Research Paper | Law | E-ISSN No : 2454-9916 | Volume : 5 | Issue : 6 | June 2019

THE CONSTITUTIONALITY OF THE CONSTITUTIONS (93rd AMENDMENT) ACT 2005

Prof. K. Madhusudhana Rao

Professor of Law, Dr. B.R.A. College of Law, Andhra University, Visakhapatnam – 530003.

ABSTRACT

There has been a growing awareness and preference for organic food products around the globe these days. Today, Organic food products are gaining more acceptance and preference over inorganic food products because of the increasing concerns about health and safety. The present study aims to study the consumer's perception towards the organic food products, the reasons contributing to the purchase of organic food products, problems faced by the consumers of organic food products and their level of satisfaction with the purchase of organic food products. The data was collected from a sample of 31 organic consumers in Kollam City of Kerala with the help of a structured questionnaire. The study found out that the main reason for the purchase of organic food products by the consumers was because they are considered to be safe. High price was the main problem faced by the consumers of organic food products. The study also found out that majority of the consumers are very much satisfied with the purchase of organic food products. The study suggests that proper awareness of the benefits of organic food products must be made to increase the number of organic food products and necessary steps must be taken by the government to increase the production and distribution of organic food products. Certification and labelling of organic food products are also suggested.

KEYWORDS: Organic food products , Certification, Labelling.

A 7 Judge Bench of the Supreme Court in P. A. Inamdar Vs. Mahatrastra[1], *inter alia,* ruled that reservation in private, unaided educational institutions were unconstitutional. In this case the Supreme Court took the position that the right to run an educational institution is implicit in Art. 19(1)(g). This right is subject to the operation of any law relating to the professional or technical qualifications necessary for practicing any profession or carrying on any occupation, trade or business, industry or service. Obviously, the fundamental right under Art. 19(1)(g) could not be restricted by any state imposed quota for the weaker sections in admission to educational institutions, as reservation of seats is not covered by any of the grounds of reasonable restrictions as stated above, except remotely "in the interest of general public" as mentioned in Art. 19(6). This factor was considered by the Supreme Court while holding that reservations in unaided private educations institutions is impermissible. This judgment forced the political class to go for a constitutional amendment and legislation to protect the reservation for schedule casts, scheduled tribes and the other backward classes in the educational institutions.

Accordingly a new article i.e., Art. 15(5) in the form of an exception to Art. 15(1) is inserted by the Constitution (93rd Amendment) ACT 2005 (w.e.f. 20-01-2006), which provides that:

> "N*othing in the article or in sub-clause(g) of clause (1) of Art. 19 shall prevent the state from making an special provision, bylaw, for the advancement of any socially and educationally backward class of citizens or for the scheduled castes or 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 Art.30".*

Art. 15(5) incorporates much of what is guaranteed in Art. 15(4) *ex abundanti coutela,* as it is for the first time special provision for the advancement of Schedule Castes, Schedule Tribes and Socially and Educationally Backward Class of citizens in terms of admission into educational institutions are dealt with and it is imperative that it is not read in conflict with the principle of non-discrimination enshrined Art. 15(1). More significantly Art. 15(5) makes it necessary for the state to make any special provision for the advancement of these weaker sections by law, and not by any executive action. So far the government has been implementing the policy of the reservation for the weaker section through executive

orders and instructions. A law on the subject could go a long way in fulfilling the letter and spirit of the constitutional amendment and even by meeting the tests of judicial review, by adding clarity. Another implication of this Amendment is that Art 15(5) exempts minority educational institutions whether based on religion or language from its purview, as they enjoy a special right under Art. 30(1) to establish and administer educational institutions of their own choice. It will be unreasonable to impose reservations on these institutions in admissions, as it would violate Art. 30(1)[2].

After the Constitution (93rd Amendment) Act 2005 was passed, the parliament passed the Central Educational Institutions (Reservation in Admissions) Act 2007 enabling the Central Government to implement the reservations in Central Educational Institutions. Section 3 of this Act provides for reservation of 15% seats for Schedule Castes, 7 ½ % for the Schedule Tribes, 27% for the other backward classes. Section 5 of the Act, mandates the increase of the seats in the central educations institutions by providing reservations to the Schedule Castes, Schedule Tribes and Other Backward classes.

The Constitution (93rd Amendment) Act 2005 along with the Central Educational Institutions (Reservation in Admissions) Act 2006 (Act 5 of 2007) were challenged before the Supreme Court as unconstitutional in Ashok Kumar Thakur Vs Union of India.[3]. In this case the ration laid down by various judges can be arranged under the following heads.

1. **Whether the 93rd Amendment of the Constitution is against the basic structure of the Constitution?**

   K. G. Balakrishnan C.J. opined that in the absence of a challenge from the "Private Unaided" educational institutions it would not be proper to pronounce upon the constitutional validity of that part of the Constitutional Amendment so far as it relates to private unaided educational institutions. This is to be decided in appropriate cases.[4] The court further ruled that if any Constitution Amendment is made which moderately abridges or alters the equality principal or the principles under Art,. 19(1)(g), it can not said that it violates the basic structure of the constitution. If such a principle is accepted our constitution would not be able to adopt itself to the changing conditions of a dynamic human society. Hence 93rd Amendment does not violates the basic structure of the constitution.[5].

   Maintaining the same tenor, Dr. Ajit Pasayat. J (for himself and on behalf of C.K. Thakkar. J) maintained that the challenge to private unaided educational institutions has not been examined because no such institution has laid any challenge. It is to be noted that the petitioners have made submission in the background of Art. 19(6) of the constitution. Hence the learned judge stated that since none of the affected institutions have made any challenge he has not proposed to consider it necessary to express nay opinion or decided on the questions.[6]

   Expressing a different note in this regard Dalveer Bhandari. J. maintained that by imposing reservation on private unaided institutions the amendment violates the basic structure of the Constitution by stripping citizens of their fundamental right under Article 19(1)(g) to carry on an occupation. T.M.A. Pai case.[7] and Inamdar Case[8] have affirmed that 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 educational institution. Reservation is unreasonable restriction that infringes this right by destroying the authority and essence of an unaided institution. The effect of 93rd Amendment is such that Art. 19 is abrogated leaving the basic structure altered. To restore the basic structure the learned judge has severed the 93rd Amendment's reference to "unaided institutions"[9].

Justice R. V. Raveendran agreeing with the learned Chief Justive and Pasayat. J Stated that Art. 15(5) is valid w.r.t. state maintained educational institutions and aided educations institutions. The learned judge left open the question whether Art. 15(5) would be unconstitutional on the ground that it violates the basic structure of the Constitution by imposing reservation in respect of private unaided educational institutions.[10] R. V. Raveendran. J. indicated additional reason for rejecting the challenge to Art. 15(5) on the ground that it renders Art. 15(4) inoperative/ineffective.[11]

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

K. G. Balakrishnana C. J. observed that it is a well settled principle of constitutional interpretation that, while interpreting the provisions of the Constitution effect shall be given to all the provisions of the Constitution and no provision shall be interpreted in a manner as to make any other provision in the constitution inoperative or otiose. Both Art. 15(4) and 15(5) are enabling provisions. Art. 15(5) was added as a sequel to P. A. Inamadar Vs. Maharashtras.[12]. Both article 15(4) and 15(5) operate in different areas. The expression "Nothing in this Article" mentioned at the beginning of Art. 15(5) would only mean that "nothing in this Article which prohibit the state on grounds mentioned in Art.15(1)" alone be given importance. Art. 15(5) does not exclude Art. 15(4) of the Constitution.[13].

Dr. Arjit Pasayat. J (for himself and on behalf o C. K. Thakkar. J) held that Art. 16(1) and Art. 16(4) have to be harmoniously construed. The one is not an exception to the other. It was further observed that Art. 15(4) and 15(5) operate in different field. Art. 15(5) does not render Art. 15(4) inoperative or inactive.[14]

Dalveer Bhandari. J observed that Art. 15(4) was not passed with an express intention to include minority institutions, nor did it arise out of a case in which minority institutions were a party. The purposes of Art. 15(4) and 15(5) do not necessarily conflict. Art. 15(5) is specific in that it refers special provisions that relate to admission in Educational Institutions, whereas Art. 15(4) makes no such reference to the type of entity by which special provisions are to be enjoyed.[15] Moreover Art.15(5) is later in time and specific to the question presented, it must neutralize Art. 15(4) in regard to reservation in education. This interpretation is harmonious because Art.15(4) still applies to other areas in which reservation may be provided.[16]

R.V. Ravindran. J ruled that clauses (3) to (5) enable the state to makes special provisions in specified areas. While clause (4) and (5) of Article 15 may operate independently, they have to be read harmoniously for the following reason i.e., the words "Nothing in the Article" occurring in Art.15(3), (4) and (5) refer to clause (1) and (2) of Article 15. When clause (4) also starts with those words, it does not refer to clause(3). Similarly, when clause (5) starts with those words, it does not refer to clauses (3) and (4). Clauses (3), (4) and (5) of Art. 15 are not to be read as being in conflict with each other, or prevailing over each other. Nor does an exception made under clause (5) operate as an exception under Clause (4). Hence, Clauses (4) and (5) of Article 15 are to be read harmoniously.[17]

3. Whether exclusion of minority institutions from Art. 15(5) is violative of Art.14 of the Constitution ?

On this issue K. G. Balakrishnan C. J. Stated that Minority educational institutions have been given a separate treatment in view of Art.30 of the Constitution. Such classification has been held to be in accordance with the provisions of the Constitution. Moreover, both Art.15(4) and (5) are operative and the plea of non-severability is not applicable.[18] Dealing with the purpose of Art.30(1) Dalveer Bandari. J stated that the framers of the Constitution conferred rights by Art.30(1), on minorities in order to instill in them a sense of confidence and security. Hence minorities possess a right or privilege that non-minorities do not have i.e., establishing and administering institutions for their community. The right to admit students of their own community in aided minority institutions was subject to admitting a reasonable number of outsiders. In the instant case, aided minority stand to benefit from the Reservation Act 2005, since they are exempted from the purview of the Act instead of having to admit a reasonable number of outsiders. But their non-minority counter parts are not exempted. Accordingly the learned judge opined that given the ultimate goal of furthering a casteless/classless society, there is no need to go out on a limb and rewrite them into the Amendment. Such a ruling would subject even more institutions to case-based reservation. This would be a step back for the nation, further the caste divide. Hence the learned judge refused to go in that direction.[19]

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

Rejecting the contention that 93rd Constitution Amendment violated the proviso to article 368 of the Constitution he Constitution, K. G. Balakrishnan C. J. stated that Under Art. 162, any matter with respect to which the legislature of the state and Parliament have the power to make the laws, the executive power of the state shall be subject to and limited by the executive power expressly conferred by the Constitution or by any law made by Parliament upon the union authority. The Constitution 93rd Amendment does not expressly or impliedly take away any such power conferred by Art.162.

It is pointed out that by virtue of the 42nd Amendment of the Constitution 'education which was previously in Entry 11 in List II was deleted and inserted in List III as Entry 25 as the field of legislation in List III. Art. 245 will operate and by reason of proviso to Art. 162, the executive power of the state by subject to and limited by, the Executive power expressly conferred by the Constitution or by any law make by parliament upon the Union authorities. Power under the 93rd Amendment Act will not curtail the power of the state and this Amendment does not fall within the scope of proviso to Art. 368.[20]

5. Whether 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?

K.G. Balakrishnan C.J. maintained that identification of "Backward Class" is not done solely based on Caste. Other parameters are followed in identifying the 'Backward Class". Hence, Act 5 of 2007 is not invalid for this reason.[21]. Dr. Arjit Pasayat J (for himself and on behalf of C.K. Thakkar. J) opined that so far as the determination of backward classes is concerned a notification should be issued by the Union of India. This can be done only after the exclusion of the 'creamy layer' for which necessary date must be obtained by the Central Government from the State Governments and the 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.[22] On this issue, while agreeing with the learned Chief Justice of India, and Pajsayat J, R.V.Raveendran J maintained that :

1. Identification of other Backward classes solely on the basis of caste will be unconstitutional.

2. Failure to exclude "Creamy Layer" from the benefits of the reservations would render the reservation for the other backward classes under Act. 5 of 2007 unconstitutional.

3. Act 5 of 2007 providing reservation for other backward classes will be valid if the definition of "Other Backward Classes" is clarified to the extent that if the identification of other backward classes is with reference to any caste considered as socially and economically backward, "Creamy Layer" of such caste should be excluded.[23]

Further, while agreeing with the Chief Justice of India, the learned Judge observed that the Act is not invalid merely because no time limit is prescribed for caste based reservations, but preferably there should be a review after 10 year to take note of the change of circumstances. A genuine measure of reservation may not opened to challenge when made but during a period of time, if the reservation is continued inspite of achieving the object of reservation, the law which was valid when made, may become invalid.[24]

Striking a different note, Dalveer Bandari. J stated that Indra Sawhney-I Vs. Union of India [25] compelled him 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 or secularism. It should not take caste into account. Exclusive economic criteria should be used. Hence the learned judge urged the government that for a period of 10 years caste and other factors such as occupation/income/property holdings or similar measures of economic power may be taken into consideration and there after only economic criteria should prevail. Otherwise we would not be able to achieve our Constitutional goal of casteless and classless India. [26]

6. Whether "Creamy Layer" is to be excluded From Socially and Educationally Backward Classes?

On this issue all the Judges agree for exclusion of Creamy Layer from the socially and educationally backward classes. K.G. Balakrishnana C.J. observed that "Creamy Layer" is to be excluded from the socially and educationally backward classes. The identification of socially and educationally backward classes will not be complete and without the exclusion of Creamy Layer such identification may not be valid under Art.15(1) of the Constitution.[27] Dr.Arjit Pasayat J (for himself and on behalf of C.K. Thakkar J) opined that for implementation of the impugned statute "Creamy Layer" must be excluded. [28] The learned judge also stated that in the Constitution for the purpose of both Art. 15 and 16, caste is not synonymous with class. However, when "Creamy Layer" is excluded from the caste, the same becomes identifiable class for the purpose of Art. 15 and 16. [29]

7. What should the parameters for determining the "Creamy Layer" group?

K.G. Balakrishnan C. J. maintained that 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 Act 5 of 2007 shall be deemed to mean class/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 Creamy Layer.[30].

Dalveer Bhandari, J observed that for a valid method of Creamy Layer exclusion, the government may use its post Indra Sawhney31 criteria as a template. The learned Judge urged the government to periodically revise the Office Memorandum so that the changing circumstances can be taken into consideration while keeping our Constitutional goal in view. The learned judge further urged the government to exclude the children of former and present Members of Parliament and Members of Legislative Assembly and suggested for Amendment of the present office memorandum.[32] R. V. Raveendran J while agreeing with the Chief Justice of India, on this issue, stated that the Office Memorandum dated 08.09.1993 of the Government of India can be applied for such determination.[33]

8. Whether Creamy Layer Principle is applicable to the Schedule Castes and Schedule Tribes?

K.G. Balakrishnan C.J. ruled that, right from the beginning, the Scheduled Castes and Scheduled Tribes were treated as separate category and nobody has disputed identification of such classes. So long as 'Creamy Layer' is not applied as one of the principles of equality, it cannot be applied to the scheduled Castes and Scheduled Tribes. So, for the purpose of reservation 'Creamy Layer' principles will not apply to the Schedule Castes and Schedule Tribes.[34] The learned Chief Justice cited with approval the following passage from E. V. Chinnaiah Vs. A.P.[35] wherein it was observed that "Scheduled Castes and Scheduled Tribes occupy a special place in our constitution. The President of India is the sole repository of the power to specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purpose of this Constitution deemed to be schedule cases and schedule tribes. The object of Art. 341 and 342 is to provide for grant of protection to the backward class of citizens who are specified in the Schedule Caste Order and a Schedule Tribes Order having regard to the economic and educational backwardness where from they suffer. Any legislation which would bring them out of purview thereof or tinker with the order issued by the President would be unconstitutional".

Dalveer Bhandari J relying upon the observation of Jeevan Reddy J, in Indra Sawhney-I Vs. Union of India.[36] that "the discussion in this case if confined to other backward classes and has no relevance in the case of Scheduled Castes and Scheduled Tribes" stated that the entire discussion was confined only to other backward classes. Therefore, the learned judge has not expressed any opinion with regard to the applicability of the exclusion of Creamy Layer to the Schedule Castes and Scheduled Tribes.[37]

9. Whether the principles laid down by the U.S. 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?

K. J. Balakrishnan, C. J. took the position that the principles applied by the US Supreme Court cannot be applied in India as the entire gamut of affirmative action in India is fully supported by constitutional provision and we have not applied the principles of "Suspect Legislation" and we have been following the doctrine that every legislation passed by the parliament is presumed to be constitutionally valid unless otherwise provided. It is repeatedly provided that American decisions are not strictly applicable to us and the very same principle of strict scrutiny and suspect legislation when sought to be applied, the Supreme Court rejected the same. [38] hence the challenge to Act 5 of 2007 cannot stand as the test of "Strict Scrutiny" and "Compelling state necessity" cannot be accepted in India.[39]

Dr. Arjit Pasayat J. (for himself and on behalf of C. K. Thakkar J.) ruled that while interpreting constitutional provisions, foreign decision do not have great determinative value They may provide materials for deciding the questing 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.[40]

Dalveer Bhandari J. maintained that the principles enunciated by the US 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 constitutional goals be enlightened by experience, learning, knowledge and wisdom from any quarter. By citing Rig Veda the learned judge said "let noble thoughts come to us from every side".

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

K. G. Balakrishnan C. J. explained that "Backward Class" is not a new word. Going by the Constitution, there are sufficient constitutional provisions to have an idea as to what is "Backward Class". Article 340specifically empowers the President of India to appoint a Commission to investigate the conditions of socially and educationally backward classes within the territory of India, Socially and Educationally backward classes of citizens are mentioned in Art. 15(4) of the constitution which formed the First Amendment to the Constitution. Backward class of citizens are also mentioned in Art. 16(4) of the Constitution. It is only for the purpose of Act 5 of 2007 that the Union of India has been entrusted with the task of determining the backward classes. There is already a National Commission and various State Commissions dealing with the affairs of the Backward classes in the Country. For the purpose of enforcement of the legislation passed under Art. 16(4), the backward class of citizens have already been identified and has been in practice since 15 years. It is in this background that the Union of India has been given the task of determining the backward classes. It is incorrect to say that there are no sufficient guidelines to determine the backward classes. Various parameters have been used and it may also be noticed that if any undeserving caste or group of persons are included in the backward class, it is open to any person to challenge the same through Judicial Review.[41] Dalveer Bhandari J was in agreement with the reasoning of the learned Chief Justice on this issue.[42]

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

K. G. Balakrishnan, C. J. explained that depending upon the result of the measures and improvement that have taken place in the states and educational advancement of the socially and educationally backward classes of citizens the matter could be examined by Parliament at a future time but that could be a ground for striking down a legislation. In addition to this, there is also the safeguard of Judicial Review and the court can exercise its powers of Judicial Review and say that the affirmative action has carried out its mission, and is thus no longer required. In the case of reservation of 27% for the backward classes, there could be a periodic review after a period of 10 years and parliament could examine whether the reservation has worked for the god of the country.[43]

Dr. Arjit Pasayat J. (for himself and on behalf of C.K.Thakkar J) stated that there must a periodic review as to the desirability of continuing the operation of the statute. This should be done once in every 5 years.[44] Dalbeer Bhadari J maintained that the Act is not invalid because it fails to set a time-limit. But given the parliamentary history of extending time limit on other reservation schemes, there is much force in the argument that Parliament will forever continue to extend reservations. It is consistent with our constitution goal of achieving a classless/castles society that a time limit must be set. But a longer bench could make such a ruling in view of Mandal Commission (1) case.[45]

12. What should be the Educational standard to be prescribed to find out whether any class is educationally backward?

On this issue K. G. Balakrishnan C. J. took the position hat though, at the time of independence, the basic idea was to improve primary and secondary level education, but now, after a period of more than 50 years it is idle to contend that the backward classes shall be determined on the basis of their attaining education only to the level of 10+2 stage. In India there are large number of arts, science and professional colleges and in the field of education, it is anachronistic to contend that primary education or secondary education shall be the index for fixing "Educational backwardness" of the backward class of citizens.[46]

Dr. Arjit Pasayat J. (for himself and on behalf of C. K. Thakkar J.) stated that there must be proper identification of other backward classes. For identifying the backward classes, the National Backward Classes Commission is set up in pursuance of Indra Sawhaney-I Vs. Union of India.[47] has to work more essentially 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.[48] Dalveer Bhandri J. opined that once a candidate graduates from a university, that 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.[49]

13. Whether the question of reservation provided in the Act.5 of 2007 is valid and whether 27% of the seats for socially and educationally backward classes was required to be reserved?

Laying down the law on this issue K. G. Balakrishna C. J. maintained that a legislation passed by Parliament can be challenged only on Constitutionally recognized grounds. The grounds of attack are, whether a legislature has leg-

islative competency to enact the law or the legislation is ultra vires the provision of the constitution, by encroaching the fundamental rights or any other provision of the constitution. Similarly a legislation could be challenged as unreasonable if it violates the principles of equality adumbrated under the constitution or it restrict he fundamental rights under Article 19 of the constitution by imposing unreasonable restrictions. A legislation cannot be challenged simply on the ground of unreasonableness because that by itself does not constitute a ground. 27% of seats for other backward classes is not illegal and Parliament must be deemed to have taken into consideration all relevant circumstances while the fixing the 27% reservation.[50] In other words, the wisdom of the legislature in enacting the law cannot be challenged in a court of law. Dr. Arjit Pasayat J (for himself and on behalf of Thakkar J) stated that to strike the constitutional balance it is necessary and desirable to earmark certain percentage of seats out of permissible limit of 27% for socially and economically backward classes.[51]

R. V. Raveendran J agreeing with the Learned Chief Justice of India on this issue, stated that reservation of 27% for other backward classes s not illegal. It would however leave open the question whether members belonging to other backward classes who get selected in the open competition field on the basis of their own merit should be counted against the 27% quota reserved for other backward –classes under an enactment enabled by Art.15(5) of the Constitution for consideration in appropriate case.

14. Can the fundamental right under Art. 21-A be accomplished without great emphasis on primary education?

This question of great constitutional significance was raised by Dalveer Bhandari J. Answering the question in negative, the learned judge said that an inversion in priorities between higher and primary/secondary education would make compliance with Art. 1-A extremely difficult. It does not mean that higher education needs no encouragement or higher education should not received more funds. Nothing is more important than to ensure total compliance with Art 21-A Total compliance means good quality education is important and children aged sex to fourteen (6-14) should regularly attend Schools.[52] Accordingly the learned judge urged the government to implement the following. The current patch work of laws on compulsory education is insufficient. Monetary fines do not go far enough to ensure that Art.21-A is implemented. The Central Government should enact a legislation by providing for the following :

1. It should provide low income parents/guardian with financial incentives so that they may afford their children to schools.

2. It should criminally penalize those who receive financial incentives despite such payment send their children to work.

3. It should criminally penalize those who preclude the children from attending schools.

4. The penalty should include imprisonment. The state should be obligated to implement free and compulsory education in toto.

5. Until we have accomplished the object of free and compulsory education for the children from 6-14 years of age the government should continue to increase e education budget and make earnest efforts to ensure that children go to schools and receive quality education.

6. The Parliament should fix a deadline by which time free and compulsory education will have to be reached to every child. This must be done within 6 months as the right to free and compulsory education is the most important o all the fundamental rights. For without education it becomes extremely difficult to exercise other fundamental rights.[53]

It is heartening to note that the Parliament has enacted "The Right of Children to Free and Compulsory Education Act 2009" that envisages free and compulsory education to the children in the age group of 6-14 years. This Act came into force w.e.f 1-4-2010. The Human Resources Development Minister termed the center's move a "National Enterprise that would help India's Future" under the Act getting education in a neighbouring school till Class-VIII would be fundamental right of the child. The salient features of the Act are as follows:

1. The Act provides for imparting elementary education as far as possible in the mother tongue of the child.

2. The Act contains a provision for establishing recognition authority in every stage under which all schools would have to fulfill the minimum requirement of infrastructure within 3 years. Otherwise they would lose recognition.

3. As per the Act the appointment of teachers had to be approved by the academic committee.

4. As per the Act it is mandatory for unaided schools to reserve 25% of their seats at the entry level, the junior most class in any school, for students from the disadvantaged sections in the neighbourhood. The expenses born by the schools on such students will be reimbursed by the Government on the basis of what it spends for child in its own school.

5. No school can collect capitation fee and subject children or their parents to any form of screening. In case a school collect capitation fee it can be fined upto 10 times of that amount and if tests or interviews are conducted the school can be find upto Rs.25,000 for the first violation and Rs.50,000 for every subsequent contravention.

6. School cannot deny admission to a child for lack of age proof and no child can be detained or expelled till the completion of elementary education. Physical punishment and mental harassment will attract disciplinary action under service rules.

7. As per the purpose of this legislation is to set a certain bench mark for school education. The Act provides punitive action for running unrecognized schools and also provides for de-recognition of institutions which do not meet the standards. These standards in terms of the qualification of teachers and their duties, and the pupil – teachers ration has been specified. This comes with a diktat that prohibits teachers from taking private tuitions and schools from deploying them for non-educational purposes other than decennial population census, disaster relief and election duty.[54] It is evident that the law is line with the judicial thinking on this aspect.

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

This issued was addressed by Dalveer Bhandari J who stated that it is reasonable to balance reservation with other social interest. To maintain standards of excellence, cut off marks for OBCs should beset not more than 10 marks out of 100 below that o the general category.[55]

CONCLUSION :

Much emphasis was laid on the aspect of "Creamy Layer" by the judiciary. But the judgement of Chinnappa Reddy J in K.C. Vasantha Kumar Vs. Karnataka[56] needs special attention in this regard.:

"One cannot quarrel with the statement that social science research and not judicial impressionism should form the basis of examination, by courts, of the sensitive question of reservation for the backward classes. Earlier we mentioned how the assumption that efficiency will be impaired if reservation exceeds 50%, if reservation is extended to promotional posts or if carry forward rule is adopted, is not based on any scientific date. One must however, enter a caveat to the criticism that the benefits of reservation are often snatched away by the top creamy layer of backward classes or castes. That a few o he posts or seats of the reserved classes are snatched away by the more fortunate among them is not to say that reservation is not necessary. This is bound to happen in a competitive society such as ours. Are not the unreserved seats and posts snatched away, in the same way by the top creamy layer of society itself? Seats reserved for the backward classes are taken away by the top layers among them on the same principle of merit on which the unreserved seats are taken away by the top layer of the society".

Viewed from this angle, insistence up on 'Creamy Layer' exclusion, leads to violation of Art. 335, which speaks of efficiency in administration, as delinking 'Creamy Layer' from reservation policy is affecting the efficiency of the administration. As such, is it not unconstitutional to insist upon application of Creamy Layer to the backward classes for being in violation of Art. 335?

END NOTES

1. (2005) 6 SCC. 537, - The Bench consisting of R.C Lahoti, C.J., and Y.K.Sabharwal, D.M. Dharmadhikari, Arun Kumar, G.P Mathur, Tarun Chattarjee and P.K. Balasubramanyam, J.J.
2. See Front Line, - 5-5-2006, pp. 15-16.
3. (2008) 6 SCC 1.
4. Ibid., at p. 477-478, paras 108 to 111.
5. Ibid., at p. 484, para 120.
6. Ibid., at p. 626. Para 358.
7. (2002) 8 SCC 481.
8. (2005) 6 SCC 537.
9. (2008) 6 SCC 1 at 708-709, para 636.
10. Ibid., at 7010, para 648.
11. Ibid., para 649.
12. (2004) 6 SCC 537.
13. (2008) 6 SCC 1 at pp. 485-486, para 125, 126.
14. Ibid., at 625, para 358.

15. Ibid., at 700, para 608
16. Ifbid., at para 609.
17. Ibid., at 712, para 655.
18. Ibid., at p. 486, para 127.
19. Ibid., at p. 704, paras 621-622..
20. Ibid., at pp. 477-478,, paras 130-131.
21. Ibid., at p 499, para 163
22. Ibid., at p.625, para 358.
23. (2008) 6 SCC1 at p. 711, para 650.
24. Ibid., at p.711, para 651.
25. AIR 1993 SC 477
26. (2008) 6 SCC 1 at p.709, para 637.
27. Ibid., at p.502, para 173.
28. Ibid., at p.625, para 358.
29. Ibid., at p.622, para 358
30. Ibid., at pp. 502-509, paras 174-176
31. AIR 1993 SC 477.
32. (2008) 6 SCC 1, at p.707, paras 631-632.
33. Ibid., at p. 711, para 652.
34. Ibid., p. 512, para 186.
35. (2005) 1 SCC 394 at p. 403.
36. AIR 1993 SC 477.
37. (20058) 6 SCC 1 at p. 707, para 633.
38. Sourabh Choudary Vs. Union of India (2003) 11 SCC, 146.
39. (2008) 6 SCC 1 at 520, Paras 209-210.
40. Ibid., at p. 626, para 358.
41. Ibid., at p. 521, para 212.
42. Ibid., at p. 710, para 642.
43. Ibid., at p. 522, para 214.
44. Ibid., at p. 625, para 358.
45. Ibid., at p. 705, para 625.
46. Ibid., at p. 523, para 217
47. AIR 1993 SC 477.
48. (2008) 6 SCC 1 at p. 626, para 358
49. Ibid., at p. 710, para 644
50. Ibid., at p. 524, para 219
51. Ibid., at p. 626, para 358
52. Ibid., at p. 708, para 634
53. Ibid., at p. 708, para 635
54. See The Right to Education Act 2009 (Act 35 of 2009)
55. (2008) 6 SCC1, at p. 710, para 645.
56. (1985) Supp SCC 714 at 763, para 72.