

ARTICLES

ASHOKA THAKUR v. UNION OF INDIA: A DIVIDED VERDICT ON AN UNDIVIDED SOCIAL JUSTICE MEASURE

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*Starting with **Thakur**, this paper travels through the mediatory role of the courts in resolving serious controversies over reservation; it examines if opposition to reservation has any constitutional basis; and argues that the 93rd Amendment to the Constitution is valid in its entirety. It also argues that a casteless society cannot be read in the Constitution, the fifty-percent limit on reservations is not a binding norm, and that the determination of the validity of laws included in the Ninth Schedule on the ground of breach of the basic structure of the Constitution may remain a myth. In sum, the paper supports the constitutional provisions and parliamentary initiatives for reservation.*

I. THE CASE

*Ashoka Kumar Thakur v. Union of India*¹ is about the validity of the Central Educational Institutions (Reservation in Admission) Act, 2006 and the Constitution (Ninety-third) Amendment Act, 2005 which introduced clause (5) in Article 15.²

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¹ Writ Petition (civil) No. 265 of 2006 decided on 10 April 2008. Hereafter, *Thakur*. References are to paragraphs of the judgments of different judges and not to page numbers.

² Cl. (5) of Art. 15 reads:

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 or educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to the educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30.

The multi-party Parliament with no political party having absolute majority in it passed the Amendment as well as the Act unanimously. The Act provides for the reservation of 15, 7 1/2 and 27 per cent seats in Central educational institutions for the Scheduled Castes (SCs), Scheduled Tribes (STs) and Other Backward Classes (OBCs) respectively. Certain educational institutions such as those in tribal areas covered by Schedule VI to the Constitution, the institutions of national and strategic importance, minority educational institutions and programmes or courses at high level of specialization are excluded from the operation of the Act. The Act also provides for increase in the number of seats in institutions in which reservation is made so that the unreserved seats are not less than the seats available in the immediately preceding year. It further provides that if for academic reasons it is not possible to make the entire reservation for OBCs in one year it could be done in up to three years. While reservation for SCs and STs was not questioned, serious questions were raised with respect to the reservation for OBCs which the Act defines as “*the class or classes of citizens who are socially and educationally backward, and are so determined by the Central Government.*” The Statement of Objects and Reasons appended to the Act states that in the light of Article 46 reservation under the Act was based on Article 15(4) but for excluding minority institutions from its scope reliance was also placed on Clause (5) of Article 15.

Thakur filed the initial petition in March 2007 against the decision of the Central Government to implement the Act from the academic session starting that year. A two judge bench of the Court stayed the Government’s move to the extent it applied to OBCs but not in respect of SCs and STs.³ In view of important questions concerning the interpretation of the Constitution involved in the petition, it was later referred to a constitution bench of five judges. The main grounds for the challenge to the Act and the Amendment before the constitution bench included: that (i) the principle of equality contained among others in Articles 14, 15(1) and 29(2) required that all admissions to educational institutions must be made on merit; (ii) any reservation is suspect and must be subject to strict scrutiny based on compelling state necessity; (iii) the Amendment was against the basic structure of the Constitution as it violated the principle of secularism by giving special favour to the minorities and also disturbed the balance between various Fundamental Rights (FRs) and between the FRs and the Directive Principles of State Policy (DPs); (iv) that the determination of OBCs or socially and educationally backward classes (SEBCs) was not consistent with the Constitution and the “creamy layer” must be excluded from amongst them; (v) clauses (4) and (5) of article 15 overlapped and conflicted with each other and could not stand together; (vi) the Act violated the principle of non-delegation of legislative power to the executive by authorizing the latter to determine the OBCs; (vii) the Act should have provided for a time limit for the operation of reservation; (viii) 27 per cent reservation for OBCs is too high; (ix) no reservation beyond 10 + 2 stage is valid;

³ Ashoka Kumar Thakur v. UOI, Writ Petition (civil) 265 of 2006 decided on 29.03.2007.

and (x) the Amendment and the Act were passed by the self-seeking politicians to please the voters even though they were against the national interest.

On April 10, 2007 the five judges announced their four separate opinions expressing concurring and conflicting views on several issues. But all of them upheld the Act in its entirety and rejected all the grounds of challenge stated above subject to the clarification that in the enumeration of OBCs the “creamy layer” from amongst them must be excluded from the provision for reservation. Exclusion of creamy layer, according to the Court, is an essential constituent of OBCs if OBCs are determined on caste lines. A group of persons based on caste is not OBC unless the creamy layer, if any, is removed from it. Exclusion of creamy layer is an essential requirement of reservation for OBCs. The Court implied this requirement in the Act and therefore upheld it as such. It also clarified that the creamy layer concept does not apply to SCs and STs.⁴ All the judges also upheld the Amendment as it applied to the issues in hand. The Amendment applies both to public and private, whether aided or unaided, educational institutions but the Act applies only to Central Government institutions. No private aided or unaided educational institution is covered by the Act and no such institution or any one on their behalf approached the Court to question the Amendment as it applies to them. Four of the judges, including the Chief Justice, confined their judgments to the issue in hand and left the determination of the validity of the Amendment with regard to the private unaided educational institutions for the future to be decided in an appropriate case, i.e. in which that matter directly arises. One of the judges, Bhandari J, however, went into the entirety of the Amendment and invalidated that part of it which applied to private unaided educational institutions. He does not take the issue of private aided institutions, which implies that he upholds the Amendment in regard to them.

II. THE BACKGROUND

For analysing the core issues which arose in *Thakur* I need not go into the history of reservation in this country, which is well recorded at least since the later part of the nineteenth century, nor need I examine the many battles that have been fought in different courts on this issue ever since the commencement of the Constitution. After the unprecedented violence that broke out on the implementation of the Mandal Commission recommendations in 1990, the major constitutional issues concerning reservation had been settled in *Indra Sawhney v. Union of India*⁵ which appeared to have put a moratorium on future controversies. However, that did not happen. At least the denial of reservation in promotions to higher positions in state services decided in that case required immediate clarification that it did not apply to SCs and STs. That led to an amendment of Article 16.⁶ Later

⁴ Thus the existing doubts on this point raised after *M Nagaraj v Union of India*, (2006) 8 SCC 212 have stand removed.

⁵ AIR 1992 SC 477.

⁶ See The Constitution 77th amendment inserting cl. (4-A) in Art. 16.

partly because of that case and a few other cases decided after it Article 16 had to be amended twice and a proviso had to be added to Article 335 by another amendment.⁷ The validity of those amendments was also contested, which the Court unanimously upheld in *M Nagaraj v. Union of India*.⁸

As *Sawhney* was about reservation in state services under Article 16(4), doubts were expressed,⁹ which I did not share, if the propositions laid down in it applied to special provisions in educational institutions under Article 15(4).¹⁰ Because of or irrespective of it, issues concerning reservation in admissions to educational institutions continued to crop up in the courts. They included issues such as the basis of reservation, level up to which reservation could be made, quality and quantity of concessions, quantum of reservation, etc. In the meantime under the spell of economic liberalisation and globalisation the Court gave two important decisions which had far-reaching implications for the education policy of the country. Differing from the monumental decision in *Unni Krishnan v State of AP*,¹¹ which recognized the FR of every citizen to free and compulsory education up to elementary level but left open if running of educational institutions was an occupation or vocation under Article 19(1) (g), the Court in *TMA Pai Foundation v. State of Karnataka*¹² held that running of educational institutions was an occupation entitled to protection under that article as well as under Article 26. Going further in *PA Inamdar v. State of Maharashtra*¹³ the Court also held that the occupation of running educational institutions in private hands without aid from the state, protected under Article 19(1) (g), was not subject to the requirement of reservation and such reservation could not be justified under Article 19(6). These decisions, especially the latter, necessitated the Amendment.

This Amendment did not cause any violent reaction though in intellectual circles it was seen as a blow to economic liberalisation and free flow and progress of education. The former Chief Justice of India, who wrote the unanimous opinion for the Court in *Inamdar*, publicly expressed his doubts on its validity and wished its invalidation by the Court.¹⁴ But soon after the passing of the Act and the government notification for its implementation, wide spread demonstrations and violence followed. Thus a concerted design to rewrite the

⁷ See the Constitution amendments 81st (2000), 82nd (2000) and 85th (2001).

⁸ (2006) 8 SCC, 212.

⁹ See e.g., DD BASU, COMMENTARY ON THE CONSTITUTION OF INDIA, vol. 2, 2047-48 (8th ed, 2007 by Chandrachud et al); MP JAIN, INDIAN CONSTITUTIONAL LAW, 1128 (5th ed, 2003) and P Singh, *Equality and Compensatory Discrimination*, in C Raj Kumar & K Chokalingam, HUMAN RIGHTS, JUSTICE, & CONSTITUTIONAL EMPOWERMENT, 126, 136 (2007).

¹⁰ See MP SINGH, VN SHUKLA CONSTITUTION OF INDIA, 78 (2001).

¹¹ (1993) 1 SCC 645.

¹² (2002) 8 SCC 481.

¹³ (2005) 6 SCC 537.

¹⁴ I could not have the time to trace the copy of the *Times of India*, New Delhi edition in which the statement of the Chief justice RC Lahoti along with his photograph appeared on the cover page and which I had preserved for my records.

Constitution appears in the background. To begin with, the policy of economic liberalisation announced in 1991 blunted the impact of implementation of Mandal Commission recommendations subsequently upheld in *Sawhney* in public employment by reducing the scope for public employment. Later in *Pai* education in private hands was made a FR and several regulations of it which were approved in *Unni* were set aside. Initially *Pai* was about the FRs of minority educational institutions but for some unclear reason it was later extended to education in private hands in general. Finally, in the name of clarifications to situation created by *Pai* and its interpretation in *Islamic Academy of Education v. State of Karnataka*,¹⁵ in *Inamdar* the Court brought the private educational institutions at the level of unaided minority schools which were exempted from the requirement of reservation. In the process the Court rewrote, rather subverted, the Constitution both in respect of reservation as well as minority rights. The Amendment was, therefore, necessary for the restoration of the Constitution. It has not restored the Constitution completely but at least reminds us that in matters of education minorities and majority stand at different footing.

III. COURTS AS MEDIATORS

The foregoing observations must not, however, be taken to undermine the immense contribution of the courts in defending the Constitution and making it acceptable to those who see it an obstacle in their way. *Thakur* is one of the several major examples of the role that the courts have played in sustaining and strengthening our constitutional democracy ever since the commencement of our Constitution. Courts may be and are often projected as anti-democratic institution and any number of examples may be pressed into service to prove that point. Even on the issue of reservation several examples may be given to prove that the courts could have done better by not entering into the controversy. But if all controversies could have been sorted out by vote, the courts would have been unnecessary. The mere fact that courts have always existed in organized societies and that ever since the process of binding written constitutions was led by the Constitution of the United States all democratic countries in the world have assigned the job of resolving constitutional controversies to the courts, is enough to prove their inevitability for sustaining a constitutional democracy.

Take *Thakur*, for example. Even though the Amendment and the Act were passed unanimously by Parliament, as soon as the decision to implement the Act was announced widespread violence, as already noted, broke out in Delhi and several other parts of the country. It subsided as soon as the Court gave interim relief and was completely silenced after the matter was referred to the constitution bench. The final decision was hailed by both sides and the media reports in the evening and on the following day gave clear indication that with minor reservations all parties were satisfied with the outcome.¹⁶ But while the government and all

¹⁵ (2003) 6 SCC 697.

¹⁶ See the news reports in any daily news paper of 11 April 2008.

political parties gave up their reservations on creamy layer issue and decided to implement the Act as interpreted by the Court, a few days later the anti-reservationists comprising mainly medicos surreptitiously entered the Supreme Court compound and protested against the decision. Again, after a gap of a few days a bigger protest was organised close to Parliament causing traffic blockage and breakdown of law and order.¹⁷ Interestingly, again most of the protestors were medicos and, therefore, on being taken into custody they threatened to paralyze all hospitals in Delhi by giving a strike call unless released immediately without bail. The government conceded and let them go without bail. Later some one filed a petition in the Delhi High Court against reservation at post-graduate level¹⁸ while in another petition the Calcutta High Court stayed implementation of OBC reservation in IIM Calcutta on the same plea that no reservation is permissible in post-graduate courses.¹⁹ On appeal against the Calcutta High Court decision and application to transfer all petitions in different High Courts to the Supreme Court, the Supreme Court has allowed the implementation of the Act subject to the exclusion of creamy layer.²⁰

A far graver situation resulting in several suicides, self-immolation, deaths and large scale destruction of property was caused by anti-reservation violence in 1990 on the Central Government's decision to implement Mandal Commission recommendations in Central services providing for 27 percent reservation for OBCs. At that time also, the Court proved to be a great healer. But after the Court had upheld the Government decision subject to some clarifications, one of them being the exclusion of creamy layer, it could be expected that the controversy on 27 percent reservation for OBCs had died for ever. Perhaps knowing the difference between services and education the Government took the risk of not excluding the creamy layer in the implementation of the Act. But after the Court has decided on the exclusion of creamy layer and the Government has agreed to do so the controversy must have died. But as we look back at the history of reservation under the Constitution, which started soon after its commencement, every effort to resolve controversies arising from or surrounding it has been defeated for one reason or the other. Let us, however, not give up our faith in our constitutional system which will in due course amicably settle our all controversies.

IV. SHARING OF EXPERIENCE

From my limited experience of university life I know how the decision to reserve seats even for SCs and STs, not to talk of OBCs, in admissions is opposed on all sorts of grounds from fall in academic standards to division of society on caste lines. Even if the decision is ultimately taken under the force of

¹⁷ See *The Times of India*, (Delhi Ed.) 7 May 2008, p. 7.

¹⁸ *Id.* at 19.

¹⁹ *The Times of India* (Kolkata ed.), 15 May 2008.

²⁰ *The Times of India* (Kolkata ed.), 17 May 2008, p. 3.

law the admission bodies try to trace out all possible loopholes to deny admission to these categories. In matters of employment, it is even worse. To begin with, the universities do not take the decision to implement reservation and even if, again under the pressure of law they take, they adopt every possible tactics to defeat its implementation for not letting anyone be appointed to the reserved positions. Out of several academic posts to which appointments had to be made a university went to the extent of designating every post as specialty to defeat reservation on the Court created justification that single post cannot be reserved.²¹ Our dismal progress in this respect is self-evident from the statistics about the presence of reserved categories especially the SCs and STs for whom we have provided reservation in Central and State services from almost the very beginning of the Constitution. If every other effort to block reservation fails resort is taken to the courts which have not been sympathetic to reservation except on and off since the emergency of 1975-77. The major breakthrough, if any, came in *Sawhney* which was also defeated by all sorts of technical interpretations requiring more than one amendment in the Constitution to overrule the Court and restore the beleaguered original position.²² Even if the Court supports the constitutional position, a fresh round of blockages starts as we have just noticed after *Thakur*. Remarkably, this time the Court has not given any interim relief against the operation of the Act.

I am fully conscious and assume similar experiences on the other side of manipulations and manoeuvres in the implementation of the constitutional provisions on reservation. From my limited experience I also know that reserved category candidates may not be as good as the non-reserve category candidates. But they are not always worse than the non-reserved category candidates in their achievements and performance. Reservation, however, assumes that they are not as good, yet they must be inducted. It is precisely for this reason that the provisions for reservation were incorporated in the Constitution. Therefore, I fail to appreciate the immeasurable gap between the thinking of those who fought for and brought us our freedom from foreign rule in order to bring revolutionary changes in our social order which they documented in the Constitution and our current elite or so-called civil society who were expected to lead and facilitate those changes. It is, however, very encouraging and faith restoring that whatever allegations against the power of vote in our democracy our political elite ever since the commencement of the Constitution has unitedly stood behind the Constitution and the ideals that inspired its making despite having adopted the policy of economic liberalization.

V. WHAT THE OPPONENTS OF RESERVATION ARE ASKING FOR?

As a student of law I have examined the reservation issue only from the legal point of view. When any issue arises I ask myself: what is the constitutional

²¹ A.R. Choudhury v Union of India, AIR 1974 SC 532.

²² See the amendments in Articles 16 and 335.

or legal issue that is being contested?²³ The more I look into the judicial decisions, the more I get convinced that the court battles have not been about the FRs or any other constitutional right. They have revolved around the application of the constitutional provisions on reservation. Thus, unlike the United States where petitioners challenged the quotas or reservation on the ground of violation of their rights under the equal protection clause no petitioner in India seems to have ever claimed that reservation violates any of his/her FRs. Even if in any case, which I cannot recall, the petitioner might have claimed violation of any of his/her FRs, such claim did not become the basis for the disposal of the case. Therefore, the fight about reservation in the courts and outside has not been about the right to equality or any other right; it is basically against the policy of reservation as such. When the opponents of the policy fail in stalling it at the political level either at the Centre or in the States, they approach the courts to stall it. As the courts are not expected to go into the policy issues they have upheld or invalidated reservation with reference to the relevant constitutional provisions in this regard examining if those provisions have or have not been complied with. As the judges are also not free from policy preferences, often the outcome in the courts has depended upon the constitution of the bench. If one carefully examines from the earliest to the latest decisions on reservation, one could discern a line with minor variations between the judges for and against reservation. It is apparent from their opinions. As reservation is expressly provided in the Constitution, opposition to it has been based on vague suppositions about the Constitution or its scheme or non-observance of some technicality. My analysis is that while in big battles like the one in 1990 on the implementation of Mandal Commission recommendations the Court has played a great shock absorber and mediator between the fighting groups on the streets and in others has helped in tailoring the reservation policy as satisfactory and acceptable to the warring groups as possible, in many instances it has not let it have its expected impact as envisaged in the Constitution. It has stalled it not because it violated any provision of the Constitution or of the law relating to its implementation but because the judges or the majority of them on the bench had their own reservations on the policy of reservation.

In principle courts are not expected to take up policy matters but even if they do so they do it in a very narrowly tailored exceptional situation where the policy is clearly against the Constitution or its core values such as the FRs or human dignity. The policy of reservation cannot be brought in that category because the Constitution expressly provides for reservation at more than one place. Any doubts ever entertained in this regard have been successively removed

²³ As a student of LLM part II I wrote my dissertation on constitutional position of minorities including the weaker or vulnerable sections such as SCs and STs. Later I returned to this topic in some of my writings including MP Singh, *Jurisprudential Foundations of Affirmative Action: Some Aspects of Equality and Social Justice*, 10 & 11 DELHI LAW REVIEW 39 (1983-84), *Are Articles 15(4) and 16(4) Fundamental Rights?* 33 (1994) 3 SCC (J) and SHUKLA'S CONSTITUTION OF INDIA (8th, 9th & 10th eds.).

by constitutional amendments and additional provisions for reservation. Therefore, no constitutional basis or justification for interference with the policy of reservation visibly exists.

As I take the view that in a constitutional democracy like ours decisions taken by the representatives of the people either in the legislature or in the executive must be honoured so long as they are not against any provision of the Constitution or any law that binds the executive, I would like to briefly examine if ever sufficient justification has existed for the courts to intervene in matters of reservation. Starting from the beginning, perhaps *State of Madras v. Champakam Dorairajan*²⁴, the very first case on reservation, is the only one that comes closest to the determination of the issue on the ground of violation of FRs of the petitioner. There too the matter was decided not on the ground that the petitioners had any right to be admitted to the educational institutions they were asking for but on the ground that they were denied admission on grounds prohibited by Article 29(2). It does not establish that the petitioners had a fundamental right to take the kind of education they were asking for. The state could have very well denied them that education if it had taken any other criteria than the ones prohibited under Article 29(2). The state pleaded that the criteria was Article 46 and not the grounds prohibited in Article 29(2). Following the principle of harmonious construction and presumption of constitutionality of state action, the Court could have very well held that the basis of reservation was Article 46 and not any of the grounds prohibited by Article 29. It could have also held that it was a measure to attain proportional equality.²⁵ But instead the Court chose a rather flawed course of reading a conflict between Articles 29 and 46 and holding that as the former was included among the FRs and latter among the DPs the latter must give way to the former. The Court's reasoning was convincingly criticized in academic writings and was soon abandoned by it in favour of reconciliation and harmonization between FRs and DPs, which has now become an aspect of basic structure of the Constitution.²⁶ *Champakam* was soon overruled by the First Amendment to the Constitution introduced, notably, by the same members of interim Parliament who gave us the Constitution.

Over a decade later in the first landmark case on reservation, namely, *M.R. Balaji v. State of Mysore*²⁷ the Court decided the whole issue under Article 15(4) which according to it was not a FR but an exception to FRs in Article 15(1). The reservation in that case was found bad because, according to the Court, it did

²⁴ AIR 1951 SC 226.

²⁵ See A Acharya, *Affirmative Action for Disadvantaged Groups A Cross-constitutional Study of India and the US*, in R Bhargava (ed), *POLITICS AND ETHICS OF THE INDIAN CONSTITUTION*, 267, 282 (2008).

²⁶ See P.K. Tripathi, *Directive principles of State Policy: The Lawyer's Approach to them Hitherto, Parochial, Injurious and Unconstitutional*, 17 SUPREME COURT JOURNAL 7 (1954); In re Kerala Education Bill, 1957, AIR 1958 SC 956 and *Minerva Mills Ltd. v. Union of India*, AIR 1980 SC 1789.

²⁷ AIR 1963 SC 649.

not satisfy the requirements of Article 15(4). The Court did not decide or discuss if it violated any of the FRs available to the petitioners or of any other individual. The judgment may have set an example of great craftsmanship and judicial creativity but it did not have any basis in FRs or any other right. On the contrary in *Devadasan v. Union of India*²⁸ the Court clearly said that there was no violation of Article 14. It said:

*“[W]here, therefore, the State makes a rule providing for the reservation of appointments and posts for such backward classes it cannot be said to have violated Art. 14 merely because members of the more advanced classes will not be considered for appointment to these posts even though they may be equally or even more meritorious than the members of the backward classes, or merely because such reservation is not made in every kind of service under the State.”*²⁹

Following *Balaji*, the Court in *Devadasan* decided exclusively on the basis of excessiveness of reservation under Article 16(4). Dissenting, Subba Rao J. emphasized that Article 16(4) was not an exception but “*preserved a power untrammelled by the other provisions of the Article.*”³⁰ Justice Subba Rao’s opinion was adopted by the majority of the Court in *State of Kerala v. N.M. Thomas*³¹ who, besides holding that Article 16(4) was not an exception to Article 16(1), also emphasized upon the principle of proportional equality in terms of equality in fact. Thus Article 16(4) was converted into an important aspect of equality from being treated as an exception to it. The same position was reiterated in *ABSK Sangh v. Union of India*³² and accepted in *Sawhney*³³. Finally, *Nagaraj*³⁴ unanimously decided that the amendments in Articles 16 and 335 that fortified reservation constituted the equality jurisprudence under the Constitution as an integral part of its basic structure. Ever since *Thomas*, I have taken the stand that *Balaji* interpretation of Article 15(4) that it was an exception to Article 15(1), was overruled though many others went by technicality that, as *Thomas*, *Sangh* and *Sawhney* related to Article 16(4), they did not affect *Balaji*.³⁵ *Thakur* has vindicated my stand.

²⁸ AIR 1964 SC 179.

²⁹ *Id.* at 185.

³⁰ *Id.* at 190.

³¹ AIR 1976 SC 490.

³² AIR 1981 SC 298.

³³ AIR 1993 SC 477.

³⁴ (2006) 8 SCC 212.

³⁵ See MP Singh, *Jurisprudential Foundations of Affirmative Action: Some Aspects of Equality and Social Justice*, 5 & 6 DELHI LAW REVIEW, 39 (1983-84); *Are Articles 15(4) and 16(4) Fundamental Rights?*, 33 (1994) 3 SCC 33 (J); and SHUKLA’S CONSTITUTION OF INDIA, 75 ff (10th ed, 2001)

I am of the view that effective implementation of Articles 15(4) and 16(4) enforces and realizes equality rather than curtails or denies it to anyone in any manner. I am also of the view that by not taking any action under Articles 15(4) and 16(4) not only inequality is perpetuated but it is also denied to those for whom those provisions have been made.³⁶ Underlying the fact that no petitioner has ever claimed and definitely the Court has never recognized the claim that the implementation of Articles 15(4) or 16(4) violates anybody's right to equality is the presumption that these provisions promote rather than curtail the right to equality. Therefore, if provisions are made under Articles 15(4) and 16(4) the presumption is and must be that they are constitutionally valid and the burden to prove otherwise must lie upon those who challenge their validity. *Thakur* confirms that position by rejecting the US suspect classification and consequent strict scrutiny and compelling state interest principles. In view of this position the courts should also deny interim stays against the actions taken under Articles 15(4) and 16(4) unless such stay is necessary for preventing irreparable harm or such a situation as arose in 1990 on the implementation of Mandal Commission recommendations.

By now, the people who approach the courts against the implementation of Articles 15(4) and 16(4) must also realize that they have no case for the courts and must democratically build a case for themselves in Parliament and State legislatures. If anybody has a FR under the Constitution then subject to the provisions of the Constitution, he must be protected by the courts even against the claims of the entire nation but if he has no such right the courts must decline to interfere against the lawful actions of the state. If the courts continue to entertain challenges to reservation on such specious or vague grounds as the reservation is against national interest or that it must be only in primary schools or up to graduation level or before making reservation arrangements must be made for primary and secondary education for everyone or that Article 21-A must be realized before reservation is made for anyone at any stage or that funds must be diverted to one kind of education rather than the other or that reservation policy must be reviewed every five years or ten years and so on and so forth there will never be an end to litigation and the constitutional goal of achieving equality through reservation will never be realized. The only apparent requirement for reservation in Article 15(4) and (5) is that it must be for OBCs or SEBCs. To that apparent requirement the Court has added that if OBCs or SEBCs are determined on the basis of caste the creamy layer amongst them must be excluded and that reservation must be of less than 50% places. If these requirements are met, no ground for challenge in the courts survives. As *Thakur* has made it amply clear that if the government has done everything required by Article 15(4) nobody has the right to question the government decision and its implementation in the courts, it may be hoped that no more the reservation policy or its implementation will be held up in the courts.

³⁶ *Id.*

VI. THE ARGUMENT OF MERIT

The most forceful and apparently convincing argument taken against the policy of reservation is of merit, i.e. merit is and must be the foundation of any society which the Constitution of India also envisages and establishes. Reservation of any kind is the negation of merit and, therefore, even though expressly provided in the Constitution, it must be kept within the narrowest possible limits only as a temporary measure. I have dealt with this argument earlier at more than one place and, therefore, need not return to all its details.³⁷ Briefly, merit is not a fixed or static concept. It varies with the needs and objects of a society. Merit, therefore, is not an end, but is only a means to the ends of a society. What ends a society sets for itself will determine the means that are most suitable to achieve those ends. What the ends of the Indian society are may not be free from controversy. But as our present society is organized under the Constitution with which we are dealing, I draw them from its Preamble as securing of justice, liberty, and equality to all the citizens and promotion of fraternity among them all assuring the dignity of the individual and the unity and integrity of the nation. Of course they are very broad ends capable of various and varying and occasionally conflicting contents and interpretations, but by all means, they are our ends. Means that are most appropriate for achieving those ends are our merit. Within the broad framework of democracy based on adult franchise which must constantly work out those means, the Constitution lays down guidelines for working out such means. Among those guidelines, reservation is provided at more than one place. Merit is not mentioned even once anywhere in the body of the Constitution. Often, reliance is placed on Article 335 to derive the notion of merit from the expression “maintenance of efficiency of administration” as if it is the foundational doctrine of our Constitution. But besides the limited application of Article 335 confined to state services, efficiency and merit is not one and the same thing. Like merit, efficiency also bears different meanings and interpretations but in the present context, it could be designated as an end while merit is only a means to achieve that end. The Constitution envisages that by taking into consideration the claims of SCs and STs in the matter of state services maintenance of efficiency of administration will be assured and, therefore, they must always be taken into consideration. Limitations on the consideration of that claim the Court placed were removed by the Constitution through appropriate amendments.

Any attempt to subvert or defeat the reservation on the plea of merit amounts to subversion of the Constitution. No constitution ever provides for its own subversion. Our Constitution does not permit even the change in its basic structure through the process of amendment provided in it. The limitation of basic structure also applies to judicial interpretation of the Constitution.³⁸ Therefore,

³⁷ See MP Singh, *Jurisprudential foundations of Affirmative Action: Some Aspects of Equality and Social Justice*, 10 & 11 Delhi Law Review, 39 (1981-82) and *Merit in the Appointment of Judges*, 1 (1999) 8 SCC (J).

³⁸ See *M Nagaraj v Union of India*, (2006) 8 SCC 212.

the courts should not get persuaded by the argument of unstated merit to defeat the stated means of achieving the constitutional goals as mentioned above. In the argument of merit to defeat the democratically taken decisions I smack an attempt to replace democracy through some sort of oligarchy. I am not imagining something unimaginable. It was very much argued and the Court noted it in the petition of Ashoka Kumar Thakur that “*a time has come to replace the ‘vote bank’ scenario with ‘talent bank’.*”³⁹ *Inamdar* is clearly based on that argument. Therefore, I earnestly plead that as guardians and defenders of the Constitution the courts should not entertain the flat argument of merit taken by a small group of privileged sections of society only to preserve and perpetuate their privileges and to defeat reservation for the underprivileged and excluded. Let me end up with a quote from *Nagaraj*:⁴⁰

“Merit is not a fixed absolute concept. ... The basic presumption .. remains that it is the State who is in the best position to define and measure merit in whatever ways it considers it to be relevant to public employment because ultimately it has to bear the costs arising from errors in defining and measuring merit.”

VII. AMENDMENT AND UNAIDED PRIVATE EDUCATIONAL INSTITUTIONS

While four judges, including the Chief justice, did not decide the issue of the validity of the amendment vis-à-vis the unaided institutions because no such institution had approached the Court, Bhandari J decided that issue because it had been argued before the Court and required to be settled to avoid uncertainty and delay when the government targeted these institutions in future. Relying upon *Minerva Mills Ltd. v. Union of India*,⁴¹ in which the determination of the dispute was not dependent upon the determination of the disputed amendment, he felt that since amendments are often enabling provisions and if they “*clear the way for future legislation that would in fact violate the basic structure, the Court need not wait for a potential violation to become an actual one.*”⁴² Laying down the test that “*an amendment alters the basic structure if its actual or potential effect would be to damage a facet of the basic structure to such an extent that the facet’s original identity is compromised*” Bhandari J mixes up “legislation” and “amendment” and says that to determine if “legislation” violates constitutional limitations two-step effect test is to be applied: “*Step one requires us to first ask if legislation affects a facet of the basic structure*” and “*at step two we ask if the*

³⁹ See *Ashoka Kumar Thakur v Union of India*, WP (Civil) 265 Of 2006 decided on 29 March 2007, paragraph 2

⁴⁰ *Id* at 249.

⁴¹ AIR 1980 SC 1789.

⁴² *Thakur*, p 134.

effect on the facet of the structure is to such an extent that the facet's original identity has been altered."⁴³ Clarifying the test he says that "the form of an amendment is irrelevant; it is the consequence thereof which matters." Further, differentiating between the expressions "abridge" and "abrogate" he says that while abridgement is valid "the legislation must be struck down" if it abrogates.⁴⁴ Applying the twin tests laid down by him to Article 15(5) the judge finds that it excludes 19(1)(g), "a facet of the basic structure of the Constitution" and a part of the golden triangle recognized in *Minerva* even though it was much milder than the amendment in Article 31-C decided in *Minerva*.⁴⁵ To bring home his point on Article 15(5) vis-à-vis Article 19(1)(g), the judge relies upon and quotes extensively from *Pai* and *Inamdar*, which the Amendment was meant to overrule, that according to those decisions the government could not take any measure of reservation in admissions to private unaided educational institutions except the regulation for ensuring admissions on merit. But he admits that Parliament could subject Article 19(1)(g) to Article 15(5) even if the Court had "held that reservation in unaided institutions was an unreasonable restriction that could not be saved by Article 19(6)"⁴⁶ and that subjecting Article 19(1)(g) to Article 15(5) does not per se violate the basic structure.⁴⁷

Taking up his second step Bhandari J asks if the amendment merely abridges or it abrogates a fundamental right even of small section of educators or even of one person and answers that in case of abridgment it does not but in case of abrogation it does violate the basic structure.⁴⁸ After enumerating the adverse effects of the amendment on unaided educational institutions, he concludes:

*"The 93rd Amendment's imposition of reservation on unaided institutions has abrogated Article 19(1)(g), a basic feature of the Constitution, in violation of our Constitution's basic structure. Therefore, I sever the 93rd Amendment's reference to 'unaided' institutions as ultra vires of the Constitution."*⁴⁹

As academic exercises are free from the procedural constraints of the courts, I could very well examine the validity of the Amendment without any concrete case or controversy having arisen. Although unlike the Constitution of the United States our courts are not expressly required to deal with actual cases and controversies, as a matter of prudence they decline to decide moot or hypothetical questions and confine to the actual issue in dispute. Only in exceptional

⁴³ *Id.* at 137.

⁴⁴ *Id.* at 139.

⁴⁵ *Id.* at 149.

⁴⁶ *Id.* at 163-164.

⁴⁷ *Id.* at 164 & 166

⁴⁸ *Id.* at 167.

⁴⁹ *Id.* at 177.

cases where the parties can satisfy the courts of the imminent urgency of the matter, which is affecting or is likely to affect immediately vital issues concerning life or liberty of the people but may not culminate into a concrete live issue before the courts, the courts agree to hear and decide moot questions. This is what happened in *Minerva*.⁵⁰ In *Minerva* the respondents raised a preliminary objection against the petition being heard on the validity of the Forty-second Amendment which after full arguments the Court rejected. Only after the disposal of the preliminary issue, the Court proceeded to hear the petition on merits.⁵¹ Even then the propriety of hearing in *Minerva* and the binding authority of the decision were questioned in a later case which remains undecided but seems to have lost its relevance with lapse of time.⁵² *Thakur* provides no clue of any such issue having been raised and decided. All the judges agreed that no private unaided institution or anyone on behalf of such an institution filed a petition or appeared before the Court. Therefore, no other judge except Bhandari J expressed any opinion on the validity of the Amendment about the private aided or unaided institutions. As neither the issue was urgent, nor was its determination necessary for the disposal of the petitions before the Court, nor was the procedure required for deciding moot questions was followed, Bhandari J could have also left this issue for the future to be decided in an appropriate case. But as he has decided it as summed up above, let us examine some of the issues related to it.⁵³

Ever since the Court has drawn the basic structure limit on the power of amendment in *Kesavananda Bharati v. State of Kerala*,⁵⁴ it has been trying to formulate a precise test that could guide the amending body as well as the courts if an amendment is consistent with or crosses that limit. Of course that process is not yet over and in view of the nature of the issue it may never be concluded, after having enumerated several basic features of the Constitution laid down in earlier cases; in *Nagaraj*,⁵⁵ the Court has tried to formulate a general test for determining if an amendment is against the basic structure of the Constitution. “*In the matter of application of the principle of basic structure*”, the Court held that “*twin tests have to be satisfied, namely, the ‘width test’ and the test of ‘identity’*.”⁵⁶ Upholding the validity of three amendments in Article 16 inserting clauses (4-A) and (4-B) and making an amendment in the former and a fourth one in Article 335 inserting a

⁵⁰ *Minerva Mills Ltd v. Union of India*, AIR 1980 SC 1789.

⁵¹ *Id.* at 1802-03. In coming to that conclusion the Court stated: “We are dealing with a constitutional amendment which has been brought into operation and which, of its own force, permits the violation of certain freedoms through laws passed for certain purposes.”

⁵² *Sanjeev Coke Mfg Co v. Bharat Coking Coal Ltd*, AIR 1983 SC 239. At p 248 the Court observed that a petition to review *Minerva* was pending in the Court.

⁵³ Even though *Minerva* was decided after the disposal of the preliminary issue, in *Sanjeev Coke Mfg. Co. Bharat Coking Coal Ltd.*, AIR 1983 SC 239 Chinappa Reddy J. raised serious doubts about *Minerva* as binding precedent on the determination of the issue of basic structure.

⁵⁴ AIR 1973 SC 1461.

⁵⁵ (2006) 8 SCC 212.

⁵⁶ *Id.* at 268.

proviso, a five judge bench of the Court unanimously held that “*applying the ‘width test’, we do not find obliteration of any of the constitutional limitations. Applying the test of ‘identity’ we do not find any alteration in the existing structure of the equality code.*”⁵⁷ Relying upon the earlier cases, especially *Kesavananda*, it has been clarified that it is not an amendment of a particular article but an amendment that adversely affects or destroys the wider principles of the Constitution such as democracy, secularism, equality or republicanism or the one that changes the identity of the Constitution is impermissible. “*To destroy its identity is to abrogate the basic structure of the Constitution*”, concluded the Court.⁵⁸ A little later in *I.R. Coelho v. State of T.N.*,⁵⁹ a nine judge bench unanimously re-emphasising the identity test, appears to have slightly varied it in respect of FRs. While, according to *Coelho*, *Nagaraj* held that in respect of the amendments of FRs, it was not the change in a particular article but the change in the essence of the right must be the test for the change in identity, in *Coelho* the Court held that if the “*triangle of Article 21 read with Article 14 and Article 19 is sought to be eliminated not only the ‘essence of right’ test but the ‘rights test’ has to apply.*”⁶⁰ Pointing out the difference between the “rights test” and the “essence of right test”, the Court observed that both form part of application of the basic structure doctrine, but:

*“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 ‘right test’ which is more appropriate.”*⁶¹

In the context of amendments to Schedule IX, the Court concluded that the validity of each new amendment must be judged on its own merits. “*The actual effect and impact of the law on the rights guaranteed under Part III has to be taken into account for determining whether or not it destroys basic structure. The impact test would determine the validity of the challenge.*”⁶²

Long before these cases, including *Kesavananda*, perhaps also *IC Golak Nath v State of Punjab*,⁶³ Dieter Conrad – one of the main architects of the

⁵⁷ *Id.* at 269.

⁵⁸ *Id.* at 268.

⁵⁹ (2007) 2 SCC 1

⁶⁰ *Id.* at 108. With due respect to the Court, I could not find the expression “essence of right” in *Nagaraj*.

⁶¹ *Id.*

⁶² *Id.* at 111.

⁶³ AIR 1967 SC 1643. Conrad told me that he first delivered his lecture on the limitation of amending power sometime in early 1965 in Madras (Chennai) which was later used in arguments in *Golak Nath*.

basic structure doctrine in India – while dealing with this issue in several writings, in one of them observed:

*“ [F]rom the fact that the constitutional provision does not mention limitations it must be concluded that the amending power is intended to be very wide. Only clearest cases of transgression would justify judicial intervention, as a remedy of last resort. Regularly, such cases will be discernible by an element of abuse of power, of some collateral purpose appearing behind the purported scope of the amendment. In the absence of such elements a general presumption of constitutionality must operate even more than in the case of ordinary legislation.”*⁶⁴

He noted an abuse of power in several provisions of Forty-second Amendment made during emergency when all political freedom were suspended and leading political opponents in Parliament and otherwise were behind the bars. *Minerva* invalidated some of these provisions, most importantly clauses (4) and (5) introduced in Article 368. Conrad also saw virtue in the vagueness of the doctrine of basic structure.⁶⁵

In the light of the principles arising from these precedents and academic exercises, which by their very nature are and will remain, if not totally vague, at least capable of different interpretations and applications, it is clear that the basic structure of the Constitution is founded within the Constitution and cannot be drawn or construed from somewhere else; that it primarily consists of the broad general features of the Constitution; that these features may not generally be represented in one particular provision of the Constitution but a change in any particular provision may change the basic structure as, for example, in the case of elimination of “*triangle of Article 21 read with Article 14 and Article 19*”; and that in case of FRs the actual effect and impact on the rights will be taken into account for determining if the amendment destroys the basic structure. But above all, as Conrad has suggested, the amendment must have an element of abuse of power or of some collateral purpose appearing behind the purported scope of the amendment. So long as it is made in the normal conditions after due deliberations in Parliament and, wherever required, also in the Legislative Assemblies of the States and is not against the interests of any vulnerable or politically insulated section of the society such as the minorities or SCs or STs, it must be presumed to be valid.

⁶⁴ See D Conrad, *Constituent Power, Amendment and Basic Structure of the Constitution: A Critical Reconsideration*, 6 & 7 DELHI L. REV. 18 (1977 & 1978). Reprinted in D. CONRAD, *ZWISCHEN DEN TRADITIONEN* (J Luett & MP Singh eds, 1999) printed at p 87 quote at p 102.

⁶⁵ *Id.* at 102.

Applying these principles and tests, I do not find anything destructive of the basic structure in the Ninety-third Amendment, even in respect of the unaided private educational institutions. It is true, as it has been admitted as much by the other judges as by Bhandari J, that the amendment overrules some of the propositions laid down by the Court in *TMA Pai* and *Inamdar*. But it is nobody's case that it could not be done by an amendment of the Constitution. The Amendment also does not abrogate the right to occupation or any other right in Article 19(1)(g). Nor does it remove or narrow down the newly recognized right to run educational institutions as occupation. It does not even amend the provision for restrictions that may be imposed on the right to occupation under Article 19(6). It simply clarifies or at the most removes a not essentially required interpretation given to the newly recognized right to occupation to run educational institutions under Article 19(1)(g). The clarification is in no way anything more than overruling Court's interpretation in the foregoing two cases so as to bring it in harmony with the rest of the Constitution and its clearly stated provisions. Article 15(4) clearly provides that the State may make "any special provision for the advancement of any socially or educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes" which definitely includes provision for reservation in admissions to educational institutions. Nobody can doubt, or has ever doubted that under this provision the State could make special provisions for the stated classes in private educational or other institutions. If there were any possibilities of restricting the application of Article 15(4) only to public or state aided educational institutions or other bodies until that article was being treated as an exception to Article 15 or Article 29, that has also been removed after it has been accepted that Article 15(4) like Article 16(4) is not an exception to, but an integral part of the equality provisions. If in a matter such as *Pai* or *Inamdar* where special provisions for the classes covered in Article 15(4) were not in issue, the Court announces that the state cannot make such provisions in private educational institutions because of the interpretation it gave to Article 19(1)(g), it does something which goes clearly against the express provisions and very foundations of the Constitution which, as adopted by the Constituent Assembly, made special provisions including reservation for such classes.⁶⁶ Even inclusion of Article 15(4), besides being beyond challenge technically because of approval to all existing amendments in *Kesavanada*, was required because the Court had damaged the basic structure as envisaged by the Constitution makers. We have already noted that the First Amendment was inserted by the same members of interim Parliament who gave us the Constitution.

The above argument is taken in view of *Waman Rao v. UOI*⁶⁷ in which rejecting the challenge to Articles 31-A and 31-B, also inserted by the First Amendment, the Court observed that the Amendment instead of weakening,

⁶⁶ See Part XVI of the Constitution which has been there from the very beginning and Parts IX and IX-A inserted by 73rd and 74th Amendments.

⁶⁷ AIR 1981 SC 271.

strengthened the basic structure of the Constitution because it “*made the constitutional ideal of equal justice a living truth.*”⁶⁸ Articles 31-A and 31-B, like Article 15(4), were also introduced to overrule the interpretation of the Court of some of the FRs, especially Articles 14, 19 and 31. The Court has repeated the same proposition recently in *Nagaraj* in which amendments to Articles 16 and 335 overruling certain interpretation of those Articles by the Court were challenged. Defending the amendments the respondents argued that “*the power under Article 368 has to keep the Constitution in repair as and when it becomes necessary and thereby protect and preserve the basic structure.*”⁶⁹ Rejecting the petitions, the Court admitted that the challenged amendments were “*curative by nature.*”⁷⁰ Thus earlier *Waman Rao* and now *Nagaraj* establish that by their interpretation of the Constitution the courts can also damage the basic structure and Parliament or the amending body owes a duty to the Constitution to repair that damage. If Parliament fails to repair the damage it shall be deemed to be conniving in damaging the basic structure of the Constitution. No doubt the courts should have much less chance for causing such damage but our experience of several amendments having become necessary because of courts’ interpretation disproves that only Parliament damages the basic structure and the courts always defend it. The same may be said of the Ninety-third Amendment introducing Article 15(5) that by its interpretation in *Pai* and *Inamdar* in the matter of education, the Court by equalizing the FRs of majorities and the minorities in matters of education and by excluding the unaided private institutions from the purview of affirmative action had damaged the basic structure of the Constitution which provides respectively for special protection to the minorities and for affirmative action as part of the equality code. The Amendment has only repaired that damage to the basic structure of the Constitution. Therefore, no basis exists to doubt the validity of the Amendment even in respect of private unaided educational institutions.

It may also be remembered that while in *Minerva*, the Court spoke of the Articles 14, 19 and 21 triangle in *Waman Rao* it upheld Article 31-A and in *Kesavananda* and also in *Minerva* Article 31-C as introduced by the Twenty-fourth Amendment, which excluded both Articles 14 and 19 in certain areas. Therefore, mere exclusion of Article 19 in any area is not enough to come to the conclusion that the basic structure has been tempered. We have to go further and see if such exclusion abrogates something that is part of the basic structure. In matters of certain aspects of property rights the Court did not think that exclusion of Articles 14 and 19 was against the basic structure of the Constitution.

In *Coelho* at several places the Court has mentioned Article 15 among the FRs that are part of the basic structure, which implies that only abrogation of Article 15 will destroy basic structure but not any expansion of it. Article 15(5) only adds something to Article 15 and does not curtail anything from it. The Court specifically stated:

⁶⁸ *Id.* at 285.

⁶⁹ (2006) 8 SCC 212 at 238.

⁷⁰ *Id.* at 270.

“The doctrine of basic structure contemplates that there are certain parts or aspects of the Constitution including Article 15, Article 21 read with Article 14 and 19 which constitute the core values which if allowed to be abrogated would change completely the nature of the Constitution.”⁷¹

The Court repeated:

“Thus, validity of such laws [i.e. laws included in the Ninth Schedule] can be challenged on the touchstone of basic structure such as reflected in Article 21 read with Article 14 and Article 19, Article 15 and the principles underlying these Articles.”⁷²

Remember that *Coelho* is a unanimous verdict of nine judges and that clause (5) had already been inserted in Article 15 by the Amendment. How could a single judge in a divided five judge bench question or even doubt the validity of the Amendment? Even on the question of abrogation of FRs, which Bhandari J considers the conclusive test for determination if an amendment violates the basic structure, *Coelho* held:

“A law that abrogates or abridges rights guaranteed by Part III of the Constitution may violate the basic structure doctrine or it may not.”⁷³

True, the Court has held Article 19 along with Articles 14 and 21 as part of the golden triangle which stands between the haven of freedom into which Tagore wanted his country to awake and the abyss of unrestrained power, but it does not mean that every part or aspect of Article 19 is equally important or essential for that triangle. We have noted that in specified areas Article 31-A introduced by the First Amendment which excluded Articles 14 and 19, not to say of 31-B which excluded application of all FRs in unspecified areas, and Article 31-C which excludes the application of Articles 14 and 19 in respect of laws made under Article 39(b) and (c) have been, apart from *Kesavandnda*, specifically upheld in *Waman Rao* and in *Minerva*. Similarly, the Forty-fourth Amendment has deleted Article 19 (1)(f) along with Article 31 but its validity has never been questioned. From the contents of Articles 19 it is apparent that all rights under that Article do not stand on the same footing. Its clauses (2) to (6) draw a clear distinction between the respective rights in several sub-clauses of clause (1). While the rights in sub-clauses (a) to (c) are subject to reasonable restrictions only on specified grounds, rights in sub-clauses (d) and (e) are subject to reasonable restrictions “*in the interests of the general public*” as well as “*for the protection of the interests of*

⁷¹ (2007) 2 SCC 1 at 108.

⁷² *Id.* at 110.

⁷³ *Id.* at 111

any Scheduled Tribe". Finally, the rights in sub-clause (g) are not only subject to reasonable restrictions "in the interest of the general public" but they are also subject to any law that may provide for (i) the professional or technical qualifications necessary for the exercise of these rights and (ii) complete or partial monopoly in favour of the state in respect of any of the activities covered by that clause. Thus not only reasonable restrictions can be imposed on any of the rights in Article 19(1)(g) on the specious ground of general public interest but their exercise in private hands can also be completely denied by creating monopoly in favour of the state or any corporation owned or controlled by the state. A reasonable restriction under Article 19(6) also includes total prohibition of any activity guaranteed in Article 19(1)(g).⁷⁴ Further, in several cases the Court has also held that rights in respect of economic activities such as business or property do not stand on the same footing as for example the right to life or freedom of speech.⁷⁵ In *Minerva*, on which reliance is placed, Palkhivala spoke primarily for Article 19(1)(a) and not for Article 19(1)(g).⁷⁶ In view of this position of rights in Article 19(1)(g) in our Constitution it is impossible to assert that mere possibility of making special provisions in unaided private educational institutions clarified by Article 15(5) to remove the doubt caused by the Court amounts to the abrogation of that right and, therefore, to the destruction of basic structure. Provision for education is even otherwise considered primarily a responsibility of the state and even in many Western liberal states it is still provided almost exclusively by the state. It is beyond comprehension that in a "SOCIALIST .. DEMOCRATIC REPUBLIC" education in private hands must be part of the basic structure of the Constitution which can be subjected only to limited regulation. Recently I read how social inequality is increased if education is left in private hands. The wealthy have no incentive to invest in the education of poor. "This leads to a vicious circle in which the educated minority drifts ever further away from the rest of the population.' This is why the education policy is so important."⁷⁷ The author compares availability of education in modern time with the ownership of land in pre-industrial societies and finds that its unequal distribution today is creating the kind of inequality that existed in pre-World War II period.⁷⁸

⁷⁴ Narendra Kumar v Union of India, AIR 1960 SC 430; Municipal Corporation v Jan Mohmad Usmanbhai; Om Prakash v State of UP, (2004) 3 SCC 402 and Hinsa Virodhi Sangh v Mirzapur Moti Kuresh Jamat, (2008) 2 SCC 1.

⁷⁵ See e.g., State of Gujarat v Shri Ambica Mills, AIR 1974 SC 1300 and RK Garg v UOI, AIR 1981 SC 2138.

⁷⁶ See MV KAMATH, NANI A PALKHIVALA A LIFE 214 (2007).

⁷⁷ R. Groetker, *Inequality: Causes and Consequences*, in Institute for Advanced Study Berlin, Koepfe und Ideen 2008, English Version, 9, 11. The author refers to the historical interpretation of social inequality by Ronald Rogowski. Emphasis supplied.

⁷⁸ *Id.* at 9 & 13. Also visit <http://www.nber.org/papers/w13926> wherein a few American scholars after intensive empirical enquiry have come to the conclusion that reservation has helped the backward in education. See generally Joseph E. Stiglitz, *The Theory of "Screening," Education, and the Distribution of Income*, THE AMERICAN ECONOMIC REVIEW, Vol. 65, No. 3 (Jun., 1975), pp. 283-300

In *Pai* and *Inamdar* the Court equated the right of citizens under Article 19(1)(g) with that of the minorities under Article 30(1) “to establish and administer educational institutions of their choice” and read within the former the same rights of admission as guaranteed to the minorities under the latter. An unspecified right of every citizen, which was not even known or recognized until *Pai*, could not have the same scope and content as the specified right of the minorities alone. As a matter of fact in the process of equalizing the rights of every citizen with the rights of the minorities the Court has destroyed a basic feature of the Constitution which grants the minorities special protection vis-à-vis the other citizens in matters of education. It has also diluted the special rights of the minorities to “national interest” in the same way as the rights of other citizens are under Article 19(6). Neither the rights of citizens under Article 19(1)(g) are the same as the rights of minorities in Article 30(1) nor can they have the claim to basic structure as the rights of the minorities are. This position is clearly implied in Article 15(5) which excludes minority institutions from its scope. Justice Bhandari’s interpretation of the right to education in Article 19(1)(g), which brings that interpretation at par with the rights of unaided minority institutions under Article 30(1) is not, therefore, substantiated either by the provisions of the Constitution or their judicial interpretation.

In this connection I need not pursue the further argument that Article 19 is available only to citizens who do not include juristic persons such as companies and other incorporated bodies which run the educational institutions. Nor do I pursue the argument that FRs have horizontal application and are also available against private persons.⁷⁹

In view of the foregoing discussion no doubt whatsoever can be entertained about the validity of the Amendment even in its application to private unaided educational institutions. The Amendment is at least partly if not wholly the restoration of the basic structure of the Constitution which had been damaged by *Pai* and *Inamdar*.

VIII. SOME RELATED ISSUES

Casteless society:- Judges, lawyers, scholars, political thinkers and others, who detest reservation, strongly argue that the Constitution envisages a casteless and classless society while reservation is made on caste lines. Reservation, especially for OBCs who are determined on the caste lines, is therefore against the spirit and very foundations of the Constitution. It divides society and goes against the “unity and integrity of the Nation” which the Preamble promises to secure to all of us. It also goes against clauses (1) and (2) of Article 15 and clause (2) of Article 16 which prohibit discrimination on the ground of caste.

⁷⁹ I have discussed this point in detail in *Protection of Human Rights against State and Non-State Action*, in D Oliver & J Fedtke, HUMAN RIGHTS AND THE PRIVATE SPHERE, 180 (2007).

Without going into the argument that OBCs are not determined exclusively on the basis of caste, let me clarify that the unity of the nation is not secured and ensured, but rather it is endangered, by not recognizing the existing historical inequalities and injustices in our society. It is against such inequalities that existed in our society on caste lines that discrimination on grounds of caste was prohibited in the above clauses. The clauses prohibit discrimination; they do not derecognize castes just as they prohibit discrimination on the basis of religion or sex or place of birth but they do not abolish or derecognize them. Prohibition of discrimination in its nature, content and objectives is different from de-recognition of differences. While prohibition of discrimination prohibits or eliminates contempt or disrespect or prejudices on the stated grounds de-recognition of them ignores and perpetuates such contempt, disrespect and prejudices. The Constitution makers knew this difference between prohibition of discrimination and de-recognition of differences very well and, therefore, they prohibited the former but did not do the latter. This difference they made obvious in clause (3) of Article 15 by providing for special provision for women, in clause (4) of Article 16 by providing for reservation for backward classes, in Article 30 for religious and linguistic minorities, in several DPs, in the entire Part XVI and Schedules V and VI. They made themselves further clear in this regard by adding clause (4) to Article 15 by the First Amendment. No two human beings are without differences and so too no society without differences can and should be conceived of. People live in families and groups. The Constitution does not and can never be expected to dissolve them. Definitely it prohibits prejudices in public life that arise from or are associated with such groups. To that extent the Constitution definitely prohibits prejudices arising from caste just as it prohibits such prejudices arising from religion or sex but no more.

Quantum of reservation.- The Court in *Balaji* arrived at less than fifty per cent reservation not on the basis of any specification in the Constitution but in the national interest. The Central Government has respected that limitation, though the States have occasionally exceeded it. In view of the fact that regional variations apart the fifty percent limitation appears to have been well accepted, I need not raise that issue. Nor do I want to dispute that. But in view of the fact that reservation in excess of that limit was the subject matter in *Nagaraj* and *Coelho* I touch this point only to emphasise that the limit is a sort of gentlemen's agreement and not a constitutional prescription. The logic on which the Court arrived at that limit does not have any basis in constitutional interpretation. National or public interest is a defence for and not a weapon against the state action. If *Balaji* was a case relating to FRs, the petitioner was expected to claim that reservation of sixty-eight percent seats in that case was against his FRs and the respondent State was expected to defend its action on the ground that it is required in the national or public interest. But no such claim seems to have been made or defended in that case. The Court of its own became the defender and decision maker of national interest without a contest between the parties on that issue. Therefore, that limit was fixed in vacuum contrary to the recognized principles of constitutional interpretation. After upholding deviation from that limit in the case of SCs and STs in *Thomas and Sangh*, in *Sawhney* the Court held that barring any extra-ordinary situations reservation should not exceed fifty percent. The Eighty-first Amendment by

inserting clause (4-B) in Article 16 has removed the fifty percent limit in state services. The Court unanimously upheld the amendment in *Nagaraj* and observed that “the concept of ‘extent of reservation’ is not an absolute concept and like merit it is context-specific.”⁸⁰ The supporters of fifty percent limit will argue that Article 16(4-B) and *Nagaraj* are about employment and not education; *Balaji* still controls reservation in educational institutions. I do not find it a sound argument. At the same time I have no quarrel with the agreeable limit of fifty percent. But that limit should not prevent the state from exceeding it if the situation so demands. The Tamil Nadu legislation, which provides for sixty-nine percent reservation and was initially the subject matter of dispute in *Coelho*, applies to education as well as employment. But to avoid a challenge, it has been included in the Ninth Schedule that we discuss next.

Reservation and the Ninth Schedule:- Kesavananda decided that laws included in the Ninth Schedule until the pronouncement of that judgment, i.e. until 24 April 1973 were protected by Article 31-B and were, therefore, beyond challenge on the ground of violation of FRs. But any laws that are included in that Schedule after that date will be subject to the requirement of basic structure and could be tested on that ground. This position was reiterated and clarified in *Waman Rao*. The same position has been reiterated in the unanimous nine judge bench decision in *Coelho*. With this abstract statement, the Court has left the validity of the laws included in the Ninth Schedule after 24 April 1973 to be determined under the basic structure limitation. In this regard two things must be noted. Firstly, the Court in *Nagaraj* found no violation of the basic structure doctrine in upholding unlimited reservation provided in Article 16(4-B). Secondly, though the Court has repeatedly held that the laws included in the Ninth Schedule after 24 April 1973 are subject to the basic structure requirement, since *Indira Gandhi* in which the validity of Representation of People Act included in the Ninth Schedule after 24 April 1973 was questioned on ground of basic structure, the Court has always rejected the plea of application of basic structure doctrine to judge the validity of legislation whether included in the Ninth Schedule or not. Recently in *Kuldip Nayar v. Union of India*⁸¹ and again in *Thakur*,⁸² the Court has declined to test the validity of legislation on the touchstone of basic structure. If this is the established constitutional position that legislation of any kind cannot be tested on the ground of violation of basic structure, it becomes enigmatic as to how can legislation included in the Ninth Schedule be examined if its contents violate the basic structure of the Constitution. In my view the threat or assurance that laws included in the Ninth Schedule after 24 April 1973 can be examined on grounds of basic structure is empty and has no substance. The laws included in the Ninth Schedule can only

⁸⁰ (2006) 8 SCC 212, 249.

⁸¹ (2006) 7 SCC 1, 67.

⁸² See Balakrishnan CJI, para 93.

be deleted by an amendment as the Forty-fourth Amendment did in deleting several entries introduced in the Ninth Schedule by the Thirty-ninth and Fortieth Amendments.

IX. CONCLUSION

To conclude the discussion, which could and is likely to be continued ad infinitum in one form or the other, I may say that despite divided verdict *Thakur* has done well. It would have certainly done better if all the judges had joined in a single verdict. Maybe the divided verdict is part of a strategy not to let the controversy be buried conclusively so that the opponents of reservation have the satisfaction that they have not yet lost their case and its supporters realize that it is a slippery path on which they must move very carefully at every step. No decision on the application of the Amendment to private unaided educational institutions could also be seen as part of that strategy. It divides what could be a united front against reservation in educational institutions and makes the government stand on its toes that a hasty action on its part may divert it from the constitutional goal. Even Justice Bhandari's dissent may be justified as a strategic move to console the opponents of reservation that they have enough scope to establish and run educational institutions free from the threat of reservation and they could continue their drive and initiative with full vigour to meet the pressing educational needs of our society.

Thakur has also clarified several lingering doubts on the reservation issue. It has decided that in essence the same principles of law apply to Article 15(4) and (5) as to Article 16(4) as determined in *Sawhney*; that SEBCs and OBCs in the two are essentially the same and the government could draw a common list for both; and that so long as OBCs are determined with reference to caste, the creamy layer from them must be removed to bring them within the definition of OBCs. Exclusion of creamy layer is an inbuilt requirement of being OBCs on caste lines. That the concept of creamy layer does not apply to SCs and STs. And that the principles of suspect classification, strict scrutiny and compelling state necessity evolved and applied by the US courts in determining the validity of affirmative action or in interpreting the concept of equality are not relevant for us in interpreting the equality provisions, especially Articles 15(4) and (5) and 16(4) (4-A) and (4-B). It has also endorsed the clarification enacted in the Amendment that in the matter of establishing and administering educational institutions minorities stand on a different footing than the majorities.

We could, therefore, very well expect in future a slow, if not immediate, demise of many controversies associated with the issue of reservation. It has always been a curious enigma to me that while without a provision in the Constitution reservation for almost innumerable categories of persons such as government nominees, children of government employees, persons involved in family planning, residents of certain territories, children of political sufferers, war widows, etc are either not noticed or have been upheld by the courts as part of equality scheme, reservation for SCs, STs and OBCs continues to be hotly contested

subject despite express provisions for it in the Constitution. Of course the answer would be that while the former are casteless the later are caste based. As caste system is a perennial evil existing from time immemorial, it should be eliminated through its non-recognition. As a student of law I ask if the Constitution makers were ignorant of such an obvious fact when they provided for reservation for OBCs, SCs, STs and even Anglo-Indians or made special provisions for minorities. Are our representatives in Parliament and State legislatures have also been ignorant of this fact who have been ever since the commencement of the Constitution supporting and strengthening these provisions? I am sure that it is not the case. On my own analysis, I find that the privileged few who retain vast resources of the society are not open to share them with the large number of our masses who have been consistently denied of them from time immemorial. They come up with all sorts of argument to retain their privileged position. The latest among them is economic liberalisation as part of globalization. While economists are equally divided on the gains of liberalization and globalization, facts have proved beyond doubt that increase in total wealth of the society does not ensure its equitable distribution.⁸³ For equitable distribution of gains, extra measures are required. Apart from DPs, provisions like Articles 15(4) and (5) and 16 (4), (4-A) and (4-B) and 335 in our Constitution are part of that requirement. They also serve a larger purpose of narrowing down the gap that has been created and perpetuated in our society on caste lines between those who have and who do not have a say in the society. They ensure that those who did not have a say so far will slowly be brought into the fold of those who have and in course of time, hopefully, the gap will vanish and an inclusive society, at least in public affairs, will be created. There should be no doubt that an inclusive society will better serve our constitutional goal of fraternity, human dignity and national unity than a divided society.

For that reason, I earnestly urge that in the larger interest of our society and of each one of us, we must give up our narrow vision and get united in the realization of our constitutional goals. We must not get confused with what the other societies are doing for themselves. *Thakur* has shown the way by rightly rejecting the principles of constitutional interpretation applied in the United States. We must also not be influenced by what United States or any other country is doing with affirmative programmes.⁸⁴ We are different, our problems are different, and our Constitution is different and has the unique distinction of being the first to expressly provide for affirmative action including reservation in key areas. We should not let this opportunity of reconstructing our society slip once again from our hands as we have been doing ever since the time of Buddha. Let us not let down our Constitution makers as we have done before to many reformers. Let us now create an ideal society on earth where all people live in harmony, free from want and fear and pursue their goals towards higher reaches of mankind without hurdles and hindrance. I take leave with this hope and wish.

⁸³ See JOSEPH STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 4-6 (2002). See also JOSEPH STIGLITZ, *MAKING GLOBALIZATION WORK* xiv (2006)

⁸⁴ See Acharya, above n. 24 at 288.