Reportable

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (C) No. 416 OF 2012

Pramati Educational & Cultural
Trust ® & Ors. ... Petitioners

Versus

Union of India & Ors. ...
Respondents

WITH

WRIT PETITION (C) No. 152 OF 2013,
WRIT PETITION (C) No.1081 OF 2013,
WRIT PETITION (C) No. 60 OF 2014,
WRIT PETITION (C) No. 95 OF 2014,
WRIT PETITION (C) No.106 OF 2014,
WRIT PETITION (C) No.128 OF 2014,
WRIT PETITION (C) No.144 OF 2014,
WRIT PETITION (C) No.145 OF 2014,
WRIT PETITION (C) No.160 OF 2014,
AND
WRIT PETITION (C) No.136 OF 2014

J U D G M E N T

A. K. PATNAIK, J.

This is a reference made by a three-Judge Bench of this Court by order dated 06.09.2010 in *Society for*

Unaided Private Schools of Rajasthan v. Union of India & Anr. [(2012) 6 SCC 102] to a Constitution Bench. As per the aforesaid order dated 06.09.2010, we are called upon to decide on the validity of clause (5) of Article 15 of the Constitution inserted by the Constitution (Ninety-third Amendment) Act, 2005 with effect from 20.01.2006 and on the validity of Article 21A of the Constitution inserted by the Constitution (Eighty-Sixth Amendment) Act, 2002 with effect from 01.04.2010.

2. Clause (5) of Article 15 of the Constitution reads as follows:

> "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."

Clause (5) of Article 15 of the Constitution, therefore, enables the State to make a special provision, by law, for

the advancement of socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes insofar as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30 of the Constitution. The constitutional validity of clause (5) of Article 15 of the Constitution insofar as it enables the State to make special provisions relating to admission to educational institutions of the State and educational institutions aided by the State was considered by a Constitution Bench of this Court in *Ashoka Kumar Thakur v. Union of India & Ors*. [(2008) 6 SCC 1] and the Constitution Bench held in the aforesaid case that clause (5) of Article 15 is valid and does not violate the "basic structure" of the Constitution so far as it relates to the State-maintained institutions and aided educational institutions. In the aforesaid case, however, the Constitution Bench left open the question whether clause (5) of Article 15 was constitutionally valid or not so far as "private unaided" educational institutions are concerned,

as such “private unaided” educational institutions were not before the Court. This batch of writ petitions has been filed by private unaided educational institutions and we are called upon to decide whether clause (5) of Article 15 of the Constitution so far as it relates to “private unaided” educational institutions is valid and does not violate the basic structure of the Constitution.

3. Article 21A of the Constitution reads as follows:

> “**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.".

Thus, Article 21A of the Constitution, provides that the State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine. Parliament has made the law contemplated by Article 21A by enacting the Right of Children to Free and Compulsory Education Act, 2009 (for short ‘the 2009 Act’). The constitutional validity of the 2009 Act was considered by a three-Judge Bench of the Court in *Society for Unaided Private Schools of Rajasthan v. Union of India & Anr*. [(2012) 6 SCC 1]. Two of the three

Judges have held the 2009 Act to be constitutionally valid, but they have also held that the 2009 Act is not applicable to unaided minority schools protected under Article 30(1) of the Constitution. In the aforesaid case, however, the three-Judge Bench did not go into the question whether clause (5) of Article 15 or Article 21A of the Constitution is valid and does not violate the basic structure of the Constitution. In this batch of the writ petitions filed by private unaided institutions, the constitutional validity of clause (5) of Article 15 and of Article 21A has to be decided by this Constitution Bench.

4. Both clause (5) of Article 15 and Article 21A were inserted in the Constitution by Parliament by exercise of its power of amendment under Article 368 of the Constitution. A Bench of thirteen-Judges of this Court in *His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala & Anr*. [(1973) 4 SCC 225] considered the scope of the amending power of Parliament under Article 368 of the Constitution and the majority of the Judges held that Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution. Hence, we are called

upon to decide in this reference the following two substantial questions of law:

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

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

Validity of clause (5) of Article 15 of the Constitution

Contentions of learned counsel for the petitioners:

5. Mr. Mukul Rohatgi, learned senior counsel for the petitioners in Writ Petition (C) No.416 of 2012, submitted that in *T.M.A. Pai Foundation & Ors v. State of Karnataka & Ors*. [(2002) 8 SCC 481] the majority of the Judges of the eleven-Judge Bench speaking through Kirpal C.J. have held that the fundamental right to carry on any occupation under Article 19(1)(g) of the Constitution includes the right

to run and administer a private unaided educational institution. He submitted that in *Minerva Mills Ltd. & Ors. v. Union of India & Ors*. [(1980) 3 SCC 625] Chandrachud, CJ., writing the judgment for the majority of the Judges of the Constitution Bench, has held that Articles 14, 19 and 21 of the Constitution constitute the golden triangle which affords to the people of this country an assurance that the promise held forth by the Preamble will be performed by ushering an egalitarian era through the discipline of fundamental rights, that is, without emasculation of the rights to liberty and equality which alone can help preserve the dignity of the individual. He submitted that in the aforesaid case, the Constitution Bench held that Section 4 of the Constitution (Forty-second Amendment) Act is beyond the amending power of Parliament and is void since it damages the basic or essential features of the Constitution and destroys its basic structure by a total exclusion of challenge to any law on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 or Article 19 of the Constitution. Mr. Rohatgi submitted that Article 19(1)(g) of the Constitution is, therefore, a basic feature of the

Constitution and this basic feature is destroyed by providing in clause (5) of Article 15 of the Constitution that nothing in Article 19(1)(g) of the Constitution shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions. Mr. Rohatgi explained that a nine-Judge Bench of this Court in *I.R. Coelho (Dead) by LRs. v. State of T.N.* [(2007) 2 SCC 1] relying on the aforesaid judgment in Minerva Mills case (supra) has similarly held that Articles 14, 19 and 21 of the Constitution stand on altogether a different footing and after the evolution of the basic structure doctrine in *Kesavananda Bharati* (supra), it will not be open to immunize legislation made by Parliament from judicial scrutiny on the ground that these fundamental rights are not part of the basic structure of the Constitution. He submitted that in the aforesaid judgment, this Court, therefore, has also held that the existence of the power of Parliament to amend the Constitution at will, with requisite

voting strength, so as to make any kind of laws that excludes Part III including the power of judicial review under Article 32 is incompatible with the basic structure of the Constitution and, therefore, such an exercise, if challenged, has to be tested on the touchstone of basic structure as reflected in Article 21 read with Article 14 and Article 19 of the Constitution. Mr. Rohatgi submitted that Bhandari, J. has taken the view in *Ashoka Kumar Thakur v. Union of India* (supra) that the imposition of reservation on unaided institutions by the Ninety-third Amendment has abrogated Article 19(1)(g), a basic feature of the Constitution and, therefore, the Ninety-third Amendment of the Constitution is *ultra vires* the Constitution.

6. Mr. R.F. Nariman, learned senior counsel for the petitioners in Writ Petition (C) No.128 of 2014, submitted that clause (5) of Article 15 of the Constitution is violative of Article 14 of the Constitution inasmuch as it treats unequals as equals. He argued that clause (5) of Article 15 of the Constitution fails to make a distinction between aided and unaided educational institutions and treats both aided and unaided alike in the matter of making special

provisions for advancement of socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes insofar as such special provisions relate to their admission to such educational institutions. He referred to paragraph 55 of the majority judgment of this Court in *T.M.A. Pai Foundation* (supra) in which the difference in the administration of private unaided institutions and government-aided institutions has been noticed. He argued that clause (5) of Article 15 of the Constitution as its very language indicates does not apply to minority educational institutions referred to in clause (1) of Article 30 of the Constitution. He submitted that Article 14 is, thus, violated because aided minority institutions and unaided minority institutions cannot be treated alike. Clause (5) of Article 15 of the Constitution, therefore, is discriminatory and violative of the equality clause in Article 14 of the Constitution, which is a basic feature of the Constitution.

7. Mr. Nariman next submitted that clause (5) of Article 15 of the Constitution is a clear violation of Article 19(1)(g) of the Constitution, inasmuch as it compels private

educational institutions to give up a share of the available seats to the candidates chosen by the State and such appropriation of seats would not be a regulatory measure and not a reasonable restriction on the right under Article 19(1)(g) of the Constitution within the meaning of Article 19(6) of the Constitution. He referred to the observations of this Court in *P.A. Inamdar & Ors. v. State of Maharashtra & Ors*. [(2005) 6 SCC 537] in paragraph 125 at page 601 that private educational institutions, which intend to provide better professional education, cannot be forced by the State to make admissions available on the basis of reservation policy to less meritorious candidates and that unaided institutions, as they are not deriving any aid from State funds, should have their own admissions following a fair, transparent and non-exploitative method based on merit. He vehemently submitted that when reservation in favour of the Scheduled Castes and the Scheduled Tribes and other socially and educationally backward classes of citizens is made in admission to private educational institutions and unaided private educational institutions by the State, such private educational institutions will no longer be institutions of

excellence. He submitted that in *T.M.A. Pai Foundation* (supra), the majority of the Judges have held that private unaided educational institutions impart education and that the State cannot take away the choice in matters of selection of students for admission and clause (5) of Article 15 of the Constitution insofar as it enables the State to take away this choice for admission of students is violative of freedom of private educational institutions under Article 19(1)(g) of the Constitution.

8. Mr. Nariman next submitted that in *Mohini Jain (Miss) v. State of Karnataka & Ors.* [(1992) 3 SCC 666], this Court has held that the "right to life" is a compendious expression with all those rights which the Courts must enforce because they are basic to the dignified enjoyment of life and that the dignity of an individual cannot be assured unless it is accompanied by the right to education. He submitted that under Article 51A(j) of the Constitution, it is a duty of every citizen of India to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement. He argued

that every citizen can strive towards excellence through education by studying in educational institutions of excellence. He submitted that clause (5) of Article 15 of the Constitution in so far as it enables the State to make special provisions relating to admission to private educational institutions for socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes will affect also this right under Article 21 read with Article 51A(j) of the Constitution.

9. Mr. Nariman submitted that clause (5) of Article 15 of the Constitution has been brought in by an amendment to achieve the Directive Principles of State Policy in Part IV of the Constitution as well as the goals of social and economic justice set out in the Preamble of the Constitution, but the majority of the Judges speaking through Chandrachud, CJ., have held in Minerva Mills case (supra) that the goals set out in Part IV of the Constitution have to be achieved without the abrogation of the means provided for by Part III of the Constitution. He submitted that in the aforesaid majority judgment in Minerva Mills case (supra) authored by Chandrachud, CJ., it has also

been observed that Parts III and IV together constitute the core of our Constitution and anything that destroys the balance between the two parts will *ipso facto* destroy an essential element of the basic structure of our Constitution. He submitted that clause (5) of Article 15 of the Constitution inasmuch as it is violative of Articles 14, 19(1)(g) and 21 of the Constitution destroys the basic feature of the Constitution and is, therefore, beyond the amending power of Parliament.

10. Dr. Rajeev Dhavan, learned senior counsel appearing for the petitioners in W.P.(C) No.152 of 2013, submitted that two tests have to be applied for determining whether a constitutional amendment is violative of basic structure in so far as it affects fundamental rights, and these two tests are the 'identity test' and the 'width test'. He submitted that the Court has to see whether the identity of a fundamental right as judicially determined is not destroyed by the width of the power introduced by the amendment of the Constitution and if the conclusion is that the width of the power of the State vested by the constitutional amendment is such as to destroy the

essence of the right, the amendment can be held to destroy the basic structure of the Constitution. In support of this proposition he relied on the judgment of this Court in *M. Nagaraj and Others* v. *Union of India and Others* [(2006) 8 SCC 212].

11. Mr. Dhavan submitted that in *T.M.A. Pai Foundation* case (supra) the majority judgment has determined the content of the right of a private educational institution under Article 19(1)(g) of the Constitution and the content of this right comprises the (a) charity, (b) autonomy, (c) voluntariness, (d) non-sharing of seats between the State Governments and the private institutions, (e) co-optation and (f) reasonableness principles. He submitted that clause (5) of Article 15 of the Constitution inserted by Parliament by way of amendment, however, provides that nothing in Article 19(1)(g) of the Constitution shall prevent the State from making any special provision, by law, for admission to private educational institutions of persons belonging to socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes. He vehemently argued that by clause (5) of Article

15 of the Constitution the power that is vested in the State is such that it can destroy the essence of the right of private educational institution under Article 19(1)(g) of the Constitution as determined by this Court in *T.M.A. Pai Foundation* case (supra) and therefore the constitutional amendment inserting clause (5) in Article 15 of the Constitution is destructive of the basic structure of the Constitution.

12. Mr. Anil B. Divan, learned senior counsel appearing for the petitioners in W.P.(C) No.60 of 2014 and W.P.(C) No.160 of 2014 submitted that in the case of *Edward A. Boyd and George H. Boyd* v. *Unites States* (1884) 116 U.S. 616 Bradley J., has observed that it will be the duty of the courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments into these rights. He submitted that in *Dwarkadas Shrinivas* v. *The Sholapur Spining & Weaving Co. Ltd. and Others* (AIR 1954 SC 119) Mahajan J., has held that in dealing with constitutional matters it is always well to bear in mind these observations of Bradley J. He submitted that while deciding on validity of clause (5) of Article 15 of the

Constitution, we should bear in mind the aforesaid observations of Bradley J. He submitted that Chandrachud, CJ. in *Minerva Mills Ltd. & Ors. v. Union of India & Ors*. (supra) has referred to the observations of Brandies J. that the need to protect liberty is the greatest when the government purposes are beneficient particularly when political pressures exercised by numerically large groups can tear the country asunder by leaving it to the legislature to pick and choose favoured areas and favourite classes for preferential treatment. He submitted that clause (5) of Article 15 of the Constitution is an amendment made by Parliament to appease socially and educationally backward classes of citizens and the Scheduled Castes or the Scheduled Tribes for political gains and it is for the Court to protect the fundamental right of private educational institutions under Article 19(1)(g) of the Constitution as interpreted by this Court in *T.M.A. Pai Foundation.*

13. Mr. Divan next submitted that clause (5) of Article 15 of the Constitution as its very language indicates, applies to non-minority private educational institutions but does

not apply to minority educational institutions referred to in clause (1) of Article 30 of the Constitution. He argued that there is absolutely no rationale for exempting the minority educational institutions from the purview of clause (5) of Article 15 of the Constitution and clause (5) of Article 15 of the Constitution really gives a favourable treatment to the minority educational institutions and is violative of the equality clause in Article 14 of the Constitution. He relied on the decision of this Court in *The Ahmedabad St. Xavier's College Society and Another* v. *State of Gujarat and Another* [(1974) 1 SCC 717] to submit that the whole object of conferring the right on the minority under Article 30 of the Constitution is to ensure that there will be an equality between the majority and the minority. He submitted that H.R. Khanna J. in his judgment in the aforesaid case has clarified that the idea of giving some special rights to the minorities is not to have a kind of a privileged or pampered section of the population but to give to the minorities a sense of security and a feeling of confidence. He submitted that Kirpal C.J. speaking for majority in *T.M.A. Pai Foundation* (supra) has similarly held that the essence of Article 30(1) of the Constitution is to

ensure equal treatment between the majority and the minority institutions that laws of the land must apply equally to majority institutions as well as to minority institutions and minority institutions must be allowed to do what the non-minority institutions are permitted to do. Mr. Divan submitted that clause (5) of Article 15 of the Constitution insofar as it excludes minority institutions referred to in Article 30(1) of the Constitution is also violative of secularism which is a basic feature of the Constitution. He referred to the judgment in *Dr. M. Ismail Faruqui and Others* v. *Union of India and Others* [(1994) 6 SCC 360] in which this Court has held that the concept of secularism is one facet of right to equality woven as the central golden thread in the fabric depicting the pattern of the scheme in our Constitution.

Contentions of learned counsel for the Union of India:

14. Mr. Mohan Parasaran, learned Solicitor General, submitted that this Court has held in *Ashoka Kumar Thakur v. Union of India* (supra) that clause (5) of Article 15 of the Constitution is only an enabling provision empowering the State to make a special

provision, by law, for the advancement of socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes insofar as such special provisions relate to their admission to educational institutions including private educational institutions. He submitted that it will be clear from paragraphs 53 and 68 of the judgment of the eleven Judge Bench of this Court in *T.M.A. Pai Foundation* (supra) that reserving a small percentage of seats in private educational institutions, aided or unaided, for weaker, poorer and backward sections of society did not in any way affect the right of private educational institutions under Article 19(1)(g) of the Constitution. He argued that after the judgment of this Court in *T.M.A. Pai Foundation* (supra) a five-Judge Bench of this Court in *Islamic Academy of Education & Anr. v. State of Karnataka & Ors.* [(2003) 6 SCC 697 was of the view that as per the judgment in *T.M.A. Pai Foundation* (supra) in case of non-minority professional colleges a percentage of seats could be reserved by the Government for poorer and backward sections. He

submitted that this view taken by the five-Judge Bench of this Court in *Islamic Academy of Education & Anr. v. State of Karnataka & Ors.* (supra), however, did not find favour with a seven-Judge Bench of this Court in *P.A. Inamdar* (supra) which held that there is nothing in the judgment of this Court in *T.M.A. Pai Foundation* (supra) allowing the State to regulate or control admissions in the unaided professional educational institutions so as to compel them to give up a share of the available seats to the candidates chosen by the State or for enforcing the reservation policy of the State. He submitted that, therefore, Parliament introduced clause (5) in Article 15 of the Constitution by the Constitution (Ninety-Third Amendment) Act, 2005 providing that the State may make a special provision, by law, for the advancement of socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes insofar as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State. He

vehemently argued that clause (5) of Article 15 introduced by the constitutional amendment is consistent with the right to establish and administer the private educational institutions under Article 19(1)(g) of the Constitution as interpreted by *T.M.A. Pai Foundation* (supra) and, therefore, does not violate the right under Article 19(1)(g) of the Constitution.

15. Mr. Parasaran next submitted that minority institutions referred to in Article 30 of the Constitution have been excluded from the purview of clause (5) of Article 15 of the Constitution because the Constitution has given a special status to minority institutions. He submitted that in the case of *Ashoka Kumar Thakur v. Union of India* (supra), this Court has held that exclusion of minority educational institutions from clause (5) of Article 15 of the Constitution is not violative of Article 14 of the Constitution as the minority educational institutions, by themselves, are a separate class and their rights are protected by other constitutional provisions. He

submitted that the argument that clause (5) of Article 15 of the Constitution is violative of equality clause in Article 14 of the Constitution is therefore misconceived.

Opinion of the Court on the validity of clause (5) of Article 15 of the Constitution:

16. We have considered the submissions of learned counsel for the parties and we find that the object of clause (5) of Article 15 is to enable the State to give equal opportunity to socially and educationally backward classes of citizens or to the Scheduled Castes and the Scheduled Tribes to study in all educational institutions other than minority educational institutions referred in clause (1) of Article 30 of the Constitution. This will be clear from the Statement of Objects and Reasons of the Bill, which after enactment became the Constitution (Ninety-Third Amendment) Act, 2005 extracted hereinbelow:

> "Greater access to higher education including professional education to a larger number of students belonging to the socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes has been a matter of major concern. At present, the

> number of seats available in aided or State maintained institutions, particularly in respect of professional education, is limited in comparison to those in private unaided institutions.
>
> 2. It is laid down in article 46, as a directive principle of State policy, that the State shall promote with special care the educational and economic interests of the weaker sections of the people and protect them from social injustice. To promote the educational advancement of the socially and educationally backward classes of citizens or of the Scheduled Castes and Scheduled Tribes in matters of admission of students belonging to these categories in unaided educational institutions, other than the minority educational institutions referred to in clause (1) of article 30 of the Constitution, it is proposed to amplify article 15.
>
> 3. The Bill seeks to achieve the above objects."

Clause (1) of Article 15 of the Constitution provides that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them and clause (2) of Article 15 of the Constitution provides that no citizen shall, on grounds of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to (a) access to shops, public restaurants, hotels and places

of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of general public. These provisions were made to ensure that every citizen irrespective of his religion, race, caste, sex, place of birth or any of them, is given the equal treatment by the State and he has equal access to public places. Despite these provisions in Article 15 of the Constitution as originally adopted, some classes of citizens, Scheduled Castes and Scheduled Tribes have remained socially and educationally backward and have also not been able to access educational institutions for the purpose of advancement. To amplify the provisions of Article 15 of the Constitution as originally adopted and to provide equal opportunity in educational institutions, clause (5) has been inserted in Article 15 by the constitutional amendment made by the Parliament by the Ninety-Third Amendment Act, 2005. As the object of clause (5) of Article 15 of the Constitution is to provide equal opportunity to a large number of students belonging to the socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled

Tribes to study in educational institutions and equality of opportunity is also the object of clauses (1)and (2) of Article 15 of the Constitution, we cannot hold that clause (5) of Article 15 of the Constitution is an exception or a proviso overriding Article 15 of the Constitution, but an enabling provision to make equality of opportunity promised in the Preamble in the Constitution a reality.

17. For this view, we are supported by the majority judgment of this Court in *State of Kerala & Anr. v. N.M. Thomas & Ors.* [(1976) 2 SCC 310] in which this Court has held that clause (4) of Article 16 of the Constitution which has opening words similar to the opening words in clause (5) of Article 15 is not an exception or a proviso to Article 16, but is a provision intended to give equality of opportunity to backward classes of citizens in matters of public employment. Similarly, in *Indra Sawhney & Ors. v. Union of India & Ors*. [1992 Supp (3) SCC 217], this Court following the majority judgment in the case of *State of Kerala & Anr. v. N.M. Thomas & Ors.* (supra) held that clause (4) of Article 16 was not an exception to clause (1) of Article 16, but is an enabling provision to give effect to

te equality of opportunity in matters of public employment. These two authorities have also been cited by K.G. Balakrishnan, CJ., in his judgment in *Ashoka Kumar Thakur v. Union of India* (supra) to hold that clause (5) of Article 15 of the Constitution is not an exception to clause (1) of Article 15, but may be taken as an enabling provision to carry out the constitutional mandate of equality of opportunity.

18. We may now consider whether clause (5) of Article 15 of the Constitution has destroyed the right under Article 19(1)(g) of the Constitution to establish and administer private educational institutions. It is for the first time that this Court held in *T.M.A. Pai Foundation* (supra) that the establishment and running of an educational institution "is occupation" within the meaning of Article 19(1)(g) of the Constitution. In paragraph 20 of the majority judgment, while dealing with the four components of the rights under Articles 19 and 26(a) of the Constitution in respect of private unaided non-minority educational institutions, Kirpal, CJ. has held that education is *per se* regarded as an activity that is charitable in

nature. Kirpal, CJ. has further held in paragraphs 53 and 68:

> **"53.** With regard to the core components of the rights under Articles 19 and 26(*a*), it must be held that while the State has the right to prescribe qualifications necessary for admission, private unaided colleges have the right to admit students of their choice, subject to an objective and rational procedure of selection and the compliance with conditions, if any, requiring admission of a small percentage of students belonging to weaker sections of the society by granting them freeships or scholarships, if not granted by the Government....."

> "**68.** It would be unfair to apply the same rules and regulations regulating admission to both aided and unaided professional institutions. It must be borne in mind that unaided professional institutions are entitled to autonomy in their administration while, at the same time, they do not forego or discard the principle of merit. It would, therefore, be permissible for the university or the Government, at the time of granting recognition, to require a private unaided institution to provide for merit-based selection while, at the same time, giving the management sufficient discretion in admitting students. This can be done through various methods. For instance, a certain percentage of the seats can be reserved for admission by the management out of those students who have passed the common entrance test held by itself or by the State/university and have applied to the college concerned for admission, while the rest of the seats may

> be filled up on the basis of counselling by the State agency. This will incidentally take care of poorer and backward sections of the society. The prescription of percentage for this purpose has to be done by the Government according to the local needs and different percentages can be fixed for minority unaided and non-minority unaided and professional colleges. The same principles may be applied to other non-professional but unaided educational institutions viz. graduation and postgraduation non-professional colleges or institutes.

19. Thus, the content of the right under Article 19(1)(g) of the Constitution to establish and administer private educational institutions, as per the judgment of this Court in *T.M.A. Pai Foundation* (supra), includes the right to admit students of their choice and autonomy of administration, but this Court has made it clear in *T.M.A. Pai Foundation* (supra) that this right and autonomy will not be affected if a small percentage of students belonging to weaker and backward sections of the society were granted freeships or scholarships, if not granted by the Government. This was the charitable element of the right to establish and administer private educational institutions under

Article 19(1)(g) of the Constitution. Hence, the identity of the right of private educational institutions under Article 19(1)(g) of the Constitution as interpreted by this Court, was not to be destroyed by admissions from amongst educationally and socially backward classes of citizens as well as the Scheduled Castes and the Scheduled Tribes.

20. In *P.A. Inamdar* (supra), this Court speaking through Lahoti, CJ., was, however, of the view that the judgment in *T.M.A. Pai Foundation* (supra) held that there was no power vested on the State under clause (6) of Article 19 to regulate or control admissions in the unaided educational institutions so as to compel them to give up a share of the available seats to the State or to enforce reservation policy of the State on available seats in unaided professional institutions. This will be clear from paragraph 125 of the judgment in *P.A. Inamdar* (supra), which is extracted hereinbelow:

> "**125.** As per our understanding, neither in the judgment of *Pai Foundation* nor in the Constitution Bench decision in *Kerala Education Bill* which was approved by *Pai*

> *Foundation* is there anything which would allow the State to regulate or control admissions in the unaided professional educational institutions so as to compel them to give up a share of the available seats to the candidates chosen by the State, as if it was filling the seats available to be filled up at its discretion in such private institutions. This would amount to nationalisation of seats which has been specifically disapproved in *Pai Foundation*. Such imposition of quota of State seats or enforcing reservation policy of the State on available seats in unaided professional institutions are acts constituting serious encroachment on the right and autonomy of private professional educational institutions. Such appropriation of seats can also not be held to be a regulatory measure in the interest of the minority within the meaning of Article 30(1) or a reasonable restriction within the meaning of Article 19(6) of the Constitution. Merely because the resources of the State in providing professional education are limited, private educational institutions, which intend to provide better professional education, cannot be forced by the State to make admissions available on the basis of reservation policy to less meritorious candidates. Unaided institutions, as they are not deriving any aid from State funds, can have their own admissions if fair, transparent, non-exploitative and based on merit.

21. The reasoning adopted by this Court in *P.A. Inamdar* (supra), therefore, is that the appropriation of seats by the State for enforcing a reservation policy was not a

regulatory measure and not reasonable restriction within the meaning of clause (6) of Article 19 of the Constitution. As there was no provision other than clause (6) of Article 19 of the Constitution under which the State could in any way restrict the fundamental right under Article 19(1)(g) of the Constitution, Parliament made the Constitution (Ninety-third Amendment) Act, 2005 to insert clause (5) in Article 15 of the Constitution to provide that nothing in Article 19(1)(g) of the Constitution shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes 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. Clause (5) in Article 15 of the Constitution, thus, vests a power on the State, independent of and different from, the regulatory power under clause (6) of Article 19, and we have to examine whether this new power vested in the State which enables the State to force the charitable

element on a private educational institution destroys the right under Article 19(1)(g) of the Constitution.

22. According to Dr. Dhavan, the right of a private educational institution under Article 19(1)(g) of the Constitution as laid down by this Court in *T.M.A. Pai Foundation (supra)* has a voluntary element. In fact, this Court in *P.A. Inamdar (supra)* has held in paragraph 126 at page 601 of the SCC that the observations in paragraph 68 of the judgment in *T.M.A. Pai Foundation (supra)* merely permit unaided private institutions to maintain merit as the criterion of admission by voluntarily agreeing for seat-sharing with the State or adopting selection based on common entrance test of the State and that there are also observations in *T.M.A. Pai Foundation (supra)* to say that they may frame their own policy to give freeships and scholarships to the needy and poor students or adopt a policy in line with the reservation policy of the State to cater to the educational needs of the weaker and poorer sections of the society. In our view, all freedoms under which Article 19(1) of the Constitution,

including the freedom under Article 19(1)(g), have a voluntary element but this voluntariness in all the freedoms in Article 19(1) of the Constitution can be subjected to reasonable restrictions imposed by the State by law under clauses (2) to (6) of Article 19 of the Constitution. Hence, the voluntary nature of the right under Article 19(1)(g) of the Constitution can be subjected to reasonable restrictions imposed by the State by law under clause (6) of Article 19 of the Constitution. As this Court has held in *T.M.A. Pai Foundation (supra)* and *P.A. Inamdar (supra)* the State can under clause (6) of Article 19 make regulatory provisions to ensure the maintenance of proper academic standards, atmosphere and infrastructure (including qualified staff) and the prevention of maladministration by those in charge of the management. However, as this Court held in the aforesaid two judgments that nominating students for admissions would be an unacceptable restriction in clause (6) of Article 19 of the Constitution, Parliament has stepped in and in exercise of its amending power under Article 368 of the Constitution inserted clause

(5) in Article 15 to enable the State to make a law making special provisions for admission of socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes for their advancement and to a very limited extent affected the voluntary element of this right under Article 19(1)(g) of the Constituion. We, therefore, do not find any merit in the submission of learned counsel for the petitioners that the identity of the right of unaided private educational institutions under Article 19(1)(g) of the Constitution has been destroyed by clause (5) of Article 15 of the Constitution.

23. We may now examine whether the Ninety-Third Amendment satisfies the width test. A plain reading of clause (5) of Article 15 would show that the power of a State to make a law can only be exercised where it is necessary for advancement of socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes and not for any other purpose. Thus, if a law is made by the State only to appease a class of citizen which is not socially

or educationally backward or which is not a Scheduled Caste or Scheduled Tribe, such a law will be beyond the powers of the State under clause (5) of Article 15 of the Constitution. A plain reading of clause (5) of Article 15 of the Constitution will further show that such law has to be limited to making a special provision relating to admission to private educational institutions, whether aided or unaided, by the State. Hence, if the State makes a law which is not related to admission in educational institutions and relates to some other aspects affecting the autonomy and rights of private educational institutions as defined by this Court in *T.M.A. Pai Foundation,* such a law would not be within the power of the State under clause (5) of Article 15 of the Constitution. In other words, power in clause (5) of Article 15 of the Constitution is a guided power to be exercised for the limited purposes stated in the clause and as and when a law is made by the State in purported exercise of the power under clause (5) of Article 15 of the Constitution, the Court will have to examine and find out whether it is for the purposes of advancement of any socially and educationally

backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes and whether the law is confined to admission of such socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes to private educational institutions, whether aided or unaided, and if the Court finds that the power has not been exercised for the purposes mentioned in clause (5) of Article 15 of the Constitution, the Court will have to declare the law as *ultra vires* Article 19(1)(g) of the Constitution. In our opinion, therefore, the width of the power vested on the State under clause (5) of Article 15 of the Constitution by the constitutional amendment is not such as to destroy the right under Article 19(1)(g) of the Constitution.

24. We may now examine the contention of Mr. Nariman that clause (5) of Article 15 of the Constitution fails to make a distinction between aided and unaided educational institutions and treats both aided and unaided alike in the matter of making special provisions for admission of socially and educationally

backward classes of citizens or for the Scheduled Castes and Scheduled Tribes. The distinction between a private aided educational institution and a private unaided educational institution is that private educational institutions receive aid from the State, whereas private unaided educational institutions do not receive aid from the State. As and when a law is made by the State under clause (5) of Article 15 of the Constitution, such a law would have to be examined whether it has taken into account the fact that private unaided educational institutions are not aided by the State and has made provisions in the law to ensure that private unaided educational institutions are compensated for the admissions made in such private unaided educational institutions from amongst socially and educationally backward classes of citizens or the Scheduled Castes and the Scheduled Tribes. In our view, therefore, a law made under clause (5) of Article 15 of the Constitution by the State on the ground that it treats private aided educational institutions and private unaided educational institutions alike is not immune from a challenge under Article 14 of the

Constitution. Clause (5) of Article 15 of the Constitution only states that nothing in Article 15 or Article 19(1)(g) will prevent the State to make a special provision, by law, for admission of socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes to educational institutions including private educational institutions, whether aided or unaided by the State. Clause (5) of Article 15 of the Constitution does not say that such a law will not comply with the other requirements of equality as provided in Article 14 of the Constitution. Hence, we do not find any merit in the submission of the Mr. Nariman that clause (5) of Article 15 of the Constitution that insofar as it treats unaided private educational institutions and aided private educational institutions alike it is violative of Article 14 of the Constitution.

25. We may now deal with the contention of Mr. Divan that clause (5) of Article 15 of the Constitution is violative of Article 14 of the Constitution as it excludes from its purview the minority institutions referred to in

clause (1) of Article 30 of the Constitution and the contention of Mr. Nariman that clause (5) of Article 15 excludes both unaided minority institutions and aided minority institutions alike and is thus violative of Article 14 of the Constitution. Articles 29(2) 30(1) and 30(2) of the Constitution, which are relevant, for deciding these contentions, are quoted hereinbelow:

> "29. **Protection of interests of minorities**-(1)
> .....
>
> (2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.
>
> **30. Right of minorities to establish and administer educational institutions**-(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.
>
> (1A) .....
>
> (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."

On the question whether the right of minority institutions under Article 30(1) of the Constitution would be affected by admission of students who do not belong to the minority community which has established the institutions, Kirpal C.J. writing the majority judgment in *T.M.A. Pai Foundation* (supra) considered the previous judgments of this Court and then held in paragraph 149 at page 582 and 583 of the SCC:

> "149. Although the right to administer includes within it a right to grant admission to students of their choice under Article 30(1), when such a minority institution is granted the facility of receiving grant-in-aid, Article 29(2) would apply, and necessarily, therefore, one of the right of administration of the minorities would be eroded to some extent. Article 30(2) is an injunction against the state not to discriminate against the minority educational institution and prevent it from receiving aid on the ground that the institution is under the management of a minority. While, therefore, a minority educational institution receiving grant-in-aid would not be completely outside the discipline of Article 29(2) of the Constitution by no stretch of imagination can the rights guaranteed under Article 30(1) be annihilated. It is this context that some interplay between Article 29(2) and

Article 30(1) is required. As observed quite aptly in St. Stephen's case "the fact that Article 29(2) applies to minorities as well as non-minorities does not mean that it was intended to nullify the special right guaranteed to minorities in Article 30(1)." The word "only" used in Article 29(2) is of considerable significance and has been used for some avowed purpose. Denying admission to non-minorities for the purpose of accommodating minority students to a reasonable extent will not be only on grounds of religion etc., but is primarily meant to preserve the minority character of the institution and to effectuate the guarantee under Article 30(1). The best possible way is to hold that as long as the minority educational institution permits admission of citizens belonging to the non-minority class to a reasonable extent based upon merit, it will not be an infraction of Article 29(2), even though the institution admits students of the minority group of its own choice for whom the institution was meant. What would be a reasonable extent would depend upon variable factors, and it may not be advisable to fix any specific percentage. The situation would vary according to the type of institution and the nature of education that is being imparted in the institution. Usually, at the school level, although it may be possible to fill up all the seats with students of the minority group, at the higher level, either in colleges or in technical institutions, it may not be possible to fill up all the seats with the students of the minority group. However, even if it is possible to fill up all the seats with students of the

> minority group, the moment the institution is granted aid, the institution will have to admit students of the non-minority group to a reasonable extent, whereby the character of the institution is not annihilated, and at the same time, the rights of the citizen engrafted under Article 29(2) are not subverted. It is for this reason that a variable percentage of admission of minority students depending on the type of institution and education is desirable, and indeed, necessary, to promote the constitutional guarantee enshrined in both Article 29(2) and Article 30."

Thus, the law as laid down by this Court is that the minority character of an aided or unaided minority institution cannot be annihilated by admission of students from communities other than the minority community which has established the institution, and whether such admission to any particular percentage of seats will destroy the minority character of the institution or not will depend on a large number of factors including the type of institution.

26. Clause (5) of Article 15 of the Constitution enables the State to make a special provision, by law, for the advancement of socially and educationally backward classes of citizens or for the Scheduled Castes and

Scheduled Tribes. Such admissions of socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes who may belong to communities other than the minority community which has established the institution, may affect the right of the minority educational institutions referred to in clause (1) of Article 30 of the Constitution. In other words, the minority character of the minority educational institutions referred to in clause (1) of Article 30 of the Constitution, whether aided or unaided, may be affected by admissions of socially and educationally backward classes of citizens or the Scheduled Castes and the Scheduled Tribes and it is for this reason that minority institutions, aided or unaided, are kept outside the enabling power of the State under clause (5) of Article 15 with a view to protect the minority institutions from a law made by the majority. As has been held by the Constitution Bench of this Court in *Ashoka Kumar Thakur v. Union of India* (supra), the minority educational institutions, by themselves, are a separate class and their rights are protected under Article 30 of the Constitution, and,

therefore, the exclusion of minority educational institutions from Article 15(5) is not violative of Article 14 of the Constitution.

27. We may now consider the contention of Mr. Divan that clause (5) of Article 15 of the Constitution is violative of secularism insofar as it excludes religious minority institutions referred to in Article 30(1) of the Constitution from the purview of clause (5) of Article 15 of the Constitution. In *Dr. M. Ismail Faruqui and Others* v. *Union of India and Others* (supra), this Court has held that the Preamble of the Constitution read in particular with Articles 15 to 28 emphasis this aspect and indicates that the concept of secularism embodied in the constitutional scheme is a creed adopted by the Indian people. Hence, secularism is no doubt a basic feature of the Constitution, but we fail to appreciate how clause (5) of Article 15 of the Constitution which excludes religious minority institutions in clause (1) of Article 30 of the Constitution is in any way violative of the concept of secularism. On the other hand, this Court has held in T.M.A. Pai Foundation (supra) that the

essence of secularism in India is the recognition and preservation of the different types of people, with diverse languages and different beliefs and Articles 29 and 30 seek to preserve such differences and at the same time unite the people of India to form one strong nation. (see paragraph 161 of the majority judgment of Kirpal, C.J., in T.M.A. Pai Foundation at page 587 of the SCC). In our considered opinion, therefore, by excluding the minority institutions referred to in clause (1) of Article 30 of the Constitution, the secular character of India is maintained and not destroyed.

28. We may now come to the submission of Mr. Nariman that the fundamental right under Article 21 read with Article 51A(j) of the Constitution is violated by clause (5) of Article 15 of the Constitution. According to Mr. Nariman, every person has a right under Article 21 and a duty under Article 51A(j) to strive towards excellence in all spheres of individual and collective activity, but this will not be possible if private educational institutions in which a person studies for the purpose of achieving excellence are made to admit students from

amongst backward classes of citizens and from the Scheduled Castes and the Scheduled Tribes. This contention, in our considered opinion, is not founded on the experience of educational institutions in India. Educational institutions in India such as Kendriya Vidyalayas, Indian Institute of Technology, All India Institute of Medical Sciences and Government Medical Colleges admit students in seats reserved for backward classes of citizens and for the Scheduled Castes and the Scheduled Tribes and yet these Government institutions have produced excellent students who have grown up to be good administrators, academicians, scientists, engineers, doctors and the like. Moreover, the contention that excellence will be compromised by admission from amongst the backward classes of citizens and the Scheduled Castes and the Scheduled Tribes in private educational institutions is contrary to the Preamble of the Constitution which promises to secure to all citizens "fraternity assuring the dignity of the individual and the unity and integrity of the nation". The goals of fraternity, unity and integrity of the nation cannot be

achieved unless the backward classes of citizens and the Scheduled Castes and the Scheduled Tribes, who for historical factors, have not advanced are integrated into the main stream of the nation. We, therefore, find no merit in the submission of Mr. Nariman that clause (5) of Article 15 of the Constitution violates the right under Article 21 of the Constitution.

29. We accordingly hold that none of the rights under Articles 14, 19(1)(g) and 21 of the Constitution have been abrogated by clause (5) of Article 15 of the Constitution and the view taken by Bhandari, J. in *Ashoka Kumar Thakur v. Union of India* (supra) that the imposition of reservation on unaided institutions by the Ninety-third Amendment has abrogated Article 19(1)(g), a basic feature of the Constitution is not correct. Instead, we hold that the (Ninety-third Amendment) Act, 2005 of the Constitution inserting clause (5) of Article 15 of the Constitution is valid.

Validity of Article 21A of the Constitution

Contention of the learned counsel for the petitioners:

30. The second substantial question of law which we are called upon to decide is whether by inserting Article 21A by the Constitution (Eighty-Sixth Amendment) Act, 2002, the Parliament has altered the basic structure or framework of the Constitution. Before we refer to the contentions of the learned counsel for the petitioners, we must reiterate some facts. Article 21A is titled 'Right to Education' and it provides that the State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine. Accordingly, the 2009 Act was enacted by Parliament to provide free and compulsory education to all children of the age of six to fourteen years. The validity of the 2009 Act was challenged and considered in *Society for Unaided Private Schools of Rajasthan v. Union of India & Anr*. (supra) by a three-Judge Bench of this Court. Two learned Judges S.H. Kapadia C.J. and Swatanter Kumar J. held that the 2009 Act is constitutionally valid and shall apply to the following:

> (i) a school established, owned or controlled by the appropriate Government or a local authority;
>
> (ii) an aided school including aided minority school(s) receiving aid or grants to meet whole or part of its expenses from the appropriate Government or the local authority;
>
> (iii) a school belonging to specified category; and
>
> (iv) an unaided non-minority school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority.

The two learned Judges, however, held that the 2009 Act, in particular Sections 12(1)(c) and Section 18(3), infringe the fundamental rights guaranteed to unaided minority schools under Article 30(1) of the Constitution and therefore the 2009 Act shall not apply to such unaided minority schools. Differing from the majority opinion expressed by the two learned Judges, Radhakrishnan J. held that Article 21A casts an obligation on the State and not on unaided non-minority and unaided minority schools to provide free and compulsory education to children of the age of six to fourteen years. After the aforesaid judgment of this Court in *Society for Unaided Private*

Schools of Rajasthan v. Union of India & Anr. (supra), the 2009 Act was amended by the Right of Children to Free And Compulsory Education Act, 2009 (Amendment Act, 2012) and by the amendment, it was provided in sub-section (4) of Section 1 of the 2009 Act that subject to the provisions of Articles 29 and 30 of the Constitution, the provisions of the 2009 Act shall apply to conferment of rights on children to free and compulsory education.

31. Mr. Rohatgi, learned senior counsel for the petitioners in Writ Petition (C) No.416 of 2012, submitted that Article 21A of the Constitution creates obligation only upon the State and its instrumentalities as defined in Article 12 of the Constitution and does not cast any obligation on a private unaided educational institution. He submitted that the minority opinion of Radhakrishnan J. in *Society for Unaided Private Schools of Rajasthan v. Union of India & Anr*. (supra) is, therefore, a correct interpretation of Article 21A. He submitted that if Article 21A is interpreted to include the private unaided educational institutions within its sweep then it would abrogate the right under Article

19(1)(g) of the Constitution to establish and administer private educational institutions which is a basic feature of the Constitution.

32. Mr. Nariman, learned senior counsel for the petitioners in Writ Petition (C) No.128 of 2014, submitted that word "State" used in Article 21A of the Constitution would mean the State as defined in Article 12 of the Constitution and therefore would include the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India. He submitted that this Court has held in *P.D. Shamdasani* v. *The Central Bank of India Ltd.* (AIR 1952 SC 1952) that the language and structure of Article 19 and its setting in Part III of the Constitution clearly show that the Article was intended to protect those freedoms against State action only and hence violation of rights of property by individuals is not within the purview of Article 19 of the Constitution. He submitted that this Court has also held in *Smt. Vidya Verma* v. *Dr.*

Shiv Narain Verma (AIR 1956 SC 108) that the fundamental right of personal liberty under Article 21 of the Constitution is available against only the State and not against private individuals. He submitted that, therefore, the word "State" in Article 21A of the Constitution would not include private unaided educational institutions or private individuals.

33. Mr. Nariman submitted that before the Constitution (Eighty-Sixth Amendment) Act, 2002, Article 45 provided that the State shall endeavour to provide, within a period of ten years from the commencement of the Constitution, "for" free and compulsory education for all children until they complete the age of fourteen years. He submitted that what Article 45 therefore meant was that the State alone shall endeavour to provide "for" free and compulsory education to all children upto the age of fourteen years. He submitted that by the Constitution (Eighty-Sixth Amendment) Act, 2002, Article 45 was deleted and in its place Article 21A was inserted in the Constitution. He submitted that in Article 21A of the

Constitution, the word “for” is missing but this does not mean that the obligation of the State to fund free and compulsory education to all children upto the age of 14 years could be passed on by the State to private unaided educational institutions. He submitted that Article 21A, if construed to mean that the State could by law pass on its obligation under Article 21A to provide free and compulsory education to all children upto the age of fourteen years to private unaided schools, Article 21A of the Constitution would abrogate the right of private educational schools under Article 19(1)(g) of the Constitution as interpreted by this Court in *T.M.A. Pai Foundation* (supra).

34. Mr. Nariman submitted that the Objects and Reasons of the Bill which became the 2009 Act explicitly stated that the 2009 Act is pursuant to Article 21A of the Constitution but did not make any reference to clause (5) of Article 15 of the Constitution. He submitted that the validity of the provisions of the 2009 Act will, therefore, have to be tested only by reference to Article 21A of the Constitution and not by reference to

clause (5) of Article 15 of the Constitution. According to both Mr. Rohatgi and Mr. Nariman, Section 12(1(c) of the 2009 Act insofar as it provides that a private unaided school shall admit in Class I to the extent of at least 25% of the total strength of the class, children belonging to weaker sections and disadvantaged group in the neighborhood and provide free and compulsory education till its completion is violative of the right of private unaided schools under Article 19(1)(g) of the Constitution as interpreted by this Court in *T.M.A. Pai Foundation* (supra) and *P.A. Inamdar* (supra). They submitted that the majority opinion of the three-Judge Bench in *Society for Unaided Private Schools of Rajasthan v. Union of India & Anr*. (supra) is, therefore, not correct.

35. Mr. Ajmal Khan, learned senior counsel appearing for the petitioners in Writ Petition (C) No.1081 of 2013 (Muslim Minority Schools Managers' Association) and Mr. T.R. Andhyarujina, learned senior counsel appearing for intervener in Writ Petition (C) No.60 of 2014 (La Martineire Schools) that under Article 30(1) of

the Constitution all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice. They submitted that the State while making the law to provide free and compulsory education to all children of the age of six to fourteen years cannot be allowed to encroach on this right of the minority institutions under Article 30(1) of the Constitution. They referred to the decisions of this Court right from the Kerala Educational Bill case to the T.M.A. Pai case (supra) to argue that admitting children other than those of the minority community which establish the school cannot be forced upon the minority institutions, whether aided or unaided. They submitted that 2009 Act, if made applicable to minority schools, aided or unaided, will be *ultra vires* Article 30(1) of the Constitution. They submitted that the majority judgment of this Court in *Society for Unaided Private Schools of Rajasthan v. Union of India & Anr*. (supra), has taken a view that the 2009 Act will not apply to unaided minority schools but will apply to aided minority schools. They submitted that accordingly sub-section (4) of Section 1 of the

2009 Act provides that subject to the provisions of articles 29 and 30 of the Constitution, the provisions of the Act shall apply to conferment of rights on children to free and compulsory education. They submitted that this sub-section (4) of Section 1 of the 2009 Act should be declared as *ultra vires* Article 30(1) of the Constitution.

Submissions of learned counsel for the Union of India:

36. In reply, Mr. K.V. Vishwanathan, learned Additional Solicitor General, submitted that the Statement of Objects and Reasons of the Bill, which was enacted as the Constitution (Eighty-Sixth Amendment) Act, 2002, stated that the goal set out in Article 45 of the Constitution of providing free and compulsory education for children upto the age of 14 years could not be achieved even after 50 years of adoption of the provision and in order to fulfill this goal, it was felt that a new provision in the Constitution should be inserted as Article 21A providing that the State shall provide free and compulsory education to all children of the

age of six to fourteen years in such manner as the State may, by law, determine. He submitted that in accordance with Article 21A of the Constitution, the 2009 Act has been enacted which provides the manner in which such free and compulsory education for children upto the age of 14 years shall be provided by the State and it provides in Section 12(1)(c) that private unaided schools shall admit in Class I from amongst weaker sections of society and from disadvantaged groups at least twenty-five per cent of the strength of the class and provide free and compulsory education.

37. Mr. Vishwanathan submitted that private educational institutions cannot have any grievance in this regard because they are performing a function akin to the function of the State. He submitted that applying the functional test private educational institutions are also State within the meaning of Article 12 of the Constitution and, therefore, the argument of Mr. Nariman that the obligation of providing free and compulsory education to all children of the age of six

to fourteen years cannot be passed on by the State to private educational institutions has no substance. Mr. Vishwanathan submitted that in paragraph 53 of the judgment in *T.M.A. Pai Foundation* (supra) this Court has held that while private unaided educational institutions have the right to admit students of their choice, admission of a small percentage of students belonging to weaker sections of the society by granting them freeships or scholarships, if not granted by the Government should also be done. He submitted that in paragraph 68 of *T.M.A. Pai Foundation* (supra), this Court has also held that a small percentage of seats may also be filled up to take care of poorer and backward sections of the society. He submitted that the 2009 Act, therefore, has provided in Section 12(1)(c) that an unaided private school shall admit in Class I, to the extent of at least twenty-five per cent of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education till its completion and this provision of the

2009 Act, therefore, is not *ultra vires* Article 19(1)(g) of the Constitution.

38. Regarding minority institutions, Mr. Vishwanathan submitted that under Article 3)(1) of the Constitution they have equal status and accordingly this Court has held in *Society for Unaided Private Schools of Rajasthan v. Union of India & Anr*. (supra) the 2009 Act will not apply to unaided minority schools but will apply to aided minority schools. He submitted that accordingly the 2009 Act was amended by the Right of Children to Free And Compulsory Education (Amendment) Act, 2012, so as to provide in sub-section (4) of Section 1 of the 2009 Act that subject to the provisions of Articles 29 and 30 of the Constitution, the provisions of the 2009 Act shall apply to conferment of rights on children to free and compulsory education.

Opinion of the Court on Article 21A of the Constitution and on the validity of 2009 Act:

39. We have considered the submissions of learned counsel for the parties and we find that this is what it is

stated in the Statement of Objects and Reasons of the Constitution (Eighty-Third Amendment) Bill, 1997, which ultimately was enacted as the Constitution (Eighty-Sixth Amendment) Act, 2002:

> "The Constitution of India in a Directive Principle contained in article 45, has 'made a provision for free and compulsory education for all children up to the age of fourteen years within ten years of promulgation of the Constitution. We could not achieve this goal even after 50 years of adoption of this provision. The task of providing education to all children in this age group gained momentum after the National Policy of Education (NPE) was announced in 1986. The Government of India, in partnership with the State Governments, has made strenuous efforts to fulfil this mandate and, though significant improvements were seen in various educational indicators, the ultimate goal of providing universal and quality education still remains unfulfilled. In order to fulfil this goal, it is felt that an explicit provision should be made in the Part relating to Fundamental Rights of the Constitution.
>
> 2. With a view to making right to free and compulsory education a fundamental right, the Constitution (Eighty-third Amendment) Bill, 1997 was introduced in Parliament to insert a new article, namely, article 21 A conferring on all children in the age group of 6 to 14 years the right to free and

compulsory education. The said Bill was scrutinised by the Parliamentary Standing Committee on Human Resource Development and the subject was also dealt with in its 165th Report by the Law Commission of India.

3. After taking into consideration the report of the Law Commission of India and the recommendations of the Standing Committee of Parliament, the proposed amendments in Part III, Part IV and Part IVA of the Constitution are being made which are as follows:-

(a) to provide for free and compulsory education to children in the age group of 6 to 14 years and for this purpose, a legislation would be introduced in Parliament after the Constitution (Ninety-third Amendment) Bill, 200l is enacted;

(b) to provide in article 45 of the Constitution that the State shall endeavour to provide early childhood care and education to children below the age of six years; and

(c) to amend article 5lA of the Constitution with a view to providing that it shall be the obligation of the parents to provide opportunities for education to their children.

4. The Bill seeks to achieve the above objects.

MURLI MANOHAR JOSHI.

NEW DELHI;
The 16th November, 2001.”

It will, thus, be clear from the Statement of Objects and Reasons extracted above that although the Directive Principle in Article 45 contemplated that the State will provide free and compulsory education for all children up to the age of fourteen years within ten years of promulgation of the Constitution, this goal could not be achieved even after 50 years and, therefore, a constitutional amendment was proposed to insert Article 21A in Part III of the Constitution. Bearing in mind this object of the Constitution (Eight-Sixth Amendment) Act, 2002 inserting Article 21A of the Constitution, we may now proceed to consider the submissions of learned counsel for the parties.

40. Article 21A of the Constitution, as we have noticed, states that the State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine. The word 'State' in Article 21A can only mean the 'State' which can make the law. Hence, Mr. Rohatgi and Mr. Nariman are right in their submission that the constitutional obligation under Article 21A of the Constitution is on the

State to provide free and compulsory education to all children of the age of 6 to 14 years and not on private unaided educational institutions. Article 21A, however, states that the State shall by law determine the "manner" in which it will discharge its constitutional obligation under Article 21A. Thus, a new power was vested in the State to enable the State to discharge this constitutional obligation by making a law. However, Article 21A has to be harmoniously construed with Article 19(1)(g) and Article 30(1) of the Constitution. As has been held by this Court in *Venkataramana Devaru v. State of Mysore* (AIR 1958 SC 255):

> "The rule of construction is well settled that when there are in an enactment two provisions which cannot be reconciled with each other, they should be so interpreted that, if possible, effect could be given to both. This is what is known as the rule of harmonious construction."

We do not find anything in Article 21A which conflicts with either the right of private unaided schools under Article 19(1)(g) or the right of minority schools under Article 30(1) of the Constitution, but the law made under Article

21A may affect these rights under Articles 19(1)(g) and 30(1). The law made by the State to provide free and compulsory education to the children of the age of 6 to 14 years should not, therefore, be such as to abrogate the right of unaided private educational schools under Article 19(1)(g) of the Constitution or the right of the minority schools, aided or unaided, under Article 30(1) of the Constitution.

41. While discussing the validity of clause (5) of Article 15 of the Constitution, we have already noticed that in paragraphs 53 and 68 of the judgment in T.M.A. Pai Foundation (supra), this Court has held that admission of a small percentage of students belonging to weaker sections of the society by granting them freeships or scholarships, if not granted by the Government and the admission to some of the seats to take care of poorer and backward sections of the society may be permissible and would not be inconsistent with the rights under Articles 19(1)(g) of the Constitution. In *P.A. Inamdar (supra),* however, this Court explained that there was nothing in this Court's judgment in *T.M.A. Pai Foundation (supra)* to say that such

admission of students from amongst weaker, backward and poorer sections of the society in private unaided institutions can be done by the State because the power vested on the State in clause (6) of Article 19 of the Constitution is to make only regulatory provisions and this power could not be used by the State to force admissions from amongst weaker, backward and poorer sections of the society on private unaided educational institutions. While discussing the validity of clause (5) of Article 15, we have also held that there is an element of voluntariness of all the freedoms under Article 19(1) of the Constitution, but the voluntariness in these freedoms can be subjected to law made under the powers available to the State under clause (2) to (6) of Article 19 of the Constitution.

42. In our considered opinion, therefore, by the Constitution (Eighty-Sixth Amendment) Act, a new power was made available to the State under Article 21A of the Constitution to make a law determining the manner in which it will provide free and compulsory education to the children of the age of six to fourteen years as this goal contemplated in the Directive Principles in Article 45

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

43. To give an idea of the goals Parliament intended to achieve by enacting the 2009 Act, we extract paragraphs 4, 5 and 6 of the Statement of Objects and Reasons of the Bill which was enacted as the 2009 Act hereinbelow:

> "4. The proposed legislation is anchored in the belief that the values of equality, social justice and democracy and the creation of a just and humane society can be achieved only through provision of inclusive elementary education to all. Provision of free and compulsory education of satisfactory quality to children from disadvantaged and weaker sections is, therefore, not merely the responsibility of schools run or supported by the appropriate Governments, but also of schools which are not dependent on Government funds.
>
> 5. It is, therefore, expedient and necessary to enact a suitable legislation as envisaged in Article 21A of the Constitution.
>
> 6. The Bill seeks to achieve this objective."

It will be clear from the aforesaid extract that the 2009 Act intended to achieve the constitutional goal of equality of opportunity through inclusive elementary education to all and also intended that private schools which did not receive government aid should also take the responsibility

of providing free and compulsory education of satisfactory quality to children from disadvantaged and weaker sections.

44. When we examine the 2009 Act, we find that under Section 12(1)(c) read with Section 2(n)(iv) of the Act, an unaided school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority is required to admit in class I, to the extent of at least twenty-five per cent of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education till its completion. We further find that under Section 12(2) of the 2009 Act such a school shall be reimbursed expenditure so incurred by it to the extent of per-child-expenditure incurred by the State, or the actual amount charged from the child, whichever is less, in such manner as may be prescribed. Thus, ultimately it is the State which is funding the expenses of free and compulsory education of the children belonging to weaker sections and several groups in the neighbourhood, which are

admitted to a private unaided school. These provisions of the 2009 Act, in our view, are for the purpose of providing free and compulsory education to children between the age group of 6 to 14 years and are consistent with the right under Article 19(1)(g) of the Constitution, as interpreted by this Court in *T.M.A. Pai Foundation* (supra) and are meant to achieve the constitutional goals of equality of opportunity in elementary education to children of weaker sections and disadvantaged groups in our society. We, therefore, do not find any merit in the submissions made on behalf of the non-minority private schools that Article 21A of the Constitution and the 2009 Act violate their right under Article 19(1)(g) of the Constitution.

45. Under Article 30(1) of the Constitution, all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice. Religious and linguistic minorities, therefore, have a special constitutional right to establish and administer educational schools of their choice and this Court has repeatedly held that the State has no power to

interfere with the administration of minority institutions and can make only regulatory measures and has no power to force admission of students from amongst non-minority communities, particularly in minority schools, so as to affect the minority character of the institutions. Moreover, in *Kesavananda Bharati Sripadagalvaru v. State of Kerala & Anr*. (supra) Sikri, CJ., has even gone to the extent of saying that Parliament cannot in exercise of its amending power abrogate the rights of minorities. To quote the observations of Sikri, CJ. in *Kesavananda Bharati Sripadagalvaru v. State of Kerala & Anr*. (supra):

> "178**.** The above brief summary of the work of the Advisory Committee and the Minorities Sub-committee shows that no one ever contemplated that fundamental rights appertaining to the minorities would be liable to be abrogated by an amendment of the Constitution. The same is true about the proceedings in the Constituent Assembly. There is no hint anywhere that abrogation of minorities' rights was ever in the contemplation of the important members of the Constituent Assembly. It seems to me that in the context of the British plan, the setting up of Minorities Sub-committee, the Advisory Committee and the proceedings of these Committees, as well as the proceedings in the Constituent Assembly mentioned above, it is impossible to read the expression "Amendment of the

Constitution" as empowering Parliament to abrogate the rights of minorities."

Thus, the power under Article 21A of the Constitution vesting in the State cannot extend to making any law which will abrogate the right of the minorities to establish and administer schools of their choice.

46. When we look at the 2009 Act, we find that Section 12(1)(b) read with Section 2(n) (iii) provides that an aided school receiving aid and grants, whole or part, of its expenses from the appropriate Government or the local authority has to provide free and compulsory education to such proportion of children admitted therein as its annual recurring aid or grants so received bears to its annual recurring expenses, subject to a minimum of twenty-five per cent. Thus, a minority aided school is put under a legal obligation to provide free and compulsory elementary education to children who need not be children of members of the minority community which has established the school. We also find that under Section 12(1)(c) read with Section 2(n)(iv), an unaided school has to admit into twenty-five per cent of the strength of class I

children belonging to weaker sections and disadvantaged groups in the neighbourhood. Hence, unaided minority schools will have a legal obligation to admit children belonging to weaker sections and disadvantaged groups in the neighbourhood who need not be children of the members of the minority community which has established the school. While discussing the validity of clause (5) of Article 15 of the Constitution, we have held that members of communities other than the minority community which has established the school cannot be forced upon a minority institution because that may destroy the minority character of the school. In our view, if the 2009 Act is made applicable to minority schools, aided or unaided, the right of the minorities under Article 30(1) of the Constitution will be abrogated. Therefore, the 2009 Act insofar it is made applicable to minority schools referred in clause (1) of Article 30 of the Constitution is *ultra vires* the Constitution. We are thus of the view that the majority judgment of this Court in *Society for Unaided Private Schools of Rajasthan v. Union of India & Anr*. (supra) insofar as it holds that the 2009 Act is applicable to aided minority schools is not correct.

47. In the result, we hold that the Constitution (Ninety-third Amendment) Act, 2005 inserting clause (5) of Article 15 of the Constitution and the Constitution (Eighty-Sixth Amendment) Act, 2002 inserting Article 21A of the Constitution do not alter the basic structure or framework of the Constitution and are constitutionally valid. We also hold that the 2009 Act is not *ultra vires* Article 19(1)(g) of the Constitution. We, however, hold that the 2009 Act insofar as it applies to minority schools, aided or unaided, covered under clause (1) of Article 30 of the Constitution is *ultra vires* the Constitution. Accordingly, Writ Petition (C) No.1081 of 2013 filed on behalf of Muslim Minority Schools Managers' Association is allowed and Writ Petition (C) Nos.416 of 2012, 152 of 2013, 60 of 2014, 95 of 2014, 106 of 2014, 128 of 2014, 144 of 2014, 145 of 2014, 160 of 2014 and 136 of 2014 filed on behalf of non-minority private unaided educational institutions are dismissed. All I.As. stand disposed of. The parties, however, shall bear their own costs.

.....CJI.
(R.M. Lodha)

.....J.
(A. K. Patnaik)

.....J.
(Sudhansu Jyoti Mukhopadhaya)

.....J.
(Dipak Misra)

.....
.....J.
(Fakkir Mohamed Ibrahim Kalifulla)

New Delhi,
May 06, 2014.