

EXTENTION OF RESERVATION IN PRIVATE EDUCATIONAL INSTITUTIONS

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INTRODUCTION

Education plays an important role in converting a society into a civilized nation. It promote the country in every sphere of the national activity. It is a duty of state that no section of the citizen should be left behind because it would affect the progress of the country as a whole. So educate every section of the citizenry who need a helping hand in marching the future bright.

Though it is said that it is the duty of the State to take special steps to bring up the minorities and other classes, under the Constitution of India.¹ Which are backward, to the standards of the general community, the protection of the rights of the same should not become an impediment for the promotion of a secular society based on national unity. "Everyone has the right to education. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit."² The word 'social justice' in the Preamble implies recognition of greater good to a larger number without deprivation of legal rights of anybody. The concept of equality, enshrined in the Preamble has also found expression as a fundamental right in Article 14 to 16, which talk about that there shall be equality of law for every citizen of this country that if any citizen or community who are under privileged, then its duty of state to take such measures for the upliftment of them.

¹ Article 46, Constitution of India, 1950.

² Article 26 (1) of Universal Declaration of Human Rights.

The debate between private rights and public duties has been entrenched in Indian society since the constitution was drafted. In all fairness, the potential benefits to be reaped by providing high-class education and facilities to children from lesser fortunate backgrounds are conflicting on multiple levels. Can private institutions do more to realize the country's potential. The potential benefits to be reaped by providing high class education and facilities to children from lesser fortunate backgrounds are conflicting on multiple levels. One is the importance of education and its public essence versus upholding the private right of an autonomous institution to practice its own ethos and impart their beliefs. The other is the issue of granting private freedoms to autonomous institutions versus setting a dangerous precedent if private institutions are treated as agents of the state.

EVOLUTION OF STATE IMPOSED RESERVATION UPON UNAIDED PRIVATE EDUCATIONAL INSTITUTIONS

Reservation is a part of the Affirmative action for the advancement of the socially and educationally backward classes or SC and ST by giving a special protection and thereby lifting them at equal level with others. The advantage of reservation has given in many field in education, scholarship, jobs. It is a kind of quota-based affirmative action. So far as educational institution are concerned, provide the quality education is the first most duty of the state among its several other duties towards the nation and its people.

However, since 1970, private owned education institution stated to provide professional and technical education and State was not in the condition to fulfill the demand of this kind of education because of lack of capital, resources and infrastructure. The changing scenario after the Globalization, Privatization and Liberalization that the State did not have much power in regarding the education and also it is already discussed that State didn't have the resources, because of that it immensely create the importance of the private educational institution in Indian educational sector.

According to article 45, its duty of the State to take an action for the upliftment of the children of weaker section of the society by giving them an education. The Supreme Court declares education as a fundamental right. On this, the Government had undertaken the serious note to provide right to education. In 1975 through 42nd amendment, Central Government put the responsibility of education related to technical education, medical education, etc ³ on joint/centre responsibility. Afterwards a new Fundamental Right stated “The state shall provide free and compulsory education to all children of the age 6 to 14 years in such manner as the state may, by law, determine“(86 Amendment to the Constitution).⁴

Clause (5) was added in Article 15 through 93rd Amendment Act of Constitution, 2005 stated that nothing shall restrict the State to coin new laws for the betterment and upliftment of the people belonging to the deprived sections of the society. Students belonging to the SC/ST should be provided with the admissions to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions. It include both aided and unaided educational school. That means every educational institution’s duty to provide education to every student whether he or she from weaker section or from the general category.

Education is the foundation for the development of any society. The quality of education provided to all the students on various levels decides the future of any nation. Elementary education system of the country has come up with flying colours when compared in terms of funding, access, enrolment and infrastructure. However, high drop-out rates, low attendance, universal, equitable and quality elementary education for all continue to be a challenge. Illiteracy can cripple the national wealth and its futuristic growth. The basic ideology behind providing a good education is to strengthen the pillars of the future India and good education can help a person in applying all the theoretical knowledge in various fields⁵.

³ Entry 25, List III, Seventh Schedule, Constitution of India, 1950

⁴ Article 21A, Constituion of India, 1950.

⁵ Sanjay Sindhu, Fundamental Right to Education in India: An Overview, 2014.

JUDICIAL APPROACH REGARDING 93RD AMENDMENT

Ever since its inception, the Indian state has dealt with the issue of education, which is not satisfactory. The issue, which was most concerning, was during 90's with regard to regulation of drastic increase in the space of private education following the ardent judgments in matters of Mohini Jain⁶ and Unnikrishnan.⁷ The case of Mohini Jain was a downfall of private education. In this case, Mohini Jain went to the Court pleading that she took admission in an MBBS course at Karnataka in some private institution. As she was not from Karnataka, she was required to pay Rs. 60,000 in the first year as a tuition fee and for the remaining year she was asked to offer a bank guarantee. Her contention was denied that there was a command for a further "capitation fee" of Rs. 4.5 lakhs. It was also argued by her that charging of Rs. 60,000 in itself amounted to a "capitation fee" as only fee of Rs. 2000 was charged for the students who were admitted in the same college against the government seats and fee of only Rs 25,000 was charged from the students of Karnataka. Following questions came up before the Court-

- Whether there exists the right to education and if it does, whether that right is being violated by charging a capitation fee, and Secondly, Whether there is violation of Article 14 by charging of capitation fee?

While dealing with the first issue, the Court in its extensive interpretation of Constitution, held, that the right to education is fundamental which exists at all levels (primary, secondary and higher) and it is a constitutional directive to the state to provide and promote institutions of education at all levels. The problem with regard to fixation of tuition fee gave a final blow to the private institutions. It was held by the court that if the fees charged for government seats is Rs. 2, 000 the state is under an obligation to make sure that all other institutions which are placed with the permission of the govt. and are recognized by the govt⁸. The amount charged as fees should be same there as well. The decision in Mohini jain was quite insensitive as it failed to take into

⁶Mohini Jain v. State of Karnataka, AIR 1992 SC 1858.

⁷Unni Krishnan v. State of Andhra Pradesh, AIR 1993 SC 2178.

⁸ Supra note 5 , p. 1861.

consideration the feasibility of administering private institutions with such provisions of providing quality education which is widely accessible.

For reconsidering the matter of Mohini Jain, a bench of five judges was constituted in Unni Krishnan J.P. v. State of Andhra Pradesh. It was argued by these Private educational institutions that if the principles enunciated in Mohini Jain were to be followed, it would result in shutting down all private educational institutions. Before raising the issues with regard to the rights of these educational institutions, it is significant to note that the first issue decided in this judgment was whether there exists a fundamental right to education. This finding had a considerable impact on private educational institutions as the non-existence of a fundamental right in itself disentitles the state to enforce such a right through private educational institutions.

It was held that the –

“Private sector should be involved and indeed encouraged to augment the much needed resources in the field of education, thereby making as much progress as possible in achieving the constitutional goals in this respect.”⁹

The second step was to stabilize this need by putting an embargo on commercialization. The Court was faced with the issue of degree of government intervention. The Court stated that

- There has to be continuation and strengthening of regulatory controls for setting down minimum standards
- There should be prohibition of the commercialization of education and extortion—provision of an adequate fee can be there to make sure that institutions are self-dependent, but capitation fee should not be there.
- There should be only merit based admission in all categories and groups.
- It should be allowed to reserve seats in favor of the disadvantaged sections of society and other groups, which deserve special conduct.

In order to balance interests, the Court framed a scheme aimed at eliminating management discretion. The salient features of the scheme were:

⁹ Supra note 6, p. 2180.

- a) All private colleges must be affiliated to and award degrees granted by recognized universities.
- b) In order to ensure that money-making is not a sole consideration, the establishment of a private college might only be through a trust or a society
- c) In all private professional colleges, the seats reserved for government would be referred as “free-seats” that will be 50% whereby the basis of admission to these seats will be a common entrance test. The management will fill the outstanding seats on the payment of the approved fees, the basis of which will be inter se merit, on the same basis with regard to admission to the free seats.

An eleven judge bench of Supreme Court was constituted in the case of TMA Pai Foundation v. State of Karnataka,¹⁰ realizing the situation in Unni Krishnan’s case to deal with the following issues -

- (a) The soundness of the policy framed by Unni Krishnan and
- (b) Non-minorities rights under Articles 19(1)(g) and 21 to set up and administer educational institutions

The initial step was to determine whether the setting up of an educational institution could be considered a fundamental right under Article 19(1)(g). In answering this issue positively, there was significantly, accord among counsel representing all sides that Article 19(1) (g) would cover the setting up of an educational institution and that the setting up of an educational institution would be an “occupation” under Article 19(1)(g). The response to this issue led to the conclusion that the policy framed by Unni Krishnan was illegitimate and not constitutional.¹¹

The vital issue then was to identify the contours of this particular right, keeping in mind that

- a) Private educational institutions cannot be deprived of their preference in matters of selection of students and fixation of fees.

¹⁰ TMA Pai Foundation v. State of Karnataka, (2002) 8 SCC 481.

¹¹ M.N. Sandeep, Rights of the Unaided Educational Institutions, Constitutionality of the 93rd Amendment and the Demerits of Reservation , 2 NUALS L.J. 33 ,(2008), p.35.

- b) Every institution that fulfilled the required conditions should gain affiliation and recognition.
- c) Right should be given to private institutions to frame their own governing body, had to be given the right to constitute their own governing body, employ their teaching and non-teaching staff, and take action if there was carelessness of duty by their employees.

Profit making was not allowable to the Court, though the institutions can take into account the future growth of institution and creation of a reasonable revenue surplus in their fee structure. The Court allowed the state or the university to develop a proper machinery to ensure that no capitation fee was charged.¹²

A 5-judge bench in *Islamic Academy v. State of Karnataka*¹³ ought to iron out these creases. In answering these questions, the Court found that

- (a) fee structure can be fixed subject to the condition that there is no profiteering or capitation,
- (b) private institutions have full autonomy in administration so long as admissions are merit-based and merit can be satisfied through a common entrance test run by the state or by an association, and
- (c) the state can provide reservation in favor of financially or socially backward sections of society. In order to ensure transparency in admission and fee structure, the Court resorted to the setting up of two committees, one to give effect to the judgment in *TMA Pai* and to approve the fee structure and the other to oversee the tests conducted by associations of institutions.

This judgment in its implementation resulted in the violation of the rights of private institutions. For instance, holding that the reservation policy of the state could be implemented through private institutions meant that virtually, the management of these institutions had been completely taken over by the state. Not only was this reservation policy implemented through the government seats, the management seats were also subjected to various quotas.

¹²SonalSrivastva, All About Reservation Policy In India, I PLEADERS, February 20, 2018, URL-
<http://blog.ipleaders.in/reservation-policy-india/>

¹³*Islamic Academy v. State of Karnataka*, 2003 6 SCC 687.

The setting up of the committees in Islamic Academy, the extent of quotas and state reservation in private institutions, and the regulation of fees was once again challenged before the Supreme Court and a larger bench of seven judges was set up in *PA Inamdar v. State of Maharashtra*,¹⁴ in order to clarify the ratio of the judgment in *TMA Pai*. Ten years after this judgment were delivered, one can conclusively state that this was the last in a long line of judgments that settled the questions surrounding private education and the rights of institutions. It took the Supreme Court over two decades to come to terms with the policy of the government recognizing the need for private institutions. *PA Inamdar* has now held the field for ten years now. The concepts of autonomy and liberalization that were first stated in 1948 in the University Education Committee report appear to have finally been incorporated into law through this judgment.

In my view, the law lay down by *TMA Pai* and *PA Inamdar* has balanced the interests of private institutions with those of students and also filled gaps in policy. However, there are widespread and increasingly entrenched problems in the implementation of these judgments. Ineffectual regulation, official corruption, and inadequate state capacity to oversee the functioning of private institutions has led to the proliferation of colleges that have been set up solely to earn a profit and exploit the demand-supply gap by charging exorbitant capitation fees. This is particularly so in medical education where thousands of students compete for a very limited number of seats.

The 93rd amendment was introduced by the UPA Government to overrule the verdict in *PA Inamdar v. State of Maharashtra*. The amendment introduced a new clause to Article 15(5) of our Constitution by which it enabled laws to be made in respect of reservation of seats for the weaker sections and in regulating merit based admission, as also regulating the fee in private institutions.

The Amendment sought to bring private colleges under the purview of the Government policies on fee structure and reservation. It is true that the State does not have the expected economic resources to establish educational institutions as and when required, or for satisfying all the communities at all times, and hence they attempt to impose reservation policies in the already established educational institutions.

¹⁴ *PA Inamdar v. State of Maharashtra*, (2005) 6 SCC 537.

Ultimately, the Constitutional validity of the Amendment as well as the validity of the Act was challenged before the Apex Court in Ashok Kumar Thakur's case.¹⁵ Following the traditional practice of the Supreme Court by referring the matter to a larger bench to resolve the conflicts and observing that the writ petitions raised substantial questions of law as to the interpretation of the Constitution the Court referred the matter to a larger bench. The Court also identified the basic issues to be addressed by the larger bench. In a unanimous verdict upholding the validity of the Act, a five-judge Constitution bench declared the constitutional validity of the 93rd amendment. In this historic verdict, the two pivotal issues, which are relevant for the education sector, can be summarized as follows:

- Does the ninety-third Amendment violate the 'basic structure' of the Constitution by imposing reservation on private unaided institutions? Whether Article 15(5) renders 15(4) ineffective?
- Whether the Central Educational Institutions (Reservations in Admissions) Act, 2007 is violative Articles 14, 15(1), 19.21 and 29 of the Constitution?

Holding that the 93rd Amendment Act does not violate basic structure insofar as it relate to the aided institutions, the Court adopted the interpretation of the constitutional provision in tune with the preamble and Directive Principles of the State Policy and opined that;

“if any constitutional amendment is made which moderately abridges or alters the equality principles or the principles under the Article 19(1)(g), it cannot be said that it violate the basic structure of the Constitution. If such a principle is adopted, our Constitution would not be able to adopt itself to the changing conditions of dynamic human society.”¹⁶

¹⁵ (2007) 4 SCC 397.

¹⁶ Arya . A Kumar, CONSTITUTIONAL CHALLENGES TO AFFIRMATIVE ACTION IN PRIVATE SECTOR: ASHOK KUMAR THAKUR IN CONTEXT, [2009] 2 MLJ 123.

RESERVATION IN PRIVATE EDUCATIONAL INSTITUTION- PRESENT SCENARIO

- **Need of Reservation in Private educational institution at Primary Level**

In Constitution of India through 86th amendment in 2002 inserted article 21-A to provide free and compulsory education to all children in age group of six to fourteen year as a fundamental right in such manner the state may, though law determine. The Right of children to Free and Compulsory Education (RTE Act, 2009) which related to article 21A of Indian Constitution, which states that every child from six to fourteen year have a right to full elementary education to satisfactory and equitable quality in a formal school which satisfies certain essential norms and standards. According to RTE Act, it is mandatory to provide 25% reservation private educational institutions for children belonging to “weaker section and disadvantaged group”¹⁷

The decision was there for merit in the private sector creates the problem that allowing people to buy seats from capitation fee which is also a kind of anti- reservation move, one that grant privileges those who have money. However, allowing capitation fee to enrich private institution occasionally cause outrage.

Even before this act many committee recommended that there where there should be a need to for a reservation in Private educational Institutions for eg.

Krishan Kumar Committee 2006¹⁸

The committee was constituted regarding admission of children of EWS quota in private schools, which had been given land by the Government. This committee submitted its report on May, 2006.

¹⁷ Section 12, Right to Education, 2009

¹⁸ The Delhi School Education Act and Rules, 1973, Report of The Review Committee, *Preamble & Section wise Examination of Issues*, Volume I, January 2012, p. 43. URL- http://righttoeducation.in/sites/default/files/Report-of-the-review-committee-on-dse-act-and-rules_vol-1.pdf.

Terms of Reference

To look into the manner and modalities of admission of children of economically weaker section of society under free ship quota, including financial support to such students by way of textbooks, uniforms etc.

Recommendations: ¹⁹

- (1) Policy to provide quota be applied uniformly to all private schools. This is necessary for systematic reforms.
- (2) EWS children should form a substantial proportion in a class / section. They must not be segregated lest they feel alienated.
- (3) Implementation of this provision must not be in terms of mechanical insertion of the poor in a private school. There should be receptivity and attitudinal change on the part of teachers.
- (4) Free ship quota to be introduced at entry level of nursery classes so that children get an opportunity to grow together. EWS children will progressively reach all classes.
- (5) Eligibility criteria should be BPL cardholder or annual family income less than 1 lakh.
- (6) District Admission Centre be set up to regulate admission under free ship policy.
- (7) Admissions under free ship policy be done by lottery.
- (8) Financial support in terms of books, uniform, shoes, mid-day meal etc. should be provided by Government to EWS children, admitted under free ship quota. Government should also pay for their transport.
- (9) Training of teachers to be undertaken to sensitize them to implement this policy.
- (10) Monitoring mechanism be set up.

But there was many issue which was faced by the privately owned educational institution and one of the issue is that they have right to practice any profession, or to carry on any occupation, trade or business²⁰.

¹⁹ *Ibid.*

²⁰ Article 19(g), Constitution of India, 1950

In the recent case, the majority opinion stated that the 2009 Act is “child centric and not institution centric”²¹ Understanding the spirit of Article 21-A, the majority opinion recognized the insufficiency of simply including a right to education under article 21-A

The task of conveying quality education beyond financial barriers to all children was thus one of priority. Irrespective of the fact that Section 12(1) (c) might burden private unaided schools, it was seen as a necessary and desirable initiative and therefore was upheld. According to the majority opinion, Article 21-A quite not exhaustive to particular school it might be aided or unaided by the government. This enables the State to freely include any type of schools within the ambit of the RTE Act, including private unaided schools. Moreover, the legal obligation to provide education is placed not only upon the State, but also on all stakeholders involved. The court also held that education is a charitable activity,²² and any venturing into commercialization of the same would exclude the schools involved from the protection of Article 19(1)(g)

In this context it is important to refer to the Statement of Objects and Reasons (SOR) attached to the Right of Children to Free and Compulsory Education Bill, 2008²³, which states:

The Right of Children to Free and Compulsory Education Bill, 2008, is anchored in the belief that the values of equality, social justice and democracy and the creation of a just and humane society can be achieved only through provision of inclusive elementary education to all. Provision of free and compulsory education of satisfactory quality to children from disadvantaged and weaker sections is, therefore, not merely the responsibility of schools run or supported by the appropriate Governments, but also of schools which are not dependent on Government funds.

The rational limit for providing the reservation shall be minimum 25% of the strength of class I, children belonging to weaker section and children belonging to disadvantaged group from the neighborhood and provide them free and compulsory education till completion if

²¹ Society for Unaided Private School v. Union of India.

²² Supra, note 12, para. 29, 30.

²³ Right to Education Bill, 2008. URL- <http://righttoeducation.in/resources/centre>

elementary education.²⁴ The rationale for 25% done on the basis of Census of 2001, SCs constitute 16.2%, and STs constitute 8.2% (total 24.4%) of the population. Further, the Tendulkar Committee, set up by the Planning Commission to measure poverty, has estimated the below poverty line (BPL) population to be 37.2%. It is a fact that much of the population that suffers economic deprivation also suffers from social disadvantage. Thus, taken together, the figure of 25% for admission of children from disadvantaged groups and weaker sections is considered reasonable.²⁵

- **Reservation in Higher Education**

In PA Inamdar case it was declared that, it was constitutionally impossible to impose any seat sharing reservation policy upon the private professional colleges. The Court also declared that State cannot impose the reservation in unaided private educational institution, it would be unreasonable restriction under article 19(1)(g) of the Indian Constitution. In order to overcome the decision, the Constitutional 93rd amendment was inserted in the form of article 15(5).

After amendment parliament enacted the Central Educational Institutions (reservation in Admission) Act, 2006. With the purpose of facilitating greater access to higher education by providing 27% reservation for socially and educationally backward classes in the educational institution Controlled by the Central Government. The Act however did not give effect to the mandate of newly introduced clause (5) under which special provision relating to admission could have been enacted for both aided and unaided private educational institutions.²⁶ The Court has advocated the principle that the higher you go in the ladder of education, the lesser should be the reservation.²⁷

²⁴ MHRD Guidelines on School Admissions under Right to Education Act, 2009. URL- <http://righttoeducation.in/sites/default/files/MHRD%20A0Guidelines%20on%20School%20Admissions%20under%20the%20Right%20to%20Education%20Act.pdf#overlay-context>.

²⁵ *Supra* note 25.

²⁶ Tanmoy Roy, *The Discourse On Reservation In Unaided Private Educational Institutions In India: A Critical Appraisal*, Volume I, Issue 4, INTERNATIONAL JOURNAL OF LEGAL INSIGHT,

²⁷ Narayan Sharma v. Pankaj Kr. Lehar, AIR 2000 SC 72.

CONCLUSION AND SUGGESTIONS

The private educational institution have the corporate social responsibility i.e. actions of corporate that contribute to social welfare, beyond what is required for profit maximization. So they cannot claim any remedy against such reservation.so for the elementary level they have to provide minimum 25% reservation and also in Higher education there should be a reservation but till date the law is silent that how much reservation should provide the reservation

The survey done by the ASER in which they clarify that why there is need of reservation in unaided educational institution. the most commonly reported reasons for the switch relates to school- be it poor quality of government school and/or better private school quality (83 percent), English being taught or used as a medium of instruction in the private school (76 percent), better facilities in private school (76 percent) teacher absenteeism in government school (57 percent), poor discipline in government school (46 percent) and subjects related to special interest in private school (50 percent). Another quarter of children also changed school from government to private because they faced problems related to their studies in government school.²⁸

The Government should first strengthen the education at the primary levels because unless and until they finish the primary education they cannot be admitted to professional institutions; once the government succeeds in providing better primary education even in aided without any kind of discrimination, the concept of reservation can be reduced to an extent within a specified period of time. The main statement consider to be that Reservation should be purely made on the basis of the economic conditions of the applicant and nothing else. The kind of reservation policy that our government currently follows does nothing but divide the society into different sections.

²⁸ ASER Centre, Baseline Report, Middle Schools in India: Access and Quality, New Delhi, June 23, 2016. URL- http://img.asercentre.org/docs/Research%20and%20Assessments/Current/Education/updatedbaselinereport_23june2016.pdf