25 per cent Reservation in Private Schools: Social Justice or Expropriation - II

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Pramati Educational & Cultural Trust ® & Ors. vs Union of India & Ors. (Writ Petition (C) No. 416 Of 2012) was referred by a three-Judge Bench of the Supreme Court by order dated 6.09.2010 in *Society for Unaided Private Schools of Rajasthan v. Union of India & Anr.* [(2012) 6 SCC 102] to a Constitution Bench to decide the validity of clause (5) of Article 15 or Article 21A of the Constitution of India whether these two Articles violate the basic structure of the Constitution.

Ratio

The Supreme Court upheld the constitutional validity of Articles 15(5) and 21-A of the Constitution in so far as it relates to unaided educational institutions to provide compulsory education for children in the age group of 6 to 14 years. It held that however, minority aided educational institutions could not be compelled to provide free and compulsory education to children belonging to weaker sections.

Analysis

Considering the Statement of Objects and Reasons of the Constitution (Ninety-Third Amendment) Act, 2005 and the object of Article 15(5), i.e. to provide equal opportunity to a large number of students belonging to the Socially and Educationally Backward Classes (SEBC) or for SC/ STs, the Court held that Article 15 is not mere exception or a proviso overriding Article 15 but an enabling provision to make equality of opportunity a reality. This is also supported by judgments such as *State of Kerala and Anr. V. N.M. Thomas & Ors.* [(1976) 2 SCC 310] and *Indra Sawhney & Ors. V Union of India & Ors.* [(1992) Supp 3 SCC 217] wherein the Court has held that clause (4) of Article 16 was not an exception to clause (1) of Article 16 but is an enabling provision to give effect to equality of opportunity in matters of public employment. The Court further cited para 53 of *TMA Pai Foundation & Ors. V. State of Karnataka & Ors.* [(2002) 8 SCC 481] Judgment:

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

The Court interprets the above para to conclude that considering the charitable element of the right to establish and administer private educational institutions under Article 19(1)(g) of the Constitution, autonomy and identity of the right of private educational institutions will not be affected if a *small* percentage of students belonging to weaker and backward sections of the society were granted freeships or scholarship. The Court has not defined up to what percentage can qualify as 'small' though the obvious implication would be approving 25 percent as small. Secondly, the Court is of the view that in any case, education is a charitable activity. So, as per the Court, admitting students from socially and backward classes does not destroy the identity of the educational institutions.

The argument is logically fallacious. Education may be a not-for-profit activity mandated by statute or delegated legislation but it is not the same thing to say that education is a charitable activity. Charity means giving or donating. Education does not have to be provided by private schools for free and does not have to be subsidized. This is why schools are free to charge any fee they want in order to cover their expenses and earn a reasonable surplus. Some may indeed do it for charity but that does not mean it ought to be for charity. An obvious legal difference between the two would be that charity is covered under Article 21 (personal liberty) whereas occupation and profession even if not-for-profit are covered under Article 19(1)(g). Therefore, it is incorrect to say that education is *per se* a charitable activity.

To the contention that nominating students for admissions would be an unacceptable restriction in clause (6) of Article 19 of the Constitution as per *P.A. Inamdar*, the Court relied on the Parliament's over-riding Constitutional Amendment inserting clause (5) in Article 15. As per the Court, Article 15(5) enables the State to make a law making special provisions for the advancement of SEBCs and affects the voluntary element of this right under Article 19(1)(g) of the Constitution to a very limited extent. The Court is of the view that 'Voluntariness in all the freedoms in Article 19(1) of the Constitution can be subjected to reasonable restrictions imposed by the State by law under clauses (2) to (6)'. Again, 'reasonable' may be very vague and subjective.

As far as Width test is concerned, the Court held that Article 15(5) is a guided power to be exercised for the limited purposes stated in the clause. But clearly, as evident from the arguments above, 'small', 'a very limited extent' and 'reasonable' have not been defined and probably left vague deliberately.

There was a contention that Article 15(5) does not make a distinction between private aided and unaided educational institutions. The Court held that a law made under Article 15(5) will need to comply with other requirements of equality and private unaided educational institutions are to be compensated.

On the issue of quality and excellence, the Court held that education institutions such as Kendriya Vidyalayas, IITs, AIIMS and Government Medical Colleges produce excellent students and the said

contention is contrary to the preamble of the Constitution which promises "fraternity assuring the dignity of the individual and the unity and integrity of the nation".

To the question whether clause (5) of Article 15 excludes both unaided minority institutions and aided minority institutions alike, violating Article 14 of the Constitution, the Court cited *TMA Pai* once again to state that minority character of an aided or unaided minority institution may be affected by admissions of SEBCs or SC/ ST and for this reason, they are kept outside the enabling power of the State in order to protect the minority institutions from a law made by the majority. The Court also cited *Ashoka Kumar Thakur v. Union of India* [(2008) 6 SCC 1] wherein it was held that the minority educational institutions by themselves are a separate class and their rights are protected under Article 30 of the Constitution.

However, the Court missed the point that neither do the rules in most states mandate minority educational institutions (MEIs) to have 100 per cent students from their own community for MEI status nor do the MEIs are always able to fill all their seats with minority students. Further, RTE does not mandate caste-based reservation only, it also mandates class based reservation. If the only yardstick was whether the reservation will impact the minority character of the MEI, the Court could have devised a preferential system of reservation by way of harmonious construction whereby the MEIs could have preferred children from economically weaker sections (EWS) from its community and then from disadvantaged groups., if there are no applicants – EWS or otherwise, from its own community.

The Court also rejected the argument outright that Clause (5) of Article 15 of the Constitution violates secularism being non-applicable to religious minority institutions referred to in Article 30(1) of the Constitution.

The Court held that Article 21A vests a new power in the State to enable the State to discharge the constitutional obligation, i.e. to provide free and compulsory education by making a law. Therefore, the State can by law determine the 'manner' in which it will discharge its constitutional obligation under Article 21A. As per section 12 (2) of the RTE Act 2009, the State shall fund the education of all students from economically weaker sections of society admitted in schools. Thus, the responsibility is effectively shouldered by the State.

The Court noted that in para 53 and para 68 of the judgment in *TMA Pai Foundation*, it was held that 'admission of a small percentage of students belonging to weaker sections of the society by granting them freeships or scholarships, if not granted by the government and the admission to some of the seats to take care of poorer and backward sections of the society may be permissible and would not be inconsistent with the rights under Articles 19(1)(g) of the Constitution'. However, in *P.A. Inamdar*, the Court clarified that 'there was nothing in this Court's judgment in TMA Foundation to say that such

admission of students from amongst weaker, backward and poorer sections of the society in private unaided institutions can be done by the State because the power vested in the State in clause (6) of Article 19 of the Constitution is to make only regulatory provisions and this power could not be used by the State to force admissions from amongst weaker, backward and poorer sections of the society on private unaided institutions'.

The Court in the present judgment held that the power vested in the State by virtue of Article 21A overrides the element of voluntariness in the right vested in private schools under Article 19(1)(g) though not the rights vested in the minority educational institutions under Article 30 of the Constitution of India. The Court has no where explained how Article 30 is an extraordinary right where as Article 19(1)(g) can be overridden. Moreover, there was no data before the Court that justified expropriation of private seats. There was no evidence that apart from children from EWS category, children from disadvantaged sections were deprived of equality of opportunity and denied education by private schools. There was no evidence as to whether there was shortage of seats in the government run schools.

A point that does not feature in the judgment at all is validity of reservation based on criteria other than caste, i.e. EWS and disadvantaged groups as defined in RTE Act. Whether the Constitution of India permits reservations based on economic criterion has not been raised or dealt in the judgment.

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