in British Parliament that have been held on this question recently and before when it has been claimed on behalf of the British Government that they have a special responsibility—a special obligation—for protection of the interests of the minorities. They claim to have more special interest than we have. It is for us to prove that it is a bogus claim, a false claim, and that nobody can be more interested than us in India in the protection of our minorities. Our mission is to satisfy every interest and safeguard the interests of all the minorities to their satisfaction." (*The Framing of India's Constitution*: Select Documents, B. Shiva Rao, Vol. II, p. 66)

*It is in the context of that background that we should view the provisions of the Constitution contained in Articles 25 to 30. The object of Articles 25 to 30 was to preserve the rights of religious and linguistic minorities, to place them on a secure pedestal and withdraw them from the vicissitudes of political controversy. These provisions enshrined a befitting pledge to the minorities in the Constitution of the country whose greatest son had laid down his life for the protection of the minorities. As long as the Constitution stands as it is today, no tampering with those rights can be countenanced. Any attempt to do so would be not only on act of breach of faith; it would be constitutionally impermissible and liable to be struck down by the courts*."

**16.** Thus from the above it is clear that the protective discrimination in favour of the minorities by providing special provisions is a basic and essential feature of the Constitution, as

(*i*) it is an accepted principle of Indian constitutional jurisprudence;

(*ii*) the same was held by this Court in *Kesavananda Bharati case* that they are so important that the Constitution framers abhorred any damage to it by an amendment by Parliament;

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(*iii*) the principle of protective discrimination in favour of minorities is the underlying overarching principle forming the basis of Articles 25, 26, 29, 30, 350-A, 350-B, 331, 333, 336 and 337 and serves as a common fabric connecting all these provisions;

(*iv*) thus forms part of the identity of the Constitution and to displace the same would be to upset the constitutional scheme.

Moreover, it also strengthens other basic features of the Constitution such as, principle of equality and secularism. The concept of equality contemplates both the equal protection of law and equality before law. While equality before law postulates uniform treatment of all persons, equal protection of law mandates the equal treatment of those who are circumstanced alike and to treat unlikes differently. Thus, the equality that our Constitution promotes is that of equality before law between similarly circumstanced persons. Thus, equality before law is subject to equal protection of law and this principle is and has been held to be a basic feature of the Constitution. The very fact that the Founding Fathers despite providing and ensuring the protection of equality before law, provided for certain special provisions for certain classes of people would speak writ large of the same e.g. the special protections and provisions for the socially and educationally backward classes, Scheduled Castes and Tribes, special protections and provisions for minorities, etc.

**17.** This Court has always upheld the view that such affirmative steps, such as reservation or preferential treatment to minorities are a facade of equality, aimed at securing the Preambular promise of EQUALITY OF STATUS AND OPPORTUNITY. The courts have also held such protective discrimination in favour of backward classes to be not infringing the basic structure and had held the very protective discrimination to be part of the egalitarian equality furthering social justice and thus the protective discrimination in case to be a basic structure. [See *Indira Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217, *M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212.]

**18.** In *Indian Medical Assn.* v. *Union of India*, (2011) 7 SCC 179, the Hon'ble Apex Court held as follows: (SCC para 172)

"In this respect, the placement of clause (5) of Article 15 in the equality code, by the 93rd Constitutional Amendment is of great significance. It clearly situates itself within the broad egalitarian objectives of the Constitution. In this sense, what it does is that it enlarges as opposed to truncating, an essential and indeed a primordial feature of the equality code. Furthermore, both *M. Nagaraj* and *Ashoka Kumar Thakur* stand for the proposition that enlargement of the egalitarian content of the equality code ought not to necessarily be deemed as a derogation from the formal equality guaranteed by Articles 14, 15(1) or 16(1). Achievement of such egalitarian objectives within the context of employment or of education, in the public sector, as long as the measures do not truncate elements of formal equality disproportionately, were deemed to be inherent parts of the promise of real equality for all citizens."

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**19.** Similarly, holding the protective discrimination in favour of minorities to be a part of the principle of equality, Ruma Pal, J. (as Her Ladyship then was) in *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481, held as follows: (SCC, paras 345 to 349 )

"*Article 30(1) and Article 14*

'Equality' which has been referred to in the Preamble is provided for in a group of articles led by Article 14 of the Constitution which says that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Although stated in absolute terms Article 14 proceeds on the premise that such equality of treatment is required to be given to persons who are equally circumstanced. Implicit in the concept of equality is the concept that persons who are in fact unequally circumstanced cannot be treated on a par. The Constitution has itself provided for such classification in providing for special or group or class rights. Some of these are in Part III itself [Article 26, Article 29(1) and Article 30(1)]. Other such articles conferring group rights or making special provision for a particular class include Articles 336 and 337 where special provision has been made for the Anglo-Indian community. Further examples are to be found in Articles 122, 212 and other articles giving immunity from the ordinary process of the law to persons holding certain offices. Again Articles 371 to 371-H contain special provisions for particular States.

The principles of non-discrimination which form another facet of equality are provided for under the Constitution under Articles 15(1), 16(1) and 29(2). The first two articles are qualified by major exceptions under Articles 15(3) and (4), 16(3), (4), (4-A) and Article 335 by which the Constitution has empowered the executive to enact legislation or otherwise specially provide for certain classes of citizens. The fundamental principle of equality is not compromised by these provisions as they are made on a consideration that the persons so 'favoured' are unequals to begin with whether socially, economically or politically. Furthermore, the use of the word 'any person' in Article 14 in the context of legislation in general or executive action affecting group rights is construed to mean persons who are similarly situated. The classification of such persons for the purposes of testing the differential treatment must, of course, be intelligible and reasonable, the reasonableness being determined with reference to the object for which the action is taken. This is the law which has been settled by this Court in a series of decisions, the principle having been enunciated as early as in 1950 in *Charanjit Lal Chowdhury* v. *Union of India*, 1950 SCR 869.

The equality, therefore, under Article 14 is not indiscriminate.

Paradoxical as it may seem, the concept of equality permits rational or discriminating discrimination. Conferment of special benefits or protection or rights to a particular group of citizens for rational reasons is

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envisaged under Article 14 and is implicit in the concept of equality. There is no abridgment of the content of Article 14 thereby but an exposition and practical application of such content. The distinction between classes created by Parliament and classes provided for in the Constitution itself, is that the classification under the first may be subjected to judicial review and tested against the touchstone of the Constitution. But the classes originally created by the Constitution itself are not so subject as opposed to constitutional amendments. On a plain reading of the provisions of the article, all minorities based on religion or language, *shall* have the right to (1) establish and (2) administer educational institutions of *their choice*. The emphasized words unambiguously and in mandatory terms grant the right to all minorities to establish and administer educational institutions. I would have thought that it is self-evident and in any event, well settled by a series of decisions of this Court that Article 30(1) creates a special class in the field of educational institutions—a class which is entitled to special protection in the matter of setting up and administering educational institutions of their choice. This has been affirmed in the decisions of this Court where the right has been variously described as "a sacred obligation", "an absolute right", "a special right", "a guaranteed right", "the conscience of the nation", "a befitting pledge", "a special right" and "an article of faith"."

**20.** Therefore, all the above decisions, would testify that the protective discrimination as conceptualised by the Constitution Framers is a basic structure of the Constitution of India.

***The Right of Children to Free and Compulsory Education Act, 2009 — Constitutional Validity qua Minority Educational Institutions***

**21.** Section 12(1)(*c*) of the Right of Children to Free and Compulsory Education Act, 2009 provides for reserving 25% of the seats in schools covered under Sections 2(*n*)(*iii*) and (*iv*) of the Act. The Hon'ble Supreme Court has in *Unaided Schools of Rajasthan* v. *Union of India*, (2012) 6 SCC 1 held that though the said provision and the Act would not be applicable qua unaided minority educational institutions, the same would be applicable in respect of minority aided educational institutions. The Hon'ble Court had only considered the validity of the Act by testing it in respect of unaided minority and non-minority educational institutions, whereas the Court had held that the Act of 2009 would be applicable to all institutions except unaided minority educational institutions. The Court came to the conclusion that Section 12(1)(*c*) would not be applicable to unaided minority educational institutions on the reasoning that though the Hon'ble Court has held in *T.M.A. Pai Foundation*, (2002) 8 SCC 481 and in *P.A. Inamdar* v. *State of Maharashtra*, (2005) 6 SCC 537, that the State cannot impose its policy of reservation on the unaided minority and non-minority educational institutions, the same has been constitutionally overridden by the 93rd

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Amendment to the Constitution introducing Article 15(5) of the Constitution, whereby Parliament was empowered to provide for reservation in respect of aided and unaided educational institutions other than those covered under Article 30(1) of the Constitution. Thus, this Hon'ble Court in *Unaided Schools of Rajasthan case* (hereinafter referred to as *Rajasthan case*) held the reservation of 25% of seats in favour of economically weaker sections in all schools to be applicable to all schools except minority unaided educational institutions.

**22.** It is relevant to note that, any reservation per se would be offensive to the right to equality guaranteed under Articles 14 and 15 of the Constitution unless saved by the provisions of Articles 15(3) to (5). Parliament by the 93rd Constitutional Amendment Act, 2005 introduced Article 15(5) as hereunder:

> "**15. (5)** Nothing in this article or in sub-clause (*g*) of clause (1) of Article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes insofar as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, *other than the minority educational institutions, referred to in clause (1) of Article 30.*"

Thus, the plain reading of the above, would show that Parliament is entitled to make provisions providing reservation to educationally backward classes of citizens in respect of admissions in non-minority educational institutions, However, the minority educational institutions, whether aided or unaided are exempted from the purview of the enabling provision under Article 15(5) of the Constitution of India. Thus, Section 12 which provides for reservation of 25% of seats in minority unaided educational institutions is violative of Articles 14, 19(1)(*g*) and 15 of the Constitution. Similarly, Section 12(1)(*b*) which provides for apportionment of about 25% of the seats in the aided institutions in favour of the State so as to be filled up in furtherance of the scheme of the State to provide for free and compulsory education is also in breach of the above fundamental rights.

**23.** Apart from the above, Section 12 is also violative of the constitutional right of the minorities to administer educational institutions of their choice guaranteed under Article 30(1) of the Constitution, as the same deprives the minority educational institution even if aided of its right to admission of students of its choice.

**24.** The Constitution Bench of the Apex Court in *Sidhrajbhai Sabbai* v. *State of Gujarat*, AIR 1963 SC 540, held the policy of the State of Gujarat to provide reservation in aided minority education as violative of Article 30(1). The Court also held that though the State is entitled to impose regulations on providing aid, the same should not impinge into the right to administration of the minorities over their educational institutions.

> "The right established by Article 30(1) is intended to be a real right for the protection of the minorities in the matter of setting up of

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educational institutions of their own choice. The right is intended to be effective and is not to be whittled down by so-called regulative measures conceived in the interest not of the minority educational institution but of the public or the nation as a whole. If every order which while maintaining the formal character of a minority institution destroys the power of administration is held justifiable because it is in the public or national interest, though not in its interest as an educational institution the right guaranteed by Article 30(1) will be but a "teasing illusion", a promise of unreality. Regulations which may lawfully be imposed either by legislative or executive action as a condition of receiving grant or of recognition must be directed to making the institution while retaining its character as a minority institution effective as an educational institution. Such regulation must satisfy a dual test—the test of reasonableness, and the test that it is regulative of the educational character of the institution and is conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it. (Para 15)

Rule 5(2) of the Rules made by Bombay Government for primary training colleges and Rules 11 and 14 for recognition of private training institution, insofar as they relate to reservation of seats therein under orders of Bombay Government, and directions given pursuant thereto regarding reservation of 80% of the seats and the threat to withhold grant-in-aid and recognition of the college infringe the fundamental freedom guaranteed to the petitioners under Article 30(1) and are unconstitutional. AIR 1958 SC 956, explained (Para 16)"

**25.** A similar situation arose for consideration of the Full Bench of the Hon'ble Bombay High Court, in *St. Francis De Sales Education Society* v. *State of Maharashtra*, (2001) 3 Mah LJ 261, where Rule 9 of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981 framed under Section 16 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977, which provided for a policy of reservation in favour of backward classes to be obligatory upon the private schools covered under the Act, was challenged as violative of Article 30(1) of the Constitution. The Full Bench through B.N. Srikrishna, J. (as His Lordship then was) held as follows:

"*34*. One last contention of the learned Government Pleader needs to be dealt with before parting. The learned Government Pleader contended that the Supreme Court judgments, right from *Kerala Education Bill* through *Sidhrajbhai* down to the year 2000 have upheld the power to the State to make regulations "for social welfare measures". He contends that reservations in favour of backward classes is certainly of national importance and a social welfare measure. We have already pointed out that a measure, even if salutary or of paramount importance, cannot be upheld if it conflicts with the guaranteed fundamental right under Article 30(1), unless it is intended to directly or indirectly advance the

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right guaranteed under Article 30(1). That is the crux of the test repeatedly laid down by the Supreme Court from *Kerala Education Bill* through *Sidhrajbhai* till *N. Ammad*. However necessary, important, or salutary the principle of reservation may be, and however enshrined it may be in the Constitution of our country, we are unable to hold that, that is a measure intended to advance the interests of the minorities and the fundamental right granted to them and guaranteed under Article 30(1) of the Constitution of India. We are, therefore, unable to accept the contention of the learned Government Pleader.

*35*. In the result, we are of the view that the *Sindhu Education Society* judgment by Dhabe, J., and Puranik, J., and *Fr. Anthony Mendonca and Rev. Sister Mary Damian* (supra) lay down the law correctly. Even after giving our utmost careful attention to the contentions raised by the learned Government Pleader and carefully considering the subsequent judgments of the Supreme Court cited at the bar, we are unable to hold that there is any need to reconsider or review the law laid down by this Court in the aforesaid judgments we have approved of.

*36*. In our judgment, the petitioner, being a minority institution, cannot be directed to appoint teachers or other staff on the basis of the reservation policy followed by the State as is evidenced in Rules 9(7) to 9(10) of the Maharashtra Employees of Private Schools (Conditions of Service) Rules, 1981. We therefore hold that the said Rules 9(7) to 9(10), if applied to the petitioner, would violate the fundamental right guaranteed to the petitioner as a minority institution under Article 30(1). Hence, we allow the writ petition."

**26.** The Division Bench of the Hon'ble Bombay High Court, again considered the question as to whether the policy of reservation of the State can be imposed qua minority aided institution, in *Bombay Institution for Deaf and Mute* v. *Department of Social Welfare*, (2002) 1 Mah LJ 354, Hon'ble R.M. Lodha, J., (as His Lordship then was) speaking for the Bench, held the policy of reservation in respect of minority institution to be violative of Article 30 (1) of the Constitution as follows:

"We deem it unnecessary to refer to various rulings of the Apex Court as in our view there seems to be no doubt and ambiguity in legal position that rights of minority educational institutions under Article 30(1) remain unaffected even after they get total aid and financial assistance from the Government. On the face of this legal position, the second contention raised by Mr Pakale cannot be accepted and has to be negated.

By asking Petitioner 1 Trust which runs educational institution to appoint teaching and non-teaching staff keeping in view the reservation prescribed under Government Resolutions dated 27-3-1991 and 23-3-1994, the petitioner's right to administer the institute is infringed

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and affected. The right having been conferred upon minority educational institutions to establish and administer educational institution of their choice is clearly violated if such minority educational institution is asked to appoint teachers as per reservation prescribed in Government Resolutions and not of its own choice as right to administer the minority educational institution inherently includes the right to appoint members of the staff of its choice to achieve its objectives. There is no doubt that the fundamental right conferred upon minority educational reasonable regulations but such regulations must 'ensure proper administration of the educational institution which has been established by minority.

* * *

What follows from the aforesaid observations of the Apex Court is that all minorities, linguistic or religious by virtue of Article 30(1) have an absolute right to establish and administer educational institutions of their choice and any law or executive direction which seeks to infringe the substance of that right under Article 30(1) would to that extent be void, though it does not restrict the right of the State to impose regulations on such minority institutions in the true interest of the efficiency of instructions, discipline, health, sanitation, morality and the like. But a direction to the minority educational institution to have reservation in the appointment of staff teachers is definitely a serious encroachment upon the right of minority institution under Article 30(1) in administering the minority educational institutions and such direction cannot be upheld."

**27.** The Kerala High Court, also considered the issue as to whether reservation or appropriation by the State of the right to admit 80% of the seats in the teacher training schools established and administered by religious minority, rendering such minorities to admit only 20% of the seat, in *State of Kerala* v. *Manager, Corporate Management of Schools of the Diocese of Palai*, 1970 KLT 106 and held Rules 6, 7 and 8 of the Kerala Education Rules, which provided for such reservation to be violative of Article 30(1) as follows:

"The impugned rules reads thus:

"6. Twenty per cent of the seats in aided training schools shall be reserved for selection by the Managers of the respective training schools.

7. Selection of candidates for sixty per cent of the seats in aided training schools and for eighty per cent of the seats in government training schools shall be made by a Selection Committee consisting of a member of the Public Service Commission as Chairman and an official nominee of the Education Department. There shall be a Selection Committee for each Revenue District.

8. In the remaining twenty per cent of seats, the Director shall depute untrained teachers employed in government and private schools for teachers' training in government and aided training schools:

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Provided that the teachers recruited through the Employment Exchange in government schools shall not be entitled for such deputation."

**28.** It is then obvious that the validity of any regulative measure imposed by the Government on an institution of the kind under consideration here, must be such that it does not whittle down the character of the institution as a minority institution which means an institution which caters to the educational needs of a minority community or a section thereof. Their Lordships have observed categorically that the freedom conceded to minorities under Article 30(1) is absolute and does not admit any restriction. So the only question relevant is whether the reservation of 80% of seats in the school for admission of outside candidates does not whittle down the freedom guaranteed to the minority communities under Article 30(1) of the Constitution, and not whether it is good for larger public interest. It is well known that the Christians have established and are maintaining many schools, primary and secondary, in different parts of the State, which require the service of a pretty large number of qualified teachers. They have therefore set up training schools to train teachers to be qualified for such appointments in their institutions. When it is remembered that the object of Article 30(1) is the conservation or advancement of the religious culture of minority communities, it is easily understandable that teachers of a particular category who will promote the purpose are required for service in their institutions, and that it is to train such teachers that these training schools are established by the community, though some other teachers who do not injure their cause will also be entertained there. To restrict the community's choice of candidates for training in their schools to 20% of the school strength would certainly prejudice that interest of the community and would therefore violate the freedom assured to them under Article 30 of the Constitution. The insistence that 80% of the strength should be candidates chosen by extraneous authorities, like the Selection Committee or the Director of Public Instruction, would seriously affect the character of the institution as an institution of the minority community and would almost reduce their freedom to a "teasing illusion".

**29.** A like condition, of reservation of 80% of seats for candidates chosen by the Government of Bombay, was held unconstitutional by the Supreme Court in *Sidhrajbhai case*, AIR 1963 SC 540. We do not find any material distinction between the facts of that case and the instant one.

"7. We would therefore uphold the learned Judges' directions that the condition of reservation of 80% of the seats in aided training schools for candidates chosen by the Selection Committee and the Director of Public Instruction should not be applied to schools run by minorities within the meaning of Article 30(1) of the Constitution."

**30.** In respect of Section 21 of the Act, according to which, a school other than unaided school shall have to constitute a school management committee consisting of elected representative of local authority, parents or

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guardian of children and teachers. The school management committee is empowered to monitor the working of the school and to prepare and recommend a school development plan and to monitor the utilisation of grants received from the government, local authority or other sources. It is relevant to note that, thus the entire management of the school is vested in the committee which is an alien body having no representation of the minority community or the management in such committee. Thus, the entire administration of the institution is vested in an external body designed by the State. Therefore Section 21 of the Act is a burdensome interference into the administration of the minority educational institution and its therefore violative of Article 30(1) of the Constitution of India. Meanwhile Parliament enacted an amendment to the Act of 2009 and the same received the assent of the President of India on 19-6-2012, whereby the school management committee has been made advisory in its function in respect of minority education institution and aided non-minority educational institution. I am advised to state that, despite performing advisory function, the very existence of an external agency in the management of school and introduction of the committee in the constitution of which the minority community has no say is violative of Article 30(1) of the Constitution.

**31.** In this regard, it would be relevant to refer to the judgment of the Constitution Bench of the Supreme Court in *State of Kerala* v. *Very Rev Mother Provincial*, (1970) 2 SCC 417, it was held as follows:

> "*9.* The next part of the right relates to the administration of such institutions. Administration means 'management of the affairs' of the institution. This management must be free of control so that the founders or their nominees can mould the institution as they think fit, and in accordance with their ideas of how the interests of the community in general and the institution in particular will be best served. No part of this management can be taken away and vested in another body without an encroachment upon the guaranteed right.
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> * * *
>
> *11.* Under these provisions the educational agency or the corporate management has to establish a governing body or a managing council respectively. The sections give the compositions of the two bodies. The governing body set up by the educational agency is to consist of 11 members and the managing council of 21 members. The 11 members of the governing body are: (*i*) the principal of the private college, (*ii*) the manager of the private college, (*iii*) a person nominated by the University in accordance with the provisions in that behalf contained in the Statutes, (*iv*) a person nominated by the Government, (*v*) a person elected in accordance with such procedure as may be prescribed by the Statues of the University from amongst themselves by the permanent teachers of the private college, and (*vi-xi*) not more than six persons nominated by the educational agency. The composition of the managing council consists of

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a principal in rotation from the private colleges, manager of the private colleges, the nominees of the University and the Government as above described, two elected representatives of the teachers and not more than 15 members nominated by the educational agency. The Act ought to have used the expression 'corporate management' instead of 'educational agency' but the meaning is clear.

* * *

*14*. These sections were partly declared ultra vires of Article 30(1) by the High Court as they took away from the founders the right to administer their own institution. It is obvious that after the erection of the governing body or the managing council the founders or even the community has no hand in the administration. The two bodies are vested with the compete administration of the institution. These bodies have a legal personality distinct from the educational agency or the corporate management. They are not answerable to the founders in the matter of administration. Their powers and functions are determined by the University laws and even the removal of the members is to be governed by the Statutes of the University. Sub-sections (2), (4), (5) and (6) clearly vest the management and administration in the hands of the two bodies with mandates from the University."

**32.** Section 21, provides for elected representative of the local bodies to be part of the school management committee and therefore this enables the political parties to come into the administration of the institution. In fact the Hon'ble Apex Court in *State of Kerala* v. *V.R. Mother Provincial*, while considering a similar provisions held as follows:

"Then comes Section 58 which reads:

**58.** ***Membership of Legislative Assembly, etc., not to disqualify teachers.***—A teacher of a private college shall not be disqualified for continuing as such teacher merely on the ground that he has been elected as a Member of the Legislative Assembly of the State or of Parliament or of a local authority:

Provided that a teacher who is a Member of the Legislative Assembly of the State or of Parliament shall be on leave during the period in which the Legislative Assembly or Parliament, as the case may be, is in session.

This enables political parties to come into the picture of the administration of minority institutions which may not like this interference. When this is coupled with the choice of nominated members left to the Government and the University by sub-section (1)(*d*) of Sections 48 and 49, it is clear that there is much room for interference by persons other than those in whom the founding community would have confidence. … We also agree sub-sections (1), (2), (3) and (9) of Section 53, sub-sections (2) and (4) of Section 56, Section 58 and Section 63 are ultra vires Article 30(1) in respect of the minority institutions."

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**33.** Similarly, the Supreme Court in *All Saints High School* v. *Government of Andhra Pradesh*, (1980) 2 SCC 478, Fazal Ali, J. speaking for the Court held as follows:

> "*63*. On an exhaustive analysis of the authorities of this Court on the various aspects of the fundamental right enshrined in Article 30(1) of the Constitution the following propositions of law emerge:
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> * * *
>
> (*3*) While the State or any other statutory authority has no right to interfere with the internal administration or management of the minority institution, the State can certainly take regulatory measures to promote the efficiency and excellence of educational standards and issue guidelines for the purpose of ensuring the security of the services of the teachers or other employees of the institution.
>
> (*4*) At the same time, however, the State or any University authority cannot under the cover or garb of adopting regulatory measures tend to destroy the administrative autonomy of the institution or start interfering willy nilly with the core of the management of the institution so as to render the right of the administration of the management of the institution concerned nugatory or illusory. Such a blatant interference is clearly violative of Article 30(1) and would be wholly inapplicable to the institution concerned.
>
> (*5*) Although Article 30 does not speak of the conditions under which the minority educational institution can be affiliated to a college or University yet the section by its very nature implies that where an affiliation is asked for, the University concerned cannot refuse the same without sufficient reason or try to impose such conditions as would completely destroy the autonomous administration of the educational institution.
>
> (*6*) The induction of an outside authority however high it may be either directly or through its nominees in the governing body or the managing committee of the minority institution to conduct the affairs of the institution would be completely destructive of the fundamental right guaranteed by Article 30(1) of the Constitution and would reduce the management to a helpless entity having no real say in the matter and thus destroy the very personality and individuality of the institution which is fully protected by Article 30 of the Constitution. Perhaps there may not be any serious objection to the introduction of high authorities like the Vice-Chancellor or his nominee in the administration particularly that part of it which deals with the conditions of service of the teachers yet such authorities should not be thrust so as to have a controlling voice in the matter and thus overshadow the powers of the managing committee. Where educational institutions have set up a particular governing body or

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the managing committee in which all the powers vest, it is desirable that such powers should not be curbed or taken away unless the Government is satisfied that these powers are grossly abused and if allowed to continue may reduce the efficacy or the usefulness of the institution."

**34.** In *D.A.V. College* v. *State of Punjab*, (1971) 2 SCC 269, while considering the validity of Section 2(1)(*a*) of the Guru Nanak University Act, 1969 the Constitution Bench through P. Jaganmohan Reddy, J. (as His Lordship then was) held as follows:

"*33*. The next ground of attack is in respect of the statutes made in exercise of the powers conferred under sub-section (1) of Section 19 of the University Act which according to the petitioners interferes with the management of their institutions, as such violates Article 30(1) of the Constitution. The relevant impugned Statutes are contained in Chapter V relating to admission to colleges. These are Sections 2(1)(*a*), 17 and 18 read with clause 1(2) and (3) which are as follows:

"2. (1)(*a*) A College applying for admission to the privileges of the University shall send a letter of application to the Registrar and shall satisfy the Senate:

(*a*) that the College shall have a regularly constituted governing body consisting of not more than 20 persons approved by the Senate and including, among others, 2 representatives of the University and the Principal of the College ex officio.

*34*. It is contended that these provisions interfere with the petitioners in the management of their institutions, in that the Colleges are required to constitute a regular governing body for each of them, of not more than 20 persons to be approved by the University Senate. Of these, two representatives of the University and the Principal of the College are to be ex officio members. According to the petitioners the Managing Committee of their institution is composed of 24 members under the D.A.V. College Trust and Management Society registered under the Societies Registration Act (21 of 1960). It will be observed that under Clause 1(3) if the petitioners do not comply with the requirements under Section 1(*a*) their affiliation is liable to be withdrawn. Similarly it is stated that Clause 17 also interferes with the petitioners' right to administer their College as the appointment of all the staff has to be approved by the Vice-Chancellor and that subsequent changes will also have to be reported to the University for Vice-Chancellor's approval. We have already held that the petitioners' institutions are established by a religious minority and therefore under Article 30 this minority has the right to administer their educational institutions according to their choice. Clauses 2(1)(*a*) and 17 of Chapter V in our view certainly interferes with that right."

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**VIII. Mr Ajmal Khan, Senior Advocate, for the petitioners** *(contd.)*

**35.** The nine-Judge Bench of this Hon'ble Court in *Ahmedabad St. Xavier's College* v. *State of Gujarat*, (1974) 1 SCC 717, speaking for the majority, Ray, C.J., (as His Lordship then was) held as follows:

"*40.* The provisions contained in Section 33-A(1)(*a*) of the Act state that every college shall be under the management of a governing body which shall include amongst its members, a representative of the University nominated by the Vice-Chancellor and representatives of teacher, non-teaching staff and students of the college. These provisions are challenged on the ground that this amounts to invasion of the fundamental right of administration. It is said that the governing body of the college is a part of its administration and therefore that administration should not be touched. The right to administer is the right to conduct and manage the affairs of the institution. This right is exercised through a body of persons in whom the founders of the institution have faith and confidence and who have full autonomy in that sphere. The right to administer is subject to permissible regulatory measures. Permissible regulatory measures are those which do not restrict the right of administration but facilitate it and ensure better and more effective exercise of the right for the benefit of the institution and through the instrumentality of the management of the educational institutions and without displacing the management. If the administration has to be improved it should be done through the agency or instrumentality of the existing management and not by displacing it. Restrictions on the right of administration imposed in the interest of the general public alone and not in the interests of land for the benefit of minority educational institutions concerned will affect the autonomy in administration.

*41.* Autonomy in administration means right to administer effectively and to manage and conduct the affairs of the institutions. The distinction is between a restriction on the right of administration and a regulation on the right of administration and a regulation prescribing the manner of administration. The right of administration is day-to-day administration. The choice in the personnel of management is a part of the administration. The university will always have a right to see that there is maladministration. If there is maladministration, the university will take steps to cure the same. There may be control and check on administration in order to find out whether the minority institutions are engaged in activities which are not conducive to the interest of the minority or to the requirements of the teachers and the students. In *State of Kerala* v. *Very Rev. Mother Provincial*, this Court said that if the administration goes to a body in the selection of whom the founders have no say, the administration would be displaced. This Court also said that situations might be conceived when they might have a preponderating voice. That would also affect the autonomy in administration. The provisions contained in Section 33-A(1)(*a*) of the Act have the effect of displacing

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**VIII. Mr Ajmal Khan, Senior Advocate, for the petitioners** *(contd.)*

the management and entrusting it to a different agency. The autonomy in administration is lost. New elements in the shape of representatives of different types are brought in. The calm waters of an institution will not only be disturbed but also mixed. These provisions in Section 33-A(1)(*a*) cannot therefore apply to minority institutions."

**36.** Concurring with the Majority, H.R. Khanna, J. observed as follows:

"*101*. In the light of the above principles, it can be stated that a law which interferes with the minorities' choice of a governing body or management council would be violative of the right guaranteed by Article 30(1). This view has been consistently taken by this Court in *Rt. Rev. Bishop S.K. Patro, Mother Provincial* and *D.A.V. College affiliated to the Guru Nanak University*.

*102*. Section 33-A which provides for a new governing body for the management of the college and also for Selection Committees as well as the constitution thereof would consequently have to be quashed so far as the minority educational institutions are concerned because of the contravention of Article 30(1). The provisions of this section have been reproduced earlier and are similar to those of Section 48 of the Kerala University Act, sub-sections (2), (4), (5) and (6) of which were held by this Court in *Mother Provincial* to be violative of Article 30(1). In *Rt. Rev. Bishop S.K. Patro*, this Court declared invalid the order passed by the educational authorities requiring the Secretary of the Church Missionary Society Higher Secondary School to take steps to constitute a managing committee in accordance with the order of the educational authorities."

**37.** Mathew, J. speaking for himself and Chandrachud, J. (as His Lordship then was) held as follows:

*181*. We think that the provisions of sub-sections (1) and (1)(*b*) of Section 33-A abridge the right of the religious minority to administer educational institutions of their choice. The requirement that the college should have a governing body which shall include persons other than those who are members of the governing body of the Society of Jesus would take away the management of the college from the governing body constituted by the Society of Jesus and vest it in a different body. The right to administer the educational institution established by a religious minority is vested in it. It is in the governing body of the Society of Jesus that the religious minority which established the college has vested the right to administer the institution and that body alone has the right to administer the same. The requirement that the college should have a governing body including persons other than those who constitute the governing body of the Society of Jesus has the effect of divesting that body of its exclusive right to manage the educational institution. That it is desirable in the opinion of the legislature to associate the Principal of the college or the other persons referred to in Section 33-A(1)(*a*) in the

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**VIII. Mr Ajmal Khan, Senior Advocate, for the petitioners** *(contd.)*

management of the college is not a relevant consideration. The question is whether the provision has the effect of divesting the governing body as constituted by the religious minority of its exclusive right to administer the institution. Under the guise of preventing maladministration, the right of the governing body of the college constituted by the religious minority to administer the institution cannot be taken away. The effect of the provision is that the religious minority virtually loses its right to administer the institution it has founded. Administration means 'management of the affairs' of the institution. This management must be free of control so that the founders or their nominees can mould the institution according to their way of thinking and in accordance with their ideas of how the interests of the community in general and the institution in particular will be best served. No part of this management can be taken away and, vested in another body without an encroachment upon the guaranteed right."

**38.** The Constitution Bench of the Apex Court, in *Rev. Bishop S.K. Patro* v. *State of Bihar*, (1969) 1 SCC 863, while setting aside the order of the Education Department, requiring the school to constitute managing committee in accordance with that order, the Court held as follows:

"2. … By order dated 4-9-1963, the President of the Board of Secondary Education approved the election of Bishop Parmar as President and Rev. Chest as Secretary of the Church Missionary Society Higher Secondary School. This order was set aside by the Secretary to the Government, Education Department, by Order dated 22-5-1967. On 21-6-1967 the Regional Deputy Director of Education, Bhagalpur, addressed a letter to the Secretary, Church Missionary Society School, Bhagalpur inviting his attention to the order dated 22-5-1967 and requested him to take steps to constitute a Managing Committee of the School "in accordance with that order".

* * *

"*19.* We are also unable to agree with the High Court that before any protection can be claimed under Article 30(1) in respect of the Church Missionary Society Higher Secondary School it was required to be proved that all persons or a majority of them who established the institution were "Indian Citizens" in the year 1854. There being no Indian citizenship in the year 1854 independently of the citizenship of the British Empire, to incorporate in the interpretation of Article 30 in respect of an institution established by a minority the condition that it must in addition be proved to have been established by persons who would, if the institution had been set up after the Constitution, have claimed Indian citizenship is to whittle down the protection of Article 30 in a manner not warranted by the provisions of the Constitution.

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**VIII. Mr Ajmal Khan, Senior Advocate, for the petitioners** *(contd.)*

*20.* The order passed by the educational authorities requiring the Secretary of the Church Missionary Society Higher Secondary School to take steps to constitute a Managing Committee in accordance with the order dated 22-5-1967 is declared invalid."

**39.** In *Bihar State Madrasa Education Board, Patna* v. *Madarasa Hanfia Arabic College, Jamallia*, (1990) 1 SCC 428, the Supreme Court held as follows:

"*6.* The question which arises for consideration is whether Section 7(2)(*n*) which confers power on the Board to dissolve the managing committee of an aided and recognised Madrasa institution violates the minorities' constitutional right to administer its educational institution according to their choice. This Court has all along held that though the minorities have right to establish and administer educational institution of their own choice but they have no right to maladminister and the State has power to regulate management and administration of such institutions in the interest of educational need and discipline of the institution. Such regulation may have indirect effect on the absolute right of minorities but that would not violate Article 30(1) of the Constitution as it is the duty of the State to ensure efficiency in educational institutions. The State has, however, no power to completely take over the management of a minority institution. Under the guise of the regulating the educational standards to secure efficiency in institution, the State is not entitled to frame rules or regulations compelling the management to surrender right of administration. In *State of Kerala* v. *Very Rev. Mother Provincial, etc.*, (1971) 1 SCR 734, Section 30(1) of the Kerala University Act, 1969 which conferred power on the Government to take over the management of a minority institution on its default in carrying out the directions of the State Government was declared ultra vires on the ground that the provisions interfered with the constitutional right of a minority to administer its institution. Minority institutions cannot be allowed to fall below the standard of excellence on the pretext of their exclusive right of management but at the same time their constitutional right to administer their institutions cannot be completely taken away by superseding or dissolving managing committee or by appointing ad hoc committees in place thereof.

In the instant case Section 7(2)(*n*) is clearly violative of constitutional fight of minorities under Article 30(1) of the Constitution insofar as it provides for dissolution of managing committee of a Madrasa. We agree with the view taken by the High Court."

**40.** Section 18 of the Act of 2009 provides that no school other than a school established, owned and controlled by the State or the local authority, shall, after the commencement of the Act, *be established or function, without obtaining a certificate of recognition from such authority* by making an application. Section 18(2) empowers the authority to grant recognition

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subject to such conditions as he may deem fit. Whereas sub-section (3) provides that on contravention of the condition of recognition, the competent authority is empowered to withdraw recognition and from the date of such withdrawal, no such school shall continue to function. Sub-section (5) provides that any person who establish or runs a school after such withdrawal or without a certificate of recognition shall be liable to fine which may extend to rupees one lakh and in case of continuing contraventions, to a fine of rupees ten thousand for each day during such contravention. Section 19 provides for norms and standards that are to be followed by the school so as to be granted recognition under Section 18. Section 19(5) provides for penalty in case of continuance of school after withdrawal of recognition.

**41.** It is submitted that Article 30(1) confers on minorities two rights, namely,—

(*i*) The right to establish educational institutions of their choice, and

(*ii*) The right to administer such institutions.

It is to be noted that, by the very nature, the right conferred under Article 30 is an absolute right. The courts however have through various judicial pronouncements read down certain restriction or regulation into the right of administration of such institutions, such as regulations to prevent maladministration or exploitation of the employees or students of such institutions. Thus the courts have upheld such regulatory measures so long as such measures do not impinge into the day-to-day administration of the institution. However, the right to establish a minority educational institution was and continues to remain an absolute right and any law that seeks to impose fetters on the right of establishment of the educational institutions would per se be violative of Article 30(1) of the Constitution of Indian.

**42.** As stated supra, Section 18 prohibits the establishment of a school without obtaining a certificate of recognition from the State under the Act. It is relevant to note that, the requirement of such certificate of recognition is independent of the recognition already granted by the State Governments under the State legislations governing the field. Thus Section 18 which prohibits the very establishment of a school by the minorities without prior nod of the State is per se offensive of the constitutional guarantee to the minorities to have an unfettered right to establish institutions of their choice. Moreover, the prescription of penalty for establishment of a school without such certificate would have a chilling effect on the right of minorities to establish institutions of their choice and would also dissuade the minorities from exercising their fundamental rights guaranteed under Article 30(1). It is also to be noted that the Founding Fathers incorporated these rights as a measure to assure the minority communities that they would be entitled to freely conserve their identity through their institutions by keeping such rights beyond the reach of executive and legislative encroachment which may after the commencement of the Constitution fall largely in the will of the majority. Section 13, which makes the very right of establishment subject to the

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approval of the competent authority under the Act and empowering the authority to withdraw the recognition at any time and thereby prevent the school from functioning, would be to emasculate the minorities of their right to establish and administer educational institutions of their choice, defeating the solemn promise of our Founding Fathers to the minorities. The State, is empowered to impose regulations only after the establishment of such institution and the State cannot make the very establishment subject to its prior permission. Even if it is assumed without conceding that the State is empowered to make regulations, such a regulations cannot be valid if they directly impede into the right conferred under Article 30(1).

**43.** In this regard, it would be relevant to refer to the judgment of this Hon'ble Court in *Sidhrajbhai Sabbai* v. *State of Gujarat* wherein this Hon'ble Court stating the scope of regulatory measures that can be imposed, held as follows:

> "The right established by Article 30(1) is intended to be a real right for the protection of the minorities in the matter of setting up of educational institutions of their own choice. The right is intended to be effective and is not to be whittled down by so-called regulative measures conceived in the interest not of the minority educational institution but of the public or the nation as a whole. If every order which while maintaining the formal character of a minority institution destroys the power of administration is held justifiable because it is in the public or national interest, though not in its interest as an educational institution the right guaranteed by Article 30(1) will be but a "teasing illusion", a promise of unreality. Regulations which may lawfully be imposed either by legislative or executive action as a condition of receiving grant or of recognition must be directed to making the institution while retaining its character as a minority institution effective as an educational institution. Such regulation must satisfy a dual test—the test of reasonableness, and the test that it is regulative of the educational character of the institution and is conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it. (Para 15)"

**44.** Similarly, the seven-Judge Constitutional Bench of this Hon'ble Court in *P.A. Inamdar* v. *State of Maharashtra*, (2005) 6 SCC 537, opined as follows:

> "*103*. The State may prescribe reasonable regulations to ensure the excellence of the educational institutions to be granted aid or to be recognised. But in the name of laying down conditions for aid or recognition, the State cannot directly or indirectly defeat the very protection conferred by Article 30. The considerations for granting recognition to a minority educational institution and casting accompanying regulation would be similar as applicable to a non-minority institution subject to two overriding considerations: (1) the recognition is not denied solely on the ground of the educational

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institution being one belonging to minority; and (2) the regulation is neither aimed at nor has the effect of depriving the institution of its minority status."

**45.** This Court in *All Saints High School case*, (1980) 2 SCC 478, explaining the scope of Article 30, held as follows:

"*63*. Article 30(1) enshrines a fundamental right of the minority institutions to manage and administer their educational institutions which is completely in consonance with the secular nature of democracy and the directives in the Constitution itself. Although unlike Article 19 the right conferred on the minorities is absolute, unfettered and unconditional but this does not mean that this right gives a free licence for maladministration so as to defeat the avowed object of the Article, namely, to advance excellence and perfection in the field of education. At the same time, the State or any University authority cannot under the cover or garb of adopting regulatory measures tend to destroy the administrative autonomy of the institution or start interfering willy nilly with the core of the management of the institution so as to render the right of the administration of the management of the institution concerned nugatory or illusory. Such a latent interference is violative of Article 30(1) and would be wholly inapplicable to the institution concerned."

**46.** Similarly, this Hon'ble Court in its judgment in *Ahmedabad St. Xavier's College Society* v. *State of Gujarat*, (1974) 1 SCC 717, Khanna, J. expounding the scope of the regulatory measures that can be imposed on the rights conferred under Article 30 held as follows:

"The broad approach has been to see that nothing is done to impair the rights of the minorities in the matter of their educational institutions and that the width and scope of the provisions of the Constitution dealing with those rights are not circumscribed. The principle which can be discerned in the various decisions of this Court is that the catholic approach which led to the drafting of the provisions relating to minority rights should not be set at naught by narrow judicial interpretation. The minorities are as much children of the soil as the majority and the approach has been to ensure that nothing should be done as might deprive the minorities of a sense of belonging, of a feeling of security, of a consciousness of equality and of the awareness that the conservation of their religion, culture, language and script as also the protection of their educational institutions is a fundamental right enshrined in the Constitution. It is, therefore, permissible for the authority concerned to prescribe regulations which must be complied with before an institution can seek and retain affiliation and recognition. Question can arise whether there is any limitation on the prescription of regulations for minority educational institutions, so far as this aspect is concerned, the authority prescribing the regulations must bear in mind that the

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Constitution has guaranteed a fundamental right to the minorities for establishing and administering their educational institutions, regulations made by the authority concerned should not impinge upon that right. Balance has, therefore, to be kept between the two objectives, that of ensuring the standard of excellence of the institution and that of preserving the right of the minorities to establish and administer their educational institutions."

**47.** Section 24 of the Act of 2009 enumerates the duties to be performed by the teachers appointed to the school covered by the Act and mandates that in default of performance of such duties, disciplinary action should be initiated against such teacher. The said provision also empowers the State to provide for a grievance redressal forum in this regard. In this regard it would be relevant to note that, the right to administration guaranteed under Article 30(1) includes the right to appoint teaching staff as also non-teaching staff and to take action if there is dereliction of duty on the part of any of the employees. Thus, it is within the absolute domain of the minority educational institution to appoint such staffs including teachers and to allocate work for them. The said right also comprises of the right to initiate action against such employees at its discretion. The same is a core component of administration and administrative control over its employees. Therefore, Section 24 which mandates the management of the minority institution to initiate disciplinary proceedings in case of dereliction of duty as enumerated under Section 24(1) is a serious inroad into the right of administration guaranteed under Article 30(1). Moreover Section 24 also empowers the Government to provide for a grievance redressal of any such teacher in the manner prescribed by the State. In this regard it would be worthy to note that the complete control that the management could have over such teachers is removed and the decisions of the management can be set at naught by recourse to such mechanism contemplated under Section 24(3) and the same is violative of Article 30(1) of the Constitution.

**48.** In this regard it would be relevant to state that this Hon'ble Court in *State of Kerala* v. *V.R. Mother Provincial*, (1970) 2 SCC 417, held as follows:

"Section 53, sub-sections (1), (2) and (3) confer on the syndicate of the University the power to veto even the action of the governing body or the managing council in the selection of the Principal. Similarly, sub-section (4) takes away from the educational agency or the corporate management the right to select the teachers. The insistence on merit in sub-section (4) or on seniority-cum-fitness in sub-section (7) does not save the situation. The power is exercised not by the educational agency or the corporate management but by a distinct and autonomous body under the control of the Syndicate of the University. Indeed sub-section (9) gives a right of appeal to the Syndicate to any person aggrieved by the action of governing or the managing council thus making the Syndicate the final and absolute authority in these matters. Coupled with this is the

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power of the Vice-Chancellor and the syndicate in sub-sections (2) and (4) of Section 56 … These provisions clearly take away the disciplinary action from the governing body and the managing council and confer it upon the University. Then comes Section 58…."

**49.** The combined reading of the judgments of this Court, would show that though the State is entitled to make regulations prescribing minimum qualifications, experiences and other conditions bearing on the merit of individual for appointment as a teacher as a reasonable regulatory measure and the prescription of any other conditions of service to prevent exploitation of employees is permissible and is not violative of Article 30(1), it is equally trite law that such regulations which interferes with the right to appoint the teachers or to take action in case of dereliction of duty, which is a core component of administration cannot be called a regulatory measure but would directly impinge into the right conferred under Article 30(1), particularly when, an external agency has been given blanket, uncanalised and arbitrary powers so as to act as a grievance redressal body. It is also to be noted that, the discretion of the management to initiate disciplinary action or to pardon an employee on dereliction of duty is completely divested and the management is bound to initiate action. The provision also does not require any representative of the management to be part of such grievance redressal body and as such the same cannot be countenanced having regard to a scope of Article 30(1).

**50.** In this regard, it would be useful to refer to the judgment of this Court in *All Saints High School* v. *State of Andhra Pradesh*, (supra), wherein the Court held as follows:

"While setting up such an authority care must be taken to see that the said authority is not given blanket and uncanalised and arbitrary powers so as to act at their own sweet will ignoring the very spirit and objective of the institution. It would be better if the authority concerned associates the members of the governing body or its nominee in its deliberation so as to instil confidence in the founders of the institution or the committees constituted by them.

While there could be no objection in setting up a high authority to supervise the teaching staff so as to keep a strict vigilance on their work and to ensure the security of tenure for them, but the authority concerned must be provided with proper guidelines under the restricted field which they have to cover. Before coming to any decision which may be binding on the managing committee must be associated and they should be allowed to have a positive say in the matter. In some cases the outside authorities enjoy absolute powers in taking decisions regarding the minority institutions without hearing them and these orders are binding on the institution. Such a course of action is not constitutionally permissible so far as minority institution is concerned because it directly interferers with the administrative autonomy of the institution…."

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**51.** In *St. Xavier's College* v. *State of Gujarat*, (1974) 1 SCC 717, Chief Justice Ray (as His Lordship then was) speaking for the majority, examining Section 52-A of the Gujarat University Act, 1949 which provided for reference to an arbitral proceeding for redressal of grievance of the teachers of affiliated colleges which include minority institutions, held the same to be a displacement of the domestic jurisdiction of the management and therefore to be not applicable to the minority institutions:

> "*44.* The provisions contained in Section 52-A of the Act contemplate reference of any dispute between the governing body and any member of the teaching, other academic and non-teaching staff of an affiliated college which is connected with the conditions of service of such member to a tribunal of arbitration consisting of one member nominated by the governing body of the college, one member nominated by the member concerned and an Umpire appointed by the Vice-Chancellor. These references to arbitration will introduce an area of litigious controversy inside the educational institution. The atmosphere of the institution will be vitiated by such proceedings. The governing body has its own disciplinary authority. The governing body has its domestic jurisdiction. This jurisdiction will be displaced. A new jurisdiction will be created in administration. The provisions contained in Section 52-A of the Act cannot, therefore, apply to minority institutions."

**52.** Concurring with the opinion of the majority, Khanna, J. held as follows:

> "*105.* Although disciplinary control over the teachers of a minority educational institution would be with the governing council, regulations, in my opinion, can be made for ensuring proper conditions of service of the teachers and for securing a fair procedure in the matter of disciplinary action against the teachers. Such provisions which are calculated to safeguard the interest of teachers would result in security of tenure and thus inevitably attract competent persons for the posts of teachers. Such a provision would also eliminate a potential cause of frustration amongst the teachers. Regulations made for this purpose should be considered to be in the interest of minority educational institutions and as such they would not violate Article 30(1).
>
> *106.* Clause (*a*) of sub-sections (1) and (2) of Section 51-A of the impugned Act which make provision for giving a reasonable opportunity of showing cause against a penalty to be proposed on a member of the staff of an educational institution would consequently be held to be valid. Clause (*b*) of those sub-sections which gives a power to the Vice-Chancellor and officer of the University authorised by him to veto the action of the managing body of an educational institution in awarding punishment to a member of the staff, in my opinion, interferes with the disciplinary control of the managing body over its teachers. It is significant that the power of approval conferred by clause (*b*) in each of

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the two sub-sections of Section 51-A on the Vice-Chancellor or other officer authorised by him is a blanket power. No guidelines are laid down for the exercise of that power and it is not provided that the approval is to be withheld only in case the dismissal, removal, reduction in rank or termination of service is mala fide or by way of victimisation or other similar cause. The conferment of such blanket power on the Vice-Chancellor or other officer authorised by him for vetoing the disciplinary action of the managing body of an educational institution makes a serious inroad on the right of the managing body to administer an educational institution. Clause (*b*) of each of the two sub-sections of Section 51-A should, therefore, be held to be violative of Article 30(1) so far as minority educational institutions are concerned.

*107.* Section 52-A of the Act relates to the reference of disputes between a governing body and any member of the teaching, other academic and non-teaching staff of an affiliated college or recognised or approved institution connected with the conditions of service of such member to a tribunal of arbitration, consisting of one nominated by the governing body of the college or, as the case may be, of the recognised or approved institution, one member nominated by the member of the staff involved in the dispute and an Umpire appointed by the Vice-Chancellor. Section 52-A is widely worded, and as it stands it would cover within its ambit every dispute connected with the conditions of service of a member of the staff of an educational institution, however trivial or insignificant it may be, which may arise between the governing body of a college and a member of the staff. The effect of this section would be that the managing committee of an educational institution would be embroiled by its employees in a series of arbitration proceedings. The provisions of Section 52-A would thus act as a spoke in the wheel of effective administration of an educational institution. it may also be stated that there is nothing objectionable to selecting the method of arbitration for settling major disputes connected with conditions of service of staff of educational institutions. It may indeed be a desideratum. What is objectionable, apart from what has been mentioned above, is the giving of the power to the Vice-Chancellor to nominate the Umpire. Normally in such disputes there would be hardly any agreement between the arbitrator nominated by the governing body of the institution and the one nominated by the member concerned of the staff. The result would be that the power would vest for all intents and purposes in the nominee of the Vice-Chancellor to decide all disputes between the governing body and the member of the staff connected with the latter's conditions of service. The governing body would thus be hardly in a position to take any effective disciplinary action against a member of the staff. This must cause an inroad in the right of the governing body to administer the institution. Section 52-A should, therefore be held to be

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violative of Article 30(1) so far as minority educational institutions are concerned."

**53.** Similarly, the Constitution Bench of this Court in *Lilly Kurian* v. *St. Lewina*, (1979) 2 SCC 124, while enumerating the scope of the interference permissible in respect of disciplinary control of management over its staffs, held as follows:

"*37.* The conferral of a right of appeal on outside authority like the Vice-Chancellor under Ordinance 33(4) takes away the disciplinary power of a minority educational authority. The Vice-Chancellor has the power to veto its disciplinary control. There is a clear interference with the disciplinary power of the minority institution. The State may 'regulate' the exercise of the right of administration but it has no power to impose any 'restriction' which is destructive of the right itself. The conferral of such wide powers on the Vice-Chancellor amounts in reality, to a fetter on the right of administration under Article 30(1). This, it seems to us, would so affect the disciplinary control of a minority educational institution as to be subversive of its constitutional rights and can hardly be regarded as a 'regulation' or a 'restriction' in the interest of the institution.

* * *

*53.* As laid down by the majority in *St. Xavier's College case*, such a blanket power directly interferes with the disciplinary control of the managing body of a minority educational institution over its teachers. The majority decision in *St. Xavier's College case* squarely applies to the facts of the present case and accordingly it must be held that the impugned Ordinance 33(4) of the University of Kerala is violative of Article 30(1) of the Constitution. If the conferral of such power on an outside authority like the Vice-Chancellor, which while maintaining the formal character of a minority institution destroys the power of administration, that is, its disciplinary control, is held justifiable because it is in the public and national interest, though not in its interest as an educational institution, the right guaranteed by Article 30(1) will be, to use the well-known expression, 'a teasing illusion' 'a promise of unreality.' "

**54.** Section 13 of the Act, prohibits any school from collecting capitation fee or subjecting the child or his or her parents for any screening procedure at the time of admitting a child into the school. Sub-section (2) makes it punishable for adopting any screening procedure for the admission of the student. It is submitted that no institution whether established by majority or minority communities have a right to collect capitation fee, however, minority educational institutions can adopt any screening procedure in admitting students as a facade of the right to administration of institutions. Similarly Section 15 prohibits the school from denying admission to any student and makes it mandatory for such schools to admit any student. While

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**VIII. Mr Ajmal Khan, Senior Advocate, for the petitioners** *(contd.)*

Section 16 prohibits, the school from holding back any student in any class or expelling any student from such school. It is submitted that, the minorities have been conferred with a fundamental right to establish institution of their choice which includes the rights to admit eligible students of their choice. The object of conferring such right on the minority community was, to establish institutions as mechanisms to conserve the unique cultural identity of such minority. Thus, the minority community through their institutions can legitimately adopt a screening procedure which would ensure admission of students who could best conserve and appreciate the unique culture or language of such minorities. Similarly any law that compels the minority educational institutions to admit students against its free will would be offensive of the right guaranteed under Article 30.

**55.** For the better appreciation of the above, it would be relevant to refer to the seven-Judge Bench of this Hon'ble Court in *P.A. Inamdar* v. *State of Maharashtra*, (2005) 6 SCC 537, wherein this Court echoing the above held as follows:

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

**56.** In answer to the Presidential Reference, *In re Kerala Education Bill, 1957*, AIR 1958 SC 956, speaking for the majority, S.R. Das, J., held as follows: (AIR para 32):

> "… As we have already stated, the distinct language, script or culture of a minority community can best be conserved by and through educational institutions, for it is by education that their culture can be inculcated into the impressionable minds of the children of their community. It is through educational institutions that the language and script of the minority community can be preserved, improved and strengthened. It is, therefore, that Article 30(1) confers on all minorities, whether based on religion or language, the right to establish and administer educational institutions of their choice. The minorities, quite understandably, regard it as essential that the education of their children should be in accordance with the teachings of their religion and they hold, quite honestly, that such an education cannot be obtained in ordinary schools designed for all the members of the public but can only be secured in schools conducted under the influence and guidance of people well versed in the tenets of their religion and in the traditions of

**Summary of Arguments**

**VIII. Mr Ajmal Khan, Senior Advocate, for the petitioners** *(contd.)*

their culture. The minorities evidently desire that education should be imparted to the children of their community in an atmosphere congenial to the growth of their culture. Our Constitution-makers recognised the validity of their claim and to allay their fears conferred on them the fundamental rights referred to above."

**57.** In *St. Stephens College* v. *Delhi University*, (1992) 1 SCC 558, the Constitutional Bench held as follows:

"*92.* The minorities cannot be treated in a religious neutral way in the educational institutions established and administered by them. Clearly that was not the aim of Article 30(1). Article 30(1) was incorporated to secure to the minorities a fair deal in the name of religion only. It was guaranteed to them as a fundamental right after a great deal of deliberation by the Framers. It should not be nullified by narrow judicial interpretation or crabbed pedantry. There must be a broad approach and the Statesman-like vision. The Catholic approach that led to the drafting of the provisions dealing with the minority rights, as discussed earlier, should not be set at naught. It must be ensured that nothing is done to deprive the minorities of a sense of belonging and of a feeling of security. [(*See*: the observations of Khanna, J., in *St. Xavier's case* (at 234)]

*93.* India is very much a Nation in its making. There are linkages and connections in the multi-layered mix-up. There are concern and considerations underlying the provisions relating to minority rights. There are shared understanding and expectations of the Founding Fathers. The constitutional construction without such concern and consideration and without such shared understanding and expectations is bound to be inadequate. It would be profoundly anti-historic and likely to produce constitutional nihilism with calamitous consequences….

* * *

95. We have elsewhere pointed out that the minorities have the right to admit their own candidates to maintain the minority character of their institutions. That is a necessary concomitant right which flows from the right to establish and administer educational institution in Article 30(1). There is also a related right to the parents in the minority communities. The parents are entitled to have their children educated in institutions having an atmosphere congenial to their own religion…."

**58.** The eleven-Judge Bench in *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481, while answering the reference as to whether the minorities' rights to establish and administer educational institutions of their choice will include the procedure and method of admission and selection of students, in affirmative, held as follows:

"*161. Q 5(a).*: "(*a*) Whether the minorities' rights to establish and administer educational institutions of their choice will include the procedure and method of admission and selection of students?

**Summary of Arguments**

**VIII. Mr Ajmal Khan, Senior Advocate, for the petitioners** *(contd.)*

*A.* A minority institution may have its own procedure and method of admission as well as selection of students, but such a procedure must be fair and transparent, and the selection of students in professional and higher education colleges should be on the basis of merit. The procedure adopted or selection made should not be tantamount to maladministration. Even an unaided minority institution ought not to ignore the merit of the students for admission. While exercising its right to admit students to the colleges aforesaid, as in that event, the institution will fail to achieve excellence."

and postulating the scope of interference of the State in the admission of students, Kirpal, C.J., (as His Lordship then was) concluded for the majority as follows:

"*161. Q 4.*: "Whether the admission of students to minority educational institution, whether aided or unaided, can be regulated by the State Government or by the University to which the institution is affiliated?

*A.* Admission of students to unaided minority educational institution viz. schools and undergraduate colleges where the scope for merit-based selection is practically nil, cannot be regulated by the State or university concerned, except for providing the qualifications and minimum conditions of eligibility in the interest of academic standards."

**59.** Such being the legal matrix, Section 13 insofar as it prohibits the minority educational institutions from adopting any screening test before admission to their schools is a patent interference into the right of administration. Similarly Section 15, which deprives the schools of their discretion to grant or refuse admission causes violence to the scope of the right under Article 30(1) of the Constitution of India.

**60.** Lastly, Section 29 of the Act, provides that the curriculum and the evaluation procedure for the schools shall be laid by the academic authority to be specified by the appropriate Government. Sub-section (2) of Section 29 states that while so laying the curriculum and evaluation procedure, the academic authority shall provide for the medium of instructions to be in the mother tongue. It is submitted that the minorities whether religious or based on language have a right to lay down their own syllabi and choose the subjects to be taught and to impart instructions through their own language or in the medium of their choice. For instance, a school run by Oriya-speaking minorities in Tamil Nadu, they can best conserve their language by imparting education in their language and the empowerment of the authority to impose any other language in the name of mother tongue or imposition of the majoritarian language i.e. Tamil, would be a grave inroad into the right to conserve their language. Similarly the minorities may intend to make literature expounding their religious or linguistic history and principles as a part of the education imparted apart from the secular education, in such case

**Summary of Arguments**

**VIII. Mr Ajmal Khan, Senior Advocate, for the petitioners** *(contd.)*

the conferment on an external authority to dictate the subjects to be taught, the curriculum and the medium in which education should be imparted would be offensive of the fundamental right of the minority communities to conserve their language, script and culture guaranteed under Article 29(1) and the right to establish and administer educational institutions of their choice under Article 30(1) of the Constitution of India. In fact, such empowerment renders the term "of their choice", illusory and amounts to surrender of a valuable constitutional right to the State nominated academic authority. Thus, Section 29 invades the very root of the right of minorities and cannot be considered as a mere regulation and is therefore violative of Articles 29(1) and 30(1) of the Constitution of India.

**61.** In this regard, it would be relevant to refer to the Constitutional Bench decision of this Court in *State of Bombay* v. *Bombay Education Society*, AIR 1954 SC 561, which examined the validity of a circular issued by the Government of Bombay, which mandated all schools using English as a medium of instruction to open progressive divisions of standards using Hindi and Indian languages as medium of instruction from Standard 1. Holding the circular, violative of Articles 29 and 30(1), the Court through S.R. Das, J., (as His Lordship then was), held as follows:

> "*17.* Coming to the second question as to whether the impugned order infringes any constitutional right of Barnes High School, the learned Attorney General contends that although any section of the citizens having distinct language, script or culture of its own, has under Article 29(1) the right to conserve the same and although all minorities, whether based on religion or language, have under Article 30(1), the right to establish and administer educational institutions of their choice, nevertheless such sections or minorities cannot question the power of the State to make reasonable regulations for all schools including a requirement that they should give instruction in a particular language which is regarded as the national language or to prescribe a curriculum for institutions which it supports … Where, however a minority like the Anglo-Indian community, which is based, 'inter alia' on religion and language, has a fundamental right to conserve its language, script and culture under Article 29(1) and has the right to establish and administer educational institutions of their choice under Article 30(1), surely then there must be implicit in such fundamental right, the right to impart instruction in their own institutions to the children of their own community in their own language. To hold otherwise will be to deprive Article 29(1) and Article 30(1) of the greater parts of their contents. Such being the fundamental right, the police power of the State to determine the medium of instruction must yield to this fundamental right to the extent it is necessary to give effect to it and cannot be permitted to run counter to it."

**Summary of Arguments**

**VIII. Mr Ajmal Khan, Senior Advocate, for the petitioners** *(contd.)*

**62.** This Hon'ble Court in *Ahmedabad St. Xavier's College* v. *State of Gujarat*, (1974) 1 SCC 717, holding that the minority educational institution as a façade of administration have a right to frame curriculum and to decide on the medium of instructions, held as follows:

> "*57.* The only purpose that the fundamental right under Article 30(1) would serve would in that case be that minorities may establish their institutions, lay down their own syllabi, provide instructions in the subjects of their choice, conduct examinations and award degrees or diplomas. Such institutions have the right to seek recognition to their degrees and ask for aid where aid is given to other educational institutions giving a like education on the basis of the excellence achieved by them. The State is bound to give recognition to their qualifications and to the institutions and they cannot be discriminated except on the around of want of excellence in their educational standards so far as recognition of degrees or educational qualifications is concerned and want of efficient management so far as aid is concerned."

**63.** Similarly, holding the government order issued by the State of Tamil Nadu, to introduce Tamil/mother tongue as a medium of instruction at primary levels in Matriculation Schools to be violative of Articles 29(1) and 30(1), the Full Bench of the Hon'ble Madras High Court in *Tamil Nadu Tamil & English Schools Association* v. *State of Tamil Nadu*, (2000) 2 CTC 344, the Full Bench, held that the minority educational institutions have a fundamental right to prescribe their own syllabus, curriculum and to impart education in the language of their choice.

**64.** Thus, from the above, it is clear that the minorities have a fundamental right to impart education by framing their own syllabus, curriculum akin to their need to conserve their language or religion and in the medium of their choice and as such Section 29 of the Act of 2009, which deprives the minority schools of this right and confers the same on an external academic authority is ultra vires Articles 29(1) and 30(1) of the Constitution of India.

***Free and Compulsory Education vis-à-vis minority educational institutions***

**65.** The quest of the State to provide for free and compulsory education to the weaker sections of the society in furtherance of the constitutional directive principle under Article 45 of the Constitution of India and the attempts by the States to impose the obligation to provide free and compulsory education on minority institutions as a precondition for recognition or grant has always been questioned before the courts. However the question was settled by this Court as earlier as in 1958 in *In re Kerala Education Bill, 1957*. The Constitutional Courts have always opined that the States' obligations under Article 45 of the Constitution cannot be imposed on the minority educational institutions who enjoy constitutionally guaranteed right of administration under Article 30(1) of the Constitution of India.

**Summary of Arguments**

**VIII. Mr Ajmal Khan, Senior Advocate, for the petitioners** *(contd.)*

**66.** The seven-Judge Bench of this Court in *In re Kerala Education Bill, 1957*, AIR 1958 SC 956, the majority held as follows:

> "*34.* Learned counsel for the State of Kerala referred us to the directive principles contained in Article 45 which requires the State to endeavour to provide, within a period of ten years from the commencement of the Constitution, for free and compulsory education for all children until they complete the age of fourteen years and with considerable warmth of feeling and indignation maintained that no minorities should be permitted to stand in the way of the implementation of the sacred duty cast upon the State of giving free and compulsory primary education to the children of the country so as to bring them up properly and to make them fit for discharging the duties and responsibilities of good citizens. To pamper to the selfish claims of these minorities is, according to learned counsel, to set back the hands of the clock of progress. Should these minorities, asks the learned counsel, be permitted to perpetuate the sectarian fragmentation of the people and to keep them perpetually segregated in separate and isolated cultural enclaves and thereby retard the unity of the nation? Learned counsel for the minority institutions were equally eloquent as to the sacred obligation of the State towards the minority communities. It is not for this Court to question the wisdom of the supreme law of the land. We the people of India have given unto ourselves the Constitution which is not for any particular community or section but for all. Its provisions are intended to protect all, minority as well as the majority communities. There can be no manner of doubt that our Constitution has guaranteed certain cherished rights of the minorities concerning their language, culture and religion. These concessions must have been made to them for good and valid reasons. Article 45, no doubt, requires the State to provide for free and compulsory education for all children, but there is nothing to prevent the State from discharging that solemn obligation through government and aided schools and Article 45 does not require that obligation to be discharged at the expense of the minority communities. So long as the Constitution stands as it is and is not altered, it is, we conceive, the duty of this Court to uphold the fundamental rights and thereby honour our sacred obligation to the minority communities who are of our own."

**67.** Thus, in light of the above arguments raised and decisions cited, it is submitted that Sections 12, 13, 14, 15, 16, 21, 18, 19, 24 and 29 of the Right of Children to Free and Compulsory Education Act, 2009 (Act 35 of 2009) is ultra vires of Articles 30(1), 14, 15 and 29 of the Constitution of India.

**68.** It is therefore prayed that, this Hon'ble Court may be pleased to declare Sections 12, 13, 14, 15, 16, 21, 18, 19, 24 and 29 of the Right of Children to Free and Compulsory Education Act, 2009 (Act 35 of 2009) as violative of the fundamental rights guaranteed under Articles 30(1), 14, 15 and 29 of the Constitution of India and is therefore void and render justice.

**Summary of Arguments** *(contd.)*

## *IX. Mr Prateek Seksaria, Advocate, for the petitioners*

### PART I

***Challenge to the Ninety-third (93rd) Constitutional Amendment of 2005 inserting clause (5) in Article 15 of the Constitution***

***Essential features which constitute the basic structure***

**1.** The theory of basic structure is based on the principle that a change in a thing does not involve its destruction and destruction of thing is a matter of substance and not of form.[1] The Supreme Court has time and again observed that "one cannot legally use the Constitution to destroy itself".

**2.** The Framers of our Constitution have built a wall around certain parts of fundamental rights, which has to remain forever, limiting ability of majority to intrude upon them. That wall is "Basic Structure" doctrine. Our Constitution will almost certainly continue to be amended as India grows and changes. However, a democratic India will not grow out of the need for protecting the principles behind our fundamental rights.[2]

**3.** It is submitted that our Constitution is framed by a Constituent Assembly which was not Parliament. It is in the exercise of law-making power by the Constituent Assembly that we have a controlled Constitution. Articles 14, 19, 21 represent the foundational values which form the basis of the rule of law.[3]

**4.** A few basic structure principles as set out in *Kesavananda Bharati*[4] are as follows:

**4.1.** Sikri, C.J. writing for the majority, indicated that the basic structure consists of the following:

(*i*) The Supremacy of the Constitution.

(*ii*) A republican and democratic form of government.

(*iii*) The secular character of the Constitution.

(*iv*) Separation of powers between the legislature, the executive and the judiciary.

(*v*) The federal character of the Constitution.

**4.2.** Shelat and Grover, JJ. in their opinion added three features to the Chief Justice's list:

(*i*) The mandate to build a welfare State contained in the directive principles of State policy.

(*ii*) Maintenance of the unity and integrity of India.

(*iii*) The sovereignty of the country.

1 Para 35, *M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212

2 Para 112, *I.R. Coelho* v. *State of T.N.*, (2007) 2 SCC 1

3 Para 48, *Y.K. Sabharwal, C.J., Principle of Constitutionality, I.R. Coelho* v. *State of T.N.*, (2007) 2 SCC 1

4 *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225

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**IX. Mr Prateek Seksaria, Advocate, for the petitioners** *(contd.)*

**4.3.** Hegde and Mukherjea, JJ. in their opinion, provided a separate and shorter list:

(*i*) The sovereignty of India.

(*ii*) The democratic character of the polity.

(*iii*) The unity of the country.

(*iv*) Essential features of individual freedoms.

(*v*) The mandate to build a welfare State.

**4.4.** Jaganmohan Reddy, J. preferred to look at the Preamble, stating that the basic features of the Constitution were laid out by that part of the document, and thus could be represented by:

(*i*) A sovereign democratic republic.

(*ii*) The provision of social, economic and political justice.

(*iii*) Liberty of thought, expression, belief, faith and worship.

(*iv*) Equality of status and opportunity.

**5.** Thus it is submitted that Parliament may in accordance with the procedure as laid down in Article 368 of the Constitution of India, by a Constitution Amendment Act, amend each Article of the Constitution including Article 368 itself, but not so as to destroy the "basic features" of the Constitution.[5]

**6.** It is submitted that the harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the Constitution. The significance of the perception that Parts III and IV together constitute the core of commitment to social revolution and they together are the conscience of the Constitution is to be traced to a deep understanding of the scheme of the Indian Constitution. Granville Austin's observation brings out the true position that Parts III and IV are like two wheels of a chariot, one no less important than the other. You snap one and the other will lose its efficacy. They are like a twin formula for achieving the social revolution, which is the ideal which the visionary founders of the Constitution set before themselves. In other words, the Indian Constitution is founded on the bedrock of the balance between Parts III and IV. Thus to give absolute primacy to one over the other is to disturb the harmony and destroy the basic structure of the Constitution.[6]

***Submissions***

**7.** It is submitted that the said amendment destroys and/or damages the basic structure of the Constitution to the extent of including private unaided institutions within its ambit.

**8.** It is submitted that the said amendment abrogates and destroys the fundamental rights enshrined in Part III of the Constitution of India and more

5 *I.R. Coelho* v. *State of T.N.*, (2007) 2 SCC 1, paras 102, 110-13.

6 Para 56, *Minerva Mills* v. *Union of India*, (1980) 3 SCC 625

**Summary of Arguments**

**IX. Mr Prateek Seksaria, Advocate, for the petitioners** *(contd.)*

particularly being Articles 14, 19 and 21, which are known as the golden triangle of the fundamental rights.

**9.** It is submitted that "three Articles 14, 19 and 21 of our Constitution, and only three, stand between the heaven of freedom into which Tagore wanted his country to awaken and the abyss of unrestrained power.[7]

**10.** It is submitted that a real democracy must endeavour to achieve its objectives through the discipline of fundamental freedoms conferred by Articles 14 and 19 and which must be preserved at all costs. The need to protect liberty is the greatest when the Government's purposes are beneficent. If immunity from the operation of Article 14 is conferred, the political pressures exercised by numerically large groups can tear the country asunder by leaving it to the legislature to pick and choose favoured areas and favourite classes for preferential treatment.[8]

**11.** It is submitted that Article 15(5) on one hand excludes minority educational institutions, protected by Article 30 reflecting the fundamental rights, which pertains to the basic structure reflected in Article 30 and which forms a part of basic structure. On the other hand, it provides for a discrimination qua the private unaided educational institution's fundamental rights by requiring them to provide for admission to any socially and educationally backward class of citizens or for Scheduled Castes and Scheduled Tribes and which is in complete derogation of Article 14 and Article 19 of the Constitution of India.

**12.** Article 15(5) violates Article 14, because Article 15(5) does not apply to aided minority institutions, who do not stand on a better footing than unaided non-minority schools.

**13.** Article 15(5) in its application to private unaided educational institutions violates their right under Article 14, as unequals are treated equally. Article 15(5) in its application to private unaided institutions fails to make any distinction between aided and unaided institutions.

**14.** Thus, Article 15(5) removes at least two sides of golden triangle which affords to the people of this country an assurance that the promise held forth by the Preamble will be performed by ushering an egalitarian era through the discipline of fundamental rights, that is, without emasculation of their fundamental rights.[9]

**15.** It is also submitted that the fact that clause (5) in Article 15 begins with a non obstante clause and puts out of the way Article 19(1)(*g*) clearly

7 Para 109, *I.R. Coelho* v. *State of T.N.*, (2007) 2 SCC 1
Para 74, *Minerva Mills* v. *Union of India*, (1983) 3 SCC 625
Para 500, *Ashoka Kumar Thakur* v. *Union of India*, (2008) 6 SCC 1

8 Para 63, *Minerva Mills* v. *Union of India* (1983) 3 SCC 625

9 Para 74, *Minerva Mills* v. *Union of India*, (1983) 3 SCC 625

**Summary of Arguments**

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reveals that the laws contemplated to be made in pursuance of powers to be exercised under Article 15(5) would not be those which would abridge the fundamental rights guaranteed under Article 19(1)(*g*) but ones which would completely destroy and abrogate the fundamental rights guaranteed under Article 19(1)(*g*). It is submitted that Article 19(6) provides for a reasonable restriction on the right available under 19(1)(*g*). But, considering the scheme of Article 15(5) the legislature in its intent makes it amply clear that the laws made in exercise of powers under Article 15(5) in relation to private unaided educational institutions would not only abridge the fundamental rights, as permissible under 19(6), but would abrogate and destroy the right under 19(1)(*g*).[10]

**16.** It is submitted that Article 15(5) emasculates the fundamental rights of private unaided institutions by excluding the applicability of Article 15(1) and further by making an exception for minority educational institutions under Article 30. Thus, it is respectfully submitted that Article 15(5) clearly takes away the immunity of private unaided institutions from being discriminated on the basis of caste or religion and it further amounts to the State conferring upon itself immunity to making class legislations which is impermissible.

**17.** It is submitted that the effect of clause (5) which is inserted in Article 15 is also that it permits the State to regulate and control admissions in private unaided institutions. Thus, apart from the State being able to compel private unaided institutions to give up their seats to such extents as the State may so declare by a special law framed in this behalf, it also enables the State to dictate and control the manner in which admissions in private unaided institutions are given. This clearly amounts to nationalisation of seats, which had been categorically disapproved by this Court.[11]

**18.** It is submitted that what Article 15(5) seeks to achieve is exactly what the scheme framed in *Unni Krishnan* sought to achieve (i.e. nationalisation of education). The eleven-Judge Bench of this Court in *T.M.A. Pai* (para 38) held that the scheme in *Unni Krishnan case* has the effect of nationalising education in respect of important features viz. the right of a private unaided institution to give admission and to fix the fee. By framing this scheme, which has led to the State Governments legislating in conformity with the scheme, the private unaided institutions have become indistinguishable from the government institutions, and curtailing all the essential features of the right of administration of a private unaided educational institution can neither be called fair or reasonable.[12]

10 Para 514, *Ashoka Kumar Thakur* v. *Union of India* (Bhandari, J.), (2008) 6 SCC 1

11 Paras 124 and 125, *P.A. Inamdar* v. *State of Maharashtra*, (2005) 6 SCC 537

12 Para 518, *Ashoka Kumar Thakur* v. *Union of India* (Bhandari, J.), (2008) 6 SCC 671
Para 38, *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481

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**IX. Mr Prateek Seksaria, Advocate, for the petitioners** *(contd.)*

**19.** By virtue of the definition of the word "State" as appearing in Article 12 gives to Article 15(5) the operation of the widest amplitude. State also includes State Government and State local authorities and other authorities. Thus by virtue of Article 15(5) even if State legislature passes a law for the purpose of giving effect to a policy of a local authority which may be intended towards securing directive principles, such law will enjoy immunity from Articles 14, 19(1) and 19(1)(*g*). Article 15(5) virtually tears away the heart of basic fundamental rights chapter.

**20.** The said amendment also amounts to taking out judicial review by making the only grounds that may be permissible to private unaided institution to challenge the validity of the laws that may be legislated unavailable. Article 15(5) takes away the power of judicial review.

**21.** The present amendment is a subversion of the Constitution inasmuch as the same has the effect of rendering fundamental rights meaningless and futile. The effect of the amendment is to take away the power of judicial review inasmuch as the validity of any law made by the State will not be open to challenge despite it being in violation of the fundamental right enshrined under Article 19(1)(*g*). This subversion of taking away the power of judicial review (Articles 32 and 226) which is the very soul of the Constitution without which in the words of the Architect of our Constitution, namely, Dr Ambedkar, the Constitution would be a nullity. Thus the present constitutional amendment is made such that it has the effect of taking away the power of judicial review and thus violative of the basic structure of the Constitution.

**22.** Thus, it is concluded that clause (5) of Article 15 in its application to private unaided educational institutions destroys the basic feature of the Constitution.

## PART II

***Applicability and scope of Article 15(5) of the Constitution***

**23.** ***Statement of Objects and Reasons***

"***Statement of Objects and Reasons***

Greater access to higher education including professional education to a larger number of students belonging to the socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes has been a matter of major concern. At present, the number of seats available in aided or State maintained institutions, particularly in respect of professional education, is limited in comparison to those in private unaided institutions.

2. It is laid down in Article 46, as a directive principle of State policy, that the State shall promote with special care the educational and economic interests of the weaker sections of the people and protect them from social injustice. To promote the educational advancement of the socially and

**Summary of Arguments**

**IX. Mr Prateek Seksaria, Advocate, for the petitioners** *(contd.)*

educationally backward classes of citizens or of the Scheduled Castes and Scheduled Tribes in matters of admission of students belonging to these categories in unaided educational institutions, other than the minority educational institutions referred to in clause (1) of Article 30 of the Constitution, it is proposed to amplify Article 15.

3. The Bill seeks to achieve the above objects.

New Delhi;
Arjun Singh
9-12-2005"

***Submissions***

**24.** Article 15(5) has been inserted in pursuance of the directive principle of the State in Article 46 and not Article 21 or 45 (free elementary education up to the age of 14).

**25.** Article 15(5) is inserted to provide students belonging to the socially and educationally backward classes of citizens or Scheduled Castes and Scheduled Tribes a greater access to higher education including professional education since the number of seats available in aided or State maintained institutions, particularly in respect of professional education was limited in comparison to those in private unaided institutions.

**26.** It is thus submitted that Article 15(5) is an enabling provision and is an exception to Article 15(1). The sphere of its operation is merely in relation to admission for socially and educationally backward classes of citizens or Scheduled Castes and Scheduled Tribes and that too for greater access to higher education including professional education.

**27.** The enabling power of the State to enact laws is restricted only with respect to admission in such institutions imparting higher and professional education and does not in any manner apply to private unaided institutions imparting elementary education.

## PART III

***Applicability and scope of Article 21-A of the Constitution***

***Statement of Objects and Reasons***

**28.** *Statement of Objects and Reasons*

The Constitution of India in a Directive Principle contained in Article 45 has made a provision for free and compulsory education for all children up to the age of fourteen years within ten years of promulgation of the Constitution. We could not achieve this goal even after 50 years of adoption of this provision. The task of providing education to all children in this age group gained momentum after the National Policy of Education (NPE) was announced in 1986. The Government of India, in partnership with the State Governments, has made strenuous efforts to fulfil this mandate and, though significant improvements were seen in various educational indicators, the ultimate goal of providing universal and quality education still remains

**Summary of Arguments**

**IX. Mr Prateek Seksaria, Advocate, for the petitioners** *(contd.)*

unfulfilled. In order to fulfil this goal, it is felt that an explicit provision should be made in the Part relating to Fundamental Rights of the Constitution.

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

3. After taking into consideration the report of the Law Commission of India and the recommendations of the Standing Committee of Parliament, the proposed amendments in Part III, Part IV and Part IV-A of the Constitution are being made which are as follows:

(*a*) to provide for free and compulsory education to children in the age group of 6 to 14 years and for this purpose, a legislation would be introduced in Parliament after the Constitution (Ninety-third Amendment) Bill, 200l is enacted;

(*b*) to provide in Article 45 of the Constitution that the State shall endeavour to provide early childhood care and education to children below the age of six years; and

(*c*) to amend Article 5l-A of the Constitution with a view to providing that it shall be the obligation of the parents to provide opportunities for education to their children.

3. The Bill seeks to achieve the above objects.

New Delhi;

Murli Manohar Joshi

16-11-2001."

**29.** ***Extracts from Parliamentary Debate on the Constitution (Ninety-third Amendment) Bill:***

"*Dr Murli Manohar Joshi (presented the Bill)*: Article 45 provided that the State shall endeavour to provide within a period of 10 years from the commencement of the Constitution for free and compulsory education for all children until they complete the age of 14 years. Accordingly, this work should have been completed by 1961-1962 but now it is the year 2001.

The provision for the Bill was made in Directive Principles (Article 45) in the Constitution. The Supreme Court has admitted in its decision in *Unni Krishnan case* that although this article is directive principle, it is as effective as the fundamental rights. In a way, the Supreme Court has ruled that education is also a fundamental right and Article 45 should be viewed as such. As many as 18 to 19 States have made legislation keeping it in view. But as education is a subject in Concurrent List and keeping in view the need of providing education to

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all persons in the country, it is the duty of the Central Government to implement that system in a proper manner. So, it is very important to introduce and pass this Bill.

In the last amendment, there was the provision to scrap Article 45 completely and to make education a fundamental right by inserting a new Article 21-A in the Constitution and some responsibility should be entrusted with the guardians also and those responsibilities should be included in the article dealing with fundamental duties. The Parliamentary Committee considered the matter and it was of the view that Article 45 directs the Government to provide education to the children until they attain the age of 14 years. I also agree to the view. In it the children up to the age of 6 years have also been included. If we had accepted the previous Bill, we could not have given any direction to the Central or State Government about providing education to the children up to the age of 6 (six). I think that it was the lacunae in the previous Bill and we thought about it deeply especially after the Parliamentary Committee pointed it out and we decided that it must be incorporated in the Bill. We have provided in Article 45 for early childhood care and education for all children until they complete the age of six years. It is also necessary to provide instructions in this regard to the Central as well as the State Government because if it is not provided, we would not be able to establish full importance of education. I would like to clarify it.

The last thing I have to say in this regard is that whatever funds the Central Government and the State Government, could manage we did manage. The group of experts that we had constituted, has examined all aspects and has recommended to spend Rs 89-90 crores during the coming 10 years. Even today our campaign of education for all is an ongoing scheme. Hon'ble Prime Minister is here. I have to thank him that this is the only scheme which, he has urgingly said, will continue. The five years plan might have been completed today, but this scheme will continue in the next five year plan. Five Year Plan has not been made yet, but this had been accepted as an ongoing scheme. For this 85% funds are given by the Central Government and 15% by the State Governments. Next time we will give 75% and State Governments will give 25%. In the further next plan we will give 50% and the State Governments will give 50% which will continue forever, so there is no difficulty like this."

*Shri Somnath Chatterjee (Bolpur):* In the First Five Year Plan, the allocation was much higher. It was to the tune of 6.79% of the total plan outlay. It came down and in the Ninth Five Year Plan it was to the tune of 4.25% only.

*Shri Samik Lahiri:* Even we were a signatory of the UN Charter in the year 1992. There also it has been stated that early childhood care and education should be taken care of by the Government. Then, why are you excluding this 0-6 age group?

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Sir, another important point is the financial aspect of this Bill. If we make it a fundamental right definitely a big amount of money is needed for it. One Committee was set up. Prof. Tapas Mazumdar Committee had indicated that a total amount of Rs 1,36,92,200 crores is needed. Already you have stated that in the Ninth Five Year Plan the share would be 15:85 ratio. In the next Five Year Plan, it will be 25:75 ratio and in the next Plan to that, it will be 50:50 ratio and from that onwards it will carry on. But some few months are left for the completion of the Ninth Five Year Plan. It means it will start from 75:25 ratio. You have to see this. This is the responsibility of the Government to arrange for the money. This is one of the most important aspects.

You may say that the Prime Minister or the Finance Minister is not giving enough money to you but it is the problem of your Government and you have to arrange it. Why do you not go in for some alternative arrangement? You are giving so many relaxations to the corporate house. Why cannot you impose an education cess on the corporate houses and accumulate some amount of money so that this can be met and realised? In that manner you have started accumulating some kind of money for road. So, why cannot you do it so far as education is concerned? It bears immense importance.

Last but not the least is this. One of the most important aspects has been stated in the Bill in the last clause that in Article 51-A of the Constitution, after clause (*j*), the following clause shall be added, "who is a parent or guardian to provide opportunities for education". It is whose responsibility? Is it State's responsibility or the guardian's responsibility to provide the opportunity?

You have stated here that a person who is a parent or a guardian has to provide opportunities for education. It is the duty of the State. If you make it a Fundamental Right, it becomes the duty of the Government to impart education to the child. It is not the duty of the parents or guardians. You could say that the duty of the parents would be that they should encourage children to go to school or to get educated but you cannot confer the responsibility upon them. You cannot shy away from your responsibility or you cannot abdicate your responsibility by putting the burden on the shoulders of the parents and guardians. This is another major point where the Government is trying to shy away from discharging its own responsibility. These are the major lacuna. I urge upon the Hon'ble Minister and urge upon this august House that the lacuna have to be addressed.

*Shri M.V.V.S. Murthi (Visakhapatnam):* This is why, the provision of amendment of the Constitution and bringing out a new Article 21-A will put responsibility on the States along with the Central Government. Now, the Union Government want to take the burden of universal education. It

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is a welcome sign and everybody should welcome it. This Bill seeks to insert a new article and to amend Article 51-A.

This has been done with a view to providing an obligation to the parents. As they have stated, it is a partnership among the Central Government, the State Government and the parents or the guardians.

There should not be more burden on the State Governments. If there is more burden on the State Governments, they may not be able to do it and this may also go the same way the other schemes have gone. At least, up to fifth class, the Government of India should fund 100%. Then only we can achieve the object of primary education to all children. After achieving this, we can go to high school education. Unless the Government makes primary education compulsory, no village can develop.

The Government is bringing an amendment Bill seeking to make it mandatory for the parents to make arrangements for the education of the children in the age group of 6 to 14 years.

*Shri Ravi Prakash Verma (Kheri):* Mr Chairman, Sir, the situation in Uttar Pradesh is very grave. Thousands of schools are lying empty. There are no teachers. I would like to talk about a goal. I went to village in my constituency. It was a faraway area. Old people in that village were very much worried about the education. They told me that the school was built three years ago but no teacher had come there.

*Smt Renuka Chowdhury:* At least, up to fifth class, the Government of India should fund 100%. Then only we can achieve the object of primary education to all children. After achieving this, we can go to high school education.

*Shri Mohan Rawale (Mumbai South Central):* We spend 3.8% of our GDP on eradicating illiteracy whereas developing countries spend almost 9% of their GDP on primary education and they have a good record vis-à-vis primary education. Therefore, I request Hon'ble Minister to increase it by at least 5%. Some primary schools don't even have blackboards while in some schools children are taught under trees.

Government have been wise enough to add financial provisions in the Bill. As per the Bill, Union Government, along with the State Government, would spend Rs 98,000 crores in the coming ten years to reach the target. I would also like to submit to the Government to ensure that State Governments do not cite the scarcity of funds as a hindrance.

*Shri Balkrishna Chauhan (Ghosi):* A Bill to this effect had been brought in Rajya Sabha in 1997 in which Article 21-A of the Constitution provided that the education for the children in the age group of 6 to 14 years would be fundamental right. However that was diluted by

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entrusting this task to the State Government by stating that "State shall enact laws for ensuring the free and compulsory education." This thing takes away the very spirit of fundamental right and now it has been left to the will of the State. By incorporating Article 51-A of the fundamental duties in Article 4(1), it has been stated that it shall be the duty of every Indian citizen to educate their children. This has always been a duty but it conveys that the State Government by enacting laws, will ensure that every guardian provide education to their children/wards. The Government can see the asylum of the Court to ensure the enforceability of this law i.e. it can try the defaulting parents by moving to the Court.

*Dr (Smt) Beatrix D'Souza (nominated):* If we consider it a fundamental duty of the parental community, then it is only fair that the parental community should share a part of the financial burden.

*Shri C. Sreenivasan (Dindigul):* Article 51-A makes it a fundamental duty of the parents or guardians to provide education to children up to 14 years when the Government takes upon itself that it will provide free and compulsory education. Only when two hands come together we can clap. Likewise both the Government and the parents must come together to ensure education to children. This is true. But at the same time it is also necessary for the Government which makes this constitutional amendment to allocate adequate funds.

*Shri Ajoy Chakraborty (Basirhat):* I would like to ask you as to why you are casting the responsibility on the guardians or parents. It is the duty of the State and it is not the duty of the guardians or the parents because the subject of "right to education" is enumerated in the fundamental rights of the Constitution. A duty is cast on the State and not on the guardians or parents.

I would say that it is not the duty of the guardian or the parent but is the right and the duty of the State to bear the expense for the education of the children. So, it should be deleted. Instead of the guardian or the parent, it should be the duty of the State to bear the expenses for the education of children of our country…. (Interruptions) I have a few suggestions to make the consideration of the House as well as of the Minister.

Compulsory education should be clearly defined so that the compulsion is on the State and not on the parents to ensure free quality education for all children.

*Dr Sushil Kumar Indora (Sirsa):* It is the responsibility of the Government to take care of the health and security of citizen. In foreign countries 6% to 7% of GDP is spent on education whereas in our country it is only 3%-4%.

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*Shri G.M. Banatwalla (Ponnani):* The word, "compulsion" has to be understood in relation to the State and the obligation of the State to provide for free education.

*Smt Sonia Gandhi (Amethi):* A year ago, I had written to the Prime Minister expressing my concern on the danger of placing all the onus and responsibility of education on the parents. Now this law is meant mostly to empower the very poor and the oppressed. Yet the Bill places all the responsibilities on these parents, especially through clause (*k*) in Article 51-A. The main responsibility for providing education should be on the State rather than on parents since most of them in any case have to struggle for their living.

In the context, the word "compulsory" in the proposed Article 21-A does not go with the spirit of the Fundamental Right. It denotes enforcement. While the citizens in the group of 6-14 year shall have a fundamental right to free education, the State should have a corresponding responsibility to provide the facilities for such education. This, I believe, must be made clean in the Bill.

Equally important, I believe is the question of the Centre's responsibility for providing education. Although all of us know that Education is a State subject, I believe, it would not be realistic for the Centre to expect the States to shoulder this onerous responsibility of discharging a Fundamental Right all by themselves. I believe that all initiatives and the entire onus at the moment have been placed with the States. The Centre's role, its responsibility and obligation, therefore, require a clear definition in the law.

The Bill also says that the cost would be Rs 9800 crore per annum. If we are really serious about fulfilling the objectives of the Bill, the actual provision of these resources must be guaranteed. *Ideally, the cost should really be shared by the Centre and the State Governments* and the administrative responsibility for implementation should be left to the States.

*The Minister of Human Resource Development, Minister of Science and Technology and Minister of Ocean Development (Dr Murli Manohar Joshi):*

The Hon'ble Leader of Opposition raised the point about the fundamental duties and asked as to why such a provision has been made in Article 51-A. As a matter of the fact the consensus is that this is a duty like any other duty which envisages that we should respect our national flag or we should not do anything which amounts insult to the women folk. Similarly, this is also a duty of the parents to give education to their children.

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**IX. Mr Prateek Seksaria, Advocate, for the petitioners** *(contd.)*

***Submissions***

**30.** The journey as to how the Right to Free and Compulsory Education began before the framing of our Constitution and after completely a full circle after a lapse of more than 60 years has come back to the same stage is briefly set out hereinbelow:

| | |
|---|---|
| 1946: | Constituent Assembly began its task. |
| 1947: | Ways and Means (Kher) Committee set up to explore ways and means of achieving Universal Elementary Education within ten years at lesser cost. |
| 1947: | Constituent Assembly Sub-Committee on Fundamental Rights places the right to free and compulsory education on the list of Fundamental Rights:<br>"*Clause 23: Every citizen is entitled as of a right to free primary education and it shall be the duty of the State to provide within a period of ten years from the commencement of this Constitution for free and compulsory primary education for all children until they complete the age of fourteen years*." |
| 1947: | Advisory Committee of the Constituent Assembly rejects free and compulsory education as a fundamental right (*costs being the reason*). Sends clause to list of "non-justiciable fundamental rights" (later termed as 'directive principles of State policy). |
| 1949: | Debate in Constituent Assembly removes the first line of "Article 36" … "Every citizen is entitled as of right to free primary education and it shall be the duty of the State to …" and replaces it with "The State shall endeavour to …" |
| 1950: | Finally, Article 45 of Directive Principles of State Policy accepted: "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." |
| 1997: | A Bill was brought in Rajya Sabha in which Article 21-A of the Constitution which provided that the education for the children in the age group of 6 to 14 years would be a fundamental right was proposed, however, the same was diluted by entrusting this task to the State Government by stating that "State shall enact laws for ensuring the free and compulsory education." |
| 2002: | Education made a fundamental right by the 86th Amendment to the Constitution (however not brought into force). |
| 2009: | Right to Free and Compulsory Education Act, 2009 enacted. |
| 2010 | Article 21-A is brought into effect. |

**31.** It is submitted that a reading of the Statement of Objects and Reasons and the Parliamentary Debate clearly shows that the duty if any to provide

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free education in pursuance of Article 45 or Article 21-A is jointly of the Central and the State Governments. This duty was required to be joined/ shared between the Centre and the State. In fact, in the Ninth Five Year Plan the share would be 15:85 ratio; in the next Five Year Plan it was to be 25:75 ratio and in the next Plan it was to be 50:50 ratio.

**32.** The debate further shows that the objective of Article 21-A was to be achieved by way of a partnership among the Central Government, the State Government and the parents or the guardians.

**33.** A plain reading of the SOR as already reproduced above makes it explicitly clear that Article 21-A was inserted only pursuant to the directive principle in Article 45. It further makes it clear that it is the Government of India who in partnership with the State Governments is required to fulfil the mandate of Article 45 to achieve the ultimate goal of providing universal education and in order to fulfil this goal, an explicit provision was being made in Part III relating to Fundamental Rights of the Constitution.

**34.** It is submitted that even the Parliamentary Debate in respect of the 86th Constitutional Amendment clearly shows that the partnership intended for the purposes of fulfilling the objective of Article 21-A is only between the Central Government and the State Government and thus Article 21-A cannot be construed to empower either the Central Government or the State Government to abdicate its duties and shift the onus of providing the same on non-State players.

**35.** It is thus submitted that as seen from the debate above, that the legislature amended the Constitution by insertion of clause (*k*) in Article 51-A in Chapter IV-A (Fundamental Duties). Article 51-A(*k*) casts an obligation on every parent or guardian to provide opportunity for education to his child between the age of 6 to 14 years. However, the Minster of HRD during the course of the Parliamentary Debates as quoted hereinabove asserted that there was consensus that the duty of the parents to give education to their children was like any other duty which is envisaged (e.g. respect for national flag or not to insult women). Furthermore, the penalty on the parent for non-compliance of their fundamental duty under Article 51-A(*k*) is only quantified from 50 paise to 1 Rupee.

**36.** It is thus clear that whilst the State perceives that despite a fundamental duty having being cast upon the parents by a constitutional amendment is a mere formality, however, private unaided schools who are neither parents nor the State and upon whom, no duty is cast under the Constitution, can be asked to provide free education on the assumption that it is their social obligation.

**37.** It is thus submitted that that Article 21-A does not in any manner mean and cannot be construed to mean as casting any obligation on private unaided school for fulfilling the fundamental duty of the State. Any other construction of the same would not only lead to an absurd result but would

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also render Article 21-A as having abrogated the fundamental rights of private unaided school under Articles 14 and 19(1)(*g*) under the Constitution and damage the basic structure of the Constitution.

## PART IV

***Challenge to the Right of Children to Free and Compulsory Education Act, 2009***

***The Statement of Objects and Reasons***

**38.** The Statement of Objects and Reasons (SOR) accompanying the RTE Bill (in particular Clause 5) makes it clear that the Act is enacted in order to fulfil the mandate of Article 21-A. Clause 5 of the SOR reads thus:

> "**5.** *It is, therefore, expedient and necessary to enact a suitable legislation as envisaged in Article 21-A of the Constitution.*"

***Enactment of the RTE Act is pursuant to Article 21-A and not Article 15(5)***

**39.** It is clear from a reading of the above Statement of Objects and Reasons that the RTE Act has been enacted pursuant to and/or for the implementation of the State's obligation to provide free and compulsory education as guaranteed under Article 21-A of the Constitution and thus cannot be traced to Article 15(5). It is further submitted that since the legislation itself is not pursuant to Article 15(5), the vice of unconstitutionality attached to the RTE Act cannot be immunised by Article 15(5).

**40.** The above submission is also clear from the counter-affidavit filed on behalf of the Union of India in Writ Petition (C) No. 95 of 2010 in the matter of *Society for Unaided Private Schools of Rajasthan* v. *Union of India*. Some of such admissions and/or contentions forming part of the abovereferred affidavit of the Union of India or the written submissions filed by the learned Attorney General of India on behalf of the Union are extracted hereinbelow:

> "*Paras 32-34: The Right to Education Act is a consequential legislation to Article 21-A in the Fundamental Rights of the Constitution, the provisions of the Act have been largely confined to this age group.*"
>
> * * *
>
> "*Paras 40-44: It is submitted that even while following the policy of reservation, the right to select students on the basis of merits (as an higher education and professional education) without any reference to merit (in the case of schools) shall remain vested in the unaided institution. It may however be submitted that the policy of reservation in unaided institutions can be brought into force only thereupon appropriate law in terms of the provisions of Article 15(5) and at present no such law has been enacted in the legislature. …*
>
> *Insofar as challenge to Right to Education Act is concerned, it may be submitted that no reservation of seats are envisaged in schools in terms of Article 15(5) of the Constitution as the Right to Education Act, 2009 is in order to give effect to Article 21-A of the Constitution of India.*"

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**41.** The fact that the RTE Act is not traceable to Article 15(5) but only Article 21-A is further borne out from the Minutes of the Meeting of Right of Children to Free and Compulsory Education Act, 2009 held on 14-8-2010:

> "*Smt D. Purandeswari, Minister of State for Human Resources Development: The RTE Act is a consequential legislation to Article 21-A of the Constitution, and would enable all children, especially children belonging to disadvantaged groups and weaker sections to access and complete elementary education of good quality.*"

**42.** It is thus clear that the RTE Act cannot not possibly be traced to, or flow from, or be in implementation of, the provisions of Article 15(5) of the Constitution.

**43.** It is submitted that even if it was to be assumed that the provisions of the RTE Act are traceable to Article 15(5), even then, Article 15(5) applies only to making any special provision, by law, for the advancement of any "*socially or educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes*". The definitions of "child belonging to disadvantaged group" in Section 2(*d*) and "child belonging to weaker section" in Section 2(*e*) of the RTE Act, make it clear that this legislation seeks to encompass a vastly larger section of the child population than those covered by Article 15(5). Section 2(*d*) not only covers classes referred to in Article 15(5), but in addition to those also seeks to include child with disability and "*such other group having disadvantage owing to social, cultural, economical, geographical, linguistic, gender or such other factor as may be specified by the appropriate Government*". In addition, Section 2(*e*) covers an entire population of children who are defined as belonging to "weaker section" solely on the basis of annual income, thus making it clear beyond a doubt that the classes sought to be covered under the RTE Act are not those envisaged under Article 15(5).

**44.** Moreover, the RTE Act as originally formed expressly sought to cover minority institutions, whether aided or unaided, whereas Article 15(5) expressly excludes them. It is thus clear that the RTE Act does not flow from Article 15(5) of the Constitution.

**45.** If is submitted that if the RTE Act is sought to be traced to Article 15(5), the same would render the Act ultra vires the enabling power which permits the State to depart from the constitutional mandate of equality contained in Articles 14 and 15(1).

**46.** The overarching constitutional mandate is to bring about, and to protect, the fundamental right to equality, which is enshrined in Articles 14 and 15(1). Clauses (3), (4) and (5) of Article 15 contain exceptions carved out from this fundamental right, and are in the nature of enabling provisions, which permit the State, in respect of certain limited classes who are in need of special protection or affirmative action, to depart from the overarching principle of equality.

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**47.** Article 15(5) being a provision which empowers departure from the equality mandate, the same must be read narrowly and strictly, and exceptions thereunder can be made solely for the castes, tribes and classes named therein. Any departure made in favour of classes not listed in Article 15(5), violates the prime mandate of equality, and is not saved by the enabling provision in Article 15(5). As stated above, the RTE Act defines "disadvantaged group" and "weaker section" in terms which are very much wider than the castes, tribes or classes covered by Article 15(5), hence the Act is clearly ultra vires the provisions of Articles 14 and 15(1).

***The gist of challenge***

**48.** It is submitted that the *Right of Children to Free and Compulsory Education Act, 2009* (the RTE Act, for short) will result in the effacement of education and will lead to the destruction or extinction of private unaided schools.

**49.** The provisions of the RTE Act make grave and unconstitutional inroads into the fundamental rights of private unaided schools and completely destroy their autonomy, violate the free choice and volition of parents, and gravely erode, with the distinct possibility of destroying altogether, the financial independence and survival of unaided private schools.

**50.** The provisions of the RTE Act violate Articles 14 and 19(1)(*a*) and 19(1)(*g*) of the Constitution of India. The provisions of the Act impose obligations and liabilities upon private unaided schools, which are neither traceable to, nor justified by reference to, Article 21-A or Article 15(5) of the Constitution.

**51.** In short, Section 3 of the Act delineates its operational mandate, and encapsulates the underlying philosophy, as well as the legislative vision, which informs Article 21-A. Sections 6, 7, 8, 9, and 11 in Chapter III of the Act when read as a whole, make the legislative scheme for achieving the constitutional goal abundantly clear that Parliament was aware, and intended, that the entire scheme of Article 21-A must be fulfilled by the Central Government, the appropriate Governments, and the local authorities.

***Submissions***

***Article 21-A in its plain terms imposes the obligation to provide free and compulsory elementary education upon the State***

**52.** The words of Article 21-A are plain, without ambiguity, and susceptible of only one meaning, namely, that "*the State shall provide*". Use of the words "*in such manner as the State may, by law, determine*" does not enlarge, alter, or change in any way the clear mandate and requirement that it is the State which shall provide free and compulsory elementary education. The latter portion of Article 21-A only lays down the modality or mechanism by which the State shall provide. But that latter portion does not empower the State to make a law which requires that somebody other than the State shall

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provide. Indeed, to read the latter portion in such manner would be to do grave violence to the plain language of the constitutional provision.

**53.** The legislative history which led to the Constitution (Eighty-sixth Amendment) Act, 2002 also clearly supports the interpretation which flows from the plain words of Article 21-A, namely, that it is the State alone which is required to provide free and compulsory elementary education throughout India. Article 45 was the only directive principle which was time-bound and required the State to endeavour to provide, within ten years of the commencement of the Constitution, for free and compulsory education for all children until they complete the age of 14 years. This directive principle was consistently construed as imposing an obligation solely upon the State. Ultimately, in *Unni Krishnan, J.P.* v. *State of Kerala*, (1993) 1 SCC 645, a Constitution Bench held that this directive principle had to be read into and treated as a part of Article 21 of the Constitution. Even *Unnikrishnan* makes it clear that the obligation and duty to provide free and compulsory elementary education was of the State alone.

**54.** The subsequent insertion of Article 15(5) by the Constitution (Ninety-third Amendment) Act, 2005, also militates against the argument that Article 21-A empowers or authorises the State to pass on its duty and responsibility onto private educational institutions, whether aided or unaided. If Article 21-A empowered or authorised the State to enact a law which required private educational institutions to admit students belonging to the weaker sections or disadvantaged classes, then there would have been no reason whatsoever to enact Article 15(5) in 2005 i.e. three years after the enactment of Article 21-A. If Article 21-A is read in the manner sought to be suggested by the Union of India, then it already allows or authorises or permits the State to do everything which is contained in Article 15(5), and the enactment of Article 15(5) would have been wholly unnecessary. It is well settled that Parliament can never be ascribed with tautology or redundancy. (*See* the Constitution Bench judgment in *Nathi Devi* v. *Radha Devi Gupta*, (2005) 2 SCC 271]. The very enactment of Article 15(5) clearly establishes that no such power existed in Article 21-A.

***The mandate of Article 21-A of the Constitution i.e. to provide free and compulsory elementary education, is completely fulfilled by Section 3, read with Sections 6, 7, 8, 9 and 11 of the RTE Act, and such of the remaining provisions of the Act as are enacted impinge and destroy the autonomy of private unaided schools***

**55.** Section 3 of the RTE Act encapsulates the vision and mandate of Article 21-A, and lays down the roadmap for how "*the State shall provide free and compulsory education to all children of the age of six to fourteen years*". The right is conferred by upon every child of that age group to have free education in a neighbourhood school till the completion of elementary education. Coupled with Section 10, which imposes a duty upon every parent and guardian, Section 3 is intended to fulfil the laudatory goal of Article 21-A.

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**56.** Section 6 mandates that "*for carrying out the provisions of this Act*", it is the appropriate Government and the local authority which have to establish neighbourhood schools within a period of three years from 1-4-2010 i.e. by 31-3-2013. Section 7 contains elaborate provisions to ensure that finances have to be raised by the Centre and the States for the aforesaid purpose, and leaves the Government with no leeway or escape routes. Section 8(*a*) and Section 9(*a*) mandate that it is the duty of the appropriate Government and the local authority to provide free and compulsory elementary education to every child, and the use of the word "shall" makes it clear that this is a mandatory duty. If there were any doubt or ambiguity in this behalf, it is dispelled by the Explanation to Section 8(*a*), which clarifies that the term "compulsory education" means the obligation of the appropriate Government to provide free elementary education to every child of the age of six to fourteen years, and to ensure compulsory admission, attendance and completion of elementary education.

**57.** Sections 8(*b*) and 9(*b*), when read with Sections 8(*d*) and 9(*f*), leave no manner of doubt that the appropriate Government and the local authority have to ensure the availability of a neighbourhood school as specified in Section 6, and for this purpose, they have to "*provide infrastructure including school building, teaching staff and learning equipment*". They also have to provide for the special training facilities specified in Section 4, provide training facilities for teachers, and various other things.

**58.** It is submitted that Sections 3, 6, 7, 8, and 9, when read with Sections 4, 5 and 10, impose all duties and obligations upon the appropriate Government and the local authority concerned, and these sections completely answer and fulfil the constitutional mandate contained in Article 21-A.

***The learned Attorney General has also clarified that the obligation as well as duty to "provide free and compulsory education to all children of the age of six to fourteen years" is cast solely and exclusively upon the State, and that this duty is not sought to be offloaded onto private, unaided schools***

**59.** *See* Vol. II of the learned Attorney's written submissions, pp. 5-6, Paras 9, 11 and 12, and pp. 10-11, Paras 27 and 32.

**60.** In Para 9, the learned Attorney explains the ambit of Section 6 with the submission: "*Thus, it is the Government that is obligated by this Section to establish and ensure availability of neighbourhood schools across the country.*"

**61.** In Para 12, after setting out the petitioners' contention that use of the words "*where it is not so established*" in Section 6 may lead the Government to treat private unaided schools as neighbourhood schools, the learned Attorney replies as follows: "*It is submitted that this contention is unfounded, and is based on a misconstruction of the section. Section 6 is the heart of the Government's obligation to ensure access to education in every nook and corner of the country. This solemn obligation does not cease merely because*

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**IX. Mr Prateek Seksaria, Advocate, for the petitioners** *(contd.)*

*a private school already exists in an area, treating such school as a "neighbourhood school".*

**62.** In Para 27, the learned Attorney submits that "*Sections 8(a) and 9(a) contain the primary obligation of the Government corresponding to the rights of the child under Section 3. The Government is obligated to ensure that* ***it provides*** *free and compulsory education to every child, and* ***it*** *is thus precluded from charging any fees from any child in the schools*" (emphasis supplied).

**63.** And in Para 32 the learned Attorney puts the matter in clear and ringing tones, when he submits: "*Sections 8 and 9 establish that the Government has taken its responsibility to provide Universal Elementary Education head on, and has* ***not offloaded it onto private schools***" (emphasis supplied).

*In view of the aforesaid clear and unambiguous stand of the Government as enunciated by the learned Attorney General, the controversy with regard to Section 12(1)(c) becomes very narrow, and hinges firstly on whether Section 12 as a whole, or in any event clause (c) of sub-section (1) thereof, can be traced to fulfilment of the constitutional mandate of Article 21-A, secondly on whether, if it is based on general or subjective notions of egalitarianism or equality dehors Article 21-A, it can be treated as an overarching goal which would override Article 19(1)(g), thirdly on whether, even if it is traceable to Article 21-A, the principle of overarching constitutional goals forming part of the basic structure can be invoked to treat an ordinary law made by Parliament as being exempt from strict scrutiny under Articles 14 and 19(1)(g), and fourthly on whether, if egalitarian equality is such an overarching goal, the obligation to provide admission to a child belonging to "weaker section" or "disadvantaged group" could have been imposed upon private unaided schools alone, and whether such imposition is not ipso facto violative of Article 14 of the Constitution*

**64.** On the first aspect, namely, whether Section 12 as a whole, or in any event clause (*c*) of sub-section (1) thereof, can be traced to or is in fulfilment of Article 21-A, such a construction would be clearly contrary to the plain words of the said Article. Indeed, it was not even the Government's case that it is so. The rationale and basis for enacting Section 12(1)(*c*) is contained in Paras 45 to 52 (pp. 14-21) of the learned Attorney's written submissions, Vol. II, and in no part of this submission is it contended that this imposition upon private unaided schools is based upon, or traceable to, Article 21-A.

**65.** Paras 45 to 52 (pp. 14-21) of the Attorney General's written submissions (Vol. II) make it clear that according to the Government, Section 12(1)(*c*) is anchored in the belief that "*schooling must act as a tool for social cohesion and remoulding the divisions in society*". This, with respect, is a laudable socio-political sentiment which is shared by all right-minded citizens, but it cannot by any stretch of the imagination be considered to flow from Article 21-A.

**Summary of Arguments**

**IX. Mr Prateek Seksaria, Advocate, for the petitioners** *(contd.)*

**66.** Since the goal of "social cohesion" or "remoulding the divisions in society" cannot possibly be treated as stemming from Article 21-A, the entire theory of overarching constitutional principles which should prevail over the fundamental rights contained in Article 14 and Article 19(1)(*g*) falls to the ground. A general desire for egalitarianism or remoulding of social divisions, or even the goal of "inclusive elementary education for all" as set out in the SOR which accompanied the Bill, cannot be elevated to an overarching mandate which would prevail over fundamental rights. In any event, the right to equality enshrined in Article 14 contains the highest and most overarching principle in the Constitution, and this fundamental right cannot be subordinated to the political goals of a particular party in power.

**67.** It is submitted that the principle of overarching constitutional goals or principles will not save a law made by Parliament which is ultra vires Part III of the Constitution.

**68.** Lastly, and most importantly, it is submitted that if the goal or desire to provide "inclusive elementary education" or to bring about social cohesion and/or remoulding the divisions in society is part of an overarching constitutional mandate which transcends Article 19(1)(*g*), then Section 12(1)(*c*) is patently and grossly violative of Articles 14 and 15(1) of the Constitution of India. As is elaborated in greater detail below, the so-called inclusiveness brought about by Section 12 is only in respect of schools covered by clause (*c*) of sub-section (1) i.e. primarily in respect of private unaided schools, while there is no such obligation to provide so-called "inclusive" education under clauses (*a*) and (*b*) of sub-section (1). Thus, government schools, local authority schools, and even private aided schools are not required to admit even a single child from the weaker section or disadvantaged class, and their obligation is confined only to providing free education to some or all of the children already admitted. This, it is respectfully submitted, is grossly violative of Articles 14 and 15(1) of the Constitution of India.

***Section 12(1)(c) is facially discriminatory, suffers from the vice of unfairness and arbitrariness, singles out private unaided schools***

**69.** Section 12(1)(*c*) is clearly violative of Article 14 inasmuch as it imposes the obligation, duty and liability of providing so-called "inclusive" education solely upon private unaided educational institutions and specified category schools, without imposing any such obligation upon government schools, local authority schools, or even private aided schools.

**70.** There is no rationale or discernible criteria for treating private unaided schools differently insofar as the so-called obligation to provide "inclusive" education by admitting at least 25% of the students from weaker sections and disadvantaged classes is concerned.

**71.** The provisions of Section 12(1(*c*) are therefore clearly violative of Article 14, both on account of unfair treatment and discrimination vis-à-vis private aided schools.

**Summary of Arguments**

**IX. Mr Prateek Seksaria, Advocate, for the petitioners** *(contd.)*

***Section 12(1)(c) is clearly violative of Article 19(1)(g), results in nationalisation of seats. The restrictions placed by this section are not "reasonable restrictions" within the meaning of Article 19(6)***

**72.** This aspect is clearly brought home by the judgments of the Constitution Benches in *T.M.A. Pai*, (2002) 8 SCC 481, and *P.A. Inamdar*, (2005) 6 SCC 537, which are respectfully relied upon.

***Section 29 of the RTE Act is clearly violative of the Petitioners' fundamental rights under Article 19(1)(a) of the Constitution of India, and this violation cannot be saved with reference to Article 19(2)***

**73.** The right to frame a curriculum of one's choice, and the right of parents to choose to educate their children under a curriculum of their choice, is clearly a right flowing from Article 19(1)(*a*), as the choice of curriculum and the content of what is taught is part of the freedom of thought and expression. This fundamental right is one of the overarching principles forming the basic structure of the Constitution of India. This fundamental right cannot be curbed or restricted in any manner, except to the limited extent permitted by Article 19(2) i.e. in the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation, or incitement to commit an offence.

**74.** It is clear beyond a doubt that the sweeping power and duty imposed upon the State Governments to lay down curricula and evaluation procedures, encroaches and trenches upon the right of unaided schools, trusts, and parents, to choose an international curriculum of their choice like the International Baccalaureate. This power and duty under Section 29 will completely efface and obliterate the very rationale and raison d'être of establishing IB schools, and will lead to the extinction of free choice both for the schools as well as the parents.

**75.** Examples are already rife where State Governments have sought to alter curricula in schools so as to reflect their own political philosophies, or the State language, or the like. If States can impose curricula based on their own language, which Section 29 clearly empowers them to do, it will lead to the demise of linguistic minority institutions, as well as international institutions like the petitioners.

***The provisions of the RTE Act, and the violations of Articles 14, 19(1)(a) and 19(1)(g), have to be tested on the anvil of T.M.A. Pai and Inamdar. The substance of Article 21-A i.e. the obligation of the State to provide free and compulsory education to all children of age six to fourteen years, was before the Supreme Court when it decided T.M.A. Pai Foundation* v. *State of Karnataka, (2002) 8 SCC 481, and therefore the said judgment by a learned eleven-Judge Bench, as interpreted by a learned seven-Judge Bench in P.A. Inamdar* v. *State of Maharashtra, (2005) 6 SCC 537, applies proprio vigore even after the introduction of Article 21-A***

**Summary of Arguments**

**IX. Mr Prateek Seksaria, Advocate, for the petitioners** *(contd.)*

**76.** When *Unni Krishnan, J.P.* v. *State of Andhra Pradesh*, (1993) 1 SCC 645 was decided in 1993, Article 45 as originally enacted by the Framers of the Constitution was in force. The said Article 45 read as follows:

> "**45.** ***Provision for free and compulsory education for children***.—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."

**77.** In contrast to this was another directive principle contained in Article 41, which qualified the State's obligation with the words "within the limits of its economic capacity and development". The said Article 41 reads as follows:

> "**41.** ***Right to work, to education and to public assistance in certain cases***.—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."

**78.** B.P. Jeevan Reddy, J. speaking for the majority in *Unni Krishnan*, held in paras 142-183 (*see* especially paras 171, 172 and 182) that the right to free and compulsory education was a fundamental right under Article 21, but the parameters of this right are to be determined with reference to Article 45. S. Mohan, J. in his concurring opinion, held in paras 44-54 (*see* especially paras 44, 45, 47, 51 and 54) that Article 45 has to be read as a part of Article 21, and that therefore "the right to free education up to the age of 14 years is a fundamental right".

**79.** In *T.M.A. Pai* (supra), the leading opinion of B.N. Kirpal, C.J. (for himself and five other learned Judges) records at para 31 (p. 538) and the answer to Question 9 (p. 590) that *Unni Krishnan* is neither reconsidered nor modified in respect of its finding that primary education is a fundamental right. On this aspect even the other Judges who wrote separate but partly dissenting judgments (Khare, Quadri, Ruma Pal and Variava, JJ.), agreed. This aspect is not varied or altered in *Islamic Academy of Education* v. *State of Karnataka*, (2003) 6 SCC 697 or in *P.A. Inamdar* v. *State of Maharashtra*, (2005) 6 SCC 537. Thus, the conclusion that Article 45 as it then stood had to be read into Article 21, and that consequently the State's obligation to provide free and compulsory education to all children aged between six and fourteen years, was a fundamental right, has held the field since 1993. This was the law declared and binding under Article 141.

**80.** What is done by the Constitution (Eighty-sixth Amendment) Act, 2002 is only to formalise this constitutional interpretation by shifting the relevant words from Article 45 to a newly engrafted Article 21-A. The Eighty-sixth Amendment Act made three changes: (*i*) it bodily lifted the wording of Article 45 and transposed that wording, with slight modifications, into Article 21-A; (*ii*) it added new words in Article 45 to confine the

**Summary of Arguments**

**IX. Mr Prateek Seksaria, Advocate, for the petitioners** *(contd.)*

directive principle to children below the age of six years; and (*iii*) it added a fundamental duty of all parents in clause (*k*) of Article 51-A.

**81.** The net effect of these amendments is mainly and essentially to carve out what was already a fundamental right in Article 21 read with Article 45, and to re-enact that pre-existing fundamental right as a separate entry in the form of Article 21-A. Since the substance and effect of the existing fundamental right in Article 21 read with Article 45 is virtually the same as that of the newly enacted Article 21-A, it is respectfully submitted that the judgments of the Hon'ble eleven-Judge Bench in *T.M.A. Pai* and the Hon'ble seven-Judge Bench in *Inamdar* clearly continue to hold the field.

***Overview of the RTE Act***

**82.** It is submitted that unless this Hon'ble Court is pleased to interpret the Act as imposing all the Article 21-A duties, obligations, responsibilities and liabilities upon the three State players envisaged in the Act, and to strike down those provisions which result in nationalisation of seats in unaided private schools the Act will become unreasonable, arbitrary, unworkable, and plainly violative of the petitioners' fundamental rights under Articles 14, 19(1)(*a*), and 19(1)(*g*) of the Constitution. The overall effect of the RTE Act, will be nationalisation of elementary education for children aged from 6 to 14 years (and also pre-school education, where that is provided by private unaided schools). On this interpretation, ***all*** "neighbourhood" children (i.e. those residing within 1 km for Standards I to V, and within 3 km for Standards VI to VIII) will have a right to free and compulsory education in a "neighbourhood school" of their choice, and the school shall have to admit them regardless of whether they exceed 25% or even 100% of the school's capacity, without any form of screening or selection whatsoever (*see* Sections 3, 13 and 15). The school will have to admit every neighbourhood child in a class appropriate to the child's age, regardless of whether such child has had any education or schooling earlier, regardless of whether the child is capable of coping with the demands of the standard in which she/he is placed, and regardless of whether the child seeks admission at the beginning of the academic year, in its middle, or even at its very end (Sections 4 and 15). The parent or guardian of every child between 6 and 14 years will be under a mandatory duty to admit the child in the "neighbourhood school", and no parent will have the discretion to admit the child in any school beyond the limits of 1 km or 3 km, as the case may be, from his residence [*see* Section 3 read with Section 10, and Rules 6(1) read with 11(3)]. Every parent, and not merely those that fall within the descriptions of "disadvantaged group" or "weaker section", may claim the right to refuse to pay fees or expenses for Standards I to VIII on the ground that such fees and expenses may prevent the child from completing the elementary education (Section 3). Though it is mandatory to admit every child in a class appropriate to the age, yet no child can be denied admission for lack of age proof [Sections 4 and 14(2), read with Rule 13(*c*)]. No child can be held back in a class or expelled, regardless

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**IX. Mr Prateek Seksaria, Advocate, for the petitioners** *(contd.)*

of academic performance, learning capability, or even criminal misbehaviour (Section 16). And, in grave violation of the fundamental rights of the petitioners guaranteed by Articles 14, 19(1)(*a*) and 19(1)(*g*) of the Constitution of India, the academic independence, functional autonomy and managerial powers of private unaided schools, including minority schools, are completely wiped out by the imposition of a common curriculum and the sweeping and unguided powers to issue directions conferred upon the Central Government, the appropriate Government, and the local authority (Sections 29 and 35).

***Analysis of the provisions of the Right to Education Act***

***Section/Rule 3(1)***

**83.** Every child between the age group of 6 to 14 years irrespective of whether he is a child belonging to a disadvantaged group or belonging to a weaker section as defined in Sections 2(*d*) and 2(*e*) has a right to free and compulsory education in a neighbourhood school. The limit of a neighbourhood school under Rule 6 is defined as one kilometre for Grades I to V and 3 km for Grades VI to VIII. Thus, Section 3(1) entitles every child in the country to get free education till completion of elementary education irrespective of whether he belongs to a disadvantaged group or a weaker section or not. A neighbourhood school is not restricted to a school established, owned or controlled by the Government or a local authority or an aided school, but includes an unaided school. It would thus mean that the private unaided schools would not be entitled to charge any fees to any child who seeks admission in a private unaided school situated in his neighbourhood, up to the age of 14 years. In fact Section 3(2) mandates that no child is liable to pay either any fee or any other charges or expenses which might prevent him from pursuing and completing elementary education. The provision is thus omnibus in nature and could include all kinds of charges including school bus charges, books and school essential charges, uniform costs, mandatory examination fees imposed by the relevant board, etc. which would have to be borne by private unaided schools. This would lead to obliteration of the fundamental right of a private unaided school under Article 19(1)(*g*) to establish, administer and run their school. This section could be perfectly valid, so long as the same applied to State owned schools or aided schools. However, the fact that the Act includes within the definition of the word "school", a private unaided school, the same would lead to the following consequences:

**84.** Whereas, on the one hand, Section 3, which seeks to confer a right to free and compulsory education in consonance with Article 21-A of the Constitution, however, if read in conjunction with Section 8(*a*) shows that when a child is admitted by his parents/guardian in an unaided school, they are required to bear the cost for the same and are not entitled to reimbursement of expenditure incurred. Thus, the provisions of Section 3 and Section 8(*a*) are mutually destructive of each other for the following reasons:

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**IX. Mr Prateek Seksaria, Advocate, for the petitioners** *(contd.)*

(*a*) Section 3 entitles every child to get free elementary education in any neighbourhood school (including a school belonging to a specified category and a private unaided school, whereas Section 8(*a*) precludes a child to get free education in a private unaided school or a school belonging to a specified category. Furthermore, Section 12(*c*) entitles only a child belonging to a disadvantaged group or a weaker section to get free elementary education in a private unaided school or a school belonging to a specified category (subject to a 25% quota). Thus, no child not belonging to such group is entitled to free elementary education in a neighbourhood school, which is sought to be guaranteed under Section 3. The aforesaid itself shows the vice of arbitrariness, unreasonableness in the said Act and the same is thus clearly violative of Article 14 of the Constitution.

***Section 4 of the said Act***

**85.** Section 4 mandates that any child who has not availed of elementary education is entitled to an admission in a class appropriate to his or her age and is also entitled to receive special training in order to be on a par with others in the same class. Thus any child above the age of 6 years, even though having not had any schooling would be entitled to direct admission in a grade corresponding to his age. This would lead to a situation where even if the child is unable to cope with the academic standards and is traumatised by virtue of the same, would have to continue at the cost of feeling inferior to other children in the same class. This section coupled with the provisions of Section 14(2) which forbid denial of admission on account of lack of age proof read with Rule 11 that prohibits segregation of any child from other children in the classroom would lead to a result where the entire class would have to be held back till such time, that a child admitted under Section 4 is able to catch up and becomes on a par with the others. This would lead to a complete chaos and make it impossible for the school to complete their curriculum or to teach to the rest of the class. The aforesaid apart from infringing the rights of private unaided school under Article 19(1)(*g*) as to the manner in which the school is being run, also violates the fundamental rights of the other children in terms of quality of education that they receive.

***Sections 6 to 11***

**86.** Chapter III of the said Act, which comprises of Sections 6 to 11, clearly fulfil the mandate of not only Article 21-A of the Constitution, but also in a large part the mandate of Article 45 of the Constitution.

**87.** Section 6 rightly casts a duty and obligation on the appropriate Government and the local authority to establish schools in every neighbourhood within a period of 3 years.

**88.** Section 7 in consonance with the mandate of Article 21-A and the intent of the legislature as borne out from the legislative debates on the Right to Education Bill and the debate in relation to the insertion of Article 21-A clearly contemplate that the entire financial and other responsibilities

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**IX. Mr Prateek Seksaria, Advocate, for the petitioners** *(contd.)*

required for the purposes of carrying out the provisions of the Act would be concurrently shared by the Central Government and the State Government.

**89.** Sections 8 and 9 correctly impose an obligation on the appropriate Government and local authority to provide free and elementary education for every child.

**90.** Section 10 is in consonance with the fundamental duty cast on every parent under Article 51-A(*k*) of the Constitution requiring them to admit or cause to be admitted their child for completion of elementary education.

**91.** Section 11 is in consonance with the directive principles under Article 45 of the Constitution, which requires the State to endeavour to provide early childhood care and education to children until they complete the age of six years.

**92.** It is submitted that it is the other provisions of the RTE Act, which neither have any bearing nor relationship nor can be traced to Articles 21-A and insofar as they relate to private unaided schools are violative of Articles 14, 19(1)(*a*) and 19(1)(*g*).

***Section 12***

**93.** Contrary to the provisions of Sections 6 to 11, which cast an obligation on either the appropriate Government or the local authority to provide free and compulsory education to every child insofar as it pertains to schools established, owned, controlled or substantially financed by funds provided directly or indirectly by the appropriate Government or a local authority. The provisions of Section 12(*c*) compel private unaided schools to admit at least 25% of the strength of Grade I from amongst children belonging to weaker section and disadvantaged group.

**94.** It is submitted that the aforesaid reservation is not contemplated by Article 21-A. Furthermore, such reservation is also not relatable to Article 15(5) of the Constitution inasmuch as the said Article was inserted in the Constitution for the purposes of enabling the State to make special laws in relation to admission in institutions for higher education, more particularly professional education. Even Article 15(5) if it were to be assumed to be applicable to elementary education, the same would only enable the State to make special provisions for the advancement of socially and educationally backward classes of citizens or Scheduled Castes or Scheduled Tribes. A bare perusal of the definition of a child belonging to disadvantaged group shows that the same is not merely restricted to the Scheduled Castes, Scheduled Tribes and socially and educationally backward classes, but is also extended to a child with disability, or a child belonging to such other group having disadvantages, owing to social, cultural, economical, geographical, linguistic, gender or such other factor as is specified by the Government. Obviously, Article 15(5) can in no manner whatsoever be construed as enabling the State to make any special provisions by law insofar as it relates to the abovementioned category of children and impose a consequent reservation on private unaided schools. Such reservation clearly violates the rights of private

**Summary of Arguments**

**IX. Mr Prateek Seksaria, Advocate, for the petitioners** *(contd.)*

unaided schools under Article 19(1)(*g*) as recognised by this Court in *T.M.A. Pai*. Furthermore, the category of children belonging to weaker section is nowhere to be found under Article 15(5) and hence, the provisions of Section 12(*c*) to the extent that the same compels private unaided schools to admit in Class I at least 25% of children belonging to weaker section and disadvantaged group and provide free elementary education is unconstitutional, unreasonable, violative of the rights of private unaided schools and cannot in any manner whatsoever be immunised by Articles 15(5) or 21-A of the Constitution.

**95.** It is submitted that the proviso to Section 12 further compels a private unaided school to also impart free pre-school education which can neither be traced to Article 21-A nor Article 15(5). It is submitted that the said provision is clearly unconstitutional and violates the rights of private unaided schools under Article 19(1)(*g*).

**96.** It is submitted that apart from the above, the provisions of Section 12 are also violative of Article 14 inasmuch as it discriminates between children belonging to weaker section and disadvantaged group insofar as their right to get free and compulsory education in a private unaided school is concerned. Thus, whilst Article 21-A of the Constitution and Section 3 of the Act confer a fundamental right on every child up to the age of 14 years to have free elementary education in a neighbourhood school, this right is without any rationale discriminated by placing children belonging to disadvantaged group and weaker section at a higher pedestal than any other child. The said provision is clearly violative of Article 14 of the Constitution.

***Sections 16***

**97.** It is clear on a reading of the provision of Section 16 that the same pertain to the right of private unaided schools to administer their schools. This provision has no co-relation whatsoever to the objects and purpose of either Article 15(5) or Article 21-A of the Constitution.

***Sections 18, 19, 21 to Section 30***

**98.** It is submitted that all of the aforesaid provisions pertain to the right of the private unaided school, to establish, administer and run their institution with complete autonomy as guaranteed by Article 19(1)(*g*) and by virtue of the decision in this Court in *T.M.A. Pai*.

**99.** The aforesaid sections completely destroy the autonomy of private unaided school and abrogate their rights under Article 19(1)(*g*). It is submitted that the provisions of abovementioned sections are unconstitutional and ultra vires the rights of the private unaided schools conferred under Article 19(1)(*g*).

**100.** It is further submitted that none of these provisions have a nexus to Article 21-A and as such, under the garb of making provisions for free and compulsory education, the same attempt to regulate private unaided schools and interfere with their rights to run and administer their schools.

**Summary of Arguments** *(contd.)*

### *X. Mr Mohan Parasaran, Solicitor General of India, for the Union of India*

**1.** It is respectfully submitted that the core issue which arises in the present batch of cases is regarding the validity of Article 15(5) qua the unaided educational institutions and also the vires of Article 21-A.

**2.** It is respectfully submitted that for the purpose of adjudicating upon the validity of the above amendment incorporating Article 15(5), it will be essential to examine the validity on the following touchstone:

(*i*) The principles relating to the interpretation of the Constitution;

(*ii*) The interrelationship between Part III and Part IV of the Constitution;

(*iii*) Balancing the fundamental rights with the goal enshrined in Part IV which imposes a duty upon the State to promote the interests of the weaker sections and the deprived class;

(*iv*) The concept of basic structure and as to whether in exercise of the constituent power under Article 368, the extent and width of the fundamental rights that can be abridged in the context of Article 15(5) when it was incorporated and the purpose for which the amendment was made in the Constitution;

(*v*) The constitutional protection afforded to the minorities under Article 30 of the Constitution;

(*vi*) Whether the impugned amendments are violative of Article 14 of the Constitution of India inasmuch as they seek to discriminate between the aided non-minority institutions and aided minority institutions which have been treated on a par on a harmonious reading of both the judgments of this Hon'ble Court in *T.M.A. Pai Foundation* v. *State of Karnataka* (2002) 8 SCC 481 and *P.A. Inamdar* v. *State of Maharashtra* (2005) 6 SCC 537;

(*vii*) The true scope and purport of the judgments of this Hon'ble Court in *T.M.A. Pai Foundation* (supra), *P.A. Inamdar* (supra) and *Islamic Academy of Education* v. *State of Karnataka* (2003) 6 SCC 697 and whether the impugned amendments are liable to be struck down as violative of basic structure of the Constitution post the judgment in *T.M.A. Pai Foundation* (supra) wherein the rights of private unaided educational institutions have been held to be duly protected under Article 19(1)(*g*) and whether at all there could be any abridgment/tinkering of the rights of such private unaided educational institutions in the matter of admissions by making reservations in terms of Article 15(5) and also mandating providing free education for those between the ages of 6 to 14 [Article 15(5) and Article 21-A.];

(*viii*) Whether Article 15(5) can be said to override Article 29(2) of the Constitution and the interplay between both the Articles;

(*ix*) Whether the impugned amendments are violative of Article 26(*a*) of the Constitution of India inasmuch as they seek to deny similar treatment to religious denominations as opposed to linguistic or religious

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**X. Mr Mohan Parasaran, Solicitor General of India, for the Union of India** *(contd.)*

minorities resulting in an imbalance created in the equilibrium and violating Article 14 by resulting in discrimination between these two classes without there being any rational nexus to the objects sought to be achieved or a valid classification.

**3.** Before dealing with the issues, one has to necessarily examine the dictum of the Constitution Bench in *Ashoka Kumar Thakur* v. *Union of India* (2008) 6 SCC 1 and to what extent the issues which have arisen in the present case are covered in the said judgment or decided in the said judgment. The Constitution Bench in *Ashoka Kumar Thakur* case specifically left open the challenge of violation/abrogation of fundamental rights guaranteed under Article 19(1)(*g*) to be decided by in an appropriate case in challenges made by aggrieved institutions or aggrieved parties, namely, private unaided educational institutions.

**4.** The challenge in the present batch of writ petitions is with regard to the validity of Articles 15(5) and Article 21-A. Further, the said challenge is confined to reservation in unaided non-minority educational institutions. Insofar as challenge made to Article 15(5) qua the aided educational institutions has been rejected by a majority of the Judges in the Constitution Bench decision in *Ashoka Kumar Thakur* v. *Union of India* (2008) 6 SCC 1. In *Ashoka Kumar Thakur case* (supra), K.G. Balakrishnan, C.J., Hon'ble R.V. Raveendran, J. and Arijit Pasayat and C.K. Thakker, JJ. comprising the majority proceeded to uphold the constitutional validity of Article 15(5) qua aided educational institution. K.G. Balakrishnan, C.J. held that Article 15(5) introduced by the Constitution (93rd Amendment) Act, 2005 does not violate the basic structure of the Constitution so far it relates to the State maintained institutions and aided educational institutions and the question whether the 93rd Amendment would be constitutionally valid or not so far as private unaided educational institutions are concerned, was left open to be decided in appropriate case. Kindly refer to para 221 at p. 525 which contains the conclusions in respect of other issues as well. The conclusions of Hon'ble Arijit Pasayat, J. can be found at para 358 p. 625 and insofar as the challenge to Article 15(5), the learned Judge has opined in para 9(*ii*) that Articles 15(4) and 15(5) operate in different fields. Article 15(5) does not render Article 15(4) inactive or inoperative. Hon'ble R.V. Raveendran, J. in his opinion at para 648 p. 710 opined that he agreed with the learned Chief Justice and Pasayat, J. that clause (5) of Article 15 is valid with reference to State maintained educational institutions and aided educational institutions and that the question whether Article 15(5) would be unconstitutional on the ground that it violates the basic structure of the Constitution by imposing reservation in respect of private unaided educational institutions is left open. The learned Judge also gave an additional reason for rejecting the challenge to Article 15(5) on the ground that it renders Article 15(4) inoperative or ineffective.

**Summary of Arguments**

**X. Mr Mohan Parasaran, Solicitor General of India, for the Union of India** *(contd.)*

***Principles governing the interpretation of the Constitution***

**5.** It is well-settled law that the articles of the Constitution have to be read as an integral logical whole, construing one part in the light of the provisions of the other parts, rendering no portion unnecessary or redundant. The Constitution is meant to endure and be capable of flexible application to changing times and circumstances. The Constitution is a living and organic document and has to be interpreted on the basis of changing times and ground realities:

**5.1.** *R.C. Poudyal* v. *Union of India*, 1994 Supp (1) SCC 324 at p. 385, para 124:

> "In expounding the processes of the fundamental law, the Constitution must be treated as a logical whole. Westel Woodbury Willoughby in *The Constitutional Law of the United States* (2nd Edn. Vol. 1, p. 65) states:
>
> 'The Constitution is a logical whole, each provision of which is an integral part thereof, and it is, therefore, logically proper, and indeed imperative to construe one part in the light of the provisions of the other parts.' "

**5.2.** *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481 at p. 582 para 148:

> "When constitutional provisions are interpreted, it has to be borne in mind that the interpretation should be such as to further the object of their incorporation. They cannot be read in isolation and have to be read harmoniously to provide meaning and purpose. They cannot be interpreted in a manner that renders another provision redundant. If necessary, a purposive and harmonious interpretation should be given."

**5.3.** *R.C. Poudyal* v. *Union of India*, 1994 Supp (1) SCC 324 at p. 385, para 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".

**5.4.** *Kihoto Hollohan* v. *Zachillhu*, 1992 Supp (2) SCC 651 at 676 para 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."

**5.5.** *M. Nagaraj* v. *State of Karnataka*, (2006) 8 SCC 212 at 240, 241 para 19:

> "Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding

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future and is intended to endure for ages to come and consequently to be adapted to the various crisis of human affairs. Therefore, a purposive rather than a strict literal approach to the interpretation should be adopted. A constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that constitutional provision does not get fossilised but remains flexible enough to meet the newly emerging problems and challenges."

**6.** It is respectfully submitted that provisions of the Constitution should be interpreted to advance the national interest, and to subserve primarily the constitutional goals. Both fundamental rights and directive principles are complementary to each other. Both Part III and Part IV are to be so interpreted keeping in mind the ultimate object sought to be achieved in the Preamble.

**7.** The Preamble is a part of the basic structure of the Constitution. This Hon'ble Court in *Minerva Mills* v. *Union of India*, (1980) 3 SCC 625 at p. 654 para 57 has held that the edifice of our Constitution is built upon the concepts crystallised in the Preamble. The Preamble was finalised after long discussion and adopted last so that it embodies the fundamentals underlying the structure of the Constitution. The following passages in *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225, deal with the importance of the Preamble,

*Sikri, C.J.*:

(*a*) "… Not only was the Constitution framed in the light of the Preamble but the Preamble was ultimately settled in the light of the Constitution…." (SCC p. 322, para 85).

(*b*) "… the object of putting the Preamble last, the President of the Assembly explained, was to see that it was in conformity with the Constitution as accepted…." (SCC p. 323, para 89).

(*c*) "… Preamble was expressly voted to be a part of the Constitution…." (SCC p. 324, paras 94-98).

(*d*) "… the Constitution should be read and interpreted in the light of the grand and noble vision expressed in the Preamble…." (SCC p. 327, para 116).

*Shelat and Grover, JJ.*:

(*a*) "… The Preamble was finalised after a long discussion and it was adopted…." (SCC p. 422, para 515).

(*b*) "… they enacted Part III (fundamental rights) and Part IV (directive principles of State policy)—*both fundamental in character*—on the one hand, basic freedoms to the individual and on the other social security, justice and freedom from exploitation by laying down guiding principles for future governments…." (SCC p. 422, para 515).

(*c*) "… the Preamble is given a transcendental position while interpreting the Constitution or other laws." (SCC p. 422, para 516).

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*Khanna, J.*:

(*a*) "… As Preamble is a part of the Constitution, its provisions other than those relating to basic structure or framework, it may well be argued, are as much subject to the amendatory process contained in Article 368 as other parts of the Constitution. Further, if the Preamble itself is amendable, its provisions other than those relating to basic structure cannot impose any implied limitations on the power of amendment. The argument that the Preamble creates implied limitations on the power of amendment cannot be accepted unless it is shown that Parliament in compliance with the provisions of Article 368 is debarred from amending the Preamble insofar as it relates to matters other than basic structure and removing the supposed limitations which are said to be created by the Preamble…." (SCC pp. 787-88, para 1473).

(*b*) "… It would be seen from the above that the first of the objectives mentioned in the Preamble is to secure to all citizens of India justice, social, economic and political. Article 38 in Part IV relating to the directive principles of State policy recites that the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life…." (SCC p. 789, para 1476).

(*c*) "… Indeed, the dignity of the individual upon which also the Preamble has laid stress, can only be assured by securing the objective of social, economic and political justice." (SCC p. 791, para 1479).

**8.** The Preamble secures and assures to all citizens Justice, social, economic and political. The Preamble also secures and assures equality of status and of opportunity. Social Justice will ultimately lead to equality of status and economic and political justice will ensure equality of opportunity. "Equality of status" is mentioned before equality of opportunity. It is "egalitarian equality" which will usher in equality of status and of opportunity in a caste-ridden society like ours, where OBCs, SCs and STs are looked down upon as inferior in status. Education and economic well-being of an individual gives a status. When large number of OBCs, SCs and STs get better educated and get into Parliament, Legislative Assemblies, public employment, professions and into other walks of public life, the attitude that they are inferior in status will disappear. This will promote fraternity assuring the dignity of the individual and the unity and integrity of the nation.

**9.** In *T.M.A. Pai* v. *State of Karnataka*, (2002) 8 SCC 481 at p. 529 para 1, it has been pithily observed by this Hon'ble Court that "The single most powerful tool for the upliftment and progress of such diverse communities is education", and as to how this could be achieved has again been pithily stated in *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 at 512 para 421 as, "The first step to achieve social integration is to bring the lower or backward social groups to the level of the forward or higher social groups."

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***Principles governing Part III and Part IV***

**10.** The fundamental rights guaranteed in Part III cannot be construed in isolation nor do they confer absolute rights and have to be read subject to other provisions in the very same Part III. (See *R.C. Cooper* v. *Union of India*, (1970) 1 SCC 248 at p. 289 para 52 and *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481 at 578 para 135.)

**11.** Originally, when the Constitution was enacted, the Framers of the Constitution expressly by Article 37 mandated that Part IV was not enforceable. However, in due course of time all directive principles will be transformed into fundamental rights. This Hon'ble Court so transformed equal pay for equal work occurring in Article 39(*d*) into a fundamental right. [*Randhir Singh* v. *Union of India*, (1982) 1 SCC 618 at p. 622]. Similarly Article 45 was transformed into a fundamental right under Article 21 [*Unni Krishnan* v. *State of A.P.*, (1993) 1 SCC 645] which has now received ratification by the constituent power by the 86th Amendment inserting Article 21-A.

**12.** In deciding the challenge to a constitutional amendment, one has to necessarily consider the same in the light of the Preamble, Part III and Part IV which are to be read as an integrated whole. Reading them as an integrated whole, the amendment brought about by inserting Article 15(5) seeks to achieve the objects of both Part III and Part IV. Articles 38(1) and (2) and Article 46 obligates the State to virtually strive hard to promote the principle of affirmative equality by uplifting the weaker sections of the people, to provide equality in status, facilities and opportunities, provide social security, etc:

**12.1.** Shelat and Grover, JJ. in *Kesavananda Bharati* v. *State of Kerala*, (1973) Supp. SCR 1 at p. 238 last paragraph:

> "The Preamble was finalised after a long discussion and it was adopted last so that it may embody the fundamentals underlying the structure of the Constitution. It is true that on a concept such as social and economic justice there may be different schools of thought but the Constitution makers knew what they meant by those concepts and it was with a view to implement them that they enacted Parts III (fundamental rights) and Part IV (directive principles of State policy)—both fundamental in character—on the one hand, basic freedoms to the individual and on the other social security, justice and freedom from exploitation by laying down guiding principles for future governments."

**12.2.** Khanna, J. in *Kesavananda Bharati* v. *State of Kerala*, (1973) Supp SCR 1 at p. 716 second paragraph:

> "Our Constitution makers did incorporate in Part III of the Constitution certain rights and designated them as fundamental rights. In addition to that, the Constitution makers put in Part IV of the Constitution certain directive principles. Although those directive

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principles were not to be enforceable by any court, Article 37 declared *that those principles were nevertheless fundamental* in the governance of the country and it should be the duty of the State to apply those principles in making laws. The directive principles embody a commitment which was imposed by the Constitution makers on the State to bring about economic and social regeneration of the teeming millions who are steeped in poverty, ignorance and social backwardness. They incorporate a pledge to the coming generations of what the State would strive to usher in." (emphasis supplied)

***Enactment of Article 15(5) is in conformity with egalitarian principles and does not abrogate Article 19(1)(g) of the Constitution***

**13.** 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 in *M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212. In *M.R. Balaji* v. *State of Mysore* 1963 Supp 1 SCR 439, this Hon'ble Court disagreed with the judgment in *State of Madras* v. *Champakam Dorairajan* 1951 SCR 525 and upheld the argument 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), Articles 38, 45 and 46 and that Article 15(5) is only a continuation of that process.

**14.** When elementary education has been made a fundamental right, in order to make that object more meaningful, it was also necessary for the State to ensure that even in higher education there has to be affirmative equality by providing chances or opportunities to socially and educationally backward classes and the seed for this was sown by this Hon'ble Court as would be evident from the observations in *Pradeep Jain* v. *Union of India*, (1984) 3 SCC 654 at 676 para 13. The enactment of Article 15(5) is not an encroachment into judicial power and it is respectfully submitted that this enactment does not in any manner change the identity or destroy the identity or abrogate the fundamental right guaranteed under Article 19(1)(*g*). As already mentioned above, the fundamental right under Article 19(1)(*g*) or as a matter of fact the various clauses, namely, Articles 19(1)(*a*) to 19(1)(*e*) are not absolute and are capable of being abridged. Article 15(5) does not seek to negate or abrogate Article 19(1)(*g*). If by an enactment Article 19(1)(*g*) can completely be affected qua a trade or business by creation of a State monopoly as envisaged under Article 19(6) seeking to impose a reasonable restriction. Similarly, ushering in affirmative equality to uphold the underlying principles laid down in the Preamble, Part III and the directive principles cannot be construed as a destruction of the identity or abrogating the right or the essence of the right and at best it only seeks to abridge with

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the width and extent of the right which is constitutionally permissible. This will not amount to usurpation of judicial power. *Kesavananda Bharati*, (1973) 4 SCC 225 ruled that it is permissible to amend the Constitution by abridging the fundamental right.

**15.** Article 15(5) does not abrogate fundamental right under Article 19(1)(*g*). Article 15(5) incorporates the principles of Part IV in Part III. It becomes part of fundamental right and so cannot be considered as abridgment of fundamental rights. Assuming that there is an abridgement of fundamental right, it is in a limited area of admissions to educational institutions, such abridgment does not violate the basic structure of the Constitution. Article 15(5) is, therefore, not violative of the basic structure of the Constitution.

**16.** In *Kesavananda Bharati* [(1973) 4 SCC 225 para 1416 p. 762] Khanna, J. held, "*... I find it difficult to deny to Parliament the power to amend the Constitution so as to take away or abridge fundamental rights by complying with the procedure of Article 368 because of any such supposed fear or possibility of the abuse of power....*"

**17.** There are no implied and inherent limitations on the power of the amendment of the Constitution as ruled in *Kesavananda Bharati*, (1973) 4 SCC 225. Kindly see:

Sikri, C.J. at p. 365, paras 284-287
Shelat and Grover, JJ., p. 453, paras 578-580
Hegde and Mukherjea, JJ., pp. 483-487, paras 658 and 667
Jaganmohan Reddy, J., pp. 627-628, paras 1139 & 1141.
Ray, J., p. 593, para 1064
Palekar, J., p. 726, para 1333
Khanna, J., p. 776, para 1446
Mathew, J., p. 881, para 1715
Beg, J., p. 913, para 1837
Dwivedi, J., pp. 942 & 944, paras 1932 & 1939
Chandrachud, J., p. 987, para 2083

**18.** The principle of equating "constituent power" to ordinary legislative power which is "constituted power" and on that principle testing the validity of the constitutional amendment is not permissible.

**19.** It is submitted that constituent power to amend, includes the power to amend fundamental rights. The Constitution 24th Amendment provided that "*nothing in Article 13 shall apply to the amendment of the Constitution under Article 368*" and "*nothing in Article 13 shall apply to any amendments made under this Article*". The objects and reasons for the 24th Amendment indicated that it was restoring the law as it prevailed before *I.C. Golak Nath*. The exercise of constituent power had the effect of reversing *I.C. Golak Nath*. This Hon'ble Court upheld the validity of the 24th Amendment in *Kesavananda Bharati*. The test applied to plenary legislation was not applied.

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**20.** The Constitution amendments for giving effect to the directive principles of the State policy would not offend the basic structure of the Constitution.

**21.** Therefore, it is respectfully submitted that amendments which may abridge individual rights to promote constitutional ideal of "justice, social, economic and political" and "equality of status", are not liable to be struck down as such amendments cannot be held to violate the basic structure of the Constitution, but strengthen the egalitarian equality doctrine comprised in Articles 14, 15 and 16 read with the Preamble and Part IV. Such amendments aid the progress towards reaching the goal of egalitarian society and strengthen the basic structure foundation of the Constitution.

**22.** In the implementation of policies to achieve "justice, social, economic and political" and "equality of status and opportunity" which are social objectives to bring about an egalitarian society, State may be faced with problems of conflict between individual rights and interest on the one hand and rights and welfare of vast sections of the population on the other. The approach in such situations of conflict is that the right of the individuals has to be conditioned by social responsibility. In this regards reliance is placed on the judgment of this Hon'ble Court in *Waman Rao*, (1981) 2 SCC 362 at p. 389 para 29:

> "… while existing inequalities are being removed, new inequalities may arise marginally and incidentally. Such marginal and incidental inequalities cannot damage or destroy the basic structure of the Constitution. It is impossible for any Government, howsoever expertly advised, socially oriented and prudently managed, to remove every economic disparity *without causing some hardship or injustice to a class of persons who also are entitled to equal treatment under the law*."
>
> (emphasis supplied)

**23.** Further, in *Kesavananda Bharati*, this Hon'ble Court has held:

> "Quite often in the implementation of these policies, the State is faced *with* the problem of conflict between the individual rights and interests on the one side and rights and welfare of vast sections of the population on the other. The approach which is now generally advocated for the resolving of the above conflict *is to look upon the rights of the individuals as conditioned by social responsibility*." [(1973) 4 SCC 225 at para 1476 at p. 790.]
>
> "A modern State has to usher in and deal with large schemes having social and economic content. It has to undertake the challenging task of what has been called social engineering, the essential aim of which is the eradication of the poverty, *uplift of the downtrodden*, the raising of the standards of vast mass of people and the narrowing of the gulf between the rich and the poor. As occasions arise quite often when the individual rights clash with larger interests of the society, *the State acquires the*

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*power to subordinate the individual rights to the larger interests of society as a step towards social justice*." [(1973) 4 SCC 225 at para 1477 at p. 790.] (emphasis supplied)

**24.** It is submitted that the validity of the Constitution 93rd Amendment is not to be tested by elevating the rights of the private unaided non-minority educational institutions to the same level and placing it on a par with the larger interests of society. Larger social purpose of upliftment of the socially and educationally backward classes of citizens would stand at a higher footing and prevail and would have primacy. The constitutional imperative is that the individual rights of general category candidates would be subordinate to such larger social purpose.

**25.** The amendments in furtherance of the goals set out in Preamble and values set out in Part IV. It strengthens the foundation of the Constitution. "*The democratic foundations are missing when equal opportunity to grow, govern and give one's best to the society is denied to sizeable section of the society*". [*Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 at p. 509 para 411 between placita *a-b*.] Hence, the requirement of reservation.

**26.** The need for Article 15(5) arose in the context of rulings of this Hon'ble Court in *T.M.A. Pai Foundation*, (2002) 8 SCC 481 and *P.A. Inamdar*, (2005) 6 SCC 537. In *Unni Krishnan* v. *State of A.P.*, (1993) 1 SCC 645 this Hon'ble Court ruled that Article 19(1)(*g*) is not attracted to establishing and running educational institutions. However, *Unni Krishnan* was overruled on this aspect in *T.M.A. Pai Foundation*. It held that the right to establish and run an educational institution is an "occupation" within the meaning of Article 19(1)(*g*). [(2002) 8 SCC 481 at p. 535 para 25.]

**27.** With regard to private aided professional institutions (non-minority), *T.M.A. Pai Foundation* ruled that as there is no fundamental right to carry on occupation with the funds coming as aid from the State, the State has jurisdiction to provide for reservation in those institutions [(2002) 8 SCC 481 at pp. 550, 551 paras 71, 72.]. However, *P.A. Inamdar* ruled that in unaided institutions there could be no reservation of seats by the State. In *P.A. Inamdar*, the scope of ruling in *T.M.A. Pai* was considered in the context of *Islamic Academy of Education* v. *State of Karnataka*, (2003) 6 SCC 697. *P.A. Inamdar* ruled that:

"So far as appropriation of quota by the State and enforcement of its reservation policy is concerned, we do not see much of difference between non-minority and minority unaided educational institutions. … The State cannot insist on private educational institutions which receive no aid from the State to implement State's policy on reservation for granting admission on lesser percentage of marks i.e. on any criterion except merit." [Para 124]

"*… Such appropriation of seats can also not be held to be a regulatory measure in the interest of minority within the meaning of*

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*Article 30(1) or a reasonable restriction within the meaning of Article 19(6) of the Constitution.* Merely because the resources of the State in providing professional education are limited, private educational institutions, which intend to provide better professional education, cannot be forced by the State to make admissions available on the basis of reservation policy to less meritorious candidate. Unaided institutions, as they are not deriving any aid from State funds, can have their own admissions if fair, transparent, non-exploitative and based on merit. [Para 125 placita *d-e*]

"Our answer to the first question is that neither the policy of reservation can be enforced by the State nor any quota or percentage of admissions can be carved out to be appropriated by the State in a minority or non-minority unaided educational institution. Minority institutions are free to admit students of their own choice including students of non-minority community as also members of their own community from other States, both to a limited extent only and not in a manner and to such an extent that their minority educational institution status is lost. If they do so, they lose the protection of Article 30(1)". [Para 132]

**28.** A chart indicating the views expressed in *T.M.A. Pai Foundation*, (2002) 8 SCC 481; *Islamic Academy of Education* v. *State of Karnataka*, (2003) 6 SCC 697; *P.A. Inamdar* v. *State of Maharashtra*, (2005) 6 SCC 537 is annexed as *Annexure A*.

**29.** The judgment of this Hon'ble Court in *P.A. Inamdar* v. *State of Maharashtra*, (2005) 6 SCC 537 disabled the State to resort to its enabling power under Article 15(4) of the Constitution in the matter of admissions in private educational institutions. With regard to unaided minority and non-minority educational institutions The decision in *T.M.A. Pai Foundation* and *Inamdar*, when holding that Article 19(1)(*g*) is attracted, has not given effect to Preamble and the directive principles of State policy in the context of reservation. *P.A. Inamdar* was only interpreting *T.M.A. Pai Foundation*. This necessitated the enactment of Constitution (93rd Amendment) Act, 2005 inserting Article 15(5) by which enabling power was conferred on Parliament and State Legislatures, so that they will have legislative competence to pass a law providing for reservation in educational institutions which will not be hit at by Article 19(1)(*g*).

**30.** It is respectfully submitted that *T.M.A. Pai Foundation* did not consider the question as to whether reservation policy would be an unreasonable restriction on the right under Article 19(1)(*g*). It only declared the right of establishing and running an educational institution to be a fundamental right under Article 19(1)(*g*). The ruling in *P.A. Inamdar* (supra), held that imposing the reservation policy of the Government in unaided non-minority institutions (and minority institutions) would be an unreasonable restriction on the right under Article 19(1)(*g*). *T.M.A. Pai*

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*Foundation* only declared that the right of establishing and running an educational institution to be a fundamental right under Article 19(1)(*g*). As the ruling in *P.A. Inamdar* (supra) which went to the extent of imposing reservation policy of the Government in unaided non-minority institutions and minority institutions as being tantamount to an unreasonable restriction on the fundamental right under Article 19(1)(*g*). Parliament was fully justified in invoking its constituent power by enacting Article 15(5) and also invoking its power of plenary legislation to reinforce the policy of reservation which was not negated by *T.M.A. Pai Foundation* and enacting a constitutional amendment which virtually seeks to be in tune with the law declared by a larger Bench of 11 Judges cannot be described as an inroad into the judicial power.

**31.** Without prejudice to the above submission, it is respectfully submitted that Article 15(5) like Article 15(4) and Article 16(4) is only an enabling provision which makes special provisions for socially and educationally backward classes of citizens specifically in the matter of their admission to educational institutions. Article 15(5) is in the nature of reasonable restriction. Assuming it had come in the form of Article 19(7) the same could not have been attacked as violative of basic structure. The same could have been an abridgment of fundamental rights in larger public interest in exercise of constituent power and not abrogation. The vesting of such power has to be tested on the principle of basic structure and the exercise of that power by enacting statutes will have to be tested on the principles applicable to test the validity of legislative or executive actions and not by reference to the vesting of power. (See for the above principle, Khanna, J. in *Kesavananda Bharati* at (1973) 4 SCC 225 at p. 765; *Charan Lal Sahu* v. *Union of India*, (1990) 1 SCC 613 at p. 666 para 63 and *M. Nagaraj*, (2006) 8 SCC 212 at p. 270 para 106.)

**32.** It is further respectfully submitted that Article 15(5) cannot be attacked on the ground that it is an abdication of the power of the constituent power or delegation of the constituent power. It is only a conferment of a legislative power. Therefore, the concept of delegation or excessive legislation will not arise in cases of conferment of power. If the petitioners' argument is accepted, the same yardstick would have equally to be applied to the amendment brought to Article 15(4) by means of the first amendment to the Constitution pursuant to the judgment in *Champakam Dorairajan*.

**33.** The substance of the arguments of the petitioners is that rights of private unaided educational institutions are infringed by Article 15(5) and the same amounts to violation of basic features of the Constitution affecting its basic structure. In order to ascertain if rights under Article 19(1)(*g*) are infringed, and if so to what extent, it has to be first ascertained as to what is the extent of the rights of a private unaided educational institution under Article 19(1)(*g*).

**34.** Till *T.M.A. Pai Foundation* was decided, a right to establish a private educational institution was not even recognised as a fundamental right. In

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*Unni Krishnan* it was argued in detail, but the Court did not recognise this as a fundamental right. In other words, it is not a situation where from the commencement of the Constitution, this right was recognised as a fundamental right. It is only as late as in 2002 that it came to be recognised as a fundamental right.

**35.** A right under Article 19(1)(*g*) is not only subject to reasonable restrictions under Article 19(6), more importantly it is also subject to other provisions in Part III of the Constitution of India (*see* para 135 of *T.M.A. Pai Foundation*.) In other words, there is no absolute right independent of other provisions of Part III. It has to be read subject to other parts of Part III. While recognising the right to establish an educational institution as one falling under Article 19(1)(*g*), para 53 of *T.M.A. Pai Foundation* places a limitation on the right under Article 19(1)(*g*) as being subject to "*requiring admission of a small percentage of students belonging to the weaker sections of society by granting them free seats or scholarship if not granted by the Government*".

**36.** The right recognised by *T.M.A. Pai Foundation* under 19(1)(*g*) is subject to the above limitation. In other words, it is a limited right that is recognised and not an absolute and unfettered right. *T.M.A. Pai* speaks of maximum autonomy for a private unaided educational institution. This is not an absolute autonomy without any control by the State. Any interpretation on *T.M.A. Pai* by a Bench of lesser number of Judges giving it a different meaning or enlarging the scope of the right under Article 19(1)(*g*) or interpreting contrary to the same, is incorrect and not permissible. It is submitted that in the event of any conflict or difference in some judgments post *T.M.A. Pai*, the law laid down in *T.M.A. Pai* has to necessarily prevail and not the law declared in a subsequent judgment, particularly, *P.A. Inamdar* on which strong reliance has been placed to plead that there cannot be any Government-directed reservations in private unaided educational institutions. In the respectful submission of the Union, *P.A. Inamdar* which is a combination of a smaller Bench has not correctly interpreted the spirit and the law declared in *T.M.A. Pai Foundation*. The above proposition of law in *P.A. Inamdar* does not even flow from *T.M.A. Pai* and on the other hand clearly runs counter to what has been held in *T.M.A. Pai*. [Kindly see para 53 of *T.M.A. Pai*.]

**37.** Apart from the limited nature of right which is recognised in *T.M.A. Pai*, the right under Article 19(1)(*g*), even otherwise, is subject to Article 19(6) which permits reasonable restrictions being placed in general public interest. General public interest would take within its ambit, provisions in the larger interest of society aimed at upliftment of the weaker sections of society. The Constitution contemplates and the underlying ethos of the Constitution and mandate is that weaker sections are uplifted so that they are able to meaningfully participate in the national life and also are able to enjoy fundamental rights.

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**38.** Apart from the above, whatever may have been the interpretation of Articles 14, 15(1) and 16(1) earlier, after the decision of this Hon'ble Court in *State of Kerala* v. *N.M. Thomas*, (1976) 2 SCC 310 which has been reiterated in *Indra Sawhney*, 1992 Supp (3) SCC 217, these provisions by themselves, even in the absence of Articles 15(4) and 16(4), would enable affirmative action which will include legislative measures for giving equal protection or better opportunities to the weaker sections, an equalising measure inasmuch as following the dissenting view of Subba Rao, J. in *Devadasan case* (1964) 4 SCR 680. In *N.M. Thomas* it was held by the majority that Articles 15(4) and 16(4) are not exceptions to Article 15(1) and Article 16(1) and create substantive rights by themselves.

**39.** Article 14 itself would be sufficient to undertake legislative and other measures which are aimed at equalising opportunities for the weaker sections by way of affirmative action. Article 14 is not a passive provision or concept. Positive measures could be taken by the State to bring about real equality — egalitarian equality.

**40.** Articles 15(1) and 16(1) also by themselves, as interpreted in *Thomas* and reaffirmed in *Indra Sawhney*, would enable protective and positive measures in favour of socially and educationally backward classes of citizen.

**41.** *T.M.A. Pai* itself says that any right under any article in Part III is subject to other provision of Part III. Therefore, the abovementioned limitations and powers of Parliament/Government under other articles in Part III have to be taken into consideration and read into rights under the newly recognised right under Article 19(1)(*g*) to establish and run a private unaided educational institution, as limiting the said right under Article 19(1)(*g*).

**42.** Articles 14 and 15(1) cannot be interpreted as empowering the State to make provisions in favour of the weaker sections in government institutions only. This power is wide enough to include measures requiring private unaided educational institutions to participate in and promote the upliftment of the weaker sections of the society. There is no limitation in Articles 14 and 15(1). Also, it is to be borne in mind that right to establish a private unaided educational institution is no higher than any other right which is recognised in Article 19(1)(*g*). Article 19(1)(*g*) speaks of "to practise any profession to carry on any occupation, trade or business". Any one part of Article 19(1)(*g*) cannot be elevated to a higher status than others.

**43.** It is respectfully submitted that if the plea of the petitioner that any impairment of the right to establish and run private unaided educational institution amounts to violation of basic features/structure of the Constitution is accepted as correct, the same would apply in regard to any restriction on trade or business as well. An interpretation cannot be placed on the right to educational institution unmindful of the above aspect. Conversely, if restrictions on trade and business have been held to be permissible and not violative of Part III, such similar restrictions on the right to establish and run private educational institutions cannot be held to be violative of Part III,

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much less deemed to be affecting the basic structure of the Constitution. The Essential Commodities Act and other measures which place a number of restrictions on trade and business have been upheld as not affecting any fundamental right. There are provisions in regard to levy sugar, restrictions in regard to pricing and there are any number of restrictive measures in the area trade and business. If such restrictions do not affect and have been not held to be violative of Part III a small impairment of a right to establish and run a private unaided educational institution cannot be said to be, not only violative of Part III, and take it to the extent of holding that it is violative of the basic structure of the Constitution.

**44.** It is submitted that the restriction which has been sought to be placed is not a restriction which is alien to the Constitution. Such provisions are already permissible under Articles 14 and 15(1) as interpreted in *Thomas* and subsequent cases. A step taken in furtherance of a provision(s) in Part IV itself cannot to be held to be alien to the Constitution or violative of the basic features of the Constitution. If a provision is made to give effect to Part IV, the same cannot be found fault with at all. If legislative measures aimed at giving effect to Part IV affects or abridges a right under Part III, one has to see what is the extent of the infringement and if it is a reasonable restriction under Article 19(6) in relation to a right under Article 19(1)(*g*), it would be valid and would not be held to be violating Part III. Even if it infringes a right under Part III, if it is shown that it is consistent with the constitutional goals and has the protection of Article 368 i.e. a Constitution amendment or inclusion in Schedule IX, then it cannot be held to be bad.

**45.** The only test for determining the validity of Article 15(5), the same being a Constitution amendment, is whether it is violative of the basic features of the Constitution and whether it damages the basic structure of the Constitution. That there is a slight impairment of a right under Article 19(1)(*g*) by itself is not sufficient. In other words, impairment of fundamental right by itself is not a ground for holding the amendment to be ultra vires. In testing whether a particular amendment is violative of the basic features of the Constitution and affecting the basic structure of the Constitution, one has to keep in the mind the underlying constitutional ethos and the egalitarian equality the Constitution seeks to bring about.

**46.** Viewed in the said context, Article 15(5) advances of the constitutional goals and strengthens the objectives sought to be achieved by the Constitution and enables Parliament to undertake legislative measures in the said direction, far from either affecting any basic features of the Constitution or undermining or affecting its basic structure.

**47.** It is submitted that in the present case, the challenge is to the exercise of a constituent power and the power to amend the Constitution conferred under Article 368. It is submitted that a constitutional amendment has to be treated on a completely different plain vis-à-vis a legislation made by Parliament or a State. A constitutional amendment is an exercise of the

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supreme constituent power which is plenary by itself and that is why it is called as "constituent power", whereas conferment of that power on the legislation is a subordinate power, namely, the "constituting power" or a "constituted power" which are amenable to challenges of violation of individual fundamental rights. Secondly, it is submitted that a distinction should be made between affecting the identity of a fundamental right and affecting the identity of the Constitution. If a constitutional amendment only seeks to affect the identity thereby affecting the width or the extent of an article so long as something which is considered was fundamental is not abrogated but only abridged, there can be no violation of the basic structure. In certain situations, the constituent power has been so exercised even to completely abrogate a fundamental right. See for instance, Article 19(1)(*f*) though the same was modified and incorporated as Article 300-A but still the right became unenforceable by itself by exercising the original jurisdiction of this Hon'ble Court, as it ceased to be a fundamental right and one had to have recourse to violation of Article 14 read with Article 300-A for maintaining a writ petition under Article 32. The present amendments do not affect the identity of the Constitution, on the other hand, seeks to promote higher constitutional values as contained in the Preamble, Part III (affirmative equality) and directive principles. At best, it can be only regarded as an abridgment of the fundamental right guaranteed under Article 19(1)(*g*) and this abridgement can at best be treated as a reasonable restriction even when tested on the touchstone of Article 19(6) as the amendment is to secure a larger public interest of guaranteeing egalitarian equality. However, if the constituted power, namely, the legislature seeks to pass any legislation which violates Part III, that may be a separate ground of challenge but that challenge cannot be mixed up with the challenge to the very exercise of the constituent power in bringing amendments in the form of Article 15(5) and Article 21-A.

**48.** A constitutional amendment having the effect of bringing changes to the main provisions of the Constitution for the purpose of achieving the larger goals set out in the Constitution cannot be said to be abrogative of the basic feature and the said amendment can only be characterised as one which would be governed by the overarching principles with the essence of rights test being applicable. It is respectfully submitted that on a close reading of the judgment in *T.M.A. Pai*, (2002) 8 SCC 481, the Court has only declared the rights of private educational institutions to carry on educational activities as occupation and being protected by the fundamental right guaranteed under Article 19(1)(*g*). The judgment in *T.M.A. Pai* never gave such institutions full autonomy as was sought to be pleaded by the counsel in para 5 of the judgment and on the other hand, put several restrictions on the rights of private unaided institutions as would be evident from use of expression "surrendering total process" and use of the expression "maximum autonomy" and ultimately expounding what the underlying spirit of the judgment was in para 68. Reference in the case may be made to paras 1, 5, 26, 38, 48, 53, 55,

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61, 62, 68, 74 and the trilogy of paras, namely, paras 41, 53 and 68 is the underlying philosophy in *T.M.A. Pai* which itself recognised that the fundamental rights of unaided educational institutions can be interfered with for achieving the constitutional goals.

***Scope of Article 30(1)***

**49.** Rights of minorities under Article 30 are inalienable and are in the nature of an additional protection which could not be overridden, Article 15(5) excluded institutions falling under Article 30.

**50.** Exempting the minority educational institutions falling under Article 30 is to conform to the constitutional mandate of additional protection for minority. The right by way of protection to minority is "inalienable":

> "the inclusion of special rights for minorities has great significance. They were clearly intended to be *inalienable*." [Sikri, C.J. in *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225 at p. 329 para 128.]
>
> "… it is impossible to read the expression "amendment of the Constitution" as empowering Parliament to abrogate the rights of minorities" [Sikri, C.J. in *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225 at p. 339 para 178.]

**51.** When India attained freedom it was arrived at as a compromise of an idea of having separate electorates based on religion and a decision taken to have a system of joint electorates so that every candidate in an election would have to seek support of all sections of the constituency. In turn special safeguards were provided for minorities in Part III.

> "When India attained freedom, the Framers of the Constitution threw away the idea of having separate electorates based on religion and decided to have a system of joint electorates so that every candidate in an election would have to seek support of all sections of the constituency. In turn special safeguards were provided to minorities and they were made part of Part III of the Constitution with a view to instil a sense of confidence and security to the minorities." [*T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481 at p. 592 para 166.]

**52.** It is further submitted that not to exclude such minority educational institutions would result in a Social Secular Democratic Republic being transformed into a theocratic State. As the exclusion of minority educational institutions is valid, the argument as to severability in deciding the validity of Article 15(5) is misplaced. In this regard reliance is placed on *T.M.A. Pai Foundation* v. *State of Karnataka* [(2002) 8 SCC 481 at p. 615 para 228 between placita *d-e*.]:

> "… Where there is a plurality in a society, the object of law should be not to split the minority group which makes up the society, but to find out political, social and legal means of preventing them from falling apart and so destroying the society of which they are members. The attempt

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should be made to assimilate the minorities with majority. It is a matter of common knowledge that in some of the democratic countries where minority rights were not protected, *those democracies acquired status of theocratic States*." (emphasis supplied)

**53.** It is submitted that Article 15(5) does not seek to discriminate between aided and unaided institutions but only seeks to exempt minority educational institutions referred to in Article 30(1). Exempting the minority educational institutions falling under Article 30 from the purview of Article 15(5) is to conform to the constitutional mandate of additional protection for minority. This Hon'ble Court in *Ashoka Kumar Thakur*, (2008) 6 SCC 1 para 127 pp. 486-487 has held that the exclusion of minority educational institutions from Article 15(5) is not violative of Article 14 of the Constitution as the minority educational institutions, by themselves, are a separate class and their rights are protected by other constitutional provisions.

**54.** It is submitted that the minority educational institutions stand on a totally different footing than non-minority private educational institutions in the light of Article 30 of the Constitution which is a distinct right by itself and which is a fundamental protection of the rights of minorities. The rights of minorities are distinct from the rights of non-minorities as would be evident from the judgment commencing from *Re: Kerala Education Bill* and the subsequent judgments in *St. Xavier's* and *St. Stephen's* which have all been elaborately discussed in *T.M.A. Pai*. This Hon'ble Court in *T.M.A. Pai* itself has sought to treat minorities as a distinct class with the result that non-minorities cannot plead any discrimination by seeking to invoke Article 14 or equate them with minorities. The scope of Article 30(1) may be outlined as follows:

(*i*) Minorities by themselves are distinct.

(*ii*) However, State can impose restrictions in larger national interest on minorities.

(*iii*) State can interfere with the secular affairs pertaining to administration of minorities.

(*iv*) Minority institutions may be compelled to admit a "sprinkling" of outsiders.

(*v*) However, the minority character cannot be annihilated meaning thereby the choices exercised by minorities as envisaged under Article 30 cannot be wiped out.

(*vi*) Unlike other articles, Article 30 is an article which seeks to protect the interests of minorities and when there is a conflict between the said article which is a protection and Article 19(1)(*g*), the efficacy of Article 30 would prevail in larger public interest.

**55.** It is further submitted that the protection under Article 30(1) is available to aided and unaided minority institutions. A minority educational

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institution whether or not it receives aid remains a minority educational institution. Its character as a minority educational institution is derived from the fact that it is established by a minority not on the basis whether it receives aid or does not receive aid. Merely because it receives aid, it does not cease to be a minority educational institution. Also by receiving aid, it does not get equated with a private aided institution.

**56.** In *St. Stephen's College* v. *University of Delhi*, (1992) 1 SCC 558, the right of an aided minority institution was considered in the context of Article 29(2). It was held that Article 29(2) will not wipe out the rights under Article 30(1) but however sought to reconcile Articles 29(2) and 30(1) by providing that minority educational institutions may admit students to an extent of 50%. This judgment was considered in *T.M.A. Pai* in detail and in *T.M.A. Pai*, it was held that such a restriction of 50% cannot be placed with regard to rights of minority educational institutions merely for the reason that it receives aid and it would be entitled to admit students to the extent of its requirements. In simple terms, receiving aid would not make any difference insofar as rights of a minority educational institution under Article 30(1). In *T.M.A. Pai*, this Hon'ble Court dealt with rights of different categories of institutions, namely, private unaided, private aided, minority unaided and minority aided. There is no equation of minority aided institution with a private aided institution. Aid is not the distinguishing factor to put them together.

***Articles 26(a) and 30 offer distinct protections and cannot be equated with each other***

**57.** In *T.M.A. Pai*, (2002) 8 SCC 481, the petitioners sought to invoke fundamental right relating to establishment and administration of educational institutions. With regard to non-minorities, reference is made to Article 19(1)(*g*) and Article 26 and in the case of minorities, reference was made to Article 30. In para 26, with regard to right to establish and maintain educational institutions pursuant to Article 26(*a*), this Hon'ble Court concluded that the term "private educational institution" as used in the judgment in *T.M.A. Pai Foundation* would include not only those educational institutions set up by secular persons or bodies but also educational institutions set up by religious denominations and the word "private" would be used in contradistinction to government institutions. Therefore, it is submitted that institutions set up in exercise of powers under Article 26(*a*) were equated only to private educational institutions whereas institutions set up as minority institutions under Article 30(1) belong to a totally different class and cannot be equated to institutions set up under Article 26(*a*).

**58.** It is submitted that Article 26, as opposed to Article 29, starts with the marginal heading "freedom to manage religious affairs" and the said fundamental right is also subject to public order, morality and health. Those institutions if subject to any restrictions for the purpose of achieving the goal of the Constitution, namely, egalitarian equality, are subject to the same

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restrictions like any private educational institutions. Article 15(5) read with Article 14 mandates the State or permits the State to enact laws for achieving the goal of egalitarian equality/affirmative equality. They cannot compare themselves with minorities who have been conferred right to establish and administer educational institutions of their choice. However, the larger issue is as to whether Article 26(*a*) would comprehend within itself educational institutions in the constitutional sense. Article 26(*a*) does not use the expression "educational institutions" but only seeks to confer freedom on religious denominations to establish and maintain institutions for religious and charitable purposes. The said Article mainly confers with the rights of religious denominations with regard to freedom to manage their religious affairs as would be evident from Article 26 and the marginal heading.

**59.** The petitioners cannot by a circuitous route seek to now contend that they can establish secular educational institutions in exercise of the right of being a religious denomination and argue that even though the expression "educational institutions" are not mentioned in Article 26(*a*), Article 26(*a*) uses the expression "charitable purposes". It is implied that they can establish educational institutions as well. This position might have been valid post the judgment in *Unni Krishnan* but after the judgment in *T.M.A. Pai Foundation*, the content and contours have changed inasmuch as private educational institutions have been held to have the fundamental right of carrying on an occupation and that they could set up such institutions, which is tantamount to occupation. If now the right has been located in Article 19(1)(*g*) as an occupation, then the conventional approach of treating education as a charity will be in conflict with the underlying principle in *T.M.A. Pai Foundation* which has for the first time conferred the fundamental right guaranteed under Article 19(1)(*g*) to private educational institutions.

**60.** Article 15(5) only mentions the expression "educational institutions including private educational institutions" and therefore when educational institutions to be set up by religious denominations have been equated to private educational institutions, those religious denominations cannot source their right to Article 26 but can only legitimately source their right to Article 19(1)(*g*). For the sake of repetition, unlike Article 30(1), Article 26 does not expressly mention the right of establishing and administering educational institutions.

**61.** For the sake of clarity, it is submitted that when *T.M.A. Pai Foundation* has sought to equate educational institutions established by religious denominations on a par with other private educational institutions, those religious denominations cannot claim any better rights than those who have established other private educational institutions and will be subject to the same rigour and restrictions like those who have established any other private educational institution.

**62.** Further, the petitioners could not take the plea of Article 26 inasmuch as they have been established by a society. Therefore, they are not entitled to claim the benefits of Article 26.

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**63.** It is submitted that this Hon'ble Court in *Bramchari Sidheshwar Sai* v. *State of West Bengal*, (1995) 4 SCC 646 has held as follows:

"*61*. If followers of Ramakrishna Mission who, as held by us to be religious denomination in Hindu religion in answering Point 2, have the right to establish and maintain institutions for charitable purposes, subject to public order, morality and health as held by us in answering Point 3, can any educational institution established by and maintained by Ramakrishna Mission be regarded as an institution established and maintained for charitable purpose within the meaning of Article 26(*a*) of the Constitution of India, is an important point that arises for our consideration here.

*62*. No doubt a six-Judge Bench of this Court in *Sidhrajbhai Sabbai* v. *State of Gujarat* [AIR 1963 SC 540: 1962 Ker LT 135] while considering the question whether the serious inroads made by the rules and order issued by the State Government in respect of an educational institution established and administered by a minority entitled to protection under Article 30(1) of the Constitution of India, speaking through Shah, J. (as he then was) has observed thus:

"Article 26 occurs in a group dealing with freedom of religion and is intended to protect the right to 'manage religious affairs'. By clause (*a*) of Article 26, every religious denomination or any section thereof, has, subject to public order, morality and health, the right to establish and maintain institutions for religious or charitable purposes, and in a larger sense an educational institution may be regarded as charitable."

*63*. But, it was thought not necessary to express any opinion on the plea that the right of petitioners under Article 26(*a*) was infringed, in that petitioners were entitled to protection of Article 30(1) of the Constitution.

*64*. While the learned Single Judge of the High Court who decided the writ petition took the view that Article 26(*a*) is confined to institutions imparting religious instructions and not to institutions imparting general education, the learned Judges of the Division Bench of the High Court deciding the appeal have taken the view that Article 26(*a*) extends to establishment and maintenance of religious and charitable institutions including institutions for imparting education and that the essential part of the cult of Shri Ramakrishna being spreading of education, educational institutions of general education of Ramakrishna Mission have the protection of Article 26(*a*) of the Constitution making it, however, clear that they do not mean to lay down that establishment of educational institutions would be essential matter of their religion.

*65*. We think that the learned Judges of the High Court should not have decided on the general question whether educational institutions established and maintained by religious denomination including those

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established and maintained by Ramakrishna Mission for general education get the protection of Article 26(*a*) of the Constitution when that question in a general form, was not really at issue before them. Therefore, the views expressed on the question shall, according to us, ought to be treated as non est and the question is left open to be decided in proper case, where such question really arises and all the parties who might be concerned with it are afforded adequate opportunity to have their say in the matter."

**64.** It is thus submitted that Article 26(*a*) only confers right on religious denominations to impart religious education and not secular education, as has been considered but left open by this Hon'ble Court in the above case.

***Interplay between Articles 15(4) and 29(2)***

**65.** It is submitted that Article 29(2) is not an absolute right and cannot be read in isolation. Article 29(2) is subject to Article 15(4). If Article 29(2) is subject to Article 15(4), the logical corollary would be that it has to be subject to Article 15(5). Article 29(2) was invoked to actually set at naught communal reservations, as a consequence of which Article 15(4) was brought in to undo the effect of *Champakam Dorairajan*. By reason of this judgment of the Constitution Bench in *Ashoka Kumar Thakur' case*, Article 15(5) having been upheld qua aided institutions, this argument does not arise for consideration. The argument that Article 29(2) overrides Articles 15(4)/16(4) is liable to be rejected outright in the light of the judgment of the Constitution Bench in *Ashoka Kumar Thakur* which has upheld the constitutional validity of the amendment to Article 15(5) permitting making of reservations in government and government aided institutions.

***The challenge to Article 21-A as being violative of basic structure of the Constitution is not tenable for the following reasons***

**66.** Article 21-A was already a part of the directive principles under Article 45 which imposed an obligation on the State to endeavour to provide within a period of 10 years from the commencement of the Constitution for free and compulsory education for all children until they complete the age of 14 years. The said article has now been made a fundamental right in Article 21-A.

**67.** Article 45 has been considered elaborately both in *Mohini Jain*, (1992) 3 SCC 666 and *Unni Krishnan*, (1993) 1 SCC 645. In *Mohini Jain case* this Hon'ble Court has categorically held that the right to education is concomitant to the fundamental rights enshrined under Part III of the Constitution. The Court also correctly noticed that the fundamental rights guaranteed under Part III of the Constitution of India cannot be appreciated and fully enjoyed unless a citizen is educated and is conscious of his individualistic dignity inter alia the various freedoms mentioned in Article 19 and went on to hold that every citizen has a right to education under the Constitution. The State is under an obligation to establish educational

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institutions to enable the citizens to enjoy the said right. The State may discharge its obligation through State owned or State recognised educational institutions. When the State Government grants recognition to the private educational institutions which would naturally include unaided institutions (emphasis averse), it creates an agency to fulfil its obligation under the Constitution. The students are given admission to the educational institutions whether State owned or State recognised in recognition of the right to education under the Constitution. Therefore, in *Mohini Jain*, the Court itself virtually elevated by a process of judicial innovation the directive principles contained in the unamended Article 45 virtually as a fundamental right and a corresponding duty on the State to provide education to make other fundamental rights meaningful.

**68.** The distinction sought to be made that the language in Articles 45 and 21-A are different inasmuch as in Article 45 the expression "provide for" occurs and in Article 21, Parliament has consciously omitted the expression "for" which imposes that the obligation is only on State and not private unaided institutions. Such a distinction which has now been sought to be made will make both the State's obligation and the fundamental right to get education through the State aided institutions or State recognised institutions virtually illusory. Applying the logic of the petitioners who have placed reliance upon the dissenting judgment of Radhakrishnan, J. in the *Society's*, (2012) 6 SCC 1 will entail that for the purpose of providing elementary education as well, it is only the State's sole responsibility and such a responsibility cannot be partnered with unaided institutions. This approach is incorrect inasmuch as this Hon'ble Court in *Unni Krishnan*, (1993) 1 SCC 645 p. 693, para 77 has held that by reason of grant of recognition, private educational institutions are again agencies of State and are discharging public functions/public duties. As opposed to State run institutions or State aided institutions, provisions for education for upliftment of socially and educationally backward classes is always permissible so long as the percentage of students which the said private unaided institution is to admit is reasonable and prescription of a 25% limit in this regard is a reasonable exercise of power which does not abrogate the fundamental right of such private institutions as envisaged in Article 19(1)(*g*) of the Constitution read with Article 19(6). It is respectfully submitted that the underlying philosophy of *Mohini Jain* has been confirmed in *Unnikrishnan*. *T.M.A. Pai* only seeks to depart from *Unnikrishnan* insofar as the scheme framed by *Unnikrishnan* providing for 50% free seats and 50% payment seats. [*T.M.A. Pai*, (2002) 8 SCC 481 para 45 p. 541.] Even though *Mohini Jain* imposed an obligation on the State to provide education to all citizens at all levels in both aided and unaided institutions, *Unnikrishnan* only went by the philosophy of Article 45 of the Constitution and confined to those between the age of 6-14 years.

**69.** Therefore, it is respectfully submitted that the 86th Amendment to the Constitution incorporating Article 21-A and 93rd Amendment to the Constitution of India incorporating Article 15(5) are valid.

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**70.** Furthermore, is respectfully submitted that the present batch of writ petitions have been placed for consideration before this Hon'ble Constitution Bench in continuation of the order of reference to the Constitution Bench which was made by a 3-Judge Bench by an order dated 6-9-2010 in *Society for Unaided Private Schools of Rajasthan* v. *Union of India*, [(2012) 6 SCC 1].

**71.** It is submitted that the said reference was warranted in view of the challenge made to the constitutional amendment brought about by insertion of Articles 15(5) and 21-A of the Constitution of India on various grounds, namely, being the said amendments were violative of the basic structure of the Constitution of India. As the matter also involved interpretation of the Constitution, the matter was placed before a Constitution Bench in terms of the provisions as enshrined in Article 145(3) of the Constitution. However, notwithstanding the above reference to the Constitution Bench, the 3-Judge Bench which had made the reference, proceeded to hear Writ Petition (Civil) No. 95 of 2010 along with Writ Petitions (Civil) Nos. 98, 126, 137, 228 and 269 of 2010 along with certain other writ petitions which had been expressly referred to a Constitution Bench. The 3-Judge Bench did not want to examine the constitutional validity per se but proceeded to examine the constitutional validity of the Right of Children to Free and Compulsory Education Act, 2009 (for short "the 2009 Act") which is upheld by a majority of 2:1.

**72.** This led to a situation where the challenge made to the constitutional validity to Articles 15(5) and 21-A continued to be undecided but some issues which were overlapping, particularly, the challenge made on violation of the constitutional provisions and in particular Article 19(1)(*g*) of the Constitution in enacting the 2009 Act was considered by the 3-Judge Bench which by majority upheld the validity of 2009 Act.

**73.** The present batch of writ petitions have been filed essentially challenging the constitutional validity of Article 15(5) and Article 21-A. On a perusal of the writ petitions as well, no specific grounds have been raised as to in what manner the provisions of the 2009 Act have been assailed as unconstitutional except on generalised grounds with prayer for declaring the entire Act as unconstitutional on the ground that it violates Articles 14, 19(1)(*g*) and 21, and runs contrary to the philosophy and the law declared in *T.M.A. Pai Foundation case* and *P.A. Inamdar case*.

**74.** It is respectfully submitted that the present batch of matters, particularly the lead matter, was referred to a Constitution Bench in the light of the earlier reference made vide an order dated 6-9-2010. It is in the respectful submission of the Union of India that no doubt was ever raised regarding the correctness of the judgment of this Hon'ble Court in *Society for Unaided Private Schools of Rajasthan* v. *Union of India & Anr* [(2012) 6 SCC 1] and the correctness of the said judgment is not the subject-matter of reference to the Hon'ble Constitution Bench. Therefore, this Hon'ble Constitution Bench is primarily concerned with the validity of Articles 15(5) and Article 21-A and not the challenge made to the vires of the 2009 Act

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which has been already upheld in the *Society's case* [(2012) 6 SCC 1]. Even the referral order of the lead matter only states that matters are directed to be placed before a larger Bench. However, during the course of hearing elaborate arguments made before this Hon'ble Court on the vires of the 2009 Act, the petitioners have not only argued on the constitutional validity to the amendments made in the form of Articles 15(5) and 21-A but have also sought to impugn various provisions of the 2009 Act.

**75.** In the most humble and respectful submission of the Union of India, in the absence of any reference made by an appropriate Bench having any doubt on the correctness of the judgment laid down in the *Society's case* cannot be reagitated.

**76.** In *Pradip Chandra Parija* v. *Pramod Chandra Patnaik*, (2002) 1 SCC 1, this Hon'ble Court has held that:

> *6.* In the present case the Bench of two learned Judges has, in terms, doubted the correctness of a decision of a Bench of three learned Judges. They have, therefore, referred the matter directly to a Bench of five Judges. In our view, judicial discipline and propriety demands that a Bench of two learned Judges should follow a decision of a Bench of three learned Judges. But if a Bench of two learned Judges concludes that an earlier judgment of three learned Judges is so very incorrect that in no circumstances can it be followed, the proper course for it to adopt is to refer the matter before it to a Bench of three learned Judges setting out, as has been done here, the reasons why it could not agree with the earlier judgment. If, then, the Bench of three learned Judges also comes to the conclusion that the earlier judgment of a Bench of three learned Judges is incorrect, reference to a Bench of five learned Judges is justified.
>
> *7.* It is not necessary for us to go into the hypothetical cases spoken of by the learned counsel for the appellants where a reference directly by a Bench of two learned Judges to a Constitution Bench would be justified. Suffice it to say that, for the present, we find it very difficult to accept the correctness of such hypothesis. The only situation when a two-Judge Bench may refer a matter directly to a Constitution Bench is when the provisions of clause (3) of Article 145 are attracted.

**77.** The manner as to how the matters can be referred to a Constitution Bench and what issues can be the subject-matter of reference has been considered by this Hon'ble Court in *Central Board of Dawoodi Bohra Community* v. *State of Maharashtra*, (2005) 2 SCC 673 wherein this Hon'ble Court has summarised the legal position in the following terms:

> (1) The law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or co-equal strength.

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(2) A Bench of lesser quorum cannot doubt the correctness of the view of the law taken by a Bench of larger quorum. In case of doubt all that the Bench of lesser quorum can do is to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger quorum than the Bench whose decision has come up for consideration. It will be open only for a Bench of co-equal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of co-equal strength, whereupon the matter may be placed for hearing before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law the correctness of which is doubted.

(3) The above rules are subject to two exceptions:

(*i*) The abovesaid rules do not bind the discretion of the Chief Justice in whom vests the power of framing the roster and who can direct any particular matter to be placed for hearing before any particular Bench of any strength; and

(*ii*) In spite of the rules laid down hereinabove, if the matter has already come up for hearing before a Bench of larger quorum and that Bench itself feels that the view of the law taken by a Bench of lesser quorum, which view is in doubt, needs correction or reconsideration then by way of exception (and not as a rule) and for reasons given by it, it may proceed to hear the case and examine the correctness of the previous decision in question dispensing with the need of a specific reference or the order of Chief Justice constituting the Bench and such listing.

**78.** The petitioners have challenged, inter alia, the validity of the 2009 Act on various grounds, namely:

(*i*) The decision of this Hon'ble Court in the *Society's case* insofar as it justifies the exclusion of unaided institutions established by the minorities is discriminatory and violative of Article 14 of the Constitution of India.

(*ii*) The provisions of the 2009 Act and the Rules made thereunder are violative of the fundamental rights guaranteed under Part III of the Constitution and in particular Article 19(1)(*g*) of the Constitution of India and does not tantamount to reasonable restrictions.

(*iii*) Under this scheme, even the 2009 Act read with the underlying principles of the Constitution both in Part III and Part IV, it is only essentially the duty of the State and State only to provide special provisions for advancement of socially and educationally backward sections of the society and no reservations can consequently be made by the State to promote the ideals of Article 21-A which has been transplanted from Article 45 with a consequential amendment made to Article 45 and which guarantees free education from the age of 6 up to

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14 and that should only be made applicable to government institutions and aided institutions and not unaided institutions.

(*iv*) The further ground of challenge is that the provisions of the Act are contrary to the ratio laid down both in *T.M.A. Pai* and *P.A. Inamdar* and grossly violates the autonomy of private educational institutions which are unaided. The petitioners have also submitted that definitions of the terms "child belonging to disadvantaged group" and "child belonging to weaker sections" under Sections 2(*d*) and 2(*e*) of the 2009 Act respectively travel far beyond even the width of Article 15(5) and therefore such enlargement made by the Act which is beyond the scope of Article 15(5), cannot even be sustained on a reading of Article 15(5) assuming the said Article is valid.

(*v*) The petitioners have also assailed various other provisions and mainly Section 12(1)(*c*) which according to them completely destroys their autonomy as it imposes reservations to the extent of 25% to socially and educationally backward classes of students in various types of educational institutions from schools to colleges and higher educational institutions.

(*vi*) A fervent plea was made by the petitioners that Section 12(1)(*c*) should be read down so as to take out unaided non-minority educational institutions from the ambit of the rigour of the said Section and the said Section should be construed as not imposing a mandatory obligation on the private unaided institutions of non-minority character, who at best can on the principles of voluntariness consistent with the principle of autonomy without there being any compulsion or threat of non-permission or non-affiliation, can admit students belonging to the socially and backward section of the society or in other words, the expression "shall" should be construed as "may". It has been further submitted that no distinction or difference can be made between unaided minority and non-minority schools insofar as the appropriation of quota by the students or its reservation policy under Section 12(1)(*c*) of the Act is concerned and any such appropriation by the State will not tantamount to a reasonable restriction within the meaning of Article 19(6) and be in the teeth of the law declared in *T.M.A. Pai* and *P.A. Inamdar*.

**79.** It is respectfully submitted that even though the petitioners are at liberty to challenge any provision on the ground that they are not similarly situated than those who were earlier before the Court but unless such challenge has been considered and the correctness of the earlier judgment which has upheld the provisions and the Act is doubted, this Hon'ble Court should refuse and decline to go into the challenge made to the vires of the 2009 Act. Allowing such challenges to be made or entertaining such pleas would virtually tantamount to permitting some parties to raise the very same pleas that have been considered and rejected by this Hon'ble Court and even assuming same arguments were not raised or considered, it is not open to

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raise those submissions or grounds of challenge keeping in consonance of the principle of both finality in litigation and public policy and also on the grounds of res judicata and stare decisis.

**80.** In *Somawanti* v. *State of Punjab*, (1963) 2 SCR 774 at p. 794, this Hon'ble Court has dealt with the issue as follows:

> "22. The argument, however, is that the protection which the Act enjoys is only to this extent that even though any of its provisions be in conflict with Article 31(2) the Act cannot be challenged on that ground; the protection does not however extend to other provisions of Part III of the Constitution, such as Article 19(1)(*f*). As we understand the decision in *Bhanji Munji case* [1955] 1 SCR 777 what this Court has held is that for a right under Article 19(1)(*f*) to hold property to be available to a person, he must have the property with respect to which he can assert such right. If the right to the possession of the property taken away by a law protected by Article 31(5)(*a*), Article 19(1)(*f*) is not attracted. That is the decision of this Court and it has been followed in two other cases. All the decisions are binding upon us. It is contended that none of the decisions has considered to argument advanced before us that a law may be protected from an attack under Article 31(2) but it will still be invalid under Article 13(2) if the restriction placed by it on the right of a person to hold property is unreasonable. In other words, for the law before us to be regarded as valid it must also satisfy the requirements of Art. 19(5) and that only thereafter can the property of a person be taken away. It is sufficient to say that though this Court may not have pronounced on this aspect of the matter we are bound by the actual decisions which categorically negative an attack based on the right guaranteed by Article 19(1)(*f*). *The binding effect of a decision does not depend upon whether a particular argument was considered therein or not, provided that the point with reference to which an argument was subsequently advanced was actually decided.* That point has been specifically decided in the three decisions referred to above.
>
> *23.* We, therefore, hold that since the Act provides that the declaration made by the State that a particular land is indeed for a public purpose shall be conclusive evidence of the fact that it is so needed the Constitution is not thereby infringed." (emphasis supplied)

**81.** It is respectfully submitted that all the grounds of challenge to the individual sections have been considered in the *Society case* not only by the majority but as well as the minority and the minority judgment in *Society's case* has only sought to make a deviation inasmuch as it sought to read down the provisions of the 2009 Act and Section 12(1)(*c*) in particular. In other words, even the minority judgment which is partly dissenting, has only sought to read down Section 12(1)(*c*) read with Sections 2(*i*) and (*iv*) of the Act since it did not seek to make any distinction between unaided minority schools and non-minority schools contrary to the judgment in *P.A. Inamdar*,

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and going by the ratio laid down in *T.M.A. Pai Foundation* and *P.A. Inamdar*, it was not possible to compel the unaided non-minority and non-minority private educational institutions to admit 25% of the students on the fee structure determined by the State as that would clearly be an invasion as well as appropriation of the rights guaranteed to them under Article 19(1)(*g*) as well as Article 30(1) of the Constitution. [Kindly refer to para 247 at p. 87 of Hon'ble Radhakrishnan, J.'s judgment.]

**82.** The minority judgment proceeds to uphold the vires of Section 12(1)(*b*) by holding that it equally safeguards the rights of the members of the religious and linguistic minorities and that Section 2(*e*) which deals with "child belonging to weaker section" or the minority communities, religious or linguistic, would also get the benefit of Section 12(1)(*b*) and therefore proceeded to uphold Section 12(1)(*b*) as it did not offend the rights of religious or linguistic communities. The minority judgment also noticed that there is no challenge to Section 13 which cannot be challenged in the light of the law declared by this Hon'ble Court prohibiting collecting capitation fee. But the majority considers the judgment in all perspectives and after elaborate discussion, proceeds to uphold the validity of the 2009 Act and all the sections which have been again challenged before this Bench based on the overarching principles of securing an egalitarian society and for achieving the directive principles of State policy. They have also considered the argument that the 2009 Act violates Article 19(1)(*g*) and also the law declared in *T.M.A. Pai* as well as in *P.A. Inamdar*. The majority took the view that the issue of reservations were never the subject-matter of consideration either in *T.M.A. Pai* or in *P.A. Inamdar* and, therefore, the Court must not also concern with the interpretation of Article 21-A and the 2009 Act. The Court seeks to expressly make reference to several paragraphs in *T.M.A. Pai* and *P.A. Inamdar* from paras 49 onwards and in para 53 came to the conclusion that reading *T.M.A. Pai* and *P.A. Inamdar* in the proper perspective, it became clear that the said principles have been applied in the context of professional/higher education where merit and excellence have to be given due weightage and which test do not apply in cases where a child seeks admission to Class I and when the impugned Section 12(1)(*c*) seeks to remove the financial obstacle. Thus the majority holds that on a reading of the 2009 Act including Section 12(1)(*c*) in its application to unaided non-minority schools, the same is saved as reasonable restriction under Article 19(1)(6).

**83.** Applying the principle of severability, the Court held that Sections 12(1)(*c*) and 18(3) infringes the fundamental freedom guaranteed to unaided minority schools and therefore the said 2009 Act was held not applicable to unaided minority.

**84.** It is respectfully submitted that the 2009 Act is neither contrary to *T.M.A. Pai* and *P.A. Inamdar*, as has been explained qua the challenge to the

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amendments to Articles 15(5) and 21-A, and for the sake of brevity is not being repeated.

**85.** The challenges are totally vague and therefore oral arguments without there being pleadings, the vires cannot be reagitated when the vires of the 2009 Act was not a subject-matter of reference before this Hon'ble Court and even accepting that this Hon'ble Court comprising a larger quorum can go into the correctness of the judgment in the *Society's case*.

**86.** As held by this Hon'ble Court in *Unni Krishnan* v. *State of A.P.*, (1993) 1 SCC 645, irrespective of the educational institutions receiving aid or not, educational institutions discharge public duties. The absence of aid does not detract from the nature of duty. Thus the scheme of the 2009 Act will not work if private educational institutions which have duty to the society as they spring into existence only because of affiliation or recognition or permission granted by the State. If there was no affiliation or permission, there would be no recognised private unaided institution at all and as a condition of that recognition or affiliation, reasonable restriction can be imposed by the State.

**87.** It is respectfully submitted that whenever there are rights, there are also corresponding duties. When fundamental rights have been conferred, there is a corresponding duty which is a higher duty in the Constitution for every citizen to implement higher constitutional goals envisaged in the Preamble, Part III and Part IV. It is respectfully submitted that a private educational institution is a material resource of the community and the State can impose an obligation that such material resources of the community should be so distributed to subserve the common good by invoking the overarching principles. Article 39(*b*) mandates that the ownership and control of natural resources should be so distributed so as to best subserve the common good. Article 37 provides that the provisions of Part IV shall not be enforceable by any court, but 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 these principles in making laws. Therefore, this Article, in a sense, is a restriction on "distribution" built into the Constitution. But the restriction is imposed on the object and not the means. The overarching and underlying principle governing "distribution" is furtherance of common good. But for the achievement of that objective, the Constitution uses the generic word "distribution". Distribution has broad contours and cannot be limited to meaning only to State-run or aided educational institution. It envisages all such methods available which ultimately subserve the "common good".

**88.** In *State of Tamil Nadu* v. *L. Abu Kavur Bai*, (1984) 1 SCC 515, this Hon'ble Court explained the broad-based concept of "distribution" as follows:

> "*89.* ... The word "distribution" used in Article 39(*b*) must be broadly construed so that a court may give full and comprehensive effect to the statutory intent contained in Article 39(*b*). A narrow construction of the

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word "distribution" might defeat or frustrate the very object which the Article seeks to subserve....

* * *

*92.* It is obvious, therefore, that in view of the vast range of transactions contemplated by the word "distribution" as mentioned in the dictionaries referred to above, it will not be correct to construe the word "distribution" in a purely literal sense so as to mean only division of a particular kind or to particular persons. The words, apportionment, allotment, allocation, classification, clearly fall within the broad sweep of the word "distribution". So construed, the word "distribution" as used in Article 39(*b*) will include various facets, aspects, methods and terminology of a broad-based concept of distribution...."

**89.** In *State of Karnataka* v. *Shri Ranganatha Reddy*, (1977) 4 SCC 471, Krishna Iyer, J. observed that keeping in mind the purpose of an article like 39(*b*), a broad rather than a narrow meaning should be given to the words of that Article. In his inimitable style, His Lordship opined thus:

"Two conclusions strike us as quintessential. Part IV, especially Articles 39(*b*) and (*c*), is a futuristic mandate to the State with a message of transformation of the economic and social order. Firstly, such change calls for collaborative effort from all the legal institutions of the system: the legislature, the judiciary and the administrative machinery. Secondly and consequentially, loyalty to the high purpose of the Constitution viz. social and economic justice in the context of material want and utter inequalities on a massive scale, compels the Court to ascribe expansive meaning to the pregnant words used with hopeful foresight, not to circumscribe their connotation into contradiction of the objectives inspiring the provision. To be Pharisaic towards the Constitution through ritualistic construction is to weaken the social-spiritual thrust of the Founding Fathers' dynamic faith."

**90.** It is respectfully submitted that this Hon'ble Court in *In Re: Special Reference No. 1 of 2012*, (2012) 10 SCC 1 has held that the term "distribute" is of wide amplitude and encompasses all manners and methods of distribution, which would include classes, industries, regions, private and public sections, etc. It has been further held that having regard to the basic nature of Article 39(*b*), a narrower concept of equality under Article 14 may frustrate the broader concept of distribution, as conceived in Article 39(*b*). Therefore, "common good' and "larger public interests" have to be regarded as constitutional reality deserving actualisation. Therefore, the principle of voluntariness canvassed by the petitioners will not be applicable and that for achieving the constitutional goal of establishing an egalitarian society and to promote fraternity legislature has been enabled and empowered to enact legislative measures to provide opportunity to the disadvantaged and weaker sections of the society in private educational institutions. The Preamble

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secures and assures to all citizens Justice, social, economic and political. The Preamble also secures and assures Equality of status and of opportunity. Social Justice will ultimately lead to equality of status and Economic and Political Justice will ensure Equality of Opportunity. "Equality of Status" is mentioned before Equality of Opportunity. It is "egalitarian equality" which will usher in equality of status and of opportunity in a caste-ridden society like ours. Education and the economic well-being of an individual gives a status. When large number of people belonging to disadvantaged and weaker sections of the society get better educated and get into Parliament, legislative assemblies, public employment, professions and into other walks of public life, the attitude that they are inferior in status will disappear. This will promote Fraternity assuring the dignity of the individual and the unity and integrity of the nation. As held in *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481 at p. 578 para 135, "the single most powerful tool for the upliftment and progress of such diverse communities is education".

**91.** Article 15(5) is a provision conferring "power coupled with duty". It is respectfully submitted that various provisions in the Constitution conferring power to make special provisions in favour of disadvantaged and weaker sections of the society is a power coupled with duty. This Hon'ble Court in *H.H. Maharajadhiraja Madhav Rao Jiwaji Rao Scindia Bahadur* v. *Union of India*, (1971) 3 SCR 9 at p. 85 has laid down the principles in this regard, which inter alia illustratively referred to Articles 366(24) and 366(25) and held as follows:

> "There are many analogous provisions in the Constitution which confer upon the President a power coupled with a duty. We may refer to two such provisions. The President has under Articles 341 and 342 to specify Scheduled Castes and Scheduled Tribes; and he has done so. Specification so made carries for the members of the Scheduled Castes and Scheduled Tribes certain special benefits e.g. reservation of seats in the House of the People, and in the State Legislative Assemblies by Articles 330 and 332, and of the numerous provisions made in Schedules V and VI. It may be noticed that expressions Scheduled Castes and Scheduled Tribes are specially defined for the purposes of the Constitution by Articles 366(24) and 366(25). If power to declare certain classes of citizens as belonging to Scheduled Castes and Scheduled Tribes includes power to withdraw declaration without substituting a fresh declaration, the President will be destroying the constitutional scheme. *The power to specify may carry with it the power to withdraw specification, but it is coupled with a duty to specify in a manner which makes the constitutional provisions operative*." (emphasis supplied)

**92.** It is submitted that to ensure that the democratic foundations are not missing, enabling power is conferred by Article 15(5) in *Part III* of the Constitution. It is therefore, a power coupled with duty.

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**93.** It is well settled that the word "may" in a given case could be interpreted as "shall" and "shall" may be interpreted as "may". Apart from such instances, there is another category, where though by virtue of the word "may", the enabling power is discretionary power, that discretionary power is a power coupled with duty. In *Chief Controlling Revenue Authority* v. *Maharashtra Sugar Mills Ltd.* [1950] SCR 536 at p. 544, this Hon'ble Court observed:

> "… something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised which may couple the power with duty and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so." (*Julius* v. *Bishop of Oxford*, 5 AC 214, 222; [1874-1880] All ER 43 at p. 47 placitum I.)
>
> See also
>
> "But when a capacity or power is given to a public authority, there may be circumstances which couple with the power a duty to exercise it." [*Alcock Ashdown and Company Ltd.* v. *Chief Revenue Authority, Bombay* 50 I.A 227 at p. 236.]

**94.** In the present case, the nature of thing empowered to be done is "to reach the goal of egalitarian equality". The right of the person or persons for whose benefit the power is to be exercised and the duty of the State is traceable to the Preamble viz. Justice, social, economic and political, Equality of status and of opportunity and to promote among them all fraternity assuring the dignity of the individual and also the duty of the State to apply Article 46 read with Article 37 viz. promotion of educational and economic interests of disadvantaged and weaker sections.

**95.** It is the constitutional duty to apply the principles in the governance of the country and in making law for the reason that it is "constitutional promise of social justice" which has ?"to be redeemed" [see *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 217 at p. 751 para 836.] It is an instance of "first charge" on the States and the Centre:

> "The interests of weaker sections of society which are a first *charge on the States and the Centre* have to be adjusted with the interests of the community as a whole." [*M.R. Balaji* v. *State of Mysore* 1963 Supp (1) SCR 439 at 470.]

**96.** A constitutional promise, an obligation and a duty to march towards egalitarian equality, a charge on the State and a goal of grand and noble vision of the Preamble and the declaration in Article 37 that the principles in Part IV are "fundamental in the governance of country" and mandating that "it shall be the duty of the State to apply those principles in making laws" makes the enabling power under Article 15(5), the highest form of duty of the State and Article 15(5) has to be necessarily interpreted as power coupled

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with duty. To hold that it is discretionary power and is not compellable to be exercised, may result in the State never exercising the power at all and the very purpose and object sought to be achieved by the insertion of Article 15(5) will be defeated. Article 46 enjoins a duty on the State to promote the educational and economic interests of the weaker sections in particular SCs and STs. Article 46 reads as under:

> "46. *Promotion of educational and economic interests of Scheduled Castes and 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 Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."

**97.** Therefore, it is respectfully submitted that special provisions in the form of Articles 15(5), 21-A and included in Part III so as to acquire enforceable efficacy as well as the 2009 Act for the purpose of ensuring egalitarian equality cannot be rendered futile by interpreting it as discretionary power.

## *XI. Mr K.V. Viswanathan, Additional Solicitor General of India, for the Union of India*

**1.** The Constitution (86th) Amendment Act, 2002 and the Constitution (93rd) Amendment Act, 2005, which introduced Article 21-A and Article 15(5) in the Constitution of India are constitutionally valid. They do not violate the basic structure of the Constitution. Equally, the Right of Children to Free and Compulsory Education Act, 2009 (hereinafter "the RTE Act") is also constitutionally valid.

### *A. Historical background*

**2.** To appreciate the true intent and purport of Article 15(5) and Article 21-A, a brief background of the constitutional position that prevailed prior to their introduction, leading up to the judgments of this Hon'ble Court in *T.M.A. Pai Foundation* v. *State of Karnataka* cited as (2002) 8 SCC 481 and *P.A. Inamdar* v. *State of Maharashtra* cited as (2005) 6 SCC 537 needs to be recapitulated.

**3.** Article 14 mandates that the State shall not deny to any person equality before the law or the equal protection of the law within the territory of India. Article 15(1) provides that the State shall not discriminate against any citizen on grounds *only of* religion, race, caste, sex, place of birth or any of them. In *State of Madras* v. *Srimathi Champakam Dorairajan* cited as (1951) SCR 525, this Hon'ble Court struck down the classification made by the State of Madras providing for communal reservation. The government order was struck down as it was founded on the basis of religion, caste and was opposed to the Constitution as it was found to be in violation of the fundamental rights. Consequently, the First Constitutional Amendment was made by which Article 15(4) was added to the Constitution in 1951.

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**4.** Article 15(4) provides that, nothing in the said Article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes.

**5.** It must be pointed out that with regard to matters of public employment Article 16(1) of the original Constitution provided that there shall be equality of opportunity to all citizens in matters relating to employment or appointment to any office under the State. Further, Article 16(4) provided that nothing in Article 16 was to prevent the State from making any provision for the reservation of appointment or posts in favour of any backward classes of citizens, which in the opinion of the State is not adequately represented in the service under the State.

**6.** In *M.R. Balaji* v. *State of Mysore* cited as (1963) 1 SCR 439 (at p. 455), it was held that Article 15(4) has to be read as a proviso or an exception to Articles 15(1) and 29(2). A majority of this Hon'ble Court in *T. Devadasan* v. *Union of India* cited as (1964) 4 SCR 680 reiterated that view. However, Subba Rao, J. in his dissenting opinion held that Article 16(4) is not an exception to Article 16(1) but that it is only an empathetic way of stating the principles inherent in the main provision itself. This dissenting view received a fillip when a majority decision of this Court held in *State of Kerala* v. *N.M. Thomas* cited as (1976) 2 SCC 310 (Ray, C.J. at para 28; Mathew, J. at paras 78-83; Krishna Iyer, J. at para 136; Fazal Ali, J. at para 184), that Article 16(4) is not an exception to Article 16(1) but it was merely an empathetic way of stating the principle in Article 16(1), and Article 16(1) being a facet of the doctrine of equality enshrined under Article 14, permits reasonable classification just as Article 14 does. This view taken in *N.M. Thomas case* has been affirmed by the majority in *Indra Sawhney* v. *Union of India* cited as 1992 Supp (3) SCC 217 (Pandian, J. at para 168; Sawant, J. at paras 428-432 and Jeevan Reddy, J. at paras 700, 713, 733, 741-745). In fact, the relevant part of para 741 from the opinion of Jeevan Reddy, J. requires to be reproduced:

> "*741.* … 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."

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***Case law on education and educational institutions***

**7.** Alongside the development of law on egalitarian equality, classification and reservation, while appreciating the background of Article 15(5) and Article 21-A the growth of law on "education" and "educational institution" also needs to be understood. Article 21 mandates that no person shall be deprived of his life or personal liberty except according to the procedure established by law. Article 45, as it originally stood, mandated that the State shall endeavour to provide within a period of 10 years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of 14 years. Article 45 after the amendment reads that the State shall endeavour to provide early childhood care and education for all children until they complete the age of 6 years. Article 46 mandates that the State shall promote with special care the educational and economical interest of the weaker sections of the people, and in particular, of the Scheduled Castes and Scheduled Tribes and shall protect them from social injustice and all forms of exploitations.

***Right to education as part of right to life under Article 21***

**8.** In *Unni Krishnan, J.P.* v. *State of Andhra Pradesh* cited as (1993) 1 SCC 645, this Hon'ble Court held that education is a preparation for a living and for life, here and hereafter. Further in para 54 it was held that right to free education up to the age of 14 years is a fundamental right (Mohan, J.). Jeevan Reddy, J. held that a child (citizen) has a fundamental right to free education up to the age of 14 years. The broad proposition laid down in *Mohini Jain* v. *State of Karnataka* cited as (1992) 3 SCC 666 was overruled.

**9.** *Unni Krishnan* held that the right to establish an educational institution does not carry with it the right to recognition or right to affiliation.

***T.M.A. Pai Foundation v. State of Karnataka cited as (2002) 8 SCC 481 and P.A. Inamdar v. State of Maharashtra cited as (2005) 6 SCC 537***

**10.** It is in this background, that the judgment by the 11 Judges of this Hon'ble Court in *T.M.A. Pai* needs to be appreciated. At the very outset it should be mentioned that in para 31 of *T.M.A. Pai* judgment, at p. 538, this Court recorded that:

> "Counsel for the institutions, as well as the Solicitor General, submitted that the decision in *Unni Krishnan case*, insofar as it had framed the scheme relating to the grant of admission and the fixing of the fee, was unreasonable and invalid. However, its conclusion that children below the age of 14 had a fundamental right to free education did not call for any interference."

***Educational institutions — Occupation — Article 19(1)(g)***

**11.** *T.M.A. Pai* in para 25 held that establishment and running of an educational institution where a large number of persons are employed as teachers or administrative staff, and an activity is carried on that results in the

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imparting of knowledge to the students, must necessarily be regarded as an occupation even if there is no element of profit generation. To that extent *Unni Krishnan* was overruled as in the view of the Court *Unni Krishnan* had mixed up the right to establish an educational institution with the right to ask for recognition or affiliation and the Court held that the question whether there is a fundamental right or not cannot be dependent upon whether it can be made the subject of controls.

***Para 50 of T.M.A. Pai — The five components***

**12.** *T.M.A. Pai* held that the right to establish and administer broadly comprises of the following rights (Para 50):

(*a*) To admit students,

(*b*) To set up a reasonable fee structure,

(*c*) To constitute a governing body,

(*d*) To appoint staff (teaching and non-teaching),

(*e*) To take action if there is dereliction of duty on the part of the employees.

**13.** *T.M.A. Pai* also held:

(*a*) Curtailing *all the* features of their right of administration can neither be called fair or reasonable (*para 38*).

(*b*) Any system of student selection would be unreasonable, if it deprives the private unaided institution of their right of rational selection (*para 40*).

(*c*) *Surrendering the total process* of selection is unreasonable (*para 41*).

(*d*) Private unaided educational institutions have their right to admit students subject to an objective and rational procedure of selection; and the compliance with conditions, if any, requiring admission of a small percentage of students belonging to the weaker section of the society by granting them freeships or scholarships, if not granted by the Government (*para 53*).

(*e*) Right to establish an educational institution can be regulated. Such regulatory measures could be to ensure maintenance of proper *academic standards, atmosphere, and infrastructure* (including qualified staff); and *prevention of maladministration* (*para 54*).

(*f*) Fixation of rigid fee structure; dictating formation and composition of a governing body; compulsory nomination of teachers and staff for appointment; or *nominating students* for admission would be unacceptable restrictions (*para 54*).

(*g*) Board or university, or the affiliating or recognising authority, can lay down conditions consistent with the requirements to ensure the excellence of education (*para 55*).

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(*h*) In the case of private unaided institutions, *maximum autonomy* in the day-to-day administration has to be left with the private unaided institution (*para 55*).

(*i*) Occupation of education is in a sense regarded as *charitable*. In the establishment of an educational institution, the object should not be to make a profit, inasmuch as education is essentially charitable in nature (*para 57*).

(*j*) Government regulations for all levels and types of education cannot be identical (*para 60*).

(*k*) In the case of unaided private schools *maximum autonomy* has to be with the management with regard to administration, including the right of appointment, disciplinary powers, admission of students, and the fees to be charged. At school level it is not possible to grant admission on the basis of merit (*para 61*).

(*l*) The private educational institutions have a personality of their own; and in *order to maintain their atmosphere and traditions*, it is but necessary that they must have their right to choose and select students who can be admitted to their course of studies (*para 65*).

(*m*) In dealing with the private unaided professional colleges the Court said that a certain percentage of the seats can be reserved for admission by the management out of those students who have passed the common entrance test held by it, or by the State/University; and have applied to the college concerned for admission, while the rest of the seats may be filled up on the basis of counselling by the State agency. This will incidentally, take care of poorer and backward sections of the society. (*This part has to be read with Inamdar case*) (*para 68*).

(*n*) Conditions granting recognition or affiliation can broadly cover academic and educational matters including the welfare of students and teachers (*para 69*).

(*o*) Establishment of educational institutions comes within the meaning of the expression "*charitable purpose*" (*para 84*).

(*p*) Dealing with minorities, the Court said that the Government cannot be prevented from making *regulations that are in national interest*. Any regulation framed in the national interest must necessarily be applied to all educational institutions (*para 107*).

(*q*) Quoting from *The Ahmedabad St. Xaviers College Society and Anr.* v. *State of Gujarat* this Court held, the idea of giving special rights to minority is to *give the minority a sense of responsibility and the feeling of confidence* (*para 120*).

(*r*) Denying admission to non-minorities for the purpose of accommodating minority students *to a reasonable extent* will not be *only* on grounds of religion, etc., but is primarily meant to preserve

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the minority character of the institution, and to effectuate the guarantee under Article 30(1). The best possible way is to hold that as long as the minority educational institution permits admission of citizens belonging to the non-minority class to a reasonable extent based upon merit, it will not be an infraction of Article 29(2), even though the institution admits students of the minority group of its own choice for whom the institution was meant (*para 149*).

***P.A. Inamdar v. State of Maharashtra***

**14.** *T.M.A. Pai* has to be read along with *P.A. Inamdar*. The Hon'ble Court in *P.A. Inamdar* had set the following questions for its consideration:

> 27. In the light of the two orders of reference, referred to hereinabove, we propose to confine our discussion to the questions set out hereunder which, according to us, arise for decision:
>
> (1) To what extent can the State regulate admissions made by unaided (minority or non-minority) educational institutions? Can the State enforce its policy of reservation and/or appropriate to itself any quota in admissions to such institutions?
>
> (2) Whether unaided (minority and non-minority) educational institutions are free to devise their own admission procedure or whether the direction made in *Islamic Academy* for compulsorily holding an entrance test by the State or association of institutions and to choose therefrom the students entitled to admission in such institutions, can be sustained in the light of the law laid down in *Pai Foundation*?
>
> (3) Whether *Islamic Academy* could have issued guidelines in the matter of regulating the fee payable by the students to the educational institutions?
>
> (4) Can the admission procedure and fee structure be regulated or taken over by the Committees ordered to be constituted by *Islamic Academy*?

**15.** The Court in *P.A. Inamdar* held:

(*a*) Thereafter, the Court held that education, accepted as a useful activity, whether for charity or for profit, is an occupation. Nevertheless, it does not cease to be a service to society. And even though an occupation, it cannot be equated to a trade or a business (*para 89*).

(*b*) It held that the right to impart education, as an occupation, is subject to the laws imposing reasonable restrictions in the interest of the general public (*para 92*).

(*c*) The Court held that education up to the undergraduate level aims at imparting knowledge just to enrich the minds and shaping the personality of the students (*para 107*).

(*d*) The Court held that the State has no power to insist on seat sharing in unaided private professional institutions by fixing a quota of

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seats between the management and the State. The Court also held that the State cannot insist on private educational institutions which receive no aid from the State to implement the State's policy of reservation for granting admission on lesser percentage of marks i.e. on any criteria except on merit (*para 124*).

(*e*) The Court held that imposing seats or enforcing reservation policy of the State on available seats in unaided professional institutions are acts constituting serious encroachment on the right of autonomy of private professional educational institutions (*para 125*).

(*f*) Thereafter, the Court held that the observations in *T.M.A. Pai* in para 68 and other paragraphs mentioning fixation of percentage of quota are to be read and understood as possible consensual arrangements which can be reached between unaided private professional institutions and the State (*p. 128*).

***Constitution (86th Amendment) Act, 2002***

**16.** Soon after the judgment in *T.M.A. Pai*, the Constitution (Eighty-sixth Amendment) Act, 2002 was passed, though it was brought into force only on 1-4-2010. By the said amendment Article 21-A was introduced, and it says 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. By the said amendment Article 45 was substituted and Article 51-A(*k*) was added to the chapter on Fundamental Duties to say that it shall be the duty of every citizen, who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years. The Statement of Objects and Reasons stated that the goal in the original Article 45 could not be achieved even after 50 years of adoption of this provision. It narrates that the ultimate goal of providing universal and quality education still remained unfulfilled. It is stated that in order to fulfil this goal, it was felt that an explicit provision should be made in the Part relating to Fundamental Rights of the Constitution. It states that the amendment was introduced after taking into consideration the report of the Law Commission of India and the recommendations of the Standing Committee of Parliament.

***The Constitution (93rd Amendment) Act, 2005***

**17.** On 20-1-2006, the Constitution (Ninety-third Amendment) Act, 2005 was passed. It introduced Article 15(5) in the Constitution of India. The Statement of Objects and Reasons set out that greater access to higher education including professional education to a larger number of students belonging to the socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes has been a matter of major concern. That at present the number of seats available in aided or State-maintained institutions, particularly in respect of professional education, is limited in comparison to those in private unaided institutions. That Article 46 states that the State shall promote with special care the educational and

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economic interests of the weaker sections of the people and protect them from social injustice. That to promote the educational advancement of the socially and educationally backward classes of citizens or of the Scheduled Castes and Scheduled Tribes in matters of admission of students belonging to these categories in unaided educational institutions, other than the minority educational institutions referred to in clause (1) of Article 30 of the Constitution, it is proposed to *amplify Article 15*.

***Validity of Article 15(5) — Ashoka Kumar Thakur v. Union of India***

**18.** The validity of Article 15(5) along with the validity of the Central Educational Institutions (Reservation in Admission) Act, 2006 (5 of 2007) was challenged before this Hon'ble Court. A Constitution Bench in *Ashoka Kumar Thakur* v. *Union of India* cited as (2008) 6 SCC 1 upheld the validity of Article 15(5) insofar as it relates to State-maintained institutions and aided educational institutions. The question whether it would be constitutionally valid or not so far as private unaided educational institutions are concerned, was left open to be decided in the appropriate course. However, Dalveer Bhandari, J. struck down the validity of Article 15(5) insofar as it applied to unaided institutions. Act 5 0f 2007 was also upheld, subject to the exclusion of creamy layer from the socially and educationally backward classes.

***The RTE Act, 2009***

**19.** On 26-8-2009, Parliament enacted the Right of Children to Free and Compulsory Education Act, 2009. It came into force on 1-4-2010. By virtue of Section 12(1)(*c*), a recognised unaided school imparting elementary education (from Class 1 to Class 8) is obligated to admit in Class 1, to the extent of at least 25% of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood; and provide free and compulsory elementary education till its completion. The schools are to be reimbursed expenditure so incurred by it to the extent of per child expenditure incurred by the State, or the actual amount charged from the child, whichever is less, in such manner as is prescribed. What is important to note is that in no manner is there any nomination by the State of the student to the extent of 25%, nor is there any infringement on the right of the private unaided institution. Expenses are reimbursed. Leave is sought to refer to other provisions of the Act.

***Validity of Article 15(5) upheld — Indian Medical Association v. Union of India***

**20.** Before dealing with the judgment in *Society for Unaided Private Schools of Rajasthan* v. *Union of India* reported as case (2012) 6 SCC 1, it should be pointed out that on 12-5-2011 in *Indian Medical Association* v. *Union of India* reported in (2011) 7 SCC 179, a Division Bench of this Hon'ble Court upheld the validity of Article 15(5) insofar as it applies to private unaided non-minority educational institutions. It expressly disagreed with the views of Bhandari, J. in *Ashok Kumar Thakur case*.

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***Society case — Validity of the RTE Act upheld***

**21.** On 12-4-2012, in the abovementioned *Society case*, a majority of two Hon'ble Judges upheld the validity of the RTE Act in relation to unaided non-minority schools, and held that the Act was inapplicable to unaided minority schools. In view of the concession of the parties, the validity of Article 15(5) and Article 21-A was not considered. Radhakrishnan, J. in his dissenting judgment held that the Act will not apply to unaided minority and non-minority schools. He noticed in para 69 that all the petitioners in the cases before the Court wholeheartedly welcomed the introduction of Article 21-A. After this judgment, the RTE Act was amended on 1-8-2012 to say under Section 1(4) that subject to the provisions of Articles 29 and 30 of the Constitution, the provisions of this Act shall apply to conferment of rights on children to free and compulsory education; and nothing in the Act was to apply to madrasas, Vedic pathshalas, and educational institutions primarily imparting religious instruction.

**22.** It is in this background that the present matter has arisen.

***B. Submissions***

***Submission I — Education basically a State function — Institutions are public utilities — Discharging public duty — Subject to the rigours of Article 14***

**23.** It is submitted that before directly dealing with arguments of the petitioners in assailing the validity of the constitutional amendments, certain preliminary submissions on the nature of functions carried on by educational institutions including private educational institutions needs to be highlighted. Education because of its primordial nature is basically a State function. That education is also a public duty. This has been held in *Modern School* v. *Union of India* cited as (2004) 5 SCC 583:

> "*15.* As far back as 1957, it has been held by this Court in the case of *State of Bombay* v. *R.M.D. Chamarbaugwalla* that education is per se an activity that is charitable in nature. Imparting of education is a State function. The State, however, having regard to its financial constraints is not always in a position to perform its duties."

**24.** It was further held *Unni Krishnan, J.P.* v. *State of A.P.*, (1993) 1 SCC 645:

> *167.* The fact that right to education occurs in as many as three articles in Part IV viz. Articles 41, 45 and 46 shows the importance attached to it by the Founding Fathers. Even some of the articles in Part III viz. Articles 29 and 30 speak of education.
>
> *168.* In *Brown* v. *Board of Education* Earl Warren, C.J., speaking for the US Supreme Court emphasised the right to education in the following words:
>
> "Today, education is perhaps the most important function of the State and local governments … It is required in the performance of

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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* 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.

* * *

"*194*. The hard reality that emerges is that private educational institutions are a necessity in the present day context. It is not possible to do without them because the Governments are in no position to meet the demand—particularly in the sector of medical and technical education which call for substantial outlays. While education is one of the most important functions of the Indian State it has no monopoly therein. Private educational institutions—including minority educational institutions—too have a role to play."

* * *

"*204*. … Clearly and indubitably, the recognised/affiliated private educational institutions, supplement the function performed by the institutions of the State. Theirs is not an independent activity but one closely allied to and supplemental to the activity of the State …"

**25.** It was also held in *State of M.P.* v. *Shri Ram Raghubir Prasad Agarwal*, (1979) 4 SCC 686:

"*28*. It may be right to caution the State while choosing textbooks from the private sector or preparing such books on their own to remember the vital constitutional values of our nation. Social justice is the cornerstone of our Constitution. Freedom of expression is basic to our democratic progress. The right to know, awareness of the implications of a sovereign, secular, socialist republic and its membership and the broad national goals incorporated in the Constitution are fundamental. When education is a State obligation, when prescription of syllabi and textbooks falls within the governmental function, when the constellation of values mandated by the Constitution is basic to our citizenship, the play of Sections 3, 4 and 5 must respond to this script. Instruction at the secondary school level must be promotional of these paramount principles. Ultimately, it is Youth Power that makes for a Human Tomorrow. The felt necessities of our cultural integration

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and constitutional creed are fostered essentially at the school level. Books are not merely the best companions but make or mar the rising generation."

**26.** The submission is:

(*i*) In the functional context of rendering education, private unaided educational institutions are State for the purpose of Article 12;

(*ii*) Alternatively, and without prejudice to the earlier submission, discharging as they are a very solemn public duty, they are subject to the rigours of Article 14;

(*iii*) In any event, since they carry on an occupation under Article 19(1)(*g*), they are subject to reasonable restrictions under 19(6). A special provision made by law for the advancement of any socially and educationally backward class of citizens, or for the Scheduled Castes or Schedule Tribes, insofar as such special provisions relate to their admission to educational institutions, including private unaided institutions, would have been even before the introduction of Article 15(5) a reasonable restriction. Article 15(5) had to be introduced only because *T.M.A. Pai* and *P.A. Inamdar* ruled to the contra and the constituent power had to be exercised to restore the status quo ante.

[See *American Jurisprudence*, 2nd Edn.; *Rajasthan State Electricity Board* cited as (1967) 3 SCR 377 (at 385-386); *Sukhdev Singh* v. *Bhagatram Sardar Singh Raghuvanshi*, (1975) 1 SCC 421 (paras 89 to 101, especially, paras 97 and 101) and *Ramana Dayaram Shetty* v. *International Airport Authority of India*, (1979) 3 SCC 489 (paras 13 to 19, and 26)]

**27.** In *M.C. Mehta* v. *Union of India*, (1987) 1 SCR 819, after reiterating *Sukhdev Singh case* and *Ramana Shetty case*, an apprehension expressed that the State Action doctrine was inapposite, since once the authority is brought within Article 12 it would be State for all purposes, was allayed and rejected. It was held that:

"But so far as this argument is concerned, we must demur to it and point out that it is not correct to say that in India once a corporation is deemed to be 'authority', it would be subject to the constitutional limitation of fundamental rights in the performance of all its functions and that the appellation of 'authority' would stick to such corporation, irrespective of the functional context."

**28.** In *Pradeep Kumar Biswas* v. *Indian Institute of Chemical Biology* cited as (2002) 5 SCC 111 (paras 12-17, 22, 25, 27, and 40) it was held that the view of Mathew, J. in *Sukhdev Singh case* '*presaged the subsequent developments in the law*'. After quoting passages from *Sukhdev Singh case* including para 97; and after noticing that the view taken in *Sukhdev Singh* had been elaborated in *Ramana Shetty case*, the conclusion in para 40 was reached. A reading of paras 16, 17(3), 25, 30; and a careful reading of para 40 shows, that the conclusion of Mathew, J. that if a given function is of such public importance and so closely related to governmental functions so as to

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be classified as a governmental agency then the presence or absence of financial aid might be irrelevant in making a finding of "State action", was not detracted from. In this background if the judgment in *Unni Krishnan* is perused, after holding in para 76 that a private educational institution either by affiliation or recognition could not be called an instrumentality of the State, even then it was held in para 77 as under:

> "*77.* As a sequel to this, an important question arises: what is the nature of functions discharged by these institutions? They discharge a public duty. If a student desires to acquire a degree, for example, in medicine, he will have to route through a medical college. These medical colleges are the instruments to attain the qualification. If, therefore, what is discharged by the educational institution is a public duty, that requires duty to act fairly. In such a case, it will be subject to Article 14."

***Submission II***

**29.** It is submitted that once the private unaided institutions are subjected to the rigours of Article 14 in the functional context of providing education, then the same reasoning that went into upholding Article 15(5) for State-maintained and State-aided institutions in *Ashoka Kumar Thakur case* (p. 513, paras 187-194) would apply to unaided institutions also.

**30.** In *Ashoka Kumar Thakur*, it was held, as was held in *N.M. Thomas case* and *Indra Sawhney case*, that Articles 16(4) and 15(4) were not exceptions to Articles 16(1) and 15(1), and as such Article 15(5) is to be viewed in this background. Viewed in this background, a provision of reservation for socially and educationally backward classes, Scheduled Castes or Scheduled Tribes, in an unaided institution would be ultimately traceable to Articles 14 and 15(1). Article 15(5) being a restatement of Articles 14 and 15(1), no exception can be taken to its application to unaided non-minority private institutions.

**31.** Equally, *Ashoka Kumar Thakur case* (p. 486, para 127) would apply for the argument of excluding minority institutions from the application of Article 15(5).

**32.** Even otherwise, as explained in the series of minority educational cases right from *Kerala Education Bill*, even minority educational institutions have a right to admit students from their community with a reasonable percentage of non-minority students. (See for the summary of the law *T.M.A. Pai*, (2002) 8 SCC 481 paras 94, 97, 98, 102, 108, 116, 120, 125, 126, 127, 133, 145, 149, 151 and 153).

**33.** Hence, minority institutions for this additional reason constitute a separate class, and enforcing social reservation through a law under Article 15(5) cannot arise. In the manner of the choice of the students they enjoy a qualitatively different right.

**34.** Insofar as children from weaker sections and disadvantaged groups, like a child with disability, or disadvantaged due to social, cultural, economical, geographical, linguistic, gender or such other factors as may be

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specified are concerned, they would constitute a separate class, and that classification could also be justified under Article 14.

**35.** The argument that there is discrimination because aided and unaided institutions are treated alike is also not tenable because since apart from the fact that factually there is no discrimination, it has been held by this Hon'ble Court in *Glanrock Estate (P) Ltd.* v. *State of T.N.* cited as (2010) 10 SCC 96, a person is treated unequally only if that person is treated worse than others. In this case when both are subjected to standards of Article 14, there is no special treatment for any category or an adverse treatment for any category. This is quite apart from the fact that even assuming there is discrimination, it is not of that exalted magnitude as to abrogate the rights of the unaided non-minority institution, thereby, violating the basic structure of the Constitution.

**36.** Hence, Article 15(5) is a restatement of Article 14, and additionally, it achieves the purpose of a directive principle. The argument based on Perceptions 1, 2, 3 cannot carry the case of the petitioner any forward. First of all, that argument overlooks that Article 15(5) actually achieves the purpose of Article 14; and secondly, whichever 'perception' is adopted including Perception 1 of means test that argument still falls short of making out a case of violation of the basic structure.

***Submission III***

**37.** It should also be pointed out that the right claimed by the petitioner is under Article 19(1)(*g*). Article 19(1)(*g*) is subject to 19(6), which enables the State from making any law imposing any reasonable restriction in the interest of general public. A restriction to ensure egalitarian equality can by no stretch of imagination be termed as unreasonable restriction. This Hon'ble Court has held as long as the restriction is not arbitrary or excessive and beyond what is required in the interest of public, it will be reasonable.

**38.** In *State of Madras* v. *V.G. Rao* cited as (1952) SCR 597 at pp. 606 to 607, it was held that the Court has to see the nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time; these should all enter the judicial verdict.

**39.** A seven-Judge Bench in *State of Gujarat* v. *Mirzapur Moti Kureshi Kassab Jamat* cited as (2005) 8 SCC 534 at para 41 held that the interest of a citizen or a section of a community however important is secondary to the interest of a country as a whole.

**40.** In *Laxmi Khandsari* v. *State of U.P.* cited as (1981) 2 SCC 600 (para 19) it has been held that the Court has to determine whether the restrictions are in the larger public interest while deciding the question of reasonableness of restriction.

**41.** If Article 15(5) had occurred as part of Article 19(6) any enabling law would pass muster, there is no reason why on the same force Article 15(5) cannot be held valid.

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**42.** In *Deepak Theatre* v. *State of Punjab* reported as 1992 Supp (1) SCC 684 (para 5), it was held that private individuals who run a business involving public interest can be subjected to reasonable restrictions.

**43.** At this stage it should be mentioned that the expression in Article 39(*b*), '*the ownership and control of material resources of the community*' have been construed in *Sanjeev Coke Mfg. Co.* v. *Bharat Coking Coal Ltd.*, (1983) 1 SCC 147 (para 19), to mean that the expression includes all resources, natural and manmade, public and private owned. In taking this view the Court followed the earlier judgment in *State of Karnataka* v. *Ranganatha Reddy* cited as (1977) 4 SCC 471.

**44.** The point is that if an ordinary law could have been made with a declaration that it had been made to give effect to Articles 39(*a*) and (*b*), it would have had the protection of Article 31-C, it could never be argued that when a higher constituent power is exercised to achieve the same object, the same would be violative of basic structure. After all, the private unaided institutions which part with a few seats and share their resources are also reimbursed.

***Submission IV***

**45.** The violation of Article 21 as argued by the petitioners was from the perspective of Fundamental Duties under Articles 51-A(*j*) and (*k*). The simple answer to that is that said duties applied to the children from disadvantaged groups and the weaker sections as well as their parents.

***Submission V***

**46.** The submission is that if these background facts had been kept in mind, *T.M.A. Pai* and *P.A. Inamdar* would not have held that reservation on the basis of social and educational backward class, SC/ST cannot apply to unaided non-minority institutions. It is to neutralise this holding and to restore the status quo that Article 15(5) was enacted by exercising constituent powers. The status quo ante stands restored, the basis of the judgment stands removed. Hence, Article 15(5) being a restatement of Articles 14 and 15(1) is a valid exercise of constituent powers.

***Submission VI — Importance of diversity/inclusiveness in schools — As found by expert bodies***

**47.** Before dealing with the argument on the basic structure, it needs to be pointed out that the following three reports bring out the importance of diversity in schools:

1. Mudaliar Commission in its Report of the Secondary Education Commission (1953).

2. Education Commission (1964-1966) headed by Mr D.S. Kothari in its report titled '*Education and National Development*'.

3. Delhi Government Committee headed by Mr Ganguly.

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***Submission VII — No case of violation of basic structure made out***

**48.** The petitioners have made no case for violation of the basic structure. As has been demonstrated above there has been no violation of Articles 14, 19, or 21 much less a violation tantamounting to violation of the basic structure of the Constitution.

**49.** A careful analysis of the arguments made above reveal that Article 15(5) and Article 21-A have been introduced to strengthen the basic structure. It has been held by this Hon'ble Court that mere abridgment of any of the freedoms (assuming for argument sake—on facts there is no infringement) would not constitute the violation of the basic structure. It has been held that in public interest there can be reasonable abridgment of fundamental rights. The constituent power can be exercised in order to secure directive principles, directed to be accomplished while maintaining the freedoms and dignity of individuals [paras 287 and 289 of *Kesavananda Bharati* v. *State of Kerala* cited as (1973) 4 SCC 225].

**50.** Amending power cannot be construed in narrow and pedantic manner and it cannot be said that no part of Part III can be abridged (para 641 of *Kesavananda Bharati case*). What is violative of the basic structure is withdrawal of the props on which the edifice of the constitution stands. Any withdrawal of such a prop on which the edifice stands will alter the identity of the Constitution (para 1159 of *Kesavananda Bharati case*). Only if a right is so abridged that it tends to affect the basic or essential content of the right, and reduces the right only to a name, will the abridgment cease to be an abridgment. That would amount to damaging and emasculating the right itself and would be ultra vires the power under Article 368 (para 1185 of *Kesavananda Bharati case*).

**51.** Relevant page and paragraph numbers from *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225 are as follows:

| *Judge* | *Page No.* | *Para No.* |
|---|---|---|
| Sikri, J. | 306 | 10, 11, 12 |
| | 344 | 203 |
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| Hegde and Mukherjea, JJ. | 469 | 621 |
| | 473 | 633, 634 |
| | 476 | 642 |
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| Jaganmohan Reddy, J. | 594 | 1068 |
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| | 666 | 1212 |
| Khanna, J. | 739 | 1358 |
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| | 806 | 1508 |
| | 816 | 1525 |
| | 823 | 1537(*vii*) |
| Conclusion | 1007 | |

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**XI. Mr K.V. Viswanathan, Additional Solicitor General of India, for the Union of India** *(contd.)*

**52.** Relevant page and paragraph numbers from *Indira Nehru Gandhi* v. *Raj Narain*, 1975 Supp SCC 1 are as follows:

| *Judge* | *Page No.* | *Para No.* |
|---|---|---|
| A.N. Ray, J. | 45 | 62 |
| Khanna, J. | 67 | |
| | 78 | 175 |
| | 87 | 198 |
| | 88/89 | 199 |
| | 90 | 200, 201, 202 |
| | 91 | 205, 206 |
| | 114 | 251, 252 |
| Mathew, J. | 119 | 264 |
| | 129 | 308 |
| | 134 | 327 |
| | 135 | 328, 330, 332 |
| | 136 | 334, 335 |
| | 137 | 341, 342, 343 |
| Beg, J. | 191 | 510 |
| | 241 | 635, 636 |
| Chandrachud, J. | 242 | |
| | 245-246 | 650 |
| | 251-252 | 663 |
| | 252 | 664 |
| | 254 | 670 |
| | 256 | 677 |
| | 257 | 678-679 |
| | 258 | 680, 681 |
| | 261 | 689, 690 |

**53.** The reasoning in *Waman Rao* v. *Union of India*, (1981) 2 SCC 362 which upheld Article 31-A applies with equal force to the present case. Para 29 of *Waman Rao* is extracted:

> "*29.* The First Amendment is aimed at removing social and economic disparities in the agricultural sector. It may happen that while existing inequalities are being removed, new inequalities may arise marginally and incidentally. Such marginal and incidental inequalities cannot damage or destroy the basic structure of the Constitution. It is impossible

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for any Government, howsoever expertly advised, socially oriented and prudently managed, to remove every economic disparity without causing some hardship or injustice to a class of persons who also are entitled to equal treatment under the law. Thus, the adoption of "family unit" as the unit of application for the revised ceilings may cause incidental hardship to minor children and to unmarried daughters. That cannot, in our opinion, furnish an argument for assailing the impugned laws on the ground that they violate the guarantee of equality. It seems to us ironical indeed that the laws providing for agricultural ceilings should be stigmatised as destroying the guarantee of equality when their true object and intendment is to remove inequalities in the matter of agricultural holdings."

**54.** Relevant page and paragraph numbers from *Waman Rao* case are as follows:

| *Page No.* | *Para No.* |
|---|---|
| 379 | 13 |
| 380 | 14 |
| 380-381 | 16 |
| 384-386 | 20 |
| 386 | 24 |
| 387 | 25, 26 |
| 388 | 27, 28 |
| 389 | 29 |

**55.** Relevant page and paragraph numbers from *Minerva Mills Ltd.* v. *Union of India* cited as (1980) 3 SCC 625 are as follows:

| *Page No.* | *Para No.* |
|---|---|
| 639 | 1 |
| 640-641 | 6-11 |
| 643 | 18 |
| 644 | 21 |
| 647 | 25 |
| 649 | 40 |
| 650 | 41 |
| 653-654 | 55-57 |
| 654-655 | 58, 59 |
| 656 | 60, 61, 62 |
| 658 | 68 |
| 659 | 70, 71, 74 |

**Summary of Arguments**

**XI. Mr K.V. Viswanathan, Additional Solicitor General of India, for the Union of India** *(contd.)*

**56.** In *Bhim Singhji* v. *Union of India* cited as (1981) 1 SCC 166 it was held as under:

> "20. The question of basic structure being breached cannot arise when we examine the vires of an ordinary legislation as distinguished from a constitutional amendment. *Kesavananda Bharati* cannot be the last refuge of the proprietariat when benign legislation takes away their "excess" for societal weal. Nor, indeed, can every breach of equality spell disaster as a lethal violation of the basic structure. Peripheral inequality is inevitable when large-scale equalisation processes are put into action. If all the Judges of the Supreme Court in solemn session sit and deliberate for half a year to produce a legislation for reducing glaring economic inequality their genius will let them down if the essay is to avoid even peripheral inequalities. Every large cause claims some martyr, as sociologists will know. Therefore, what is a betrayal of the basic feature is not a mere violation of Article 14 but a shocking, unconscionable or unscrupulous travesty of the quintessence of equal justice. If a legislation does go that far it shakes the democratic foundation and must suffer the death penalty. But to permit the *Bharati* ghost to haunt the corridors of the court brandishing fatal writs for every feature of inequality is judicial paralysation of parliamentary function. Nor can the constitutional fascination for the basic structure doctrine be made a Trojan horse to penetrate the entire legislative camp fighting for a new social order and to overpower the battle for abolition of basic poverty by the 'basic structure' missile. Which is more basic? Eradication of die-hard, deadly and pervasive penury degrading all human rights or upholding of the legal luxury of perfect symmetry and absolute equality attractively presented to preserve the status quo ante? To use the Constitution to defeat the Constitution cannot find favour with the judiciary! I have no doubt that the strategy of using the missile of 'equality' to preserve die-hard, dreadful societal inequality is a stratagem which must be given short shrift by this Court. The imperatives of equality and development are impatient for implementation and judicial scapegoats must never be offered so that those responsible for stalling economic transformation with a social justice slant may be identified and exposed of. Part IV is a basic goal of the nation and now that the Court upholds the urban ceiling law, a social audit of the Executive's implementation a year or two later will bring to light the gaping gap between verbal valour of the statute book and the executive slumber of law-in-action. The Court is not the anti-hero in the tragedy of land reform, urban and agrarian."

**Summary of Arguments**

**XI. Mr K.V. Viswanathan, Additional Solicitor General of India, for the Union of India** *(contd.)*

**57.** It was *then* held in *M. Nagaraj* v. *Union of India* cited as (2006) 8 SCC 212 that:

> "*28.* To conclude, the theory of basic structure is based on the concept of constitutional identity. The basic structure jurisprudence is a preoccupation with constitutional identity. In *Kesavananda Bharati* v. *State of Kerala* it has been observed that "one cannot legally use the Constitution to destroy itself". It is further observed "the personality of the Constitution must remain unchanged". Therefore, this Court in *Kesavananda Bharati* while propounding the theory of basic structure, has relied upon the doctrine of constitutional identity. The word "amendment" postulates that the old Constitution survives without loss of its identity despite the change and it continues even though it has been subjected to alteration. This is the constant theme of the opinions in the majority decision in *Kesavananda Bharati*. To destroy its identity is to abrogate the basic structure of the Constitution. This is the principle of constitutional sovereignty. Secularism in India has acted as a balance between socio-economic reforms which limits religious options and communal developments. The main object behind the theory of the constitutional identity is continuity and within that continuity of identity, changes are admissible depending upon the situation and circumstances of the day."

**58.** What is important is the Court speaks of the identity of the Constitution and not the identity of the right. Relevant page and paragraph numbers from *M. Nagaraj case* are as follows:

| *Page No.* | *Para No.* |
|---|---|
| 240 | 19 |
| 243 | 23-26 |
| 244 | 28 and 29 |
| 245 | 31 |
| 245-246 | 32 |
| 246 | 33-37 |
| 248 | 43 |
| 249 | 47 |
| 251 | 50 |
| 268 | 102 |
| 269-270 | 104 |

**59.** Relevant page and paragraph numbers from *I.R. Coelho* v. *State of T.N.* cited as (2007) 2 SCC 1 are as follows:

| *Page No.* | *Para No.* |
|---|---|
| 80 | 49 |
| 80-81 | 50 |
| 81-82 | 53 |

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| | |
|---|---|
| 87 | 69 |
| 94 | 91 |
| 97 | 95 |
| 97-98 | 96 |
| 98 | 97, 98, 101 |
| 99 | 104, 105 |
| 100 | 106, 107 |
| 101 | 108, 109 |
| 104 | 123, 124 |
| 105 | 127, 128, 129 |
| 107 | 138 |
| 108 | 139-141 |
| 108-109 | 142 |
| 109 | 145, 146 |
| 110 | 147, 149 |
| 111 | 150, 151 |

**60.** In *Glanrock Estate (P) Ltd.* v. *State of T.N.* cited as (2010) 10 SCC 96 (paras 24-38, 72-75, 82-84), a constitutional amendment was challenged as violative of basic structure, and to illustrate the point that a violation of a fundamental right could violate basic structure, *Indira Nehru Gandhi case* and *Minerva Mills case* were cited. In para 30 in *Glanrock* it was held as under:

> *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* 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*. 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.

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**61.** It was further held in para 32 of the said judgment: (*Glanrock case*)

*32.* It is important to bear in mind that according to Mathew, J.'s observations in *Indira Nehru Gandhi*, equality is a feature of the rule of law and not vice versa, as submitted by Mr Viswanathan, learned counsel for the petitioner(s). Very often the expression "the rule of law" is used to convey the idea of a Government that is limited by law. The expression "the rule of law" describes a society in which the 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. It is in that sense that the expression "the rule of law" constitutes an overarching principle embodied in Article 21, one aspect of which is equality. It is in that context that this Court has used the phrase "Article 21 read with Article 14" in the judgment in *I.R. Coelho* to which one of us Kapadia, J. was a party.

**62.** In para 37 it was held as under: (*Glanrock case*)

*37.* The doctrine of classification under Article 14 has several facets and none of those facets have been abrogated by the Constitution (Thirty-fourth Amendment) Act, 1974. Equality is a comparative concept. 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. The "similarly situated test" is not attracted in this case for the simple reason that the two Acts, namely, the Janmam Act (24 of 1969), which seeks to abolish a tenure, is distinct and separate from the Ceiling Act (20 of 1972).

**63.** In para 73 it was held as under: (*Glanrock case*)

*73.* We have to first examine whether the provisions of the Janmam Act included in the Ninth Schedule by the Constitution (Thirty-fourth Amendment) Act, 1974 is violating any of the rights guaranteed under Part III of the Constitution, and if our answer is in the affirmative, our further enquiry would be whether the violation so found has abrogated or destroyed the basic structure of the Constitution. On such examination, if our answer is in the affirmative, the result would be invalidation of the Act to the extent of its violation. The petitioner, therefore, cannot succeed merely by establishing that any of his fundamental rights have been violated but he has to further show that the violation has the effect of abrogating the basic structure of the Constitution. Once it is established, the onus would shift to the State to justify the infraction of the fundamental right, and if they fail, still the State can show that such infraction has not abrogated or destroyed the basic structure of the Constitution. Violation of fundamental right, may not, therefore, ipso facto, violate the basic structure doctrine, but a law which violates the basic structure invariably violates some of the rights guaranteed under Part III, but not vice versa. A law which infringes a basic feature of the

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Constitution cannot be validated under Article 31-B, by inserting it in the Ninth Schedule of the Constitution.

**64.** In para 84 it was held as under: (*Glanrock case*)

*84.* The fundamental rights enshrined in Part III can be extinguished by constitutional amendments and if it abrogates or abridges such rights, would not as such, abrogate or abridge the basic structure. The test is whether it has the effect of nullifying the overarching principles of equality, secularism, liberty and so on especially when such a law is placed in the Ninth Schedule, which test in the present case has not been satisfied.

***Submission VIII***

**65.** If the above principles are applied to the present case there is neither an abridgment nor abrogation of any right of any unaided non-minority institution. In any case there is no abridgment so as to attract the exalted concept of basic structure. None of the five facets mentioned in para 50 of *T.M.A. Pai* stand abridged. With regard to right to admit, being an educational institution, it is being held to the rigours of Articles 14 and 15(1) to achieve egalitarian equality. The prescription actually goes to standards and excellence and also to national interest. Concepts which even *T.M.A. Pai* and *P.A. Inamdar* approved. The right to carry on an institution is nowhere affected; much less is there a dent on the pillars or edifice of the Constitution. As far as the RTE Act is concerned not only has its validity been upheld, but it is a measure which is perfectly in accord with the constitutional goals. As the study reports have revealed, diversifying the classroom making it inclusive will alone prepare the students for the life ahead. If Mark Twain is to be proved wrong when he said '*I never let my schooling get in the way of my education*,' measures like the one taken by our Constitution in form of the 86th and 93rd Amendments have to be implemented with full vigour.

**66.** It is submitted that the petitions have no merit, and may be dismissed.

**67.** At the very outset, the validity of the impugned Act (*Right of Children to Free and Compulsory Education Act, 2009*, hereinafter referred to as "the Act") has already been upheld by a three-Judge Bench of the Hon'ble Supreme Court in the judgment of *Society for Unaided Private Schools of Rajasthan* v. *Union of India*, (2012) 6 SCC 1 (hereinafter referred to as the "Society case"). The Hon'ble Supreme Court, after considering the provisions of the Act, concluded that the impugned provisions of the Act constitute a reasonable restriction on the right to occupation of the private institutions under Article 19(6) of the Constitution, in the interest of the general public. Thus, it is the respectful submission of the respondent that it is no longer open to the petitioners herein to challenge the validity of the Act, afresh.

***Binding effect of the judgment in Society case***

**68.** It is humbly submitted that the validity of the Act having already been adjudicated upon and upheld in the *Society case*, the petitioners cannot reagitate the challenge before this Court, even by raising fresh grounds of

**Summary of Arguments**

**XI. Mr K.V. Viswanathan, Additional Solicitor General of India, for the Union of India** *(contd.)*

challenge. It is pertinent to mention, however, that no new grounds have been raised by the petitioners in the present writ petitions which were not raised before this Court by the petitioners in the *Society case*. The same grounds were raised before and rejected by the Hon'ble Supreme Court in the said judgment.

**69.** Even if petitioners had sought to raise any new grounds, this Court has unequivocally held in a number of pronouncements that

> "the binding effect of a decision does not depend upon whether a particular argument was considered therein or not, provided that the point with reference to which an argument was subsequently advanced was actually decided." (*Somawanti* v. *State of Punjab*, (1963) 2 SCR 774, at p. 794)

**70.** Similarly in a later decision of *T. Govindaraja Mudaliar* v. *State of T.N.*, (1973) 1 SCC 336, this Hon'ble Court relied upon its earlier decision in *Somawanti case* and held:

> "*10.* … It was, therefore, open to those effected by the provisions of Chapter IV-A to have agitated before this Court the question which is being raised now based on the guarantee embodied in Article 19(1)(*f*) which was never done. It is apparently too late in the day now to pursue this line of argument. In this connection we may refer to the observations of this Court in *Mohd. Ayub Khan* v. *Commissioner of Police*, according to which even if certain aspects of a question were not brought to the notice of the Court it would decline to enter upon re-examination of the question since the decision had been followed in other cases. In *Somavanti* v. *State of Punjab* a contention was raised that in none of the decisions the argument advanced in that case that a law may be protected from an attack under Article 31(2) but it would be still open to challenge under Article 19(1)(*f*), had been examined or considered. Therefore, the decision of the Court was invited in the light of that argument. This contention, however, was repelled by the following observations at p. 794:
>
> > "The binding effect of a decision does not depend upon whether a particular argument was considered therein or not, provided that the point with reference to which an argument was subsequently advanced was actually decided."
>
> *11.* It is common ground in the present cases that the validity of Chapter IV-A of the Act has been upheld on all previous occasions. Merely because the aspect now presented based on the guarantee contained in Article 19(1)(*f*) was not expressly considered or a decision given thereon will not take away the binding effect of those decisions on us."

**71.** Thereafter, this Hon'ble Court reiterated the position on binding effect of a judgment of this Court with respect to the validity of a statutory provision in *Kesho Ram and Co.* v. *Union of India*, (1989) 3 SCC 151, at p. 160, in the following words:

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"*10.* Before we consider the submissions made on behalf of the tenants we would like to point out that some of the tenants who were unsuccessful before this Court in *Punjab Tin Supply Co. case*, have again filed petitions challenging the validity of Section 3 and the impugned Notification on additional grounds. In our opinion the petitions by such tenants are not maintainable as the same are barred by the principles of res judicata. Once the petitioners challenged the validity of the impugned Notification dated 24-9-1974 in earlier proceedings they ought to have raised all the grounds which could have been raised in impugning the validity of Section 3 and the notification, if they failed to raise a ground in earlier petition they cannot raise that ground now in the present proceedings. *Finality in litigation and public policy both require that a litigant should not be permitted to challenge validity of the provisions of the Act or notification at different times on different grounds.* Once the petitioners' challenge to Section 3 and the impugned notification was considered by the Court and the validity of the same was upheld it must be presumed that all grounds which could validly be raised were raised and considered by the Court. The learned counsel for the petitioners urged that the questions which are being raised in the present proceedings were neither raised nor considered by this Court in *Punjab Tin Supply Co. case*, therefore it is open to them to question the validity of Section 3 and the Notification dated 24-9-1974. *This submission is contrary to the principles of res judicata and it further ignores the binding effect of a decision of this Court under Article 141 of the Constitution.* The binding effect of a decision of this Court does not depend upon whether a particular argument was considered or not, provided the point with reference to which the argument is advanced subsequently was actually decided in the earlier decision, see *Somavanti* v. *State of Punjab*, *T. Govindaraja Mudaliar* v. *State of T.N.* and *Anil Kumar Neotia* v. *Union of India*. It is therefore no longer open to the petitioner tenants to challenge the validity of Section 3 of the Act and the impugned Notification dated 24-9-1974 on the ground that some points had not been urged or considered in *Punjab Tin Supply Co. case*. On the principles of res judicata, and also in view of Article 141 of the Constitution, the law declared by this Court in *Punjab Tin Supply Co. case* is binding on the petitioners. But even otherwise the submissions made on their behalf in impugning the validity of Section 3 and the Notification dated 24-9-1974 are devoid of any merit as we shall presently discuss the same."

**72.** Thus, it is the humble submission of the respondent that it is not open to the petitioners to challenge the validity of the Act and the writ petitions shall therefore be dismissed as not maintainable.

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**XI. Mr K.V. Viswanathan, Additional Solicitor General of India, for the Union of India** *(contd.)*

***Challenge to the validity of the Act***

**73.** The averments made by the petitioners in the writ petitions seek to assail the validity of the Act on untenable grounds. Following are the common grounds on which the validity of the Act is sought to be challenged by the petitioners:

(*i*) The provisions of the Act and the Rules made thereunder, are violative of Part III of the Constitution and particularly of the freedom guaranteed under Article 19(1)(*g*) of the Constitution of India.

(*ii*) The provisions of the Act are contrary to the ratio laid down in *T.M.A. Pai judgment*, (2002) 8 SCC 481.

(*iii*) The decision of this Hon'ble Court in the judgment of *Society case* insofar as it excludes the unaided institutions established by the minorities, is discriminatory.

(*iv*) The definition of the terms "child belonging to disadvantaged group" and "child belonging to weaker section" under Sections 2(*d*) and 2(*e*) of the Act respectively, are beyond the scope of Article 15(5) and therefore such provisions cannot be sustained on account of Article 15(5).

(*v*) Section 12(1)(*c*) infringes upon the autonomy of private unaided institutions inasmuch as it violates the autonomy guaranteed to private unaided institutions by the *Pai judgment*.

Apart from the grounds of challenge commonly raised by the petitioners, some writ petitions have also challenged the validity of individual provisions of the Act. Some of the writ petitions have also raised a grievance regarding the inadequacy of the reimbursement provided by the State under the Act. Additionally the petitioners have also sought to assail the judgment in *Society case* upholding the validity of the Act.

***Reply to the grounds of challenge to the Act***

**74.** It is the humble submission of the respondent that similar grounds were raised before the Court in *Society case* and rejected by the Hon'ble Court. Even otherwise, none of the grounds above are justifiable and do not provide sufficient reason for rebutting the presumption which is always in favour of the validity of a legislation [see *Hamdard Dawakhana* v. *Union of India*, AIR 1960 SC 554 and *State of M.P.* v. *Rakesh Kohli*, (2012) 6 SCC 312]:

***The grounds raised by the petitioners can be rebutted as follows***:

***(i) Incorrect to contend that the provisions of the Act and the Rules made thereunder are violative of Part III of the Constitution***

**75.** It is the humble submission of the respondent herein that the Act has been enacted in furtherance of the right under Article 21-A of the Constitution and it does not violate the other rights guaranteed under Part III of the Constitution.

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**76.** Article 21 mandates that no person shall be deprived of his life or personal liberty except according to the procedure established by law. Article 45 (after the amendment) provides that the State shall endeavour to provide early childhood care and education for all children until they complete the age of 6 years. Article 46 mandates that the State shall promote with special care the educational and economical interest of the weaker sections of the people, and in particular, of the Scheduled Castes and Scheduled Tribes and shall protect them from social injustice and all forms of exploitations.

**77.** In *Unni Krishnan* [(1993) 1 SCC 645, para 175] this Hon'ble Court held that "a child (citizen) has a fundamental right to free education up to the age of 14 years". This was affirmed in the *T.M.A. Pai judgment* [(2002) 8 SCC 481, para 31]. Article 21-A which was inserted by the 86th Amendment Act, came into force on 1-4-2010. It provides for right to free and compulsory education to all children of age of six to fourteen years. It is in furtherance of this right guaranteed under Article 21-A read with Article 14 and Article 46, that the Act has been enacted by Parliament exercising its legislative powers.

**78.** It has been precisely held by the Hon'ble Supreme Court in the judgment of *Society case* that:

> "*32*. Article 21 says that "no person shall be deprived of his life … except according to the procedure established by law" whereas Article 19(1)(*g*) under the chapter "Right to freedom" says that all citizens have the right to practise any profession, or to carry on any occupation, trade or business which freedom is not absolute but which could be subjected to social control under Article 19(6) in the interest of general public. By judicial decisions, right to education has been read into right to life in Article 21. A child who is denied right to access education is not only deprived of his right to live with dignity, he is also deprived of his right to freedom of speech and expression enshrined in Article 19(1)(*a*). The 2009 Act seeks to remove all those barriers including financial and psychological barriers which a child belonging to the weaker section and disadvantaged group has to face while seeking admission.
>
> *33*. It is true that, as held in *T.M.A. Pai Foundation* as well as *P.A. Inamdar*, the right to establish and administer an educational institution is a fundamental right, as long as the activity remains charitable under Article 19(1)(*g*), however, in the said two decisions the correlation between Articles 21 and 21-A, on the one hand, and Article 19(1)(*g*), on the other, was not under consideration. Further, the content of Article 21-A flows from Article 45 (as it then stood). The 2009 Act has been enacted to give effect to Article 21-A. For the above reasons, since the Article 19(1)(*g*) right is not an absolute right as Article 30(1), the 2009 Act cannot be termed as unreasonable. To put an obligation on the

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unaided non-minority schools to admit 25% children in Class I under Section 12(1)(*c*) cannot be termed as an unreasonable restriction. Such a law cannot be said to transgress any constitutional limitation. The object of the 2009 Act is to remove the barriers faced by a child who seeks admission to Class I and not to restrict the freedom under Article 19(1)(*g*).

* * *

*45*. At the outset, we may reiterate that Article 21-A of the Constitution 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. Thus, the primary obligation to provide free and compulsory education to all children of the specified age is on the State. However, the manner in which this obligation will be discharged by the State has been left to the State to determine by law. The State may do so through its own schools or through aided schools or through private schools, so long as the law made in this regard does not transgress any other constitutional limitation. This is because Article 21-A vests the power in the State to decide the manner in which it will provide free and compulsory education to the specified category of children. As stated, the 2009 Act has been enacted pursuant to Article 21-A."

Further, the Act has been held to be a reasonable restriction under Article 19(6) of the Constitution [*see No. (v), below*].

**79.** Thus, the Act does not violate the freedom guaranteed under Article 19(1)(*g*) and qualifies as a reasonable restriction on the said freedom, permissible under Article 19(6).

***(ii) Incorrect to contend that the provisions of the Act are contrary to the ratio laid down in T.M.A. Pai judgment***

**80.** The petitioners are relying on certain paragraphs of the judgment in the *T.M.A. Pai case* to aver that the private unaided institutions have maximum autonomy in matters of admission, administration, etc. and the same could not have been curtailed by the enactment of the impugned Act.

**81.** It is the humble submission of the respondent that the ratio in *T.M.A. Pai judgment* cannot be plainly read to contend that the autonomy of the private unaided institutions is absolute and unbridled. The judgment has to be understood in the background of its own facts. Further, the said judgment itself provides in para 53 that condition of admission of a small percentage of students belonging to weaker sections of the society by granting them freeships or scholarships, if not granted by the Government, can be imposed on private institutions:

"*53*. With regard to the core components of the rights under Articles 19 and 26(*a*), it must be held that while the State has the right to prescribe qualifications necessary for admission, private unaided colleges have the right to admit students of their choice, subject to an objective

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and rational procedure of selection and the compliance with conditions, if any, requiring admission of a small percentage of students belonging to weaker sections of the society by granting them freeships or scholarships, if not granted by the Government…."

**82.** Even if it is argued that the judgment in *P.A. Inamdar* has explained such seat sharing to be consensual, the power of State to require such institutions to draw a small percentage of students from disadvantaged groups and weaker sections is bolstered by the coming into force of Article 21-A of the Constitution, which enables the State to provide free and compulsory education "in such manner as the State may, by law, determine."

**83.** It was held in the *Society case* in this regard that:

"*39*. In *T.M.A. Pai Foundation*, this Court vide para 53 has observed that the State while prescribing qualifications for admission in a private unaided institution may provide for condition of giving admission to small percentage of students belonging to weaker sections of the society by giving them freeships, if not granted by the Government. Applying the said law, such a condition in Section 12(1)(*c*) imposed while granting recognition to the private unaided non-minority school cannot be termed as unreasonable. Such a condition would come within the principle of reasonableness in Article 19(6)."

It was further held that:

"*46*. In this case, we are concerned with the interplay of Article 21, Article 21-A, on the one hand, and the right to establish and administer educational institution under Article 19(1)(*g*) read with Article 19(6). That was not the issue in *T.M.A. Pai Foundation* nor in *P.A. Inamdar*. In this case, we are concerned with the validity of Section 12(1)(*c*) of the 2009 Act. Hence, we are concerned with the validity of the law enacted pursuant to Article 21-A placing restrictions on the right to establish and administer educational institutions (including schools) and not the validity of the scheme evolved in *Unni Krishnan, J.P.* v. *State of A.P.*

*47*. The above judgments in *T.M.A. Pai Foundation* and *P.A. Inamdar* were not concerned with interpretation of Article 21-A and the 2009 Act. It is true that the above two judgments have held that all citizens have a right to establish and administer educational institutions under Article 19(1)(*g*), however, the question as to whether the provisions of the 2009 Act constituted a restriction on that right and if so whether that restriction was a reasonable restriction under Article 19(6) was not in issue.

*48*. Moreover, the controversy in *T.M.A. Pai Foundation* arose in the light of the scheme framed in *Unni Krishnan case* and the judgment in *P.A. Inamdar* was almost a sequel to the directions in *Islamic Academy of Education* v. *State of Karnataka* in which the entire focus was institution-centric and not child-centric and that too in the context of higher

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education and professional education where the level of merit and excellence have to be given a different weightage than the one we have to give in the case of Universal Elementary Education for strengthening social fabric of democracy through the provision of equal opportunities to all and for children of weaker sections and disadvantaged group who seek admission not to higher education or professional courses but to Class I."

**84.** Thus, when the issue was not adjudicated upon by this Hon'ble Court in *T.M.A Pai*, the Act cannot be said to be contrary to the judgment in the said case.

***(iii) Incorrect to contend that the exclusion of the unaided institutions established by the minorities is discriminatory under Article 14***

**85.** This averment of the petitioners is surmised on the wrong presumption that the right under Article 19(1)(*g*) i.e. right to practise any occupation; and Article 30 i.e. right of minorities to establish and administer educational institutions, are identical.

**86.** It is humbly submitted by the respondent that the most basic tenet of the right to equality is that there should be equality amongst equals and inequality amongst unequals, blindly applying the same rules to unequally situated parties may lead to injustice. That the rights under Article 19(1)(*g*) and Article 30 are qualitatively different has been acknowledged in *T.M.A. Pai* as affirmed in *Islamic Academy of Education*, (2003) 6 SCC 697 and reaffirmed in *P.A Inamdar*. Thus, the same set of rules cannot be made applicable to minority and non-minority institutions.

**87.** In this respect, it was held in the judgment in *Society case* that:

"*61*. Article 15(5) is an enabling provision and it is for the respective States either to enact a legislation or issue an executive instruction providing for reservation except in the case of minority educational institutions referred to in Article 30(1). The intention of Parliament is that the minority educational institution referred to in Article 30(1) is a separate category of institutions which needs protection of Article 30(1) and viewed in that light we are of the view that unaided minority school(s) needs special protection under Article 30(1). Article 30(1) is not conditional as Article 19(1)(*g*). In a sense, it is absolute as the Constitution Framers thought that it was the duty of the Government of the day to protect the minorities in the matter of preservation of culture, language and script via establishment of educational institutions for religious and charitable purposes (*see* Article 26).

*62*. Reservations of 25% in such unaided minority schools result in changing the character of the schools if right to establish and administer such schools flows from the right to conserve the language, script or culture, which right is conferred on such unaided minority schools. Thus,

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the 2009 Act including Section 12(1)(*c*) violates the right conferred on such unaided minority schools under Article 30(1)."

***(iv) Incorrect to contend that the definition of the terms "child belonging to disadvantaged group" and "child belonging to weaker section" under Sections 2(d) and 2(e) of the Act are beyond the scope of Article 15(5)***

**88.** The petitioners seek to argue that since the Act provides for making special provisions for the classes not provided for under Article 15(5), it cannot be protected under the same Article as a special provision, as provided for under the said Article.

**89.** It is the respectful submission of the respondent that the impugned legislation has been enacted under Articles 21-A, read with Articles 14, 15(1) and 46. It has been held by this Hon'ble Supreme Court that constitutional articles providing for special provisions for the disadvantaged classes are merely emphatic statement of the principle embedded in the main provision guaranteeing right to equality. Hence, for those classes not covered by Article 15(5), special provisions can be made under Articles 14, 15(1) and 21-A.

**90.** It is further submitted that making a special provision for the disadvantaged group and weaker section of the society is only in furtherance of the right to equality guaranteed under Articles 14 and 15(1). In *M.R. Balaji* v. *State of Mysore* cited as (1963) 1 SCR 439 (at p. 455), it was held that Article 15(4) has to be read as a proviso or an exception to Articles 15(1) and 29(2). A majority of this Hon'ble Court in *T. Devadasan* v. *Union of India* cited as (1964) 4 SCR 680 reiterated that view. However, Subba Rao, J. in his dissenting opinion held that Article 16(4) is not an exception to Article 16(1) but that it is only an emphatic way of stating the principles inherent in the main provision itself. This dissenting view received a fillip when a majority decision of this Court held in *State of Kerala* v. *N.M. Thomas* cited as (1976) 2 SCC 310 (Ray, C.J. at para 28; Mathew, J. at paras 78-83; Krishna Iyer, J. at para 136 and Fazal Ali, J. at para 184), that Article 16(4) is not an exception to Article 16(1) but it was merely an emphatic way of stating the principle in Article 16(1), and Article 16(1) being a facet of the doctrine of equality enshrined under Article 14, permits reasonable classification just as Article 14 does. This view taken in *N.M. Thomas case* has been affirmed by the majority in *Indra Sawhney* v. *Union of India* cited as 1992 Supp (3) SCC 217 (Pandian, J. at para 168; Sawant, J. at paras 428-432 and Jeevan Reddy, J. at paras 700, 713, 733, 741-745).

**91.** Further, the term "weaker sections" has to be read in the light of Articles 21-A and 46 also. While Article 21-A enjoins upon the State to ensure free and compulsory education to "all children"; Article 46 speaks of promotion of economical and educational interests of even "other weaker sections" of the society. Thus, the Act cannot be assailed for making a special

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provision for the weaker sections and disadvantaged groups of the society, its purpose being a holistic scheme for ensuring the fundamental right of compulsory education guaranteed to all children between six to fourteen years of age.

**92.** Thus, on a combined reading of Articles 14, 15(1) and 21-A along with Articles 46 and 51-A(*k*), the Act is protected under the Constitution and its validity cannot be challenged on such frivolous grounds. Further, the special provisions in the Act for socially and educationally backward classes of citizens and Scheduled Castes/Scheduled Tribes, are protected under Article 15(5).

***(v) Incorrect to contend that Section 12(1)(c) infringes upon the autonomy of private unaided institutions***

**93.** It is the humble submission of the respondent that the private unaided institutions cannot claim absolute autonomy under Article 19(1)(*g*). Their right under Article 19(1)(*g*) can be reasonably curtailed under Article 19(6). This view has been sustained by the Hon'ble Supreme Court in the decision of *T.M.A. Pai* (as reaffirmed in *P.A. Inamdar case*) where the Hon'ble Supreme Court has held that the right to establish and administer educational institutions can be restricted under Article 19(6) by way of reasonable restrictions, in the interest of the general public.

**94.** This Hon'ble Court has observed in *Society case* that:

> "*35.* At the outset, it may be noted that Article 19(6) is a saving and enabling provision in the Constitution as it empowers Parliament to make a law imposing reasonable restriction on the Article 19(1)(*g*) right to establish and administer an educational institution while Article 21-A empowers Parliament to enact a law as to the manner in which the State will discharge its obligation to provide for free and compulsory education."

It was further held that:

> "*53.* On reading *T.M.A. Pai Foundation* and *P.A. Inamdar* in the proper perspective, it becomes clear that the said principles have been applied in the context of professional/higher education where merit and excellence have to be given due weightage and which tests do not apply in cases where a child seeks admission to Class I and when the impugned Section 12(1)(*c*) seeks to remove the financial obstacle. Thus, if one reads the 2009 Act including Section 12(1)(*c*) in its application to unaided non-minority school(s), the same is saved as reasonable restriction under Article 19(6)."

**95.** Thus, it is the respectful submission of the respondent that Section 12(1)(*c*) is a reasonable restriction on the autonomy of private unaided institutions, under Article 19(6).

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***Substantial portion of Justice Radhakrishnan's opinion supports the stand of the Union of India***

**96.** The petitioners have further relied upon the dissenting judgment of Radhakrishnan, J. in *Society case*. It is sought to be contended that the obligations imposed upon private unaided institutions under Section 12(1)(*c*) along with Sections 4,10,14,15 and 16 can at best be directory and not mandatory. In the humble submission of the respondent, this view of the minority in Society judgment is not binding and is a stand-alone view which does not get any support from the other judgments on the issue, including the judgments in *T.M.A. Pai* and *P.A. Inamdar cases*.

**97.** At the very outset, it is humbly submitted that even the dissenting judgment of the minority did not declare the Act to be unconstitutional, on the contrary, the minority judgment upheld the various provisions of the Act in paras 275 to 289. Thus, it has been concluded in para 289, as thus:

> "*289.* The legislature noticed that there are a large number of children from the disadvantaged groups and weaker sections who drop out of the schools before completing the elementary education, if promotion to higher class is subject to screening. Past experience shows that many of such children have dropped out of the schools and are being exploited physically and mentally. The Universal Elementary Education eluded those children due to various reasons and it is in order to curb all those maladies that the Act has provided for free and compulsory education. I, therefore, find no merit in the challenge against those provisions which are enacted to achieve the goal of Universal Elementary Education for strengthening the social fabric of the society."

**98.** So far as the dissenting opinion of the Hon'ble Justice Radhakrishnan with respect to the obligation of providing free and compulsory education being on the State alone is concerned, the same has been answered by the respondent in its written submissions (Written submissions on behalf of the Union of India, by Mr K.V. Viswanathan, Additional Solicitor General) that imparting of education is a public function and in that capacity private unaided institutions stand on a different footing than other non-State actors. In discharging its duty to ensure the right to education to its citizens, as guaranteed by the Constitution, under Article 21-A of the Constitution, regulation of activities of these institutions, which are discharging a public function, is permissible.

**99.** Coming to the opinion of the minority in *Society case* on the application of Section 12(1)(*c*) to private unaided institutions, the minority opinion relies on the interpretation of the judgments in *T.M.A. Pai* and *P.A. Inamdar*, to conclude that the obligation imposed upon the unaided private institutions to admit 25% of its students from weaker section and disadvantaged group is an inroad into the fundamental right of carrying on any occupation guaranteed to the private institutions. It is the respectful

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submission of the respondent that the above conclusion has been arrived at by overlooking the observation of the majority in the judgment of *T.M.A. Pai* itself which provided in para 53 of the judgment that:

> "*53.* On reading *T.M.A. Pai Foundation* and *P.A. Inamdar* in the proper perspective, it becomes clear that the said principles have been applied in the context of professional/higher education where merit and excellence have to be given due weightage and which tests do not apply in cases where a child seeks admission to Class I and when the impugned Section 12(1)(*c*) seeks to remove the financial obstacle. Thus, if one reads the 2009 Act including Section 12(1)(*c*) in its application to unaided non-minority school(s), the same is saved as reasonable restriction under Article 19(6)."

**100.** Moreover, the opinion overlooks the fact that what is prohibited is the nomination of individuals by the State to seats in unaided private institutions. The Act, in the present case makes no provisions for any such nomination of students by the State. It is a social welfare legislation that merely requires the private institutions to draw 25% of its students from weaker section and disadvantaged group of the society and even reimburses the institution for imparting education to such students. Thus, the provision under Section 12(1)(*c*) cannot be held to be infringing the right to autonomy of the private institutions. Further, as already stated above, the majority judgment in *Society case* has concluded that such an obligation under Section 12(1)(*c*) is a reasonable restriction under Article 19(6) of the Constitution.

***Averments in the writ petitions regarding validity of provisions of the Act***

**101.** It is pertinent to mention that despite the fact that the Act in its entirety is sought to be declared as unconstitutional, no reasons have been given by the petitioners as to how their rights have been infringed by the various provisions of the Act. The main challenge in all the petitions, barring Writ Petition No. 160 of 2014—*Unaided Schools Forum* v. *Union of India* and Writ Petition No. 145 of 2014—*Tamil Nadu Arya Samaj Educational Society* v. *Union of India*, is only to Section 12(1)(*c*) of the Act.

**102.** Even though no notice has been issued to the Union in the matter of Writ Petition No. 160 of 2014, it is by way of abundant caution that the respondent seeks to respond to the challenges raised in the said writ petition.

**103.** Following are the challenges raised against the provisions of the Act and the Union's answer to such averments:

***(i) Section 4***

**103.1.** Section 4 of the Act has been challenged on the ground that it compels the school to admit students who have not been admitted to any school before, which may increase the financial burden on the school and on

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the fees paying parents. Neither any particulars have been given, nor has any factual foundation been laid to make good the contention. It is further averred in the petitions, that the second proviso to the section has the effect of compelling the schools to continue the elementary education of the child even after she/he completes 14 years of age. Therefore, it is an unreasonable restriction on the right to carry on occupation under Article 19(1)(*g*) and Articles 14, and 30 of the Constitution.

**103.2.** This averment of the petitioner does not hold water as the obligation of the school to continue the education of a child even independent of the Act. No child, irrespective of the existence of such a provision can be thrown out of school midstream. The enactment of the provision is only by way of *ex abundanti cautela*.

**103.3.** It is the respectful submission of the respondent that the petitioner has failed to prove any material prejudice caused to its fundamental rights by virtue of this section. Secondly, the *Society* judgment in *para 269* (minority opinion) notes that a challenge has been raised to the application of the impugned sections (including Section 4) insofar as they impose obligations on private institutions. The judgment of the minority (which has been relied upon by the petitioners) did not think it fit to invalidate the said section as violative of right under Article 19(1)(*g*).

***(ii) Section 12(1)(c)***

**103.4.** A detailed submission has been made with regard to Section 12(1)(*c*) and its validity in paras 27-29.

***(iii) Section 12(2)***

**103.5.** Section 12(2) has been sought to be declared invalid on the ground that the reimbursement provided is insufficient and illusory. This challenge can be answered on two points. *Firstly*, education being a charitable activity, the schools do not have the right to make profit in imparting education. *Secondly*, it is incorrect that the amount of reimbursement is insufficient as no data/figures have been produced by the Petitioner to support this averment.

***(iv) Section 13***

**103.6.** Section 13 is sought to be challenged on the ground that it prohibits the school from subjecting a child or his parents to screening procedure, which would affect the standard of education in schools. It is further contended that as selecting a procedure of admission is an integral part of the freedom of occupation, it cannot be taken away by enactment of such a provision. It is relevant to mention here that the challenge to Section 13 was raised and rejected in *Society case* and even the minority judgment expressly held as follows.

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"*279.* Several representations were received by the Ministry of Human Resources and Development, Government of India seeking clarification on that aspect and the Ministry issued a Notification dated 23-11-2009 under Section 35(1) of the Act laying guidelines to be followed by both unaided and aided educational institutions. It was pointed out that the object of the provisions of Section 13(1) read with Section 2(*d*) is to ensure that schools adopt an admission procedure which is non-discriminatory, rational and transparent and the schools do not subject children and their parents to admission tests and interviews so as to deny admission. I find no infirmity in Section 13, which has nexus with the object sought to be achieved, that is, access to education."

**103.7.** Section 35 of the Act reads as follows:

"**35.** ***Power to issue directions***.—(1) The Central Government may issue such guidelines to the appropriate Government or, as the case may be, the local authority, as it deems fit for the purpose of implementation of the provisions of this Act.

(2) The appropriate Government may issue guidelines and give such directions, as it deems fit, to the local authority or the School Management Committee regarding implementation of the provisions of this Act.

(3) The local authority may issue guidelines and give such directions, as it deems fit, to the School Management Committee regarding implementation of the provisions of this Act."

**103.8.** No averment has been made in the writ petitions challenging Section 14 of the Act.

**(*v*) *Section 15***

**103.9.** Section 15 of the Act has been challenged on the ground that it prohibits the school from denying admission to a child after the extended period of admission is over, affecting the quality of education in the school. It is the respectful submission of the respondent that this is a frivolous objection raised without any concrete case of violation of any right being set out. This provision was included in the Act to cover a situation where for no fault of the child, he is not able to seek admission within the stipulated period of admission.

**103.10.** Moreover, the said section was sought to be challenged in *Society case* and the Hon'ble Supreme Court in its judgment (both of majority and minority) upheld the validity of the section, in following words:

"*281.* Section 15 states that a child shall not be denied admission even if the child is seeking admission subsequent to the extended period. A child who evinces an interest in pursuing education shall never be discouraged, so that the purpose envisaged under the Act could be achieved. I find no legal infirmity in that provision."

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***(vi) Section 16***

**103.11.** Section 16 of the Act is challenged on the ground that it is a fetter on the autonomy of the private institutions as it takes away their right to hold back a child in a class or to expel her/him from school. It is humbly submitted that the validity of the said section was challenged and upheld in the judgment of *Society case* and even the minority judgment (which is relied upon by the petitioners) has held as follows:

> "*282*. Challenge was also made to Section 16 of the Act stating that it will lead to indiscipline and also deterioration in the quality of the education, which I find difficult to agree with looking to the object and purpose of the Act. Holding back in a class or expulsion may lead to large number of drop-outs from the school, which will defeat the very purpose and object of the Act, which is to strengthen the social fabric of democracy and to create a just and humane society. The provision has been incorporated in the Act to provide for special tuition for the children who are found to be deficient in their studies, the idea is that failing a child is an unjust mortification of the child's personality, too young to face the failure in life in his or her early stages of education. Duty is cast on everyone to support the child and the child's failure is often not due to the child's fault, but several other factors. No legal infirmity is found in that provision, hence the challenge against Section 16 is rejected."

***(vii) Section 17***

**103.12.** Section 17 of the Act is sought to be declared unconstitutional on the ground that it is vague and subject to misuse. It is the respectful submission of the respondent that the said ground is completely absurd inasmuch as it tries to perpetuate the evil of corporal and mental punishment to children of tender age of six to fourteen years because of the fear that the child may misuse the provision.

**103.13.** It is pertinent to mention here that the said section was not even challenged before the Hon'ble Court in *Society case* and was in fact welcomed by the schools (*see para 272*).

***(viii) Sections 18 and 19***

**103.14.** The petitioners have sought to challenge the validity of Sections 18 and 19, which provide for recognition of schools on fulfilment of prescribed norms, on the ground that the said sections are discriminatory, as they treat different kinds of schools alike. It is humbly submitted that no substantial ground has been raised to challenge the validity of the said sections. Moreover, in *Society case*, the Hon'ble Supreme Court has already upheld the validity of the said sections (both by majority and minority opinions) and the Hon'ble Court held as follows:

> "283. … Sections 18 and 19 insist that no school shall be established without obtaining certificate of recognition under the Act and that the

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norms and standards specified in the Schedule be fulfilled, if not already fulfilled, within a stipulated time. There is nothing objectionable in those provisions warranting our interference."

**(*ix*) *Section 29***

**103.15.** Lastly, the petitioners have challenged the validity of Section 29 of the Act on the ground that it seeks to unify the curriculum in different schools, thus treating unequals equally.

**103.16.** It is the humble submission of the respondents that the said section is being sought to be assailed on frivolous grounds. Secondly, the validity of the said section was challenged in *Society case* and was upheld as follows:

"287. Further, the curriculum framework contemplated by Section 29(1) does not subvert the freedom of an institution to choose the nature of education that it imparts, as well as the affiliation with CBSE or other educational boards. Over and above, what has been prescribed by those affiliating or recognising bodies is that these schools have also to follow the curriculum framework contemplated by Section 29(1) so as to achieve the object and purpose of the Act. I, therefore, find no infirmity in the curriculum or evaluation procedure laid down in Section 29 of the Act."

**(*x*) *Challenge to the Schedule to the Act***

**103.17.** The petitioners have also sought to challenge the validity of the Act on the ground of certain norms laid down in the Schedule to the Act delineating certain infrastructural requirements. It is humbly submitted that this ground has been raised without adducing any reasons as to how it violates the petitioner's right to occupation.

**103.18.** Some of the norms and standards laid out in the Schedule are:

(*a*) Teacher student ratio to be 1:35

(*b*) Separate toilets for boys and girls

(*c*) Safe and adequate drinking water facility to all children

(*d*) Playground

(*e*) Minimum number of working days of the school

(*f*) library

It can be seen from the above that these are the most basic norms that every school must follow in order to provide an environment for quality education and the petitioners' challenge to the requirements set out in the Schedule is absolutely untenable.

**104.** Thus, it is the respectful submission of the respondents that the challenge to the constitutional validity of the Act is completely unfounded and devoid of any merits and therefore deserves to be rejected.

The Judgment of the Court was delivered by

**A.K. PATNAIK, J.**— This is a reference made by a three-Judge Bench of this Court by order dated 6-9-2010 in *Society for Unaided Private Schools of Rajasthan* v. *Union of India*[1] to a Constitution Bench. As per the aforesaid order dated 6-9-2010[1], we are called upon to decide on the validity of clause (5) of Article 15 of the Constitution inserted by the Constitution (Ninety-third Amendment) Act, 2005 with effect from 20-1-2006 and on the validity of Article 21-A of the Constitution inserted by the Constitution (Eighty-sixth Amendment) Act, 2002 with effect from 1-4-2010.

**2.** Clause (5) of Article 15 of the Constitution reads as follows:

> "**15. (5)** Nothing in this article or in sub-clause (*g*) of clause (1) of Article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes insofar as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30."

Clause (5) of Article 15 of the Constitution, therefore, 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 insofar as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30 of the Constitution.

**3.** The constitutional validity of clause (5) of Article 15 of the Constitution insofar as it enables the State to make special provisions relating to admission to educational institutions of the State and educational institutions aided by the State was considered by a Constitution Bench of this Court in *Ashoka Kumar Thakur* v. *Union of India*[2] and the Constitution Bench held in the aforesaid case that clause (5) of Article 15 is valid and does not violate the "basic structure" of the Constitution so far as it relates to the State-maintained institutions and aided educational institutions. In the aforesaid case, however, the Constitution Bench left open the question whether clause (5) of Article 15 was constitutionally valid or not so far as "private unaided" educational institutions are concerned, as such "private unaided" educational institutions were not before the Court. This batch of writ petitions has been filed by private unaided educational institutions and we are called upon to decide whether clause (5) of Article 15 of the Constitution so far as it relates to "private unaided" educational institutions is valid and does not violate the basic structure of the Constitution.

**4.** Article 21-A of the Constitution reads as follows:

> "**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."

1 (2012) 6 SCC 102
2 (2008) 6 SCC 1

Thus, Article 21-A of the Constitution, provides 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. Parliament has made the law contemplated by Article 21-A by enacting the Right of Children to Free and Compulsory Education Act, 2009 (for short "the 2009 Act"). The constitutional validity of the 2009 Act was considered by a three-Judge Bench of the Court in *Society for Unaided Private Schools of Rajasthan* v. *Union of India*[3]. Two of the three Judges have held the 2009 Act to be constitutionally valid, but they have also held that the 2009 Act is not applicable to unaided minority schools protected under Article 30(1) of the Constitution. In the aforesaid case, however, the three-Judge Bench did not go into the question whether clause (5) of Article 15 or Article 21-A of the Constitution is valid and does not violate the basic structure of the Constitution. In this batch of writ petitions filed by the private unaided institutions, the constitutional validity of clause (5) of Article 15 and of Article 21-A has to be decided by this Constitution Bench.

**5.** Both clause (5) of Article 15 and Article 21-A were inserted in the Constitution by Parliament by exercise of its power of amendment under Article 368 of the Constitution. A Bench of thirteen Judges of this Court in *Kesavananda Bharati* v. *State of Kerala*[4] considered the scope of the amending power of Parliament under Article 368 of the Constitution and the majority of the Judges held that Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution. Hence, we are called upon to decide in this reference the following two substantial questions of law:

**5.1.** (*i*) Whether by inserting clause (5) in Article 15 of the Constitution by the Constitution (Ninety-third Amendment) Act, 2005, Parliament has altered the basic structure or framework of the Constitution?

**5.2.** (*ii*) Whether by inserting Article 21-A of the Constitution by the Constitution (Eighty-sixth Amendment) Act, 2002, Parliament has altered the basic structure or framework of the Constitution?

***Validity of clause (5) of Article 15 of the Constitution***

***Contentions of the learned counsel for the petitioners***

**6.** Mr Mukul Rohatgi, learned Senior Counsel for the petitioners in Writ Petition (C) No. 416 of 2012, submitted that in *T.M.A. Pai Foundation* v. *State of Karnataka*[5] the majority of the Judges of the eleven-Judge Bench speaking through Kirpal, C.J. have held that the fundamental right to carry on any occupation under Article 19(1)(*g*) of the Constitution includes the right to run and administer a private unaided educational institution. He submitted that in *Minerva Mills Ltd.* v. *Union of India*[6] Chandrachud, C.J., writing the

3 (2012) 6 SCC 1
4 (1973) 4 SCC 225
5 (2002) 8 SCC 481
6 (1980) 3 SCC 625

judgment for the majority of the Judges of the Constitution Bench, has held that Articles 14, 19 and 21 of the Constitution constitute the golden triangle which affords to the people of this country an assurance that the promise held forth by the Preamble will be performed by ushering an egalitarian era through the discipline of fundamental rights, that is, without emasculation of the rights to liberty and equality which alone can help preserve the dignity of the individual. He submitted that in the aforesaid case, the Constitution Bench held that: (SCC p. 660, para 75)

> "*75.* … '*1.* … Section 4 of the Constitution (Forty-second Amendment) Act is beyond the amending power of Parliament and is void since it damages the basic or essential features of the Constitution and destroys its basic structure by a total exclusion of challenge to any law on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 or Article 19 of the Constitution….' †"

Mr Rohatgi submitted that Article 19(1)(*g*) of the Constitution is, therefore, a basic feature of the Constitution and this basic feature is destroyed by providing in clause (5) of Article 15 of the Constitution that nothing in Article 19(1)(*g*) of the Constitution 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 insofar as such special provisions relate to their admission to educational institutions including private educational institutions.

**7.** Mr Rohatgi explained that a nine-Judge Bench of this Court in *I.R. Coelho* v. *State of T.N.*[7] relying on the aforesaid judgment in *Minerva Mills case*[6] has similarly held that Articles 14, 19 and 21 of the Constitution stand on altogether a different footing and after the evolution of the basic structure doctrine in *Kesavananda Bharati*[4], it will not be open to immunise legislation made by Parliament from judicial scrutiny on the ground that these fundamental rights are not part of the basic structure of the Constitution. He submitted that in the aforesaid judgment, this Court, therefore, has also held that the existence of the power of Parliament to amend the Constitution at will, with requisite voting strength, so as to make any kind of laws that excludes Part III including the power of judicial review under Article 32 is incompatible with the basic structure of the Constitution and, therefore, such an exercise, if challenged, has to be tested on the touchstone of basic structure as reflected in Article 21 read with Article 14 and Article 19 of the Constitution. Mr Rohatgi submitted that Bhandari, J. has taken the view in *Ashoka Kumar Thakur* v. *Union of India*[2] that the imposition of reservation on unaided institutions by the Ninety-third Amendment has abrogated Article 19(1)(*g*), a basic feature of the

† **Ed.**: As observed in *Minerva Mills Ltd.* v. *Union of India*, (1980) 2 SCC 591 at pp. 592-93, para 1.

7 (2007) 2 SCC 1

6 *Minerva Mills Ltd.* v. *Union of India*, (1980) 3 SCC 625

4 (1973) 4 SCC 225

2 (2008) 6 SCC 1

Constitution and, therefore, the Ninety-third Amendment of the Constitution is ultra vires the Constitution.

**8.** Mr R.F. Nariman, learned Senior Counsel for the petitioners in Writ Petition (C) No. 128 of 2014, submitted that clause (5) of Article 15 of the Constitution is violative of Article 14 of the Constitution inasmuch as it treats unequals as equals. He argued 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 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 such educational institutions. He referred to para 55 of the majority judgment of this Court in *T.M.A. Pai Foundation*[5] in which the difference in the administration of private unaided institutions and government aided institutions has been noticed. He argued that clause (5) of Article 15 of the Constitution as its very language indicates does not apply to minority educational institutions referred to in clause (1) of Article 30 of the Constitution. He submitted that Article 14 is, thus, violated because aided minority institutions and unaided minority institutions cannot be treated alike. Clause (5) of Article 15 of the Constitution, therefore, is discriminatory and violative of the equality clause in Article 14 of the Constitution, which is a basic feature of the Constitution.

**9.** Mr Nariman next submitted that clause (5) of Article 15 of the Constitution is a clear violation of Article 19(1)(*g*) of the Constitution, inasmuch as it compels 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. He referred to the observations of this Court in *P.A. Inamdar* v. *State of Maharashtra*[8] (SCC p. 601, para 125) that private educational institutions, which intend to provide better professional education, cannot be forced by the State to make admissions available on the basis of reservation policy to less meritorious candidates and that unaided institutions, as they are not deriving any aid from State funds, should have their own admissions following a fair, transparent and non-exploitative method based on merit. He vehemently submitted that when reservation in favour of the Scheduled Castes and the Scheduled Tribes and other socially and educationally backward classes of citizens is made in admission to private educational institutions and unaided private educational institutions by the State, such private educational institutions will no longer be institutions of excellence. He submitted that in *T.M.A. Pai Foundation*[5], the majority of the Judges have held that private unaided educational institutions impart education and that the State cannot take away the choice in matters of selection of students for admission and clause (5) of Article 15

5 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481
8 (2005) 6 SCC 537

of the Constitution insofar as it enables the State to take away this choice for admission of students is violative of freedom of private educational institutions under Article 19(1)(*g*) of the Constitution.

**10.** Mr Nariman next submitted that in *Mohini Jain* v. *State of Karnataka*[9], this Court has held that the "right to life" is a compendious expression with all those rights which the courts must enforce because they are basic to the dignified enjoyment of life and that the dignity of an individual cannot be assured unless it is accompanied by the right to education. He submitted that under Article 51-A(*j*) of the Constitution, it is a duty of every citizen of India to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement. He argued that every citizen can strive towards excellence through education by studying in educational institutions of excellence. He submitted that clause (5) of Article 15 of the Constitution insofar as it enables the State to make special provisions relating to admission to private educational institutions for socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes will affect also this right under Article 21 read with Article 51-A(*j*) of the Constitution.

**11.** Mr Nariman submitted that clause (5) of Article 15 of the Constitution has been brought in by an amendment to achieve the directive principles of State policy in Part IV of the Constitution as well as the goals of social and economic justice set out in the Preamble of the Constitution, but the majority of the Judges speaking through Chandrachud, C.J., have held in *Minerva Mills case*[6] that the goals set out in Part IV of the Constitution have to be achieved without the abrogation of the means provided for by Part III of the Constitution. He submitted that in the aforesaid majority judgment in *Minerva Mills case*[6] authored by Chandrachud, C.J., it has also been observed that Parts III and IV together constitute the core of our Constitution and anything that destroys the balance between the two parts will ipso facto destroy an essential element of the basic structure of our Constitution. He submitted that clause (5) of Article 15 of the Constitution inasmuch as it is violative of Articles 14, 19(1)(*g*) and 21 of the Constitution destroys the basic feature of the Constitution and is, therefore, beyond the amending power of Parliament.

**12.** Dr Rajeev Dhavan, learned Senior Counsel appearing for the petitioners in WP (C) No. 152 of 2013, submitted that two tests have to be applied for determining whether a constitutional amendment is violative of basic structure insofar as it affects fundamental rights, and these two tests are the "identity test" and the "width test". He submitted that the Court has to see whether the identity of a fundamental right as judicially determined is not destroyed by the width of the power introduced by the amendment of the Constitution and if the conclusion is that the width of the power of the State

9 (1992) 3 SCC 666
6 *Minerva Mills Ltd.* v. *Union of India*, (1980) 3 SCC 625

vested by the constitutional amendment is such as to destroy the essence of the right, the amendment can be held to destroy the basic structure of the Constitution. In support of this proposition he relied on the judgment of this Court in *M. Nagaraj* v. *Union of India*[10].

**13.** Mr Dhavan submitted that in *T.M.A. Pai Foundation case*[5] the majority judgment has determined the content of the right of a private educational institution under Article 19(1)(*g*) of the Constitution and the content of this right comprises the: (*a*) charity, (*b*) autonomy, (*c*) voluntariness, (*d*) non-sharing of seats between the State Governments and the private institutions, (*e*) co-optation, and (*f*) reasonableness principles. He submitted that clause (5) of Article 15 of the Constitution inserted by Parliament by way of amendment, however, provides that nothing in Article 19(1)(*g*) of the Constitution shall prevent the State from making any special provision, by law, for admission to private educational institutions of persons belonging to socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes. He vehemently argued that by clause (5) of Article 15 of the Constitution the power that is vested in the State is such that it can destroy the essence of the right of private educational institution under Article 19(1)(*g*) of the Constitution as determined by this Court in *T.M.A. Pai Foundation case*[5] and therefore the constitutional amendment inserting clause (5) in Article 15 of the Constitution is destructive of the basic structure of the Constitution.

**14.** Mr Anil B. Divan, learned Senior Counsel appearing for the petitioners in WP (C) No. 60 of 2014 and WP (C) No. 160 of 2014 submitted that in *Boyd* v. *United States*[11] Bradley, J., has observed that it will be the duty of the courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments into these rights. He submitted that in *Dwarkadas Shrinivas* v. *Sholapur Spg. & Wvg. Co. Ltd.*[12] Mahajan, J., has held that in dealing with constitutional matters it is always well to bear in mind these observations of Bradley, J. He submitted that while deciding on validity of clause (5) of Article 15 of the Constitution, we should bear in mind the aforesaid observations of Bradley, J. He submitted that Chandrachud, C.J. in *Minerva Mills Ltd.* v. *Union of India*[6] (SCC p. 657, para 63) has referred to the observations of Brandies, J. that the need to protect liberty is the greatest when the Government's purposes are beneficent, particularly when political pressures exercised by numerically large groups can tear the country asunder by leaving it to the legislature to pick and choose favoured areas and favourite classes for preferential treatment. He submitted that clause (5) of Article 15 of the Constitution is an amendment made by Parliament to appease socially and educationally backward classes of citizens and the Scheduled Castes or the Scheduled Tribes for political

10 (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013
5 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481
11 29 L Ed 746 : 116 US 616 (1886)
12 AIR 1954 SC 119
6 (1980) 3 SCC 625

gains and it is for the Court to protect the fundamental right of private educational institutions under Article 19(1)(*g*) of the Constitution as interpreted by this Court in *T.M.A. Pai Foundation*[5].

**15.** Mr Divan next submitted that clause (5) of Article 15 of the Constitution as its very language indicates, applies to non-minority private educational institutions but does not apply to minority educational institutions referred to in clause (1) of Article 30 of the Constitution. He argued that there is absolutely no rationale for exempting the minority educational institutions from the purview of clause (5) of Article 15 of the Constitution and clause (5) of Article 15 of the Constitution really gives a favourable treatment to the minority educational institutions and is violative of the equality clause in Article 14 of the Constitution.

**16.** Mr Divan relied on the decision of this Court in *Ahmedabad St. Xavier's College Society* v. *State of Gujarat*[13] to submit that the whole object of conferring the right on the minority under Article 30 of the Constitution is to ensure that there will be an equality between the majority and the minority. He submitted that H.R. Khanna, J. in his judgment in the aforesaid case has clarified that: (SCC p. 772, para 77)

> "*77.* The idea of giving some special rights to the minorities is not to have a kind of a privileged or pampered section of the population but to give to the minorities a sense of security and a feeling of confidence."

He submitted that Kirpal, C.J. speaking for majority in *T.M.A. Pai Foundation*[5] has similarly held that the essence of Article 30(1) of the Constitution is to ensure equal treatment between the majority and the minority institutions that laws of the land must apply equally to majority institutions as well as to minority institutions and minority institutions must be allowed to do what the non-minority institutions are permitted to do.

**17.** Mr Divan submitted that clause (5) of Article 15 of the Constitution insofar as it excludes minority institutions referred to in Article 30(1) of the Constitution is also violative of secularism which is a basic feature of the Constitution. He referred to the judgment in *M. Ismail Faruqui* v. *Union of India*[14] in which this Court has held that: (SCC p. 403, para 37)

> "*37.* … The concept of secularism is one facet of the right to equality woven as the central golden thread in the fabric depicting the pattern of the scheme in our Constitution."

***Contentions of the learned counsel for the Union of India***

**18.** Mr Mohan Parasaran, learned Solicitor General, submitted that this Court has held in *Ashoka Kumar Thakur* v. *Union of India*[2] 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

5 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481
13 (1974) 1 SCC 717
14 (1994) 6 SCC 360
2 (2008) 6 SCC 1

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 private educational institutions. He submitted that it will be clear from paras 53 and 68 of the judgment of the eleven-Judge Bench of this Court in *T.M.A. Pai Foundation*[5] that reserving a small percentage of seats in private educational institutions, aided or unaided, for weaker, poorer and backward sections of society did not in any way affect the right of private educational institutions under Article 19(1)(*g*) of the Constitution.

**19.** Mr Parasaran argued that after the judgment of this Court in *T.M.A. Pai Foundation*[5] a five-Judge Bench of this Court in *Islamic Academy of Education* v. *State of Karnataka*[15] was of the view that as per the judgment in *T.M.A. Pai Foundation*[5] in case of non-minority professional colleges a percentage of seats could be reserved by the Government for poorer and backward sections. He submitted that this view taken by the five-Judge Bench of this Court in *Islamic Academy of Education* v. *State of Karnataka*[15], however, did not find favour with a seven-Judge Bench of this Court in *P.A. Inamdar*[8] which held that there is nothing in the judgment of this Court in *T.M.A. Pai Foundation*[5] allowing the State to regulate or control admissions in the unaided professional educational institutions so as to compel them to give up a share of the available seats to the candidates chosen by the State or for enforcing the reservation policy of the State. He submitted that, therefore, Parliament introduced clause (5) in Article 15 of the Constitution by the Constitution (Ninety-Third Amendment) Act, 2005 providing that the State may 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 private educational institutions, whether aided or unaided by the State. He vehemently argued that clause (5) of Article 15 introduced by the constitutional amendment is consistent with the right to establish and administer the private educational institutions under Article 19(1)(*g*) of the Constitution as interpreted by *T.M.A. Pai Foundation*[5] and, therefore, does not violate the right under Article 19(1)(*g*) of the Constitution.

**20.** Mr Parasaran next submitted that minority institutions referred to in Article 30 of the Constitution have been excluded from the purview of clause (5) of Article 15 of the Constitution because the Constitution has given a special status to minority institutions. He submitted that in *Ashoka Kumar Thakur* v. *Union of India*[2], this Court has held that exclusion of minority educational institutions from clause (5) of Article 15 of the Constitution is not violative of Article 14 of the Constitution as the minority educational institutions, by themselves, are a separate class and their rights are protected

5 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481
15 (2003) 6 SCC 697
8 *P.A. Inamdar* v. *State of Maharashtra*, (2005) 6 SCC 537
2 (2008) 6 SCC 1

by other constitutional provisions. He submitted that the argument that clause (5) of Article 15 of the Constitution is violative of equality clause in Article 14 of the Constitution is therefore misconceived.

***Opinion of the Court on the validity of clause (5) of Article 15 of the Constitution***

**21.** We have considered the submissions of the learned counsel for the parties and we find that the object of clause (5) of Article 15 is to enable the State to give equal opportunity to socially and educationally backward classes of citizens or to the Scheduled Castes and the Scheduled Tribes to study in all educational institutions other than minority educational institutions referred to in clause (1) of Article 30 of the Constitution. This will be clear from the Statement of Objects and Reasons of the Bill, which after enactment became the Constitution (Ninety-Third Amendment) Act, 2005 extracted hereinbelow:

> "**1.** Greater access to higher education including professional education to a larger number of students belonging to the socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes has been a matter of major concern. At present, the number of seats available in aided or State maintained institutions, particularly in respect of professional education, is limited in comparison to those in private unaided institutions.
>
> **2.** It is laid down in Article 46, as a directive principle of State policy, that the State shall promote with special care the educational and economic interests of the weaker sections of the people and protect them from social injustice. *To promote the educational advancement of the socially and educationally backward classes of citizens or of the Scheduled Castes and Scheduled Tribes in matters of admission of students belonging to these categories in unaided educational institutions, other than the minority educational institutions referred to in clause (1) of Article 30 of the Constitution, it is proposed to amplify Article 15.*
>
> **3.** The Bill seeks to achieve the above objects." (emphasis supplied)

**22.** Clause (1) of Article 15 of the Constitution provides that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them and clause (2) of Article 15 of the Constitution provides that:

> "**15. (2)** No citizen shall, on grounds 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 the general public."

These provisions were made to ensure that every citizen irrespective of his religion, race, caste, sex, place of birth or any of them, is given the equal

treatment by the State and he has equal access to public places. Despite these provisions in Article 15 of the Constitution as originally adopted, some classes of citizens, Scheduled Castes and Scheduled Tribes have remained socially and educationally backward and have also not been able to access educational institutions for the purpose of advancement. To amplify the provisions of Article 15 of the Constitution as originally adopted and to provide equal opportunity in educational institutions, clause (5) has been inserted in Article 15 by the constitutional amendment made by Parliament by the Ninety-Third Amendment Act, 2005. As the object of clause (5) of Article 15 of the Constitution is to provide equal opportunity to a large number of students belonging to the socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes to study in educational institutions and equality of opportunity is also the object of clauses (1) and (2) of Article 15 of the Constitution, is we cannot hold that clause (5) of Article 15 of the Constitution is an exception or a proviso overriding Article 15 of the Constitution, but an enabling provision to make equality of opportunity promised in the Preamble in the Constitution a reality.

**23.** For this view, we are supported by the majority judgment of this Court in *State of Kerala* v. *N.M. Thomas*[16] in which this Court has held that clause (4) of Article 16 of the Constitution which has opening words similar to the opening words in clause (5) of Article 15 is not an exception or a proviso to Article 16, but is a provision intended to give equality of opportunity to backward classes of citizens in matters of public employment. Similarly, in *Indra Sawhney* v. *Union of India*[17], this Court following the majority judgment in *State of Kerala* v. *N.M. Thomas*[16] held that clause (4) of Article 16 was not an exception to clause (1) of Article 16, but is an enabling provision to give effect to the equality of opportunity in matters of public employment. These two authorities have also been cited by K.G. Balakrishnan, C.J., in his judgment in *Ashoka Kumar Thakur* v. *Union of India*[2] to hold that clause (5) of Article 15 of the Constitution is not an exception to clause (1) of Article 15, but may be taken as an enabling provision to carry out the constitutional mandate of equality of opportunity.

**24.** We may now consider whether clause (5) of Article 15 of the Constitution has destroyed the right under Article 19(1)(*g*) of the Constitution to establish and administer private educational institutions. It is for the first time that this Court held in *T.M.A. Pai Foundation*[5] that the establishment and running of an educational institution "is occupation" within the meaning of Article 19(1)(*g*) of the Constitution. In para 20 of the majority judgment, while dealing with the four components of the rights under Articles 19 and 26(*a*) of the Constitution in respect of private unaided non-minority educational institutions, Kirpal, C.J. has held that education is

16 (1976) 2 SCC 310 : 1976 SCC (L&S) 227
17 1992 Supp (3) SCC 217 : 1992 SCC (L&S) Supp 1 : (1992) 22 ATC 385
2 (2008) 6 SCC 1
5 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481

per se regarded as an activity that is charitable in nature. Kirpal, C.J. has further held in paras 53 and 68: (SCC pp. 543-44 & 549)

> "*53*. With regard to the core components of the rights under Articles 19 and 26(*a*), it must be held that while the State has the right to prescribe qualifications necessary for admission, *private unaided colleges have the right to admit students of their choice, subject to an objective and rational procedure of selection and the compliance with conditions, if any, requiring admission of a small percentage of students belonging to weaker sections of the society by granting them freeships or scholarships, if not granted by the Government.* …
>
> * * *
>
> *68*. It would be unfair to apply the same rules and regulations regulating admission to both aided and unaided professional institutions. It must be borne in mind that unaided professional institutions are entitled to autonomy in their administration while, at the same time, they do not forego or discard the principle of merit. It would, therefore, be permissible for the university or the Government, at the time of granting recognition, to require a private unaided institution to provide for merit-based selection while, at the same time, giving the management sufficient discretion in admitting students. This can be done through various methods. For instance, a certain percentage of the seats can be reserved for admission by the management out of those students who have passed the common entrance test held by itself or by the State/university and have applied to the college concerned for admission, while the rest of the seats may be filled up on the basis of counselling by the State agency. *This will incidentally take care of poorer and backward sections of the society. The prescription of percentage for this purpose has to be done by the Government according to the local needs and different percentages can be fixed for minority unaided and non-minority unaided and professional colleges*. The same principles may be applied to other non-professional but unaided educational institutions viz. graduation and postgraduation non-professional colleges or institutes."
>
> (emphasis supplied)

**25.** Thus, the content of the right under Article 19(1)(*g*) of the Constitution to establish and administer private educational institutions, as per the judgment of this Court in *T.M.A. Pai Foundation*[5], includes the right to admit students of their choice and autonomy of administration, but this Court has made it clear in *T.M.A. Pai Foundation*[5] that this right and autonomy will not be affected if a small percentage of students belonging to weaker and backward sections of the society were granted freeships or scholarships, if not granted by the Government. This was the charitable element of the right to establish and administer private educational institutions under Article 19(1)(*g*) of the Constitution. Hence, the identity of the right of private educational institutions under Article 19(1)(*g*) of the

5 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481

Constitution as interpreted by this Court, was not to be destroyed by admissions from amongst educationally and socially backward classes of citizens as well as the Scheduled Castes and the Scheduled Tribes.

**26.** In *P.A. Inamdar*[8], this Court speaking through Lahoti, C.J., was, however, of the view that the judgment in *T.M.A. Pai Foundation*[5] held that there was no power vested on the State under clause (6) of Article 19 to regulate or control admissions in the unaided educational institutions so as to compel them to give up a share of the available seats to the State or to enforce reservation policy of the State on available seats in unaided professional institutions. This will be clear from para 125 of the judgment in *P.A. Inamdar*[8], which is extracted hereinbelow: (SCC p. 601)

> "*125.* As per our understanding, neither in the judgment of *Pai Foundation*[5] nor in the Constitution Bench decision in *Kerala Education Bill*[18] which was approved by *Pai Foundation*[5] is there anything which would allow the State to regulate or control admissions in the unaided professional educational institutions so as to compel them to give up a share of the available seats to the candidates chosen by the State, as if it was filling the seats available to be filled up at its discretion in such private institutions. This would amount to nationalisation of seats which has been specifically disapproved in *Pai Foundation*[5]. *Such imposition of quota of State seats or enforcing reservation policy of the State on available seats in unaided professional institutions are acts constituting serious encroachment on the right and autonomy of private professional educational institutions. Such appropriation of seats can also not be held to be a regulatory measure in the interest of the minority within the meaning of Article 30(1) or a reasonable restriction within the meaning of Article 19(6) of the Constitution.* Merely because the resources of the State in providing professional education are limited, private educational institutions, which intend to provide better professional education, cannot be forced by the State to make admissions available on the basis of reservation policy to less meritorious candidates. Unaided institutions, as they are not deriving any aid from State funds, can have their own admissions if fair, transparent, non-exploitative and based on merit."
>
> (emphasis supplied)

**27.** The reasoning adopted by this Court in *P.A. Inamdar*[8], therefore, is that the appropriation of seats by the State for enforcing a reservation policy was not a regulatory measure and not reasonable restriction within the meaning of clause (6) of Article 19 of the Constitution. As there was no provision other than clause (6) of Article 19 of the Constitution under which the State could in any way restrict the fundamental right under Article 19(1)(*g*) of the Constitution, Parliament made the Constitution (Ninety-third Amendment) Act, 2005 to insert clause (5) in Article 15 of the

8 *P.A. Inamdar* v. *State of Maharashtra*, (2005) 6 SCC 537
5 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481
18 *Kerala Education Bill, 1957, In re*, AIR 1958 SC 956

Constitution to provide that nothing in Article 19(1)(*g*) of the Constitution 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 insofar as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State. Clause (5) in Article 15 of the Constitution, thus, vests a power on the State, independent of and different from the regulatory power under clause (6) of Article 19, and we have to examine whether this new power vested in the State which enables the State to force the charitable element on a private educational institution destroys the right under Article 19(1)(*g*) of the Constitution.

**28.** According to Dr Dhavan, the right of a private educational institution under Article 19(1)(*g*) of the Constitution as laid down by this Court in *T.M.A. Pai Foundation*[5] has a voluntary element. In fact, this Court in *P.A. Inamdar*[8] has held in para 126 at p. 601 of SCC that the observations in para 68 of the judgment in *T.M.A. Pai Foundation*[5] merely permit unaided private institutions to maintain merit as the criterion of admission by voluntarily agreeing for seat-sharing with the State or adopting selection based on common entrance test of the State and that there are also observations in *T.M.A. Pai Foundation*[5] to say that they may frame their own policy to give freeships and scholarships to the needy and poor students or adopt a policy in line with the reservation policy of the State to cater to the educational needs of the weaker and poorer sections of the society. In our view, all freedoms under which Article 19(1) of the Constitution, including the freedom under Article 19(1)(*g*), have a voluntary element but this voluntariness in all the freedoms in Article 19(1) of the Constitution can be subjected to reasonable restrictions imposed by the State by law under clauses (2) to (6) of Article 19 of the Constitution. Hence, the voluntary nature of the right under Article 19(1)(*g*) of the Constitution can be subjected to reasonable restrictions imposed by the State by law under clause (6) of Article 19 of the Constitution. As this Court has held in *T.M.A. Pai Foundation*[5] and *P.A. Inamdar*[8] the State can under clause (6) of Article 19 make regulatory provisions to ensure the maintenance of proper academic standards, atmosphere and infrastructure (including qualified staff) and the prevention of maladministration by those in charge of the management. However, as this Court held in the aforesaid two judgments that nominating students for admissions would be an unacceptable restriction in clause (6) of Article 19 of the Constitution, Parliament has stepped in and in exercise of its amending power under Article 368 of the Constitution inserted clause (5) in Article 15 to enable the State to make a law making special provisions for admission of socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes for their advancement and to a very limited extent affected the voluntary element of this right under

5 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481
8 *P.A. Inamdar* v. *State of Maharashtra*, (2005) 6 SCC 537

Article 19(1)(*g*) of the Constitution. We, therefore, do not find any merit in the submission of the learned counsel for the petitioners that the identity of the right of unaided private educational institutions under Article 19(1)(*g*) of the Constitution has been destroyed by clause (5) of Article 15 of the Constitution.

**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 citizens 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*[5], 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

5 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481

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 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.

**32.** Articles 29(2), 30(1) and 30(2) of the Constitution, which are relevant, for deciding these contentions, are quoted hereinbelow:

> "**29.** ***Protection of interests of minorities***.—(1) * * *
>
> (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.
>
> (1-A) * * *
>
> (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."

**33.** On the question whether the right of minority institutions under Article 30(1) of the Constitution would be affected by admission of students who do not belong to the minority community which has established the institutions, Kirpal, C.J. writing the majority judgment in *T.M.A. Pai Foundation*[5] considered the previous judgments of this Court and then held in para 149 (SCC pp. 582 & 583):

> "*149*. Although the right to administer includes within it a right to grant admission to students of their choice under Article 30(1), when such a minority institution is granted the facility of receiving grant-in-aid, Article 29(2) would apply, and necessarily, therefore, one of the rights of administration of the minorities would be eroded to some extent. Article 30(2) is an injunction against the State not to discriminate against the minority educational institution and prevent it from receiving aid on the ground that the institution is under the management of a minority. While, therefore, a minority educational institution receiving grant-in-aid would not be completely outside the discipline of Article 29(2) of the Constitution, by no stretch of imagination can the rights guaranteed under Article 30(1) be annihilated. It is this context that some interplay between Article 29(2) and Article 30(1) is required. As observed quite aptly in *St. Stephen's case*[19] (SCC p. 608, para 85) '†the fact that Article 29(2) applies to minorities as well as non-minorities does not mean that it was intended to nullify the special right guaranteed to minorities in Article 30(1)'†. The word 'only' used in Article 29(2) is of considerable significance and has been used for some avowed purpose. **Denying admission to non-minorities for the purpose of accommodating minority students to a reasonable extent will not be only*** *on grounds of religion, etc., but is primarily meant to preserve the minority character of the institution and to effectuate the guarantee under Article 30(1).** The best possible way is to hold that as long as the minority educational institution permits admission of citizens belonging to the non-minority class to a reasonable extent based upon merit, it will not be an infraction of Article 29(2), even though the institution admits students of the minority group of its own choice for whom the institution was meant. What would be a reasonable extent would depend upon variable factors, and it may not be advisable to fix any specific percentage. The situation would vary according to the type of institution and the nature of education that is being imparted in the institution. Usually, at the school level, although it may be possible to fill up all the seats with students of the minority group, at the higher level, either in colleges or in technical institutions, it may not be possible to fill up all the seats with the students of the minority group. However, even if it is possible to fill up all the seats with students of the minority group, the moment the institution is

5 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481
19 *St. Stephen's College* v. *University of Delhi*, (1992) 1 SCC 558
† **Ed.**: Emphasis between the two dagger marks in the original has been ignored
* **Ed.**: Emphasis has been supplied to the matter between two asterisks.
** **Ed.**: The word "only" has been emphasised in original as well.

granted aid, the institution will have to admit students of the non-minority group to a reasonable extent, whereby the character of the institution is not annihilated, and at the same time, the rights of the citizen engrafted under Article 29(2) are not subverted. It is for this reason that a variable percentage of admission of minority students depending on the type of institution and education is desirable, and indeed, necessary, to promote the constitutional guarantees enshrined in both Article 29(2) and Article 30." (emphasis in original)

Thus, the law as laid down by this Court is that the minority character of an aided or unaided minority institution cannot be annihilated by admission of students from communities other than the minority community which has established the institution, and whether such admission to any particular percentage of seats will destroy the minority character of the institution or not will depend on a large number of factors including the type of institution.

**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*[2], 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*[14], this Court has held that: (SCC p. 403, para 37)

"*37.* … The Preamble of the Constitution read in particular with Articles 25 to 28 emphasises this aspect and indicates that … the concept

2 (2008) 6 SCC 1
14 (1994) 6 SCC 360

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*[5] 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*[5] 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.

**36.** We may now come to the submission of Mr Nariman that the fundamental right under Article 21 read with Article 51-A(*j*) of the Constitution is violated by clause (5) of Article 15 of the Constitution. According to Mr Nariman, every person has a right under Article 21 and a duty under Article 51-A(*j*) to strive towards excellence in all spheres of individual and collective activity, but this will not be possible if private educational institutions in which a person studies for the purpose of achieving excellence are made to admit students from amongst backward classes of citizens and from the Scheduled Castes and the Scheduled Tribes. This contention, in our considered opinion, is not founded on the experience of educational institutions in India.

**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.

5 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481

**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*[2] 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.

***Validity of Article 21-A of the Constitution***

***Contention of the learned counsel for the petitioners***

**39.** The second substantial question of law which we are called upon to decide is whether by inserting Article 21-A by the Constitution (Eighty-sixth Amendment) Act, 2002, Parliament has altered the basic structure or framework of the Constitution. Before we refer to the contentions of the learned counsel for the petitioners, we must reiterate some facts. Article 21-A is titled "Right to Education" and it provides 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. Accordingly, the 2009 Act was enacted by Parliament to provide free and compulsory education to all children of the age of six to fourteen years. The validity of the 2009 Act was challenged and considered in *Society for Unaided Private Schools of Rajasthan* v. *Union of India*[3] by a three-Judge Bench of this Court. Two learned Judges S.H. Kapadia, C.J. and Swatanter Kumar, J. held that the 2009 Act is constitutionally valid and shall apply to the following: (SCC pp. 43-44, para 64)

> "(*i*) a school established, owned or controlled by the appropriate Government or a local authority;
>
> (*ii*) an aided school including aided minority school(s) receiving aid or grants to meet whole or part of its expenses from the appropriate Government or the local authority;
>
> (*iii*) a school belonging to specified category; and
>
> (*iv*) an unaided non-minority school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority."

The two learned Judges, however, held that the 2009 Act, in particular Sections 12(1)(*c*) and Section 18(3), infringe the fundamental rights guaranteed to unaided minority schools under Article 30(1) of the Constitution and therefore the 2009 Act shall not apply to such unaided minority schools. Differing from the majority opinion expressed by the two learned Judges, Radhakrishnan, J. held that Article 21-A casts an obligation on the State and not on unaided non-minority and unaided minority schools to provide free and compulsory education to children of the age of six to

2 (2008) 6 SCC 1
3 (2012) 6 SCC 1

fourteen years. After the aforesaid judgment of this Court in *Society for Unaided Private Schools of Rajasthan* v. *Union of India*[3], the 2009 Act was amended by the Right of Children to Free and Compulsory Education (Amendment) Act, 2012 (Act 30 of 2012) and by the amendment it was provided in sub-section (4) of Section 1 of the 2009 Act that subject to the provisions of Articles 29 and 30 of the Constitution, the provisions of the 2009 Act shall apply to conferment of rights on children to free and compulsory education.

**40.** Mr Rohatgi, learned Senior Counsel for the petitioners in Writ Petition (C) No. 416 of 2012, submitted that Article 21-A of the Constitution creates obligation only upon the State and its instrumentalities as defined in Article 12 of the Constitution and does not cast any obligation on a private unaided educational institution. He submitted that the minority opinion of Radhakrishnan, J. in *Society for Unaided Private Schools of Rajasthan* v. *Union of India*[3] is, therefore, a correct interpretation of Article 21-A. He submitted that if Article 21-A is interpreted to include the private unaided educational institutions within its sweep then it would abrogate the right under Article 19(1)(*g*) of the Constitution to establish and administer private educational institutions which is a basic feature of the Constitution.

**41.** Mr Nariman, learned Senior Counsel for the petitioners in Writ Petition (C) No. 128 of 2014, submitted that the word "State" used in Article 21-A of the Constitution would mean the State as defined in Article 12 of the Constitution and therefore would include the Government and Parliament of India and the Government and the legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India. He submitted that this Court has held in *P.D. Shamdasani* v. *Central Bank of India Ltd.*[20] that the language and structure of Article 19 and its setting in Part III of the Constitution clearly show that the article was intended to protect those freedoms against State action only and hence violation of rights of property by individuals is not within the purview of Article 19 of the Constitution. He submitted that this Court has also held in *Vidya Verma* v. *Shiv Narain Verma*[21] that the fundamental right of personal liberty under Article 21 of the Constitution is available against only the State and not against the private individuals. He submitted that, therefore, the word "State" in Article 21-A of the Constitution would not include private unaided educational institutions or private individuals.

**42.** Mr Nariman submitted that before the Constitution (Eighty-sixth Amendment) Act, 2002, Article 45 provided that the State shall endeavour to provide, within a period of ten years from the commencement of the Constitution, "for" free and compulsory education for all children until they

3 (2012) 6 SCC 1
20 AIR 1952 SC 59
21 AIR 1956 SC 108 : 1956 Cri LJ 283

complete the age of fourteen years. He submitted that what Article 45 therefore meant was that the State alone shall endeavour to provide "for" free and compulsory education to all children up to the age of fourteen years. He submitted that by the Constitution (Eighty-sixth Amendment) Act, 2002, Article 45 was deleted and in its place Article 21-A was inserted in the Constitution. He submitted that in Article 21-A of the Constitution, the word "for" is missing but this does not mean that the obligation of the State to fund free and compulsory education to all children up to the age of 14 years could be passed on by the State to private unaided educational institutions. He submitted that Article 21-A, if construed to mean that the State could by law pass on its obligation under Article 21-A to provide free and compulsory education to all children up to the age of fourteen years to private unaided schools, Article 21-A of the Constitution would abrogate the right of private educational schools under Article 19(1)(*g*) of the Constitution as interpreted by this Court in *T.M.A. Pai Foundation*[5].

**43.** Mr Nariman submitted that the Objects and Reasons of the Bill which became the 2009 Act explicitly stated that the 2009 Act is pursuant to Article 21-A of the Constitution but did not make any reference to clause (5) of Article 15 of the Constitution. He submitted that the validity of the provisions of the 2009 Act will, therefore, have to be tested only by reference to Article 21-A of the Constitution and not by reference to clause (5) of Article 15 of the Constitution. According to both Mr Rohatgi and Mr Nariman, Section 12(1)(*c*) of the 2009 Act insofar as it provides that a private unaided school shall admit in Class I to the extent of at least 25% of the total strength of the class, children belonging to weaker sections and disadvantaged group in the neighbourhood and provide free and compulsory education till its completion is violative of the right of private unaided schools under Article 19(1)(*g*) of the Constitution as interpreted by this Court in *T.M.A. Pai Foundation*[5] and *P.A. Inamdar*[8]. They submitted that the majority opinion of the three-Judge Bench in *Society for Unaided Private Schools of Rajasthan* v. *Union of India*[3] is, therefore, not correct.

**44.** Mr Ajmal Khan, learned Senior Counsel appearing for the petitioners in Writ Petition (C) No. 1081 of 2013 (Muslim Minority Schools Managers' Association) and Mr T.R. Andhyarujina, learned Senior Counsel appearing for intervener in Writ Petition (C) No. 60 of 2014 (La Martiniere Schools) that under Article 30(1) of the Constitution all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice. They submitted that the State while making the law to provide free and compulsory education to all children of the age of six to fourteen years cannot be allowed to encroach on this right of the minority institutions under Article 30(1) of the Constitution. They

5 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481
8 *P.A. Inamdar* v. *State of Maharashtra*, (2005) 6 SCC 537
3 (2012) 6 SCC 1

referred to the decisions of this Court right from *Kerala Education Bill case*[18] to *T.M.A. Pai case*[5] to argue that admitting children other than those of the minority community which establish the school cannot be forced upon the minority institutions, whether aided or unaided. They submitted that the 2009 Act, if made applicable to minority schools, aided or unaided, will be ultra vires Article 30(1) of the Constitution. They submitted that the majority judgment of this Court in *Society for Unaided Private Schools of Rajasthan* v. *Union of India*[3], has taken a view that the 2009 Act will not apply to unaided minority schools but will apply to aided minority schools. They submitted that accordingly sub-section (4) of Section 1 of the 2009 Act provides that subject to the provisions of Articles 29 and 30 of the Constitution, the provisions of the Act shall apply to conferment of rights on children to free and compulsory education. They submitted that this sub-section (4) of Section 1 of the 2009 Act should be declared as ultra vires Article 30(1) of the Constitution.

***Submissions of the learned counsel for the Union of India***

**45.** In reply, Mr K.V. Viswanathan, learned Additional Solicitor General, submitted that the Statement of Objects and Reasons of the Bill, which was enacted as the Constitution (Eighty-sixth Amendment) Act, 2002, stated that the goal set out in Article 45 of the Constitution of providing free and compulsory education for children up to the age of 14 years could not be achieved even after 50 years of adoption of the provision and in order to fulfil this goal, it was felt that a new provision in the Constitution should be inserted as 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. He submitted that in accordance with Article 21-A of the Constitution, the 2009 Act has been enacted which provides the manner in which such free and compulsory education for children up to the age of 14 years shall be provided by the State and it provides in Section 12(1)(*c*) that private unaided schools shall admit in Class I from amongst weaker sections of society and from disadvantaged groups at least twenty-five per cent of the strength of the class and provide free and compulsory education.

**46.** Mr Viswanathan submitted that private educational institutions cannot have any grievance in this regard because they are performing a function akin to the function of the State. He submitted that applying the functional test private educational institutions are also State within the meaning of Article 12 of the Constitution and, therefore, the argument of Mr Nariman that the obligation of providing free and compulsory education to all children of the age of six to fourteen years cannot be passed on by the State to private educational institutions has no substance. Mr Viswanathan

18 *Kerala Education Bill, 1957, In re*, AIR 1958 SC 956
5 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481
3 (2012) 6 SCC 1

submitted that in para 53 of the judgment in *T.M.A. Pai Foundation*[5] this Court has held that while private unaided educational institutions have the right to admit students of their choice, admission of a small percentage of students belonging to weaker sections of the society by granting them freeships or scholarships, if not granted by the Government should also be done. He submitted that in para 68 of *T.M.A. Pai Foundation*[5], this Court has also held that a small percentage of seats may also be filled up to take care of poorer and backward sections of the society. He submitted that the 2009 Act, therefore, has provided in Section 12(1)(*c*) that an unaided private school shall admit in Class I, to the extent of at least twenty-five per cent of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education till its completion and this provision of the 2009 Act, therefore, is not ultra vires Article 19(1)(*g*) of the Constitution.

**47.** Regarding minority institutions, Mr Viswanathan submitted that under Article 30(1) of the Constitution they have equal status and accordingly this Court has held in *Society for Unaided Private Schools of Rajasthan* v. *Union of India*[3] the 2009 Act will not apply to unaided minority schools but will apply to aided minority schools. He submitted that accordingly the 2009 Act was amended by the Right of Children to Free and Compulsory Education (Amendment) Act, 2012, so as to provide in sub-section (4) of Section 1 of the 2009 Act that subject to the provisions of Articles 29 and 30 of the Constitution, the provisions of the 2009 Act shall apply to conferment of rights on children to free and compulsory education.

***Opinion of the Court on Article 21-A of the Constitution and on the validity of the 2009 Act***

**48.** We have considered the submissions of the learned counsel for the parties and we find that this is what it is stated in the Statement of Objects and Reasons of the Constitution (Eighty-third Amendment) Bill, 1997, which ultimately was enacted as the Constitution (Eighty-sixth Amendment) Act, 2002:

> "**1.** The Constitution of India in a directive principle contained in Article 45, has made a provision for free and compulsory education for all children up to the age of fourteen years within ten years of promulgation of the Constitution. We could not achieve this goal even after 50 years of adoption of this provision. The task of providing education to all children in this age group gained momentum after the National Policy of Education (NPE) was announced in 1986. The Government of India, in partnership with the State Governments, has made strenuous efforts to fulfil this mandate and, though significant improvements were seen in various educational indicators, the ultimate goal of providing universal and quality education still remains

5 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481
3 (2012) 6 SCC 1

unfulfilled. In order to fulfil this goal, it is felt that an explicit provision should be made in the Part relating to Fundamental Rights of the Constitution.

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

**3.** After taking into consideration the report of the Law Commission of India and the recommendations of the Standing Committee of Parliament, the proposed amendments in Part III, Part IV and Part IV-A of the Constitution are being made which are as follows:

(*a*) to provide for free and compulsory education to children in the age group of 6 to 14 years and for this purpose, a legislation would be introduced in Parliament after the Constitution (Ninety-third Amendment) Bill, 2001 is enacted;

(*b*) to provide in Article 45 of the Constitution that the State shall endeavour to provide early childhood care and education to children below the age of six years; and

(*c*) to amend Article 51-A of the Constitution with a view to providing that it shall be the obligation of the parents to provide opportunities for education to their children.

**4.** The Bill seeks to achieve the above objects.

MURLI MANOHAR JOSHI.

NEW DELHI;
16-11-2001."

It will, thus, be clear from the Statement of Objects and Reasons extracted above that although the directive principle in Article 45 contemplated that the State will provide free and compulsory education for all children up to the age of fourteen years within ten years of promulgation of the Constitution, this goal could not be achieved even after 50 years and, therefore, a constitutional amendment was proposed to insert Article 21-A in Part III of the Constitution. Bearing in mind this object of the Constitution (Eighty-sixth Amendment) Act, 2002 inserting Article 21-A of the Constitution, we may now proceed to consider the submissions of the learned counsel for the parties.

**49.** Article 21-A of the Constitution, as we have noticed, states 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. The word "State" in Article 21-A can only mean the "State" which can make

the law. Hence, Mr Rohatgi and Mr Nariman are right in their submission that the constitutional obligation under Article 21-A of the Constitution is on the State to provide free and compulsory education to all children of the age of 6 to 14 years and not on private unaided educational institutions. Article 21-A, however, states that the State shall by law determine the "manner" in which it will discharge its constitutional obligation under Article 21-A. Thus, a new power was vested in the State to enable the State to discharge this constitutional obligation by making a law. However, Article 21-A has to be harmoniously construed with Article 19(1)(*g*) and Article 30(1) of the Constitution. As has been held by this Court in *Venkataramana Devaru* v. *State of Mysore*[22]: (AIR p. 268, para 29)

> "*29.* … The rule of construction is well settled that when there are in an enactment two provisions which cannot be reconciled with each other, they should be so interpreted that, if possible, effect could be given to both. This is what is known as the rule of harmonious construction."

We do not find anything in Article 21-A which conflicts with either the right of private unaided schools under Article 19(1)(*g*) or the right of minority schools under Article 30(1) of the Constitution, but the law made under Article 21-A may affect these rights under Articles 19(1)(*g*) and 30(1). The law made by the State to provide free and compulsory education to the children of the age of 6 to 14 years should not, therefore, be such as to abrogate the right of unaided private educational schools under Article 19(1)(*g*) of the Constitution or the right of the minority schools, aided or unaided, under Article 30(1) of the Constitution.

**50.** While discussing the validity of clause (5) of Article 15 of the Constitution, we have already noticed that in paras 53 and 68 of the judgment in *T.M.A. Pai Foundation*[5], this Court has held that admission of a small percentage of students belonging to weaker sections of the society by granting them freeships or scholarships, if not granted by the Government and the admission to some of the seats to take care of poorer and backward sections of the society may be permissible and would not be inconsistent with the rights under Article 19(1)(*g*) of the Constitution. In *P.A. Inamdar*[8], however, this Court explained that there was nothing in this Court's judgment in *T.M.A. Pai Foundation*[5] to say that such admission of students from amongst weaker, backward and poorer sections of the society in private unaided institutions can be done by the State because the power vested on the State in clause (6) of Article 19 of the Constitution is to make only regulatory provisions and this power could not be used by the State to force admissions from amongst weaker, backward and poorer sections of the society on private unaided educational institutions. While discussing the validity of clause (5) of Article 15, we have also held that there is an element of voluntariness of

22 AIR 1958 SC 255
5 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481
8 *P.A. Inamdar* v. *State of Maharashtra*, (2005) 6 SCC 537

all the freedoms under Article 19(1) of the Constitution, but the voluntariness in these freedoms can be subjected to law made under the powers available to the State under clauses (2) to (6) of Article 19 of the Constitution.

**51.** In our considered opinion, therefore, by the Constitution (Eighty-sixth Amendment) Act, a new power was made available to the State under Article 21-A of the Constitution to make a law determining the manner in which it will provide free and compulsory education to the children of the age of six to fourteen years as this goal contemplated in the directive principles in Article 45 before this constitutional amendment could not be achieved for fifty years. This additional power vested by the Constitution (Eighty-sixth Amendment) Act, 2002 in the State is independent and different from the power of the State under clause (6) of Article 19 of the Constitution and has affected the voluntariness of the right under Article 19(1)(*g*) of the Constitution. By exercising this additional power, the State can by law impose admissions on private unaided schools and so long as the law made by the State in exercise of this power under Article 21-A of the Constitution is for the purpose of providing free and compulsory education to the children of the age of 6 to 14 years and so long as such law forces admission of children of poorer, weaker and backward sections of the society to a small percentage of the seats in private educational institutions to achieve the constitutional goals of equality of opportunity and social justice set out in the Preamble of the Constitution, such a law would not be destructive of the right of the private unaided educational institutions under Article 19(1)(*g*) of the Constitution.

**52.** To give an idea of the goals Parliament intended to achieve by enacting the 2009 Act, we extract Paras 4, 5 and 6 of the Statement of Objects and Reasons of the Bill which was enacted as the 2009 Act hereinbelow:

> "**4.** The proposed legislation is anchored in the belief that the values of equality, social justice and democracy and the creation of a just and humane society can be achieved only through provision of inclusive elementary education to all. Provision of free and compulsory education of satisfactory quality to children from disadvantaged and weaker sections is, therefore, not merely the responsibility of schools run or supported by the appropriate Governments, but also of schools which are not dependent on government funds.
>
> **5.** It is, therefore, expedient and necessary to enact a suitable legislation as envisaged in Article 21-A of the Constitution.
>
> **6.** The Bill seeks to achieve this objective."

It will be clear from the aforesaid extract that the 2009 Act intended to achieve the constitutional goal of equality of opportunity through inclusive elementary education to all and also intended that private schools which did not receive government aid should also take the responsibility of providing

free and compulsory education of satisfactory quality to children from disadvantaged and weaker sections.

**53.** When we examine the 2009 Act, we find that under Section 12(1)(*c*) read with Section 2(*n*)(*iv*) of the Act, an unaided school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority is required to admit in Class I, to the extent of at least twenty-five per cent of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education till its completion. We further find that under Section 12(2) of the 2009 Act such a school shall be reimbursed expenditure so incurred by it to the extent of per-child-expenditure incurred by the State, or the actual amount charged from the child, whichever is less, in such manner as may be prescribed. Thus, ultimately it is the State which is funding the expenses of free and compulsory education of the children belonging to weaker sections and several groups in the neighbourhood, which are admitted to a private unaided school. These provisions of the 2009 Act, in our view, are for the purpose of providing free and compulsory education to children between the age group of 6 to 14 years and are consistent with the right under Article 19(1)(*g*) of the Constitution, as interpreted by this Court in *T.M.A. Pai Foundation*[5] and are meant to achieve the constitutional goals of equality of opportunity in elementary education to children of weaker sections and disadvantaged groups in our society. We, therefore, do not find any merit in the submissions made on behalf of the non-minority private schools that Article 21-A of the Constitution and the 2009 Act violate their right under Article 19(1)(*g*) of the Constitution.

**54.** Under Article 30(1) of the Constitution, all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice. Religious and linguistic minorities, therefore, have a special constitutional right to establish and administer educational schools of their choice and this Court has repeatedly held that the State has no power to interfere with the administration of minority institutions and can make only regulatory measures and has no power to force admission of students from amongst non-minority communities, particularly in minority schools, so as to affect the minority character of the institutions. Moreover, in *Kesavananda Bharati* v. *State of Kerala*[4] Sikri, C.J., has even gone to the extent of saying that Parliament cannot in exercise of its amending power abrogate the rights of minorities. To quote the observations of Sikri, C.J. in *Kesavananda Bharati* v. *State of Kerala*[4]: (SCC p. 339, para 178)

> "*178.* The above brief summary of the work of the Advisory Committee and the Minorities Sub-Committee shows that no one ever contemplated that fundamental rights appertaining to the minorities

5 *T.M.A. Pai Foundation* v. *State of Karnataka*, (2002) 8 SCC 481
4 (1973) 4 SCC 225

would be liable to be abrogated by an amendment of the Constitution. The same is true about the proceedings in the Constituent Assembly. There is no hint anywhere that abrogation of minorities' rights was ever in the contemplation of the important members of the Constituent Assembly. It seems to me that in the context of the British plan, the setting up of Minorities Sub-Committee, the Advisory Committee and the proceedings of these Committees, as well as the proceedings in the Constituent Assembly mentioned above, *it is impossible to read the expression 'Amendment of the Constitution' as empowering Parliament to abrogate the rights of minorities*." (emphasis supplied)

Thus, the power under Article 21-A of the Constitution vesting in the State cannot extend to making any law which will abrogate the right of the minorities to establish and administer schools of their choice.

**55.** When we look at the 2009 Act, we find that Section 12(1)(*b*) read with Section 2(*n*)(*ii*) provides that an aided school receiving aid and grants, whole or part, of its expenses from the appropriate Government or the local authority has to provide free and compulsory education to such proportion of children admitted therein as its annual recurring aid or grants so received bears to its annual recurring expenses, subject to a minimum of twenty-five per cent. Thus, a minority aided school is put under a legal obligation to provide free and compulsory elementary education to children who need not be children of members of the minority community which has established the school. We also find that under Section 12(1)(*c*) read with Section 2(*n*)(*iv*), an unaided school has to admit into twenty-five per cent of the strength of Class I children belonging to weaker sections and disadvantaged groups in the neighbourhood. Hence, unaided minority schools will have a legal obligation to admit children belonging to weaker sections and disadvantaged groups in the neighbourhood who need not be children of the members of the minority community which has established the school. While discussing the validity of clause (5) of Article 15 of the Constitution, we have held that members of communities other than the minority community which has established the school cannot be forced upon a minority institution because that may destroy the minority character of the school. In our view, if the 2009 Act is made applicable to minority schools, aided or unaided, the right of the minorities under Article 30(1) of the Constitution will be abrogated. Therefore, the 2009 Act insofar it is made applicable to minority schools referred in clause (1) of Article 30 of the Constitution is ultra vires the Constitution. We are thus of the view that the majority judgment of this Court in *Society for Unaided Private Schools of Rajasthan* v. *Union of India*[3] insofar as it holds that the 2009 Act is applicable to aided minority schools is not correct.

3 (2012) 6 SCC 1

**56.** In the result, we hold that the Constitution (Ninety-third Amendment) Act, 2005 inserting clause (5) of Article 15 of the Constitution and the Constitution (Eighty-sixth Amendment) Act, 2002 inserting Article 21-A of the Constitution do not alter the basic structure or framework of the Constitution and are constitutionally valid. We also hold that the 2009 Act is not ultra vires Article 19(1)(*g*) of the Constitution. We, however, hold that the 2009 Act insofar as it applies to minority schools, aided or unaided, covered under clause (1) of Article 30 of the Constitution is ultra vires the Constitution. Accordingly, Writ Petition (C) No. 1081 of 2013 filed on behalf of Muslim Minority Schools Managers' Association is allowed and Writ Petitions (C) Nos. 416 of 2012, 152 of 2013, 60, 95, 106, 128, 144-45, 160 and 136 of 2014 filed on behalf of non-minority private unaided educational institutions are dismissed. All IAs stand disposed of. The parties, however, shall bear their own costs.

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(*Record of Proceedings*)

(BEFORE R.M. LODHA, A.K. PATNAIK, S.J. MUKHOPADHAYA, DIPAK MISRA AND F.M. IBRAHIM KALIFULLA, JJ.)

PRAMATI EDUCATIONAL AND CULTURAL TRUST AND OTHERS .. Petitioners/ Applicants;

*Versus*

UNION OF INDIA AND ANOTHER .. Respondents.

IA No. 3 in Writ Petition (C) No. 416 of 2012, decided on January 29, 2014

**Constitution of India — Arts. 145(3), 21-A and 15(5) — Constitutionality of Constitutional amendments inserting Art. 21-A and cl. (5) of Art. 15 — Consideration of — Directed to be listed before Constitution Bench**

D/52826/C

Advocates who appeared in this case :

Mukul Rohatgi, Senior Advocate (Nikhil Goel, Ankit Goel and Sanjay Kr. Yadav, Advocates) for the Petitioners/Applicants;

Mohan Parasaran, Solicitor General (D.L. Chidananda and Ms Sushma Suri, Advocates) for the Respondents.

ORDER

Let the writ petition along with Interlocutory Application No. 3 be listed for hearing in the present hearing list at the bottom along with connected matter/matters, if any.

Court Masters

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