

The highlights of judgments delivered by Constitutional bench are placed below:

BENCH:

K.G. BALAKRISHNAN, C.J.I.

Questions:

1. *Whether the Ninety-Third Amendment of the Constitution is against the "basic structure" of the Constitution?*

The Constitution (Ninety-Third Amendment) Act, 2005 does not violate the "basic structure" of the Constitution so far as it relates to the state maintained institutions and aided educational institutions. Question whether the Constitution (Ninety-Third Amendment) Act, 2005 would be constitutionally valid or not so far as "private unaided" educational institutions are concerned, is left open to be decided in an appropriate case.

(Paragraph 79)

2. *Whether Articles 15(4) and 15(5) are mutually contradictory, hence Article 15(5) is to be held ultra vires?*

Article 15(5) is constitutionally valid and Articles 15(4) and 15(5) are not mutually contradictory.

(Paragraph 100)

3. *Whether exclusion of minority educational institutions from Article 15(5) is violative of Article 14 of Constitution?*

Exclusion of minority educational institutions from Article 15(5) is not violative of Article 14 of the Constitution as the minority educational institutions, by themselves, are a separate class and their rights are protected by other constitutional provisions.

(Paragraph 102)

4. *Whether the Constitutional Amendment followed the procedure prescribed under Article 368 of the Constitution?*

The Ninety-Third Amendment of the Constitution does not affect the executive power of the State under Article 162 of the Constitution and hence, procedure prescribed under Proviso to Article 368(2) is not required to be followed.

(Paragraph 103)

5. *Whether the Act 5 of 2007 is constitutionally invalid in view of definition of "Backward Class" and whether the identification of such "Backward Class" based on "caste" is constitutionally valid?*

Identification of "backward class" is not done solely based on caste. Other parameters are followed in identifying the backward class. Therefore, Act 5 of 2007 is not invalid for this reason.

(Paragraph 142)

6. *Whether "Creamy Layer" is to be excluded from SEBCs?*

"Creamy Layer" is to be excluded from SEBCs. The identification of SEBCs will not be complete and without the exclusion of "creamy layer" such identification may not be valid under Article 15(1) of the Constitution. (Paragraph 152)

7. *What should be the para-meters for determining the "creamy layer" group?*

The parameters contained in the Office Memorandum issued by the Government of India, Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training) on 08.09.1993 may be applied. And the definition of "Other Backward Classes" under Section 2(g) of the Act 5 of 2007 should be deemed to mean class or classes of citizens who are socially and educationally backward, and so determined by the Central Government; and if the determination is with reference to caste, then the backward class shall be after excluding the creamy layer.

Paragraphs 153 and 155)

8. *Whether the "creamy layer" principle is applicable to Scheduled Tribes and Scheduled Castes?*

"Creamy Layer" principle is not applicable to Scheduled Castes and Scheduled Tribes.

(Paragraph 163)

9. *Whether the principles laid down by the United States Supreme Court for affirmative action such as "suspect legislation", "strict scrutiny" and "compelling State necessity" are applicable to principles of reservation or other affirmative action contemplated under Article 15(5) of the Constitution?*

The principles laid down by the United States Supreme Court such as "suspect legislation", "strict scrutiny" and "compelling State necessity" are not applicable for challenging the validity of Act 5 of 2007 or reservations or other affirmative action contemplated under Article 15(5) of the Constitution.

(Paragraphs 184)

10. *Whether delegation of power to the Union Government to determine as to who shall be the backward class is constitutionally valid?*

The delegation of power to the Union Government to determine as to who shall be the "other backward classes" is not excessive delegation. Such delegation is constitutionally valid.

(Paragraph 186)

11. *Whether the Act is invalid as there is no time limit prescribed for its operation and no periodical review is contemplated?*

The Act 5 of 2007 is not invalid for the reason that there is no time limit prescribed for its operation, but a review can be made after a period of 10 years.

(Paragraph 187)

12. *What shall be the educational standard to be prescribed to find out whether any class is educationally backward?*

The contention that educational standard of matriculation or (10+2) should be the benchmark to find out whether any class is educationally backward is rejected.

(Paragraph 189)

13. *Whether the quantum of reservation provided for in the Act is valid and whether 27% of seats for SEBC was required to be reserved?*

27% of seats for other backward classes is not illegal and the Parliament must be deemed to have taken into consideration all relevant circumstances when fixing the 27% reservation.

(Paragraph 193)

These Writ Petitions are disposed off in light of the above findings, and the "Other Backward Classes" defined in Section 2(g) of Act 5 of 2007 is to be read as "Socially and Educationally Backward Classes" other than Scheduled Castes and Scheduled Tribes, determined as 'Other Backward Classes' by the Central Government and if such determination is with reference to caste, it shall exclude "Creamy Layer" from among such caste. In Contempt Petition (Civil) No. 112/2007 in Writ Petition (C) No. 265/2006, no orders are required. It is dismissed.

BENCH:

Dr. ARIJIT PASAYAT & C.K. THAKKER

139. *To sum up, the conclusions are as follows:*

(1) **For implementation of the impugned Statute creamy layer must be excluded.**

(2) **There must be periodic review as to the desirability of continuing operation of the Statute. This shall be done once in every five years.**

(3) **The Central Government shall examine as to the desirability of fixing a cut off marks in respect of the candidates belonging to the Other Backward Classes (OBCs). By way of illustration it can be indicated that five marks grace can be extended to such candidates below the minimum eligibility marks fixed for general categories of students. This would ensure quality and merit would not suffer. If any seats remain vacant after adopting such norms they shall be filled up by candidates from general categories.**

(4) **So far as determination of backward classes is concerned, a Notification should be issued by the Union of India. This can be done only after exclusion of the creamy layer for which necessary data must be obtained by the Central Government from the State Governments and Union Territories. Such Notification is open to challenge on the ground of wrongful exclusion or inclusion. Norms must be fixed keeping in view the peculiar features in different States and Union Territories.**

(5) There has to be proper identification of Other Backward Classes (OBCs.). For identifying backward classes, the Commission set up pursuant to the directions of this Court in Indra Sawhney No.1 has to work more effectively and not merely decide applications for inclusion or exclusion of castes. While determining backwardness, graduation (not technical graduation) or professional shall be the standard test yardstick for measuring backwardness.

(6) To strike the constitutional balance it is necessary and desirable to ear-mark certain percentage of seats out of permissible limit of 27% for socially and economically backward classes.

(7) In the Constitution for the purposes of both Articles 15 and 16, caste is not synonyms with class and this is clear from the paragraphs 782 and 783 of Indra Sawhney No.1. However, when creamy layer is excluded from the caste, the same becomes an identifiable class for the purpose of Articles 15 and 16.

(8) Stress has to be on primary and secondary education so that proper foundation for higher education can be effectively laid.

(9) So far as the constitutional amendments are concerned:

(i) Articles 16(1) and 16(4) have to be harmoniously construed. The one is not an exception to the other.

(ii) Articles 15(4) and 15(5) operate in different fields. Article 15(5) does not render Article 15(4) inactive or inoperative.

(10) While interpreting the constitutional provisions, foreign decisions do not have great determinative value. They may provide materials for deciding the question regarding constitutionality. In that sense, the strict scrutiny test is not applicable and in depth scrutiny has to be made to decide the constitutionality or otherwise, of a statute.

(11) If material is shown to the Central Government that the Institution deserves to be included in the Schedule, the Central Government must take an appropriate decision on the basis of materials placed and on examining the concerned issues as to whether Institution deserves to be included in the Schedule.

(12) Challenge relating to private un-aided educational institutions has not been examined because no such institution has laid any challenge. It is to be noted that the petitioners have made submissions in the background of Article 19(6) of the Constitution. Since none of the affected institutions have made any challenge we do not propose to consider it necessary to express any opinion or decide on the question.

140. In view of the above-said conclusions, the writ petitions and the Contempt Petition (Civil) No.112/2007 in W.P. (C) No.265/2006 are disposed of.

BENCH:
Dalveer Bhandari

SUMMARY OF FINDINGS

1A. Whether the creamy layer be excluded from the 93rd Amendment (Reservation Act)?

Yes, it must. The 93rd amendment would be ultra vires and invalid if the creamy layer is not excluded.

See paras 22, 25, 27, 30, 34, 35, 43, 44.

1B. What are the parameters for creamy layer exclusion?

For a valid method of creamy layer exclusion, the Government may use its post-Sawhney I criteria as a template.

(See: Office Memorandum dated 8-9-1993, para 2(c)/Column 3).

I urge the Government to periodically revise the O.M. so that changing circumstances can be taken into consideration while keeping our constitutional goal in view. I further urge the Government to exclude the children of former and present Members of the Parliament and Members of Legislative Assemblies and the said O.M. be amended accordingly.

See paras 55-57.

1C. Is creamy layer exclusion applicable to SC/ST?

In Indra Sawhney-I, creamy layer exclusion was only in regard to OBC. Justice Reddy speaking for the majority at para 792 stated that "this discussion is confined to Other Backward Classes only and has no relevance in the case of Scheduled Tribes and Scheduled Castes". Similarly, in the instant case, the entire discussion was confined only to Other Backward Classes. Therefore, I express no opinion with regard to the applicability of exclusion of creamy layer to the Scheduled Castes and Scheduled Tribes.
See para 34.

2. Can the Fundamental Right under Article 21A be accomplished without great emphasis on primary education?

No, it cannot.

An inversion in priorities between higher and primary/secondary education would make compliance with Article 21A extremely difficult. It is not suggested that higher education needs no encouragement or that higher education should not receive more funds, but there has to be much greater emphasis on primary education. Our priorities have to be changed. Nothing is really more important than to ensure total compliance of Article 21A. Total compliance means good quality education is imparted and all children aged six to fourteen regularly attend schools. I urge the Government to implement the following:

The current patchwork of laws on compulsory education is insufficient. Monetary fines do not go far enough to ensure that Article 21A is implemented. The Central Government should

enact legislation that:

- (a) provides low-income parents/guardians with financial incentives such that they may afford to send their children to schools;
- (b) criminally penalizes those who receive financial incentives and despite such payment send their children to work;
- (c) penalizes employers who preclude children from attending schools;
- (d) the penalty should include imprisonment; the aforementioned Bill would serve as an example. The State is obligated under Article 21A to implement free and compulsory education in toto.
- (e) until we have accomplished for children from six to fourteen years the object of free and compulsory education, the Government should continue to increase the education budget and make earnest efforts to ensure that children go to schools and receive quality education;
- (f) The Parliament should fix a deadline by which time free and compulsory education will have reached every child. This must be done within six months, as the right to free and compulsory education is perhaps the most important of all the fundamental rights. For without education, it becomes extremely difficult to exercise other fundamental rights.

See paras 126-131.

3. *Does the 93rd Amendment violate the Basic Structure of the Constitution by imposing reservation on unaided institutions?*

Yes, it does. Imposing reservation on unaided institutions violates the Basic Structure by stripping citizens of their fundamental right under Article 19(1)(g) to carry on an occupation. T.M.A. Pai and Inamdar affirmed that the establishment and running of an educational institution falls under the right to an occupation. The right to select students on the basis of merit is an essential feature of the right to establish and run an unaided institution. Reservation is an unreasonable restriction that infringes this right by destroying the autonomy and essence of an unaided institution. The effect of the 93rd Amendment is such that Article 19 is abrogated, leaving the Basic Structure altered. To restore the Basic Structure, I sever the 93rd Amendment's reference to "unaided" institutions.

See paras 132-182.

4. *Whether the use of caste to identify SEBCs runs afoul of the casteless/classless society, in violation of Secularism.*

Sawhney I compels me to conclude that use of caste is valid. It is said that if reservation in education is to stay, it should adhere to a basic tenet of Secularism: it should not take caste into account. As long as caste is a criterion, we will never achieve a casteless society. Exclusively economic criteria should be used. I urge the Government that for a period of ten years caste and other factors such as occupation/income/property holdings or similar measures of economic power may be taken into consideration and thereafter only economic criteria should prevail; otherwise we would not be able to achieve our constitutional goal of casteless and classless India.

See paras 194, 195, 231, 248, 251.

5. *Are Articles 15(4) and 15(5) mutually contradictory, such that 15(5) is unconstitutional?*

I am able to read them harmoniously.

See paras 252-256.

6. *Does Article 15(5)'s exemption of minority institutions from the purview of reservation violate Article 14 of the Constitution?*

Given the inherent tension between Articles 29(2) and 30(1), I find that the overriding constitutional goal of realizing a casteless/classless society should serve as a tie-breaker. We will take a step in the wrong direction if minority institutions (even those that are aided) are subject to reservation.

See paras 268-269.

7) *Are the standards of review laid down by the U.S. Supreme Court applicable to our review of affirmative action under Art 15(5) and similar provisions?*

The principles enunciated by the American Supreme Court, such as, "Suspect Legislation" "Narrow Tailoring" "Strict Scrutiny" and "Compelling State necessity" are not strictly applicable for challenging the impugned legislation.

Cases decided by other countries are not binding but do have great persuasive value. Let the path to our constitutional goals be enlightened by experience, learning, knowledge and wisdom from any quarter. In the words of Rigveda, let noble thoughts come to us from every side.

See para 183.

8) *With respect to OBC identification, was the Reservation Act's delegation of power to the Union Government excessive?*

It is not an excessive delegation. With respect to this issue, I agree with the reasoning of the Chief Justice in his judgment.

9) *Is the impugned legislation invalid as it fails to set a time-limit for caste-based reservation?*

**It is not invalid because it fails to set a time-limit.
See para 272.**

10) At what point is a student no longer Educationally Backward and thus no longer eligible for special provisions under 15(5)?

Once a candidate graduates from a university, the said candidate is educationally forward and is ineligible for special benefits under Article 15(5) of the Constitution for post graduate and any further studies thereafter.

See para 273.

11. Would it be reasonable to balance OBC reservation with societal interests by instituting OBC cut-off marks that are slightly lower than that of the general category?

It is reasonable to balance reservation with other societal interests. To maintain standards of excellence, cut off marks for OBCs should be set not more than 10 marks out of 100 below that of the general category.

See paras 274-278.

These Writ Petitions and Contempt Petition are accordingly disposed of. In the facts and circumstances, the parties are to bear their own costs.

