

**(2013) 02 GUJ CK 0055**

**In the Gujarat High Court**

**Case No :** Writ Petition (PIL) No's. 20 of 2011 and 191 of 2012

Adam B. Chaki

APPELLANT

Vs

Government of India and Others

RESPONDENT

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**Date of Decision :** 15-02-2013

**Acts Referred:**

Constitution of India, 1950 — Article 11, 12, 132(1), 134A, 14  
Government of India Act, 1935 — Section 126, 298, 298(1)  
National Commission For Backward Classes Act, 1993 — Section 11, 9, 9(1), 9(2)  
National Commission for Minorities Act, 1992 — Section 2(1)(a), 2(c), 3, 9  
Penal Code, 1860 (IPC) — Section 458  
Police Act, 1861 — Section 15, 15(1)

**Citation :** AIR 2013 Guj 66

**Hon'ble Judges :** V.M. Sahai, J;R.R. Tripathi, J;J.B. Pardiwala, J;D.H. Waghela, J;Akil Abdul Hamid Kureshi, J

**Bench :** Full Bench

**Advocate :** Ekrama Qureshi and Mr. Hashim Qureshi, in Writ Petition PIL No. 20 of 2011 for Mr. Shalin Mehta, with Ms. Srushti Thula in Writ Petition PIL No. 191 of 2012, for the Appellant; Kamal B. Trivedi, Advocate General with Mr. Pankaj Jani, Government Pleader with Ms. Sangeeta Vishen, AGP in Writ Petition (PIL) No. 191 of 2012 and for Opponent(s) No. 2 in Writ Petition (PIL) No. 20 of 2011, Mr. Paras Kuhad, Addl. Solicitor General of India Mr. Pankaj S. Champaneri, Asst. Solicitor General of India with Mr. Hriday Buch, Advocate, Mr. Yatin Oza with Ms. Srushti A. Thula, Advocate for Opponent Nos. 3-4 in Writ Petition (PIL) No. 20 of 2011, Mr. Hashim Qureshi, Advocates in Writ Petition (PIL) No.191 of 2012, Y.H. Muchhala M.T.M. Hakim, Advocates and Mr. Dushyant Dave with Mr. Anand Yagnik, for the Respondent

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## **Judgement**

J.B. Pardiwala and Ravi R. Tripathi, JJ.—I have had the benefit of going through a very erudite and lucid judgment prepared by my esteemed learned brother Justice Akil Kureshi, holding that the Scheme in question is valid and not discriminatory in terms of Article 15(1) of the Constitution of India. My learned brother has also held that the State Government is legally bound to implement the same. It is with deep and sincere regret that I express my inability to

persuade myself to agree with the views expressed by my esteemed learned brother. I admit that on the question referred to this Full Bench, there is room for difference of opinion, but I would like to express my own views to ensure that the scope of fundamental right conferred by any provision contained in Part-III of the Constitution of India is not allowed to be belittled or restricted. I am of the view that the Scheme in question is discriminatory and is hit by Article 15(1) of the Constitution of India for the reasons I shall assign hereafter. The facts have been elaborately stated in the majority judgment and, therefore, they are not being repeated for the sake of convenience.

Four score and seven years ago our fathers brought forth on this continent a new nation conceived in liberty and dedicated to the proposition that all men are created equal. We are engaged in a great civil war, testing whether that nation, or any nation so conceived and so dedicated, can long endure.

Abraham Lincoln: Gettysburg Address

2. The idea of equality is the heart and soul of the Indian Constitution system. The Preamble of our Constitution promises equality, which is explained in detail in Articles 14 and 15 as enshrined in Part-III of the Constitution. Equality as contemplated under our Constitution system is among equals and similarly situated. Equality in general cannot be universally applied and is subject to conditions and restrictions as spelt out in the Constitution itself. The Constitution of India has an elaborate Preamble. The purpose of the Preamble is to clarify who has made the Constitution, what is its source, what is the ultimate sanction behind it; what is the nature of the polity which is sought to be established by the Constitution and what are its goals and objectives ?

3. The Preamble does not grant any power but it gives a direction and purpose to the Constitution. It outlines the objectives of the whole Constitution. The Preamble contains the fundamentals of the Constitution. It serves several important purposes, as for example:

- (1) It contains the enacting clause which brings the Constitution into force.
- (2) It declares the great rights and freedoms which the People of India intended to secure to all its citizens.
- (3) It declares the basic type of Government and polity which is sought to be established in the country.
- (4) It throws light on the source of the Constitution, viz. the People of India.

4. Articles 14, 15 and 16 deal with the various facets of the right to equality. Article 14 provides for equality before law and prohibits the State from denying to any person, equality before law or equal protection of laws. Article 15 provides for prohibition of discrimination against any citizen on grounds only of religion, race, caste, sex or place of birth or any of them, but permits special provisions being made for women and children or for the advancement of any socially and

educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes. Article 16 guarantees equality of opportunity in matters of public employment to the citizens of India.

5. These three Articles form part of the same Constitutional code of guarantees and, in the sense, supplement to each other. Article 14 on the one hand, and Articles 15 and 16 on the other, have frequently been described as being the genesis and the species respectively.

6. In the light of the constitutional guarantee of equality in the matter of making special provision for the advancement of any socially and educationally backward class of citizens, I am called upon to test the constitutional validity of a centrally sponsored scheme of "Pre-Matric Scholarship" for the students belonging to the minority communities. Few salient features of the Scheme in question which require a mention are as under:-

(1) The Scheme provides scholarship for meritorious students from religion based minority communities.

(2) u/s 2(c) of the National Commission for Minorities Act, 1992, the Muslims, Sikhs, Christians, Buddhists and Zoroastrians (Parsis) have been notified as minority communities.

(3) The object of the Scheme is to encourage parents from minority communities to send their school-going children to schools, lighten their financial burden on school education and sustain their efforts to support their children to complete school education.

(4) According to the eligibility criteria prescribed in the said Scheme, the scholarship would be awarded to the students who have secured not less than 50% marks in the previous final examination and the annual income of their parents/guardians from all sources should not exceed Rs. 1 lakh.

(5) The distribution of scholarship among the State/Union Territory will be made on the basis of the population of minorities in the State/Union Territory indicated in the Census 2001.

7. Thus, it is abundantly clear that the benefit of the Pre-Matric Scholarship is available only to the students of five minority communities, namely, Muslims, Sikhs, Christians, Buddhists and Zoroastrians (Parsis) and that too, only to those students who have secured not less than 50% marks in the previous final examination and the annual income of their parents/guardians from all sources is not exceeding Rs. 1 lakh.

8. In the circumstances referred to above, the question that falls for my consideration is, whether the scheme introduced by the Central Government is violative of Article 15(1) of the Constitution of India as only on the ground of religion the children of all other communities except the five communities indicated in the Scheme are deprived of the said benefit, however meritorious

the children of other communities may be and however lower ebb of poverty and distress they are suffering from.

9. Before I proceed to examine this main question, it will be profitable to take brief note of the various submissions which have been made on either side:

Gist of the submissions made on either side

I. Submissions to uphold the validity of the Scheme:

Mr. Paras Kuhad, the learned Assistant Solicitor General of India appearing for the Union of India, Mr. Ekrama Qureshi, the learned advocate appearing for the petitioner of Writ Petition (PIL) No. 20 of 2011, Mr. Y.H. Muchhala, the learned senior counsel appearing for the Intervener and Mr. Dushyant Dave, the learned senior counsel appearing for another Intervener, in one voice, submitted that the impugned Scheme promulgated by the Union of India is to fulfill its obligation to minimize inequalities in income and to eliminate inequalities in status, facilities and opportunities amongst group of people in India and thereby to ensure social order in which justice, social, economic and political shall inform all institutions of national life. The impugned Scheme comprises of "special steps" to promote educational and economical interests of the religious minorities who constitute weaker sections of the people and thereby Union of India has discharged its constitutional obligation under Article 46 of the Constitution of India. The Scheme in question is not based only on religion or poverty but is based on variety of factors, namely, economic, poverty, sex, minority status and State-wise population.

It is constitutionally permissible to treat religious minorities as specified in the National Commission for Minorities Act, 1992 as a separate class. The burden of proof to assail constitutional validity of the impugned Scheme lies on the party who challenges the same.

Article 15(4) also permits special provisions to be made for socially and educationally backward classes. The State of Gujarat is under a constitutional obligation to implement the Scheme and its refusal to do so amounts to breach of its obligation and fundamental rights read with socio-economic rights of the religious minorities.

One of the submissions was that if the decision of the Supreme Court in the case of Indra Sawhney etc. etc Vs. Union of India and others, etc. etc., is read closely, then so far as the Hindus are concerned, caste can be a starting point while for other religions where there is no caste system, occupation can be the starting point. Thus, emphasis in so far as Hindus are concerned, should be for "caste", and for others, "occupation".

Relying on the decision of the Division Bench of the Andhra Pradesh High Court rendered in the case of R. Krishnaiah v/s. Union of India (PIL Nos. 1, 22 and 56 of 2012 decided on 28th May 2012), it was submitted that clubbing certain minorities such as Muslims, Christians, Sikhs, Buddhists and Zoroastrians

(Parsis) into one group does not per se lead to any conclusion of homogeneity among them on the contrary, the presumption is of diversity. It was also submitted that the five minority communities do not form a homogeneous group but a heterogeneous group.

It was sought to be contended by the learned Assistant Solicitor General of India Mr. Kuhad that Court should take a wholesome balanced view of the entire scheme and not a pedantic view. According to him, the decision rendered by the Supreme Court in the case of Prafull Goradia Vs. Union of India (UOI), is the complete answer to the question of constitutional validity of the Scheme and that it is not hit in any manner by Article 15(1) of the Constitution of India.

It was also submitted that the decision of the Central Government to float such a scheme for the five minority communities could be termed as a policy decision of the Government, and unless it is shown by adducing some evidence that such policy decision violates fundamental right, only then Court should interfere in exercise of powers under Article 226 of the Constitution of India.

Drawing distinction between differentiation and discrimination, it was submitted that the Scheme is in consonance with the Second Part of Article 14 of the Constitution of India.

It was also submitted that the basis for introducing such a Scheme was the Report of Justice Sachar Committee constituted by the Central Government as a part of Prime Minister's 15 point programme.

It was submitted that the benefit is not being extended to a member of a particular religion but a class of citizens who have been declared as a minority under a notification issued u/s 2(c) of the National Commission for Minorities Act, 1992.

It was also submitted that Article 15(4) of the Constitution of India is one of the sources of power to introduce such a scheme for the minorities and not the only source of power.

Reliance was mainly placed on the following decisions in support of the Scheme:

- (1) Indra Sawhney etc. etc Vs. Union of India and others, etc. etc., ;
- (2) State of Kerala and Another Vs. N.M. Thomas and Others, ;
- (3) Ashoka Kumar Thakur Vs. Union of India (UOI) and Others, ;
- (4) Prafull Goradia Vs. Union of India (UOI), .

II. Submission to declare the Scheme invalid being hit by Article 15(1) of the Constitution of India.

Mr. Kamal B. Trivedi, the learned Advocate General appearing for the State of Gujarat, Mr. Prakash K. Jani, the learned Government Pleader, assisted by Ms. Sangeeta Vishen, the learned AGP, Mr. Y.N. Oza, the learned senior counsel

appearing for the respondents in Writ Petition (PIL) No. 20 of 2011, Mr. Shalin Mehta, the learned senior counsel appearing for the petitioner in Writ Petition (PIL) No. 191 of 2012, in one voice, submitted that the Scheme in question is violative of Article 15(1) of the Constitution of India, since it seeks to discriminate on the ground only of religion. There is no other consideration coupled therewith which could have permitted the said discrimination based on the ground of religion.

So far as Scheduled Castes and Scheduled Tribes are concerned, the same are to be specified by the President in consultation with the Governor for a particular State as provided under Articles 341 and 342, respectively. So far as SEBC is concerned, there is no such provision in the Constitution. Article 340 does not envisage a Commission for finding out and classifying the citizens who are socially and educationally backward. What it envisages is that for the removal of difficulties of citizens who are socially and educationally backward, the Commission may investigate facts and submit recommendations. In the case of *Indra Sawhney* (supra), while dealing with the challenge against recommendation of Mandal Commission appointed under Article 340, mandated in paragraphs 117, 123A, 123B, 366(17) and 471(9) that the Central Government as well as State Governments should create a permanent machinery in form of Commission or Tribunal for examining request of inclusion in or exclusion from backward class, while keeping in mind various factors like caste, education, occupation, habitat, poverty, etc.

Apropos the above, the Central Government enacted National Commission for Backward Classes Act, 1993, whereas the State Government constituted a permanent Commission vide G.R. dated 18th March 1993 (page 83 in the Writ Petition (PIL) No. 20 of 2011) for specifying backward classes of citizens in the State. As a result of the exercise undertaken by the said State Commission, in all 146 castes and communities have been specified to be SEBCs in the State of Gujarat, which include 31 castes which belong to the minority communities of Muslims and Christians. Except the above, the said Commission has not identified any other caste relating to any religious minority community as SEBC. Similarly, at the Union level also, the National Commission for Backward Classes constituted under the NCBC Act, 1993 has never specified all the said five religious minorities as a backward class or as SEBC.

Unless religious minorities referred to in the Scheme in question are so specified as Scheduled Castes or Scheduled Tribes or SEBC or any other backward class, any preferential treatment sought to be given to them only on the ground of their being the religious minorities, would be discriminatory in nature and hit by Article 15(1) of the Constitution.

The determination of socio-economic backwardness of Muslim community and other socio-religious categories in India by Justice Sachar Committee, vide Report dated 17th November 2006, cannot, by any stretch of imagination, be called identification of the said Muslim community and other socio-religious

categories as belonging to "Socially and Educationally Backward Classes" within the State of Gujarat. Unless the said communities are so identified and declared by the permanent Commission working in the State of Gujarat as belonging to Socially and Economically Backward Class, they cannot per se be recognized as SEBCs.

Reliance was mainly placed on the following decisions:

- (1) T.M.A. Pai Foundation and Others Vs. State of Karnataka and Others, ;
- (2) S.R. Bommai and others Vs. Union of India and others etc. etc., ;
- (3) Bal Patil and Another Vs. Union of India (UOI) and Others, ;
- (4) The State of Rajasthan and Others Vs. Thakur Pratap Singh, ;
- (5) E.V. Chinnaiah Vs. State of Andhra Pradesh and Others, .

#### ANALYSIS:-

In Constitutional Law of India (by H.M. SEERVAI, 4th Edn., Vol. I at page 439) what is meant by equal protection of laws is answered thus:- "If all men are created equal and remained equal throughout their lives, thus the same laws would apply to all men. But "we know" that men are unequal; consequently, a right conferred on persons that they shall not be denied "the equal protection of the laws", cannot mean the protection of the same laws for all. It is here that the doctrine of classification steps in and gives content and significance to the guarantee of the equal protection of the laws. According to that doctrine, equal protection of the laws must mean the protection of equal laws for all persons similarly situated. To separate persons similarly situated from those who are not, we must "discriminate", that is, act on the basis of a differences between persons, or, observe distinctions carefully between persons who are and persons who are not, similarly situated. But as the distinction is to be made for the purpose of making a law, how must the distinction be related to the law ?

10. This is answered by the Central List for a permissible classification: "Permissible classification must satisfy two conditions, namely: (1) it must be founded on an intelligent differentia which distinguishes persons or things that are grouped together from others left out of the group; and (2) the differentia must have a rational relation to the object sought to be achieved by the statute in question with the qualification that the differentia and the object are different, so that the object by itself cannot be the basis of classification. A law based on a permissible classification, fulfills the guarantee of the equal protection of the laws and is valid."

11. The expression "equal protection of the laws" is now being read as a positive obligation of the State to ensure equal protection of the laws by bringing in necessary social and economic changes, so that everyone may enjoy equal protection of the laws and nobody is denied such protection. If the State leaves the existing inequalities untouched by the laws, it fails in its duty of providing

equal protection of its laws to all persons.

12. On plain reading of Articles 14, 15 and 16, it is very clear that the right to equality and the prohibition against discrimination provided for under Articles 15 and 16 of the Constitution of India are in a sense narrower than the guarantee of equality before law incorporated in Article 14. Both Articles 15 and 16 confined the guarantee as well as the corresponding prohibition, in relation to citizens alone and have, therefore, no application to non-citizens. The operation of these two Articles is, therefore, narrower in that sense than the terms of Article 14. In a sense the guarantee provided under these two Articles is more unqualified than the terms in which Article 14 guarantees the rights. While Article 14 permits reasonable classification provided such classification is permissible on an application of the principle referred to above, the scope of such classification under Articles 15 and 16 is restricted by the terms of these two Articles because any classification based solely on the grounds set out in these Articles, which would be permissible under Article 14 would nevertheless be outside these Articles. For example, if a person is discriminated against solely on the ground of religion, race, caste, sex or place of birth or any of them, the discrimination would not be struck down under Article 14 if such classification is founded on an intelligible differentia which distinguishes persons that are grouped together from others who are outside the group and such differentia has a rational relation to the object sought to be achieved. Such a classification, however, would nevertheless militate against Article 15 and in case of any matter of public employment, Article 16 as well, unless in the case of Article 15, such a classification could be justified with a reference to clause (3) of Article 15, which provides that "nothing in this Article shall prevent the State from making any special provision for women and children", and in the case of Article 16, relating to matters of public employment, such a classification or discrimination is saved by clauses 3, 4 and 5 of that Article.

13. It follows, therefore, that while discrimination on the basis of caste or religion, as in the present case, may be justified under Article 14 of the Constitution of India, if caste or religion, on the facts and circumstances of this case, could be said to be an intelligible differentia which distinguishes students of the five minority communities with similarly placed students of any other community i.e. other than the minority community, and such differentia has a rational relation to the object that was sought to be achieved by the Scheme in question, such a classification would not be permissible either under Article 15 of the Constitution of India or under Article 16 of the Constitution of India, unless it was saved by clause (4) of that Article.

14. The moot question which emerges from the aforesaid discussion is, whether the benefits of the Scheme are conferred only on the basis of religion or there are any other rational factors on the basis of which it could be said that the Scheme is not discriminatory in nature violating Article 15(1) of the Constitution of India.



15. Before answering the above referred question, it would be profitable to look into few relevant provisions of the Constitution of India:

#### Article 14

14. Equality before law. - The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

#### Article 15

15. Prohibition of discrimination on grounds of religion, race, caste, sex, place of birth. - (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to -

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes.

(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 in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30.

#### Article 16

16. Equality of opportunity in matters of public employment. - (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.

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

4(A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

4(B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent, reservation on total number of vacancies of that year.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

#### Article 21A

21A. 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.

#### Article 25

25. Freedom of conscience and free profession, practice and propagation of religion - (1) Subject to public order, morality and health and to the other provisions of this part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the state from making any law -

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

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

Explanation II. - In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

## Article 26

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

(a) to establish and maintain institutions for religious and charitable purpose;

(b) to manage its own affairs in matters of religion;

(c) to own and acquire movable and immovable property; and

(d) to administer such property in accordance with law.

## Article 29

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

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

## Article 30

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

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

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

## Article 46

46. Promotion of educational and economic interests of Scheduled Castes,

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

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

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

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

"Discriminate against" means "make an adverse distinction with regard to"; "distinguish unfavourably from others" (Oxford Dictionary). What the article says is that, no person of a particular religion or caste shall be treated unfavourably

when compared with persons of other religions and castes merely on the ground that they belong to a particular religion or caste. Now what does the Communal G.O. purport to do ? It says that a limited number of seats only are allotted to persons of a particular caste, namely Brahmins. The qualifications which would enable a candidate to secure one of those seats would necessarily be higher than the qualifications which would enable a person of another caste or religion, say, Harijan or Muslim to secure admission.

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

19. This decision was upheld by the Supreme Court on appeal in - *The State of Madras Vs. Srimathi Champakam Dorairajan*, . Their Lordships say:

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

20. Thus, the decisions of the Supreme Court in *Champakam Dorairajan* (supra) and *Kathi Raning Rawat* (supra) establish the proposition that, while classification is permissible, it cannot be based on any of the factors mentioned in Articles 15 and 16. So far as this proposition of law is concerned, it still holds good even after the pronouncement of the Supreme Court in the case of *Indra Sawhney* (supra).

21. In the present case, the complaint is that the Scheme is based on caste or religion only, which is a factor on which discrimination is forbidden by Article 15(1) of the Constitution of India. In my opinion, the two decisions referred to above are based upon the language of the Constitution and are also in accordance with its spirit. The founding fathers of the Constitution were citizens of India hailing from all parts of the country. They were fully aware of the difficulties, disabilities and prejudices which existed at the relevant point of time in various parts of the country. It was with this object that Articles 15 and 16 were given a place in the Part relating to fundamental rights. The framers of the Constitution knew fully well that women were, in many parts of the country, still backward - that is why under Article 15(3) legislation discriminating in their favour is permitted - and yet they forbade discrimination "against" them. No

evasion of the Constitution can be permitted merely by calling an Act "classification" and not "discrimination".

22. Article 15, as originally enacted, did not contain Article 15(4). It was inserted by the Constitution (First Amendment) Act, 1951, as a result of the decision in the case of Champakam Dorairajan (*supra*), setting aside reservation of seats in educational institution on the basis of caste and community. The Court observed that the Government's order was violative of Article 15 or Article 29(2). It said in paragraph 9 at page 228 as under:

Seeing, however, that clause 4 was inserted in Article 16, the omission of such an express provision from Article 29 cannot but be regarded as significant.

23. The object of the First Amendment was to bring Articles 15 and 29 in line with Article 16(4). After the introduction of Article 15(4), reservation of seats in educational institution came to be upheld in the case of *M.R. Balaji and Others Vs. State of Mysore*, . Justice Gajendragadkar, speaking for the Bench, observed in paragraph 22 as under:

Therefore, in dealing with the question as to whether any class of citizen is socially backward or not, it may not be irrelevant to consider the caste of the said group of citizens. In this connection, it is, however, necessary to bear in mind that the special provision is contemplated for class of citizens, and not for individual citizens as such, and so, though the caste of the group of citizens may be relevant, its importance should not be exaggerated. If the classification of backward classes of citizens was based solely on the caste of the citizen, it may not always be logical and may perhaps contain the vice of perpetuating the castes themselves.

24. Thus, the Supreme Court in *M.R. Balaji* (*supra*) made it very clear that caste could be one of the considerations in determining the extent of backwardness but it could not be the sole consideration. Accordingly, it held that the order passed by the State of Mysore "was a fraud on the constitutional power conferred on the State by Article 15(4)" and was liable to be quashed, because the order categorized, contrary to the plain intendment of Article 15(4), the backward classes on the sole basis of caste.

25. What then exactly shall be understood by the term "class" as appearing in Article 15(4) of the Constitution ? The expression "class" has been well explained by the Supreme Court in *State of Andhra Pradesh and Another Vs. P. Sagar*, . Late Justice J.C. Shah (as His Lordship then was), speaking for the Bench, has very eruditely explained by observing in paragraph 6 of the judgment as under:

6. In the context in which it occurs the expression "class" means a homogeneous section of the people grouped together because of certain likenesses or common traits and who are identifiable by some common attributes such as status, rank, occupation, residence in a locality, race, religion and the like. In determining whether a particular section forms a class, caste cannot be excluded altogether.

But in the determination of a class a test solely based upon the caste or community cannot also be accepted. By Clause (1), Article 15 prohibits the State from discriminating against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. By Clause (3) of Article 15 the State is, notwithstanding the provision contained in Clause (1), permitted to make special provision for women and children. By Clause (4,) a special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes is outside the purview of Clause (1). But Clause (4) is an exception to Clause (1). Being an exception, it cannot be extended so as in effect to destroy the guarantee of Clause (1). The Parliament has by enacting Clause (4) attempted to balance as against the right of equality of citizens the special necessities of the weaker sections of the people by allowing a provision to be made for their advancement. In order that effect may be given to Clause (4), it must appear that the beneficiaries of the special provision are classes which are backward, socially and educationally and they are other than the Scheduled Castes and Scheduled Tribes, and that the provision made is for their advancement. Reservation may be adopted to advance the interests of weaker sections of society, but in doing so, care must be taken to see that deserving and qualified candidates are not excluded from admission to higher educational institutions. The criterion for determining the backwardness must not be based solely on religion, race, caste, sex, or place of birth, and the backwardness being social and educational must be similar to the backwardness from which the Scheduled Castes and the Scheduled Tribes suffer.

26. What is discernible from the judgment of the Supreme Court in the case of State of Andhra Pradesh (supra) is that, "class" means "a homogeneous section of the people grouped together because of certain likenesses or common traits and who could be identifiable by some common features such as race, religion, etc. It once again reiterated the principle enunciated in M.R. Balaji's case (supra) that in the determination of a class, a test solely based upon the class or community could not be accepted. Still, the important part of the observations is that clause (4) has been enacted to balance the right of equality of citizens, more particularly, the special necessities of the weaker sections of the people by allowing a provision to be made for their advancement. But in doing so, care must be taken to see that deserving and qualified candidates are not excluded.

27. In State of Andhra Pradesh (supra), the Court proceeded further to observe that:

Article 15 guarantees by the first clause a fundamental right of far-reaching importance to the public generally. Within certain defined limits an exception has been engrafted upon the guarantee of the freedom in clause (1), but being in the nature of an exception, the conditions which justify departure must be strictly shown to exist.

28. Very important observations fell from the Bench, stating that when a dispute is raised before a Court (like in the present case) that a particular law which is

inconsistent with the guarantee against discrimination is valid on the plea that it is permitted under clause (4) of Article 15, the assertion by the State that the officers of the State had taken into consideration the criteria which had been adopted by the Courts for determining who the socially and educationally backward classes of the Society are, or that the authorities had acted in good faith in determining the socially and educationally backward classes of citizens, would not be sufficient to sustain the validity of the claim. The Courts of the country are invested with the power to determine the validity of the law which infringes the fundamental rights of citizens and others, and when a question arises whether a law which prima facie infringes a guaranteed fundamental right is within an exception, the validity of that law has to be determined by the Courts on materials placed before them.

29. The Supreme Court held by observing that, by merely asserting that law was made after full consideration of the relevant evidence and criteria which have a bearing on them, and which was within the exception, the jurisdiction of the Courts to determine whether by making the law a fundamental right has been infringed is not excluded.

30. After *M.R. Balaji (supra)* and *State of Andhra Pradesh (supra)*, the third decision in line is the case of *Triloki Nath and Another Vs. State of Jammu and Kashmir and Others*, . In the said decision, the Supreme Court said that the members of an entire caste or community may, in the social, economic and educational scale of values at a given time, be backward and may, on that account, be treated as a backward class, but that is not because they are members of a caste or community, but because they form a class.

31. The three decisions referred to above viz. *M.R. Balaji (supra)*, *State of Andhra Pradesh (supra)* and *Triloki Nath (supra)* were considered by a three-judge Bench of the Supreme Court in the case of *State of Uttar Pradesh and Others Vs. Pradip Tandon and Others*, . In that case, the instructions framed by the State in making reservation in favour of candidates from rural areas, hilly areas and Uttarakhand were challenged on the ground that they were constitutionally invalid. While upholding the reservation for the hill and Uttarakhand areas and declaring the reservation for rural areas as unconstitutional, the Supreme Court made the following observations in paragraphs 15 and 17 as under:

15. Broadly stated, neither caste nor race nor religion can be made the basis of classification for the purposes of determining social and educational backwardness within the meaning of Article 15(4). When Article 15(1) forbids discrimination on grounds only of religion, race, caste, caste cannot be made one of the criteria for determining social and educational backwardness. If caste or religion is recognised as a criterion of social and educational backwardness Article 15(4) will stultify Article 15(1). It is true that Article 15(1) forbids discrimination only on the ground of religion, race, caste, but when a classification takes recourse to caste as one of the criteria in determining socially



and educationally backward classes the expression "classes" in that case violates the rule of *expressio unius est exclusio alterius*. The socially and educationally backward classes of citizens are groups other than groups based on caste.

17. The expression "Classes of citizens" indicates a homogeneous section of the people who are grouped together because of certain likeliness and common traits and who are identifiable by some common attributes. The homogeneity of the class of citizens is social and educational backwardness. Neither caste nor religion nor place of birth will be the uniform element of common attributes to make them a class of citizens.

32. After Pradip Tandon's case (*supra*) came, the decision of the Supreme Court in the case of *State of Kerala and Another Vs. N.M. Thomas and Others*, , which marked the beginning of a new thinking on Article 16. In the said decision, the Supreme Court took the view that if classification was permissible under Article 14, it was equally permissible under Article 16 because both the Articles lay down equality. The Court proceeded further to observe that Article 16(1) permitted classification on the basis of object and purpose of law or State action, except classification involving discrimination prohibited by Article 16(2). The Court clarified that although Article 16(1) permitted classification just as Article 14 does, but by the classification there should not be any discrimination on the ground only of race, caste and other factors mentioned in Article 16(2). The important observations in *N.M. Thomas (supra)* are that, assuming it is permissible to identify different categories only on the ground of religion, for such a classification to be constitutionally permissible, it must rest upon a distinction that is substantial and not illusory.

33. In the year 1993, a nine-judge Constitution Bench of the Supreme Court, in the case of *Indra Sawhney etc. etc Vs. Union of India and others, etc. etc.*, (known as *Mandal Commission Case*), delivered a very significant pronouncement on the question of reservation of posts for backward classes.

34. In *Indra Sawhney's case (supra)*, the Court considered all the earlier judgments of the Supreme Court which have been referred to above. The majority took the view that Article 16(1) permits reasonable classification for ensuring attainment of the equality of opportunity assured by it. For assuring equality of opportunity, it may well be necessary in certain situations to treat unequally situated persons unequally. The Court proceeded to observe that by not doing so, it would perpetuate and accentuate inequality. The Court took the view that Article 16(4) was one such instance of such classification. It also took the view that clause (4) of Article 16 was not an exception to clause (1) of Article 16. While referring to *M.R. Balaji's case (supra)* and *T. Devadasan Vs. The Union of India (UOI) and Another*, , the Court held that at the time when *Balaji's case (supra)* and *Devadasan's case (supra)* were decided, the Supreme Court had not recognized that Article 16(1) being a facet of Article 14 implicitly permitted classification. It clarified that once the said feature was recognized, the theory of clause (4) being an exception to clause (1) became untenable, and if clause (4)

of Article 16 is an exception to clause (1), then it is equally an exception to clause (2).

35. While commenting on identification of "backward class of citizens", the Bench made the following observations in paragraph 83 of the decision. The relevant part is quoted hereinbelow:

83. Now, we may turn to the identification of "backward class of citizens". How do you go about it? Where do you begin? Is the method to vary from State to State, region to region and from rural to urban? What do you do in the case of religions where caste system is not prevailing? What about other classes, groups and communities which do not wear the label of caste? Are the people living adjacent to cease-fire line (in Jammu and Kashmir) or hilly or inaccessible regions to be surveyed and identified as backward classes for the purpose of Art. 16(4)? And so on and so forth are the many questions asked of us. We shall answer them. But our answers will necessarily deal with generalities of the situation and not with problems or issues of a peripheral nature which are peculiar to a particular State, district or region. Each and every situation cannot be visualised and answered. That must be left to the appropriate authorities appointed to identify. We can lay down only general guidelines.

At the outset, we may state that for the purpose of this discussion, we keep aside the Scheduled Tribes and Scheduled Castes (since they are admittedly included within the backward classes), except to remark that backward classes contemplated by Art. 16(4) do comprise some castes - for it cannot be denied that Scheduled Castes include quite a few castes.

Coming back to the question of identification, the fact remains that one has to begin somewhere - with some group, class or section. There is no set or recognised method. There is no law or other statutory instrument prescribing the methodology. The ultimate idea is to survey the entire popue. If so, one can well begin with castes, which represent explicit identifiable social classes/groupings, more particularly when Art. 16(4) seeks to ameliorate social backwardness. What is unconstitutional with it, more so when caste, occupation, poverty and social backwardness are so closely intertwined in our society? (Individual survey is out of question, since Art. 16(4) speaks of class protection and not individual protection. This does not mean that one can wind up the process of identification with the castes. Besides castes (whether found among Hindus or others) there may be other communities, groups, classes and denominations which may qualify as backward class of citizens. For example, in a particular State, Muslim community as whole may be found socially backward. (As a matter of fact, they are so treated in the State of Karnataka as well as in the State of Kerala by their respective State Governments). Similarly, certain sections and denominations among Christians in Kerala who were included among backward communities notified in the former princely State of Travancore as far back as in 1935 may also be surveyed and so on and so forth. Any authority entrusted with the task of identifying backward classes may well start with the castes. It can take caste

"A", apply the criteria of backwardness evolved by it to that caste and determine whether it qualifies as a backward class or not. If it does qualify, what emerges is a backward class, for the purposes of clause (4) of Art. 16. The concept of "caste" in this behalf is not confined to castes among Hindus. It extends to castes, wherever they obtain as a fact, irrespective of religious sanction for such practice. Having exhausted the castes or simultaneously with it, the authority may take up for consideration other occupational groups, communities and classes. For example, it may take up the Muslim community (after excluding those sections, castes and groups, if any, who have already been considered) and find out whether it can be characterised as a backward class in that State or region, as the case may be. The approach may differ from State to State since the conditions in each State may differ, Nay, even within a State, conditions may differ from region to region. Similarly, Christians may also be considered. If in a given place, like Kerala, there are several denominations, sections or divisions, each of these groups may separately be considered. In this manner, all the classes among the popue will be covered and that is the central idea. The effort should be to consider all the available groups, sections and classes of society in whichever order one proceeds. Since caste represents an existing, identifiable, social group spread over an overwhelming majority of the country's population, we say one may well begin with castes, if one so chooses, and when go to other groups, sections and classes. We may say, at this stage, that we broadly commend the approach and methodology adopted by Justice O. Chinnappa Reddy Commission in this respect.

We do not mean to suggest - we may reiterate-that the procedure indicated hereinabove is the only procedure or method/approach to be adopted. Indeed, there is no such thing as a standard or model procedure/approach. It is for the authority (appointed to identify) to adopt such approach and procedure as it thinks appropriate, and so long as the approach adopted by it is fair and adequate, the Court has no say in the matter. The only object of the discussion in the preceding para is to emphasis that if a Commission/ Authority begins its process of identification with castes (among Hindus) and occupational groupings among others, it cannot by that reason alone be said to be constitutionally or legally bad. We must also say that there is no rule of law that a test to be applied for identifying backward classes should be only one and/or uniform. In a vast country like India, it is simply not practicable. If the real object is to discover and locate backwardness, and if such backwardness is found in a caste, it can be treated as backward; if it is found in any other group, section or class, they too can be treated as backward.

83A. The only basis for saying that caste should be excluded from consideration altogether while identifying the Backward Class of Citizens for the purpose of Art. 16(4) is clause (2) of Article 16. This argument, however, overlooks and ignores the true purport of clause (2). It prohibits discrimination on any or all of the grounds mentioned therein. The significance of the word "any" cannot be minimised. Reservation is not being made under clause (4) in favour of a "caste"

but a "backward class". Once a caste satisfies the criteria of backwardness, it becomes a backward class for the purposes of Art. 16(4). Even that is not enough. It must be further found that that backward class is not adequately represented in the services of the State. In such a situation, the bar of clause (2) of Art. 16 has no application whatsoever. Similarly, the argument based upon secular nature of the Constitution is too vague to be accepted. It has been repeatedly held by the U.S. Supreme Court in School desegregation cases that if race be the basis of discrimination, race can equally form the basis of redressal. In any event, in the present context, it is not necessary to go to that extent. It is sufficient to say that the classification is not on the basis of the caste but on the ground that that caste is found to be a backward class not adequately represented in the services of the State. Born heathen, by baptism, it becomes a Christian-to use a similitude. Baptism here means passing the test of backwardness.

36. While answering the question, whether the backwardness in Article 16(4) should be both, socially and educationally, the Bench, in paragraph 88A, made the following observations:

88A. We may now summarise our discussion under Question No. 3(a), a caste can be and quite often is a social class in India. If it is backward socially, it would be a backward class for the purposes of Art. 16(4). Among non-Hindus, there are several occupational groups, sects and denominations, which for historical reasons are socially backward. They too represent backward social collectives for the purposes of Art. 16(4). (b) Neither the Constitution nor the law prescribes the procedure or method of identification of backward classes. Nor is it possible or advisable for the court to lay down any Such procedure or method. It must be left to the authority appointed to identify. It can adopt such method/procedure as it thinks convenient and so long as its survey covers the entire people, no objection can be taken to it. Identification of the backward classes can certainly be done with reference to castes among, and along with, other groups, classes and sections of people. One can start the process with the castes, wherever they are found, apply the criteria (evolved for determining backwardness) and find out whether it satisfies the criteria. If it does - what emerges is a "backward class of citizens" within the meaning of and for the purposes of Article 16(4). Similar process can be adopted in the case of other occupational groups, communities and classes, so as to cover the entire people. The central idea and overall objective should be to consider all available groups, sections and classes in society. Since caste represents an existing, identifiable social group/class encompassing an overwhelming majority of the country's population, one can well begin with it and then go to other groups, sections and classes. (c) It is not necessary for a class to be designated as a backward class that it is situated similarly to the Scheduled Caste/Scheduled Tribes. (d) "Creamy layer" can be, and must, be excluded. (e) It is not correct to say that the backward classes contemplated by Article 16(4) is limited to the socially and educationally backward classes referred to in Article 15(4) and Article 340. It is much wider. The test or requirement of social and educational backwardness cannot be

applied to Scheduled Castes and Scheduled Tribes, who indubitably fall within the expression "backward class of citizens." The accent in Article 16(4) appears to be on social backwardness. Of course, social, educational and economic backwardness are closely intertwined in the Indian context. The classes contemplated by Article 16(4) may be wider than those contemplated by Article 15(4).

37. The another important issue which was decided in the said case was, as to whether caste by the name of which a group of persons are identified, could be taken as a criterion in determining as to whether that caste is a socially and educationally backward class, and if so, could it be the sole or dominant or one of the factors in the determination of "social and educational backwardness". The Court answered the said question, stating that in the effort to ascertain social backwardness, it would be a misnomer and fallacious to say that the caste should be considered only at the end point. The Court proceeded further to hold that after identifying and classifying a group of persons belonging to a particular caste by testing with the application of the relevant criteria other than the caste criterion, the identification of the caste of that class of persons would no longer be required as in the case of identification of caste-less society as a backward class.

38. Justice Sawant (as His Lordship then was), speaking for the majority view, made very important observations in paragraph 388 of the judgment. Paragraph 388 is quoted hereinbelow:

388. The various provisions in the Constitution relating to reservation, therefore, acknowledge that reservation is an integral part of the principle of equality where inequalities exist. Further they accept the reality of inequalities and of the existence of unequal social groups in the Indian society. They are described variously as "socially and educationally backward classes" (Article 15(4) and Article 340), "backward" class" (Article 16(4)) and "weaker sections of the people" (Article 46). The provisions of the Constitution also direct that the unequal representation in the services be remedied by taking measures aimed at providing employment to the discriminated class, by whatever different expressions the said class is described. How does one identify the discriminated class is a question of methodology. But once it is identified, the fact that it happens to be a caste, race, or occupational group, is irrelevant. If the social group has hitherto been denied opportunity on the basis of caste the basis of the remedial reservation has also to be the caste. Any other basis of reservation may perpetuate the status quo and may be inappropriate and unjustified for remedying the discrimination. When, in such circumstances, provision is made for reservations, for example, on the basis of caste, it is not a reservation in favour of the caste as a "caste" but in favour of a class or social group which has been discriminated against, which discrimination cannot be eliminated, otherwise", What the Constitution forbids in discrimination "only" on the basis of caste, race etc. However, when the caste also happens to be a social group which

is "backward" or "socially and educationally backward" or a "weaker section", this discriminatory treatment in its favour, is not only on the basis of the caste.

39. Thus, what is discernible from a long line of decisions of the Apex Court referred to above is that caste can be used for identifying socially and educationally backward classes. It is also made amply clear that no classification can validly be made only on the basis of caste, just as it cannot be made only on the basis of religion, race, sex, descent, place of birth or any of them, the same being prohibited by Article 15(1) of the Constitution of India. If any affirmative action is to be taken to give the special advantage envisaged by Article 15(4) and Article 16(4), it must be given to such class of citizens because they belong to such discriminatory caste.

40. State has a power to make a provision for women and children under Article 15(3) of the Constitution of India, which is to be read as an enabling provision to Article 15(1) of the Constitution of India. Discrimination on the ground of sex is permissible if it is found that the women were not equal with the men and are lagging behind the men in the field where the reservation is sought to be made. For the purposes of providing opportunities in the matters of appointment in service, such a discrimination cannot be held to be between equals but is a discrimination between unequals, which is not hit even by Articles 14 and 15(1) of the Constitution of India.

41. What is prohibited under the Constitution of India is, that discrimination cannot be made among equals and that equals are required to be treated equally. At this stage, it would not be out of context to state that the prohibition in Article 15(1) is against differentiation between one citizen and another citizen on the grounds of caste, race or religion. Thus, the rights that are protected and guaranteed by this Article are the personal rights of each individual citizen, irrespective of his caste, race or religion. It is not the rights of a caste or community or the rights of citizens, as representing or forming integral parts of a caste or community, that Article 15(1) deals with and guarantees. As observed by the Full Bench of the Madras High Court in *Smt. Champakam (supra)*, the right guaranteed under Article 15(1) is the personal right of every individual citizen qua citizen, and not as belonging to a particular class or professing a particular religion.

42. In this context, it is apposite to quote the observations of the Supreme Court in the case of *Nain Sukh Das and Another Vs. The State of Uttar Pradesh and Others*, . Chief Justice Patanjali Sastri, speaking for the Bench, made the following observations in paragraph 7:

It is plain that the fundamental right conferred by Article 15(1) is conferred on a citizen as an individual and is a guarantee against his being subjected to discrimination in the matter of the rights, privileges and immunities pertaining to him as a citizen generally.

**EXAMINATION OF THE SCHEME:-**

43. I propose at this stage now to examine the validity of the Scheme in question on the anvil of Article 15(1) only as if Article 15(4) is not there in the Constitution. I propose to undertake this exercise because the learned Additional Solicitor General of India appearing for the Union of India and learned Senior Advocate Mr. Dushyant Dave appearing for the Interveners very forcefully submitted that the Scheme is valid even without taking recourse to Article 15(4), which empowers the State to make any special provision for the advancement of any socially and educationally backward classes of citizens.

44. The Scheme is sought to be defended on the premise that it is for the benefit of the minority communities who have been identified as socially and educationally backward and, therefore, it is with this laudable object that the Scheme was introduced by the Central Government. I have already observed in the earlier part of my judgment that Articles 14 and 15 must be read together and the effect of these two Articles is not that the State cannot discriminate or cannot pass unequal laws, but if they do discriminate or they do pass unequal laws, the discrimination or the inequality must be based on some reasonable ground, and Article 15(1) expressly states that discrimination merely on the ground of religion, race, caste, sex or place of birth is not and cannot be a reasonable ground. Therefore, if the Government takes any action which is discriminatory in nature and the discrimination is based merely on the ground of religion, race or a caste of a person or of a section of a public, then the action can be successfully challenged under Article 15. As the Scheme stands, there can be no doubt that the Scheme has been floated with an intention to encourage parents from minority communities to send their school-going children to schools, lighten their financial burden on school education and sustain their efforts to support their children to complete school education. It was vociferously submitted that the Court may also take judicial notice of the problems which the Muslims as a whole are facing in the country and who deserve the support and sympathy of the Government.

45. Undoubtedly, this is a very laudable object. But, is there any reason why that laudable object should be confined only to the members of the five communities ? There are members of the public all over the country belonging to the other communities who are in an equally sad plight, and if such scheme is introduced to meet the needs of people in a particular position or belonging to a particular strata of the society, then undoubtedly, it would be a public purpose which would not, in any way, be discriminatory under Article 15(1). But, when the Government picks up members of a particular community or caste, may be declared as a minority, and wishes to give those members particular facilities, although other members of the public may equally be in need of those facilities, then undoubtedly, the action is discriminatory. It is for this obvious reason that the test of reasonable classification based on intelligible differentia fails in the present case. The present case, in my opinion, is nothing but discrimination in the name of classification. The minorities cannot be per se regarded as weaker sections or unprivileged segments of the society as held by the Supreme Court in

the case of T.M.A. Pai Foundation and Others Vs. State of Karnataka and Others, . Therefore, under the garb of an affirmative action for the advancement of the minorities, in my opinion, it cannot be construed as a reasonable classification for the purpose of Article 14 of the Constitution of India so as to violate Article 15(1) of the Constitution of India.

46. It was also sought to be contended that when the Government takes a discriminatory step and the discrimination is in favour of five minority communities who could be termed as socially and educationally backward, it is doing something which is reasonable because it is doing what the Constitution itself envisages and directs the State to do.

47. I am not impressed with this submission for the simple reason that Article 15, or indeed, any article conferring fundamental right, cannot be permitted to be defeated or qualified by anything that is contained in Part-IV of the Constitution.

48. The fundamental rights are justiciable, the directive principles enumerated in Part-IV are not justiciable and the provisions of Part-IV must be read as subsidiary to the fundamental rights contained in Part-III. Under Article 46 the State is enjoined to promote with special care the educational and economic interests of the weaker sections of the people does not mean that the State is permitted to discriminate in favour of a particular community so as to contravene the fundamental right conferred upon citizens by Article 15(1).

49. Let me go back to the Scheme and once again look into the objective of the Scheme with which the Central Government has floated. The main object appears to be to see that the parents send their school-going children to schools, lighten their financial burden on school education and sustain their efforts to support their children to complete school education. But, this is to encourage only the parents from five minority communities. It was sought to be contended very vociferously that once any community is declared as a minority community u/s 2(c) of the National Commission for Minorities Act, 1992, that community is deemed to be a weaker section of the society compared to the majority and, therefore, for the upliftment of such minority community the Government can come out with a programme for the betterment or the advancement of such community. It was also sought to be contended that religious minority need not be equated solely with religion. Thus, taking shelter of "minority", the Government has tried its best to come out of the rigours of the word "only", which mitigates the constitutional prohibition. According to the Government, the affirmative action could not be said to be based only on religion as, coupled with the religion, other factors are also taken into consideration.

50. What is a "minority", and to what extent protection has been afforded by the Constitution so far as the minorities are concerned is a question which I shall answer at a little later stage. However, what I want to convey is that the basic concept emanating from Article 15(1) of the Constitution of India cannot and



should not be permitted to be diluted by taking cover under the guise of "minorities". The only escape route for the Government to save the Scheme from being hit by Article 15(1) is the shelter of "minorities". At this stage, I would like to quote the observations of R.M. Sahai, J. in *Indra Sawhney*'s case (supra) as contained in paragraph 658 of the Report. I am conscious of the fact that the judgment delivered by R.M. Sahai, J. is one of the minority views in *Indra Sawhney* (supra) but the observations which I propose to rely upon could not be made any exception because, in my opinion, there cannot be any debate on what fell from the learned Judge and there does not appear to be any dissent with these observations so far as the majority view is concerned. The observations assume significance as the same are aptly applicable to the facts of the present case are concerned. The learned Judge has observed in paragraph 658 as under:

When it comes to any State action on race, religion or caste etc. the word, "only" mitigates the constitutional prohibition. That is if the action is not founded, exclusively, premerely, on that which is prohibited then it may not be susceptible to challenge. What does it mean? Can a State action founded on race, religion caste etc. be saved under Article 16(2) if it is coupled-with any factor relevant or irrelevant. What is to be remembered is that the basic concept pervading the Constitution cannot be permitted to be diluted by taking cover under it. Use of word, "only" was to avoid any attack on legitimate legislative action by giving it colour of race, religion or caste. At the same time it cannot be utilised by the State to escape from the prohibition by taking recourse to such measures which are race, religion or caste based by sprinkling it with something other as well.

(Emphasis supplied)

51. In the aforesaid context, it will be profitable to look into the observations almost on the same line made by His Lordship Krishna Iyer, J. in paragraph 143 in the case of *State of Kerala* (supra).

If Article 14 admits of reasonable classification, so does Article 16(1) and this Court has held so. In the present case, the economic advancement and promotion of the claims of the grossly underrepresented and pathetically neglected classes, otherwise described as scheduled castes and scheduled tribes consistently with the maintenance of administrative efficiency, is the object, constitutionally sanctioned by Articles 46 and 335 and reasonably accommodated in Article 16(1). The differentia, so loudly obtrusive, is the dismal social milieu of Harijans. Certainly this has a rational relation to the object set out above. I must repeat the note of caution earlier struck. Not all caste backwardness is recognised in this formula. To do so is subversive of both Article 16(1) and (2). The social disparity must be so grim and substantial as to serve as a foundation for benign discrimination. If we search for such a class, we cannot find any large segment other than the scheduled castes and scheduled tribes. Any other caste, securing exemption from Article 16(1) and (2), by exerting political pressure or other influence, will run the high risk of unconstitutional discrimination. If the real basis of classification is caste, masked as backward class, the Court must

strike at such communal manipulation.

(Emphasis supplied)

52. Let me test the validity of the Scheme on the basis of the classification in the name of minority. What is a "minority" ? The expression "minority" has been well explained by the Supreme Court in T.M.A. Pai Foundation(supra). I quote paragraphs 164, 166 and 167 with profit.

164...The expression "minority" has been derived from the Latin word "minor" and the suffix "ity" which means "small in number". According to Encyclopedia Britannica "minorities" means "groups held together by ties of common descend, language or religious faith and feeling different in these respects from the majority of the inhabitants of a given political entity". J.A. Laponce in his book "The Protection of Minority" describes "minority" as a group of persons having different race, language or religion from that of the majority of inhabitants.

166. We find that the expression "minorities" has been employed only at four places in the Constitution of India. The head note of Article 29 uses the word minorities. Then again the expressions of minorities or minority have been employed in the head note of Article 30 and clauses (1) and (2) of Article 30.....At this stage, it may be noted that the expression "minorities" has been used in Article 30 in two senses - one based on religion and the other on the basis of language. However, prior to coming into force of the Constitution, the expression minority was understood in terms of a class based on religion having different electorates. 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 Chapter III of the Constitution with a view to instill a sense of confidence and security to the minorities.

167. But the question arises, what is the test to determine minority status based on religion or language of a group of persons residing in a State or Union Territory ? Where minority status of a given group of persons has to be determined in relation to the population of the whole of India or population of the State where the said group of persons is residing. When the Constitution of India was being framed, it was decided that India would be a Union of States and the Constitution to be adopted would be of federal character. India is a country where many ethnic or religious and multi-language people reside. Shri K.M. Munshi, one of the Members of the Constituent Assembly in his note and draft article on right to religion and cultural freedom referred to minorities as national minorities. The said Draft Article VI(3) runs as under:

3. Citizens belonging to the national minorities in a State whether based on religion or language have equal rights with other citizens in forming, controlling and administering at their own expense, charitable, religious and social

institutions, schools and other educational establishments with the free use of the language and practice of their religion.

53. While dealing with a controversy as to whether Theosophical Society is a minority based on religion, the Division Bench of the Patna High Court in the case of Choudhary Janki Prasad and Others Vs. State of Bihar and Others, , held to the effect that the said Theosophical Society was merely an organization to bring about harmony between religions and was not a new religion. While so holding, it was observed as under:

9. The word "religion" to my mind, has been used in Article 30 of the Constitution in the same sense in which an ordinary man in this country understands. The word was not used in the abstract philosophical sense. It means what we understand by the word "religion" in common parlance, for example, Islam or Buddhism. The question is whether the Society is covered by the term....

10. I have gone through the various portions of the Book cited on behalf of the petitioners and I find that the founders of the Society did not establish another religion, rather they were interested in bringing about a cordial relation amongst adherents of different religions and foster love amongst the mankind throughout the world....It is manifest that the Society did not intend to bring about a new religion. It endeavoured to eliminate the hostility existing between different religions and promote goodwill?

13... Having regard to all the circumstances which have been placed before us in this case, I think that the Society is not a minority based on religion within the meaning of Article 30 of the Constitution.

54. In the case of Firdaus Amrut Higher Secondary School, Ahmedabad Vs. M.M. Dave, , this Court had an occasion to deal with the guidelines framed by the Minorities Commission for determining the minority status of educational institutions under the Constitution of India, wherein the stress laid by this Hon"ble Court was on religion and religion alone, i.e. Parsi Zoroastrian without there being any reference to the aspect relating to social and/or educational backwardness.

55. Any minority declared as per Section 2(c) of the National Commission for Minorities Act, 1992 is either based on language or religion and the minority community, in my opinion, cannot be conceived independent of language or religion. I fail to understand as to in what manner Parsis, Christians, Buddhists and Sikhs could be described as weaker sections of the society or socially, educationally and economically backward, and if yes, in what context and further what is the material on record ? Is the Union trying to suggest that once a religion based minority always a socially and educationally backward community.

56. It was sought to be argued that even though Article 15 does not mention minorities in specific terms, minorities who are socially and educationally

backward are clearly within the ambit of the term "any socially and educationally backward class" in Article 15. It was also argued that the Central Government and State Governments have included sections of religious minorities in the list of backward classes and have provided for reservation for them.

57. The onus of establishing that a particular class is "backward" within the meaning of Article 15(4) is on the Government - be it State or Central Government. When protective discrimination for promotion of equalisation is pleaded, the burden is on the party who seeks to justify ex facie deviation from equality. Merely to say that in its opinion a class of citizen is "socially and educationally backward" will not discharge that onus. The Government must produce materials to satisfy the Court that: (a) there was a proper inquiry, (b) relevant criteria were adopted and (c) the Government dealt with this matter objectively, and applied its mind to relevant and proper materials. A mere averment in the affidavit filed by the Government that it has acted in good faith and has taken into consideration relevant criteria for determining the backwardness of a class will not suffice. The Government is obliged to place before the Court the materials upon which such determination was made, and the Court is entitled to decide whether the determination was made in conformity with the requirements of clause (4) of Article 15 and consistently with the rights guaranteed by clause (1) of Article 15 of the Constitution of India. (See *State of Andhra Pradesh and Another Vs. P. Sagar*, , and *R. Chitralekha and Another Vs. State of Mysore and Others*,

58. When the determination of a class as "socially and educationally backward" is challenged by a person aggrieved, it is for the Government to show the basis or test by which they have been held to be "socially and educationally backward". (See *M.R. Balaji and Others Vs. State of Mysore*, .

59. In my opinion, there is not an iota of material to atleast show that any inquiry or survey was undertaken to identify Parsis, Christians, Buddhists and Sikhs as socially and educationally backward classes of citizens. They have not been so declared by the Central Government even under the provisions of the National Commission for Backward Classes Act, 1993. The reason is also simple. The survey was only for the Muslim community. This is precisely the reason why there is no reference of Justice Sachar Committee in the Scheme. In such circumstances, it could not be said that the Scheme has passed the test of reasonable classification based on intelligible differentia.

60. In so far as Muslims are concerned, it is sought to be contended that there is material in the form of Report of the Sachar Committee which was constituted by the Government to undertake a survey of the social, economic and educational status of only the Muslim community in India. So far as Sachar Committee Report is concerned, I shall deal with it a little later. The point which I am trying to drive at is that the object which is sought to be achieved is to give relief to the parents of the five minority communities so that their children could go to schools. This problem could be of any other class or classes of citizens in the

country irrespective of the five minority communities. However, what is the material available on record to even remotely suggest that this problem is being faced by Parsis, Sikhs, Christians and Buddhists so that the help which the Government wants to render by way of the Scheme will serve the objective with which the Scheme has been floated. There is none. Thus, it necessarily suggests that in absence of any material to even remotely suggest that such a problem was identified and with a view to take care of such problem, the Scheme has been floated, the only consideration would be religion and nothing beyond religion.

61. When the Government makes a special provision for the advancement of the weaker sections of the society referred to in Article 15 of the Constitution of India, it has to approach its task objectively and in a rational manner. Undoubtedly, it has to take reasonable and even generous steps to help the advancement of the weaker elements, but the extent of the problems must be weighed, the requirements of the community at large must be borne in mind and a formula must be evolved which would strike a reasonable balance between the several relevant considerations. As held in *Indra Sawhney (supra)*, the survey also has to be State-wise. What may be true in one State, may not be true in any other State. What is necessary in order to pass a test of permissible classification under Article 14 is that the classification must not be "arbitrary, artificial or evasive" but must be based on some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved by the Legislature.

62. While replying to one of the questions raised as regards minority in this behalf in the case of *T.M.A. Pai Foundation (supra)*, the Apex Court observed as under:

Q. 1 What is the meaning and content of the expression "minorities" in Article 30 of the Constitution of India ?

(a) Linguistic and religious minorities are covered by the expression "minority" under Article 30 of the Constitution....

63. Thus, the availability of the benefit of the Scheme in question is confined to five religious minority communities or in other words, five religions. Therefore, it is not permissible to argue that the Scheme in question has no connection with "religion", since the "religion" is the main and only qualifying factor for being eligible to the benefit of the Scheme in question.

64. India is a secular country and secularism is the main feature of our Constitution. By insertion of the word "secular" in the Preamble of the Constitution along with the word "socialist" by 42nd Constitution Amendment Act, 1976, what was implicit came to be made explicit. Simple meaning of the word "secular" is something which is not related to any particular religion. In this behalf, it would be apt to quote the following words of Dr. Radhakrishnan from his book entitled "World Perspectives - Recovery of Faith" (page 202), which is

quoted by the Hon"ble the Apex Court in the case of S.R. Bommai and others Vs. Union of India and others etc. etc., .

no one religion should be given preferential status, or unique distinction, that no one religion should be accorded special privileges in national life or international relations for that would be a violation of the basic principles of democracy and contrary to the best interest of religion and Government.

65. While quoting the aforesaid words of Dr. Radhakrishnan, the Apex Court in the case of S.R. Bommai (supra), observed as under:

...Article 14 guarantees equality before the law or equal protection of laws. Discrimination on grounds of religion is prohibited by Article 15. Article 16 mandates equal opportunity to all citizens in matters relating to employment or appointment to any office or post under the State and prohibits discrimination on grounds only of inter-alia religion.....It would thus be clear that Constitution made demarcation between religious part personal to the individual and secular part thereof The State is neither pro-particular religion nor anti-particular religion. It stands aloof in other words, maintains neutrality in matters of religion and provides equal protection to all religions subject to regulation and actively acts on secular part.

66. In furtherance of the above, the following observations of the Apex Court in the case of Bal Patil and Another Vs. Union of India (UOI) and Others, are worth referring to (relevant paragraphs 32 to 36):

32. We have traced the history of India and its struggle for independence to show how the concept of minority developed prior to and at the time of framing of Constitution and later in the course of its working. History tells us that there were certain religious communities in India who were required to be given full assurance of protection of their religious and cultural rights. India is a country of people with the largest number of religions and languages living together and forming a Nation. Such diversity of religions, culture and way of life is not to be found in any part of the world. John Stuart Mill described India as "a world placed at closed quarters". India is a world in miniature. The group of Articles 25 to 30 of the Constitution, as the historical background of partition of India shows, was only to give a guarantee of security to the identified minorities and thus to maintain integrity of the country. It was not in contemplation of the framers of the Constitution to add to the list of religious minorities. The Constitution through all its organs is committed to protect religious, cultural and educational rights of all. Articles 25 to 30 guarantee cultural and religious freedoms to both majority and minority groups. Ideal of a democratic society, which has adopted right of equality as its fundamental creed, should be elimination of majority and minority and so-called forward and backward classes. Constitution has accepted one common citizenship for every Indian regardless of his religion, language, culture or faith. The only qualification for citizenship is a person's birth in India. We have to develop such enlightened citizenship where each citizen of whatever

religion or language is more concerned about his duties and responsibilities to protect rights of the other group than asserting his own rights. The constitutional goal is to develop citizenship in which everyone enjoys full fundamental freedoms of religion, faith and worship and no one is apprehensive of encroachment of his rights by others in minority or majority.

33. The constitutional ideal, which can be gathered from the group of articles in the Constitution under Chapters of Fundamental Rights and Fundamental Duties, is to create social conditions where there remains no necessity to shield or protect rights of minority or majority.

34. The above-mentioned constitutional goal has to be kept in view by the Minorities Commissions set up at the Central or State levels. Commissions set up for minorities have to direct their activities to maintain integrity and unity of India by gradually eliminating the minority and majority classes. If, only on the basis of a different religious thought or less numerical strength or lack of health, wealth, education, power or social rights, a claim of a section of Indian society to the status of "minority is considered and conceded, there would be no end to such claims in a society as multi-religious and multi-linguistic as India is. A claim by one group of citizens would lead to a similar claim by another group of citizens and conflict and strife would ensue. As such, the Hindu society being based on caste, is itself divided into various minority groups. Each caste claims to be separate from the other. In a caste-ridden Indian society, no section or distinct group of people can claim to be in majority. All are minorities amongst Hindus. Many of them claim such status because of their small number and expect protection from the State on the ground that they are backward. If each minority group feels afraid of the other group, an atmosphere of mutual fear and distrust would be created posing serious threat to the integrity of our Nation. That would sow seeds of multi-nationalism in India. It is, therefore, necessary that Minority Commission should act in a manner so as to prevent generating feelings of multi-nationalism in various sections of people of Bharat.

35. The Commission instead of encouraging claims from different communities for being added to a list of notified minorities under the Act, should suggest ways and means to help create social conditions where the list of notified minorities is gradually reduced and done away with altogether.

36. These concluding observations were required after the eleven-Judges' Bench in TMA Pai Foundation case (supra) held that claims of minorities on both linguistic and religious basis would be each State as a unit. The country has already been reorganized in the year 1956 under the States Reorganization Act on the basis of language. Differential treatments to linguistic minorities based on language within the State is understandable but if the same concept for minorities on the basis of religion is encouraged, the whole country, which is already under class and social conflicts due to various divisive forces, will further face division on the basis of religious diversities. Such claims to minority status based on religion would increase in the fond hope of various sections of people

getting special protections, privileges and treatment as part of constitutional guarantee. Encouragement to such fissiparous tendencies would be a serious jolt to the secular structure of constitutional democracy. We should guard against making our country akin to a theocratic State based on multi-nationalism. Our concept of secularism, to put it in a nutshell, is that "State" will have no religion. The States will treat all religions and religious groups equally and with equal respect without in any manner interfering with their individual rights of religion, faith and worship.

(Emphasis supplied)

67. It is in the spirit of the aforesaid religious impartiality provided in our Constitution that one does not find reference of the words "religion" or "religious minority" in Article 15, which provide for prohibition against discrimination on the sole ground of religion, race, caste, place of birth, sex or any one of them or in Article 16, which ensures equal opportunities in the matter of public employment. Both these Articles speak about the affirmative actions to be taken by the States for the Scheduled Castes, Scheduled Tribes and Socially and Educationally Backward Classes.

68. However, as far as the minorities are concerned, the Constitution envisages only following three distinctive rights flowing from Articles 29 and 30 viz.

(i) Right of any section of citizens to conserve its language, script or culture,

(ii) Right of all religious and linguistic minorities to establish and administer educational institutions of their own choice, and

(iii) Right of any educational institution run by religious or linguistic minority not to be discriminated against in the matter of receipt of State Aid on the ground that it is under the management of minority.

69. In the aforesaid context, I may state that during the course of hearing of the reference, a specific question was put by me to the learned Additional Solicitor General of India as to whether solely on issuance of notification u/s 2(c) of the National Commission for Minorities Act, 1992, the five minority communities could be termed as socially and educationally backward per se. The answer was very fairly "No". Although the learned Additional Solicitor General of India appearing on behalf of the Central Government contended that one cannot go behind the said notification, he did not submit that apart from the minuscule nature of the said five communities based on religion against the majority, there were any other factors taken into consideration for declaring them as minority communities under the Minorities Act. As against this, the contention on behalf of the respective counsel, challenging the notification, is that the declaration of their being minority communities vide the aforesaid notification, does not ipso facto confer the status of socially and educationally backward class on the said five minority communities based on religion.

70. A lot of emphasis was sought to be placed on the observations of the



Supreme Court made in paragraph 116 of Indra Sawhney's case (supra). The observations sought to be relied upon to meet with the complaint of discrimination under Article 15(1) of the Constitution of India are as under:

...But it may not be entirely right to say that Article 15(4) is a provision envisaging programmes of positive action. Indeed, even programmes of positive action may sometimes involve a degree of discrimination. For example, if a special residential school is established for Scheduled Tribes or Scheduled Castes at State expense, it is a discrimination against other students, upon whose education a far lesser amount is being spent by the State. Or for that matter, take the very American cases-Fullilove (1980 (65) Law Ed 2d 902) or Metro Broadcasting (1990 (111) Law Ed 2d 445) - Can it be said that they do not involve any discrimination? They do. It is another matter that such discrimination is not unconstitutional for the reason that it is designed to achieve an important governmental objective.

(Emphasis supplied)

71. In my respectful opinion, the aforesaid observations of the Supreme Court should be read in conjunction with very important observations as contained in paragraph 57, which are as under:

...We too believe that Article 16(1) does permit reasonable classification for ensuring attainment of the equality of opportunity assured by it. For assuring equality of opportunity, it may well be necessary in certain situations to treat unequally situated persons unequally.

72. Thus, for the purpose of assuring equality of opportunity for the advancement of weaker sections of the society, law permits by way of reasonable classification to treat unequally situated persons unequally but, law does not permit two equally situated persons unequally in the name of reasonable classification with a colour of religion or minority.

(Emphasis supplied)

73. The entire judgment of Indra Sawhney (supra) is based on Articles 16(1), 16(2) and 16(4) of the Constitution of India. But, as held by the Supreme Court in Indra Sawhney (supra) itself that what is said about Article 16(4) would equally hold good and valid for the purpose of Article 15(4). The observations in paragraph 116 should not be construed to convey that even at the cost of Article 16(2) of the Constitution of India "discrimination" is permissible, if the same could be termed as a reasonable classification based on intelligible differentia.

74. Thus, I am of the opinion that by mere conferment of minority status under a notification issued u/s 2(c) of the National Commission for Minorities Act, 1992, by itself will not be sufficient to consider the five communities as weaker sections of the society or backward classes of the society or socially, economically and educationally backward. Status of minority is and could be conferred for many reasons. Minority mainly is religious and linguistic. It is true that till this date,

there has been no challenge so far as the notification issued u/s 2(c) of the Act is concerned, notifying five communities as minorities. But at the same time, to confer the status of being a class by itself which needs upliftment at the end of the Government at the exclusion of similarly situated persons of communities other than the five communities, there has to be some cogent and convincing material to show that having regard to the peculiar problems and other drawbacks that the five minority communities deserve some special treatment at the end of the Government for their advancement to compete with the other sections of the society.

75. I am of the opinion that if any benefit is to be extended to the weaker sections of the citizens in the name of affirmative action for their advancement, then the problem as a whole should have been looked into and then the Government could have come up with some solution. For example, the problems which the Muslims may be facing in each of the States or in the country as a whole may not be the problems which the other four communities as minorities may be facing. If the problem is religious, then accordingly it has to be solved. If it is educational, then accordingly it should be taken care of. The Constitution itself has limited the protection to the minorities to a certain extent, which I have referred to in the preceding paragraphs. However, to treat and consider the five communities as a whole to be weaker sections of the society or socially and educationally backward and take affirmative action discriminating similarly situated other persons, would be nothing but perpetuating the very distinction which the Constitution seeks to abolish. What is envisaged by the Constitution is a secular state under which no distinction is made between man and man with reference to his religion or his caste. To honour and effectuate this laudable principle embodied in the Constitution, it is necessary that classification should not be made on the basis of religion, like in the present case in the name of minorities.

76. In this context, the decision of the Supreme Court rendered in the case of *The State of Rajasthan and Others Vs. Thakur Pratap Singh*, is required to be looked into, which, in my opinion, deals with very similar issue. The facts of the said case can be summarised as under:

77. The Appeal before the Supreme Court by the State of Rajasthan raised for considering the constitutional validity of one paragraph of a notification issued by the State of Rajasthan u/s 15 of the Police Act (Central Act V of 1861) under which "the Harijan" and "Muslim" inhabitants of the villages, in which an additional police force was stationed, were exempted from the obligation to bear any portion of the cost of that force.

78. It was stated that the inhabitants of certain villages in the district of Jhunjhunu in the State of Rajasthan, harboured dacoits and receivers of stolen property, and were besides creating trouble between landlords and tenants, as a result of which, there were serious riots in the locality in the course of which some persons lost their lives. The State Government, therefore, took action u/s

15 of the Police Act. The relevant portion of the said Section is quoted below:

Quartering of additional police in disturbed or dangerous districts-

(1). It shall be lawful for the State Government, by proclamation to be notified in the official Gazettee, and in such other manner as the State Government shall direct, to declare that any area subject to its authority has been found to be in a disturbed or dangerous state, or that from the conduct of the inhabitants of such area, or of any class or section of them, it is expedient to increase the number of police.

(2). It shall thereupon be lawful for the Inspector-General of Police, or other officer authorised by the State Government in this behalf, with the sanction of the State Government, to employ any police-force in addition to the ordinary fixed complement to be quartered in the areas specified in such proclamation as aforesaid.

(3). Subject to the provisions of subsection (5) of this section, the cost of such additional police force shall be borne by the inhabitants of such area described in the proclamation.

(4). The Magistrate of the district, after such enquiry as he may deem necessary, shall apportion such cost among the inhabitants who are, as aforesaid, liable to bear the same and who shall not have been exempted under the next succeeding sub-section. Such apportionment shall be made according to the Magistrate's judgment of the respective means within such area of such inhabitants.

(5). It shall be lawful for the State Government by order to exempt any persons or class or section of such inhabitants from liability to bear any portion of such cost.

79. The notification by which these provisions were invoked and which was impugned in those proceedings was in these terms:-

Whereas the Rajpramukh is satisfied that the area shown in the schedule annexed hereto has been found to be in a disturbed and dangerous state;

Now, therefore, in the exercise of the authority vested in him u/s 15(1) of the Police Act (V of 1861), the Rajpramukh is pleased to declare that the 24 villages included in the said schedule shall be deemed to be disturbed area for a period of six months from the date of this notification.

Under sub-section (2) of the said section 15 of the Police Act (V of 1861), the Rajpramukh is pleased to authorise the Inspector-General of Police to employ, at the cost of the inhabitants of the said area any Police force in addition to the ordinary fixed complement quartered therein.

Under sub-section (5) of section 15 of the said Act the Rajpramukh is further pleased to exempt the Harijan and Muslim inhabitants of these villages from liability to bear any portion of the cost on account of the posting of the additional

Police force.

80. Then followed the names of 24 villages mentioned in the notification.

81. The respondent, one Thakur Pratap Singh being an inhabitant of Baragaon, one of these 24 villages, moved the High Court of Rajasthan for the issue of a writ or direction under Article 226 of the Constitution, impugning the validity of Section 15 of the Police Act and in particular, of sub-section (5) thereof, and of the notification and praying for appropriate reliefs.

82. The High Court repelled the wider contentions urged regarding the invalidity of Section 15 of the Police Act in general as also of the powers conferred on the State Government to order the exemption of "any person or classes or sections of such inhabitants" from liability to bear the cost of the additional police force. But the learned Judges held that paragraph 4 of the notification, which exempted "Harijan and Muslim inhabitants of the villages" from the levy, was violative of the guarantee in Article 15(1) of the Constitution against discrimination on the ground of caste or religion etc., which reads:

The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them" and struck it down as unconstitutional.

83. The State of Rajasthan which felt aggrieved by this order applied to the High Court for a certificate under Art. 132(1) to enable it to file an appeal to the Supreme Court and such certificate having been granted, the appeal came up before the Apex Court.

84. The learned counsel for the State made a strenuous effort before the Supreme Court to show that the exemption of the Harijan and Muslim inhabitants of the villages, was, in the impugned notification, not based "only" on the ground of "caste" or "religion" or the other criteria set out in Article 15(1), but on the ground that persons belonging to these two communities were found by the State not to have been guilty of the conduct which necessitated the stationing of the additional police force. It was the same argument as was addressed to the High Court and was rejected by the learned Judges who observed:

Now this is a very strange argument that only persons of a certain community or caste were law-abiding citizens, while the members of other communities were not. Disturbing elements may be found among members of any community or religion just as much as there may be saner elements among members of that community or religion.

85. In such a case, the Supreme Court while dismissing the appeal made the following observations:

The view here expressed by the learned Judges is, in our opinion, correct. Even if it be that the bulk of the members of the communities exempted or even all of them were law-abiding, it was not contended on behalf of the State that there

were no peaceful and law-abiding persons in these 24 villages belonging to the other communities on whom the punitive levy had been directed to be made. In paragraph 5(f) of the petition filed before the High Court the respondent had averred:

That the aforesaid Notification is ultra vires of the Constitution of India as it discriminates amongst the Citizens of a village on the basis of religion, race or caste, inasmuch as it makes a distinction between persons professing the Mohammadan religion and others and also between persons who are Muslims and Harijans by caste and the rest. It, therefore, contravenes the provisions of Art. 15 of the Constitution of India". The answer to this by the State was in these terms.

The Harijan and Muslim inhabitants to these villages have been exempted from liability to bear any portion of the cost of the additional force not because of their religion race or caste but because they were found to be peace-loving and law-abiding citizens, in the 24 villages additional force has been posted.

It would be seen that it is not the case of the State even at the stage of the petition before the High Court that there were no persons belonging to the other communities who were peace-loving and law-abiding, though it might very well be, that according to the State, a great majority of these other communities were inclined the other way. If so, it follows that the notification has discriminated against the law-abiding members of the other communities and in favour of the Muslim and Harijan communities, - (assuming that every one of them was "peace loving and law-abiding") on the basis only of "caste" or "religion". If there were other grounds they ought to have been stated in the notification. It is plain that the notification is directly contrary to the terms of Article 15(1) and that paragraph 4 of the notification has incurred condemnation as violating a specific constitutional prohibition. In our opinion, the learned Judges of the High Court were clearly right in striking down this paragraph of the notification.

(Emphasis supplied)

86. It is in the aforesaid context that a Division Bench, while referring the matter to the Full Bench, posed three questions for the consideration of the Central Government. The three questions are:

1. Will the Scheme, if made available to all the Children in the country irrespective of their religion, not lighten the financial burden of some similarly or more precariously placed persons belonging to the other communities or of persons having even annual income of less than Rs. 1 lakh on school education of their children and sustain their effort to support their children to complete school education and provide a level playing field in the competitive employment arena?

2. Will those persons of other communities whose annual income is less than Rs.

1 lakh and whose children are equally or more meritorious, not be deprived of the Government patronage only because they belong to different religions than those five religions?

3. By the Scheme in question, has the Central Government not exposed its idea that there is no necessity of Socio Economic upliftment of the persons of even the poorer and socially backward citizen by Government sponsorship unless they belong to those five religions?

87. The only reply of the learned Additional Solicitor General of India to the aforesaid three questions was, that at the best it could be said that it is a case of under-classification and not discrimination only on the ground of religion.

88. Thus, once again the shelter of the words "only" is being taken by the Central Government.

89. The expression "on grounds only" in Article 15(1) and (2) and in Article 16(2) has been well explained by reference to Section 298(1) of the Government of India Act, 1935 which used that very expression in prohibiting discrimination on grounds similar to those contained in Articles 15 and 16. Section 298(1) of the Act of 1935 reads as under:

No subject of His Majesty domiciled in India shall on grounds only of religion, place of birth, descent, colour or any of them be ineligible for office under the Crown in India, or be prohibited on any such grounds from acquiring, holding or disposing of property or carrying on any occupation, trade, business or profession in British India.

90. In *Punjab v/s. Daulat Singh* [(1946) 73 I.A. 59], Section 298(1) was considered under the backdrop of the following circumstances:

91. Section 13A, which was added to the Punjab Alienation of Land Act, 1900, with retrospective effect was impugned as violating Section 298(1). By majority, the Federal Court held that the Act contravened Section 298(1) in some cases, and remanded the case for ascertaining facts in the light of their directions. Beaumont J., who dissented, emphasised the words "on the ground only", observing that the true basis of the impugned Act was not discrimination only, or even principally, on one or more of the grounds specified in Section 298(1), but the true object of the Act was to avoid a method of evading the principal Act though in achieving that object some persons whose only disqualification was a lack of particular descent might be affected. The Privy Council decisively rejected this view, observing that:

Their Lordships are unable to accept this as the correct test. In their view, it is not a question of whether the impugned Act is based only on one or more of the grounds specified in Section 298 sub-section (1), but whether its operation may result in a prohibition only on these grounds. The proper test as to whether there is a contravention of the sub-section is to ascertain the reaction of the impugned Act on the personal right conferred by the sub-section, and, while the scope and

object of the Act may be of assistance in determining the effect of the operation of the Act on a proper construction of its provisions, if the effect of the Act so determined involves an infringement of such personal right, the object of the Act, however laudable, will not obviate the prohibition of sub-section (1).

92. S.R. Das, J. in *The State of Bombay Vs. Bombay Education Society and Others*, , cited the above passage as laying down the correct test and added:

Whatever the object the immediate ground and direct cause for the denial is that the mother tongue of the pupil is not English. Adapting the language of Lord Thankerton, it may be said that the laudable object of the impugned order does not obviate the prohibition of Article 29(2) because the effect of the order involves an infringement of this fundamental right, and that effect is brought about by denying admission only on the ground of language.

(Emphasis supplied)

93. Das, J. said that this very test was implicit in an earlier decision of the Supreme Court, namely, *Madras v/s. Smt. Champakam Dorairajan* (supra).

94. The Division Bench of this Court, while referring the matter to the Larger Bench, on consideration of the entire material on record, took note of a very pertinent fact that in order to get the benefit of the Scheme in question, the following basic conditions must be complied with:

(a) The student concerned must not get less than 50% marks in the previous final examination.

(b) The annual income of his/her parents/guardian from all sources must not exceed Rs. 1 lakh. However, inter se selection weightage should be given to poverty rather than the marks obtained.

(c) The student must be either a Muslim or Christian or Sikh or Buddhist or Zoroastrian [Parsi].

95. After looking into the basic conditions as referred to above, the Division Bench proceeded to observe as under:

Let us now consider a situation where two citizens of this country, one belonging to any of those five religions and the other, not belonging to those five religions, due to their misfortune are reduced to the lowest ebb of poverty and distress and earning their livelihood as street-beggars, having the same meager amount of annual income which is much less than Rs. 1 lakh. Both the aforesaid persons have a son each and they want that their respective son should complete education so that he is not forced to undergo a life of misery. The son of the person not belonging to any of those five religions has secured 90% marks in the last final examination whereas the son of the other, who belongs to one of those five religions, has obtained 60% marks. According to the Scheme in question, the son of the former one who does not belong to any of those five religions will be deprived of the benefit only on the ground that he does not belong to those

five religions whereas the son of the other person, who belongs to one of those five religions, will be entitled to the benefit only because he belongs to one of those five religions and no other ground although he is less meritorious than the former and the socioeconomic condition of his father is the same as that of the father of the former. The Scheme in question, therefore, clearly discriminates against a citizen only on the ground of religion.

We, therefore, hold that if we pass direction upon the State Government to implement the Scheme in question it will amount to passing direction upon the State Government to violate Article 15(1) of the Constitution. Since our above view is in conflict with the earlier decision of a Division Bench of this Court in Special Civil Application No. 2245 of 2008 (Vijay Harishchandra Patel vs. the Union of India) disposed on March 20, 2010, in our opinion, the judicial decorum demands that we should refer the question before a Larger Bench.

96. The only reply to the situation envisaged by the Division Bench as referred to above was that Article 14 does not forbid reasonable classification of persons for the purpose of attaining specific ends and affirmative action for the advancement of SEBCs could be in a phased manner.

97. I may only state that in determining the constitutional validity of a measure or a provision therein, regard must be had to the real effect and impact thereof on the fundamental rights. The seven-judge Bench of the Supreme Court, in the case of Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, , held that the approach to be adopted by the Court in adjudging the constitutionality of a statute should be on the touchstone of fundamental rights. While answering the question, "what is the test or yardstick to be applied for determining whether the statute infringes a particular fundamental right". After considering all earlier decisions, Their Lordships have concluded:

68....The pith and substance theory was thus negatived in the clearest terms and the test applied was as to what is the direct and inevitable consequence or effect of the impugned State action on the fundamental right of the petitioner. It is possible that in a given case the pith and substance of the State action may deal with a particular fundamental right but its direct and inevitable effect may be on another fundamental right and in that case, the State action would have to meet the challenge of the latter fundamental right. The pith and substance doctrine looks only at the object and subject-matter of the State action but in testing the validity of the State action with reference to fundamental rights, what the Court must consider is the direct and inevitable consequence of the State action. Otherwise, the protection of the fundamental rights would be subtly but surely eroded.

(Emphasis supplied)

98. In the present case, we are examining the validity of a scheme floated by the Central Government and the Scheme is being tested on the touchstone of Article 15 of the Constitution of India. The direct and inevitable consequences of the



Scheme is that a student who does not belong to any of those five religious minorities will be deprived of the benefit only on the ground that he does not belong to those five religious minorities, even though he possesses all other qualifications of the Scheme, whereas the other persons who belong to one of those five religious minorities, will be entitled to benefit only because they belong to one of those five religious minorities, although they may be less meritorious than the former and the socio-economic conditions of the parents would be the same as that of the parents of the former.

#### EXAMINATION OF THE SCHEME ON THE ANVIL OF ARTICLE 15(4):

99. I shall now examine the Scheme taking into consideration Article 15(4) of the Constitution of India. It was sought to be contended that Article 15(4) is a special provision in the Constitution which is an enabling provision having an overriding effect over Article 15(1) of the Constitution of India. At one stage, it was also sought to be contended that assuming for the moment that there is a discrimination, wherein there is some element of religion or caste involved, then such discrimination is saved and permissible under Article 15(4) of the Constitution of India.

100. A special provision for the educational advancement of any backward class of citizens though comprised within the directive principles of the State policy, can be made only by way of a permissible abridgment of the fundamental rights under Articles 15 and 29(2) of the Constitution of India. The fourth clause of Article 15 comprises two ideas - one, of classifying citizens as socially and educationally backward and the other, making a special provision for their advancement. The former has relevance to the ideas of equality and nondiscrimination and the later to the ambit of the restraint which could be lawfully be based upon the fundamental right.

101. What the Constitution really prohibits is a discrimination based on the grounds only of religion, caste, sex, etc. as contained in Article 15(1) of the Constitution of India. If, however, a group of persons or a class of citizens clearly identifiable by their religion or caste is really backward, socially and educationally, and is on that basis given the benefit of certain schemes like the present one, the ineligibility of a person belonging to another caste to secure such benefits may not be clearly based on the ground of religion or caste but, would be a consequence of the reasonable classification based on intelligible differentia made in favour of a backward class. The above is subject to the strict scrutiny or test that such benefits granted to a class or a group of citizens is not based only on religion but coupled with some other rational factors. However, if it can be shown that the criterion adopted for determining their backwardness is useless as a test of backwardness, so that the preference given to them virtually amounts to a preference on the ground of religion alone, the description as backward will be illusory or fictitious.

102. The words "classes of citizens" in Article 15(4) are words of wide

significance. If the intention of the Government is to give benefit to the five minority communities by taking recourse or with the aid of Article 15(4) of the Constitution of India, then in such circumstances, the Government will have to show that minorities by itself constituted a class of citizens on the basis of a factor which is peculiar for that class only and not found in majority.

103. Besides the above, the expression "class" means, a homogeneous section of the people grouped together because of certain likenesses or common traits and who are identifiable by some common attributes such as status, rank, occupation, residence in a locality, race, religion and the like. Could it be said by any stretch of imagination that the five minority communities constitute a homogeneous section of the people as a class ? The answer has to be in the negative.

104. In the aforesaid context, I may take support of a very recent Division Bench judgment of the Andhra Pradesh High Court rendered in the case of R. Krishnaiah v/s. Union of India (PIL Nos. 1, 22 and 56 of 2012, decided on 28th May 2012). In the said case, an Office Memorandum was challenged, which provided a sub-quota of 4.5% for socially and educationally backward class of citizens belonging to minorities for reservation in admission in some central educational institutions. While examining the validity of the Office Memorandum, the Division Bench observed that the very use of the words "belonging to minorities" or "for minorities" indicate that the sub-quota had been carved out on religious lines and not on any other intelligible basis. In that case, the identified minorities were Muslims, Christians, Sikhs, Buddhists and Zoroastrians (Parsis), like in the present case. The Court also observed that absolutely no material was placed before it to demonstrate that persons belonging to the religious groups were more backward than any other category of backward classes or that they needed any preferential treatment as compared to other OBCs. Court also observed that in the absence of any material, it was very evident that the sub-quota had been created only on the grounds of religion and nothing else. According to the Division Bench, the same was impermissible in view of the specific language of Article 15(1) of the Constitution of India as well as Article 16(2) of the Constitution of India.

105. The Division Bench of the Andhra Pradesh High Court also took into consideration, whether the groups clubbed together in the Office Memorandum were homogeneous or not. The Court held that clubbing certain minorities such as Muslims, Christians, Sikhs, Buddhists and Zoroastrians (Parsis) into one group does not per se lead to any conclusion of homogeneity amongst them. The Court, while striking down the Office Memorandum under challenge as unconstitutional, held that Muslims, Sikhs, Christians, Buddhists and Zoroastrians (Parsis) did not form a homogeneous group but a heterogeneous group.

106. I fully subscribe to the views expressed by the Division Bench of the Andhra Pradesh High Court.

107. Until the decision in the case of *State of Kerala v/s. N.M. Thomas* (supra), clause (4) of Article 15 as well as clause (4) of Article 16 were understood as constituting exceptions to clause (1) of Article 15 and clauses (1) and (2) of Article 16, respectively. In the said case, however, which was subsequently relied upon in *Indra Sawhney* (supra), a majority of Judges expressed the view that the power to make a special provision in favour of backward class of citizens was implicit and inherent in clause (1) of Article 16, itself, and by parity of same reasoning in Article 15(1) and that clause (4) in each of those Articles was merely an emphatic way of stating the same principle. It was held that the principle of reasonable classification inherent in Article 14 is extended equally to Article 15(1) and Article 16(1) as well. Even if it is held that clause (1) of Article 15 permit reasonable classification, the same cannot be on the basis of religion or caste alone, since that would be directly in the teeth of the prohibition contained in Article 15(1) and 16(2) of the Constitution of India.

108. While providing concessions to the backward classes, the fundamental rights of other communities cannot be completely and absolutely ignored. The judicious relation between the special concessions given to the backward classes vis-?-vis the rest of the society cannot be laid down rigidly. The situation would differ from State to State as I have observed earlier. It also depends upon the nature of concessions or benefits and its overall effects on the fundamental rights of others.

109. I quote with profit the *Constitutional-Law of India* (by H.M. Seervai, 4th Edn., Vol. I at page 557):

...Can it be said that sub-Art. 15(4) is the dominant sub-Art. and Art. 15(1) the subordinate sub-Article ? To ask this question is to answer it in the negative. For a sub-Article which confers no right but a discretionary power, cannot be described as occupying a dominant or primary position over an enforceable fundamental right. But if sub-Art. 15(4) cannot be treated as the dominant provision, can the two sub-Articles be treated as independent of each other ? The answer is, "No". First, because Art. 15(4) opens with the words "Nothing in this Article shall prevent the State..." which show that Art. 15(4) is in some way connected with Art. 15(1). Secondly, the statement that sub-Art. (1) and sub-Art. (4) are independent of each other leads to an internal contradiction and to an absurd result. For, to say that the two sub-Arts. are independent is to say that sub-Art. 15(1) is not in any way affected by sub-Art. 15(4), and vice versa. This means that a citizen can enforce his fundamental right against the State regardless of what is contained in sub-Art. 15(4). Equally, that the State can exercise its discretionary power under Art. 15(4) regardless of what is contained in sub-Art. 15(1). This leads to the self-contradictory and absurd result that a citizen cannot exercise his fundamental right not to be discriminated against on the ground of caste or religion if the State can discriminate against him on the ground of caste and religion in favour of Scheduled Castes. And similarly, the State cannot exercise its discretionary power to discriminate against a citizen on

the ground of race, caste or religion in favour of Scheduled Castes, because the citizen has a fundamental right under Art. 15(1) not to be so discriminated against. Therefore it follows that the two sub-Articles are not independent. There is no third alternative, which would describe the relation of Art. 15(1) and 15(4) unless it is said that Art. 15(4) has been enacted *ex majore cautela*, that is, by way of abundant caution. But to say this is to say that sub-Art. 15(4) was not necessary, and that the result would have been the same even if it had not been enacted or was struck out. But the terms of sub-Art. 15(4) show that they were not inserted *ex majore cautela*, because if Art. 15(4) were struck out, the State would have no power to make special provision for the advancement of the classes mentioned in Art. 15(4), because such a provision would violate the prohibition of Art. 15(1). In fact, sub-Art. 15(4) was introduced in Art. 15 by a Constitutional Amendment to confer on the State a power which it was held by the Supreme Court the State did not possess under the unamended Art. 15(1) to (3). It follows therefore that the theory that Art. 15(4) is not an exception leads to an inherent contradiction in describing the relation between the two sub-Articles and must therefore be rejected.

110. In one of the recent pronouncements of the Supreme Court in the case of *E.V. Chinnaiah v/s. State of Andhra Pradesh* (supra), in the concurring judgment *S.B. Sinha, J.* made certain observations as regards Article 15(4). I may quote with profit those observations as contained in paragraph 104 of the judgment:

It is, therefore, manifest that the backward class which may be given the benefit of clause (4) of Article 15 or Article 16 must consist of a homogeneous group - the element of homogeneity being the backwardness characterising the class. The link or the thread holding the class together, thus, should be the backwardness of its members which can never be supplemented by castes. Classification, thus, may be justified on the ground that it is a backward class but the same may not stand the scrutiny or the equality clause when classification is made on the basis of a backward caste or a section of a backward caste.

111. In *R.C. Poudyal and Others Vs. Union of India and others*, . *Agrawal, J.* held in paragraph 191 of the judgment in a partly dissenting opinion (with no Lordship disagreeing on this issue) as under:

Clause (1) of Article 15 prohibits discrimination by the State against any citizen on the ground only of religion, race, caste, sex or any of them. Clause (3), however, permits the State to make special provision for women and children. Similarly, Clause (4) permits the State to make special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes. Clauses (3) and (4) do not, however, permit making of special provisions in derogation of the prohibition against discrimination on the ground of religion.

112. In the aforesaid context, I may also refer to the decision of the Supreme Court in the case of *Triloki Nath Tiku* (supra). In the said case, the petitioners

claimed that they had been discriminated against in the matter of promotion to the gazetted cadre, solely on the ground of religion and place of residence. The case that junior officers were promoted to the gazetted cadre over officers senior to them on the ground solely that they, the junior members, belonged to the Muslim community or that they were Hindus belonging to the Jammu province of the State of Jammu & Kashmir was not denied. However, the prejudicial treatment of senior officers was sought to be supported on the plea that the State had acted in consonance with the principles of clause (4) of Article 16 of the Constitution. It was the case of the State that Muslims as a community in the whole of the State of Jammu & Kashmir formed a backward class of citizens and they were not adequately represented in the services under the State. Similarly, Hindus from the province of Jammu formed as backward community and were not adequately represented in the services of the State, and on that account, reservation in the matter of appointments or posts and promotions in the services of the State was made in respect of those classes. In the aforesaid background, the Supreme Court made the following observations in paragraph 4, which reads as under:

4. Article 16 in the first instance by Cl. (2) prohibits discrimination on the ground, inter alia, of religion, race, caste, place of birth, residence and permits an exception to be made in the matter of reservation in favour of backward classes of citizens. The expression "backward class" is not used as synonymous with "backward caste" or "backward community". The members of an entire caste or community may in the social, economic and educational scale of values at a given time be backward and may on that account be treated as a backward class, but that is not because they are members of a caste or community, but because they form a class. In its ordinary connotation the expression "class" means a homogenous section of the people grouped together because of certain likenesses or common traits, and who are identifiable by some common attributes such as status, rank, occupation, residence in a locality, race, religion and the like. But for the purpose of Art 16 (4) in determining whether a section forms a class, a test solely based on caste, community, race, religion, sex, descent, place of birth or residence cannot be adopted, because it would directly offend the Constitution.

113. In my opinion, this statement of the law would equally apply to Article 15(4) of the Constitution of India.

114. I am of the view that the Scheme cannot be held valid even on the anvil of Article 15(4) of the Constitution of India.

115. It was sought to be contended on behalf of the Union that Article 14 is an umbrella article, wider in its scope and purview as compared to Articles 15 and 16 which are minor postulates of Article 14. I am not in a position to agree to this proposition of law as, in my view, it is not a correct proposition of law. As observed earlier, the said three Articles form part of a string of constitutionally guaranteed rights. In this behalf, I may quote with profit the following

observations of the Supreme Court in the case of State of Karnataka v/s. N.M. Thomas (supra):-

45....If classification is permissible under Article 14, it is equally permissible under Article 16, because both the Articles lay down equally....

46....Article 16(1) permits classification on the basis of object and purpose of law or State action except classification involving discrimination prohibited by Article 16(2)....

116. Similarly, the following observations from the decision of the Supreme Court in the case of Indra Sawhney (supra) are also worth referring:

68....Though Balaji was not a case arising under Article 16(4), what it said about Article 15(4) came to be accepted as equally good and valid for the purpose of Article 16(4). The formulation enunciated with respect to Article 15(4) were, without question, applied and adopted in cases arising under Article 16(4).

117. In my opinion, Articles 15(4) and 16(4) are enabling provisions and are not minor postulates of Article 14. The said two Articles empower the State to take positive affirmative actions but with a strong caveat that such actions cannot be taken so as to violate the constitutional mandate flowing from Articles 15(1), 16(2) and 29(2) of the Constitution of India which use almost similar language while imposing positive obligation on the same.

118. In the case of Ashok Kumar Thakur (supra), the Court observed as under:

126....As has been held in N.M. Thomas case and Indra Sawhney case Articles 15(4) and 16(4) are not exceptions to Articles 15(1) and 16(1) but independent enabling provisions."

119. At the same time, one should not lose sight of the following observations of the Supreme Court in the earlier judgment in the case of State of Uttar Pradesh v/s. Pradip Tandon (supra), which was also taken note of by the Apex Court in its later judgments in the case of Indra Sawhney (supra) and Ashok Kumar Thakur (supra). The observations are as under:

15....If caste or religion is recognized as a criterion of social and educational backwardness, Article 15(4) will stultify Article 15(1)....

120. I have also examined the Scheme taking into consideration Article 15(3) of the Constitution of India which says that nothing in Article 15 shall prevent the State from making any special provision for women and children. The Scheme in question would not get saved under Article 15(3) of the Constitution of India since the same seeks to create class within the class, such as sub-classification, which is constitutionally not permissible. Thus, under Article 15(3), special provision can be made for women as a class and children as a class, but not for children of specified religious minorities as is sought to be done by the Scheme in question. This could very well be appreciated by considering the following few illustrations:

- (i) Dattatraya Motiram More Vs. State of Bombay, .
- (ii) No punishment for female as a class for the offence punishable in case of a man u/s 458 of the IPC - Yusuf Abdul Aziz Vs. State, , Yusuf Abdul Aziz Vs. The State of Bombay and Husseinbhoy Laljee, .
- (iii) Govt. of Andhra Pradesh Vs. P.B. Vijaykumar and another, - rel. paras 3, 6, 7.
- (iv) Reservation of a woman in the post of Enquiry-cum-Reservation Clerks in Railways , (1997) 11 SCC 638 .
- (v) Vijay Lakshmi Vs. Punjab University and Others, .
- (vi) Air India Cabin Crew Association Vs. Yeshawinee Merchant and Others, .
- (vii) Rajesh Kumar Gupta and Others Vs. State of U.P. and Others, .
- (viii) Enactment of the Juvenile Justice (Care & Protection of Children) Act, 2000 for the children as a class.
- (ix) Enactment of the Right of Children to Free and Compulsory Education Act, 2009 for the Children as a class.

121. Where a class of children is divided in sub-classification of the children of only five religious minorities, protection of Article 15(3) will not be available. In this Context, it will be profitable to quote the observations of the Apex Court in the case of E.V. Chinnaiah v/s. State of Andhra Pradesh (supra):

The very fact that the members of the Scheduled Castes are most backward amongst the backward classes and the impugned legislation having already proceeded on the basis that they are not adequately represented both in terms of clause (4) of Article 15 and clause (4) of Article 16 of the Constitution, a further classification by way of micro-classification is not permissible. Such classification of the members of different classes of people based on their respective castes would be also violative of the doctrine of reasonableness.

122. The material on record would further suggest that the Scheme seeks to treat equals as unequals, because similarly situated SEBCs in Gujarat State are not eligible to have the benefit of the Scheme in question at par with Muslim SEBCs as illustrated hereinbelow:

123. The materials on record also indicate that the overall literacy rate of five religious minorities in question is on a higher side as compared to the literacy rate prevailing amongst the Scheduled Castes and Scheduled Tribes. The details are as under:

\*Figures shown against serial No. 6 pertaining to Parsis community is on All India basis.

#### JUSTICE SACHAR COMMITTEE REPORT:

124. On 9th March 2005, the Prime Minister's Office had issued a notification for

constitution of a High-Level Committee for preparation of a report on the social, economic and educational status of the Muslim community of India. A part of the notification reads thus:

#### Notification

Sub: Constitution of a High Level Committee to prepare a report on the social, economic and educational status of the Muslim community of India.

As it has been noted that there is lack of authentic information about the social, economic and educational status of the Muslim community of India which comes in the way of planning, formulating and implementing specific interventions, policies and programmes to address the issues relating to the socio-economic backwardness of this community, Government has constituted a High Level Committee to prepare a comprehensive report covering these aspects.

125. The Committee gave its report on 17th November 2006 which was placed in both the Houses of the Parliament on 30th November 2006. Although the affidavits filed on behalf of the Central Government do not categorically say so, an attempt on the part of the Central Government was to connect the Scheme in question with the Report of the Justice Sachar Committee. It was also submitted that though the terms of reference for the working of Justice Sachar Committee was in respect of the social and educational backwardness of the Muslim community, Justice Sachar Committee, after having made extensive research and study in respect of Muslim community, also made some observations in its report with reference to other socio-religious categories and that the Scheme in question concerning the five minority communities is the outcome of the findings as regards the social and educational backwardness of the said minority communities flowing from the Report of the Justice Sachar Committee.

126. It appears that the Scheme for minority was announced pursuant to the Hon"ble Prime Minister's 15 point programme for minority announced in June 2006 and that, therefore, the Scheme in question has nothing to do with the Report dated 17th November 2006 of Justice Sachar Committee. Apart from the above, the Scheme in question does not, expressly or impliedly, make a reference of the said Report of Justice Sachar Committee.

127. It was also sought to be argued by the learned Advocate General that the study undertaken by the Committee was at the National level and, therefore, the community as a whole cannot be considered as SEBC in the State of Gujarat as can be seen from the data furnished in the Committee's Report. It was also argued that there has been no survey undertaken for determining the social and educational backwardness of the five religious minority communities in the State and that too, by a permanent commission appointed by the Central Government under the NCBC Act.

128. In support of the aforesaid submissions, reliance was placed on the Division Bench decision of the Andhra Pradesh High Court in the case of R. Krishnaiah



(supra). Paragraphs 39 and 40 of the judgment were relied upon, which read as under:

39. In the case at hand, what the Central Government has essentially done is to cull out religious minorities - Muslims, Christians, Sikhs, Buddhists and Zoroastrians (Parsis) and "designate" them as more backward amongst the Other Backward Classes. In view of the law laid down, in our opinion, one of the reasons why the OM should be struck down is that while issuing them, the NCBC has been totally ignored and by-passed by the Central Government in culling out some categories of citizens from the generic class of OBCs. This is impermissible. The statutory function of the NCBC (under Section 9(1) of the NCBC Act) is to examine requests for inclusion of any class of citizens as a backward class, formulate a list of backward classes and advise the Central Government in this regard. This statutory function cannot be given a go-bye - the NCBC Act does not provide for it. On the contrary, in terms of Section 9(2) of the NCBC Act, the advice of the NCBC shall ordinarily be binding upon the Central Government. It is only thereafter that the Central Government may prepare lists for the Scheduled Castes, the Scheduled Tribes and Other Backward Classes for making provision for reservations.

40. Section 11 of the NCBC Act provides for the periodic revision of lists by the Central Government. In essence, therefore, a reading of Section 9 and Section 11 of the NCBC Act indicates that the statute occupies the legislative field and the Central Government cannot, unilaterally, issue an OM identifying a backward class of citizens for inclusion in the lists to be prepared by it or to identify a backward class of citizens already included in the list for any preferential treatment. As mentioned above, the advice of the NCBC is mandatorily required to be taken and since that not been taken, the procedure adopted by the Central Government while issuing the first OM is clearly faulty. For this reason and applying the law laid down by the Supreme Court, the portion of the first OM objected to by the petitioners ought to be struck down.

(Emphasis supplied)

129. I am not impressed to a certain extent with the submission of the learned Advocate General appearing for the State that unless the five religious minority communities are identified and declared by the permanent commission in terms of Article 340 of the Constitution of India functioning in the State as belonging to socially and educationally backward class, they do not, on their own, acquire the status of being socially and educationally backward merely on the basis of some findings in the Report of Justice Sachar Committee.

Article 340

340. Appointment of a Commission to investigate the conditions of backward classes.--(1) The President may by order appoint a Commission consisting of such persons as he thinks fit to investigate the conditions of socially and educationally backward classes within the territory of India and the difficulties

under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove such difficulties and to improve their condition and as to the grants that should be made for the purpose by the Union or any State and the conditions subject to which such grants should be made, and the order appointing such Commission shall define the procedure to be followed by the Commission.

(2) A Commission so appointed shall investigate the matters referred to them and present to the President a report setting out the facts as found by them and making such recommendations as they think proper.

(3) The President shall cause a copy of the report so presented together with a memorandum explaining the action taken thereon to be laid before each House of Parliament.

130. I am of the opinion that appointment of a commission in terms of Article 340 of the Constitution of India is not obligatory before making a special provision, or before providing for reservations under Articles 15(4) and 16(4) of the Constitution of India. Even apart from the provisions of the Commission of Inquiry Act, the executive power of the State or Central extends to appointing a person or a committee by whatever name it may be called to investigate the social and educational backwardness of any classes or groups in the State, and to act upon the report submitted by such person or committee. It may even be upon the Government to make its own investigation and take appropriate measures.

131. However, the moot question which arises in this petition is as to whether the Union before floating the Pre-Matric Scholarship scheme for the five minority communities, wanted some data or material, and for that purpose, it appointed Justice Sachar Committee, or was it independent of the same. In other words, whether Justice Sachar Committee Report could be said to be the foundation of the Scheme or not. I may once again reiterate that the constitution of a High-Level Committee to prepare a report on the social, economic and educational status was confined only to the Muslims of India. As stated earlier, the Scheme was announced in June 2006, whereas the Report of Justice Sachar Committee is dated 17th November 2006. Thus, I have reasons to believe that much before Justice Sachar Committee Report was laid before both the Houses of the Parliament, the Pre-Matric Scholarship Scheme was already announced. Therefore, it could not be said that based on the materials collected by the Committee, the Union decided to float the Scheme as one of the measures for advancement of socially and educationally backward classes of citizens. However, the point I am trying to drive at is, why was the survey restricted only for the Muslim community all over the country. Is it the case of the Union that there are no other social classes/groupings or communities which may qualify as socially and educationally backward classes for the purpose of Article 15(4) of the Constitution of India. The mandate of the Supreme Court in *Indra Sawhney* (supra) is otherwise. According to the Supreme Court, the question of

identification has to begin with some group, class or section as the ultimate idea is to survey the entire populace. The Supreme Court has held that if so, one can well begin with castes, which represented explicit identifiable social classes or groupings, more particularly, when Article 16(4) seeks to ameliorate social backwardness. The Supreme Court also laid down that one should not wind up the process of identification with the castes. The Court explained that besides castes (whether found among Hindus or others) there may be other communities, groups, classes and denominations which may qualify as backward class of citizens. The Supreme Court gave an example that in a particular State, Muslim community as a whole may be found socially backward as they were treated in the State of Karnataka as well as in the State of Kerala by their respective State/Governments. The Supreme Court further explained that any authority entrusted with the task of identifying backward classes may well start with the castes. Having exhausted the castes or simultaneously with it, the authority may take up other occupational groups, communities and classes. The Supreme Court gave an example that it may take up the Muslim community (after excluding those sections, castes and groups, if any, who have already been considered) and try to ascertain, whether it could be characterised as a backward class in that State or region, as the case may be. The Court held that the approach may differ from State to State since the condition in each State may differ. In paragraph 83 of the judgment, the Supreme Court held that in this manner all the classes among the populace will be covered and that is the central idea. The effort should be to consider all the available groups, sections and classes of the society in whichever order one proceeds.

132. The Supreme Court also clarified that they did not mean to suggest that the procedure indicated in paragraph 83 of the judgment was the only procedure or method to be adopted. It would be for the authority (appointed to identify) to adopt such approach and procedure as it may think appropriate, and so long as the approach adopted by it is fair and adequate, the Court may have no say in the matter.

133. I am of the opinion that proper identification of social and educational backwardness should be State-wise. Even, according to Justice Sachar Committee Report and more particularly the findings at page-53 of the Report, a general analysis at the State level presented a better picture for Muslims. According to the Report, in as many as 10 out of 21 selected States, literacy rate amongst Muslims were found to be higher than the State average and this included Gujarat. However, the Report once again changed its stand, stating that such estimates could be deceptive and hide the low levels of attainment amongst specific group.

134. The position so far as the State of Gujarat, according to Justice Sachar Committee Report is concerned, is as under:-

Literacy level - (pg. 287)

Literacy level in respect of those who have completed at least primary-school - (pg. 295)

Literacy level in respect of those who have completed at least middle-school - (pg. 297)

Literacy level in respect of those who have completed at least Matric-school - (pg. 299)

135. I am also of the opinion that the National Commission constituted under the National Commission for Minorities Act, 1992 should also not have been ignored by the Central Government. Section 3 of the National Commission for Minorities Act, 1992, provides that the Central Government shall constitute a body to be known as "the National Commission" for Minorities to exercise the powers conferred on, and to perform the functions assigned to it, under the Act. Section 9 of the Act in Chapter III envisages the functions of the Commission. The Commission shall perform all or any of the following functions, namely, (a) to evaluate the progress of the development of minorities under the Union and States; (b) to monitor the working of the safeguards provided in the Constitution and in law enacted by Parliament and the State Legislatures; (c) make recommendations for the effective implementation of safeguards for the protection of the interests of minorities by the Central Government or the State Governments....."Sub-section (2) postulates that the Central Government shall cause the recommendations referred to in clause (c) of sub-section (1) to be laid before each House of Parliament along with a memorandum explaining the action taken or proposed to be taken on the recommendations relating to the Union and the reasons for non-acceptance, if any, of any of such recommendations.

136. By operation of Section 3 read with Section 9, it is the duty of the Central Government to constitute a National Commission and it shall be the duty and the responsibility of the National Commission to ensure compliance of the principles and programmes evaluated in Section 9 of the Act, protecting the interest of the minorities for their development and working of the safeguards provided to them in the Constitution and the law enacted by the Parliament as well as the State Legislature.

137. Such being the position, there is no satisfactory reply at the end of the Central Government as to why, despite there being a National Commission constituted for the minorities under the National Commission for Minorities Act, 1992, the same was bypassed. The National Commission at no point of time has said that the five religious minorities are socially and educationally backward. The National Commission at no point of time has said that the five religious minorities are socially and educationally backward.

Whether directions should be given to the State Government to implement the Scheme.

138. Even if I were to hold that the Scheme is valid, in my opinion, no case has

been made out for a writ of mandamus on the State or directions in the nature of mandamus for implementation of the Scheme.

139. From the material on record, it appears that prior to the Scheme in question becoming effective with effect from 1st April 2008, the Central Government, vide its letter dated 30th November 2007, had sought the views of the State Government and the State Government, vide its letter dated 4th March 2008, had conveyed to the Central Government as to why the State is not agreeable for implementation of the Scheme in question in the State. Thereafter, although the Central Government had addressed few letters in the beginning of every academic year for the release of funds, at no point of time, any directions were issued by the Central Government asking the State Government to implement the Scheme in question. It is also not the case of the Central Government that they had ever issued any direction to the State Government for implementing the Scheme in question. According to the learned Advocate General appearing for the State, the State Government is not obliged to implement the Scheme in question, more particularly, when the same is optional in nature with a sharing pattern, wherein the State Government has to contribute to the extent of 25% of the total amount to be disbursed under the Scheme in question.

140. To appreciate the aforesaid question, let me look into few relevant provisions of the Constitution of India:

Article 73:

73. Extent of executive power of the Union--(1) Subject to the provisions of this Constitution, the executive power of the Union shall extend-

- (a) to the matters with respect to which Parliament has power to make laws; and
- (b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement:

Provided that the executive power referred to in sub-clause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State to matters with respect to which the Legislature of the State has also power to make laws.

(2) Until otherwise provided by Parliament, a State and any officer or authority of a State may, notwithstanding anything in this article, continue to exercise in matters with respect to which Parliament has power to make laws for that State such executive power or functions as the State or officer or authority thereof could exercise immediately before the commencement of this Constitution.

Article 256:

256. Obligation of States and the Union--The executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to

the Government of India to be necessary for that purpose.

Article 257:

257. Control of the Union over States in certain cases.--(1) The executive power of every State shall be so exercised as not to impede or prejudice the exercise of the executive power of the Union, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose.

(2) The executive power of the Union shall also extend to the giving of directions to a State as to the construction and maintenance of means of communication declared in the direction to be of national or military importance:

Provided that nothing in this clause shall be taken as restricting the power of Parliament to declare highways or waterways to be national highways or national waterways or power of the Union with respect to the highways or waterways so declared or the power of the Union to construct and maintain means of communication as part of its functions with respect to naval, military and air force works.

(3) The executive power of the Union shall also extend to the giving of directions to a State as to the measures to be taken for the protection of the railways within the State.

(4) Where in carrying out any direction given to a State under clause (2) as to the construction or maintenance of any means of communication or under clause (3) as to the measures to be taken for the protection of any railway, costs have been incurred in excess of those which would have been incurred in the discharge of the normal duties of the State if such direction had not been given, there shall be paid by the Government of India to the State such sum as may be agreed, or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India, in respect of the extra costs so incurred by the State.

141. The Scheme in question floated by the Central Government could be considered to be in exercise of its executive powers provided under Article 73 of the Constitution of India, but as provided in its proviso, the same cannot be applied to the State Government or foisted upon the State mandatorily in the absence of any provision in that behalf in the Constitution or in the absence of any law made by the Parliament and operating in the State in the matter of grant of Pre-Matric Scholarship to the students of the minority communities. Article 56 would apply only when any Law has been made by the Parliament and the executive powers of the State is made subservient to it by requiring it to ensure compliance with such laws. Where it appears to the Government of India that it is so necessary to do, directions can be issued. It was sought to argue very vociferously that our Constitution is not unitary in nature and the Central Government must respect the federal status of the State.

142. In the case of *S.R. Bommai* (supra), the Supreme Court made the following observations in paragraph 276 of the judgment:

276: The fact that under the scheme of our Constitution, greater power is conferred upon the Centre vis-?-vis the States does not mean that States are mere appendages of the Centre. Within the sphere allotted to them, States are supreme. The Centre cannot tamper with their powers. More particularly, the courts should not adopt an approach, an interpretation, which has the effect of or tends to have the effect of whittling down the powers reserved to the States. It is a matter of common knowledge that over the last several decades, the trend the world over is towards strengthening of Central Governments - be it the result of advances in technological/scientific fields or otherwise, and that even in USA the Centre has become far more powerful notwithstanding the obvious bias in that Constitution in favour of the States. All this must put the court on guard against any conscious whittling down of the powers of the States. Let it be said that the federalism in the Indian Constitution is not a matter of administrative convenience, but one of principle - the outcome of our own historical process and a recognition of the ground realities. This aspect has been dealt with elaborately by Shri M.C. Setalvad in his Tagore Law Lectures "Union and State relations under the Indian Constitution" (Eastern Law House, Calcutta, 1974). The nature of the Indian federation with reference to its historical background, the distribution of legislative powers, financial and administrative relations, powers of taxation, provisions relating to trade, commerce and industry, have all been dealt with analytically. It is not possible - nor is it necessary - for the present purposes to refer to them. It is enough to note that our Constitution has certainly a bias towards Centre vis-?-vis the States *Automobile Transport (Rajasthan) Ltd. vs. State of Rajasthan*. It is equally necessary to emphasise that courts should be careful not to upset the delicately crafted constitutional scheme by a process of interpretation.

(Emphasis supplied)

143. In the aforesaid context, it will be profitable to quote the following passage pp. 1138 and 1139 of Volume VII of Official Report of Constituent Assembly Debates, wherein Dr. B.R. Ambedkar explained the reasons for adding the proviso to draft Article 60, which is corresponding to the present

Article 73 of the Constitution:

I was saying that there is no substance in the argument that we are departing from the provision contained in Section 126 of the Government of India Act. As I said, that section was not based upon any principle at all.

In support of the proviso, I would like to say two things. First, there is ample precedent for the proposition enshrined so to say in this proviso. My honourable Friend Mr. T.T. Krishnamachari has dealt at some length with the position as it is found in various countries which have a federal Constitution. I shall not therefore labour that point again. But I would just like to make one reference to the

Australian Constitution. In the Australian Constitution we have also what is called a concurrent field of legislation. Under the Australian Constitution it is open to the Commonwealth Parliament in making any law in the Concurrent field to take upon itself the authority to administer. I shall just quote one short paragraph from a well known book called "Legislative and Executive Power in Australia" by a great lawyer Mr. Wynes. This is what he says:

Lastly, there are Commonwealth Statutes. Lefroy states that executive power is derived from legislature power unless there be some restraining enactment. This proposition is true, it seems, in Canada, where the double enumeration commits to each Government exclusive legislative powers, but is not applicable in Australia. Where the legislative power of the Commonwealth is exclusive-e.g., in the case of defence - the executive power in relation to the subject of the grant inheres in the Commonwealth, but in respect of concurrent powers, the executive function remains with the States until the Commonwealth legislative power is exercised.

Which means that in the concurrent field, the executive authority remains with the States so long as the Commonwealth has not exercised the power of making laws which it had. The moment it does the execution of that law is automatically transferred to the Commonwealth. Therefore, comparing the position as set out in the proviso with the position as it is found in Australia, I submit that we are not making any violent departure from any federal principle that one may like to quote. Now, Sir, my second submission is that there is ample justification for a proviso of this sort, which permits the Centre in any particular case to take upon itself the administration of certain laws in the Concurrent list. Let me give one or two illustrations. The Constituent Assembly has passed article 11, which, abolishes untouchability. It also permits Parliament to pass appropriate legislation to make the abolition of untouchability a reality. Supposing the Centre makes a law prescribing a certain penalty, certain prosecution for obstruction caused to the untouchables in the exercising of their civic rights. Supposing a law like that was made, and supposing that in any particular province the sentiment in favour of the abolition of untouchability is not as genuine and as intense nor is the Government interested in seeing that the untouchables have all the civic rights which the Constitution guarantees, is it logical, is fair that the Centre on which so much responsibility has been cast by the Constitution in the matter of untouchability, should merely pass a law and sit with folded hands, waiting and watching as to what the Provincial Governments are doing in the matter of executing all those particular laws? As everyone will remember, the execution of such a law might require the establishing of additional notice, special machinery for taking down, if the offence was made cognizable, for prosecution and for all costs of administrative matters without which the law could not be made good. Should not the Centre which enacts a law of this character have the authority to execute it? I would like to know if there is anybody who can say that on a matter of such vital importance, the Centre should do nothing more than enact a law. ....



(Emphasis supplied)

144. In the case of Dr. Amin Prakash V. Ors. Vs. State of Gujarat and Others, , a Division Bench of this High Court held in paragraphs 51 and 52 as under:

51...The expression... "the Legislature of the State has also power to make laws" used in proviso to clause (1) of Article 73 necessarily refers to subjects specified in the Concurrent List. Therefore, unless the Constitution provides otherwise or unless any law made by Parliament has authorized the Central Government to do so, the executive power of the Central Government does not extend to matters in respect of subjects specified in the Concurrent List.

(Emphasis supplied)

52.... Therefore, we are unable to uphold the argument raised on behalf of the petitioners that Entry 25 in the Concurrent List in its present form disables the State Government from exercising its executive power in relation to matters falling under Entry 25 in the Concurrent List as amended.

145. In Sharma Transport Rep. by D.P. Sharma Vs. Government of Andhra Pradesh and Others, , the Supreme Court, while explaining the scope and ambit of Articles 256, 257 and 73 of the Constitution of India, held in paragraphs 8 and 9 as under:

8. This is not a case where the theory of occupied field can be made applicable. The Taxation Act essentially deals with fares charged from passengers and freight collected from them. On the contrary, the Act deals with levy on vehicles. They are conceptually different. Whatever has been stated above in the background of Article 73 is equally applicable to Articles 256 and 257 of the Constitution. Article 256 provides that the executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose. This Article has application only when any law has been made by Parliament and the executive power of the State is made subservient to it by requiring it to ensure compliance with such laws. Where it appears to the Government of India that it is so necessary to do, directions can be issued. Article 257 provides that the executive power of every State shall be so exercised as not to impede or prejudice the exercise of the executive power of the Union. Where the Government of India feels it so necessary to do so, it can issue a direction. At the cost of repetition it may be noted that there is no law specifying the principles of taxation on the subject matter of controversy so as to bring in application of either article 256 or Article 257 of the Constitution.

9. It has to be noted that clause (b) in Article 73 cannot apply to legislative powers of the State. The expression "agreement" referred to in the said clause has to be considered in terms of Article 299 of the Constitution. Article 246 deals with subject matter of laws made by Parliament and Legislatures of State. Clause

(1) of the said Article gives exclusive power to deal with the matters enumerated in List II of the Seventh Schedule. The expression "for that purpose" in Article 256 refers to the requirement of compliance with the laws made by Parliament. Article 256 operated if the Government of India feels that the executive power of the State is being exercised in a manner which may amount to impediment with the executive power of the Union. It has to be noted that Entry 56 of List II of the Seventh Schedule deals with passengers and the Union has no power to levy taxes in respect of passengers. Above being the position, there is no substance in the plea of the appellants that the letter of the Joint Secretary to the Government of India dated 30th August, 1993 was in the nature of a direction.

146. In *T.P. George and Others Vs. State of Kerala and Others*, , the Supreme Court, while dealing with a UGC Scheme, inter alia, fixing 60 years as an age of superannuation was not implemented by the State of Kerala which gave rise to a petition, held as under:

Though clause 26 of the scheme provides that an age of superannuation for teachers should be 60 years and the scheme contemplates certain improvements in providing for assistance in that behalf, it is not a scheme which is statutorily binding. ... ... Firstly, as already stated, the UGC Scheme does not become applicable because of any statutory mandate making it obligatory for the Government and the Universities to follow the same. Therefore, State Government had a discretion either to accept or not to accept the scheme ... ... as long as the superannuation remains fixed at 55 years and as long as the State Government has not accepted the UGC's recommendation to fix the age of superannuation as 60 years, teachers cannot claim as a matter of right that they are entitled to retire on attaining the age of 60 years.

(Emphasis supplied)

147. Thus, Articles 256 and 257 of the Constitution of India though provided for exercise of the executive power of the State, the same is required to be read with Article 73, and if so read, it clearly conveys that the executive power of the State is to be exercised so as to ensure compliance with the laws made by the Parliament and that they shall be so exercised as not to impede or prejudice the exercise of the executive power of the Union, although the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose. In the present case, in my opinion, although it was sought to argue that the Scheme was placed before both the Houses of the Parliament and is a part of Prime Minister's 15 point programme, there is no law in the matter of grant of Pre-Matric Scholarship under the Scheme in question so as to bring any application of either Article 256 or Article 257 of the Constitution of India.

148. The powers of the High Court under Article 226 of the Constitution of India though are discretionary and no limits can be placed upon such discretion, they must be exercised in accordance with law and subject to certain self-imposed

restrictions. The expression "for any other purpose" in Article 226 makes the jurisdiction of the High Courts more extensive but yet the Courts must exercise the same with certain restraints and within some parameters. It is a settled position of law that one of the conditions for exercising power under Article 226 of the Constitution of India for issuance of a mandamus is that the Court must come to the conclusion that the aggrieved person has a legal right, which entitles him to. any of the rights and that such right has been infringed. To put it in other words, existence of a legal right of a citizen and performance of any corresponding legal duties by the State or any public authority, could be enforced by issuance of a writ of mandamus. But, the most important aspect of the mandamus is that the duty that may be enjoined by mandamus may be one imposed by the Constitution, a statute, common law or by rules or orders having the force of law. When the aforesaid principle is applied to the case in hand, I am of the opinion that no case has been made out for issuance of writ of mandamus or directions in the nature of mandamus.

149. Let me now deal with few decisions of the Supreme Court, relied upon by the respective counsel in support of their submission (which are found to be relevant) that the Scheme in question is not based only on religion, but on reasonable classification based on intelligible differentia.

The State of Punjab Vs. Ajaib Singh and Another,

150. In that case, the question which had come up for consideration before the Constitution Bench was whether Abducted Persons (Recovery and Restoration) Act, 1949 was discriminatory. The attack on the constitutionality was advanced on the ground that that Act applied only to a male or female child if he or she be a Muslim, as would appear from the definition of the expression "abducted person" given in Section 2(1)(a). In repelling the attack on the anvil of Article 14, it was stated that Muslim abducted persons constitute a well defined class for the purposes of legislation. Therefore, the Act even though it applied only to the Muslims was not held violative of the equality clause. The ratio propounded in this judgment would not help to save the scheme which is hit by Article 15(1) of the Constitution of India. Relying on this decision, the Punjab High Court in S. Raghbir Singh Vs. Union of India (UOI) and Others, , upheld the validity of the Evacuee Interest (Separation) Act, 1951, which had declared that certain mortgages of the property belonging to Muslims who had migrated to Pakistan shall stand extinguished under certain circumstances. The Court, however, stated that the mortgages of the property of Muslim evacuees constitute a well defined class for the purposes of legislation and it was pointed out that if substantial differences exist among persons who are included and those who are excluded, the classification would not be bad. It was then held that the Muslims who had migrated to Pakistan substantially differed from other persons. It was further observed that the Act made no discrimination between one person and another in the group and each one of them was treated alike under similar circumstances and conditions. The classification was said to be neither capricious nor arbitrary

and was held to be based on the fact that the situation and circumstances of persons who are mortgages of evacuee property are different from the situation and circumstances of persons who are mortgages of the other property; and there was a clear and distinct connection between the classification and the object of the Act. The validity of the Act was, therefore, upheld. This judgment was based on peculiar facts of the case and would not help the counsel in any manner.

Moti Das Vs. S.P. Sahi, The Special Officer In Charge of Hindu Religious Trusts and Others,

151. In that case the validity of the provisions contained in Sections 2, 5, 6, 7 and 8 of Bihar Hindu Religious Trusts Act was assailed on the ground that the definition of the word "Hindu" in Section 2 does not include Sikhs; and Section 5 constitutes a Board for religious trusts other than Jain religious trusts. As to Sections 6, 7 and 8, it was alleged that the constitution of the Board for religious trusts other than Jain religious trusts differs in material particulars from the constitution of the two Boards for Jain religious trusts. The challenge was, however, not accepted by pointing out that there are some differences between Hindus, Sikhs and Jains in some of the essential details of the faith which they profess and the religious practices they observe. The Court held that in view of these differences, it could not be said that in the matter of religious trusts in the State of Bihar, Sikhs, Hindus and Jains are situated alike or that the needs of the Jains and Hindus are the same in the matter of the administration of their respective religious trusts; and so, the classification was held to be not ultra vires. This judgment would also not help the counsel in any manner.

Lingappa Pochanna Appelwar Vs. State of Maharashtra and Another,

152. In the said case, the validity of Sections 3 and 4 of the Maharashtra Restoration of Lands to Scheduled Tribes Act, 1974 was, inter alia, challenged on the ground that it is violative of Article 14 of the Constitution, inasmuch as the same seek to treat members belonging to Scheduled Caste unfavourably, as compared to members of Scheduled Tribes. The impugned provisions provided annulment of transfer of lands effected by the tribals during the specified period and for restoration thereof to the said tribals. Some of the members of Scheduled Tribes who were not getting the said benefit of specified period, challenged the said provisions as violative of Article 14 of the Constitution on the ground that similar benefit is not available to the members of Scheduled Castes. However, on a detailed inquiry, the Apex Court found that the petitioner - members of the Scheduled Tribes were not eligible to get the benefit of the provisions of the Act and that they could not plead the cause of members of Scheduled Caste who were different from those of Scheduled Tribes more particularly when members of Scheduled Tribes were aboriginals, constituting a distinct class, required a special protection of the State. In view of this, the Apex Court upheld the validity of the provisions under challenge.

Balbir Kaur and Another Vs. Steel Authority of India Ltd. and Others,

153. In the said case, the claim of the appellant for compassionate appointment was dismissed by the High Court while upholding the validity of the family benefit scheme floated by Steel Authority of India. In this context, the Apex Court observed to the effect that constitutional philosophy should be allowed to become a part of everymen's life in this country and then only the constitution will reach everyone more particularly when the employer was Steel Authority of India which was expected to be a model employer.

Dalmia Cement (Bharat) Ltd. and Another Vs. Union of India (UOI) and Others,

154. In this case, the petitioners who were the manufacturers of cement, sugar and other commodities and plastic bags, challenged the constitutionality of Sections 3 to 5 of the Jute Packaging Material Compulsory Use in Packing Commodities) Act, 1987, and the orders issued by the Central Government on the anvil of Articles 14, 19(1)(g) and 301 of the Constitution of India. One of the main contentions on behalf of the appellant was to the effect that compulsory packing of the finished goods in gunny bags was an unreasonable restriction. It was the further argument of the petitioners that preference to the jute sector at the cost of and in total disregard of other sectors like cement, sugar and alternative industry or general public would be unreasonable and arbitrary. While dealing with the said challenge, the Apex Court broadly discussed about the Fundamental Rights and Directives of State Policy and Principles and observed that the main objective behind the enactment of the Act was to provide livelihood to nearly four million rural agricultural families, which will provide upliftment of the vast number of people and that is how, the Apex Court upheld the validity of the Act while discussing the concept of socio and economic justice.

Zee Telefilms Ltd. and Another Vs. Union of India (UOI) and Others,

155. The challenge before the Apex Court under Article 32 was the termination of the contract by the BCCI wherein a preliminary objection was raised by BCCI to the effect that it is not covered within the purview of "other authority" within the definition of Article 12 of the Constitution of India. The Apex Court by majority judgments held that the BCCI cannot be held to be a "State" for the purpose of Article 12 and the petition was dismissed. The Apex Court in para 35 has observed that the Constitution of our country is a living organism and it is the duty of the Courts to interpret the same to fulfil the needs and aspirations of the people, depending on the needs of the time. However, while so observing, the Apex Court categorically held that there is no need to further expand the scope of Article 12 by judicial interpretation for covering BCCI, at least for the time being.

Minor P. Rajendran Vs. State of Madras and Others,

156. In the said case, Rule 5 of Madras Educational Rules for selection of candidates for admission to First year M.B.B.S. Course was challenged on the

ground that the same provided for reservation on the sole ground of castes, violating Article 15(1). However, the State Government successfully established that reservation was not based solely on the caste of the persons referred to in the list, inasmuch as the members of the castes referred to in the list were found to be socially and educationally backward. That is how they were placed in the list right from 1906, which was finally adopted for the purpose of Article 15(4) as a result of detailed inquiry. This was not controverted by the petitioner and that therefore, challenge to Rule 5 came to be failed in the Hon'ble Supreme Court.

AIR India Vs. Nergesh Meerza and Others,

157. In the said case one of the main challenges was with reference to differential treatment as between Assistant Flight Pursers ("AFPs" for short) and Air Hostess ("AH" for short) more particularly in the matter of payment of salary allegedly on the ground of sex only. Before the Apex Court, it was proved that discrimination between the said two categories of employees was based on sex coupled with other considerations. It was not disputed that at the time of initial recruitment, qualifications for appointment of AFPs and AH were essentially different, the classification and conditions of service for both the posts were different. Apex Court rejected the plea that both being members of the same cabin crew must belong to the same class on the ground that AHs form an absolutely separate category from that of AFPs in all respects and therefore it was a valid classification.

Prafull Goradia Vs. Union of India (UOI),

158. In Goradia's case, the Supreme Court was mainly concerned with Article 27 of the Constitution of India. The challenge by the petitioner before the Supreme Court was that he was a Hindu but he had to pay direct and indirect taxes, part of whose proceeds go for the purpose of the Haj pilgrims, which is only done by the Muslims. It was contended that his fundamental right under Article 27 of the Constitution was being violated. The Supreme Court observed that if only a relatively small part of the tax collected is utilized for providing some convenience or facilities or concessions to any religious denominations, that would not be violative of Article 27 of the Constitution. The Supreme Court clarified that it was only when a substantial part of the tax was utilized for any particular religion that Article 27 would be violated. The Court also observed that one must not be too rigid in such matters and must give some free play to the joints of the State machinery. The Court observed that a balanced view has to be taken and one should not say that even if one paisa of the Government money is spent for a particular religion, there will be violation of Article 27.

159. I fail to understand how this judgment would help in defending the scheme. It appears that the respective counsel laid much emphasis on the words "some free play to the joints of the State machinery". Relying on those observations, it was sought to argue that even if there is some discrimination in the form of an affirmative action, then the Government must be given some discretion in that

regard. In my opinion, it is complete misreading of the judgment. It was also observed by the Supreme Court that there was no violation of Articles 14 and 15 because facilities were also given and expenditures were also incurred by the Central and the State Governments in India for other religions. Relying on such observations, it was sought to be contended that the persons who are not able to take the benefit of the scheme as the same is confined only to the five minority communities, there are other schemes of the similar nature which take care for the advancement of other socially and educationally backward class. I am afraid to apply the ratio of Goradia's case in the manner as suggested by the respective counsel. It is like saying that, "permit us to discriminate and we shall compensate for the discrimination".

Sanjiv Gajanan Punalekar Vs. Union of India (UOI), Ministry of Minority Affairs and Others,

160. The Division Bench of the Bombay High Court had an occasion to examine the same scheme, which is the subject matter of the present petition. While upholding the validity of the scheme, the Division Bench took the view that Article 14 and 15(1) of the Constitution permits reasonable classification i.e. classification between two classes of people treated differently based upon intelligible differentia and the differentia must have rational nexus with the object sought to be achieved. According to the Division Bench, Article 15(4) would come in, when, and only when a special provision is made for the benefit of one class at the cost of, or to the detriment of, another class. The Court proceeded further to take the view that the scholarship schemes giving incentive are based on reasonable classification supported by Article 14 and 15(1) and since the impugned schemes do not have any adverse impact on the other communities, Article 15(4) would not come into play. The Court also took the view that it was not necessary to give any finding on the petitioner's contention that minority communities per-se cannot be treated as socially and educationally backward classes falling under Article 15(4) of the Constitution. Thus, the entire judgment of the Division Bench proceeded on the footing of reasonable classification based on intelligible differentia permissible under Article 15(1) of the Constitution. This judgment also, in my opinion, would not help in any manner, and with profound respect, I am unable to subscribe to the views expressed in the said judgment.

Javed and Others Vs. State of Haryana and Others,

161. In that case, the challenge was to the vires of the provisions of Sections 175(1)(q) and 177(1) of the Haryana Panchayati Raj Act, 1994. The provision in question disqualified a person who was having more than two living children from holding the specified offices in Panchayat. Several persons were disqualified or were proceeded against for disqualification either from contesting the elections for, or from continuing in the office of Panchayats/Sarpanch, in view of they having incurred the disqualification as provided by Section 175(1)(q) or Section 177(1) read with Section 175(1)(q) of the Act. It was argued before the Supreme Court that the provision was arbitrary and violative of Article 14 of the

Constitution. It was also argued that the provision was discriminatory. While deciding the main issue as regards the constitutional validity of the two Sections referred to above, some observations fell from the Court, which are sought to be relied upon in the present case. The Supreme Court observed that a uniform policy may be devised by the Central or the State, but there was no constitutional requirement that any such policy should be implemented in one-go. The Court observed that the policies are capable of being implemented in a phased manner. The Court also observed that when the policies have far-reaching implications and are dynamic in nature, their implementation in a phased manner is welcome for it receives gradual willing acceptance and invites lesser resistance. The Supreme Court further observed that the implementation of policy decision in a phased manner is suggestive neither of arbitrariness nor of discrimination. The Supreme Court relied on its earlier decision in the case of *L.N. Mishra Institute of Economic Development and Social Change Patna and Another Vs. State of Bihar and Others*, wherein the policy of nationalising educational institutes was sought to be implemented in a phased manner. It was sought to argue relying on those observations that in the present case also if the Central Government has decided to float a scholarship scheme in favour of five minority communities, then such schemes for other communities could be introduced after some time. I am afraid that the ratio laid down in this case cannot be applied to the facts of the present case in such a mechanical manner. I have yet to come across a single judgment of the Supreme Court or any other High Court taking a view that even if a policy is clearly discriminatory in terms of Article 15(1) of the Constitution being based only on religion such a policy should not be struck down as a similar policy for the discriminated class could be evolved in a phased manner.

*Vijay Harishchandra Patel Vs. Union of India (UOI) and Another,*

162. In this case, the same scheme which is the subject matter of challenge in the present petition was considered by the Division Bench of this Court. While upholding the validity of the scheme, the Division Bench took the view that our nation has no religion of its own and we are living in a secular nation being secular in character. The actions of the State to minimise inequality in income and status and the endeavour to eliminate poverty and to provide opportunities in employment would only uphold constitutional objectives. The Division Bench also took into consideration Article 27 of the Constitution of India.

163. I am of the opinion that in the entire judgment, there is no discussion as regards Article 15 of the Constitution of India. This is precisely the reason why the Division Bench of this Court did not agree with the views expressed by the Division Bench in *Vijay Harishchandra Patel (supra)* and thought fit to refer the matter to a Larger Bench.

*The State of Bombay Vs. Narasu Appa Mali,*

164. In this case, the challenge was to the validity of the Bombay Prevention of



Hindu Bigamous Marriages Act, 1946 on the ground that it contravened the fundamental rights guaranteed under Articles 14, 15 and 25 of the Constitution of India. The argument before the Division Bench of the Bombay High Court was that the Hindu community in Bombay had been picked out for the legislation in question prohibiting polygamy. It was pointed out that polygamy was prevalent and permissible among Muslims living in the State of Bombay and yet could marry more than one wife while Hindu doing the same was made liable to severe penalty. It was also argued that our Constitution sets up a secular State and that Article 44 contained a directive to the State to secure for the citizens a uniform Civil Code throughout the territory of India. In repelling the argument, the Court took the view that there could be no doubt that Muslims have been excluded from the operation of the Act in question but the exclusion was not based only on religions as polygamy was recognized as a valid institution when a Muslim male marries more than one wife. The Court thereafter considered whether there was any reasonable basis for creating the Muslim as a separate class to which the laws prohibiting polygamy would not apply. The Court thereafter considered the historic fact that both the Muslims and the Hindus in the country had their own personal laws which were based upon their respective religious texts and which embody their own distinctive evolution and which were coloured by their own distinctive backgrounds. The Court further held that one community might be prepared to accept and work social reform; another may not yet be prepared for it; and Article 14 did not lay down that any legislation that the State might embark upon must necessarily be of an all-embracing character. The Court held that the State may rightly decide to bring about social reform by stages and the stages could be territorial or they could be community-wise. From such considerations, if there was a discrimination against the Hindus in the applicability of the Hindu Bigamous Marriages Act, that discrimination, according to the Court, was not based only upon ground of religion.

165. Gajendragadkar, J. in his concurring judgment also observed that the equality before the law guaranteed by Article 14 would not get offended by the impugned Act if the classification which the Act made was based on reasonable and rational considerations.

166. This judgment was heavily relied upon by the learned senior counsel Mr. Muchhala as well as by Mr. Ekrama Qureshi, the learned advocate appearing for the interveners and petitioners respectively.

167. The emphasis laid is on the observations of the Court that social reform or welfare could be in steps and in phased manner. In my opinion, this judgment would also not help in any manner in defending the Scheme because the manner in which the ratio of this judgment is sought to be interpreted, would lead to an inference that discrimination is there but since it is a discrimination in the form of an affirmative action, the same could be in a phased manner and the discriminated class could be considered at a later stage. In my opinion, the important observations which are sought to be overlooked are:-

...So long as the State Legislature in taking gradual steps for social welfare and reform does not introduce distinctions or classifications which are unreasonable, irrational or oppressive, it cannot be said that the equality before law is offended.

168. That is to say, unless a class is created within a class, it will not be violative of Article 15(1) of the Constitution of India.

169. In the present case, I have reached to the conclusion that the distinctions or classifications are unreasonable and not based on intelligible differentia.

170. I may only state that plethora of decisions were relied upon on both sides, however, it is not necessary to deal with each of those decisions. I have discussed few decisions, which, in my opinion, are relevant being very close to the point involved in this petition. I may further state that it is well established that a judgment is a precedent for what it decides and not what may appear to logically flow from it. In this context, I may with profit refer to the decision of the Supreme Court in the case of Ashwani Kumar Singh Vs. U.P. Public Service Commission and Others, , in which the apex Court has explained as to how Courts should place reliance on precedents. The observations made in paragraphs 10, 11, 12 and 13 are reproduced hereinbelow:

10. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are not to be read as Euclid's theorems nor as provisions of the statute. These observations must be read in the context in which they appear. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for Judges to embark into lengthy discussions, but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In *London Graving Dock Co. Ltd. v. Horton* (1951 AC 737 at p. 761), Lord Mac Dermot observed:

The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes, J. as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished Judge.

11. In *Home Office v. Dorset Yacht Co.*, 1970 (2) All ER 294 Lord Reid said, "Lord Atkin's speech.....is not to be treated as if it was a statute definition. It will require qualification in new circumstances.

Megarry J. in *Shepherd Homes Ltd. v. Sandham* (No. 2) ((1971) 1 WLR 1062) observed:

One must not, of course, construe even a reserved judgment of Russell, L.J. as if it were an Act of Parliament.

In *Herrington v. British Railways Board* (1972 (2) WLR 537) Lord Morris said:

There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances made in the setting of the facts of a particular case.

12. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

13. The following words of Lord Denning in the matter of applying precedents have become locus classicus:

Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.

xxx xxx xxx

Precedent would be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches, else you will find yourself lost in the thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it.

171. For the foregoing reasons, my answer to the two questions referred by the Division Bench in reference vide order dated 8th October 2012 is as under:

(1) I hold that the Scheme in question violates Article 15(1) of the Constitution of India and no direction should be given to implement the Scheme as any direction upon the State Government to implement the Scheme in question will amount to passing direction upon the State Government to violate Article 15(1) of the Constitution of India.

(2) The decision of the Division Bench of this Court in Special Civil Application No. 2245 of 2008 (*Vijay Harishchandra Patel v/s. The Union of India*) disposed of on 20th March 2009 does not lay down the correct proposition that the Scheme in question is not violative of Article 15 of the Constitution of India.

172. The matters be now placed before appropriate Division Bench.

V.M. Sahai, J.

173. After the judgment was pronounced, learned Advocate General Mr. Kamal B. Trivedi appearing with Government Pleader Mr. P.K. Jani assisted by Ms. Sangeeta Vishen, learned Assistant Government Pleader appearing for the State Government made an oral request for grant of Certificate under Article 134A of

the Constitution of India for leave to appeal before the Apex Court, which is opposed by learned counsel Mr. Hasim Qureshi appearing with Mr. Ekrama Qureshi appearing for the petitioner, Mr. P.S. Champaneri, learned Assistant Solicitor General appearing with Mr. Hriday Buch, learned Senior Central Government Counsel appearing for the Central Government as well as learned counsel appearing for the interveners.

174. We have considered this request and we are of the prima facie opinion that the case involves a substantial question of law as to the interpretation of Article 15 of the Constitution of India. But since we have only answered the questions referred to us by the Division Bench and we have not finally decided the petitions, in our opinion, such a request should be made before the Division Bench once such petitions are disposed of which shall consider the request that may be made by either of the parties.

175. Learned Advocate General also requested for staying the operation of the majority opinion delivered today. We do not see any reason to stay our majority opinion as after the reference has been answered, the proceedings shall be placed before the Division Bench. Only after the public interest petitions are disposed of, question of stay may arise. For the aforesaid reasons, oral request made by learned Advocate General for grant of certificate envisaged under Article 134A of the Constitution of India for fitness to appeal before the Apex Court is disposed of.