R.C. POUDYAL AND ANR. ETC. ETC. A

v.

UNION OF INDIA AND ORS. ETC. ETC.

FEBRUARY 10, 1993

[L.M. SHARMA, CJ, M.N. VENKATACHALIAH, J.S. VERMA, B
K.J. REDDY AND S.C. AGRAWAL, JJ.]

Representation of People Act, 1950:

Sections 7(1-A) and 25A (As inserted by Election Laws Extension to Sikkim) Act, 1976 and Representation of People (Amendment) Act, 1980—Constitutional validity of. C

Representation of People Act, 1951:

Section 5A(2) (As inserted by the Representation of People (Amendment)) Act, 1980—Constitutional validity of. D

Sikkim Assembly—Reservation of 12 seats out of 32 seats for Sikkimese of "Bhutia-Lepcha" origin—Whether violative of Articles 14, 170(2) and Clause (f) of Article 371-F—Whether violative of Indian Constitutionalism—Whether violative of Principle of Republicanism—Extent of reservation of seats—Whether disproportionate and violative of Article 332(3). E

Reservation of one seat in favour of 'Sangha' (Buddhist Lamaic Religious Monastries) with provision for election on the basis of separate electoral roll—Whether based on pure religious distinction—Whether violative of Articles 15(1) and 325—Provision of reservation of Sangha seat—Whether to be construed as a nomination. F

Constitution of India, 1950:

Articles 1(3)(c), 2, 3, and 4.

G

Admission of a new State into Indian Union—Power of Parliament to impose terms and conditions—Constitutional limitations on power of Parliament—What are—Terms and conditions of admission of new State—Justiciability of—Doctrine of Political question—Applicability of.

Expression "as it thinks fit" in Article 2—Meaning of. H

A *Articles 15 and 325:*

State Legislature—Reservation of seats in favour of 'sangha' (Buddhist Lamaic Religious Monastries) with provision for maintenance of separate electoral ro.l—Whether violative of Articles 15 and 325.

B *Article 371-F—Non-obstante clause—Scope and effect of.*

Clause (f)—Whether violative of Basic Features of Democracy—Whether violates 'one person one vote' rule enshrined in Article 170(2)—Whether enables departure from Article 332(3).

C *Article 332—State Legislature—Reservation of seats for Scheduled Castes and Scheduled Tribes—Clause (3)—Words 'As nearly as May be'—Scope of—Whether permit deviation from prescribed proportion of Reservation.*

Words and Phrases:

D *'Democratic Republic'—'Democracy' and 'Democratic'—Meaning of.*

On May 8, 1973, a tripartite agreement was executed amongst the Chogyal (Ruler) of Sikkim, the Foreign Secretary to the Government of India and the leaders of the political parties representing the people of Sikkim which envisaged right of people of Sikkim to elections on the basis
E **of adult suffrage, contemplated setting up of a Legislative Assembly in Sikkim to be reconstituted by election every four years and declared a commitment to free and fair elections to be overseen by a representative of the Election Commission of India. Para (5) of the said agreement provided that the system of elections shall be so organised as to make the**
F **Assembly adequately representative of the various sections of the population The size and composition of the Assembly and of the Executive Council shall be such as may be prescribed from time to time, care being taken to ensure that no single section of the population acquires a dominating position due mainly to its ethnic origin, and that the rights and interests of the Sikkimese Bhutia Lepcha origin and of the Sikkimese**
G **Nepali, which includes Tsong and Scheduled Caste origin, are fully protected. This agreement was effectuated by a Royal Proclamation called the Representation of Sikkim Subjects Act, 1974, issued by the Ruler of Sikkim. It directed the formation of Sikkim Assembly consisting of 32 elected members - 31 to be elected from territorial constituencies and one**
H **Sangha constituency to elect one member through on electoral college of**

Sanghas. Consequently, elections for the Sikkim Assembly were held in April 1974. The Sikkim Assembly so elected and constituted passed the Government of Sikkim Act, 1974. Section 7 of the said Act gave recognition to paragraph 5 of the tripartite agreement dated May 8, 1973. In pursuance of this development the Constitution of India was amended by the Constitution (Thirty-Fifth Amendment) Act, 1974 inserting Article 2A which made Sikkim an "Associate State" with the Union of India. On 10th April, 1975, the Sikkim Assembly passed a resolution abolishing the institution of Chogyal and declared that Sikkim would henceforth be a constituent unit of India enjoying a democratic and fully responsible Government. A request was made in the resolution to the Government of India to take the necessary measures. By an opinion poll the said resolution was affirmed by the people of Sikkim. Accordingly, the Constitution was further amended by the Constitution (Thirty-Sixth Amendment) Act, 1975 whereby Sikkim became a full-fledged State in the Union of India and Article 371-F was inserted in the Constitution which envisaged certain special conditions for the admission of Sikkim as a new State in the Union of India. Clause (f) of the said Article empowered Parliament to make provision for reservation of seats in the Sikkim Assembly for the purpose of protecting the rights and interests of the different sections of the population of Sikkim.

Thereafter Parliament enacted the Election Laws (Extension to Sikkim) Act, 1976 which sought to extend, with certain special provisions, the Representation of the People Act, 1950 and the Representation of the People Act, 1951 to Sikkim. Further, the Bhutia-Lepchas were declared as Scheduled Tribes in relation to the State of Sikkim by a Presidential Order issued under Article 342 of the Constitution of India, and they thus became entitled to the benefits of reservation of seats in the State Legislature in accordance with Article 332. The consequential reservation in the State Legislature were made in the Representation of People Act, 1950 and Representation of People Act, 1951 by the 1976 Act and the Representation of People (Amendment) Act, 1980. Twelve seats out of thirty-two seats in the Sikkim Assembly were reserved for Sikkimese of Bhutia-Lepcha origin; and one seat was reserved for Sanghas, election to which was required to be conducted on the basis of a separate electoral roll in which only the Sanghas belonging to monasteries recognised for the purpose of elections held in Sikkim in April, 1974 were entitled to be registered.

A The petitioners, Sikkimese of Nepali origin, filed petitions challenging the reservation of 12 seats for Sikkimese of "Bhutia-Lepcha" origin and one seat for "sangha".

Objections as to the maintainability of the writ petitions were taken B on behalf of the State of Sikkim and the Union of India on the grounds : (a) that a law made under Article 2 containing the terms and conditions on which a new State is admitted in the Indian Union is, by its very nature, political involving matters of policy and, therefore, the terms and conditions contained in such a law are not justiciable on the political question doctrine; (b) in view of the *non-obstante* clause in Article 371-F, Parlia- C ment can enact such a law in derogation of the other provisions of the Constitution and the said law would not be open to challenge on the ground that it is violative of any other provisions of the Constitution.

On behalf of the petitioners it was contended (1) that the reservation D of one seat in favour of the 'Sangha' (Bhuddhist Lamaic Religious Monasteries) is purely based on religious considerations and is violative of Articles 15(1) and 325 of the Constitution and offends the secular principles; the said reservation based on religion with a separate electorate at the religious monasteries is violative of basic structure of the Constitution; (2) that the provisions in clause (f) of Article 371-F enabling E reservation of seats for sections of the people and law made in exercise of that power providing reservation of seats for Bhutias-Lepchas violate fundamental principles of democracy and republicanism under the Indian Constitution; (3) the reservation of seats for Sikkimese of Bhutia-Lepcha origin without making a corresponding reservation for Sikkimese of F Nepali origin is violative of the right to equality guaranteed under Article 14 of the Constitution; (4) in view of the Constitution (Sikkim) Scheduled Tribes Order, 1978 declaring Bhutias-Lepchas as Scheduled Tribes, the extent of reservation of seats is disproportionate and violative of Article 332 (3) of the Constitution; and (5) that this departure from the provisions of Article 332(3) derogates from the principle of one man, one G vote enshrined in Article 170(2) of the Constitution.

On behalf of the respondents it was contended (1) that although basically the monasteries are religious in nature, yet they form a separate section of the society on account of the social services they have been H rendering mainly to the Bhutia-Lepcha section of the population. Viewed in

this background they should not be treated as merely religious institutions for the purposes of reservation; (2) since the Constitution permits nomination to be made in the legislatures, the creation of a separate electorates for the Sangha seat cannot be objected to; (3) that the constitutional amendment bringing in Article 371F(f), as also the relevant amended provisions of the Representation of the People Acts are legal and valid because a perfect arithmetical equality of value of votes is not a constitutionally mandated imperative of democracy and secondly, that even if the impugned provisions made a departure from the tolerance limits and the constitutionally permissible latitudes, the discriminations arising are justifiable on the basis of the historical considerations peculiar to and characteristic of the evoluation of Sikkim's political institutions.

Dismissing the petitions, this Court,

HELD : *By the Court*

(i) The questions raised in the petitions pertaining to the terms and conditions of accession of new State are justiciable. [975B]

(ii) Clause (f) of Article 371-F of the Constitution of India, is not violative of the basic features of democracy. [986C]

(iii) That impugned provisions providing for reservation of 12 seats, out of 32 seats in the Sikkim Legislative Assembly in favour of Bhutias-Lepchas, are neither unconstitutional as violative of the basic features of democracy and republicanism under the Indian Constitution nor are they violative of Articles 14, 170(2) and 332 of the Constitution. The impugned provisions are also not *ultra vires* of Clause (f) of Article 371-F. [986E-H, 987A-H, 988A]

(iv) The extent of reservation of seats is not violative of Article 332(3) of the Constitution. [987A-B, 988A]

(v) The reservation of one seat for Sangha to be elected by an Electoral College of Lamaic monasteries is not based purely on religious distinctions and is, therefore, not unconstitutional as violative of Articles 15(1) and 325 of the Constitution. [989A-H]

Quaere (i) Whether the terms and conditions of admission of a new State are justiciable?

A *Per M.N. Venkatachaliah (For himself J.S. Verma and K.J. Reddy, JJ.)*

1. The power to admit new States into the Union under Article 2 is, no doubt, in the very nature of the power, very wide and its exercise necessarily guided by political issues of considerable complexity many of which may not be judicially manageable. But for that reason, it cannot be
B **predicated that Article 2 confers on the Parliament an unreviewable and unfettered power immune from judicial scrutiny. The power is limited by the fundamentals of the Indian constitutionalism and those terms and conditions which the Parliament may deem fit to impose, cannot be inconsistent and irreconciliable with the foundational principles of the Con-**
C **stitution and cannot violate or subvert the Constitutional scheme. Therefore, if the terms and conditions stipulated in a law made under Article 2 read with clause (f) of Article 371-F go beyond the constitutionally permissible latitudes, that law can be questioned as to its validity. Consequently it cannot be said that the issues are non-justiciable.**

D **[974D-F, 975B-E]**

A.K. Roy **v.** *Union of India,* **[1982] 2 S.C.R. 272;** *Madhav Rao* **v.** *Union of India,* **[1971] 3 S.C.R. 9 and** *State of Rajasthan* **v.** *Union of India,* **[1978] 1 S.C.R. 11, referred to.**

E *Vinod Kumar Shantilal Gosalia* **v.** *Gangadhar Narsingdas Agarwal & Ors.,* **[1982] 1 S.C.R. 392, Held inapplicable.**

Marbury **v.** *Madison,* **1 Cr. 5 U.S. 137, 170 (1803);** *Martin* **v.** *Mott,* **12 Wheat - 25 US 19 (1827);** *Ware* **v.** *Hylton,* **3 Dall. 3 U.S. 199 (1796);** *Luther* **v.** *Borden,* **7 How. 48 U.S. 1 (1849);** *Baker* **v.** *Carr,* **369 U.S. 186;** *Powell* **v.**
F *McCormack,* **395 U.S. 486 and** *Japan Whaling Ass'n* **v.** *American Cetacean Society,* **478 (1986) U.S. 221, referred to.**

A.K. Pavithran, *Substance of Public International Law Western and Eastern,* **First Edition, 1965 pp. 281-2;** *The Constitution of the United States*
G *of America, Analysis and Interpretation and Congressional Research Service; Liberty of Congress* **1982 Edn. p.703, referred to.**

2. Article 2 gives a wide latitude in the matter of prescription of terms and conditions subject to which a new territory is admitted. There is no constitutional imperative that those terms and conditions should
H **ensure that the new State should, in all respects, be the same as the other**

States in the Indian Union. However, the terms and conditions should not seek to establish a form or system of Government or political and governmental institutions alien to and fundamentally different from those the Constitution envisages. [984C-D]

Constitutional Law of India, Edited by Hidayatullah, J., referred to.

3. In judicial review of the vires of the exercise of a constitutional power such as the one under Article 2, the significance and importance of the political components of the decision deemed fit by Parliament cannot be put out of consideration as long as the conditions do not violate the constitutional fundamentals. In the interpretation of a constitutional document, "words are but the framework of concepts and concepts may change more than words themselves". The significance of the change of the concepts themselves is vital and the constitutional issues are not solved by a mere appeal to the meaning of the words without an acceptance of the line of their growth. It is aptly said that "the intention of a Constitution is rather to outline principles than to engrave details". [985A-C]

43 Aust. Law Journal, p.256, referred to.

4. Article 371-F cannot transgress the basic features of the Constitution. The *non obstante* clause cannot be construed as taking clause (f) of Article 371-F outside the limitations on the amending power itself. The provision of clause (f) of Article 371-F and Article 2 have to be construed harmoniously consistent with the foundational principles and basic features of the Constitution. [974H, 975A]

Mangal Singh & Anr. v. *Union of India,* [1967] 2 S.C.R. 109, relied on.

Per S.C. Agrawal, J. (Concurring)

1. While admitting a new State in the Union, Parliament, while making a law under Article 2, cannot provide for terms and conditions which are inconsistent with the scheme of the Constitution and it is open to the Court to examine whether the terms and conditions as provided in the law enacted by Parliament under Article 2 are consistent with the constitutional scheme or not. Power conferred on Parliament under Article 2 is not wider in ambit than the amending power under Article 368 and it would be of little practical significance to treat Article 371-F as a law made under Article 2 of the Constitution or introduced by way of

A amendment under Article 368. In either event, it will be subject to the limitation that it cannot alter any of the basic features of the Constitution. The scope of the power conferred by Article 371-F, is therefore, subject to judicial review. So also is the law that is enacted to give effect to the provisions contained in Article 371-F. [1005E-H]

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Baker v. *Carr,* 1962 (369) U.S. 186 and *Powell* v. *McCormack,* 395 U.S. 490, referred to.

A.K. Roy v. *Union of India,* [1982] 2 S.C.R. 272; *Madhav Rao* v. *Union of India,* [1971] 3 S.C.R. 9; *State of Rajasthan* v. *Union of India,*
C [1978] 1 S.C.R. 1; *S.P. Gupta* v. *Union of India,* [1982] 2 S.C.R. 365 and *Mrs. Sarojini Ramaswami* v. *Union of India & Ors.,* Writ Petition (Civil) No. 514 of 1992 decided on August 27, 1992, referred to.

2. It is not doubt true that is the matter of admission of a new State
D in the Indian Union, Article 2 gives considerable freedom to Parliament to prescribe the terms and conditions on which the new State is being admitted in the Indian Union. But at the same time, it cannot be said that the said freedom is without any constitutional limitation. The power conferred on Parliament under Article 2 is circumscribed by the overall constitutional scheme and Parliament, while prescribing the terms and
E conditions on which a new State is admitted in the Indian Union, has to act within the said scheme. Parliament cannot admit a new State into the Indian Union on terms and conditions which derogate from the basic features of the Constitution. To hold otherwise would mean that it would be permissible for Parliament to admit to the Union new States on terms
F and conditions enabling those State to be governed under systems which are inconsistent with the scheme of the Constitution and thereby alter the basic features of the Constitution. It would lead to the anomalous result that by an ordinary law enacted by Parliament under Article 2 it would be possible to bring about a change which cannot be made even by exercise of the constituent power to amend to the Constitution, viz., to alter any of
G the basic features of the Constitution. The words 'as it thinks fit' in Article 2 of the Constitution cannot, therefore, be construed as empowering Parliament to provide terms and conditions for admission of a new State which are inconsistent with the basic features of the Constitution. The said words can only mean that within the framework of the Constitution,
H it is permissible for Parliament to prescribe terms and conditions on

new State is admitted in the Union. [1003G-H, 1004A, C-E] A

Mangal Singh v. *Union of India,* [1967] 2 S.C.R. 109, referred to.

R.D. Lumb, *The Constitution of Commonwealth of Australia,* (1986) 4th Edn. p. 736, referred to. B

3. There is no doubt that the *non-obstante* clause in a statute gives overriding effect to the provisions covered by the *non-obstante* clause over the other provisions in the statute to which it applies and in that sense, the *non-obstante* clause used in Article 371-F would give overriding effect to clauses (a) to (p) of Article 371-F over other provisions of the Constitution. C But at the same time, it cannot be ignored that the scope of the *non-obstante* clauses in 371-F cannot extend beyond the scope of the legislative power of Parliament under Article 2 or the amending power under Article 368. Therefore, the *non-obstante* clause has to be so construed as to conform to the aforesaid limitation or otherwise Article 371-F would be rendered unconstitutional. A construction which leads to such a D consequence has to be eschewed. Thus as a result of the *non-obstante* clause in Article 371-F, clauses (a) to (p) of the said Article have to be construed to permit a departure from other provisions of the constitution in respect of the matters covered by clauses (a) to (p) provided the said departure is not of such a magnitude as to have the effect of altering any of the basic E features of the Constitution. [1006B-G]

4. It cannot be said that Article 371-F contains a political element in the sense that it seeks to give effect to a political agreement relating to admission of Sikkim into the Indian Union. [1003D] F

Per L.M. Sharma, CJ. (Concurring)

1. The courts are not only vested with the jurisdiction to consider and decide the points raised in these writ petitions, but are under a duty to do so. If steps are taken to grant legitimacy to a state of affairs repulsive G to the basic features of our Constitution, the Courts are under a duty to judicially examine the matter. [925C, H]

2. There is a vital difference between the initial acquisition of additonal territory and the admission of the same as a full-fledged State of the Union of India similar to the other States. [921G] H

A 3. Special provisions for any State can certainly be made by an amendment of the Constitution, as is evident by Article 371A, 371B, 371C at cetera, but it is not permissible to do so in derogation of the basic features of the Constitution. So far the power of sovereignty to acquire new territories is concerned, there cannot be any dispute. The power is inherent, it was, therefore, not considered necessary to mention it in express terms in the Con-
B stitution. It is also true that if an acquisition of new territories is made by a treaty or under an agreement the terms of the same will be beyond the scrutiny of the courts. The position, however, is entirely different when new territory is made part of India, by giving it the same status as is enjoyed by an existing State under the Constitution of India. The process of such a
C merger has to be under the Constitution. No other different process adopted can achieve this result. And when this exercise is undertaken, there is no option, but to adopt the procedure as prescribed in conformity with the Constitution. At this stage the Court's jurisdiction to examine the validity of the adopted methodology cannot be excluded. [921H, 922A-C]

D 4. So far the present case is concerned the decision does not admit of any doubt that when the Thirty-Sixth Amendment of the Constitution was made under which Sikkim joined India as a full-fledged State like other States, power of amendment of the Constitution was invoked, and this had to be done only consistent with the basic features of the Constitu-
E tion. Sikkim became as much a State as any other. Considered in this background, the objection to the maintainability of the writ petitions cannot be upheld. [922D, H, 923A]

Mangal Singh & Anr. v. *Union of India,* [1967] 2 S.C.R. 109, referred to.

F 5. It is true that in case of acquisition Article 2 comes into play but that is only at the initial stage when the new territory joins and becomes the territory of India under Article 1(3)(c). In the present case the power under Article 2 was not exercised at any point of time. Initially, Sikkim joined India as an Associate State by Article 2A introduced in the Con-
G stitution by an amendment. When further steps of its complete merger with India were taken, the methodology under Article 3 was not available in view of the observations in *Berubari* case. Correctly assessing the situation, fresh steps for amendment of the Constitution once more were taken and Sikkim was granted the status of a full Statehood at par with the other
H States by the Thirty-Sixth Amendment of the Constitution. Once this

was done it had to be consistent with the basic features of the Constitution. [924E-G] A

The Berubari Union and Exchange of Enclaves, [1960] 3 S.C.R. 250, relied on.

Quaere (ii) Whether the impugned provisions providing for reservation of Sangha seat with provision for separate electoral roll and Sangha constituency are unconstitutional? B

Per M.N. Venkatachaliah (For himself, J.S. Verma and K.J. Reddy, JJ.). C

1. A separate electorate for a religious denomination would be obnoxious to the fundamental principles of our secular Constitution. If a provision is made purely on the basis of religious considerations for election of a member of that religious group on the basis of a separate electorate, that would, indeed, be wholly unconstitutional. But in the case of the Sangha, it is not merely a religious institution. The literature on the history of development of the political institutions of Sikkim tend to show that the Sangha had played an important role in the political and social life of the Sikkimese people. It had made its own contribution to the Sikkimese culture and political development. Thus, there is material to sustain the conclusion that the 'Sangha' had long been associated itself closely with the political developments of Sikkim and was inter-woven with the social and political life of its people. In view of this historical association, the provisions in the matter of reservation of a seat for the Sangha recognises the social and political role of the institution more than its purely religious identity. The provision can be sustained on this construction. [989C-H, 990A] D E F

2. In the historical setting of Sikkim and its social and political evolution the provision has to be construed really as not invoking the impermissible idea of a separate electorate either. Indeed, the provision bears comparison to Article 333 providing for representation for the Anglo-Indian community. It is to be looked at as enabling a nomination but the choice of the nominee being left to the 'Sangha' itself. [989E-F] G

Per S.C. Agrawal, J. (Dissenting)

1. The impugned provision providing for a separate electoral roll for H

A Sangha Constituency contravenes Article 325 and reservation of one seat for Sanghas contravenes Article 15(1). Article 371-F does not permit a departure from the principle contained in Articles 325 and 15(1) while applying the Constitution to the newly admitted State of Sikkim. Clause (f) of Article 371-F, cannot be construed to permit reservation of a seat for Sanghas and election to that seat on the basis of a separate electoral roll composed of Sanghas only. Consequently, clause (c) of sub-section (1-A) of Section 7 and Section 25-A of the 1950 Act and the words 'other than constituency reserved for Sanghas' in clause (a) of sub-section (2) of Section 5-A and clause (c) of sub-section (2) of Section 5-A of the 1951 Act are violative of the provisions of Articles 15(1) and 325 of the Constitution and are not saved by Article 371-F of the Constitution. The said provisions, are however, severable from the other provisions which have been inserted in the 1950 Act and the 1951 Act by the 1976 Act and the 1980 Act and the striking down of the impugned provisions does not stand in the way of giving to the other provisions. [1023H, 1024A-B, D-E]

2. Since only a Buddhist can be a Sangha, the effect of the reservation of a seat for Sanghas and the provision for special electoral roll for the Sangha Constitutency wherein only Sanghas are entitled to be registered as electors, is that a person who is not a Buddhist cannot contest the said reserved seat and he is being discriminated on the ground only of religion. Similarly, a person who is not a Buddhist is rendered ineligible to be included in the electoral roll for Sangha Constituency on the ground only of religion. The historical considerations do not justify this discrimination. [1018E-G]

2.1. The reservation of one seat for Sanghas in Sikkim Council and subsequently in the Sikkim Assembly was in the context of the administrative set up in Sikkim at that time wherein Sanghas were playing a major part in the taking of decisions in the Council. The said reason does not survive after the admission of Sikkim as a new State in the Indian Union. The continuation of a practice which prevailed in Sikkim with regard to reservation of one seat for Sanghas and the election to the said seat on the basis of a special electoral college composed of Sanghas alone cannot, therefore, be justified on the basis of historical considerations and the impugned provisions are violative of the Constitutional mandate contained in Article 15(1) and Article 325 of the Constitution. [1019D-E]

Nain Sukh Das and Anr. v. *The State of Uttar Pardesh and Ors.*, [1953] S.C.R. 1184; *Punjab Province* v. *Daulat Singh and Ors.*, 1946 F.C.R. 1; *State of Bombay* v. *Bombay Education Society and Ors.*, [1955] 1 S.C.R. 568 and *The State of Madras* v. *Srimathi Champakam Dorairajan*, [1951] S.C.R. 525, relied on.

3. In so far as clause (1) of Article 15 is concerned express provision has been made in clauses (3) and (4) empowering the State to make special provisions for certain classes of persons. Sanghas, as such, do not fall within the ambit of clauses (3) and (4) of Article 15 and therefore, a special provision in their favour, in derogation of clause (1) of Article 15 is not permissible. [1020C]

4. Article 325 is of crucial significance for maintaining the secular character of the Constitution. Any contravention of the said provision cannot but have an adverse impact on the secular character of the Republic which is one of the basic features of the Constitution. The same is true with regard to the provisions of clause (1) of Article 15 which prohibits reservation of seats in the legislatures on the ground only of religion. [1023A-B]

Smt. Indira Gandhi v. *Raj Narain*, [1976] 2 S.C.R. 347 and *Kesavananda Bharati* v. *State of Kerala*, [1973] Supp. S.C.R. 1, referred to.

5. It is no doubt true that the impugned provisions, relate to only one seat out of 32 seats in the Legislative Assembly of Sikkim. But the potentialities of mischief resulting from such provisions cannot be minimised. The existence of such provisions is bound to give rise to similar demands by followers of other religions and revival of the demand for reservation of seats on religious grounds and for separate electorates which was emphatically rejected by the Constituent Assembly. It is poison which, if not eradicated from the system at the earliest, is bound to eat into the vitals of the nation. It is, therefore, imperative that such provision should not find place in the statute book so that further mischief is prevented and the secular character of the Republic is protected and preserved. [1023C-E]

Kedar Nath Bajoria v. *The State of West Bengal*, [1954] 5 S.C.R. 30, referred to.

A Shiva Rao, *Framing of India's Constitution, Select Documents,* Vol.II, p.412 and *Constituent Assembly Debates,* Vol. V. p. 202, 224, 225, referred to.

Per L.M. Sharma, CJ. (Dissenting)

B 1. The provisions of Section 25A of the Representation of the People Act, 1950 are *ultra vires* the Constitution. The provisions of Section 7(1A)(c) and the other connected amendments are also *ultra vires* the Constitution. [941B, 935G]

C The Buddhist Monasteries, which are the beneficiaries of the reservation, are admittedly religious institutions. If the entire Constitution is considered harmoniously along with all the other materials, relevant in law for this purpose inluding the 'Enacting History', there is no escape from the conclusion that any weightage at the poll in favour of a group on the ground of religion is strictly prohibited and further, that this is a basic D feature, which is not amenable to amendment. [931D, 935G]

B.K. Mukherjee, *Hindu Law of Religious and Charitable Trust;* George Kotturan, *The Himalayan Gateway;* J.C. White, *Sikkim and Bhutan - Twenty One Years on the North-East Frontier 1887-1908;* J.S. Lall, *The* E *Himalaya - Aspects of change, 1981;* Geoffrey Georer, *Himalayan Village and* A.C. Sinha, *Politics of Sikkim - A Sociological Study,* referred to.

3. If the Constitution is so interpreted as to permit, by an amendment a seat to be reserved in the legislature for a group of religious institutions like the Buddhist Monasteries, it will follow that such a F reservation would be permissible for institutions belonging to other religions also. And all this may ultimately change the very complexion of the legislatures. The effect that only one seat has been reserved today for the Monasteries in Sikkim is the thin edge of the wedge which has the potentiality, to tear apart, in the course of time, the very foundation, which the democratic republic is built-upon. All this is prohibited as being G abhorrent to the basic features of the Constitution. [932H, 933A-D]

3.1. Today a single seat in the legislature of one State is not conspicuously noticeable and may not by itself be capable of causing irreparable damage, but this seed of discord has the potentiality of developing H into a deadly monster. It is true that some special rights have been envisaged

in the Constitution for handicapped classes but this has been done only to offset the disadvantage the classes suffer from, and not for bringing another kind of imbalance by making virtue out of minority Status. The Constitution, therefore, has taken precaution to place rigid limitations on the extent to which this weightage can be granted, by including express provisions instead of leaving the matter to be dealt with by subsequent enactments - limitations both by putting a ceiling on the reservation of seats in the legislatures and excluding religion as the basis of discrimination. To ignore these limitations is to encourage small groups and classes - which are in good number in our country on one basis or the other - to stick to and rely on their special status as members of separate groups and classes and not to join the main-stream of the nation and be identified as Indians. It is, therefore, absolutely essential that religion, disguised by any mask and concealed within any cloak must be kept out of the field exclusively reserved for the exercise of the State powers. [955D-H]

4. There is also another serious flaw in the reservation for the Sangha rendering the same to be unconstitutional. By the impugned provisions of the 1950 Act, a special electorate has been created for this seat which is highly abhorrent to the fundamental tenets of the Constitution. [935H, 936A]

4.1. From the entire scheme of the Constitution, it is clear that its basic philosophy eloquently rejects the concept of separate electorate in India. This conclusion is reinforced by the historical background, the delebrations of the Advisory Committee, and the discussion which took place in the Constituent Assembly before giving final shape to the Constitution. There is no reason for assuming that while inserting Article 371 F(f) in the Constitution there was a complete reversal of faith on this basic and vital matter, which was otherwise also not permissible. It follows that consistent with the intention of the rest of the Constitution the provision regarding the delimitation of the Assembly constituencies in Article 371 F(f) has to be interpreted in the same sense, as the expression has been used in the other provisions. Clause (f) of Article 371F neither by its plain language nor intendment permits separate electorates and any attempt to give a different construction would not only be highly artificial and speculative but also would be violative of a basic feature of the Constitution. [940G-H, 941A]

B. Shiva Rao's *Framing of Indian Constitution,* Vol. II, pp. 56-57, 392,

412, referred to.

Constituent Assembly Debates, Vol. V, P.225, 224, 202, referred to.

5. There is no parallel between the nominations permitted by the Constitution to be made in the legislatures and the creation of a separate electorates for the Sangha. After the establishment of a democratic government at every level in the country in one form or the other, nomination under the Constitution amounts to exercise of a power to induct a member in the legislature by an authority, who ultimately represents the people, although the process of the representation may be a little involved. So far a handful of the Buddhist Monasteries in Sikkim are concerned, they cannot be said to represent the people of Sikkim in any sense of the term. Allotting a seat in the legislature to represent these religious institutions is bad enough by itself; and then, to compound it by vesting the exclusive right in them to elect their representative to occupy the reserved seat is to aggravate the evil. This cannot be compared with any of the provisions in the Constitution relating to nominations. [940D-F]

Quaere (iii) Whether the impugned provisions providing for reservation of twelve seats in favour of Bhutia-Lepchas are unconstitutional?

Per M.N. Venkatachaliah (For himself, J.S. Verma and K.J. Reddy, JJ.).

1. Article 371F(f) cannot be said to violate any basic feature of the Constitution such as the democratic principle. [986C]

1.1. The provisions of clauses (f) of Article 371 F and the consequent changes in the electoral laws were intended to recognise and accommodate the pace of the growth of the political institutions of Sikkim and to make the transition gradual and peaceful and to prevent dominance of one section of the population over another on the basis of ethnic loyalties and identities. These adjustments and accommodations reflect a political expediencies for the maintenance of social equilibrium. Indeed, the impugned provisions, in their very nature, contemplate and provide for a transitional phase in the political evolution of Sikkim and are thereby essentially transitional in character. The impugned provisions have been found in the wisdom of Parliament necessary in the admission of a new State into the Union. The departures are not such as to negate fundamental principles of democracy. Thus, the provisions in the particular situa-

tion and the permissible latitudes, cannot be said to be unconstitutional. A
[986E-H, 987H, 988A, H]

1.2. It is true that the reservation of seats of the kind and the extent brought about by the impugned provisions may not, if applied to the existing States of the Union, pass the Constitutional muster. But in relation to a new territory admitted to the Union, the terms and conditions B are not such as to fall outside the permissible constitutional limits. Historical considerations and compulsions do justify inequality and special treatment. [987A-B]

Lachhman Dass etc. v. *State of Punjab & Ors.*, A.I.R. 1963 S.C. 222 C and *State of Madhya Pradesh* v. *Bhopal Sugar Industries Ltd.*, [1964] 6 S.C.R. 846, referred to.

2. An examination of the constitutional scheme would indicate that the concept of 'one person one vote' is in its very nature considerably tolerant of imbalances and departures from a very strict application and D enforcement. The provision in the Constitution indicating proportionality of representation is necessarily a broad, general and logical principle but not intended to be expressed with arithmetical precision. The principle of mathematical proportionality of representation is not a declared basic requirement in each and every part of the territory of India. The systemic E deficiencies in the plenitude of the doctrine of full and effective representation has not been understood in the constitutional philosophy as derogating from the democratic principle. The inequalities in representation in the present case are an inheritance and compulsion from the past. Historical considerations have justified a differential treatment.
[985G-H, 986A-B] F

Reynolds v. *Sims*, 377 U.S. 506 and *Attorney General (CTH) Ex. Rei. Mckinlay* v. *The Commonwealth*, 135 C.L.R. (1975) 1, referred to.

2.1. Article 170 incorporates the rule of 'fair and effective representation'. Though the rule 'one person one vote' is a broad principle of G democracy, it is more a declaration of a political ideal than a mandate for enforcement with arithmetical accuracy. These are the usual problems that arise in the delimitation of constituencies. In what is called "First-past- the-post" system of elections, the variations in the size and in the voting populations of different constituencies, detract from a strict H

A **achievement of this ideal. The system has the merit of preponderance of "decisiveness" over "representativeness". [976E-F]**

Keith Graham, *The Battle of Democracy: Conflict, Consensus and the Individual,* **referred to.**

B **2.2. The concept of political equality underlying a democratic system is a political value. Perfect political equality is only ideological. [977D]**

Rodney Brazier, *Constitutional Reform: Re-shaping the British Political System,* **referred to.**

C **Brazier,** *Constitutional Practice* **(Clarendon Press Oxford), referred to.**

Lijphart, *Democracy in Plural Societies'* **Howard D. Hamilton,** *Legislative Appointment: Key to Power;* **Gordon E. Baker,** *One Person, One Vote: Fair and Effective Representation?* **(Representation and Misrepresentation**
D **- Rand McNally & Co. Chicago), referred to.**

3. The contention that clause (f) of Article 371 F would require that whichever provisions for reservation of seats are considered necessary for the purpose of protecting the rights and interests of different sections of
E **the population of Sikkim, such reservations are to be made for all such sections and not, as here, for one of them alone ignores that the provision in clause (f) of Article 371 F is merley enabling. If reservation is made by Parliament for only one section it must, by implication, be construed to have exercised the power respecting the other sections in a negational sense. The provision really enables resrvation confined only to a**
F **particular section. [988B-C]**

4. Clause (f) of Article 371 F is intended to enable, a departure from Article 332(2). This is the clear operational effect of the *non obstante* **clause with which Article 371 F opens. [988F]**

G **5. Mere existence of a Constitution, by itself, does not ensure constitutionalism or a constitutional culture. It is the political maturity and traditions of a people that import meaning to a Constitution which otherwise merely embodies political hopes and ideals. [986E]**

H *Per S.C. Agrawal, J. (Concurring)*

1. Clause (a) of sub-section (1-A) of Section 7 of the 1950 Act which provides for reservation of 12 seats in an Assembly having 32 seats for Sikkimese of Bhutia-Lepcha origin does not transgress the limits of the power conferred on Parliament under Article 371 F(f) and it cannot be said that it suffers from the vice of unconstitutionality. [1014E]

2. The reservation of seats for Bhutias and Lepchas is necessary because they constitute a minority and in the absence of reservation they may not have any representation in the Legislative Assembly. Sikkimese of Nepali origin constitute the majority in Sikkim and on their own electoral strength they can secure representation in the Legislative Assembly against the unreserved seats. Moreover, Sikkimese of Bhutia and Lepcha origin have a distinct culture and tradition which is different from that of Sikkimese of Nepali origin. Keeping this distinction in mind Bhutias and Lepchas have been declared as Scheduled Tribes under Article 342 of the Constitution. The Constitution in Article 332 makes express provision for reservation of seats in the Legislative Assembly, of a State for Scheduled Tribes. Such a reservation which is experessly permitted by the Constitution cannot be challenged on the ground of denial of right to equality guaranteed under Article 14 of the Constitution. [1008B-D]

3. Clause (3) of Article 332 has to be considered in the light of clause (f) of Article 371-F. The non-obstante clause in Article 371-F enables Parliament to make a departure from the ratio contemplated by Article 332(3) within the limitation which is inherent in the power conferred by Article 371-F, i.e., not to alter any of the basic features of the Constitution. [1008E-F, 1009B]

3.1. By providing for reservation to the extent of 38% of seats in the Legislative Assembly for Sikkimese of Bhutia-Lepcha origin Parliament has sought to strike a balance between protection of the extent of 50% that was available to them in the former State of Sikkim and the protection envisaged under Article 332 (3) of the Constitution which would have entitled them to reservation to the extent of 25% seats in accordance with the proportion of their population to the total population of Sikkim. [1010C-D]

4. The principle of one man, one vote envisages that there should be parity in the value of votes of electors. Such a parity though ideal for a representative democracy is difficult to achieve. There is some departure in every system following this democratic path. In the matter of delimitation of

A constituencies, it often happens that the population of the one constituency differs from that of the other constituency and as a result although both the constituencies elect one member, the value of the vote of the elector in the constituency having lesser population is more than the value of the vote of the elector of the constituency having a larger population. [1010G-H, 1011A]

B *Reynolds* v. *Sims,* (1964) 377 U.S. 533; *Mahan* v. *Howell,* 410 U.S. 315 and *Attorney General (CTH) Ex. Rel. Mckinlay* v. *The Commonwealth,* 135 C.L.R. [1975] 1, referred to.

H.W.R. Wade: *Constitutional Fundamentals, The Hamlyn Lectures,*
C 32nd Series, 1980, p.5, referred to.

4.1. Provisions of Delimitation Act, 1962 show that population, though important, is only one of the factors that has to be taken into account while delimiting constituencies which means that there need not be uniformity of population and electoral strength in the matter of delimitation of constituen-
D cies. In other words, there is no insistence on strict adherence to equality of votes or to the principle one vote-one value. [1013H, 1014A]

4.2. The words "as nearly as may be" in clause (3) of Article 332 indicate that even in the matter of reservation of seats for Scheduled Castes and Scheduled Tribes it would be permissible to have deviation to
E some extent from the requirement that number of seats reserved for Scheduled Castes or the Scheduled Tribes in the Legislative Assembly of any State shall bear the same proportion to the total number of seats as the population of the Scheduled Castes or the Scheduled Tribes in the State in respect of which seats are so reserved, bears to the total popula-
F tion of the state. The *non-obstante* clause in Article 371-F read with clause (f) of the said Article enlarges the field of deviation in the matter of reservation of seats from the proportion laid down in Article 332 (3). The only limitation on such deviation is that it must not be to such an extent as to result in tilting the balance in favour of the Scheduled Castes or the
G Scheduled Tribes for whom the seats are reserved and thereby convert a minority into majority. This would adversely affect the democratic functioning of the legislature in the State which is the core of representative domocracy. [1014B-D]

4.3. The non-obstante clause in Article 371-F when read with clause (f)
H of Article 371-F envisages that Parliament may, while protecting the rights

and interests of the different sections of the population of Sikkim deviate from the provisions of the Constitution, including Article 332. [1010F] A

5. In view of the vast differences in their numbers the Sikkimese of Nepali origin can have no apprechension about their rights and interests being jeopardised on account of reservation of 12 seats for Sikkimese of Bhutia-Lepcha origin in the Legislative Assembly composed of 32 seats. Therefore, it cannot be said that reservation of seats for Sikkimese of Nepali origin was required in order to protect their rights and interests and in not making any provision for reservation of seats for Sikkimese of Nepali origin Parliament has failed to give effect to the provisions of clause (f) Article 371-F of the Constitution. [1025E-H] B C

Per L.M. Sharma, CJ. (Dissenting)

1. The impugned provisions are *ultra vires* the Constitution including Article 371F(f). [954E]

D

2. The problem of Bhutia-Lepcha Tribe is identical to that of the other Tribes of several States where they are greatly out-numbered by the general population, and which has been effectively dealt with by the provisions for reservation in their favour included in Part XVI of the Constitution. It cannot be justifiably suggested that by subjecting the provisions of the reservations to the limitations in clause (3) of Article 332, the Tribes in India have been left unprotected at the mercy of the overwhelming majority of the general population. The reservations in Part XVI were considered adequate protection to them. Therefore, adequate safeguard in favour of the Bhutia-Lepchas was already available under the Constitution and all that was required was to treat them as Tribes like the other Tribes which was done by a Presidential Order issued under Article 342. Therefore, the object of clause (f) was not to take care of this problem and it did not authorise the Parliament to pass the Amendment (Act 8 of 1980) inserting Section 7(1A) (a) in the Representation of the People Act, 1950 and Section 5A in the Representation of the People Act, 1951 and other related amendments. They being violative of the Constitutional provisions including those in Article 371F (f) are *ultra vires*. [948F-H, 949A-C] E F G

3. Clause (f) permits the Parliament to take only such steps which would be consistent with the provisions of the Constitution coming from before, so that Sikkim could completely merge with India and be placed at H

A par with the other States. This conclusion is irresistible if the facts and circumstances which led to the ultimate marger of Sikkim in India are kept in mind. If clause (f) of Article 371F is so construed as to authorise the Parliament to enact the impugned provisions it will be violative of the basic features of the Constitution and, therefore, void. [946E-F, 953C]

B 3.1. The choice of the candidate and the right to stand as a candidate at the election are inherent in the principle of adult suffrage, that is, one-man-one-vote. By telling the people that they have a choice to elect any of a select group cannot be treated as a free choice of the candidate. This will only amount to lip service, too thinly veiled to conceal the reality of an oligarchy
C underneath. It will be just an apology for democracy; a subterfuge; and if it is permitted to cross the limit so as to violate the very core of the *principle of one-man-one- vote,* and is not controlled by the constitutional safeguards as included in clause (3) of Article 332 of the Constitution it will amount to a huge fraud perpetrated against the people. [950E-G]

D 3.2. The very purpose of providing reservation in favour of a weaker class is to aid the elemental principle of democracy based on one-man-one-vote to succeed. The disproportionately excessive reservation creates a privileged class, not brought to the same plane with others but put on a higher pedestal, causing unhealthy competition, creating hatred and dis-
E trust between classes and fostering devisive forces. [950H, 951A]

3.3. The unequal apportionment of the role in the polity of the country assigned to different groups tends to foster unhealthy rivalry impairing the mutual feeling of goodwill and fellowship amongst the people, and encouraging divisive forces. [955B]

F

3.4. As explained by the Preamble the quality of democracy envisaged by the Constitution does not only secure the equality of opportunity but of status as well, to all the citizens. This equality principle is clearly brought out in several Articles in the different parts of the Constitution, including Part XVI having special provisions relating to certain
G classes. The sole objective of providing for reservations in the Constitution is to put the principle of equal status to work. So far the case of inadequate representation of a backward class in State services is concerned, the problem is not susceptible to be solved in one stroke; and consequently the relevant provisions are kept flexible permitting wider
H discretion so as to attain the goal of adequate proportionate repre-

sentation. The situation in respect to representation in the legislature is entirely different. As soon as an election takes place in accordance with the provisions for proportionate representation, the objective is achieved immediately, because there is no problem of backlog to be tackled. On the earlier legislature disappearing, paving the way for new election, the people get a clean slate before them. The excessive reservation in this situation will bring in an imbalance - of course of another kind - but defeating the cause of equal status all the same. The pendulum does not stand straight - it swings to the other side. The casualty in both cases is the equality clause. Both situations defeat the very object for which the democratic forces waged the war of independence; and they undo what has been achieved by the Constitution. This is clearly violative of the basic features of the Constitution. [952B, F-H, 953A-B]

4. A perusal of the Agreement dated 8th May, 1973 clearly indicates that the spirit of the Indian Constitution pervaded through out the entire Agreement and the terms thereof were drafted respecting the main principles embodied in our Constitution. It must, therefore, be held that an interpretation cannot be given to the Agreement which will render it as deviating from the constitutional pattern of the Indian Constitution.

[945A-B]

CIVIL ORIGINAL JURISDICTION : Transfer Case (C) No. 78 of 982 etc. etc.

(Under Article 139A of the Constitution of India.)

Vepa Sharathy, Attorney General, G. Ramaswamy, Additional Solicitor General, R.K. Jain, B.N. Bhat, K. Lahiri, K. Parasaran, A.K. Ganguli, F.S. Nariman, Uday Lalit, A.C. Manoj Goel, K.M.K. Nair, Kailash Vasudev, Sudhir Walia, Mohit Mathur, Ms. A. Subhashini, K. Swamy, T. Topgay, Rathin Das, Ajit Kumar Sinha, S.C. Sharma, Amlan Ghosh, Ms. J.S. Wad, Mayakrishnan, D.P. Mukherjee, G.S. Chatterjee, and K. N. Bhat for the appearing Parties.

The Judgments of the Court were delivered by

SHARMA, CJ. The two constitutional questions of vital importance which arise in this case are : (i) whether a seat can be earmarked at all in the Legislature of a State after its complete merger in India for a repre-

A sentative of a group of religious institutions to be elected by them, and (ii) whether seats can be reserved in favour of a particular tribe far in excess of its population. My answer to both the questions is in the negative.

2. These cases relate to the constitution of Legislative Assembly of Sikkim which merged with India in 1975. They were instituted as writ petitions under Article 226 of the Constitution before the Sikkim High Court and have been later transferred to this court. The main case being Writ Petition No. 4 of 1980 registered as Transfer Case No. 78 of 1982 after transfer to this Court was filed by the petitioner R.C. Poudyal in person and he was conducting this case himself, and will be referred to as the petitioner or the writ petitioner in this judgment. During the course of the hearing of the case, Mr. R.K. Jain assisted the Court as amicus curiae and pressed the writ petition on his behalf. Transfer Case No. 84 of 1982 was filed by Somnath Poudyal as Writ Petition No. 12 of 1980 in the High Court, taking a similar stand as in writ petition No. 4 of 1980. The third case being Writ Petition No. 15 of 1990 filed by Nandu Thapa, also challenging the impugned reservations, is Transfer Case No. 93 of 1991. During the hearing, however, the stand taken by his counsel, Mr. K.N. Bhat was substantially different from the case of the main writ petitioner, and he lent support to some of the arguments of the contesting respondents. The case in Writ Petition No. 16 of 1990 of the High Court (Transfer Case No. 94 of 1991 here) is similar to that in Transfer Case No. 93 of 1991. The writ petition has been defended mainly by the State of Sikkim, represented by Mr. K. Parasaran, Union of India appearing through Mr. Attorney General and by Mr. F. S. Nariman on behalf of certain other parties.

3. The relevant provisions relating to the impugned reservations are those as included in the Representation of the People Acts, 1950 and 1951, by the Representation of the People (Amendment) Act, 1980 (Act 8 of 1980) purportedly made by virtue of Article 371F(f), inserted in the Constitution in 1975 by the Constitution (Thirty-Sixth Amendment) Act, 1975 and consequential amendments in the Delimitation of Parliamentary and Assembly Constituencies Order, 1976. The writ petitioner contends that the impugned provisions of the Representation of the People Acts are *ultra vires* of the Constitution and cannot be saved by Article 371F(f). Alternatively it has been argued that if the provisions of Article 371F(f) are interpreted as suggested on behalf of the respondents, the same would be violative of the basic features of the Constitution and would, therefore, itself be rendered invalid. Another line which was pursued during the argument was that assuming the inter-

pretation of the Act and the Constitution as put by the respondents is correct, still the circumstances do not justify the impugned reservations in the Assembly which are, therefore, fit to be struck down. A

4. The case of the respondents who are challenging the stand of the writ petitioner, is that the constitutional amendment bringing in Article 371F(f), as also the relevant amended provisions of the Representation of the People Acts are legal and valid, and having regard to all the relevant circumstances in which Sikkim became a part of the Indian Union the writ petition of the petitioner is fit to be dismissed. B

5. For appreciating the points arising in the case and the arguments addressed on behalf of the parties it will be necessary to briefly consider the historical background of and the constitutional position in Sikkim before and after its merger with India. Sikkim, during the British days, was a princely State under a hereditary monarch called Chogyal, subject to British paramountcy. The Chogyal, also described as Maharaja, was a member of the chamber of Princes entitled to gun salute of 15. The provisions of the Government of India Act, 1935 were applicable and Sikkim thus did not have any attribute of sovereignty of its own. On the independence of India in 1947 there was a public demand in Sikkim for merger with India which was resisted by the Rulers. The statements made in paragraph 3 (v) in the counter affidavit of the Union of India, respondent No. 1, sworn by the Deputy Secretary, Ministry of Home Affairs, is illuminating. It has been *inter alia* said that there was a strong and clearly expressed sentiment on the part of the people of Sikkim favouring closer relations with India and growth of *genuine democratic institutions which led* to large scale agitations demanding merger with India. However, the Government of India did not favour an immediate change in Sikkim's status, and, therefore, only a treaty was entered into between Sikkim and the Government of India whereunder the latter assumed the responsibility with respect to the defence, external affairs and communication of Sikkim on the terms detailed in the document dated 3.12.1950. Chogyal, thereafter, took several steps towards sharing his power with the people by providing for elections, which will be dealt with later. The public demand developed into violent demonstrations leading to complete breakdown of law and order, which forced the then Chogyal to request the Government of India to assume the responsibility for establishment of law and order and good administration in Sikkim. Ultimately a formal agreement was signed on May 8, 1973 to which the Government of India, the then C D E F G H

A Chogyal and the leaders of the political parties representing the people of Sikkim, were parties. I will have to refer to this agreement in greater detail later but it will be useful even at this stage to see one of the clauses of the Agreement which reads as follows :-

B

> "(1) The three parties hereby recognize and undertake to ensure the basic human rights and fundamental freedoms of the people of Sikkim. The people of Sikkim will enjoy the right of election *on the basis of adult suffrage* to give effect to the principles of *one man one vote.*"

C

(emphasis added)

6. The population of Sikkim has been constituted mainly by three ethnic groups known as Lepchas, Bhutias and Nepalis. People from India also have been going to and settling in Sikkim but their number was small D before 1973. Although the population of Nepalis has been far larger than the Lepchas and the Bhutias, their influence in the polity was considerably less as Chogyal was a Bhutia and with a view to perpetuate his hold, there was a consistent policy for uniting Lepchas and Bhutias as against the rest. On the lapse of British paramountcy and in its place the substitution of the protectorate of India, Chogyal in an attempt to assuage the public sentiment, issued E a Proclamation providing for establishment of a State Council of 12 members, allocating 6 seats to Bhutia and Lepchas and 6 to Nepalis, all to be elected by the voters divided in 4 territorial constituencies. Only after a few months a second Proclamation followed on March 23, 1953, adding seats for 6 more members with one of them as President of the Council to be F nominated by the Maharaja, i.e., Chogyal. Thus the total number rose to 18. Maharaja, however, reserved his right to veto any decision by the Council and to substitute it by his own. Another Proclamation which was issued in 1957 again maintained the parity of 6 seats each for Bhutia-Lepchas and Nepalis. By a further Proclamation dated 16.3.1958, there was an addition of 2 more seats to the Council, one described as Sangha seat earmarked for religious G Budhist Monasteries run by Monks who are Lamas, and another declared as general seat. Thus, for the first time in 1958 Chogyal, by creating a general seat took note of the presence of the immigrants who were neither Bhutia-Lepchas nor Nepalis and were mostly Indians. He also introduced the Lamas in the Council as he was sure of their support for him, as will be seen later. H Appended to the Proclamation, there was a Note of the Private Secretary to

the Chogyal which has been referred to by the respondents in their arguments in support of the impugned reservations. The Note is in three sub-paras dealing with the Sangha seat, the general seat and the question of parity between the Bhutia-Lepchas and the Nepalis. It has been mentioned in the first sub-para (a) that the Sangha constituted a vital and important role in the life of the community in Sikkim and had played a major part in taking of decisions by the Councils in the past. In sub-para (b) it has been stated that the political parties have been demanding one-third of the total seats in the Council to be made available to all persons having fixed habitation in Sikkim although not belonging to any of the categories of Bhutias-Lepchas and Nepalis, and the Maharaja by a partial concession had allowed one seat for the general people. The last sub-para declares the desire of the Maharaja that the Government of Sikkim should be carried on equally by the two groups of the Bhutia-Lepchas and Nepalis, without one community imposing itself or encroaching upon the other.

7. By a later Proclamation dated December 21, 1966 the Sikkim Council was reconstituted with a total number of 24 members, out of whom 14 were to be elected from 5 territorial constituencies, reserving 7 seats for Bhutia-Lepchas and 7 seats for Nepalis; one by the Scheduled Castes, one by the Tsongs, and one was to be treated as a general seat. The Sangha seat was maintained, to be filled up by election through an electoral College of the Sanghas and the remaining 6 seats to be nominated by the Chogyal as before. It appears that it was followed by another similar Proclamation in 1969, which has not been placed before us by the parties.

8. In spite of the establishment of the Sikkim Council, the ultimate power to govern remained concentrated in the hands of Chogyal, who besides having the right to nominate 6 members in the Council, reserved to himself the authority to veto as also of taking final decision in any matter. The people could not be satisfied with this arrangement, and as said earlier, there was widespread violent demonstrations and complete collapse of law and order which forced the Chogyal to approach the Government of India to take control of the situation. The 3 parties namely the Chogyal, the people of Sikkim represented by the leaders of the political parties, and the Government of India were ultimately able to arrive at the terms as included in the Tripartite Agreement of 8.5.1973 and the authority of Chogyal was considerably reduced. The preamble in the agreement specifically mentioned that the people of Sikkim had decided to adopt,

A "A system of elections based on adult suffrage which will give equitable representation to all sections of the people on the basis of the *principle of one man one vote*."

(emphasis supplied)

B It was further said that with a view to achieve this objective, the Chogyal as well as the representatives of the people had requested the Government of India to take necessary steps. The first paragraph dealing with the Basic Rights declared that the people of Sikkim would enjoy the right of election on the basis of adult suffrage to give effect to the *principle* C *of one man one vote*. Another provision of this agreement which is highly important for decision of the issues in the present case is to be found in the 5th paragraph which reads as follows:-

D "The system of elections shall be so organised as to make the Assembly adequately representative of the various sections of the population. The size and composition of the Assembly and of the Executive Council shall be such as may be prescribed from time to time, care being taken to ensure that no single section of the population acquires a dominating position due mainly to its ethnic origin, and E that the rights and interests of the Sikkimese Bhutia Lepcha origin and of the Sikkimese Nepali, which includes Tsong and Scheduled Caste origin, are fully protected."

Strong reliance has been placed on the above paragraph on behalf of the F respondents in support of their stand that the Bhutia-Lepchas who contribute to less than one-fourth of the total population of the State, are entitled to about 40% of the seats in the Council as allowed by the impugned provisions.

G 9. The next Proclamation which is relevant in this regard was issued on the 5th of February, 1974 and was named as the Representation of Sikkim Subjects Act, 1974. It directed the formation of Sikkim Assembly consisting of 32 elected members - 31 to be elected from 31 territorial constituencies and one Sangha constituency to elect one member through an electoral College of Sanghas. The break-up of the 32 seats is given in H section 3, directing that 16 constitutencies including one for the Sangha

were to be reserved for Bhutia-Lepchas, and the reamining 16 including one for Tsongs and another for the Scheduled Castes for Nepalis. As a result the general seat disappeared. A further Act was passed the same year in the month of July by the newly constituted Sikkim Assembly emphasising once more the decision of the people to hold the elections to the Assembly "on the basis of one man one vote", that is to say every person who on the prescribed date was a Subject of Sikkim, was not below the prescribed age and was not otherwise disqualified under the Act was entitled to be registered as voter at any future election.

10. The Assembly which was established under the 1974 Act was vested with larger powers than the Council earlier had, and the fight for effective power between Chogyal and the people entered the crucial stage. The main party, Sikkim Congress, representing the people captured 31 out of 32 seats at the poll at the election held in pursuance of the agreement, and it is significant that its elections menifesto went on to state:

> "We also aspire to achieve the *same* democratic rights and institutions that the people of India have enjoyed for a quarter of century."
>
> (emphasis added)

Ultimately a special opinion poll was conducted by the Government of Sikkim and an unambiguous verdict was returned by the people in favour of Sikkim's joining and becoming a part of the Indian Union. In pursuance of this development the Constitution of India was amended by the Constitution (Thirty-Fifth Amendment) Act, 1974, inserting Article 2A which made Sikkim associated with the Union of India on certain terms and conditions. The amendment came into force in February, 1975. On the 10th of April, 1975 the Sikkim Assembly passed another momentous resolution abolishing the intitution of Chogyal and declaring that Sikkim would henceforth be a constituent unit of India, enjoying a democratic and fully responsible government. A request was made in the resolution to the Government of India to take the necessary measures. Accordingly, the Constitution was further amended by the Constitution (Thirty-Sixth Amendment) Act, 1975 which became effective in May, 1975. As a result of this constitutional amendment Sikkim completely merged in the Union of India.

11. By the Thirty-Fifth Amendment of the Constitution, Sikkim was,

as mentioned earlier, merely associated with the Union of India by insertion of Article 2A on the terms and conditions set out separately in a schedule added as the Tenth Schedule. Certain amendments were made in Articles 80 and 81 also. By the Thirty-Sixth Amendment of the Constitution, a full merger of Sikkim with Union of India was effected by adding Sikkim as Entry 22 in the First Schedule of the Constitution under the heading "1. The State". Further, some special provisions were made in a newly added Article 371F, and strong reliance has been placed on behalf of the respondents on the provisions of clause (f) in Article 371F as authorising the impugned amended provisions in the Representation of the People Acts. Article 2A, the Tenth Schedule, and certain other provisions in some of the Articles were omitted.

12. In 1978 the Bhutia-Lepchas were declared as Scheduled Tribes in relation to the State of Sikkim by a Presidential Order issued under clause (1) of Article 342 of the Constitution of India, and they thus became entitled to the benefits of reservation of seats in the State legislature in accordance with Article 332. The consequential reservation in the state legislature were made in the Representation of the People Act, 1950 and the Representation of the People Act, 1951, twice by the Act 10 of 1976 and the Act 8 of 1980, but not consistent with clause (3) of Article 332 which is in the following terms :-

> "332 Reservation of seats for Scheduled Castes and Scheduled Tribes in the Legislative Assemblies of the States. --
>
> (1) .....
>
> (2) .....
>
> (3) The number of seats reserved for the Scheduled Castes or the Scheduled Tribes in the Legislative Assembly of any State under clause (1) shall bear, as nearly as may be, the same proportion to the total number of seats in the Assembly as the population of the Scheduled Castes in the State or of the Scheduled Tribes in the State or part of the State, as the case may be, in respect of which seats are so reserved, bears to the total population of the State."

Out of the total seats of 32 in the House, 12 have been reserved for Sikkimese of Bhutia-Lepcha origin and one seat for the Sanghas by clauses (a) and (c) respectively of the newly inserted sub-section (1A) in section 7 of the Representation of the People Act, 1950. Dealing further with the Sangha seat it is provided in section 25A of the 1950 Act that there would be a Sangha constituency in the State and only Sanghas belonging to Monasteries recongnised for the purpose of elections held in Sikkim in April, 1974 shall be entitled to be registered in the electoral roll, and the said electoral roll shall be prepared or revised in such a manner as may be directed by the Election Commission. Consequently amendments were made by inserting section 5A in the Representation of the People Act, 1951. The extent of each constituency and the reservation of seats were initially directed to follow the position immediately before the merger under the Thirty-Sixth Amendment of the Constitution, and later amendments were made in this regard in the Delimitation of Parliamentary and Assembly Constituencies Order, 1976. The amended provisions of sub-section (3) of section 7 dealt with (besides dealing with Arunachal Pradesh) this matter. These special provisions have been challenged by the writ petitioner on various grounds.

13. The first objection taken on behalf of the respondents is to the maintainability of the writ petitions on the ground that the dispute raised by the petitioner is of political nature and the issues are not justiciable. The argument proceeds thus. To acqure fresh territories is an inherent attribute of sovereignty and this can be done by conquest, treaty or otherwise on such conditions which the sovereign considers necessary. Any question relating thereto entirely lies within the political realm and is not amenable to the court's jurisdiction. Referring to Articles 2 and 4 of the Constitution it has been urged that the admission into the Union of India is permissible without a constitutional amendment and the terms and conditions of such admission are not open to scrutiny by the courts. Article 371F must, therefore, be respected, and the impugned amendments of the Representation of the People Acts must be held to be legally valid on account of the provisions of clause (f) of Article 371F. I am afraid this argument fails to take into account the vital difference between the initial acquisition of additional territory and the admission to the same as a full-fledged State of the Union of India similar to the other States.

14. Special provisions for any State can certainly be made by an

A amendment of the Constitution, as is evident by Articles 371A, 371B, 371C et cetera, but it is not permissible to do so in derogation of the basic features of the Constitution. So far the power of sovereignty to acquire new territories is concerned, there cannot be any dispute. The power is inherent, it was, therefore, not considered necessary to mention it in express
B terms in the Constitution. It is also true that if an acquisition of new territories is made by a treaty or under an agreement the terms of the same will be beyond the scrutiny of the courts. The position, however, is entirely different when new territory is made part of India, by giving it the same status as is enjoyed by an existing State under the Constitution of India. The process of such a merger has to be under the Constitution. No other
C different process adopted can achieve this result. And when this exercise is undertaken, there is no option, but to adopt the procedure as prescribed in conformity with the Constitution. At this stage the court's jurisdiction to examine the validity of the adopted methodology cannot be excluded.

D 15. So far the present case in concerned the decision does not admit of any doubt that when the Thirty-Sixth Amendment of the Constitution was made under which Sikkim joined India as a full-fledged State like other States, power of amendment of the Constitution was invoked, and this had to be done only consistent with the basic features of the Constitution. As
E mentioned earlier when Sikkim became associated with India as a result of the Thirty-Fifth Amendment of the Constitution, it did not become a State of the Union of India. A special status was conferred on Sikkim by Article 2A read with Tenth Schedule but, without amending the list of the States in the First Schedule. Although the Status, thus bestowed on Sikkim then, was mentioned as Associate, it could not be treated as a mere protectorate
F of India. The protectorateship had been there in existence from before under the earlier treaties and by Article 2A read with Tenth Schedule something more was achieved. This, however, was short of Statehood. Consequently Sikkim was not enjoying all the benefits available under the Constitution of India. By the Thirty-Sixth Amendment there came a vital
G change in the Status of Sikkim. It was included as the 22nd Entry in the list of the States in the First Schedule without any reservation. Article 2A, the Tenth Schedule and other related provisions included in the Constitution by the Thirty-Fifth Amendment, were omitted from the Constitution. Thus, as a result of the Thirty-Sixth Amendment Sikkim became as much
H

a State as any other. Considered in this background, the objection to the maintainability of the writ petitions cannot be upheld. Further, the challenge by the writ petitioner is to the amendments introduced in the Representation of the People Acts by the Central Act 8 of 1980 as being unconstitutional and not protected by Article 371F(f) and this point again has to be decided by the Court. If the conclusion be that clause (f) of Article 371F permits such amendments the further question whether clause (f) itself is violative of the basic features of the Constitution will have to be examined. In my view the position appears to have been settled by the Constituted Bench of this Court in *Mangal Singh and Anr.* v. *Union of India,* [1967] 2 SCR 109, at page 112 in the following terms :-

> "The law referred to in Arts. 2 & 3 may therefore alter or amend the First Schedule to the Constitution which sets out the names of the States and description of territories thereof and the Fourth Schedule allotting seats to the States in the Council of States in the Union Parliament. .....Power with which the Parliament is invested by Arts. 2 and 3, is power to admit, establish, or form new States which conform to *the democratic pattern envisaged by the Constitution;* and the power which the Parliament may exercise by law is supplemental, incidental or consequential to the admission, establishment or formation of a State as contemplated by the Consitution, and *is not power to override the constitutional scheme.*
>
> (emphasis added)

16. It would be of considerable help to refer also to several observations made by Gajendragadkar, J. on behalf of the Bench of 8 learned Judges of this Court *in Re: The Berubari Union and Exchange of Enclaves:* [1960] 3 SCR 250, although the facts of that case were not similar to those before us. Dealing with the treaty making power of a sovereign State the learned Judge observed at pages 283-284 of the report that it is an essential attribute of sovereignty that a State can acquire foreign territory and in case of necessity cede the parts of its territory in favour of the foreign State, but this power is of course subject to the limitations which the Constitution of the State may either expressly of by necessary implication impose in that

A behalf. Article 1 (3) (c) does not confer power or authority in India to acquire territories, and what the clause purports to do is to make a formal provision for absorption and integration of any foreign territories which may be acquired by virtue of its inherent rights to do so. In this background Articles 1, 2, 3 and 4 were examined and the question was concluded thus:-

B

> "The crux of the problem, therefore, is: Can Parliament legislate in regard to the Agreement under Art. 3?"

> "There can be no doubt that foreign territory which after acquisition becomes a part of the territory of India under
C Art. 1 (3) (c) is included in the last clause of Art. 3 (a) and that such territory may, after its acquisition, be absorbed in the new State which may be formed under Art. 3 (a). Thus Art. 3 (a) deals with the problem of the formation of a new State and indicates the modes by which a new State can be formed."

D

Dealing with the nature of the power of ceding a part of the territory, it was held that such a power cannot be read in Article 3 (c) by implication, and in the case of a part of the Union Territories there can be no doubt that Article 3 does not cover them. The conclusion arrived at was that this
E was not possible by a law under Article 3 and an amendment of the Constitution was essential. It is true that in case of acquisition Article 2 comes into play but that is only at the initial stage when the new territory joins and becomes the territory of India under Article 1 (3)(c). In the present case the power under Article 2 was not exercised at any point of
F time. Initially, as pointed out earlier, Sikkim joined India as an Associate State by Article 2A introduced in the Constitution by an amendment. When further steps of its complete merger with India were taken, the methodology under Article 3 was not available in view of the observations in *Berubari* case. Correctly assessing the situation, fresh steps for amendment of the Constitution once more were taken and Sikkim was granted the status of
G a full Statehood at par with the other States by the Thirty-Sixth Amendment of the Constitution. Once this was done it had to be consistent with the basic features of the Constitution.

17. If we assume that the stand of the respondents as mentioned
H earlier on this aspect is correct, the result will be that in a part of India,

joining the nation later, a different rule may have to be allowed to prevail. This is not a fanciful hypothesis. Even during this last decade of the present century there are Tribes, in isolation from the rest of the world, maintaining a social order of primitive nature completely oblivious of the long strides of civilisation through history. In case of illness, the treatment is entrusted to the witch doctor and the trial of an alleged crime is left to certain persons supposed to be having super-natural powers employing bizzare methods for decision on the accusation. Without any regard for human dignity, women accused of being possessed of witchery are burnt alive and many such customs are followed which are highly abhorrent to every concept of justice, liberty, equality and every other quality for which our civilisation stands today. If steps are taken to grant legitimacy to a state of affairs repulsive to the basic features of our Constitution, the Courts are under a duty to judicially examine the matter.

18. Mr. Parasaran, in the course of his argument fervently appealed to this Court to decline to consider the questions raised by the petitioner on merits, on the ground that the issues are political. He proceeded to contend, in the form of a question, that if one of our neighbouring countries (he discreetly omitted to identify it) wishes to join India on certain conditions inconsistent with the philosophy of our Constitution, should we deny ourselves the opportunity of forming a larger and stronger country, and in the process, of eliminating the unnecessary tension which is causing grave concern internationally. If I may say so, the fallacy lies in this line of thought due to the assemption that there is only one process available in such a situation and that is by way of a complete merger under our Constitution, as has been adopted in the case of Sikkim, by the Thirty-Sixth Amendment. The plea ignores other alternatives which may be adopted, for example, by forming a confederation. However, this question is highly hypothetical and is surely political in nature and I do not think it is necessary to answer it in precise terms.

19. The maintainability of the writ petitions has also been questioned by Mr. Attorney General and Mr. Nariman on similar grounds. I have considered the plea of unjusticiability of the dispute raised in the light of all the arguments addressed before us, but since I do not find any merit therein, I hold that the courts are not only vested with the jurisdiction to consider and decide the points raised in the writ petitions, but are under

A a duty to do so.

20. On the merits of the writ petitions let us first consider the position with respect to Sangha seat. It is not in dispute that the reserved seat is earmarked for the representative of a number of Buddhist Monasteries to
B be elected by an electoral college of Lamas in which the entire population of Sikkim excepting the registered Buddhist Priests, have been denied any say. For the purpose of explaining Sangha, Mr. Parasaran has referred to the book on Hindu law of Religious and Charitable Trusts by B.K. Mukherjee, dealing with Buddhism and stating that Buddhism was essentially a monastic religion and the Buddhist Order or congregation of monks was
C known by the name of Sangha and this Sangha together with Buddha and Dharma (sacred law) constituted three jewels which were the highest objects of worship among the Buddhists. With a view to show that the Sangha could be given an exclusive voting right to a seat reserved for this purpose, further reliance was placed on a passage saying that the Sangha
D was undoubtedly a juristic person and was capable of holding property in the same way as a private person could. Further as a corporation the Sangha enjoyed a sort of immortality and was consequently fit to hold property for ever. In other words, Sangha also described as a Buddhist congregation has, like the Christian Chruch, a corporate life and a jural existence. Maths were founded by Adi Shankaracharya and other Hindu
E ascetics on the model of these Buddhist vihars. Now, coming to the impugned provision of the Act it will be seen that section 7(1A)(c) of the Representation of the People Act, 1950 allots one seats for Sanghas referred to in section 25A. Section 25A states that notwithstanding anything contained in sections 15 and 19, the Sanghas belonging only to such
F Monastries as were recongnised for the purpose of elections held in April, 1974 for forming the Assembly for Sikkim, shall be entitled to be registered in the electoral roll. The Election Commission has to prepare or revise the same in consultation with the Government of Sikkim. Before Sikkim joined India, Buddhism was the State religion. The Gazetteer 1864 of Sikkim stated that "Lamas or Tibetan Buddhism is the State religion of Sikkim".
G The position continued till 1974 when the elections for Constituent Assembly were held. The case of the writ petitioner is that the reservation in favour of the Sangha based on religious with a separate electorate of the religious monasteries is violative of the basic structure of the Constitution of India, and is not permissible after Sikkim joined India as a full-fledged
H State. It is further contended that the number of the persons actually

entitled to exercise the right being considerably very small (about 30 only). their share works out to be disproportionately very high.

21. In reply Mr. Parasaran contended that Sangha has played a vital role in the life of the community for a long time in the past, and a body consisting of Lamas and laity - Lhade-Medi - has contributed towards cultural, social and political development of the people of Sikkim. The Sangha seat was, therefore, introduced in order to provide for their representation. Their interest is synonymous with the interest of the minority communities and this reservation, which is coming from the time of Chogyal, should be maintained. He quoted from the Book *'the Himalayan Gateway'* by George Kotturan, dealing with the history and culture of Sikkim, which states that the author found the monasteries everywhere looking after the *spiritual* needs of a small community. The Chogyal also allowed the Lamas to play a role in the administration and this arrangement is, therefore, not fit to be disturbed. The learned counsel explained the position in his own way as asserting that in substance the reservation is not in favour of a religous body and it is not based solely on religous consideration. The Buddhist priests were rendering useful service to the people and the reservation must, therefore, be upheld as valid and the fact that they belong to a particular religious body should be ignored.

22. Similar was the approach of the Attorney General and Mr. Nariman but no further light was thrown during their arguments. Mr. Phur Ishering Lepcha who was added later in these cases as a party-respondent on an intervention application, filed his written argument *inter alia* stating that Sangha is a distinct identity which has played a very vital role in the life of the community since the earliest known history of Sikkim and has played a major part in deciding the important issues. The Lhadi-Medi, a body consisting of all the Lamas and laity has contributed towards cultural, social and political development of the people of Sikkim, and the reservation in favour of Sangha was introduced in order to provide for the representation of a section which was responsible for the basic culture of the Sikkimese Bhutia-Lepchas including some sections of the Nepali community of Sikkim. Reliance has been placed on many passages from the book *'Himalyan Gateway'* by Georage Kotturan, referred to earlier. In substance the stand taken in the argument by Mr. Parasaran and supplemented by his written submissions, has been re-emphasised by Phur Ishering Lepcha. The excerpts from the book give the history of Buddhism, and

A described how the religion got modified from time to time under the guidance of many Saints going to Sikkim from India. It is further stated that the culture of Sikkim under the Chogyal was essentially religious and the patron saint of Sikkim Lhatsum Chhembo, believed to be an incarnation of an Indian Saint, is according to the traditional belief, incarnated more than once; and that the late 12th Chogyal of Sikkim, Palden Thondup Namgyal (referred to in the book as "Present Chogyal") was (accroding to the belief) and incarnate of Chogyal Sidkeong who himself was an incarnate Lama. There is a list of Monasteries of Sikkim as given at page 481 which indicates that the separate electorate contains only a little more than 30 Sanghas. Some passages from other books have also been quoted in the written argument and what is stated at page 15 of "Sikkim and Bhutan - Twenty-One years on the North- East Frontier 1887-1908" by J.C. White, C.I.E. (Political Officer of Sikkim, 1889-1908) indicates that "as a rule the Lamas are ignorant, idle and useless, living at the expense of the country, which they are surely dragging down. There are, of course, exceptions to every rule and I have met several lamas" who appeared to be throughly capable, "but I am sorry to say that such men were few and far between. The majority generally lead a wordly life and only enter the priesthood as a lucrative profession and one which entails no trouble to themselves".

Another book '*The Himalaya - Aspects of Change, 1981*' by J.S. Lall (Dewan of Sikkim, 1949-1952) mentions at pages 228-229 that "Though Lamaist Buddhism continues to be the official religion, it is professed mainly by the Butias, Lepchas and Newars, along with a few of the other tribal groups such as Tamangas, and the Buddhistic overlay wears thin in Dzongu where nun traditions survive". It is further mentioned that the influence of the Monasteries was diminishing and fewer and fewer young boys were being sent by their families as novices for the priesthood. The last Chogyal, who was himself an incarnate Lama was greatly concerned at this loss of interest and set up a training school for attracting more novices. Fresh impetus in a different way was also given to the "Buddhist revival" through the presence of a renowned teacher and and mystic from Tibet. All this was happening quite late problably in 1950s.

Reliance has also been placed on '*Himalayan Village*', a book by Geoffrey Gorer which at pages 192-193 reads thus :-

"Finally lamaism is a social organisation. The lamas (to a

lesser extent the nuns) are arranged in a disciplined hierarchy. They are a section of society which performs for the whole society its religious functions; in return the rest of society should give material support to the lamas. In Tibet this social aspect is extremely important, the lamas possess the greater part of the temporal power and are also as a group *an exploiting class;* the monasteries own land and the peasants attached to the land are practically monastery serfs. The lower-ranking lamas also work for the benefit of those of higher rank and are possibly as *much exploited as the peasants;* but they have, at least in theory, the possibility of rising to the higher ranks, which possibilities are completely shut out from the laymen. In Sikkim, as far as I can learn, the social influence of the lamas is considerably less;".

(emphasis added)

Another book by A.C. Sinha - "*Politics of Sikkim - A Sociological Study*" - describes the system of Sikkim thus :-

"The political system of Sikkim is a typically Himalayan theocratic *feudalism* parallel to the Tibetan Lamaist pattern. The ruler is not only the secular head of the State, but also an incarnate lama with responsibility to rule the subjects in accordance with the tenets of the "Choos" - the Dharma. The basic tenets of the Lamaist polity in Sikkim ever since 1642 are the Chos (Chhos) as the established religion and the rulers (rGyalpo) who are instrumental in upholding the doctrine justifying the appellation, the "Chos-rGyal" (Chogyal)."

(emphasis added)

This book goes on to record how the Buddhist Monasteries having the patronage of the Chogyal came to wield authority in Sikkim. The Monks, however, "Were drawn from the high-born Bhotias and Lepchas". The Lamas did not confine their participation only to the administration but also controlled the electorate. At page 78 it is stated that the major portion

A of the trans-Himalayan trade was in the hands of Marwaris, the aristocracy and some of the Lamas.

23. Another intervenor which placed its case is Sikkim Tribal Welfare Association, a registered organisation for the purpose of *inter alia* "to effectively and efficiently establish and promote a strong and healthy organisation of the Bhutias, Lepchas and Sherpas of Sikkim at Gangtok, and subsequently to build up similar organisations in the four districts of Sikkim". In its written argument very long excerpts have been given from a book by Joseph Dalton Hooker who visited Sikkim in 1848 (the book was published in 1854), giving detailed descriptions of the features, habits, customs et cetera of the Lepchas which are certainly very interesting but, of little relevance in the present cases. The intervenor has relied on this book for showing that the Lepchas were inhabiting Sikkim earlier than the arrival of the Nepalis who were inducted by the British rulers and others. The customs followed by them, as mentioned in the book, indicate that "their existence was primitive in nature so much so that every tribe had a priest doctor; who neither knew or practised the healing art, but was a pure exorcist; all bodily ailments being deemed the operations of devils, who are cast out by prayers and invocations". On the question as to who are the early settlers in Sikkim there is serious controversy, the other view being that so far the Bhutias are concerned they could not be treated as aboriginals. I do not think anything turns on the question as to the order in which the different sections of the population settled in Sikkim and I, therefore, do not propose to consider the affidavits filed by the parties on this aspect. From the records, however, it is clear that a seat in the Council was allotted to the Sanghas for the first time in 1958 and the Lamas manning the Sanghas are drawn from the minority section of the population (less than 25%) belonging to Bhutia and Lepcha tribes. The reason given by the different respondents in support of the reservation of the Sangha seat is the historical background showing that the Lamas, besides performing the religious rites and discharging the religious and spiritual duties were rendering social service and with the patronage of Chogyal were permitted to take part in the administration. It is argued that although the Chogyal might have disappeared, the participation by these Buddhist Monks in the administration should not be denied. The issue is whether this is permissible after Sikkim joined India as a full-fledged State.

B C D E F G H

24. It is firmly established and needs no elaboration that an amendment of the Constitution which violates the basic features of the Constitution is not permissible. It has been contended on behalf of the respondents that the provisions of clause (f) of Article 371F do not in any way offend any of the basic features and since the clause permits the impugned reservations in the Representation of the People Acts, they have to be upheld.

25. So far the reservation of Sangha seat is concerned, the question is whether this violates Article 15 as also several other provisions of the Constitution; and further whether these constitutional provisions are unalterable by amendment. If they are basic in nature they will have to be respected and clause (f) must be construed not to have violated them in spite of the *non-obstante* clause with which the Article begins.

26. Let us first consider Article 15 which prohibits discrimination on the ground of religion. The Buddhist Monasteries, which are the beneficiaries of the reservation, are admittedly religious institutions. What the respondents have tried to suggest is that although basically the Monasteries are religious in nature, they form a separate section of the society on accont of the social services they have been rendering mainly to the Bhutia-Lepcha section of the population. Further emphasis has been laid on the fact that they were participating in the administration by the blessings of the Chogyals for about 17 years - yes, only 17 years - as the seat in their favour was created for the first time in 1958 before the merger with India. The argument is that in this background they should not be treated as merely religious institutions for the purposes of reservation, and in any event religion is not the only basis for putting them in a separate group. The classification, therefore, is not unconstitutional. I do not find myself in a position to agree with the respondents. The Buddhist Monasteries are religious in nature out and out, and, besides taking care of the spiritual needs of the people and looking after the ritual side of the Buddhist religion, they are also trying to do all what their religion expects from them. The concern for the people and the society stands high on the agenda of Buddhism, and for that matter, of all religions. But it is only in the capacity of Monks that they have been trying to help a minority section of the people of Sikkim and that is their true identification. The position could have been different if the reservation had been in favour of a social group devoted to public service, which for identification had led to

A religious groups including these Monks as well. But that is not so. The position is just the other way. The attempt of the respondents is to defend reservation in favour of a particular religious body and by way of justification for the same to bring in the element of social service. They forget that the role of the Sanghas in rendering social service to a section of the public
B is not a feature special for these Monasteries. The self-less services rendered by the Christian Missionaries to the helpless sick persons, specially in many under-developed parts of the world, and to the badly injured soldiers in the war; or, for that matter, the all round care of the society which has been taken by the innumerable Hindu Maths and temples (trusts) in the different parts of India for ages cannot be ignored. A very
C large number of charitable institutions run by Hindu and Muslim religious bodies have been always helping the people in many ways. Learned and selfless religious saints and leaders have made significant contributions in establishment of civilised society for centuries and history shows that this has been done through the instrumentality of religious institutions and
D organisations. Similar is the position with respect to the other religions in India. The positive role religion has played in lifting humanity from barbaric oblivion to the present enlightened and cultured existence should not be belittled. But, at the same time, it cannot be forgotten that religion has been from time to time, misused to bring on great misfortunes on mankind. In modern times, therefore, social and political thinkers do not hold
E unanimous view on the question of the desirability to allow religion to influence and control politics and the State instrumentality. The difference in the two perceptions is vital and far-reaching in effect, and generally one view or the other has been accepted as national commitment, not subject to a change. When I proceed to examine the issue further I will not be
F using the expression 'religion' in its pure and true sense spreading universal compassion and love, but in the ordinary concept as it is popularly understood today and accepted by the general man in the modern time, sometimes as a spiritual experience, sometimes as customary rituals but most of the time as a social and political influence on one segment of the population or other, bringing with it (although not so intended) mutual distrust
G between man and man, and hostility amongst different religious groups. In this process the very welfare of the society, which is of prime consideration becomes the casualty.

27. It has to be remembered that if the Constitution is so interpreted
H as to permit, by an amendment a seat to be reserved in the legislature for

a group of religious institutions like the Buddhist Monasteries, it will follow that such a reservation would be permissible for institutions belonging to other religions also. There will not be any justifiable reason available against a similar provision for the Christian Missionary institutions in the country on the ground of their services, to the cause of upliftment of Adivasis, their contribution in the field of education, and their efforts for medical assistance to the underprivileged; or, for the innumerable other religious institutions of Hindus, Muslims, Sikhs and other religions providing invaluable relief to the helpless. And all this may ultimately change the very complexion of the legislatures. The effect that only one seat has been reserved today for the Monasteries in Sikkim is the thin edge of the wedge which has the potentiality, to tear apart, in the course of time, the very foundation, which the democratic republic is built-upon. In this background the question to ask is whether all this is prohibited as being abhorrent to the basic feature of the Constitution. I have no hesitation in answering the issue in the positive. Now let us have a brief survey of the relevant provisions of the Constitution.

28. The Preamble, which is the key to understand the Constitution, emphasises by the very opening words, the democratic nature of the Republic guaranteeing equality of status to all which the people of India had resolved to constitute by adopting, enacting and giving to themselves the Constitution. The personality of the Constitution is developed in Part III dealing with the Fundamental Rights, and the framers of the Constitution, even after including Article 14 ensuring equality before law, were not satisfied unless they specifically prohibited religion as a ground for differential treatment. The freedom of propagation of religion and the right to manage religious affairs et cetera were expressly recognised by Articles 25 to 28 but when it came to deal with the State, the verdict was clear and emphatic that it must be free from all religious influence.

29. Mr. Nariman claimed that a prohibition against discrimination on the ground of religion is not a basic feature of a democratic State. He placed strong reliance on the constitutions of several countries with special emphasis on the Constitution of Cyprus. The argument is that although Cyprus is an independent and sovereign republic with a democratic Constitution, the seats in the legislature are divided between the Greek population following the Greek-Orthodox Church and the Muslim Turkish community. There is a division even at the highest level, the President

always to be a Greek Christian and the Vice-President a Muslim Turk. Mr. Nariman emphasised on the separate electorate provided by Cyprus Constitution and urged that these provisions do not render the Constitution undemocratic or illegal. He also referred to the Statesman's Year Book (containing statistical and historical *annual* of the States of the world for the year 1985-86) showing that the population of the Christian community following Greek-Orthodox Church was in 1983, 5,28,700 but was allotted only 70% of the seats in the legislature, and the Turkish Muslims with a population of only 1,22,900, the remaining 30% of seats. In other words the Muslims forming only about 20% of the total population, were allotted 30% of the seats. The fallacy in the argument of the learned counsel is the erroneous assumption that fundamental features of all constitutions are same or similar. The basic philosophy of a constitution is related to various elements including culture and tradition, social and political conditions, and the historical background. If the partition of India had not taken place in 1947 and the people belonging to all the religious communities had decided to agree on some arrangement like the people of Cyprus, by adopting a constitution providing for sharing of power on religious basis, the Constitution of Cyprus could have been relevant. There was a sustained effort on the part of the Indian National Congress and of several other political and social groups, by and large representing the people who remained in divided India and proceeded to frame the present Constitution, to avoid the partition of the country on the basis of religion, but they could not succeed. Unfortunately the struggle for maintaining the unity of the country was defeated by religion used as a weapon. The country was visited by a grave national tragedy resulting in loss of human life on a very big magnitude. Religious fundamentalism triumphed, begetting and encouraging more such fundamentalism. In the shadow of death and destruction on an unprecedented scale the making of the Constitution was taken up. The Constitution of Cyprus or any other constitution framed in circumstances different from those obtaining in this country, therfore, cannot be relevant for understanding the basic philosophy and ethos of our Constitution. Although it is not strictly relevant for the decision in the present case, it may be noted that this patchwork Constitution of Cyprus of which the parties represented by Mr. Nariman seem to be so enamoured of, has completely failed to keep the country together.

The learned counsel also referred to the provisions contained in Articles 239A, 240 and 371A with respect to the Union Territories and

State of Nagaland; and Article 331 permitting the President to nominate one or two members of Anglo Indian Community to the House of People if he is of the opinion that the Community is not adequately represented in the House. I do not see how these Articles can be of any help to the respondents in the present case. None of these provisions are linked with any particular religion at all. There should not be any misapprehension that an 'Anglo Indian' has to be a Christian [see the definition of the expression in Article 366 (2)].

30. Religion not only became the cause of partition of the country, it led to wide-spread bloodshed which continued even later and in which people belonging to the different communities died in very large numbers. The people of India are convinced that this tragedy was the direct result of the policy of the British rulers to divide the people on the basis of the religion and give them differential political treatment. During their earlier resistance to the establishment of the British rule, the Hindus and the Muslims were working together, and the combination was proving to be dangerous to the foreigners, and in 1857 the Empire had to face a serious threat. That in this background the principles of divide and rule was adopted and an atmosphere of destrust and hatred between the main communities of the country on the basis of religion was created, are undisputed facts of history. The people, who made exemplary sacrifices, unfortunately failed in their fight for independence of the undivided nation and were left with no alternative but to be reconciled with partition of the country. These were the people who proceeded to frame the present Constitution, and despite the set back they had suffered, they reiletrated their firm belief in a democratic republic where religion has no role to play. All this is what has been described as 'Enacting History,' by jurists and is available as aid to the interpretation of the Constitution.

31. If we proceed to consider the entire Constitution harmoniously along with all the other materials, relevant in law for this purpose including the 'Enacting History', there is no escape from the conclusion that any weightage at the poll in favour of a group on the ground of religion is strictly prohibited and further, that this is a basic feature, which is not amenable to amendment. The provisions of section 7 (IA)(c) and the other connected amendments must, therefore, be held to be *ultra vires*.

32. There is also another serious flaw in the reservation for the

A Sangha rendering the same to be unconstitutional. By the impugned provisions of the 1950 Act, a special electorate has been created for this seat which is highly abhorrent to the fundamental tenets of the Constitution. Much thought was bestowed in the Constituent Assembly on the question whether separate electorate could be permitted under the Con-
B stitution. An Advisory Committee was constituted on January 24, 1947 for determining the fundamental rights of citizens, minorities, et cetera. The Advisory Committee was empowered to appoint sub-committees [see B. Shiva Rao's Framing of Indian Constitution, Vol. II, pp. 56-57] and accordingly a Sub-Committee on Minorities was appointed on February 27, 1947, to consider and report, *inter alia*, on the issue whether there should be joint
C or separate electorates. The Sub-Committee by a majority of 28 to 3 decided that there should be no separate electorates for election to the legislatures. [Shiva Rao's Vol. II, p 392] The Report of the Sub-Committee was accepted by the Advisory Committee and the following observations were made :-

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> "The first question we tackled was that of separate electorates; we considered this as being of crucial importance both to the minorities themselves and to the political life of the country as a whole. By an overwhelming majority, we came to the conclusion that the system of separate
E electorates must be abolished in the new Constitution. In our judgment, *this system has in the past sharpened communal differences to a dangerous extent and has proved one of the main stumbling blocks to the development of a healthy national life.* It seems specially necessary to avoid these dangers in the new political conditions that have developed
F in the country and from this point of view the *arguments against separate electorates seem to us absolutely decisive.* We recommend accordingly that all elections to the Central and Provincial Legislatures should be held on the basis of joint electorates."

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(emphasis added)

[Shiva Rao's Vol. II, p. 412]

I think that the Advisory Committee was right in suggesting that the
H decision against separate electorates was absolutely decisive for all times

to come. Sardar Patel, after referring to the suffering and the heavy penalty the nation had to pay on this count, expressed his satisfaction "that there has been unanimity on the point that there should be no more separate electorates and we should have joint electorates hereafter. So this is a great gain". Replying to the Debate Sardar Patel expressed his views in the following words :-

> "I had not the occasion to hear the speeches which were made in the initial stages when this question of communal electorates was introduced in the Congress; but there are many eminent Muslims who have recorded their views that *the greatest evil in this country which has been brought to pass is the communal electorate. The introduction of the system of communal electorates is a poison which has entered into the body politic of our country.* Many Englishmen who were responsible for this also admitted that. But today, after agreeing to the separation of the country as a result of this communal electorate, *I never thought that that proposition was going to be moved seriously, and even if it was moved seriously, that it would be taken seriously.*"
>
> (emphasis added)
>
> (Constituent Assembly Debates; Vol. V, p. 225)

I, however, find that the impugned amendment was made without bestowing serious thought and the respondents are supporting the same so determinedly that it has become necessary for this Court to consider the proposition 'seriously'. Pandit Govind Ballabh Pant, opposing an amendment moved by B. Pocker Sahib Bahadur of the Muslim League providing for separate electorate for Muslims, expressed his indignation thus :-

> "....*We all have had enough of this experience, and it is somewhat tragic to find that all that experience should be lost* and still people should hug the exploded shibboleths and slogans."
>
> (emphasis added)

A [Constituent Assembly Debates; Vol. V, p.224]

Shri V.I. Muniswami Pillai, on this occasion reiterated these sentiments and said with a sigh of relief :-

B "...Sir, which I would like to tell this House is that we got rid of the harmful mode of election by separate electorates. *It has been buried seven fathom deep, never more to rise in our country.* The conditions that were obtaining in the various provinces were the real cause for introducing the system of separate electorates. The Poona Pact gave us C both the separate and joint electorates but now we have advised accoding to this report that has been presented here that the Depressed Classes are doing to enjoy joint electorates. It is hoped, Sir, that, in the great Union that we are all envisaging that this Country will become in the years to come, - joint electorates will give equal opportunity D for the Caste Hindus and the Minority communities to come together and work together and produce a better India."

[Constituent Assembly Debates; Vol. V, p.202]

E Unfortunately, the firm belief of Mr. Pillai was not shared when the reservation in question was introduced by amendment three decades later in 1980.

It will be helpful, for appreciating the reference by Sardar Patel to F the opinions of even Englishmen in his reply and to the Poona Pact by Shri Pillai, to recall briefly the developments during the British Rule relevant to this aspect.

33. In order to break the united front of the Indians against foreign domination, one of the most effective steps taken on behalf of the regime G was to introduce separate electorates with weightage for the Muslims. The occassion was provided by the demand of the separate electorate for the Muslims by a deputation headed by Aga Khan presented to the then Viceroy, Lord Minto, in 1906. Lord Minto not only supported him but added that in view of the service that the Muslims had rendered to the H Empire, their position deserved to "be estimated not merely on "their"

numerical strength but in respect of the political importance of "the" community and the service that it had rendered to the Empire". The demand was accepted in 1909 by Minto Morley Reforms. The matter was again considered in 1919 by the Montague-Chemsford Committee. Their report disapproved the idea of separate electorates by stating that such electorates "were opposed to the teaching of history : that they perpetuated class division : that they stereotyped existing relations; and that they constituted a very serious hindrance to the development of the self-governing principle". Sardar Patel was, in his reply, presumably referring to these expressions and similar other opinions. Unfortunately, however, the principle of communal electorates was adopted for the Muhammadans in the country and in Punjab for Sikhs.

34. Having, thus succeeded in introducing this highly undersirable system of separate electorates on the basis of religion, the British rulers proceeded to extend the same with a view to divide the people further by proposing separate electorates for the "Depressed Classes" in 1932 under the Communal Award of Prime Minister Ramsay MacDonald. By that time the leadership of the country was in the hands of Mahatma Gandhi, who fully realised the dangerous fall-out of the proposed measure. Rejecting the suggestion of the British Prime Minister to accept the same even for a temporary period, he staked his life for fighting out the menace by deciding to go on fast unto death. The rulers conceded and backed out, and the matter was sorted out by the famous Yarvada Pact. Separate electorate for the Muslims, however, could not be undone, and was given effect to in the Government of India Act, 1935, ultimately leading to the partition of the Country.

35. In this background the Debate in the Constituent Assembly took place, and the recommendations of the Advisory Committee in favour of joint electorate both at the Central and the State levels were accepted. It is significant to note here that in the original draft Constitution there was no express provision declaring that the elections to the Parliament and to the State legislatures would be on the basis of joint electorates and the matter had been left to be dealt with by auxiliary legislation under Articles 290 and 291 of the draft Constitution [Shiva Rao, Framing of India's Constitution, Vol. IV, p. 141]. On a deep deliberation on the issue it was realised that any provision for separate electorates would be a deadly virus for the health of the nation. The Constituent Assembly considered it right

A to reject the idea once for all and not leave the matter to be dealt with later. Accordingly Article 325 adopted in the following terms:-

> "325. No person to be ineligible for inclusion in, or to claim to be included in a special, electoral roll on grounds of religion, race, caste or sex - There shall be one general electoral roll for every territorial constituency for election to either House of Parliament or to the House of either House of the Legislature of a State and no person shall be ineligible for inclusion in any such roll or claim to be included in any special electoral roll for any such constituency on grounds only of religion, race, caste, sex or any or them."

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36. During the hearing it was also contended that if the Constitution permits nominations to be made in the legislatures how can the creation of a separate electorates for the Sangha seat be objected to. I do not find any parallel between the two. After the establishment of a democratic government at every level in the country in one from or the other, nomination under the Constitution amounts to exercise of a power to induct a member in the legislature by an authority, who ultimately represents the people, although the process of the representation may be a little involved. So far a handful of the Buddhist Monasteries in Sikkim are concerned, they cannot be said to represent the people of Sikkim in any sense of the term. Allotting a seat in the legislature to represent these religious institutions is bad enough by itself; and then, to compound it by vesting the exclusive right in them to elect their representative to occupy the reserved seat is to aggravate the evil. I do not think this can be compared with any of the provisions in the Constitution relating to nominations.

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From the entire scheme of the Constitution, it is clear that its basic philosophy eloquently rejects the concept of separate electorate in India. This conclusion is reinforced by the historical background referred to above, the delebrations of the Advisory Committee, and the discussion which took place in the Constituent Assembly before giving final shape to the Constitution. I do not discover any reason for assuming that while inserting Article 371F(f) in the Constitution there was complete reversal of faith on this basic and vital matter, which was otherwise also not permissible. It follows that consistent with the intention of the rest of the Con-

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stitution the provision regarding the delimitation of the Assembly constituencies in Article 371F(f) has to be interpreted in the same sense, as the expression has been used in the other provisions. Clause (f) of Article 371F neither by its plain language nor intendment permits separate electorates and any attempt to give a different construction would not only be highly artificial and speculative but also would be violative of a basic feature of the Constitution. I, accordingly, hold that the provisions of section 25A of the Representation of the People Act, 1950 are also *ultra vires* the Constitution and this furnishes another ground to strike down section 7 (1A) (c).

37. So far the reservation of 12 seats in favour of the Bhutia- Lepchas is concerned, the ground relied upon by the respondents for upholding the same is the historical background coupled with the 5th term under the head BASIC RIGHTS in the Tripartite agreement of the 8th May, 1973, which reads as follows:-

> "(5) The system of elections shall be so organised as to make the Assembly adequately representative of the various sections of the population. The size and composition of the Assembly and of the Executive Council shall be such as may be prescribed from time to time, care being taken to ensure that no single section of the population acquires a dominating position due mainly to its ethnic origin, and the rights and interests of the Sikkimese Bhutia Lepcha origin and of the Sikkimese Nepali, which includes Tsong and Scheduled Caste origin, are fully protected."

It is further said that in view of this Tripartite Agreement the Proclamation dated 5.2.1974 was made reserving 16 constituencies out of the total number of 32 in favour of Bhutia-Lepchas, and when the Government of Sikkim Act, 1974 was passed, which came into force on 4.7.1974, the following provision was included in section 7:-

> "7. (1) For the purpose of elections to the Sikkim Assembly, Sikkim shall be divided into constituencies in such manner as may be determined by law.
>
> (2) The Government of Sikkim may make rules for the purpose of providing that the Assembly adequately repre-

A sents the various sections of the population, that is to say, while fully protecting the legitimate rights and interests of Sikkimese of Lepcha or Bhutia origin and of Sikkimese of Nepali origin and other Sikkimese, including Tsongs and Scheduled Castes no single section of the population is allowed to acquire a dominating position in the affairs of Sikkim mainly by reason of its ethnic origin."

In these circumstances the Thirty-Fifty Amendment of the Constitution of India was made which became effective from 23.2.1975 and Sikkim was thus Associated with the Union of India. The Thirty-Sixth Amendment of the C Constitution inserting the new Article 371F was thereafter made with clause (f) which reads as follows:-

"(f) Parliament may, for the purpose of protecting the rights and interests of the different sections of the population of Sikkim make provision for the number of seats in the D Legislative Assembly of the State of Sikkim which may be filled by candidates belonging to such sections and for the delimitation of the assembly constituencies from which candidates belonging to such sections alone may stand for election to the Legislative Assembly of the State of Sikkim".

E and clause (k) in the following terms:-

"(k) all laws in force immediately before the appointed day in the territories comprised in the State of Sikkim or any part thereof shall continue to be in force therein until F amended or repealed by a competent Legislature or other competent authority".

The argument is that the impugned provisions of the Representation of the People Acts are thus fully protected by the Thirty-Sixth Constitutional Amendment.

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38. I have not been able to pursuade myself to accept the contention made on behalf of the respondents for several reasons. Before proceeding further it will be useful to have a survey of the relevant circumstances and the documents relevant to this aspect at a glance.

H 39. Chogyal was an autocratic ruler anxious to relain his absolute

power, while the people were becoming more aware of their rights in the changing world. By the middle of this century, encouraged by the developments in India which was not only neighboring country but on which Sikkim was solely dependent for its vital needs including defence, they were able to build up a formidable force demanding establishment of a truly democratic government. The materials on record fully establish that in this struggle of power, Chogyal had to heavily rely on Bhutia-Lepchas, who were close to him as he was one from that group. According to the case of the respondents the Bhutia-Lepchas had arrived in Sikkim earlier than the Nepalis and the Nepalis were inducted in the area mainly on account of the policy followed by the British paramountcy. The records also show that protest in vain was made to the British General posted in the area, long time back when the Nepalis were arriving on the scene. The Bhutia-Lepchas, who were following the Buddhist religion, were paying high respect for the Lamas who were enjoying the patronage of Chogyal. Appreciating their usefulness the Chogyal later earmarked a seat for them on the basis of a separate electorate in 1958. When public demand for effective participation in the administration grew stronger, the Chogyal adopted the line of appeasement by establishing a Council where initially 12 members were divided half and half (vide the Proclamation of 28th December, 1952) between the Bhutia-Lepchas on the one hand and the Nepalis on the other. But soon he appreciated that unless he reserved to himself the right to induct some more nominees of his own, his position would be jeopardised. He, therefore, hurriedly issued another Proclamation within 3 months, on the 23rd March, 1953, declaring that 6 more members would be included in the Council to be nominated by him in his discretion including the President of the Concil. In Article 26 he expressly declared that notwithstanding the provisions of the other Articles he would be retaining his power to veto any decision made by the Council and substitute his own decision therefor.

40. The steps taken by the Chogyal could not control the demand for democracy and the public agitation gathered more support. Ultimately the people came out victorious, not only in getting rid of the Chogyal, but also in their demand for democracy, to be established on the lines as in India. The Chogyal, of course, in his vain attempt to retain his authority, was trying to scuttle away the overwhelming public opinion by one method or the other and with that view, was trying to give weightage to Bhutia-Lepchas, to which group he himself belonged and on whose support he

A could count, and in this situation the Tripartite Agreement of 8th May, 1973 came to be executed. The fact that Chogyal was going to be a party to it and was desperately trying to have something in the terms, to build his strategy on, cannot be ignored while assessing the meaning and effect of paragraph 5 of the Agreement. The Tripartite Agreement described itself in the very opening sentence as envisaging a democratic set up for B Sikkim, and the Chogyal joined the people of Sikkim in declaring that he was also convinced and was in favour of the establishment of a fully responsible Government in Sikkim. The other provisions of the Agreement unmistakably indicate that the intention was to have a democratic government in Sikkim exactly similar to the one in India. It (Agreement) provided C guarantee of Fundamental Rights, the rule of law and independent judiciary, as also.

> "a system of elections based on adult suffrage which will give equitable representation to all sections of the people on the basis of the principle of *one man one vote*".

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(emphasis added)

All the three parties expressly recognised and undertook to ensure the basic human rights and fundamental freedoms of the people and that:-

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> "the people of Sikkim will enjoy the right of election on the basis of adult suffrage to get effect to the principle of *one man one vote.*"

(emphasis supplied)

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Equality before law and independence of the judiciary were assured. It further recited that the Chogyal as well as the representative of the people had requested the Government of India to assume responsibility for the establishment of law and order and good administration and "to ensure the further development of a constitutional Government", as also to provide G the head of the administration described as Chief Executive to help and achieve the State's objectives. A firm decision was taken to hold fair and free elections under the supervision of a representative of the Election Commission of India. The Chief Executive was to be nominated by the Government of India and it was only the passing of the formal order in this H regard which was left to the Chogyal. Towards the end of the Agreement

it was emphasised that the Government of India was solely responsible for the defence and territorial integrity of Sikkim and for the conduct and regulation of the external relations whether political, economic or financial, and necessary powers for carrying out these responsibilities were reaffirmed. A perusal of the document clearly indicates that the spirit of the Indian Constitution pervaded through out the entire Agreement and the terms thereof were drafted respecting the main principles embodied in our Constitution. It must, therefore, be held that an interpretation cannot be given to the Agreement which will render it as deviating from the constitutional pattern of the Indian Constitution.

41. A question may be raised that since the Agreement included paragraph (5) which has been quoted earlier, does that inject in this Agreement an element incompatible with the Indian Constitution. In my opinion the answer is in the negative. The safeguard under the scheme envisaged in paragraph (5) was capable of being provided by the Indian Constitution. Many provisions in the different parts of the Constitution including Part III are relevant in this regard. Their representation of all sections has been the concern of the Constitution also; and with that view provisions have been made for reservation of seats in favour of certain classes in the Parliament and the state Legislatures and some special rights have been given to the minority. In my view these constitute adequate guarantee against unfair dominance by the majority. This of course does not lead to the conclusion that power would be concentrated in the hands of the minority, or that their would be division of the authority in the matter of carrying on the affairs of the State, on mathematically equal terms, between the different groups; because the first will result in the abnegation of democracy itself, and the second will lead to an unworkable situation ending in chaos. The principle of adult suffrage with *one-man-one-vote rule,* as repeated again and again in the documents referred to above, indicates the concept of democracy which had to be established in Sikkim. In the Proclamation of the 5th February, 1974 total number of 32 seats in the Assembly were divided half and half between the two groups, but it is significant to note that as soon as the Assembly was constituted after election, it immediately modified the provision fixing the parity of seats by declaring in section 6(2) of the Government of Sikkim Act, 1974 that the matter would be determined by law. The intention that no single section of the population should acquire a "dominating position due mainly to its

A ethnic origin" does not mean that the majority held by a particular section would not be allowed to be reflected in the legislature. The word "dominating" indicates something more than merely forming a majoirty. What was intended was to eliminate the chance of a particular section of the population misusing its position to the prejudice of the legitimate rights of the B others. The risk of such an undesirable situation could and should have been eliminated by adopting such methods as provided in the Indian Constitution. It cannot be legitimately contended that the safeguard in this regard under the Indian Constitution is in any way inadequate. If at all, the minority in this country are in certain matters enjoying special benefits not available to the majority and this is the reason that repeated attempts have C been and are being made by various groups to claim minority status, as is evident by reported cases. The necessary consequence of assuming otherwise would be to hold that under the Constitution applicable to the rest of the country, the minorities here have no protection agains the "dominance" of the majority, and our stand about the rule of law and equality of status D to all in this country is an empty claim made before the world.

42. The further point is as to whether the provisions of clause (f) of Article 371F envisage and authorise the Parliament to exercise its power only in such a manner which would be consistent with the relevant E provisions of the Constitution applicable to the rest of the country if the same is capable of achieving the object with reference to the special conditions of Sikkim; or, that they allow the Parliament to take any decision in this regard, including such measures which would perpetuate the situation obtaining in Sikkim in the past, on the ground of historical background. For the reasons indicated earlier, I am of the view that clause (f) permits F the Parliament to take only such steps which would be consistent with the provisions of the Constitution coming from before, so that Sikkim could completely merge with India and be placed at per with the other States. This conclusion is irresistible if the facts and circumstances which led to the ultimate merger of Sikkim in India are kept in mind. They have been G briefly referred to earlier in paragraph 10 above. After the Proclamation of the 5th of February, 1974, Sikkim went to polls. The main representative of the people was Sikkim Congress as was proved by the result of the election. Sikkim Congress winning 31 out of the total of 32 seats. The election manifesto on the basis of which the people almost unanimously H

voted in favour of Sikkim Congress, *inter alia,* declared thus :- A

> "We also aspire to achieve the *same* democratic rights and ifistitutions that the people of India has enjoyed for a quarter of century."

(emphasis added) B

Respecting this pledge, solemnly given to the people, the Assembly passed a unanious resolution dated 10.04.1975 and submitted it to the people for their approval. A plebiscite was thus held in which about 64% of the electorate cast their votes. The Resolution was approved by the 62% of the total electorate and only less than 2% went against the same. The Statement of Objects and Reasons of the Constitution (Thirty-Sixth Amendment) Act, 1975 refers to the unanimous Resolution of the State Assembly, which after taking note of the persistent anti-people activities of the Chogyal decided to abolish the institution of the Chogyal and to make Sikkim a constituent unit of India in the following terms : C D

> "The institution of the Chogyal is hereby abolished and Sikkim shall henceforth be a constituent unit of India, enjoying a democratic and fully responsible Government."

In this background, the Statement of Objects and Reasons further proceeds to declare :- E

> "5. Accordingly, it is proposed to include Sikkim as a *full-fledged State* in the First Schedule to the Constitution and to allot to Sikkim one seat in the Council of States and one seat in the House of the People. It is also proposed to insert a new article containing the provisions considered necessary *to meet the special circumstances and needs of* Sikkim." F

(emphasis added) G

43. The intention was clear that the people of Sikkim, by a near unanimous verdict, decided to join India as a full-fledged State with the aspiration of participating in the affairs of the country on the same terms applicable to the rest of India. The decision to insert a new Article was considered necessary only the limited purpose to meet the special cir- H

A cumstances and needs of Sikkim. The question is whether a provision for granting a disproportionately higher representation of the Bhutia-Lepchas in the State legislature was necessary. If it was not, clause (f) of Article 371F must be construed as not protecting the impugned statutory amendments.

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44. If we examine the different clauses of Article 371F, we find that several additional provisions deviating from the original, have been incorporated in the Constitution, in view of the special circumstances peculiar to Sikkim. By Article 170 the minimum size of the Assembly of the States is fixed at 60 seats which was too large for a small State like Sikkim with C a total population of only three lacs. This was a special feature which distinguished it from the other States. The ratio of the number of the representatives to the population did not justify a House of 60 and, therefore, by clause (a) the minimum number was fixed only at 30. For obvious reasons clauses (c) and (e) had to be inserted in the Article as the D appointed day with reference to Sikkim could not have been the same as the appointed day with reference to the other States. Clause (d) also became relevant for allotting a seat to the State of Sikkim in the House of the People. So far clause (b) is concerned, the same became necessary for a temporary period for the smooth transition of Sikkim from merely "associate" status to a full-fledged State of the Union. In order to avoid a E bumpy ride during the period that the effect of merger was being constitutionally worked out, there was urgent need of special temporary provisions to enables the State functionaries to discharge their duties. If the other clauses are also examined closely it will be manifest that they were necessary in view of the special needs of the Sikkim. The point is whether for F the protection of the Bhutia-Lepcha Tribe, the safeguards already provided in the Constitution were inadequate so as to call for or justify special provisions of reservation, inconsistent with the Constitution of India as it stood before the Thirty-Sixth Amendment. The problem of Bhutia-Lepcha Tribe is identical to that of the other Tribes of several States where they are greatly out-numbered by the general population, and which has been G effectively dealt with by the provisions for reservation in their favour included in Part XVI of the Constitution. It cannot be justifiably suggested that by subjecting the provisions of the reservations to the limitations in clause (3) of Article 332, the Tribes in India have been left unprotected at the mercy of the overwhelming majority of the general population. The H reservations in Part XVI were considered adequate protection to them and

it had not been proved wrong for about three and a half decades before 1975, when Sikkim merged with India. It must, therefore, be held that the adequate safeguard in favour of the Bhutia-Lepchas was already available under the Constitution and all that was required was to treat them as Tribes like the other Tribes. As a matter of fact this position was correctly appreciated in 1978 when the Presidential Order was issued under Article 342 of Part XVI. The interpretation of Article 371F (f), as suggested on behalf of the respondents, is inconsistent with the issuance of the said Order. I, therefore, hold that the object of clause (f) was not to take care of this problem and it did not authorise the Parliament to pass the Amendment (Act 8 of 1980) inserting section 7(1A) (a) in the Representation of the People Act, 1950 and section 5A in the Representation of the People Act, 1951 and other related amendments. They being violative of the constitutional provisions including those in Article 371F (f) are *ultra vires.*

45. The next point is as to whether clause (f) of Article 371F will have to be struck down on the ground of violation of the basic features of the Constitution, if it is interpreted as suggested on behalf of the respondents.

46. The Preamble of the Constitution of India emphatically decalres that we were giving to ourselves the Constitution with a firm resolve to constitute a sovereign, democratic, republic; with equality of status and of opportunity to all its citizens. The issue which has direct bearing on the question under consideration is as to what is the meaning of 'democratic republic'. The expressions 'democracy' and 'democratic' have been used in varying senses in different countries and in many places have been subjected to denote the state of affairs which is in complete negation of the meaning in which they are understood. During the present century it progressively became more fashionable and profitable to frequently use those terms and accordingly they have been grossly misused. We are not concerned with that kind of so called democracy, which is used as a stepping stone for the establishment of a totalitarian regime, or that which is hypocritically dangled before the people under the name of democracy but is in reality an oligarchical set up concentrating the power in a few. We are also not concerned with the wider theoretical conception in which the word can be understood. In our Constitution, it refers to denote what it literally means. that is, 'people's powers.' It stands for the actual, active and effective exercise of power by the people in this regard. Schumpeter gives

A a simple definition of democracy as "the ability of a people to choose and dismiss a government". Giovanni Sartori translates the same idea in institutional form and says that democracy is a multi-party system in which the majority governs and respects the right of minority. In the present context it refers to the political participation of the people in running the administration of the government. It conveys the state of affairs in which each B citizen is assured of right of equal participation in the polity. The expression has been used in this sense, both in the Indian Constitution and by the people of Sikkim as their goal to achieve. The repeated emphasis that was goven to the *rule of one-man-one-vote* in the various documents preceding Sikkim's merger with India, clearly defines the system of government which C the people of Sikkim by an overwhelming majority decided to establish and which was exactly the same as under the Indian Constitution. This goal cannot be achieved by merely allotting each person one vote which they can cast in favour of a particular candidate or a special group of persons, selected for this purpose by others, in which they have no say. The result D in such a case would be that while one man of this class is assigned the strengh of one full vote, others have to be content with only a fraction. If there is 90% reservation in the seats of a House in favour of 10% of the population in the State, and only the remaining 10% of the seats are left to the majority population, then the principle of adult suffrage as included in Article 326 is sacrificed. By permitting the 90% of the population to vote E not only for 10% seats available to them, but also for the 90% reserved seats the basic flaw going to the root of the matter is not cured. The choice of the candidate and the right to stand as a candidate at the election are inherent in the principle of adult suffrage, that is, one-man-one-vote. By telling the people that they have a choice to elect any of a select group F cannot be treated as a freee choice of the candidate. This will only amount to lip service, to thinly veiled to conceal the reality of an oligarchy underneath. It will be just an apology for democracy; a subterfuge; and if it is permitted to cross the limit so as to violate the very core of the *principle of one-man-one-vote,* and is not controlled by the constitutional safeguards as included in clause (3) of Article 332 (see paragraph 12 above) of the G Constitution it will amount to a huge fraud perpetrated against the people. So far the Sangha seat is concerned even this transparent cloak has been shed off. It has to be appreciated that the very purpose of providing reservation in favour of a weaker class is to aid the elemental principle of democracy based on one-man-one-vote to succeed. The disproportionately H

excessive reservation creates a privileged class, not brought to the same plane with others but put on a higher pedestal, causing unhealthy competition, creating hatred and distrust between classes and fostering devisive forces. This amounts to abnegation of the values cherished by the people of India (including Sikkim), as told by their story of struggle and sufferings culminating into the framing of the Indian Constitution (and the merger of Sikkim as one of the State in 1975). This is not permissible even by an amendment of the Constitution.

47. In a search for constitutions similar to ours, one may look towards Canada and Australia and not to Cyprus. But the Canadian and Australian Constitutions also differ from our Constitution in many respects, including some of the fundamental principles and the basic features. The unalterable fundamental commitments incorporated in a written constitution are like the soul of a person not amenable to a substitution by transplant or otherwise. And for identifying what they are with reference to a particular constitution, it is necessary to consider, besides other factors, the historical background in which the constitution has been framed, the firm basic commitments of the people articulated in the course of and by the contents of their struggle and sacrifice preceding it (if any), the thought process and traditional beliefs as also the social ills intended to be taken care of. These differ from country to country. The fundamental philosophy, therefore, varies from Constitution to Constitution. A Constitution has its own personality and as in the case of a human being, its basic features cannot be defined in the terms of another Constitution. The expressions 'democracy' and 'republic' have conveyed not exactly the same ideas through out the world, and little help can be obtained by referring to another Constitution for determining the meaning and scope of the said expressions with reference to our Constitution. When we undertake the task of self-appraisal, we cannot afford to forget our motto of the entire world being one big family (Vasudhaiva Kutumbkam) and consequent commitment to the cause of unity which made the people suffer death, destruction and devastation on an unprecedented scale for replacing the foreign rule by a democratic government on the basis of equal status for all. The fact that they lost in their effort for a untited independent country is not relevant in the present context, because that did not shake their faith in democracy where every person is to be trated equal, and with this firm resolve, they proceeded to make the Constitution. An examination of the provisions of the Constitution does not leave room from any doubt that this

A idea has been kept as the guiding factor while framing the Constitution. 'Democracy' and 'republic' have to be understood accordingly. Let us now examine the Constitution in this light.

48. As explained by the Preamble the quality of democracy envisaged
B by the Constitution does not only secure the equality of opportunity but of status as well, to all the citizens. This equality principle is clearly brought out in several Articles in the different parts of the Constitution, including Part III dealing with Fundamental Rights, Part IV laying down the Directive Principles of State policy and Part XVI having special provisions relating to certain classes. The spirit pervades through the entire document
C as can be seen by the other provisions too. When the question of the qualification for election as President arises, all classes of citizens get same treatment by Articles 58 and 59 (subject to certain qualifications which are uniformly applied) and similar is the position with respect to the Vice-President and the other constitutional functionaries. The protection in Part
D III is available to all, and the State has to strive to promote the welfare of the people and the right to adequate means of livelihood, to justice and free legal aid, and to work et cetera with respect to everybody. Certain special benefits are, however, extended or may be extended to certain weaker classes, but this again is for the sake of placing them on equal footing with the others, and not for defeating the cause of equality. So far
E the question of equality of opportunity in matter of employment is concerned, provisions for reservation of posts are included in favour of backward classes who may be inadequately represented in the services. Welfare measures also are permitted on the same line, but, when it comes to the reservation of seats in the Parliament or the State Legislature, it is given a
F different treatment in Part XVI. Clause (2) of Article 330 and clause (3) of Article 332 lay down the rule for maintaining the ratio, which the population of the class bears to the total population. This is significant. The sole objective of providing for reservations in the Constitution is to put the principle of equal status to work. So far the case of inadequate representation of a backward class in State services is concerned, the problem
G is not susceptibly to be solved in one stroke; and consequently the relevant provisions are kept flexible permitting wider discretion so as to attain the goal of adequate proportionate representation. The situation in respect to representation in the legislature is entirely different. As soon as an election takes place in accordance with the provisions for proportionate repre-
H sentation, the objective is achieved immediately, because there is no prob-

lem of backlog to be tackled. On the earlier legislature disappearing, paving the way for new election, the people get a clean slate before them. The excessive reservation in this situation will bring in an imbalance–of course of another kind–but defeating the cause of equal status all the same. The pendulam does not stand straight - it swings to the other side. The casualty in both cases is the equality clause. Both situations defeat the very object for which the democratic forces waged the war of independence; and they undo what has been achieved by the Constitution. This is clearly violative of the basic features of the Constitution. I hold that if clause (f) of Article 371F is so construed as to authorise the Parliament to enact the impugned provisions it will be violative of the basic features of the Constitution and, therefore, void.

49. The views expressed above are adequate for the disposal of the present cases, but it may be expedient to examine the matter from one more angle before concluding the judgment. It was very strongly contended by the learned advocates for the respondents that the impugned provisions should be upheld and the writ petitions dismissed by reason of the historical background of Sikkim. It was repeatedly emphasised that in view of the 5th term of the Tripartite Agreement and in view of the fact that the Sangha seat was created by Chogyal as far back as in 1958, the arrangements agreed upon by the parties are not liable to be disturbed. Reference was made to the several Proclamations of Chogyal by the counsel for the different respondents and intervenors one after the other. In my view the impact of the historical background on the interpretation of the situation is to the contrary. During the period, referred to, the fight between the despotic Chogyal trying to retain his authority and the people demanding installation of a democratic rule was going on. No importance can, therefore, be attached to the terms included in the Agreement at the instance of the ruler or to his Proclamations. On the other hand, what is relevant to be considered is the demand of the people which ultimately succeeded. If we proceed to interpret the situation by respecting and giving effect to the acts and omissions of Chogyal in his desperate attempt to cling to power and subvert to the democratic process set in motion by the people, we may have to re-write the history and deprive the people of Sikkim of what they were able to wrest from his clutches from time to time ultimately ending with the merger. The reservation of the Sangha seat was also one of such anti-people acts. So far the Note to the Proclamation of 16 May, 1968 is concerned if it has to be enforced, the Nepalis shall also be entitled

A to reservation of equal number of seats as the Bhutia-Lepchas and same number of seats should be earmarked for nomination by the authority in power. Actually Mr. Bhatt appearing for some of the respondents seriously pressed before us the claim of Nepalis for reservation in their favour. This entire line of thought is wholly misconceived. We can not ignore the fact that as soon as the Assembly vested with effective authority was constituted B it proceeded to undo what is being relied upon before us on behalf of the respondents. When they passed the historic resolution dated April 10, 1975, discussed earlier in detail, the 5th terms of the Agreement was given up, and when the people were invited to express their opinion by holding a plebiscite, they gave their verdict, unburdened by any such condition, by a C near unanimous voice. I presume that this was so because it was known that the in-built safeguards of the Indian Constitution were adequate for taking care of this aspect. This is a complete answer to such an argument. The history, so far it may be relevant, condemns in no uncertain terms the excessive reservation in favour of the Bhutia-Lepchas and the Sangha. The D Thirty-Sixth Amendment in the Constitution has to be understood in this light.

50. My conclusion, therefore, is that the impugned provisions are *ultra vires* the Constitution including Article 371F (f). Consequently the present Sikkim Assembly constituted on the basis of the election, held E under the impugned provisions has to be declared illegally constituted. Therefore, the concerned authorities must take fresh and immediate steps under the law consistent with the Constitution as applied to the rest of the country. The writ petitions are accordingly allowed with costs payable to the writ petitioners.

F

51. Before finally closing, I would like to say a few words in the light of the opinion of my learned Brothers as expressed in the majority judgment disagreeing with my conclusions. In view of this judgment all the petitions have now to be dismissed, but I want to emphasize that what has G been held therein is that the Parliament has not exceeded its Constituent and Legislative Powers in enacting the impugned provisions and consequently the writ petitions have to be dismissed. This does not mean that the Parliament is bound to give effect to the discriminatory provisions by reason of the historical background in which Sikkim joined India. It is H within the 'wisdom' (to borrow the expression from paragraph 30 of the

majority judgment) of the Parliament to take a decision on the issue and as hinted in the same paragraph, the present situtation hopefully may be a transitory passing phase. The provisions in clause (f) of Article 371F have been, in paragraph 31 of the judgment, described as 'enabling', that is, not obligatory. It, therefore, follows that although this Court has not jurisdiction to strike down the impugned provisions, it is perfectly within the domain of the Parliament to undo, what I prefer to call, 'the wrong'. The unequal apportionment of the role in the polity of the country assigned to different groups tends to foster unhealthy rivalry impairing the mutual feeling of goodwill and fellowship amongst the people, and encouraging divisive forces. The reservation of a seat for the Sanghas and creation of a separate electorate have a still greater pernicious portent. Religion, as it has come to be understood, does not mix well with governance; the resultant explosive compound of such an illsuited combination has proved to be lethal for the unity of the nation only a few decades ago leading to the partition. The framing of our Constitution was taken up immediately thereafter. Our country has suffered for a thousand years on account of this dangerous phenomenon resulting in large scale internecine struggles and frequent blood spilling. Today a single seat in the legislature of one State is not conspicuously noticeable and may not by itself be capable of causing irreparable damage, but this seed of discord has the potentiality of developing into a deadly monster. It is true that some special rights have been envisaged in the Constitution for handicapped classes but this has been done only to off-set the disadvantage the classes suffer from, and not for bringing another kind of imbalance by making virtue out of minority status. The Constitution, therefore, has taken precaution to place rigid limitations on the extent to which this weightage can be granted, by including express provisions instead of leaving the matter to be dealt with by subsequent enactments - limitations both by putting a ceiling on the reservation of seats in the legislatures and excluding religion as the basis of discrimination. To ignore these limitations is to encourage small groups and classes - which are in good number in our country on one basis or the other - to stick to and rely on their special status as members of separate groups and classes and not to join the mainstream of the nation and be identified as Indians. It is, therefore, absolutely essential that religion, disguised by any mask and concealed within any cloak must be kept out of the field exclusively reserved for the exercise of the State powers. To my

A B C D E F G H

A mind the message has been always clear and loud and now it remains for the nation to pay heed to and act through its elected representatives.

VENKATACHALIAH, J. These petitions under Article 226 of the Constitution of India --- which where originally filed in the High Court of Sikkim and now withdrawn by and transferred to this Court under Article B 139-A ---raise certain interesting and significant issues of the constitutional limitations on the power of Parliament as to the nature of the terms and conditions that it could impose under Article 2 of the Constitution for the admission of the new States into the Union of India. These issues arise in the context of the admission of Sikkim into the Indian Union under the C Constitution (36th Amendment) Act, 1975 as the 22nd State in the First Schedule of the Constitution of India.

2. Earlier, in pursuance of the resolution of the Sikkim Assembly passed by virtue of its powers under the Government of Sikkim Act, 1974, D expressing its desire to be associated with the political and economic institutions of India and for the representation of the people of Sikkim in India's Parliamentary system, the Constitution [35th Amendment] Act, 1974 had come to be passed inserting Article 2A which gave the State of Sikkim the status of an "Associate State"; but later Sikkim became, as aforesaid, an integral part of the Indian Union as a full-fledged State in E the Union by virtue of the Constitution (36th Amendment) Act, 1975, which, however, provided for special provisions in Article 371-F to accommodate certain historical incidents of the evolution of the political institutions of Sikkim. It is the contitutionality of the incidents of this special status, particularly in the matter of reservation of seats for various ethnic F and relgious gourps in the Legislative Assembly of the State that have been assailed as "unconstitutional" in these petitions.

3. Sikkim is a mountain-State in the North-East of India of an area of about 7200 sq. km. on the Eastern Himlayas. It has a population of about four lakhs. Sikkim is of strategic location bounded, as it is, on the West by G Nepal, on the North by Tibet, on the East by Bhutan and on the Southern and Western sides by the State of West Bengal in the Indian Union. It lies astride the shortest route from India to Tibet. The State is entirely mountainous. Covered with dense forests, it lies in the Northern-most Areas in Lachen and Lachung. Mountains rise to 7000 m and above Kanchenjunga H (8,579 m) being World's Third Highest Peak. Sikkim has several hundred

varieties of orchids and is frequently referred to as 'botanist's paradise'. ("India 1991" page 930).

4. To the historian, Sikkim's history, lore, culture and traditions are a fascinating study. The early history of this mountainous land is lost in the mists of time. But it is said that in 1642, Phuntsog Namgyal became the first Chogyal, the spiritual and temporal Ruler in the Namgyal dynasty which ruled Sikkim till it joined the mainstream of Indian polity in 1975.

The main inhabitants of Sikkim are the Lepchas, the Bhutias and the later immigrants from Nepal. The Lepchas were the original indigenous inhabitants. The Bhutias are said to have come from Kham in Tibet during the 15th and 16th centuries. These people of Tibetan origin are called Bhutias -- said to be a derivative from the word "Bod" or "Tibet" -- and as the tradition has it took refuge in the country after the schism in Tibet in 15th and 16th centuries. One of their Chieftains was crowned the 'Chogyal' of Sikkim in 1642. It would appear that Sikkim was originally quite an extensive country but is stated to have lost large chunks of its territories to Nepal and Bhutan and finally to the British. Lepchas and Bhutias are Buddhists by religion.

Sikkim was a British protectorate till 1947 when the British paramountancy lapsed whereafter under a Treaty of the 3rd December, 1950 with India, Sikkim continued as a protectorate of India. Over the past century, there was large migration into Sikkim of people of Nepalese origin. The influx was such that in the course of time, Sikkimese of Nepalese origin constituted almost 2/3rd of Sikkim's population. There has been, accordingly, a clamour for protection of the original Bhutias-Lepchas now an ethnic majority from the political voice and expression being sub-merged by the later immigrants from Nepal.

5. These ethnic and demographic diversities of the Sikkimese people; apprehensions of ethnic dimensions owing to the segmental pluralism of the Sikkimese society and the imbalances of opportunities for political expression are the basis of -- and the claimed justification for -- the insertion of Article 371-F. The phenomenon of deep fragmentation, societal cleavages of pluralist societies and recognition of these realities in the evolution of pragmatic adjustments consistent with basic principles of democracy are the recurrent issues in political organisation.

A In his "Democracy in Plural Societies", Arend Lijphart makes some significant observations at Page 16. :

> "A great many of the developing countries--particularly those in Asia and Africa, but also some South American countries, such as Guyana, Surinam, and Trinidad--are beset by political problems arising from the deep divisions between segments of their populations and the absence of a unifying consensus. The theoretical literature on political development, nation-building, and democratization in the new states treats this fact in a curiously ambivalent fashion. On the one hand, many writers implicitly refuse to acknowledge its importance.
>
> "Such communal attachments are what Cliffor Geertz calls "primordial" loyalties, which may be based on language, religion, custom, region, race, or assumed blood ties. The subcultures of the European consociational democracies, which are religious and ideological in nature and on which, in two of the countries, linguistic divisions are superimposed, may also be regarded as primordial groups-if one is willing to view ideology as a kind of religion."
>
> "At the same time, it is imperative to be alert to qualitative and quantitative differences within the broad category of plural societies: differences between different kinds of segmental cleavages and differences in the degree to which a society is plural.
>
> The second prominent characteristic of non-Western politics is the breakdown of democracy. After the initial optimism concerning the democratic prospects of the newly independent countries, based largely on the democratic aspirations voiced by their political leaders, a mood of disillusionment has set in. And, according to many observers, there is a direct connection between the two fundamental features of non-Western politics: a plural society is incapable of sustaining a democratic government."

Pluralist societies are the result of irreversible movements of history. They cannot be washed away. The political genius of a people should be able to evolve within the democratic system, adjustments and solutions.

6. Pursuant to Article 371-F and the corresponding conseqential changes brought about in the Representation of the People Act, 1950, Representation of the People Act, 1951, as amended by the Election Laws (Extension to Sikkim) Act, 1976 and the Representation of the People (Amendment) Act, 1980, 12 out of the 32 seats in the Sikkim Assembly are reserved for the Sikkimese of "Bhutia-Lepcha" origin and one seat for the "Sangha", Buddhist Lamaic monasteries the election to which latter being on the basis of a separate Electoral roll in which only the "Sanghas" belonging to the Lamaic monasteries recognised for the purposes of elections held in Sikkim in April, 1974, are entitled to be registered.

These reservations of seats for the ethnic and religious groups are assailed by the petitioners who are Sikkimese of Nepali origin as violative of the fundamentals of the Indian constitutionalism and as violative of the principles of republicanism and secularism forming the bedcrock of the Indian constitutional ethos. The basic contention is that Sikkim citizen is as much as citizen of the Union of India entitled to all the Constitutional guarantees and the blessings of a Republican Democracy.

7. It is necessary here to advert to the movement for the establishment of a responsible Government in Sikkim and of the evolution of its political institutions.

By a Royal Proclamation of 28th December, 1952, State Council was set-up in which out of the 12 elected members, 6 were to be Bhutias-Lepchas and the other 6 Sikkimese of Nepalese origin. Sikkim was divided into four constituencies with the following break-down of the distribution of seats between Bhutias-Lepchas and the Nepalis :

(i) Gangtok Constituency	-	2 Bhutia-Lepcha	1 Nepali
(ii) North-Central Constituency	-	2 Bhutia-Lepcha	1 Nepali
(iii) Namchi Constituency	-	1 Bhutia-Lepcha	2 Nepalis
(iv) Pemayangtse Constituency	-	1 Bhutia-Lepcha	2 Nepalis

By "the State Council and Executive Council Proclamation, 1953" dated 23rd March, 1953, a State Council of 18 members consisting of 12 elected members, 5 nominated members and a President to be nominated by the Maharaja was constituted. Out of the 12 elected members, again 6 were to be Bhutias-Lepchas and the other 6 of Nepalese origin. Clauses 1, 2 and 3 of the Proclamation read :

> "1. This Proclamation may be cited as the State Council and Executive Council Proclamation, 1953, and shall come into operation immediately on its publication in the Sikkim Government Gazette.
>
> 2. There shall be constituted a State Council for the State of Sikkim.
>
> 3. The State Council shall consist of :-
>
> (a) A president who shall be nominated and appointed by the Maharaja;
>
> (b) Twelve elected members, of whom six shall be either Sikkim Bhutia, or Lepcha and the remaining six shall be Sikkim Nepalese; and,
>
> (c) Five members nominated by His Highness the Maharaja in his discretion."

In 1958, the strength of the council was increased to 20. The break - up of the its composition was as under :

(1) Seats reserved for Bhutia & Lepchas - 6

(2) Seats reserved for Nepalis - 6

(3) General seat -1

(4) Seat reserved for the Sangha -1

(5) Nomination by His Highness -6

By the "Representation of Sikkim Subjects Regulation, 1966" dated 21.12.1966 promulgated by the then Chogyal, the State Council was to

consist of territorial constituencies as under :

1. Bhutia-Lepchas -	7
2. Sikkimese Nepalese -	7
3. The Sanghas -	1
4. Scheduled Caste -	1
5. Tsong -	1
6. General seat -	1
7. Nominated by the Chogyal -	6
Total =	24

8. The year 1973 saw the culmination of a series of successive political movements in Sikkim towards a Government responsible to the people. On 8th May, 1973, a tripartite agreement was executed amongst the Ruler of Sikkim, the Foreign Secretary to the Government of India and the political parties representing the people of Sikkkim which gave expansion to the increassing popular pressure for self-Government and democratic institutions in Sikkim. This tripartite agreement envisaged the right of poeple of Sikkim to elections on the basis of adult suffrage. It also contemplated the setting up of a Legislative Assembly in Sikkim to be re-constituted by election every four years. The agreement declared a commitment to free and fair elections to be overseen by a represenatative of the Election Commission of India. Clause 5 of the Tripartite agreement said :

> "(5) The system of elections shall be so organised as to make the Assembly adequately representative of the various sections of the population. The size and composition of the Assembly and of the Executive Council shall be such as may be prescribed from time to time, care being taken to ensure that no single section of the population acquires a dominating position due mainly to its ethnic origin, and that the rights and interests of the Sikkimese Bhutia Lepcha origin and of the Sikkimese Nepali, which includes Tsong and Scheduled Caste origin, are fully protected."

This agreement was effectuated by a Royal Proclamation called the Representation of Sikkim Subjects Act, 1974. The reservations of seats

A under this dispensation were as under :

> "3. The Assembly shall consist of thirty-two elected members.
> A(i) Sixteen Constituencies shall be reserved for Sikkimese of Bhutia Lepcha origin.
>
> B
>
> A(ii) Out of these sixteen constituencies, one shall be reserved for the Sangha.
>
> B(i) The remaining sixteen constituencies shall be reserved for Sikkimese of Nepali, including Tsong and Scheduled
> C Caste, origin.
>
> B(ii) Out of the above-mentioned sixteen constituencies of reserved for Sikkimese of Nepali origin, one constituency shall be reserved for persons belonging to the Scheduled
> D Castes notified in the Second Schedule annexed hereto."

9. The Sikkim Assembly so elected and constituted, passed the Government of Sikkim Act, 1974 "for the progressive realisation of a fully responsible Government in Sikkim and for further strengthening close ties with India". Para 5 of the Tripartite agreement dated 8.5.1973 was incor-
E porated in Section 7 of the said Act.

Sections 30 and 33 of the said Act further provided :

> "30. For the speedy development of Sikkim in the social, economic and political field, the Government of Sikkim
> F may --
>
> (a) request the Government of India to include the planned development of Sikkim within the ambit to the Planning Commission of India while that Commission is
> G preparing plans for the economic and social development of India and to appropriately associate officials from Sikkim in such work;
>
> (b) request the Government of India to provide facilities for students from Sikkim in institutions for higher learning
> H and for the employment of people from Sikkim in the public

services of India (including All - India Services), at par with those available to citizens of India;

(c) seek participation and representation for the people of Sikkim in the political institutions of India."

"33. The Assembly whcih the has been formed as a result of the elections held in Sikkim in April, 1974, shall be deemed to be the first Assembly duly constituted under this Act, and shall be entitled to exercise the powers and perform the functions conferred on the Assembly by this Act."

10. Article 2A of the Constitution introduced by the Constitution (35th Amendment) Act, 1974 was the Indian reciprocation of the aspirations of the Sikkimese people and Sikkim was given the status of an "Associate State" with the Union of India under terms and conditions set out in the 10th Schedule inserted in the Constitution by the said Constitution (35th Amendment) Act, 1974.

11. The year 1975 witnessed an uprising and dissatisfaction of the people against the Chogyal. The Sikkim Assembly, by an unanimous resolution, abolished the institution of "Chogyal" and declared that Sikkim shall thenceforth be "a constituent unit of India enjoying a democratic and fully responsible Government". The resolution also envisaged an opinion-poll on the matter. Its resolution was endorsed by the people of Sikkim in the opinion-poll conducted on 14.4.1975. The Constitution (36th Amendment) Act, 1975 came to be passed giving statehood to Sikkim in the Indian polity. Article 2A was repealed. Article 371-F introduced by the 36th Constitutional Amendment, envisaged certain special conditions for the admission of Sikkim as a new State in the Union of India. Certain legislative measures for amendments to the Electoral Laws considered necessary to meet the special situation of Sikkim, were also brought into force. Clause (f) of Article 371F reads :

"(f) Parliament may, for the purpose of protecting the rights and interests of the different sections of the population of Sikkim, make provision for the number of seats in the Legislative Assembly of the State of Sikkim which may be

A filled by candidates belonging to such sections and for the delimitation of the assembly constituencies from which candidates belonging to such sections alone may stand for election to the Legislative Assembly of the State of Sikkim."

The Election Laws (Extension to Sikkim) Act, 1976 sought to extend, B with certain special provisions, the Representation of the People Act, 1950 and the Representation of the People Act, 1951 to Sikkim.

Section 25A of the said Act provides :

"25-A. *Conditions of registration as elector in Sangha Con-* C *stituency in Sikkim* - Notwithstanding anything contained in sections 15 and 29, for the Sangha Constituency in the State of Sikkim, only the Sanghas belonging to monasteries, recognised for the purpose of the elections held in Sikkim in April, 1974, for forming the Assembly for Sikkim, shall D be entitled to be registered in the electoral roll, and the said electoral roll shall, subject to the provisions of sections 21 to 25, be prepared or revised in such manner as may be directed by the Election Commission, in consultation with the Government of Sikkim."

E By the "Representation of the People (Amendment) Ordinance, 1979" promulgated by the President of India on 11.9.1979, amendments were introduced to the Representation of the People Act, 1950 and the Representation of the People Act, 1951 to enable fresh elections to the Sikkim Assembly on certain basis considered appropriate to and in con- F formity with the historical evolution of the Sikkim's political institutions. The Ordinance was later replaced by Representation of the People (Amendment) Act, 1980 by which sub-section (1-A) was inserted in Section 7 of the Representation of the People Act, 1950. That sub-section provides:

"(1-A). Notwithstanding anything contained in sub-s. (1), G the total number of seats in the Legislative Assembly of the State of Sikkim, to be constituted at anytime after the commencement of the Representation of the People (Amendment) Act 1980 to be filled by persons chosen by direct election from assembly constituencies shall be thir- H ty-two, of which -

(a) twelve seats shall be reserved for Sikkimese of Bhutia-Lepcha origin; A

(b) two seats shall be reserved for the Scheduled Caste of that State; and

(c) one seat shall be reserved for the Sanghas referred to in Section 25-A. B

Explanation : In this sub-s. 'Bhutia' includes Chumbipa, Dopthapa, Dukpa, Kagatey, Sherps, Tibetan, Tromopa and Yolmo." C

Section 5-A was also introduced in the Representation of the People Act, 1951. Sub-section (2) of Section 5A provides :

"5A (2) Notwithstanding anything contained in Section 5, a person shall not be qualified to be chosen to fill a seat in D the Legislative Assembly of the State of Sikkim, to be constitued at any time after the commencement of the Representation of the People (Amendment) Act, 1980 unless -

(a) in the case of a seat reserved for Sikkimese of Bhutia-Lepcha origin, he is a person either of Bhutia or Lepcha E origin and is an elector for any assembly constituency in the State other than the constituency reserved for the Sanghas'

(b) in the case of a seat reserved for the Scheduled Castes, F he is a member of any of those castes in the State of Sikkim and is an elector for any assembly constituency in the State;

(c) in the case of a seat reserved for Sanghas, he is an elector of the Sangha constituency; and G

(d) in the case of any other seat, he is an elector for any assembly constituency in the State."

12. Petitioners assail the constitutionality of the provisions for reservation of seats in favour of Bhutias-Lepchas and the "Sangha". H

A On the contentions urged in support of the petitions, the points that fall for consideration, are the following :

(a) Whether the questions raised in the petitions pertaining as they do to the terms and conditions of accession of new territory are governed by rules of public international law and are non-justiciable on the "political questions doctrine"?

B

(b) Whether clause (f) of Article 371 F of the Constitution of India, introduced by the Constitution (36th Amendment) Act, 1975 is violative of the basic features of democracy?

C

(c) Whether Secton 7(1A) and Section 25A of the Representation of the People Act, 1950 [as inserted by Election Laws (Extension to Sikkim) Act, 1976] and Representation of the People (Amendment) Act, 1980 respectively and Section 5A(2) of the Representation of the People Act, 1951 [as inserted by the Representation of the People (Amendment) Act, 1980] providing for reservation of 12 seats, out of 32 seats in the Sikkim Legislative Assembly in favour of Bhutias-Lepachas, are unconstitutional as violative of the basic features of democracy and republicanism under the Indian Constitution?

D

E

(d) Whether the aforesaid provisions and the reservations made thereunder are violative of Article 14, 170(2) and 332 of the Constitution? Whether they violate 'one person one vote' rule? Or are these differences justified in the historical background of Sikkim and are incidental to the political events culminating in the cession of Sikkim?

F

(e) Whether the reservation of 12 seats out of 32 seats reserved for Bhutias-Lepchas is *ultra vires* of clause (f) of Article 371-F in that while that provision enabled the protection of the rights and interests of different sections of population of Sikkim and for the number of seats in the Legislative Assembly which may be filled by the candidates belonging to such sections, the impugned provisions pro-

G

H

vide for one section alone, namely, the Bhutias-Lepchas.

(f) Whether, at all events in view of the Constitution (Sikkim) Scheduled Tribes Order, 1978 declaring Bhutias and Lepchas as a Schedule Tribe, the extent of reservation of seats is disproportionate and violative of Article 332(3) of the Constitution which requires that the number of seats to be reserved shall bear as nearly as may be, the same proportion to the total number of the seats in the Assembly as the population of the Secheduled Tribe in the State bears to the total population of the State.

(g) Whether the reservation of one seat for Sangha to be elected by an Electoral College of Lamaic monasteries is based purely on religious distinctions and is, therefore, unconstitutional as violative of Articles 15(1) and 325 of the Constitution and as violative of the principle of secularism?

Re : Contention (a)

13. The territory of Sikkim was admitted into the Indian Union by an act of voluntary cession by the general consent of its inhabitants expressed on a Referendum. Referring to the acquisition of title to territory by cession, a learned author says :

"(f) Title by Cession - Title to territory may also be acquired by an act of cession, which means, the transfer of sovereignty over State territory by the owner (ceding) State to the acquiring State. It rests on the principle that the right of transferring its territory is a fundamental attribute of the sovereignty of a State."

"Plebiscite - The method of plebiscite in certain cases was adopted by the Treaties of Peace after the First World War, and it had the buyant blessing of President Wilson who told the Congress: "No peace can last or ought to last, which does not recognise and accept the principle that government drive all their just powers from the consent of the governed, and that no right anywhere exists to hand peoples

A about from sovereignty as if they were property." Article 26 of the Constitution of France (1946) provides that no new territory shall be added to France without a plebiscite.

In certain cases, cession may be made conditional upon the result of a plebiscite, which is held to give effect to the
B principle of self-determination. In other words, no cession shall be valid until the inhabitants have given their consent to it by a plebiscite. It is often only a technicality, as in Outer Mongolia, in 1945, and in South-West Africa, in 1946. As Oppenheim observes, it is doubtful whether the
C law of nations will ever make it a condition of every cession that it must be ratified by a plebiscite."

[See : *Substance of Public International Law Western and Eastern* : A.K. Pavithran First Edition, 1965 at pp. 281-2]

D Sri Parasaran urged that the rights of the inhabitants of a territory becoming part of India depend on the terms subject to which the territory is admitted and Article 2 confers wide powers on the Parliament. Sri Parasaran urged that the considerations that guide the matter are eminently political and are outside the area of justiciability. Sri Parasaran said that the in-
E habitants of a territory can claim and assert only those rights that the succeeding sovereign expressly confers on them. Sri Parasaran relied upon the following observations of Chief Justice Chandrachud in *VinodKumar Shantilal Gosalia* v. *Gangadhar Narsingdas Agarwal & Ors.*, [1982] 1 SCR 392 :

"Before considering the merits of the respective contenF tions bearing on the effect of the provisions of the Administration Act and the Regulation, it is necessary to reiterate a well-settled legal position that when a new territory is acquired in any manner -- be it by consent, annexation or cession following upon a treaty -- the new
G "sovereign" is not bound by the rights which the residents of the conquered territory had against their sovereign or by the obligations of the old sovereign towards his subjects. The rights of the residents of a territory against their state of sovereign come to an end with the conquest, annexation or cession of that territory and do not pass on to the new
H environment. The inhabitants of the acquired territory

bring with them no rights whcih they can enforce against the new State of which they become inhabitants. The new state is not required, by any positive assertion or declaration, to repudiate its obligations by disowning such rights. The new state may recongnise the old rights by re-granting them which, in the majority of cases, would be a matter of contract or of executive action; or, alternatively, the recongnition of old rights may be made by an appropriate statutory provisions whereby rights which were in force immediately before an appointed date are saved. Whether the new state has accepted new obligations by recognising old rights, is a question of fact depending upon whether one or the other course has been adopted by it. And, whether it is alleged that old rights are saved by a statutory provision, it becomes necessary to determine the kind of rights which are saved and the extend to which they are saved."

A B C D

But, we are afraid these observations are inapposite in the present context as the situation is different here. What the argument overlooks is that the petitioners are not seeking to enforce such rights as vested in them prior to the accession. What they seek to assert and enforce, are the rights which the Indian Constitution confers on them upon the accession of their territory into the Indian Union and as arising from the conferment on them of Indian citizenship. In the present cases the question of recognition and enforcement of the rights which the petitioners, as residents of the ceded territory had against their own sovereign or by the obligations of the old sovereign its people, do not arise.

E F

The principal questions are whether there are any constitutional limitations on the power of Parliament in the matter of prescription of the terms and conditions for admission of a new State into the Union of India; and if so, what these limitations are.

G

14. Articles 2 and 4 of the Constitution provide :

"2. Parliament may by law admit into the Union, or establish, new States on such terms and conditions as it thinks fit."

H

A "4. (1) Any law referred to in article 2 or article 3 shall contain such provisions for the amendment of the First Schedule and the Fourth Schedule as may be necessary to give effect to the provisions of the law and may also contain such supplemental, incidental and consequential provisions (including provisions as to representation in
B Parliament and in the Legislature or Legislatures of the State or States affected by such law) as Parliament may deem necessary.

(2) No such law as aforesaid shall be deemed to be an
C amendment of this Constitution for the purpose of article 368.

Can the Parliament in imposing terms and conditions in exercise of power under Article 2 stipulate and impose conditions inconsistent with the basic and fundamental principles of Indian Constitutionalism? Or is it
D imperative that the newly admitted State should be treated exactly similar to the States as at the time of the commencement of the Constitution? If not, what is the extent of the permissible departure and latitude and do the conditions in clause (f) of Article 371-F and as expressed in the electoral laws as applicable to Sikkim go beyond these constitutionally permissible
E limits? These are some of the questions.

15. The learned Attorney-General for the Union of India and Sri Parasaran sought to contend that the terms and conditions of admission of a new territory into the Union of India are eminently political questions
F which the Court should decline to decide as these questions lack adjudicative disposition. This political thickets doctrine as a restraint on judicial power has been the subject of forensic debate, at once intense and interesting, and has evoked considerable judicial responses.

G 16. In "The Constitution of the United States of America" (Analysis and Interpretation; Congressional Research Service: Library of Congress 1982 Edn. at p.703), the following statement of the law on the subject occurs:

"It may be that there will be a case assuredly within the
H Court's jurisdiction presented by the parties with standing

in which adverseness and ripeness will exist, a case in other words presenting all the qualifications we have considered making it a justiciable controversy, which the Court will nontheless refuse to adjudicate. The "label" for such a case is that it presents a "political question".

Tracing the origins and development of this doctrine, the authors refer to the following observations of Chief Justice Marshall in *Marbury* v. *Madison,* 1 Cr. 5 US 137, 170 (1803) :

> "The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. *Questions in their natural political, or which are, by the constitution and laws, submitted to the executive can never be made in this court."*
>
> (emphasis supplied)

The authors further say :

> "But the doctrine was asserted even earlier as the Court in *Ware* v. *Hylton,* 3 Dall. 3 US 199 (1796) refused to pass on the question whether a treaty had been broken. And in *Martin* v. *Mott,* 12 Wheat. 25 US 19 (1827) the Court held that the President acting under congressional authorization had exclusive and unreviewable power to determine when the militia should be called out. But it was in *Luther* v. *Borden,* 7 How. 48 US 1 (1849) that the concept was first enunciated as a doctrine separate from considerations of interference with executive functions."

17. Prior to the decision of the Supreme Court of the United States in *Baker* v. *Carr,* 369 US 186 the cases challenging the distribution of political power through apportionment and districting, weighed-voting, and restrictions on political action were held to present non-justiciable political questions. The basis of this doctrine was the "seeming conviction of the courts that the issues raised were well beyond the judicial responsibility". In *Baker* v. *Carr,* the Court undretook a major rationalisation and formulation of the 'political question doctrine' which led to considerable narrowing

A of its application. The effect *Baker* v. *Carr.,* and the later decision in *Poweel* v. *McCormack,* 395 US 486 is that in the United States of America certain controversies previously immune from adjudication were held justiciable and decided on the merits. The rejection of the political thickets arguments in these cases marks a narrowing of the operation of the doctrine in other
B areas as well.

In *Japan Whaling Ass'n* v. *American Cetacean Society,* 478 [1986] US 221 the American Supreme Court said :

C

> "We address first the Japanese petitioners' contention that the present actions are unsuitable for judicial review because they involve foreign relations and that a federal court, therefore, lacks the judicial power to command the Secretary of Commerce, an Executive Branch official, to
> D dishonor and repudiate an international agreement. Relying on the political question doctrine, and quoting *Baker* v. *Carr.,* 369 US 186, 217 7 L Ed. 2d 663, 82 S Ct. 691 (1969), the Japanese Petitioners argue that the danger of "embarrassment from multifarious pronouncements by various
> E departments on one question" bars any judicial resolution of the instant controversy." (Page 178)

> "We disagree. Baker carefully pointed out that not every matter touching on politics is a political question, id., at
> F 209, 7 L Ed. 2d 663, 82 S.Ct. 691, and more specifically, that it is "error to suppose that every case of controversy which touches foreign relations lies beyond judicial cognizance." Id., at 211, 7 L Ed. 2d 663, 82 S Ct. 691. *The political question doctrine excludes from judicial review those*
> G *controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch. The Judiciary is particularly ill-suited to make such decisions, as "courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal*
> H *in nature."* (P. 178)

"As Baker plainly held, however, the courts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts. It is also evident that the challenge to the Secretary's decision not to certify Japan for harvesting whales in excess of IWC quotas presents a purely legal question of statutory interpretation. The Court must first determine the nature and scope of the duty imposed upon the secretary by the Amendments, a decision which calls for applying no more than the traditional rules of statutoty construction, and then applying this analysis to the particular set of facts presented below. We are cognizent of the interplay between these Amendments and the conduct of this Nation's foreign relations, and we recognize the premier role which both Congress and the Executive play in this field. *But under the Constitution, one of the Judiciary's characteristic roles is to interpret Statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones."* (PP. 178-9)

(emphasis supplied)

18. Our Court has received and viewed this doctrine with a cautious reservation. In *A.K. Roy* v. *Union of India,* [1982] 2 SCR 272 at 296-7, Chief Justice Chandrachud recognised that the doctrine, which was essentially a function of the separation of powers in America, was to be adopted cautiously and said :

"It must also be mentioned that in the United States itself, the doctrine of the political question has come under a cloud and has been the subject matter of adverse criticism. It is said that all that the doctrine really means is that in the exercise of the power of judicial review, the courts must adopt a 'prudential' attitude, which requires that they should be wary of deciding upon the merit of any issue in which claims of principle as to the issue and claims of expediency as to the power and prestige of courts are in sharp conflict. The result, more or less, is that in America

A the phrase "political question' has become "a little more than a play of words".

There is further recognition of the limitation of this doctrine in the pronouncement of this Court in *Madhav Rao* v. *Union of India,* [1971] 3 SCR 9 and *State of Rajasthan* v. *Union of India,* [1978] 1 SCR 1.
B

19. It is urged for the respondents that Article 2 of the Constitution empowers the Parliament, by law, to admit into the Union new States "on such terms and conditions as it finds fit" and that these considerations involve complex questions of political policy and expdience; of internation-
C al-relations; of security and defence of the realm etc. whcih do not possess and present judicially manageable standards. Judicial response to these questions, it is urged, is judicial restraint.

The validity of clause (f) of Article 371 F introduced by the Constitu-
D tion (36th Amendment) Act, 1975 is assailed on the ground that the said clause provides for a reservation which violates 'one person one vote' rule which is essential to democracy which latter is itself a basic feature of the Constitution. The power to admit new States into the Union under Article 2 is, no doubt, in the very nature of the power, very wide and its exercise
E necessarily guided by political issues of considerable complexity many of which may not be judicially manageable. But for that reason, it cannot be predicated that Article 2 confers on the Parliament an unreviewable and unfettered power immune from judicial scrutiny. The power is limited by the fundamentals of the Indian constitutionalism and those terms and conditions which the Parliament may deem fit to impose, cannot be incon-
F sistent and irreconciliable with the foundational principles of the Constitution and cannot violate or subvert the Constitutional scheme. This is not to say that the conditions subject to which a new State or territory is admitted into the Union ought exactly be the same as those that govern all other States as at the time of the commencement of the Constitution.
G

It is, however, urged that Article 371F starts with a *non obstante* clause and therefore the other provisions of the Constitution do not limit the power of impose conditions. But Article 371-F cannot transgress the basic features of the Constitution. The *non obstante* clause cannot be
H construed as taking clause (f) of Article 371F outside the limitations on the

amending power itself. The provisions of clause (f) of Article 371-F and Article 2 have to be construed harmoniously consistent with the foundational principles and basic features of the Constitution. Whether clause (f) has the effect of destroying a basic feature of the Constitution depends, in turn, on the question whether reservation of seats in the legislature based on ethnic group is itself destructive of democratic principle. Whatever the merits of the contentions be, it cannot be said the issues raised are non-justiciable.

In *Mangal Singh & Anr.* v. *Union of India,* [1967] 2 SCR 109 at 112 this Court said :

> "... Power with which the Parliament is invested by Arts. 2 and 3, is power to admit, establish, or form new States which conform to the democratic pattern envisaged by the Constitution; and the power which the Parliament may exercise by law is supplemental, incidental or consequential to the admission, establishment or formation of a State as contemplated by the Constitution, and is not power to override the constitutional scheme".

Even if clause (f) of Article 371 F is valid, if the terms and conditions stipulated in a law made under Article 2 read with clause (f) of Article 371F go beyond the constitutionally permissible latitudes, that law can be questioned as to its validity. The contention that the vires of the provisions and effects of such a law are non-justiciable cannot be accepted.

Contention (a) requires to be and is rejected.

Re : Contentions (b), (c) and (d)

20. The objection of non-justiciability thus out of their way, the petitioners urge that the provisions in clause (f) of Article 371F enabling reservation of seats for sections of the people and law made in exercise of that power providing reservation of seats to Bhutias-Lepchas violate fundamental principles of democracy and republicanism under the Indian Constitution and violate the 'one person one vote' rule which, it is urged, is a basic to the republican principle found in Article 170(2) of the Constitution.

A Sri R.K. Jain, learned senior counsel for the petitioners said that apart from the invalidity of the power itself the exercise of the power in the matter of the extent of the reservations made for Bhutias-Lepchas has the effect of whittling down, correspondingly, the value of the votes of the Sikkimese of Nepalese origin and is destructive of the equality principle B and the democratic principle. Clauses (1) and (2) of Article 170 provide :

> "170. (1) Subject to the provisions of article 333, the Legislative Assembly of each State shall consist of not more than five hundred, and not less than sixty, members chosen by direct election from territorial constituencies in the State.
>
> C
>
> (2) For the purposees of clause (1), each State shall be divided into territorial constituencies in such manner that the ratio between the population of each constituency and the number of seats allotted to it shall, so far as practicable be the same throughout the State.
>
> D
>
> Explanation. In this clause, the expression "population" means the population as ascertained at the last preceding census of which the relevant figures have been published:"

E This provision incorporates the rule of 'fair and effective representation'. Though the rule 'one person one vote' is a broad principle of democracy, it is more a declaration of a political ideal than a mandate for enforcement with arithmetical accuracy. These are the usual problems that arise in the delimitation of constituencies. In what is called "First-past-the-post" system of elections, the variations in the size and in the voting F populations of different constituencies, detract from a strict achievement of this ideal. The system has the merit of preponderance of "decisiveness" over "representativeness".

Commenting on this phenomenon Keith Graham in "*The Battle of* G *Democracy:* Conflict, Consensus and the Individual" says :

> "This, in existing systems where voters are electing representatives, examples of gross inequality between the powers of different votes occur, either because of desparities in constituency size or because of the anomalies produced in H a first-past-the-post system. There was, for instance, an

occasion when one Californian State Senator represented six million electors and another one fourteen thousand electors (Portter 1981:114); in February, 1974 constituencies in England varied from 96,380 to 25,007 electors (Hansard Society Commission 1976:7); and in the United Kingdom between 1945 and 1976 nine out of ten of the elected governments acquired more than 50 per cent of the seats, but none acquired 50 per cent of the votes cast (ibid.:9). When the United States Supreme Court asserted that it had jurisdiction in the matter of huge disparities in the value of citizens' votes it did so, significantly, by referring to the Fourteenth Amendment, which guarantees equal protection of the laws." (Page 55)

21. The concept of political equality underlying a democratic system is a political value. Perfect political equality is only ideological. Indeed, as Rodney Brazier points out in his "*Constitutional Reform*: Re-shaping the British Political System" :

"Inextricably linked in the voting system with unfairness is the supremacy of decisiveness over representativeness. The first-past-the-post system has developed into a mighty engine which can be relied on to produce a government from one of the two principal parties. But in that development the purpose of gathering a House of Commons which is broadly representative of the electorate has rather faded. This would be possibly not be as important as it is if the elective function worked on the basis of a majority of voters conferring a parliamentary majority on the winning party. Patently, however, it does not do so. Mrs. Thatcher's 144-seat landslide majority in 1983, and her huge 102-seat majority in 1987, were achieved even though on both occasions some 57 per cent of votes were given to other parties. Almost 60 per of voting citizens voted against the Conservative Government. This is by no means a recent phenomenon. Attlee's 146-seat majority in 1945 was won on under 48 per cent of the vote, and indeed no winning party has been supported by half or more of those going to the polls since the general election of 1935. Are the

A virtues of the British electoral system - simplicity, decisiveness, its ability to produce stable governments, and so on - so self-evident as to justify such distortions of the electoral will? It is really necessary to have voting system predicated either on the representative function, or (as in Britain) on the elective function?" (Page 46)

B

Again, Brazier in "*Constitutional Practice*" (Clarendon Press Oxford) says :

"The first-past-the-post system usually has the advantage
C of producing a majority government at a general election: it is decisive, simple, and familiar to the electorate. Yet it is also unfair. No one could say that a scheme which gives one political group three per cent of the seats from 22.6 per cent of the national vote, but which gives another party 36 per cent of the seats with a mere eight per cent more of
D the votes, does anything but violence to the concept of fair play as the British understand it. The present system also underpins elective dictatorship in a way that different electoral rules, which would return more MPs from third (and perhaps fourth) parties, would undermine. And we speak
E of 'majority governments' by reference to seats won in the House, but no government has been returned with a majority of the popular vote since 1935." (Page 191)

Arend Lijphart in "Democracy in Plural Societies" observes :

F "Formidable though the classic dangers are of a plurality of sovereign states, these have to be reckoned against those inherent in the attempt to contain disparate communities within the framework of a single government. In the field of peace research, there is a similar tendency to frown on
G peace which is achieved by separating the potential enemies-- significantly labeled "negative" peace--and to strive for peace based on fraternal feeling within a single integrated and just society: "positive" peace. (P. 47)

The problem of equality of the value of votes is further complicated
H by a progressive rural depopulation and increasing urbanisation. In the

work "Legislative Apportionment : Key to Power" (Howard D. Hamilton) the learned author says :

> "But even the right to vote, and its exercise does not in itself insure equal voice in the affairs of government.
>
> Today--more than 175 years after the nation was founded-the votes of millions of citizens are worth only one-half, one quarter and even one-one hundredth the value of votes of others because of the unfair formulas by which we elect the Unites States Congress and the legislatures of the forty-eight states. As our population grows and moves continuously toward urban centres, the ballots of millions become less and less equal to the votes of others. Our system of representative government is being sapped at its roots."
>
> "Who are the second-class citizens in this under - represented majority? They are the millions living in our towns and cities, says the United States Conference of Mayors, pointing to the fact that the 59 per cent of all Americans who were living in urban centers in 1947 elected only 25 percent of the state legislators." (Page 74)

Gordon E. Baker writing on "One Person, One Vote : "Fair and Effective Representation?" [Representation and Misrepresentation - Rand McNally & Co. Chicago] says :

> "While population inequality among legislative districts is hardly new, its has become a major source of controversy primarily in the twentieth century."
>
> "A statistical analysis of the New Jersey Senate by Professor Ernest C. Reock, Jr., revealed that "The average relative population deviation rose from 27.7. per cent in 1791 to 80.0 per cent in 1922. The ratio between the largest and smallest counties - only 7.85 at the beginning of that period - reached 33.51 at the end. The minimum percentage of the state's population residing in counties electing a majority of the Senate dropped from 41.0 per cent to 15.9 per cent." (PP. 72-3)

A 22. Sri Jain, however, relied upon the decision in *B.A. Reynolds* v. *M.O. Sims,* 377 US 506 at 527 in which it was observed :

> "Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner
B is preservative of other basic civil and political rights, any allege infringement of the right of citizens to vote must be carefully and meticulously scrutinized."

> "Legislators represent people, not trees or acres. Legis-
C lators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system."
D

> "And, if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right
E to vote of those residing in the disfavored areas had not been effectively diluted. It would appear exordinary to suggest that a State could be constitutionally permitted to enact a law providing that certain of the State's voters could vote two, five or 10 times for their legislative representatives, while voters living elsewhere could vote only
F once."

Even so, Chief Justice Warren observed :

> "... We realize that it is a practical impossibility to arrange
G legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement." (p.536)

> "... *So long as the divergences from a strict population stand-*
H *ard are based on legitimate considerations incident to the*

effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature." (p.537)

(emphasis supplied)

23. Section 24 of the Australian Constitution requires that "the House of Representatives shall be composed of members directly chosen by the people of Commonwealth". The High Court of Australia considered the principle of *Reynolds* v. *Sims, (supra) somewhat inapposite in the Australian context. In Attorney General (CTH) Ex. Rel. Mckinlay* v. *The Commonwealth,* [1975] 135 CLR 1 at p.22 Barwick CJ observed :

> "It is, therefore, my opinion that the second paragraph of s.24 cannot be read as containing any guarantee that there shall be a precise mathematical relationship between the number of members chosen in a State and the population of that State or that every person in Australia or that every elector in Australia will have a vote, or an equal vote."

Mason, J. said :

> "The substance of the matter is that the conception of equality in the value of a vote or equality as between electoral divisions is a comparatively modern development for which no stipulation was made in the system of democratic representative government provided for by our Constitution." (p.62)

24. It is true that the right to vote is central to the right to participation in the democratic process. However, there is less consensus amongst theorists on the propriety of judicial activism in the voting area. In India, the Delimitation Laws made under Article 327 of the Constitution of India, are immune from the judicial test of their validity and the process of allotment of seats and constituencies not liable to be called in question in any court by virtue of Article 329(a) of the Constitution. But the laws providing reservations are made under authority of other provisions of the Constitution such as those in Art. 332 or clause (f) of Article 371F which

A latter is a special provision for Sikkim.

25. The rationale and constitutionality of clause (f) and the other provisions of the electoral laws impugned in these petitions are sought to be justified by the respondents on grounds that first, a perfect arithmetical equality of value of votes is not a constitutionally mendated imperative of B democracy and, secondly, that even if the impugned provisions make a departure from the tolerance limits and the constituationally permissible latitudes, the discriminations arising are justifiable on the basis of the historical considerations peculiar to and characteristic of the evolution of Sikkim's political institutions. This, it is urged, is the justification for the C special provisions in clause (f) which was specifically intended to meet the special situation. It is sought to be pointed out that throughout the period when the ideas of responsible-Government sprouted in Sikkim, there has been a vigilant political endeavour to sustain that delicate balance between Bhutias-Lepchas on the one hand and the Sikkimese of Nepalese origin on D the other essential to the social stability of that mountain-State. Clause (f) of Article 371F was intended to prevent the domination of the later Nepali immigrants who had, in course of time, outnumbered the original inhabitants. What Article 371-F(f) and the electoral laws in relation to Sikkim seek to provide, it is urged, is to maintain this balance in the peculiar E historical setting of the development of Sikkim and its political institutions.

26. So far as the 'Sangha' is concerned it is urged that though it was essentially a religious institution of the Buddhists, it however occupied a unique position in the political, social and cultural life of the Sikkimese society and the one seat reserved for it cannot, therefore, be said to be based F on considerations 'only' of religion. In the counter-affidavit filed by the Sikkim Tribal Welfare Association, certain special aspects of the position of the 'Sangha' in Sikkim's polity are emphasised. Reference to and reliance has been placed on the extracts from "The Himalayan Gateway" (History and Culture of Sikkim) in which the following passages occur :

G

> "The reservation for the Sangha is the most unique feature of the political set up in the State. It is a concession to continuity and is admittedly short term. Before the revolution the Buddhist Sangha of the Lamas wielded immense power, both religious and political. The people have come H to have great faith in their wisdom and justice. They are

universally respected and still command considerable influence with a section of the people who would be called poor and politically backward. The presence of one of their representatives in the Assembly could possibly give the illiterate masses a greater faith in its deliberations."(P.149)

"Finally lamaism is a social organisation. The lamas (to a lesser extent the nuns) are arranged in a disciplined hierarchy. They are a section of society which performs for the whole society its religious functions; in return the rest of society should give material support to the lamas...." (PP. 192- 193)

"It is calculated that about ten per cent of the combined Bhutia-Lepcha population are monks. Could there be anything more telling for the spiritual heritage of the people. According to tradition the second son of every Bhutia household is to be called to the Sangha - the order of Buddhist monks. No matter where one goes, one can come across a monastery called Gompa. For a small state like Sikkim in which the Buddhist Bhutia - Lepcha population hardly exceed thirty thousands, there are more than thirty famous monasteries. In fact most of the prominent hilitops of the country are crowned with a monastery shrine or a temple. Apart from these at every village there is a Gompa or a village monastery with a resident lama looking after the spiritual needs of a small community. Frequently, Chorten, the lamaist version of the original Buddhist stupa, are also seen." (pp. 112-3)

"Life in the countryside centres round the monastery of the Buddhist monks, the lamas. Birth, death, sickness - all are occasions for the lamas to be called in for the performance of appropriate ceremonies. Just putting up a prayer flag even needs the attendance of lamas."(p. 115)

Since the rulers were also monk-incarnates constantly in transaction with the high Lamas of Tibet and the Deb-Raja of Bhutan, these monks were used as emissaries,

A medioators, and settlers of various state affairs. In internal administration also, the monks held important positions. They were appointed to the State Council, they managed the monastery estates, administered justice and even helped the laity in fighting against the enemies. Though economically dependent, they were very much influential both in the court and in public life. In fact, it was these clergymen who managed the affairs of the state in collaboration with Kazis." (p. 18, 19)

B

27. As is noticed earlier Article 2 gives a wide latitude in the matter C of prescription of terms and conditions subject to which a new territory is admitted. There is no constitutional imperative that those terms and conditions should ensure that the new State should, in all repects, be the same as the other States in the Indian Union. However, the terms and conditions should not seek to establish a form or system of Government or political D and governmental institutions alien to and fundamentally different from those the Constitution envisages.

Indeed, in "*Constitutional Law of India*", [Edited by Hidayatullah, J. published by the Bar Council of India Trust], it is observed :

E

"Foreign territories, which after acquisition, become a part of the territory of India under Article 1(3) (c) can be admitted into the Union of India by a law passed under Article 2. Such territory may be admitted into the Union F of India or may be constituted into new States on such terms and conditions as Parliament may think fit. Such territory can also be dealt with under clause (a) or (b) of Article 3. *This means that for admitting into the Indian Union or establishing a new State, a parliamentary law is necessary and the new State so admitted or established* G *cannot claim complete equality with other Indian States, because Parliament has power to admit or establish a new State "on such terms and conditions as it thinks fit".* (Vol. I, Page 58)

H (Emphasis supplied]

28. In judicial review of the vires of the exercise of a constitutional power such as the one under Article 2, the significance and importance of the political components of the decision deemed fit by Parliament cannot be put out of consideration as long as the conditions do not violate the constitutional fundamentals. In the interpretation of constitutional document, "words are but the framework of concept and concepts may change more than words themselves". The significance of the change of the concepts themselves is vital and the constitutional issues are not solved by a mere appeal to the meaning of the words without an acceptance of the line of their growth. It is aptly said that 'the intention of a Constitution is rather to outline principles than to engrave details'.

Commenting on the approach appropriate to a Constitution, a learned author speaking of another federal document says (The Australian Law Journal, Vol. 43 at p.256) :

> "A moment's reflection will show that a flexible approach is almost imperative when it is sought to regulate the affairs of a nation by powers which are distributed, not always in the most logical fashion, among two or more classes of political agencies. The difficulties arising from this premise are much exacerbated by the way in which the Australian Constitution came to be formed : drafted by many hands, then subjected to the hazards of political debate, where the achievement of unanimity is often bought at the price of compromise, of bargaining and expediency."

29. An examination of the constitutional scheme would indicate that the concept of 'one person one vote' is in its very nature considerably tolerant of imbalances and departures from a very strict application and enforcement. The provision in the Constitution indicating proportionality of representation is necessarily a broad, general and logical principle but not intended to be expressed with arthmetical precision. Articles 332 (3A) and 333 are illustrative instances. The principle of mathematical proportionality of representation is not a declared basic requirement in each and every part of the territory of India. Accommodations and adjustments, having regard to the politcal maturity, awareness and degress of political development in different parts of India, might supply the justification for

A even non-elected Assemblies wholly or in part, in certain parts of the country. The differing degrees of political development and maturity of various parts of the country, may not justify standards based on mathematical accuracy. Articles 371A, a special provisions in respect of State of Negaland, 239A and 240 illustrate the permissible areas and degrees of
B departure. The systemic deficiencies in the plenitude of the doctrine of full and effective representation has not been understood in the contitutional philosophy as derogating from the democratic principle. Indeed, the argument in the case, in the perspective, is really one of violation of the equality principle rather than of the democratic principle. The inequalities in
C representation in the present case are an inheritance and compulsion from the past. Historical considerations have justified a differential treatment.

Article 371F (f) cannot be said to violate any basic feature of the Constitution such as the democratic principle.

D 30. From 1975 and onwards, when the impugned provisions came to be enacted, Sikkim has been emerging from a political society and monarchical system into the mainstream of a democratic way of life and an industrial civilisation. The process and pace of this political transformation is necessarily reliant on its institutions of the past. Mere existence of a
E Constitution, by itself, does not ensure constitutionalism or a constitutional culture. It is the political maturity and traditions of a people that import meaning to a Constitution which otherwise merely embodies political hopes and ideals. The provisions of clause (f) of the Article 371F and the consequent changes in the electoral laws were intended to recognise and
F accommodate the pace of the growth of the political institutions of Sikkim and to make the transition gradual and peaceful and to prevent dominance of one section of the population over another on the basis of ethnic loyalties and identities. These adjustments and accommodations reflect a political expediencies for the maintenance of social equilibrium. The political and social maturity and of economic development might in course of time
G enable the people of Sikkim to transcend and submerge these ethnic apprehensions and imbalances and might in future --- one hopes sooner --- usher-in a more egalitarian dispensation. Indeed, the impugned provisions, in their very nature, contemplate and provide for a transitional phase in the political evolution of Sikkim and are thereby essentially transitional in
H character.

It is true that the reservation of seats of the kind and the extent brought about by the impugned provisions may not, if applied to the existing States of the Union, pass the Constitutional muster. But in relation to a new territory admitted to the Union, the terms and conditions are not such as to fall outside the permissible constitutional limits. Historical considerations and compulsions do justify inequality and special treatment. In *Lachhman Dass etc.* v. *State of Punjab & Ors.,* AIR 1963 SC 222 this court said :

> "The law is now well settled that while Article 14 prohibits discriminatory legislation directed against one individual or class of individuals, it does not forbid reasonable classification, and that for this purpose even one person or group of persons can be a class. Professor Willis says in his Constitutional Law p.580 "a law applying to one person or one class of persons is constitutional if there is sufficient basis of reason for it.....And if after reorganisation of States and integration of the Pepsu Union in the State of Punjab, different laws apply to different parts of the State, that is due to historical reasons, and that has always been recognised as a proper basis of classification under Article 14."

In *State of Madhya Pradesh* v. *Bhopal Sugar Industries Ltd.,* [1964] 6 SCR 846 at 850 this court said:

> ".....The Legislature has always the power to make special laws to attain particular objects and for that purpose has authority to select or classify persons, objects or transactions upon which the law is intended to operate. Differential treatment becomes unlawful only when it is arbitrary or not supported by a rational relation with the object of the statute. .....where application of unequal laws is reasonably justified for historical reasons, a geographical classification founded on those historical reasons would be upheld."

We are of the view that the impugned provisions have been found in the wisdom of Parliament necessary in the admission of a strategic border-

A State into the Union. The departures are not such as to negate fundamental principles of democarcy. We accordingly hold and answer contentions (b), (c) and (d) also against the petitioners.

Re : Contentions (e) and (f)

B 31. Sri Jain submitted that clause (f) of Article 371F would require that wherever provisions for reservation of seats are considered necessary for the purpose of protecting the rights and interests of different sections of the population of Sikkim, such reservations are to be made for all such sections and not, as here, for one of them alone. This contention ignores C that the provision in clause (f) of Art. 371F is merely enabling. If reservation is made by Parliament for only one section it must, by implication, be construed to have exercised the power respecting the other sections in a negational sense. The provision really enables reservation confined only to a particular section.

D 32. Sri Jain contended that Bhutias and Lepchas had been declared as Scheduled Tribes under the Constitution [Sikkim Scheduled Tribes] Order, 1978 and that the extent of the reservation in their favour would necessarily be governed by the provisions of Article 332(2) of the Constitution which requires that the number of seats to be reserved shall bear, as E nearly as may be, the same proportion to the total number of seats in the Assembly as the population of the Schedule Tribes in the State bears to the total population of the State. But, in our opinion, clause (f) of Article 371F is intended to enable, a departure from Art. 332(2). This is the clear operational effect of the *non obstante* clause with which Article 371F opens.

F Sri Jain pointed out with the help of certain demographic statistics that the degree of reservation of 38% in the present case for a population of 20%, is disproportionate. This again has to be viewed in the historical development and the rules of apportionment of political power that ob- G tained between the different groups prior to the merger of the territory in India. A parity had been maintained all through.

We are of the opinion that the provisions in the particular situation and the permissible latitudes, cannot be said to be unconstitutional.

H *Re : Contention (g)*

The contention is that the reservation of one seat in favour of the 'Sangha' which is Bhuddhist Lamaic religious monasteries, is one purely based on religious considerations and is violative of Articles 15(1) and 325 of the Constitution and offends its secular principles. The reservation of one seat for the 'Sangha', with a special electorate of its own, might at the first blush appear to resuscitate ideas of separate electorates considered pernicious for the unity and integrity of the country.

The Sangha, the Buddha and the Dharma are the three fundamental postulates and symbols of Buddhism. In that sense they are religious institutions. However, the literature on the history of development of the political institutions of Sikkim adverted to earlier tend to show that the Sangha had played an important role in the political and social life of the Sikkimese people. It had made its own contribution to the Sikkimese culture and political development. There is material to sustain the conclusion that the'Sangha' had long been associated itself closely with the political developments of Sikkim and was inter-woven with the social and political life of its people. It view of this historical association, the provisions in the matter of reservation of a seat for the Sangha recognises the social and political role of the institution more than its purely religious identity. In the historical setting of Sikkim and its social and political evolution the provision has to be construed really as not invoking the impermissible idea of a separate electorate either. Indeed, the provision bears comparison to Articles 333 providing for representation for the Anglo-Indian community. So far as the provision for the Sangha is concerned, it is to be looked at as enabling a nomination but the choice of the nominee being left to the 'Sangha' itself. We are conscious that a separate electorate for a religious denomination would be obnoxious to the fundamental principles of our secular Constitution. If a provision is made purely on the basis of religious considerations for election of a member of that religious group on the basis of a separate electorate, that would, indeed, be wholly unconstitutional. But in the case of the Sangha, it is not merely a religious institution. It has been historically a political and social institution in Sikkim and the provisions in regard to the seat reserved admit to being construed as a nomination and the Sangha itself being assigned the task of and enabled to indicate the choice of its nominee. The provision can be sustained on this construction. Contention (g) is answered accordingly.

A 33. For the foregoing reasons, all the petitions are dismissed without any order as to costs.

S.C. AGRAWAL, J. With due deference to my learned brethren for whom I have the highest regard, I regret my inability to concur fully with B the views expressed in either of these judgments. It has, therefore, become necessary for me to express my views separately on the various questions that arise for consideration.

These cases arise out of Writ Petitions which were originally filed under Article 226 of the Constitution in the High Court of Sikkim and have C been transferred to this Court for disposal under Article 139A of the Constitution. They involve challenge to the validity of the provisions inserted in the Representation of the People Act, 1950 (hereinafter referred to as the '1950 Act') and the Representation of the People Act, 1951 (hereinafter referred to as the '1951 Act') by the Election Laws (Extension D to Sikkim) Act, 1976 (10 of 1976) (hereinafter referred to as the '1976 Act') and the Representation of the People (Amendment) Act, 1980 (Act No. 8 of 1080) (hereinafter refrerred to as the '1980 Act'), whereby (i) twelve seats out of thirty-two seats in the Legislative Assembly of Sikkim have been reserved for Sikkimese of Bhutia-Lepcha origin; and (ii) one seat has E been reserved for Sanghas and election to the seat reserved for Sanghas is required to be conducted on the basis of a separate electoral roll in which only the Sanghas belonging to monasteries recognised for the purpose of elections held in Sikkim in April, 1974 for forming the Assembly for Sikkim are entitled to be registered.

F For a proper appreciation of the questions that arise for consideration, it is necessary to briefly refer to the historical background in which the impugned provisions were enacted.

Sikkim is mainly inhabited by Lepchas, Bhutias and Nepalese. Lep- G chas are the indigenous inhabitants. Bhutias came from Kham in Tibet some time during fifteenth and sixteenth centuries and one of the chieftains was crowned Chogyal, or religious and secular ruler, in 1642. Lepchas and Bhutias are Buddhists. By the end of the last century, Sikkim became a British protectorate and it continued as such till 1947 when British rule H came to an end in India. During this period, while it was British protec-

torate, there was immigration of Nepalese on a large scale and as a result, by 1947, Sikkimese of Nepali origin out-numbered other people in a ratio of 2:1. After the end of the British rule in 1947, Sikkim came under the protection of the Government of India. On December 3, 1950, the Maharaja of Sikkim entered into a treaty with the President of India whereby it was agreed that Sikkim shall continue to be a Protectorate of India and subject to the provisions of the Treaty, shall enjoy autonomy in regard to its internal affairs.

On December 28, 1952, the Ruler of Sikkim issued a Proclamation to make provision for election of members of the State Council. The said Proclamation envisaged twelve elected members in the Council out of which six were to be Bhutia-Lepcha and six were to be Nepalese. On March 23, 1953, another Proclamation known as the State Council and Executive Council Proclamation, 1953, was issued. It provided for a State Council consisting of eighteen members (a President to be nominated and appointed by the Maharaja twelve elected members and five nominated members). Out of the elected members six were to be either Sikkimese Bhutia or Lepcha and the remaining six were to be Sikkimese Nepalese. By Proclamation dated March 16, 1958, the strength of the Council was raised to twenty. The six seats for nominated members were retained and while maintaining the reservation of six seats for Bhutias and Lepchas and six seats for Nepalese, it was provided that there shall be one general seat and one seat shall be reserved for the Sangha. It was provided that voting for the seat reserved for the Sangha will be through an electoral college of the Sanghas belonging to monasteries recognised by the Sikkim Darbar (Ruler of Sikkim).

Certain adaptations and modifications in the laws relating to election to and composition of the Sikkim Council were made by the Proclamation dated December 21, 1966 (known as the Representation of Sikkim Subjects Regulation, 1966) issued by the Chogyal (Ruler) of Sikkim. Under the said Proclamation, for the purpose of election to the Sikkim Council, Sikkim was divided into five territorial constituencies, one General Constituency and one Sangha Constituency. The General Constituency was to comprise the whole of Sikkim and the Sangha Constituency was to comprise the Sanghas belonging to the monasteries recognised by the Sikkim Darbar. It was also declared that, besides the President who was to be appointed by the Chogyal, the Sikkim Council was to consist of twenty-four members out

A of which seven were to be Bhutia-Lepcha and seven were to be Sikkimese-Nepali who were to be elected from five territorial constituencies; three members were to be elected from the general constituency out of which one seat was to be a General seat, the second from the Scheduled Castes as enumerated in the Second Schedule annexed to the Proclamation, and the third from Tsongs; and the Sangha Constituency was to elect one member through an electoral college of the Sanghas. Six seats were to be filled in by nomination made by the Chogyal at his discretion.

On May 8, 1973, a tripartite agreement was entered into by the Chogyal of Sikkim, the Foreign Secretary to the Government of India and the leaders of the political parties representing the people of Sikkim, whereby it was agreed that the people of Sikkim would enjoy the right of election on the basis of adult suffrage to give effect to the principal of one man one vote and that there shall be an Assembly in the Sikkim and that the said Assembly shall be elected every four years and the elections shall be fair and free, and shall be conducted under the supervision of a representative of the Election Commission of India, who shall be appointed for the purpose by the Government of Sikkim. Para (5) of the said agreement provided as under :

> "(5) The system of elections shall be so organised as to make the Assembly adequately representative of the various sections of the population. The size and composition of the Assembly and of the Executive Council shall be such as may be prescribed from time to time, care being taken to ensure that no single section of the population acquires a dominating position due mainly to its ethnic origin, and that the rights and interests of the Sikkimese Bhutia Lepcha origin and of the Sikkimese Nepali, which includes Tsong and Scheduled Caste Caste origin, are fully protected".

This tripartite agreement was followed by Proclamation dated February 5, 1954 issued by Chogyal of Sikkim. The said Proclamation known as the Representation of Sikkim Subjects Act, 1974, provided that for the purpose of election to the Sikkim Assembly, Sikkim would be divided into thirty-one territorial constituencies and one Sangha constituency and the Sangha constituency would comprise the Sanghas belong-

ing to monasteries recognised by the Chogyal of Sikkim. The Assembly was to consist of thirty-two elected members. Sixteen Constituencies were to be reserved for Sikkimese of Bhutia-Lepcha origin, out of which one was reserved for the Sangha. The remaining sixteen constituencies were to be reserved for Sikkimese of Nepali, including Tsong and Scheduled Caste, origin out of which one constituency was to be reserved for persons belonging to the Scheduled Castes notified in the Schedule annexed to the Proclamation. The elections to the thirty-one territorial constituencies were to be held on the basis of adult suffrage and the Sangha constituency was to elect one member through an electoral college of the Sanghas and a member of the electoral college for the Sanghas was not eligible to vote for any other constituency.

Elections for the Sikkim Assembly were held in accordance with the Representation of Sikkim Subjects Act, 1974 in April 1974. The Sikkim Assembly thus elected, passed the Government of Sikkim Bill, 1974, and after having received the assent of the Chogyal of Sikkim the said Bill was notified as the Government of Sikkim Act, 1974. As stated in the Preamble, the said Act was enacted to provide "for the progressive realisation of a fully responsible Government in Sikkim and for further strengthening its close relationship with India". Section 7 of the said Act relating to elections to the Sikkim Assembly gave recognition to paragraph 5 of the tripartite agreement dated May 8, 1973 in sub-s. (2) wherein it was provided :

> "(2) The Government of Sikkim may make rules for the purpose of providing that the Assembly adequately represents the various sections of the population, that is to say, while fully protecting the legitimate rights and interests of Sikkimese of Lepcha or Bhutia origin and of Sikkimese of Nepali origin and other Sikkimese, including Tsongs and Scheduled Castes no single section of the population is allowed to acquire a dominating position in the affairs of Sikkim mainly by reason of its ethnic origin".

Section 30 of the said Act made provision for association with the Government of India for speedy development of Sikkim in the social, economic and political fields. By section 33 of the said Act, it was declared that the Assembly which had been formed as a result of the elections held in April, 1974 shall be deemed to be the first Assembly duly constituted

A under the said Act.

In order to give effect to the wishes of the people of Sikkim for strengthening Indo-Sikkim cooperation and inter-relationship, the Constitution of India was amended by the Constitution (Thirty- Fifth Amendment) Act, 1974, as a result of which Article 2-A was inserted and Sikkim
B was associated with the Union on the terms and conditions set out in the Tenth Schedule inserted in the Constitution by the said amendment.

It appears that on April 10, 1975, the Sikkim Assembly unanimously passed a resolution wherein, after stating that the activities of the Chogyal
C of Sikkim were in violation of the objectives of the tripartite agreement dated May 8, 1973 and that the institution of Chogyal not only does not promote the wishes and expectations of the people of Sikkim but also impeded their democratic development and participation in the political and economic life of India, it was declared and resolved :

D

> "The institution of the Chogyal is hereby abolished and Sikkim shall henceforth be a constituent unit of India, enjoying a democratic and fully responsible Government".

It was further resolved :

E

> "1. The Resolution contained in part "A" shall be submitted to the people forthwith for their approval.
>
> 2. The Government of India is hereby requested, after the people have approved the Resolution contained in part "A"
F to take such measures as may be necessary and appropriate to implement this Resolution as early as possible".

In accordance with the said Resolution, a special opinion poll was conducted by the Government of Sikkim on April 14, 1975 and in the said
G poll, 59, 637 votes were cast in favour and 1496 votes were cast against the Resolution out of a total electorate of approximately 97,000.

In view of the said resolution adopted unanimously by the Sikkim Assembly which was affirmed by the people of Sikkim in special opinion poll, the Constitution was further amended by the Constitution (Thirty-
H Sixth Amendment) Act, 1975 whereby Sikkim was included as a full-

fledged State in the Union and Article 371-F was inserted whereby special provisions with respect to the State of Sikkim were made. By virtue of Clause (b) of Article 371-F the Assembly of Sikkim formed as a result of the elections held in Sikkim in April 1974 was to be deemed to be the Legislative Assembly of the State of Sikkim duly constituted under the Constitution and under Clause (c) the period of five years for which the Legislative Assembly was to function was to be deemed to have commenced on the date of commencement of the Constitution (Thirty-Sixth Amendment) Act, 1975. Clause (f) of Article 371-F empowers Parliament to make provision for reservation of seats in the Legislative Assembly of the State of Sikkim for the purpose of protecting the rights and interests of the different sections of the population of Sikkim.

Thereafter Parliament enacted the 1976 Act to provide for the extension of the 1950 Act and the 1951 Act to the State of Sikkim and introduced certain special provisions in the 1950 Act and the 1951 Act in their application to Sikkim. Many of those provisions were transitory in nature being applicable to the Sikkim Assembly which was deemed to be the Legislative Assembly of the State of Sikkim under the Indian Constitution. The only provision which is applicable to future Legislatures of Sikkim is that contained in Section 25-A which reads as under :

> "25-A. *Conditions of registration as elector in Sangha Constituency in Sikkim* – Notwithstanding anything contained in sections 15 and 19, for the Sangha Constituency in the State of Sikkim, only the Sanghas belonging to monasteries, recongised for the purpose of the elections held in Sikkim in April 1974, for forming the Assembly for Sikkim, shall be entitled to be registered in the electoral roll, and the said electoral roll shall, subject to the provisions of sections 21 to 25, be prepared or revised in such manner as may be directed by the Election Commission, in consultation with the Government of Sikkim".

In exercise of the powers conferred on him by Cl. (1) of Article 342 of the Constitution of India, the President of India promulgated the Constitution (Sikkim) Scheduled Tribes Order, 1978 (C.O.11) on June 22, 1978 and it was prescribed that Bhutias and Lepchas shall be deemed to be Scheduled Tribes in relation to the State of Sikkim.

Since the 1976 Act did not make provision for fresh elections for the Legislative Assembly of Sikkim and the term of the said Assembly was due to expire, the Representation of the People (Amendment) Bill, 1979 was introduced in Parliament on May 18, 1979 to amend the 1950 Act and the 1951 Act. While the said Bill was pending before Parliament, Lok Sabha was dissolved and the said Bill lapsed.

Thereafter the Legislative Assembly of Sikkim was also dissolved on August 13, 1979 and fresh elections for the Assembly were to be held. The Representation of the People (Amendment) Ordinance, 1979 (No.7 of 1979) was, therefore, promulgated by the President on September 11, 1979 whereby certain amendments were introduced in the 1950 Act and the 1951 Act. Elections for the Sikkim Legislative Assembly were held in October, 1979 on the basis of the amendments introduced by the said Ordinance. Thereafter, the 1980 Act was enacted to replace the Ordinance. By the 1980 Act, sub-s. (1-A) was inserted in Section 7 of the 1950 Act and it reads as under :

> "(1-A). Notwithstanding anything contained in sub-s.(1), the total number of seats in the Legislative Assembly of the State of Sikkim, to be constituted at any time after the commencement of the Representation of the People (Amendment) Act, 1980 to be filled by persons chosen by direct election from assembly constituencies shall be thirty-two, of which -
>
> (a) twelve seats shall be reserved for Sikkimese of Bhutia-Lepcha origin;
>
> (b) two seats shall be reserved for the Scheduled castes of that State; and
>
> (c) one seat shall be reserved for the Sanghas referred to in Section 25-A.
>
> Explanation : In this sub-s. 'Bhutia' includes Chumbipa, Dopthapa, Dukpa, Kagatey, Sherpa, Tibetan, Tromopa and Yolmo".

Similarly, the following provision was inserted in Section 5-A of the 1951 Act :

"(2) Notwithstanding anything contained in Section 5, a person shall not be qualified to be chosen to fill a seat in the Legislative Assembly of the State of Sikkim, to be constituted at any time after the commencement of the Representation of the People (Amendment) Act, 1980 unless -

(a) in the case of a seat reserved for Sikkimese of Bhutia-Lepcha origin, he is a person either of Bhutia or Lepcha origin and is an elector for any assembly constituency in the State other than the constituency reserved for the Sanghas;

(b) in the case of a seat reserved for the Scheduled Castes, he is a member of any of those castes in the State of Sikkim and is an elector for any assembly constituency in the State;

(c) in the case of a seat reserved for Sanghas, he is an elector of the Sangha constituency; and

(d) in the case of any other seat, he is an elector for any assembly constituency in the State."

The petitioners in these cases are Sikkimese of Nepali origin and they are challenging the validity of Section 25-A introducted in the 1950 Act by the 1976 Act and sub-section (1-A) of Section 7 of the 1950 Act and sub-s. (2) of Section 5-A of the 1951 Act which were introduced by the 1980 Act insofar as they relate to :

(1) Reservation of 12 seats out of 32 seats in the Sikkim Legislative Assembly for Sikkimese of Bhutia-Lepcha origin; and

(2) Reservation of one seat for Sanghas.

The petitioners have not challenged the validity of the Constitution (Thirty Sixth Amendment) Act, 1975 whereby Artitle 371-F was inserted in the Constitution.

In Transferred Cases Nos. 78 of 1982 and 84 of 1982, the case of the petitioners is that Article 371-F should be construed in a manner that it is

A consistent with the general philosophy of the Constitution particularly democracy and secularism and they have challenged the provisions of the 1976 Act and the 1980 Act providing for reservation of 12 seats in the Legislative Assembly of Sikkim for Sikkimese of Bhutia and Lepcha origin and reservation of one seat for Sanghas on the ground that the said
B provisions fall outside the ambit of Article 371-F and are violative of the provisions contained in Articles 332, 14 and 15 and 325 of the Constitution. In the alternative, the case of the petitioners is that if Article 371-F is given a wider construction, it would be unconstitutional being violative of the basic features of the Constitution. The petitioners in Transferred Cases Nos. 93 and 94 of 1991 have taken a different stand. Instead of challenging
C the reservation of seats for Sikkimese of Bhutia and Lepcha origin as well as Sanghas, they have relied upon clause (f) of Article 371-F to claim similar reservation of seats in the Assembly for Sikkimese of Nepali origin.

Before I proceed to deal with contentions urged by the learned
D counsel on behalf of the petitioners in these matters, it is necesary to deal with the submissions of Shri K. Parasaran appearing for the State of Sikkim and the learned Attorney General appearing for the Union of India that the matters in issue being political in nature are not justiciable. It has been urged that admission of Sikkim as a State of Indian Union constitutes
E acquisition of territory by cession in international law and the terms and conditions on which the said cession took place as contained in Article 371-F, are intended to give effect to the tripartite agreement dated May 3, 1973 which was political in nature. It is further urged that under Article 2 of the Constitution, Parliament is empowered by law to admit into Union
F of India and establish new States on such terms and conditions as it thinks fit and that Article 371-F prescribing the terms and conditions on which the State of Sikkim was admitted into the Union of India is a law under Article 2 of the Constitutions and merely because it was introduced in the Constitution by the Constitution (Thirty- sixth Amendment) Act enacted under Article 368 of the Constitution, by way of abundent caution, is of no
G consequence and that it does not alter the true character of the law. The submission is further that since the terms and conditions on which Sikkim was admitted in Union of India, are political in nature, the said terms and conditions cannot be made the subject matter of challenge before this Court because the law is well settled that courts do not adjudicate upon
H questions which are political in nature.

The political question doctrine has been evolved in the United States to deny judicial review in certain fields. The doctrine received a set back in the case of *Baker* v. *Carr.,* [1962] 369 US 186, wherein Brennan, J., rejecting the contention that the challenge to legislative apportionment raises a non-justiciable political question, has observed :

> ".... The nonjusticiability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of the "political question" label to obscure the need for case-by-case inquiry. Deciding whether a matter has in any measure been committed by the Constitution to another brach of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution".
>
> (pp. 210-211)

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> ".... Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility of judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action."
>
> (pp. 211-212)

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> "... Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind

A clearly for nonjudicial discretion; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expression lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question. Unless one of these formulations is inextricable for the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence". (p. 217)

In *Powell* v. *McCormack,* 395 US 490, after reiterating the observations of Brennan, J. In *Baker* v. *Carr* (Supra),Warren, CJ has stated -

"In order to determine whether there has been a textual commitment to a co-ordinate department of the Government, we must interpret the Constitution. In other words, we must first determine what power the Constitution confers upon the House through Art. I, 5, before we can determine to what extent, if any, the exercise of that power is subject to judicial review. ...If examination of 5 disclosed that the Constitution gives the House judicially unreviewable power to set qualifications for memebership and to judge whether prospective members meet those qualifications, further review of the House determination might well be barred by the political question doctrine. On the other hand, if the Constitution gives the House power to judge only whether elected members possess the three standing qualifications set forth in the Constitution, further consideration would be necessary to determine whether any of the other formulations of the political question doctrine are inextricable from the case at bar". (p. 516)

In *A.K. Roy* v. *Union of India,* [1982] 2 SCR 272, Chandrachud, CJ, has thus explained the doctrine as applicable in the United States :

"The doctrine of the political question was evolved in the United States of America on the basis of its Constitution

which has adopted the system of a rigid separation of powers, unlike ours. In fact, that is one of the principal reasons why the U.S. Supreme Court had refused to give advisory opinions. In *Baker* v. *Carr*, Brennan, J. said that the doctrine of political question was "essentially a function of the separation of powers". There is also a sharp difference in the position and powers of the American President on one hand and President of India on the other. The President of the United States exercises executive power in his own right and is responsible not to the Congress but to the people who elect him. In India, the executive power of the Union is vested in the President of India but he is obliged to exercise it on the aid and advice of his Council of Ministers. The President's "satisfaction" is therefore nothing but the satisfaction of his Council of Ministers in whom the real executive power resides. It must also be mentioned that in the United States itself, the doctrine of the political question has come under a cloud and has been the subject matter of adverse criticism. It is said that all that the doctrine really means is that in the exercise of the power of judicial review, the courts must adopt a 'prudential' attitude, which requires that they should be wary of deciding upon the merit of any issue in which claims of principle as to the issue and claims of expediency as to the power and prestige of courts are in sharp conflict. The result, more or less, is that in America the phrase "political question" has become "a little more than a play of words". (pp. 296-297)

In *Madhav Rao* v. *Union of India,* [1971] 3 SCR 9, it was contended that in-recognising or de-recognising a person as a Ruler the President exercises "political power" which is a sovereign power and that the relevant covenants under which the rights of the Rulers were recognised were 'political agreements'. Rejecting the said contention, Shah, J. (as the learned Chief Justice then was) speaking for the majority, observed -

"The functions of the State are classified as legislative, judicial and executive : the executive function is the residue which does not fall within the other two functions. Con-

A stitutional mechanism in a democratic policy does not contemplate existence of any function which may qua the citizens be designated as political and orders made in exercise whereof are not liable to be rested for their validity before the lawfully constituted courts" (p.75)

B Similarly, Hedge, J. has stated -

"There is nothing like a political power under our Constitution in the matter of relationship between the executive and the citizens. Our Constitution recognises only three powers
C viz. the legislative power, the judicial power and the executive power. It does not recognise any other power. (p.169)

In *State of Rajasthan* v. *Union of India,* [1978] 1 SCR 1, Bhagwati, J. as the learned Chief Justice then was, has observed :

D "It will, therefore, be seen that merely because a question has a political colour, the Court cannot hold its hands in despair and declare 'judicial hands off'. So long as a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can
E certainly be decided by the court. Indeed, it would be its constitutional obligation to do so." (p.80)

Relying upon these observations and after taking note of the decisions in *Baker* v. *Carr* (supra) and *Powell* v. *McCormack* (supra),
F Venkataramiah, J., as the learned Chief Justice then was, in *S.P. Gupta* v. *Union of India,* [1982] 2 SCR 365 has laid down :

"In our country which is governed by a written Constitution also many questions which appear to have a purely political colour are bound to assume the character of judicial ques-
G tions. In the *State of Rajasthan & Ors. etc. etc.* v. *Union of India etc. etc.,* (supra) the Government's claim that the validity of the decision of the President under Article 356(1) of the Constitution being political in character was not justiciable on that sole ground was rejected by this
H Court." (p. 1248)

The same view has been reiterated by Verma, J. speaking for the majority in *Mrs. Sarojini Ramaswami* v. *Union of India & Ors.*, Writ Petition (Civil) No. 514 of 1992 decided on August 27, 1992.

Sikkim was not admitted in the Indian Union on the basis of any treaty or agreement between the Chogyal of Sikkim and the Government of India. It was so admitted in pursuance of the unanimous resolution that was passed by the Assembly of Sikkim on April 10, 1975, after the said resolution had been approved by majority of the people of Sikkim at the special opinion poll conducted on April 14, 1975. The said resolution does not contain any terms and conditions on which the people of Sikkim wanted to join the Indian Union except stating that "Sikkim shall henceforth be a Constituent unit of India enjoying a democratic and fully responsible Government". The Tripartite Agreement of May 8, 1973 was also not an agreement containing terms and conditions for admission of Sikkim in the Indian Union. It contains the framework for "establishment of a fully responsible Government in Sikkim with a more democratic Constitution". This agreement was implemented by the enactment of the Government of Sikkim Act, 1974. It cannot, therefore, be said that Article 371- F contains a political element in the sense that it seeks to give effect to a political agreement relating to admission of Sikkim into the Indian Union.

It is, however, urged that a law made under Article containing the terms and conditions on which a new State is admitted in the Indian Union is, by its very nature, political involving matters of policy and, therefore, the terms and conditions contained in such law are not justiciable. In this context, emphasis is laid on the words "on such terms and conditions as it thinks fit" in Article 2 and it is contended that Parliament has complete freedom to lay down the terms and conditions for admission of a new State in the Indian Union and such terms and conditions are outside the scope of judicial review. I find it difficult to subscribe to this proposition. It is no doubt true that in the matter of admission of a new State in the Indian Union, Article 2 gives considerable freedom to Parliament to prescribe the terms and conditions on which the new State is being admitted in the Indian Union. But at the same time, It cannot be said that the said freedom is without any constitutional limitation. In may view the power conferred on Parliament under Article 2 is circumscribed by the overall constitutional scheme and Parliament, while prescribing the terms and conditions on

A which a new State is admitted in the Indian Union, has to act within the said scheme. Parliament cannot admit a new State into the Indian Union on terms and conditions which derogate from the basic features of the Constitution. It cannot make a law permitting the said State to continue as a monarchy because it would be in derogation to the republican form of
B Government established under the Constitution. Similarly it would not be permissible for Parliament to prescribe that the new State would continue to have an autocratic form of administration when the Constitution envisages a democratic form of Government in all the States. So also it would not be open to Parliament to provide that the new State would continue to
C be a theocratic State in disregard of the secular set up prevailing in other States. To hold otherwise would mean that it would be permissible for Parliament to admit to the Union new States on terms and conditions enabling those States to be governed under systems which are inconsistent with the scheme of the Constitution and thereby alter the basic feature of the Constitution. It would lead to the anomalous result that by an ordinary
D law enacted by Parliament under Article 2 it would be possible to bring about a change which cannot be made even by exercise of the constituent power to amend the Constitution, viz., to alter any of the basic features of the Constitution. The words "as it thinks fit" in Article 2 of the Constitution cannot, therefore, be construed as empowering Parliment to provide terms
E and conditions for admission of a new State which are inconsistent with the basic features of the Constitution. The said words can only mean that within the framework of the Constitution, it is permissible for Parliament to prescribe terms and conditions on which a new State is admitted in the Union.

F

With regard to the power conferred on Parliament under Articles 2 and 3 of the Constitution, this Court in *Mangal Singh* v. *Union of India,* [1967] 2 SCR 109, has laid down -

G

> "....Power with which the Parliament is invested by Arts. 2 and 3, is power to admit, establish, or form new States which conform to the democratic pattern envisaged by the Constitution; and the power which the Parliament may exercise by law is supplemental, incidental or consequential to the admission, establishment or formation of a State as
H contemplated by the Constitution, and is not power to

override the constitutional scheme". P.112 A

In this context, it may also be mentioned that Article 2 of the Constitution is modelled on Section 121 of the Commonwealth of Australia Constitution Act which provides :

B

> "S. 121 The Parliament may admit to the Commonwealth or establish new States, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of Parliament, as it thinks fit."

C

This provision has not yet been used and there has been no occasion for the Courts to construe this provision. A learned Commentator on the Australian Constitution has, however, expressed the view that under Section 121 "no terms and conditions could be imposed which are inconsistent with the provisions of the Constitution, e.g., nothing could be done to D prevent the Judicature chapter of the Constitution from applying to the new State' (R.D. Lumb : The Constitution of the Commonwealth of Australia (1986) 4th Ed. p. 736)

I am, therefore, of the view that while admitting a new State in the E Union, Parliament, while making a law under Article 2, cannot provide for terms and conditions which are inconsistent with the scheme of the Constitution and it is open to the Court to examine whether the terms and conditions as provided in the law enacted by Parliament under Article 2 are consistent with the constitutional scheme or not. This would mean that F power conferred on Parliament under Article 2 is not wider in ambit than the amending power under Article 368 and it would be of little practical significance to treat Article 371-F as a law made under Article 2 of the Constitution or introduced by way of amendment under Article 368. In either event, it will be subject to the limitation that it cannot alter any of the basic features of the Constitution. The scope of the power conferred G by Article 371-F, is therefore, subject to judicial review. So also is the law that is enacted to give effect to the provisions contained in Article 371-F. The contention, raised by Shri Parasaran as well as the learned Attorney General, that such an examination is outside the scope of judicial review, cannot, therefore be accepted. H

A Shri Parasaran and the learned Attorney General have laid emphasis on the use of the expression "notwithstanding anything in this Constitution" which precedes clauses (a) to (p) of Article 371-F. The submission is that as a result of the said *non-obstante* clause in Article 371-F, it is permissible for parliament to enact a law in derogation of the other provisions of the B Constitution while giving effect to clauses (a) to (p) of Article 371-F and the said law would not be open to challenge on the ground that it is violative of any of the other provisions of the Constitution. There is no doubt that the *non-obstante* clause in a statute gives overriding effect to the provisions covered by the *non-obstante* clause over the other provisions in the statute to which it applies and in that sense, the *non-obstante* clause C used in Article 371-F would give overriding effect to clauses (a) to (p) of Article 371-F over other provisions of the Constitution. But at the same time, it cannot be ignored that the scope of the *non-obstante* clause in Article, 371-F cannot extend beyond the scope of the legislative power of Parliament under Article 2 or the amending power under Article 368. As D pointed out earlier, the legislative power under Article 2 does not enable Parliament to make a law providing for terms and conditions which are inconsistent with the Constitutional scheme and in that sense, the said power is not very different from the amending power under Article 368, which does not extend to altering any of the basic features of the Constitu- E tion. The *non-obstante* clause in Article 371-F, has therefore, to be so construed as to conform to the aforesaid limitations or otherwise Article 371-F would be rendered unconstitutional. A construction which leads to such a consequence has to be eschewed. This means that as a result of the *non-obstante* clause in Article 371-F, clauses (a) to (p) of the said Article F have to be construed to permit a departure from other provisions of the Constitution in respect of the matters covered by clauses (a) to (p) provided the said departure is not of such a magnitude as to have the effect of altering any of the basic features of the Constitution. In order to avail the protection of Article 371-F, it is necessary that the law should not G transcend the abovementioned limitation on the scope of the *non-obstante* clause.

This takes me to the question whether the impugned provisions contained in the 1976 Act and the 1980 Act make such a departure from H the provisions of the Constitution as to render them inconsistent with the

Constitutional scheme and have the effect of altering any of the basic features of the Constitution. As indicated earlier the challenge to the impugned provisions relates to two matters, viz., (i) reservation of twelve seats for Sikkimese of Bhutia-Lepcha origin; and (ii) reservation of one seat for Sanghas.

With regard to the reservation of twelve seats for Sikkimese of Bhutia and Lepcha origin under sub-s.(1-A) inserted in Section 7 of the 1950 Act by Act No. 8 of 1980, Shri R.K. Jain, the learned Senior counsel, appearing as *amicus curiae* for the petitioner in T.C. No. 78 of 1982, has advanced a two-fold argument. In the first place, he has urged that the reservation of seats for Sikkimese of Bhutia-Lepcha origin without making a corresponding reservation for Sikkimese of Nepali origin is violative of the right to equality guaranteed under Article 14 of the Constitution. The other contention turns on the extent of such reservation. Shri Jain has submitted that Bhutias and Lepchas have been declared as Scheduled Tribes under the Constitution (Sikkim) Scheduled Tribes Order, 1978 dated June 22, 1978 and reservation of seats for Scheduled Tribes in the Legislative Assembly of a State is governed by Article 332 of the Constitution. Shri Jain has referred to Cl. (3) of Article 332 which prescribes that the number of seats reserved for the Schedueled Castes or the Scheduled Tribes in the Legislative Assembly of any State under Cl. (1) shall bear, as nearly as may be, the same proportion to the total number of seats in the Assembly as the population of the Scheduled Castes in the State or of the Scheduled Tribes in the State. Shri Jain has pointed out that according to the 1971 census, the total population was about 2,09,843 out of which Bhutias and Lepchas were around 51,600 and according to 1981 census, the total population was around 3,16,385 out of which Bhutias and Lepchas were around 73,623. The submission of Shri Jain is that keeping in view the fact that Bhutias and Lepchas constitute about 25% of the total population, reservation of twelve out of thirty-two seats in the Legislative Assembly for Bhutias and Lepchas, which constitute 38% of the total number of seats in the Assembly, is far in excess of the ratio of the population of Bhutias and Lepchas to the total population of Sikkim and, therefore, the aforesaid reservation of twelve seats for Bhutias and Lepchas is violative of Clause (3) of Article 332 of the Constitution. Shri Jain has contended that the said provision for reservation is destructive of Democracy which is a basic feature of the

A Constitution. In support of the aforesaid submission, Shri Jain has placed reliance on the decision of the U.S. Supreme Court in *Reynolds* v. *Sims*, [1964] 377 US 533.

In my view, both these contentions of Shri Jain cannot be accepted. The reservation of seats for Bhutias and Lepchas is necessary because they constitute a minority and in the absence of reservation they may not have any representation in the Legislative Assembly. Sikkimese of Nepali origin constitute the majority in Sikkim and on their own electoral strength they can secure representation in the Legislative Assembly against the unreserved seats. Moreover, Sikkimses of Bhutia and Lepcha origin have a distinct culture and tradition which is different from that of Sikkimese of Nepali origin. Keeping this distinction in mind Bhutias and Lepchas have been declared as Scheduled Tribes under Article 342 of the Constitution. The said declaration has not been questioned before us. The Constitution in Article 332 makes express provision for reservation of seats in the Legislative Assembly of a State for Scheduled Tribes. Such a reservation which is expressly permitted by the Constitution cannot be challenged on the ground of denial of right to equality guaranteed under Article 14 of the Constitution.

The second contention relating to the extent of the reservation of seats for Bhutias and Lepchas is based on the provisions of Article 332 (3) of the Constitution. Clause (3) of Article 332 postulates that the number of seats reserved for Scheduled Castes or Scheduled Tribes in the Legislative Assembly of the State shall bear, as nearly as may be, the same proportion to the total number of seats in the Assembly as the population of the Scheduled Castes or the Scheduled Tribes in the State bears to the total population of the State. The said provision has, however, to be considered in the light of Clause (f) of Article 371-F which provides -

> "(f) Parliament may, for the purpose of protecting the rights and interests of the different sections of the population of Sikkim make provision for the number of seats in the Legislative Assembly of the State of Sikkim whcih may be filled by candidates belonging to such sections and for the delimitation of the assembly constituencies from which candidates belonging to such sections alone may stand for

election to the Legislative of the State of Sikkim." A

This provision empowers Parliament to make provision prescribing the number of seats in the Legislative Assembly in the State of Sikkim which may be filled in by candidates belonging to the different sections of the population of Sikkim with a view to protect the rights and interests of those sections. The *non-obstante* clause in Article 371-F enables Parliament B to make a departure from the ratio contemplated by Article 332 (3) within the limitation which is inherent in the power conferred by Article 371-F, i.e., not to alter any of the basic features of the Constitution. It is, therefore, necessary to examine whether in providing for reservation of twelve seats out of thirty-two seats for Bhutias and Lepchas Parliament has acted in C disregard of the said limitation. While examining this question, it has to be borne in mind that Lepchas are the indigenous inhabitants of Sikkim and Bhutias migrated to Sikkim long back in fifteenth and sixteenth centuries and they follow the same faith (Budhism). They have a culture which is distinct from that of Nepalese and others who migrated to Sikkim much D later. Since the proportion of Nepalese in the population of Sikkim was much higher than that of Bhutias and Lepchas, it became necessary to provide for reservation of seats for Bhutias and Lepchas in the State Council of Sikkim when representative element through elected members was introduced in the administration of Sikkim in 1952. Ever since then, E till Sikkim was admitted as a new State in the Indian Union, there was reservation of seats for Bhutias and Lepchas in the Sikkim Council which later became the Sikkim Assembly. Since the Ruler of Sikkim was of Bhutia origin following the Budhist faith, there was reservation of seats in the Sikkim Council and Sikkim Assembly for Sikkimese of Nepali origin on the same lines as Bhutias and Lepchas and in such reservations a parity was F maintained between the seats reserved for Sikkimese of Bhutia-Lepcha origin on the one hand and Sikkimese of Nepali origin on the other. On the date when Sikkim was admitted in the Indian Union, Sikkim Assembly was consisting of thirty-two elected members out of which sixteen seats (including one Sangha seat) were reserved for Sikkimese of Bhutia-Lepcha G origin and sixteen seats (including one seat for Scheduled Castes) were reserved for Sikkimese of Nepali origin. This parity in the reservation of seats in the Sikkim Council and Sikkim Assembly between Sikkimese of Bhutia and Lepcha origin and Sikkimese of Nepali origin was with a view H

A to ensure that neither of two sections of the population of Sikkim acquires a dominating position due mainly to their ethnic origin. This was expressly provided in para 5 of the Tripartite Agreement of May 8, 1973 and Section 7(2) of the Government of Sikkim Act, 1974. Clause (f) of Article 371-F seeks to preserve the said protection which was envisaged by Clause (5) of
B the Tripartite Agreement because it also provides for protecting the rights and interests of the different sections of population of Sikkim. The impugned provision contained in clause (a) of sub-section (1-A) of s.7 of the 1950 Act by providing for reservation of twelve seats for Sikkimese of Bhutia-Lepcha origin seeks to give this protection in a more limited
C manner by reducing the ratio of the seats reserved for Sikkimese of Bhutia and Lepcha origin from 50% prevalent in the Assembly in the former State of Sikkim to about 38% in the Assembly for the State of Sikkim as constituted under the Constitution of India. It would thus appear that by providing for reservation to the extent of 38% of seats in the Legislative Assembly for Sikkimese of Bhutia-Lepcha origin Parliament has sought to
D strike a balance between protection to the extent of 50% that was available to them in the former State of Sikkim and the protection envisaged under Article 332(3) of the Constitution which would have entitled them to reservation to the extent of 25% seats in accordance with the proportion of their population to the total population of Sikkim. It is argued that this
E departure from the provisions of Article 332(3) derogates from the principle of one man, one vote enshrined in the Constitution and is destructive of Democracy which is a basic feature of the Constitution. This argument proceeds on the assumption that for preservation of Democracy, the principle of one man, one vote is inviolable and it fails to take note of the
F *non-obstante* clause in Article 371-F which when read with clause (f) of Article 371-F envisage that Parliament may, while protecting the rights and interests of the different sections of the population of Sikkim (which would include Sikkimese of Bhutia-Lepcha origin), deviate from the provisions of the Constitution, including Article 332.

G The principle of one man, one vote envisages that there should be parity in the value of votes of electors. Such a parity though ideal for a representative democracy is difficult to achieve. There is some departure in every system following this democratic path. In the matter of delimitation
H of constituencies, it often happens that the population of one constituency

differs from that of the other constituency and as a result although both the constituencies elect one member, the value of the vote of the elector in the constituency having lesser population is more than the value of the vote of the elector of the constituency having a larger population. Take the instance of Great Britain. There a statutory allocation of seats between England, Scotland, Wales and Northern Ireland whereunder Scotland is to have not less than 71 seats; Wales not less than 35 and Northern Ireland 17. It has been found that Scotland is over represented to the extent of 14 seats and Wales to the extent of 5 seats and England is under-represented to the extent of 14 seats. The justification that has been offered for these ineqalities is that constituencies in sparsely populated areas such as the Highlands would otherwise be inconveniently large geographically. Prof. Wade has questioned this justification (H.W.P. Wade : Constitutional Fundamentals, The Hamlyn Lectures, 32nd series, 1980, p.5). He has pointed out that within the constituent counties of the United Kingdom, there are great inequalities in the size of individual constituencies and that the smallest constituency contains only 25,000 voters and the largest 96,000, nearly four times as many. He has referred to the Report of the Blake Commission on Electoral Reforms (1976) wherein it is recommended that the discrepancy should never exceed two to one, and has observed - "this is surely the maximum which should be regarded as tolerable" (p.7). Criticising the existing state of affairs, Prof. Wade has said -

> "The British Parliament, addicted though it is to the pursuit of equality in so many other ways, does not seem interested in equality of representation between voters any more than between the different parts of the United Kingdom. Since 1948 it has insisted rigidly on the principle of one man, one vote. When will it accept the correlative principle one vote, one value?" (p.8)

The matter of apportionment of seats in the State Legislatures has come up for consideration before U.S. Supreme Court in a number of cases. In *Reynolds* v. *Sims* (supra), the Court, while examining the said matter on the touch-stone of the equal protection clause, has held that the equal protection clause requires that the seats in both houses of a bicameral State Legislature be apportioned on a population basis and that such deviations from the equal population principle are constitutionally

permissible so long as such deviations are based on legitimate considerations incident to the effecuation of a rational state policy. Chief Justice Warren, expressing the views of six members of the Court, has observed -

> ".....We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement." (p.577)

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> ".....So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature". (p.579)

Variance to the extent of 16% has been upheld by the Court. (See : *Mahan* v. *Howell,* 410 US 315.

The High Court of Australia, in *Attorney General (CTH) Ex. Rel. Mckinlay* v. *The Commonwealth,* [1975] 135 CLR 1 has considered the issue in the context of Section 24 of the Austratian Constitution which provides that "the House of Representatives shall be composed of members directly chosen by the people of the Commonwealth". It was argued that the words "chosen by the people of Commonwealth" required each electoral division within a State so far as practicable to contain the same number of people or, alterantively, the same number of electors. The said contention was rejected and it was held (by Majority of six to one) that Section 24 of the Constitution did not require the number of people or the number of electors in electoral divisions to be equal. The decisions of the U.S. Supreme Court on apportionment were held to be inapplicable in the context of the Australian Constitution. Barwick C.J., has observed :

> "It is, therefore, my opinion that the second paragraph of s.24 cannot be read as containing any guarantee that there shall be a precise mathematical relationship between the

> numbers of members chosen in a State and the population of that State or that every person in the Australia or that every elector in Australia will have a vote, or an equal vote." (p.22)

Similarly, Mason, J., as the learned Chief Justice then was, has stated:

> "The substance of the matter is that the conception of equality in the value of a vote or equality as between electoral divisions is a comparatively modern development for which no stipulation was made in the system of democratic representative government provided for by our Constitution." (p.62)

In this regard, the scheme of our Constitution is that under Article 327 Parliament is empowered to make a law relating to delimitation of constituencies and under Article 329 (a) the validity of such a law or the allotment of seats to such constituencies cannot be called in question in any court. In exercise of the power conferred on it under Article 327 Parliament has enacted the Delimitation Act, 1962 which provides for constitution of a Delimitation Commission to readjust on the basis of the latest census figures the allocation of seats in the House of the People to the several States, the total number of seats in the Legislative Assembly of each State and the division of each State into territorial constituencies for the purpose of elections to the House of People and to the State Legislative Assembly. In Section 9(1) of the said Act it is prescribed that the Commission shall delimit the constituencies on the basis of the latest census figures but shall have regard to considerations referred to in clauses (a) to (d). Clause (a) requires that all constituencies shall, as far as practicable, be geographically compact areas, and in delimiting them regard shall be had to physical features, existing boundaries of administrative units, facility of communication and public convenience. Clause (b) requires that every assembly constituency shall be so delimited as to fall wholly within on parliamentary constituency. Clauses (c) and (d) relate to location of constituencies in which seats are reserved for Scheduled Castes and Scheduled Tribes. This shows that population, though important, is only one of the factors that has to be taken into account while delimiting constituencies which means that there need not be uniformity of population and electoral strength in the matter of delimitation of constituencies. In other words,

A there is no insistence on strict adherence to equality of votes or to the principle one vote-one value.

In clause (3) of Article 332, the words "as nearly as may be" has been used. These words indicate that even in the matter of reservation of seats for Scheduled Castes and Scheduled Tribes it would be permissible to have
B deviation to some extent from the requirement that number of seats reserved for Secheduled Castes or the Scheduled Tribes in the Legislative Assembly of any State shall bear the same proportion to the total number of seats as the population of the Scheduled Castes or the Scheduled Tribes in the State in respect of which seats are so reserved, bears to the total
C population of the State. The *non-obstante* clause in Article 371-F read with clause (f) of the said Article enlarges the filled of deviation in the matter of reservation of seats from the proportion laid down in Article 332(3). The only limitation on such deviation is that it must not be to such an extent as to result in tilting the balance in favour of the Scheduled Castes or the
D Scheduled Tribes Tribes for whom the seats are reserved and thereby convert a minority in majority. This would adversely affect the democratic functioning of the legislature in the State which is the core of representative Democracy. Clause (a) of sub-s. (1-A) of s.7 of the 1950 Act provides for reservation of twelve seats in an Assembly having thirty-two
E seats, i.e., to the extent of about 38% seats for Sikkimese of Bhutia-Lepcha origin. The said provision does not, therefore, transgress the limits of the power conferred on Parliament under Article 371-F(f) and it cannot be said that it suffers from the vice of unconstitutionality.

F The other challenge is to the reservation of one seat for Sanghas. With regard to this seat, it may be mentioned that Section 25-A of the 1950 Act makes provision for an electoral roll for the Sangha constituency wherein only the Sanghas belonging to monasteries recognised for the purpose of elections held in Sikkim, in April 1974 for forming the Assembly for Sikkim, are entitled to be registered. Clause (c) of sub- s.(2) of s. 5-A
G of the 1951 Act prescribes that a person shall not be qualified to be chosen to fill a seat in the Legislative Assembly of Sikkim to be constituted at any time after the commencement of the 1980 Act unless, in the case of the seat reserved for Sanghas, he is an elector of the Sangha constituency. The aforesaid provisions indicate that for the one seat in the Legislative As-
H sembly of Sikkim which is reserved for Sanghas, a separate electoral roll

has to be prepared under Section 25-A of the 1950 Act and only the Sanghas belonging to monasteries recognised for the purpose of elections held in April 1984 for forming the Assembly for Sikkim are entitled to be registered in the said electoral roll and, in view of Section 5-A(2)(c), no person other than an elector for the Sangha constituency is qualified to be chosen to fill the said reserved seat for Sanghas.

To assail the validity of these provisions Shri Jain has urged that the provision in s.7(1-A)(c) of the 1950 Act is violative of the right guaranteed under Article 15(1) of the Constitution inasmuch as by reserving one seat for Sanghas (Budhist Lamas), the State has discriminated against a person who is not a Budhist on the ground only of religion. Shri Jain has also urged the provisions contained in S.25-A of the 1950 Act and S.5-A(2)(c) of the 1951 Act are violative of Article 325 of the Constitution inasmuch as these provisions provide for election to the seat reserved for Sanghas on the basis of a separate electoral roll in which Sanghas alone are entitled to be registered and exclude others from being registered as electors on that electoral roll on the ground only of religion. The submission of Shri Jain is that these provisions are inconsistent with the concept of secularism which is a basic feature of the Constitution.

The reservation of one seat for Sanghas and election to the same through a separate electoral roll of Sanghas only has been justified by Shri Parasaran on the basis of historical reasons. He has argued that the Sangha has played a vital role in the life of community since the earliest known history of Sikkim and have also played a major part in deciding important issues in the affairs of the State. It has been pointed out that Lhade-Medi, a body consisting of the Lamas and laity, has contributed towards cultural, social and political development of the poeple of Sikkim and that the Sangha seat was introduced in order of provide for the representation of a section which was responsible for the presevation of the basic culture of the Sikkimese Bhutias and Lepchas including some sections of the Nepali community of Sikkim who are Budhists. It has been submitted that their interests are synonymous with the interests of the minority communities of Sikkim and that as such a seat for the Sangha has always been nominated and later reserved in the Sikkim State Council and the State Assembly respectively.

A Clause (1) of Article 15 prohibits discrimination by the State against any citizen on the ground only of religion, race, caste, sex or any of them. Clause (3), however, permits the State to make special provision for women and children. Similarly, Clause (4) permits the State to make special provision for the advancement of any socially and educationally backward B classes of citizens or for the Scheduled Castes and the Scheduled Tribes. Clauses (3) and (4) do not, however, permit making of special provisions in derogation of the prohibition against discrimination on the ground of religion. This Court has laid down that this constitutional mandate to the State contained in Article 15(1) extends to political as well as to other rights and any law providing for elections on the basis of separate elec- C torates for members of different religious communities offends against this clause. (See *Nain Sukh Das and Anr.* v. *The State of Uttar Pradesh and Others,* [1953] SCR 1184).

D Similarly Article 325 requires that there shall be one general electoral roll for every constituency for election to either House of Parliament or to the house of either House of Legislature of a State and precludes a person being rendered ineligible for inclusion in any such roll or to be included in any special electoral roll for any such constituency on the grounds only of E religion, race, caste, sex or any of them. The provisions which permit election on the basis of separate electorates are, those contained in Clauses (a), (b) and (c) of Clause (3) of Article 171 relating to Legislative Council of a State. The said provisions provide for separate electorates of members of municipalities, district boards and local authorities Cl. (a), graduates of universities Cl. (b), and teachers Cl. (c). They do not provide for prepara- F tion of separate electoral rolls on the ground of religion. The question for consideration is whether the impugned provisions providing for reservation of one seat for Sanghas, preparation of a special electoral roll for the Sangha constituency in which Sanghas alone can be registered as electors and a person who is an elector in the said electoral roll alone being eligible G to contest for the Sangha seat, can be held to be violative of the provisions of Articles 15(1) and 325 on the ground that in relation to one seat reserved for Sanghas in the Legislative Assembly of the State of Sikkim a person who is a non-Budhist is being discriminated on the ground of religion only and similarly in the preparation of the special electoral roll for Sangha H constituency a person who is a non-Budhist is rendered ineligible for

inclusion in the said electoral roll on the ground only of religion. For this purpose it is necessary to construe the words "on grounds only of religion..." in Articles 15(1) and 325. In this context, it may be pointed out that sub-s.(1) of s.298 of the Government of India Act, 1935 contained the words "on grounds only of religion, place of birth, discent, colour, ...". In *Punjab Province* v. *Daulat Singh and Ors.*, (1946) FCR 1 the provisions of s. 13-A of the Punjab Alienation of Land Act, 1900 were challanged as contravening sub- s.(1) of s. 298 of the Government of India Act, 1935. In the Federal Court, Beaumont J., in his dissenting judgment, has taken view that in applying the terms of sub-s. (1) of Section 298, it was necessary for the Court to consider the scope and object of the Act which was impugned so as to determine the ground on which such Act is based. This test was not accepted by the Judicial Committee of the Privy Council. Lord Thankerton, delivering the opinion of the Judicial Committee has observed:-

> "Their Lordship are unable to accept this as the correct test. In their views, it is not a question of whether the impugned Act is based only on one or more of the grounds specified in S. 298, sub-S. 1, but whether its operation may result in a prohibition only on these grounds. The proper test as to whether there is a contravention of the sub-section is to ascertain the reaction of the impugned Act on the personal right conferred by the sub-section, and, while the scope and object of the Act may be of assistance in determining the effect of the operation of the Act on a proper construction of its provisions, if the effect of the Act so determined involves an infringement of each personal right, object of the however laudable, will not obviate the prohibition of sub-s.1". (p.18)

In *State of Bombay* v. *Bombay Education Society and Others,* [1955] 1 SCR 568, this Court, in the context of Article 29(2) wherein also the expression "on grounds only of religion, ..." has been used, has accepted the test laid down by the Judicial Committee of the Privy Council in *Punjab Province* v. *Daulat Singh and Others* (supra).

I may, in this context, also refer to the decision of this Court in *The*

A *State of Madras* v. *Srimathi Champakam Dorairajan,* [1951] SCR 525, wherein, the question was whether there was denial of admission to Srinivasan, one of the petitioners, on the ground only of caste. It was found that the denial of admission to the said petitioner, who was a Brahmin and had secured higher marks than the Anglo-Indian and Indian Christians but B could not get any of the seats reserved for the said communities for no fault of his except that he was a Brahmin and not a member of the said communities, could not but be regarded as made on ground only of his caste. (p.532)

C The validity of the impugned provisions has, therefore, to be considered by applying the aforesaid test of effect of operation of the said provisions.

It is not disputed that Sangha, (Budhist order or congregation of monks) has an important place in Budhism. Sangha together with the D Buddha and Dharma (sacred law) constituted the three Jewels which were the highest objects of worship among the Buddhists and a monk at the time of his ordination had to declare solemnly that he had taken refuge in Buddha, Dharma and Sangha. [B.K. Mukherjea on *'The Hindu Law of Religious and Charitable Tursts'*, Tagore Law Lectures : Fifth Ed. (1983), p.18]. In Sikkim, Lamaistic Buddhism was the official religion and Sanghas E (Bhudhist Lamas) staying in the Budhist monasteries played an important role in the adminstration. Since only a Budhist can be a Sangha, the effect of the reservation of a seat for Sanghas and the provision for special electoral roll for the Sangha constituency wherein only Sanghas are entitled to be registered as electors, is that a person who is not a Budhist cannot F contest the said reserved seat and he is being discriminated on the ground only of religion. Similarly a person who is not a Budhist is rendered ineligible to be included in the electoral roll for Sangha constituency on the ground only of religion.

G The historical considerations to which reference has been made by Shri Parasaran do not, in my view, justify this discrimination of non-Budhists because the said considerations which had significance at the time when Sikkim was governed by the Chogyal who professed Lamaistic Budhism and ran the administration of Sikkim in accordance with the tenets of his religion, can no longer have a bearing on the set up of the functioning H of the State after its admission into the Indian Union. In this regard, it may

be pointed out that the reason for the reservation of one seat for Sanghas, as set out in cl. (a) of the note that was appended to the Proclamation of March 16, 1958, was as follows :-

> "(a) It has long been felt that, as the Monasteries and The Sangha have constituted such a vital and important role in the life of the community since the earliest known history of Sikkim, and have played a major part in the taking of decisions in the Councils of the past, there should be a seat specifically reserved for The Sangha in the Sikkim Council. It is for this reason that a seat has been provided specifically for their representation".

This shows that the reservation of one seat for Sanghas in Sikkim Council and subsequently in the Sikkim Assembly was in the context of the administrative set up in Sikkim at the time wherein Sanghas were playing a major part in the taking of decisions in the Council. The said reason does not survive after the admission of Sikkkim as a new State in the Indian Union. The continuation of a practice which prevailed in Sikkim from 1958 to 1976 with regard to reservation of one seat for Sanghas and the election to the said seat on the basis of a special electoral college composed of Sanghas alone cannot, therefore, be justified on the basis of historical considerations and the impugned provisions are violative of the Constituional mandate contained in Article 15 (1) and Article 325 of the Constitution.

The next question which arises for consideration is whether the departure as made by the impugned provisions from the provisions of Articles 15(1) and 325 of the Constitution is permitted by Article 371-F of the Constitution. It has already been pointed out that Article 371-F, whether it is treated as having been inserted in the Constitution by way of an amendment under Article 368 or by way of terms and conditions on which Sikkim was admitted into the Indian Union under Article 2, does not permit alteration of any of the basic features of the Constitution. Although the expression 'Secular' did not find a place in the Constitution prior to its insertion in the Preamble by Constitution (Forty-Second Amendment) Act, 1976, but the commitment of the leaders of our freedom struggle during the course of freedom movement which finds expression in the various provisions of the Constitution leaves no room for doubt that

A secularism is one of the basic features of the Constitution. It was so held in the *Kesavananda Bharati* case, [1973] Supp. SCR 1 [Sikri, CJ. at pp. 165-6; Shelat and Grover, JJ. at p.280; Hegde and Mukharjea, JJ. at p.314 and Khanna J. at p.685] and in *Smt. Indira Gandhi* v. *Raj Narain,* [1976] 2 SCR 347 [Mathew, J. at p.503 and Chandrachud, J. at p. 659]. The matter B has now been placed beyond controversy by incorporating the expression "secular" in the Preamble by the Constitution (Forty- second Amendment) Act, 1976.

In so far as clause (1) of Article 15 is concerned express provision has been made in clauses (3) and (4) empowering the State to make special C provisions for certain classes of persons. Sanghas, as such, do not fall within the ambit of clauses (3) and (4) of Article 15 and therefore, a special provision in their favour, in derogation of clause (1) of Article 15 is not permissible. Article 325 also does not postulate any departure from the prohibition with regard to special electoral roll contained therein. This is D borne out by the background in which Article 325 came to be adopted in the Constitution.

Under the British Rule, separate electorates, for Muslims were provided by the Indian Councils Act, 1909. The Communal Award announced in 1932 provided for separate electorates for Muslims, Eropeans, E Sikhs, Indian Christian and anglo-Indians. By it, separate electorates were sought to be extended to the depressed classes also. This was opposed by Mahatma Gandhi who undertook fast unto death and thereupon the said proposal was given up. The Congress Working Committee in its resolution adopted in Calcutta in October 1937 declared the communal award as F being "anti-national, anti-democratic and a barrier to Indian freedom and development of Indian unity". The Congress felt that separate electorates was a factor which led to the partition of the country. When the Constitution was being framed, the question whether there should be joint or separate electorates was first considered by the Advisory Committee constituted by the Constituent Assembly to determine the fundamental rights G of citizen, minorities etc. The advisory Committee in its report dated August 8, 1947 has stated -

> "The first question we tackled was that of separate electorates; we considered this as being of crucial importance H

both to the minorities themselves and to the political life of the country as a whole. By an overwhelming majority, we came to the conclusion that the system of separate electorates must be abolished in the new Constitution. In our judgment, this system has in the past sharpened communal differences to a danagerous extent and has proved one of the main stumbling blocks to the development of a healthy national life. It seems specially necessary to avoid these dangers in the new political conditions that have developed in the country and from this point of view the arguments against separate electorates seem to us absolutely decisive.

We recommend accordingly that all elections to the Central and Provincial Legislatures should be held on the basis of joint electorates."

[Shiva Rao, Framing of India's Constitution, Select Documents, Vol.II, p.412]

When the report of the Advisory Committee came up for consideration before the Constituent Assembly, Shri Muniswami Pillai, expressing his satisfaction with the report, said :

"One great point, Sir, which I would like to tell this house is that we got rid of the harmful mode of election by separate electorates. It has been buried seven fathom deep, never more to rise in our country."

[Constituent Assembly Debates, Vol. V p. 202]

An amendment was moved by Shri B. Pocker Sahib Bahadur belonging to Muslim League to the effect that all the elections to the Central and Provincial Legislatures should, as far as Muslims are concerned, be held on the basis of separate electorates. The said amendment was opposed by most of the members. Pandit Govind Ballabh Pant, speaking on the said occasion, stated -

"... So, separate electorates are not only dangerous to the State and to society as a whole, but they are particularly

A harmful to the minorities. We all have had enough of this experience, and it is somewhat tragic to find that all that experience should be lost and still people should hug the exploded shibboleths and slogans."

[Constituent Assembly Debates; Vol. V, p.224]

B

Sardar Patel in his reply to the debate was more emphatic. He said;-

"I had not the occasion tohear the speeches which were made in the initial stages when this question of communal C electorates was introduced in the Congress; but there are many eminent Muslims who have recorded their views that the greatest evil in this country which has been brought to pass is the communal electorate. The introduction of the system of communal electorates is a poison which has entered into the body politic of our country. Many English- D men who were responsible for this also admitted that. But today, after agreeing to the separation of the country as a result of this communal electorte, I never thought that proposition was going to be moved seriously, and even if it was moved seriously, that it would be taken seriously."

E

[Constituent Assembly Debates; Vol. V, p. 255]

The Constituent Assembly rejected the move and approved the recommendation of the Advisory Committee. But in the original Draft Constitution there was no express provision to the effect that elections to F the Parliament and to the State Legislatures shall be on the basis of the joint electorates for the reason that electoral details had been left to auxiliary legislation under Articles 290 and 291 of the Draft Constitution. Subsequently it was felt that provision regarding joint electorates is of such fundamental importance that it ought to be mentioned expressly in the G Constitution itself. Article 289-A was, therefore, inserted to provide that all elections to either House of Parliament or the Legislature of any State shall be on the basis of the joint electorates. [Shiva Rao : Framing of India's Constitution, Select Documents, Vol. IV p. 141]. Article 289-A, as proposed by the Drafting Committee, was substituted during the course of H debate in the Constituent Assembly and the said provision, as finally

adopted by the Constituent Assembly was numbered as Article 325. A

This would show that Article 325 is of crucial significance for maintaining the secular character of the Constitution. Any contravention of the said provision cannot but have an adverse impact on the secular character of the Republic which is one of the basic features of the Constitution. The same is true with regard to the provisions of clause (1) of Article 15 which prohibits reservation of seats in the legislatures on the ground only of religion. B

It is no doubt true that the impugned provisions, relate to only one seat out of 32 seats in the Legislative Assembly of Sikkim. But the potentialities of mischief resulting from such provisions cannot be minimised. C The existence of such provisions is bound to give rise to similar demands by followers of other religions and revival of the demand for reservation of seats on religious grounds and for separate electorates which was emphatically rejected by the Constituent Assembly. It is a poison which, if not D eradicated from the system at the earliest, is bound to eat into the vitals of the nation. It is, therefore, imperative that such provision should not find place in the statute book so that further mischief is prevented and the secular character of the Republic is protected and preserved. While dealing with fundamental liberties, Bose J., in *Kedar Nath Bajoria* v. *The State of West Bengal,* [1954] 5 SCR 30, has struck a note of caution : E

> "If we wish of retain the fundamental liberties which we have so eloquently proclaimed in our Constitution and remain a free and independment people walking in the democratic way of life, we must be swift to scotch at the F outset tendencies which may easily widen, as precedent is added to precedent, into that which in the end will be the negation of freedom and equality". (p.52)

Similar caution is called for to preserve the secular character of the Republic. G

Having found that the impugned provision providing for a separate electoral roll for Sangha Constituency contraveness Article 325 and reservation of one seat for Sanghas contravenes Article 15(1) and Articles 325 and 15(1) are of crucial importance to the concept of Secularism envisaged H

A in the Constitution it becomes necessary to examine whether Article 371-F permits a departure from the principle contained in Articles 325 and 15(1) while applying the Constitution to the newly admitted State of Sikkim. I am unable to construe the provisions of Cl (f) of Article 371-F as conferring such a power clause (f) of Article 371-F which empowers Parliament to
B make provision for reservation of seats in the Legislative Assembly of Sikkim for protecting the rights and interest of the different sections of the population of Sikkim, must be considered in the context of clause (5) of the tripartite agreement of May 8, 1973. The 'different sections' contemplated in clause (f) of Article 371-F are Sikkimese of Bhutia-Lepcha
C origin on the one hand and Sikkimese of Nepali origin on the other and the said provision is intended to protect and safeguard the rights and interests of these sections. Clause (f) of Article 371-F, in my view, cannot be construed to permit reservation of a seat for Sanghas and election to that seat on the basis of a separate electoral roll composed of Sanghas only.

D It must, therefore, be held that clause (c) of sub-s.(1-A) of s.7 and Section 25-A of the 1950 Act and the words "other than constituency reserved for Sanghas" in clause (a) of sub-s.(2) of s.5-A and clause (c) of sub-s.(2) of s.5-A of the 1951 Act are violative of the provisions of Articles 15(1) and 325 of the Constitution and are not saved by Article 371-F of the
E Constitution. The said provisions, in my view, are however, severable from the other provisions which have been inserted in the 1950 Act and the 1951 Act by the 1976 Act and the 1980 Act and the striking down of the impugned provisions does not stand in the way of giving effect to the other provisions.

F

I would, therefore, strike down s.25-A inserted in the 1950 Act by the Act 10 of 1976 and the provisions contained in clause (c) of sub-s.(1-A) which has been inserted in Section 7 of the 1950 Act by Act 8 of 1980, the words "other than the constituency reserved for the Sanghas" in clause (a) of sub-s.(2) as well as clause (c) of sub-s.(2) inserted in Section 5-A of the
G 1951 Act by Act 8 of 1980 as being unconstitutional.

In Transferred Cases Nos. 93 and 94 of 1991, Shri K.N. Bhatt and Shri K.M.K. Nair, the learned counsel appearing for the petitioners therein have not assailed the validity of the provisions with regard to reservation
H of seats for Sikkimese of Bhutia and Lepcha origin. They have, however,

urged that Clause (f) of Article 371-F imposes an obligation on Parliament to make provision for protection of the rights and interests of Sikkimese of Nepali origin also and that while making reservation for protection of rights and interest of Sikkimese of Bhutia-Lepcha origin, Parliament was also required to provide for similar reservation of seats for Sikkimese of Nepali origin to protect the rights and interests of Sikkimese of Napalis origin. In this regard, it has been submitted that reservation for seats in the Sikkim Council and subsequently in Sikkim Assembly for Sikkimese of Nepali origin had been there since the elective element was introduced in 1952. It was also urged that after Sikkim was admitted in the Indian Union, there has been large influx of outsiders in Sikkim as a result of which the original residents of Sikkim including Sikkimese of Nepali origin have been vastly out numbered by settlers coming to Sikkim from other parts of the country. In my view, there is no substance in these contentions. According to the figures of 1971 census Sikkimese of Nepali origin were 1,40,000 whereas Sikkimese of Bhutia-Lepcha origin were 51,600 and as per per the figures of 1981 census the corresponding figures were 2,24,481 and 73,623 respectively. This shows that the ratio of Sikkimese of Nepali origin and Sikkimese of Bhutia-Lepcha origin is about 3:1. In view of the vast differnce in their numbers the Sikkimese of Nepali origin can have no apprehension about their rights and interests being jeopardised on account of reservation of twelve seats for Sikkimese of Bhutia-Lepcha origin in the Legislative Assembly composed of thirty-two seats. As regards the apprehension that the Sikkimese of Nepali origin would be out-numbered by the settlors from other parts of the country, I find that no material has been placed by the petitioners to show that the number of settlors from other parts of the country into Sikkim is so large that Sikkimese of Nepali origin are being out-numbered. The figures of the 1971 and 1981 census, on the other hand, indicate to the contrary. According to the 1971 census in the total population of 2,09,843 the Sikkimese of Nepali origin were about 1,40,000, i.e., about 67%, and according to the 1981 census in the total population of 3,16,385 Sikkimese of Nepali origin were 2,24,481, i.e., about 70%. In these circumstances, it cannot be said that reservation of seats for Sikkimese of Nepali origin was required in order to protect their rights and interests and in not making any provision for reservation of seats for Sikkimese of Nepali origin Parliament has failed to give effect to the provisions of clause (f) Article 371-F of the Constitution.

A B C D E F G H

A For the reasons abovementioned, these cases have to be partly allowed and it is declared that Section 25-A introduced in the 1950 Act by Act no. 10 of 1976, Clause (c) of sub-s.(1A) introduced in Section 7 of the 1950 Act by Act no. 8 of 1980, the words "other than constituency reserved for the Sanghas"in clause (a) of sub-s.(2) introduced in Section 5-A of the
B 1951 Act by Act no.8 of 1980 and clause (c) of sub-s.(2) introduced in s.5-A of the 1951 Act by Act no.8 of 1980 are unconstitutional and avoid.

T.N.A. Petitions dismissed.