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Private Partnership in Social Justice: The Significance of The Constitution (93rd Amendment) Act, 2005

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ABSTRACT

The concept of social justice attracts the scholars worldwide in making democracy works well. More importantly, when the unequal social and economic structure in multicultural societies imparts enormous pressures, the concept of social justice comes into forefront. It implies twofold agenda in realising equality and justice. The Constitution of India upholds these values at large. Though the state remains a major player, the participation of the private sector is needed as well. The public and private partnership is now well recognised in the sphere of reservation policy though it often takes in the form of communal quota. This paper discusses the far reaching significance of the constitutional ninety-third amendment act in realising social justice in India.

Keywords: Constitution amendment, social justice, private partnership, reservation policy

INTRODUCTION

Welfare state is viewed as people friendly and democratic in delivering goods and services with public interests. As time passes, the financial burden forces the state to invite the private sectors and more specifically the capitalist to share the cost of social service. The two conflicting interests, namely, the welfare interests and the profit interests have to reconcile to continue to deliver the public goods and services. Legal enforcement is sometimes more valuable rather voluntary efforts. Distribution of resources in equitable manner is vested with the public policy. The formulation and implementation of reservation policy or communal quota in India is largely or even completely vested with the state. For effective implementation and enhanced outcome of its benefits, the participation of the private sectors is also needed. The social responsibility of private sector is emphasised with its economic interests. Endowments and charities are ancient and perennial practice in every society. In modern era, the state is the largest endowment and charity organisation, perhaps, with the funds provided by its citizens largely. The capitalists through their profit making enterprises extends their charities from the time of past too. However, their privileges and concessions previously assured by the government and later reversed make them worry and they begin to challenge the government. Judiciary may see the justice in terms of existing laws.

CONSTITUTION AND STATE RESPONSIBILITY

The Constitution of India came into force in 1950 assures to secure to all its citizens: justice, social,

economic and political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity; and to promote among them all fraternity assuring the dignity of the individual and the unity and integrity of the Nation. The preamble shows the basic structure of the constitution and provides the state with responsibilities. The fundamental rights from Article 12 to 35 allocate six categories of rights and all the Indian citizens are entitled to enjoy subject to conditions set by state authority. These are: Right to Equality,Right to Freedom,Right against Exploitation,Right to Freedom of Religion,Cultural and Educational Rights, and Right to Constitutional Remedies. Protection of these rights is also the responsibility of the state.[1]

Articles from 36 to 51 direct the state with a view to realising the objectives of better society. The Directive Principles of State Policy suggests the State to secure a social order for the promotion of welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life. Besides, the State shall strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people. For that the constitution prescribes certain principles of policy to be followed by the State.[2] Reservation policy is well fitted into these concepts approved by the constitution. However, judiciary often sees inherent incompatibility in connecting the state sponsored idea of social justice with the constitutional provisions. The friction between the legislature and the judiciary often resulted in making amendments to the constitution in the interests of people or due to political advantage.

CONSTITUTIONAL AMENDMENTS FOR QUOTA SYSTEM

As early in 1950, the Madras High Court struck down the communal quota system that had been in practice for more than two decades by upholding the provisions of the new Constitution of independent India. The Madras State government appealed to the Supreme Court. But the court retained the High Court judgement.[3] Mass agitation forced the Union government to make necessary amendment to the constitution for the first time. In other words, a judgement necessitated a constitutional amendment. Like the constitutional first amendment in 1951, the constitutional ninety-third amendment in 2005 came into picture. In both cases, the state played major role in bringing out the amendment.

State intervention in private sector education is nothing new in India. The Supreme Court has upheld the RTE mandated 25 percent reservation in private schools.[4]Reservation in private for profit sector is advocated on two grounds – (1) that there is discrimination; and (2) they have a social obligation. The counter argument against (1) is that there is no incentive for discrimination for a business since it is concerned only with money - so only with merit. If business avoids merit, it will dig its own grave. The counter argument to this counter argument is that there is both business compulsion and personal imperative to do discrimination. Against (2) the counter argument is that the 'private' is protected by autonomy absolving it of social obligation. The counter argument to this is that the supposed claim of the autonomy of the private is based on mixing up the private with the personal and autonomy with license.Those who support reservation in private sectors argue that the private sector is developing with the aid of government aid and resources, like land, water, electricity, finance etc. Besides, they enjoy tax relaxation some extent. While the business motive is dominant they return nothing to state. Hence, reservation in private sector is also important to achieve better welfare of the disadvantaged people.

CIRCUMSTANCES NECESSITATED RESERVATION IN PRIVATE INSTITUTIONS

Since 1970, private owned education institution stated to provide professional and technical education and State was not in the condition to fulfil 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, it is the 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 on joint/centre responsibility.[5] Afterwards Article 21A in 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".[6]

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 90s with regard to regulation of drastic increase in the space of private education following the ardent judgments in matters of Mohini Jain [7], and Unnikrishnan.[8] Mohini Jain went to the Court pleading that she took admission in an MBBS course at Karnataka in some private institution. 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 and further capitation fee of Rs. 4.5 lakhs.

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, that is, 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 government and are recognized by the government.For reconsidering the matter of Mohini Jain, a bench of five judges was constituted in Unni Krishnan v. State of Andhra Pradesh,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 onprivate 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.The second step was to stabilize this need by putting restriction on commercialization of education. The Courtwas faced with the issue of degree of government intervention. The Court gave some directions. 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 favour 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 Court recommended that all private colleges must be affiliated to and award degrees granted by recognized universities.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. In all private professional colleges, the seats reserved for government would be referred as free-seats that will be 50present 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.

The issue of private institution appeared in another case. A 11-judge bench of Supreme Court was constituted in the case of TMA Pai Foundation v. State of Karnataka, realizing the situation in Unni Krishnan's case to deal with the soundness of the policy framed by Unni Krishnan and, non-minorities rights under Articles 19(1)(g) and 21 to set up and administer educational institutions.[9] 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. A 5-judge bench in Islamic Academy v. State of Karnataka ought to iron out these creases.[10] 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 favour 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 approvethe fee structure and the other to oversee the tests conducted by associations of institutions. The supporters of private institutions viewed that this judgment in its implementation resulted in the violation of the rights of private institutions. They argue that the reservation policy of the state could be implemented through private institutions meant that 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.

There is another judgement that really forces the state to bring out the constitutional 93rd amendment. The Supreme Court delivered a judgement on 12 August 2005 in the case of P.A. Inamdar and Others v. State of Maharashtra and othersdeclaring the State cannot impose its reservation policy on minority and non-minority unaided private colleges, including professional colleges.[11]The Court in Inamdar case held: 1) The policy of reservation can't be enforced by the state nor can a quota or percentage of admissions be carved out to be appropriated by the state. 2) A common entrance test can be held by a group of similarly placed institutions provided that it is fair, transparent, and non-exploitative; The state may itself or through an agency, arrange for holding such tests and students can be admitted on the basis of merit out of these common entrance tests. However, the state may only take over if the three criteria mentioned above are not satisfied. 3) Every institution is liberal to devise its own fee structure subject to the limitation that there can be no profiteering and no capitation fee that can be charged directly or indirectly, or in any form. NRI seats are permissible to the extent of 15 per cent in all institutions. 4) The two committees for monitoring admission procedure and determining fee structure under the judgment of Islamic Academy are permissible as regulatory measures. 5) During the absence of any central legislation, it is for the central and state governments to come out with a detailed, well-thought-out legislation on the subject.[12]

REALITIES EXPOSED BY STUDIES

Studies show that the SCs and the STs are employed in public sectors in proportion to their population approximately, perhaps, more in the lower level jobs and less in higher level jobs.[13] The OBCs also placed in government jobs sector, much less in proportion to their population and somewhat higher in private sector. The upper castes still tops in placement in government as well as private sectors. In fact, their placement ratio is double in proportion to their population.[14]For decades, there are appeals from political parties and pressure groups that the reservation policy should be extended to the private sectors as well. As the role of public sector and the quantum of government jobs are reduced year by year, and the corresponding opportunities for education and employment are increasing every year, more in private sector, their demands are justified in the interest of the people as well as the interests of the state. These circumstances led the government to make an amendment to the constitution in order to bring the private institutions to the fold of reservation policy in educational matters.

EXTENDING RESERVATION FOR PRIVATE INSTITUTIONS

The Constitution ninety-third amendment was enacted in 2005 in order to direct the private unaided institutions to follow the reservation policy set by the government. The act aims to provide greater access to higher education including professional education to a larger number of students belonging to the socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes. The number of seats available in aided or State maintained institutions, particularly in respect of professional education, was limited in comparison to those in private unaided institutions.

It is laid down in article 46, as a directive principle of State policy, that the State shall promote with special care the educational and economic interests of the weaker sections of the people and protect them from social injustice. To promote the educational advancement of the socially and educationally backward classes of citizens or of the Scheduled Castes and Scheduled Tribes in matters of admission of

students belonging to these categories in unaided educational institutions, other than the minority educational institutions referred to in clause (1) of article 30 of the Constitution, it was enacted to amplify article 15.

The amendment inserted clause (5) in Article 15 of the Constitution with a aim to promote the educational advancement of the socially and educationally backward classes of citizens, the Scheduled Castes and the Scheduled Tribes through special provisions relating to admission of students belonging to these categories in all educational institutions, including private educational institutions, whether aided or unaided by the State.In article 15 of the Constitution, after clause (5), was inserted, reads, "Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30."[15]

The government claims that the Act was enacted to fulfil the Constitutional obligation of uplifting the backward classes and other weaker sections. The critics argue thatthe amendment unequivocally destroys the essence of equality embedded in the Constitution by excluding educational institutions established by minorities and subjecting non-minority established institutions alone to bear the burden of weaker sections that are less meritorious. Besides, there is no provision to remove educational disparities among OBCs.Former Minister of HRD, Arjun Singh weighed the 93rd amendment more sound than the 1st amendment. The Amendment widened its scope of implementation by specifically including the term "admission to educational institutions." While Article 15 was first amended this particular amendment mentions "educational advancement," it does not use the term "admission to educational institutions." So, by this scope of the amendment act has been widely increased.[16] However, the Act does not apply to a central educational institution established in the tribal areas referred to in the 6th Schedule of the Constitution, and a minority educational institution.

SUPREME COURT'S OBSERVATION ON 93RD AMENDMENT ACT

The Supreme Court views that the 93rd Amendment Act does not violate the basic structure of the Constitution so far as it relates to State maintained institutions and aided educational institutions. Article 15(5) of the Constitution is constitutionally valid and Articles 15(4) and 15(5) are not mutually contradictory. Further, reservation is one of the many tools that are used to preserve and promote the essence of equality, so that disadvantaged groups can be brought to the forefront of civil life. It is also the duty of the State to promote positive measures to remove barriers of inequality and enable diverse communities to enjoy the freedoms and share the benefits guaranteed by the Constitution. The Court made it clear that the creamy layer should be excluded from the socially and educationally backward classes. However, the creamy layer principle would not apply as far as the SCs and STs are concerned.[17]

CONCLUSION

It is a long due to bring the private institutions into the fold of reservation policy. It is justified on two grounds that the private institutions have more space to accommodate the aspirants and hitherto the lower strata of the society has less space and upper strata have more space in the private sectors. A satisfactory balance of equality is contemplated in private institutions. One way it is to lessen the burden of the state in maintaining social justice for the disadvantaged sections. Though the rights of minority institutions are protected, they also have the moral responsibility to extend their support to the disadvantaged people in future.

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