THE CONSTITUTIONAL CONSPECTUS OF THE RIGHT TO HIGHER EDUCATION IN INDIA: JUDICIAL PERCEPTION

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Introduction

Right to Education: A Fundamental Right

The Constitution of India, as it was adopted by the Constituent Assembly, did not contain an express provision guaranteeing the right to education. However, the right has been judicially read into the right to life guaranteed in Article 21[1] of the Constitution. Recently, the Indian Parliament, by a constitutional amendment[2], has elevated the right to education upto the secondary level to the status of a fundamental right, leaving the right to higher education to be inferred from either the right to freedom of speech and expression[3] guaranteed in Article 19(1)(a)[4], Article 19(1)(a) of the Indian Constitution declares: or the right to life guaranteed in Article 21 of the Constitution.

Endorsing the view taken by the Supreme Court in *Mohini Jain v. Union of India*[5] and *Bandhua Mukti Morcha v. Union of India*[6] Jeevan Reddy, J., in *Unnikrishnan v. State of Andhra Pradesh* [7] speaking for himself and Justice S. Ratnavel Pandian, observed[8]:

"Having regard to the fundamental significance of education to the life of an individual and the nation... we hold....that the right to education is implicit in and flows from the right to life guaranteed by Article 21..... In

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1 Article 21 of the Constitution of India states:
"No person shall be deprived of his life or personal liberty except by procedure established by law"

2 See the Constitution (Eighty-Sixth Amendment) Act, 2001 which introduced Article 21A which declares "The State provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine".

3 *Express News Papers (P) Ltd v. Union of India, AIR* 1958 SC 578.

4 Article 19(1)(a) of the Indian Constitution declares:
"All citizens shall have the right –
(a) to freedom of speech and expression".

5 *AIR.* 1992 SC 1858.

6 *AIR.* 1984 SC 802.

7 (1993) I *SCC* 645.

8 Id. at pp. 730-731 and 732.

Mohini Jain the importance of education has been duly and rightly stressed.... We agree with the observation that without education being provided to the citizen of this country, the objectives set forth in the Preamble to the Constitution cannot be achieved. The Constitution would fail..... It would not be correct to contend that Mohini Jain was wrong in so far as it declared that "the right to education flows directly from right to life".

I

No right to Demand Educational Facilities from the State

Although the right to education has been held to be a part of the right to life, it does not entitle the Indian citizens to demand that the "State provide adequate number of medical colleges, engineering colleges and other educational institutions to satisfy all their educational needs[9]". The Supreme Court in the *Unni Krishnan* case[10], disagreeing with the view taken in the *Mohini Jain* case[11] where it was held that the Indian citizens could so demand[12], held[13]:

> The right to education which is implicit in the right to life and personal liberty guaranteed by Article 21 must be construed in the light of the directive principles in Part IV of the Constitution. So far as the right to education is concerned, there are several articles in Part IV which speak of it. ...A true democracy is one where education is universal, where people understand what is good for them and the nation and know how to govern themselves. The three Articles. 45,46 and 41 are designed to achieve the said goal among others. It is in the light of these Articles that the content and parameters of the right to education have to be determined. Right to education, understood in the context of Article 45 and Article 41, means: (a) every child/citizen of this country has a right to free education until he completes the age of fourteen years, and (b) after a child/citizen completes 14 years,

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9 Id. at p. 732.
10 Supra n. 7.
11 Supra n. 5.
12 Id. at pp.1864-1865. The Court observed:
"The "right to education", therefore, is concomitant to the fundamental rights enshrined under part III of the Constitution. The State is under a constitutional – mandate to provide educational institutions at all levels for the benefit of citizens".
13 Supra n. 7 at pp. 732-733.

his right to education is circumscribed by the limits of the economic capacity of the State and its development.

II

The Right to Education: The Extent of State's Responsibility

Although the right to education, as an aspect of the right to life, cannot be enforced through judicial writs[14], it is the primary responsibility of the State to provide adequate educational facilities to its citizens at all levels of education. In this respect, the role of private educational institutions has been one of supplementing the efforts of the State. The spirit of this theme has been echoed by the Supreme Court in the *Unni Krishnan* case, where Justice Jeevan Reddy observed[15]:

> Imparting of education is the most important function of the State. This duty may be discharged by the State directly or through the instrumentality of private educational institutions...The hard reality that emerges is that private educational institutions are a necessity in the present day context. It is not possible to do without them because the government are in no position to meet the demand – particularly in the sector of medical and technical education which calls for substantial outlays. While education is one of most important functions of the Indian State it has no monopoly therein. Private educational institutions including minority educational institutions too have a role to play.

III

Role of Private Educational Institutions: Constitutional Scheme

The fact that private educational institutions have a vital role to play in the realisation and actualisation of the right to education in this country is evident from the fact that while the number of government- maintained professional colleges have more or less remained stationary, more and more private colleges have been established in different parts of the country. For example, in the State of Karnataka, of the 19 medical colleges, only 4 are government-maintained medical colleges. Similarly, out of 51 Engineering colleges in the State, only 12 have been established by the government. What is true with respect to the State of Karnataka is equally true with respect to

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[14] *Francis Coralie v. Union Territory of Delhi, AIR.* 1981 S.C. 746 and *Bandhua Mukti Morcha v. Union of India, AIR* 1984 SC 802.

[15] Supra n. 7 at pp. 741 and 744.

several other states. Therefore, the question is: What is the scope of the Constitutional right of the private sector to establish and administer private educational institutions.

(a) Private educational institutions: Source of the Constitutional Right to Establish.

The right to establish private educational institutions has been judicially read[16] into the rights guaranteed by Articles 19(1)(g)[17], 26(a)[18] and 30(1)[19] of the Indian Constitution. While Article 19(1)(g) gives, inter alia, a right to all Indian citizens to practice any profession or to carry on any occupation, Article 26 confers on all religious denominations the right to establish and maintain institutions for religious purposes which would include educational institutions also. In a similar vein, Article 30(1) empowers the religious and linguistic minorities to establish and administer educational institutions of their choice. Thus Articles 19(1)(g) and 26 confer rights on all citizens and religious denominations, including the majority and minority commnities, to establish educational institutions. These rights are, however, subject to restrictions that may be placed under Articles 19(6) and 26(a), respectively. Similarly, Article 30(1) confers on linguistic and religious minorities additional right to establish and administer educational institutions of their choice.

In *T.M.A. Pai Foundation v. State of Karnataka*[20], Chief Justice Kirpal, concluding his narration of the scope of the right to establish educational institutions under Article 19(1)(g) read with Article 19(6)[21] and Article 26(a), observed[22]:

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16 Mohini Jain v.. Union of India, AIR. *1992 S.C. 1858;* Unni Krishnan v. State of A.P,*' (1993) I Also See* 645 and *T.M.A. Pai Foundation v. Karnataka*, 2002 (8) *SCALE*.1.

17 Article 19(1)(g) of the Constitution of India states:
"All citizens shall have the right –
(g) to practice any profession, or to carry on any occupation, trade or business".

18 Article 26(a) of the Indian Constitution declares:
"Subject to public order, morality and health, every religions denomination or any section thereof shall have the right –
(a) to establish and maintain institutions for religions and charitable purposes".

19 Article 30(1) of the Constitution of India says:
"All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice".

20 2002 (8) *SCALE* 1.

21 See Article 19(6) of the Constitution of India.

22 See supra n. 20 at pp. 17-18.

Therefore religious denominations or sections thereof, which do not fall within the special categories carved out in Articles 29(1) and 30(1), have the right to establish and maintain religious and educational institutions. This would allow members belonging to any religious denomination, including the majority religious community, to set up an educational institution. Given this, the phrase "private educational institution" as used in this judgement would include not only those educational institutions set up by secular persons or bodies, but also educational institutions, set up by religious denominations; the word "private" is used in contradistinction to government institutions.

IV

The Right to Equality in Matters of Admission to Educational Institutions and the Idea of Protective Discrimination: Constitutional Scheme

The constitutional scheme, as envisaged in Articles 14[23], 15[24] and 46[25], is the result of an attempt to harmonise the conflict between the egalitarian principle of social justice and the principle of merit. The constitutional scheme indicates that the Indian Constitutional makers made a deliberate choice in favour of the former principle. They preferred the egalitarian principle of social justice along with the consequential prospect of slow development to the merit principle with the prospect of rapid development. According to this constitutional scheme preferential treatment in matters of admission to educational institutions in terms of reservation of seats in these institutions in favour of certain disadvantaged and deprived sections of the society (i.e. Scheduled Castes, Scheduled Tribes and socially and educationally backward classes of citizens) can be effected in order to ensure substantive equality to these classes. This scheme envisages sacrifice of merit for the sake of giving benefit to certain historically disadvantaged sections. While Article 14 embodies the genus of equality, Article 15(4)[26] provides for the species of the genus and is in the nature of an illustration of the general concept of equality.

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[23] Article 14 of the Constitution states:
"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India".

[24] See Article 15 of the Constitution of India.

[25] See Article 16 of the Constitution of India.

[26] Article 15(4) of the Constitution of India stipulates:
"Nothing in this Article or in clause 2 of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes".

V

The Right to Equality in Matters of Admission to Educational Institutions:

Judicial Perception

The Supreme Court has in a number of cases articulated its perception of the right to equality in matters of admission to higher educational institutions. Thus, in *Balaji v. State of Mysore*[27], the Supreme Court, while examining the scope of Article 15(4) in the context of the validity of a government order which sought to effect 68% reservation of seats in Medical and Engineering colleges in the State, held that Article 15(4) which was in the nature of exception must be allowed to operate within limits. An exception should not be allowed to exclude the rest of the society. Justice Gajendragadkar, who delivered the judgement of the Court strongly felt that it would be against the national interest to exclude from the portals of our Universities qualified and competent students on the ground that all the seats in the Universities were reserved for the weaker elements in society[28]. In this context Justice Gajendragadkar observed[29]:

> Therefore, in considering the question about the propriety of the reservations made by the impugned order we cannot lose sight of the fact that the reservation is made in respect of higher university education. The demand for technicians, scientists, doctors, economists, engineers and experts for the further advancement of the country is so great that *it would cause grave prejudice to national interest if considerations of* merit are completely excluded by wholesale reservation of seats in all technical, medical and engineering colleges or institutions of that kind. Therefore, consideration of national interest and the interest of the community or society as a whole cannot be ignored in determining the question as to whether the special provision contemplated by Article 15(4) can be special provision which excludes the rest of the society all together. ...If admission to professional and technical colleges is unduly liberalised, it will be idle to contend that the quality of our graduates will not suffer. That is not to say that reservations should not be adopted; reservation should and must be adopted to advance the prospects of the weaker sections of society. But in

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[27] *AIR* 1963 SC 649.
[28] Id. at 662.
[29] Id. at 662-663 (emphasis added).

> providing for special measures in this behalf care must be taken not to exclude admission to higher educational centres to deserving and qualified candidates of other communities..... A special provision contemplated by Article 15(4), like reservation of posts and appointments contemplated by Article 16(4), must be within limits.

In a similar vein, the Supreme Court in *Preeti Srivatsava v. State of M.P*[30] focussed on the importance of national interest. In this case, while examining the issue whether or not there could be reservation at the level of super specialities in medicine, Justice Sujata V. Manohar, delivering majority opinion, highlighted the importance of the national interest in the context of reservation of seats in educational institutions. Justice Sujata V. Manohar observed that reservation in favour of backward classes was as much in the interests of the society as the protected groups. At the same time there may be other national interests such as promoting at the highest level and providing best talent in the country with the maximum available facilities to excel and contribute to society, which have also to be born in mind[31].

In this context, Justice Sujata V. Manohar applied Article 335 requirements indirectly to Article 15(4) reservations, when she maintained that admission to super-specialties courses in medicine amounted to recruitment to posts and services in hospitals and that therefore the principles embodied in Article 335 equally applied to Article 15(4) reservations[32]. The Hon'ble Judge was also of the view that the special provision envisaged in Article 15(4) must not be allowed to effect the national interest[33]. The same theme of national interest has been echoed by the Supreme Court in *A.I.I.M.S.Students Union v. A.I.I.M.S*[34]. Justice R.C. Lahoti, who spoke for a 3-judge Bench, articulating a similar theme, infused a new insight into the issue of national interest which, in effect, supports the principle of merit in matters of admission to educational institutions.

Justice R.C. Lahoti observed[35]:

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30 *AIR.* 1999 2894.
31 Id. at 2920.
32 Id. at pp. 2908 and 2921.
33 Id. at 2920.
34 *AIR* 2001 SC 3262.
35 Id. at 3280-3281 (emphasis added).

Preamble to the Constitution of India secures, as one of its objects, fraternity assuring the dignity of the individual and the unity and integrity of the nation to "We the people of India". Reservation unless protected by the Constitution itself, as given to us by the founding fathers and as adopted by the people of India, is subversion of fraternity, unity and integrity and dignity of the individual. While dealing with Directive Principle of State Policy, Article 46 is taken note of often by Articles 41 and 47. Article 41 obliges the State, *inter-alia*, to make effective provision for securing the right to work and right to education. Any reservation in favour of one, to the extent of reservation, is an inroad on the right of other to work and to learn. Article 47 recognises the improvement of public health as one of the primary duties of the State. Public health can be improved by having the best of doctors, specialists and super-specialists.... Fundamental duties, as defined in Article 51A are not made enforceable by a Writ of court just as the fundamental rights are, but it cannot be lost sight of that 'duties' in Part IV A – Article 51A[36] are prefixed by the same word "fundamental" which was prefixed by the founding fathers of the Constitution to "rights" in Part III. Every citizen of India is fundamentally obligated to develop the scientific temper and humanism. He is fundamentally duty bound to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavours and achievements. State is, all the citizens placed together and hence though Article 51A does not expressly cast any fundamental duty on the State, the fact remains that the duty of every citizen of India is the collective duty of the State. *Any reservation, apart from being sustainable on the Constitutional anvil, must also be reasonable to be permissible. In assessing the reasonability one of the factors to be taken into consideration would be – whether the character and quantum of reservation would stall, or accelerate achieving the ultimate goal of excellence enabling the nation constantly raising to higher levels. In the era of globalisation, where the nation as a whole has to compete with other nations of the world so as to survive, excellence cannot be given an unreasonable go by and certainly not compromised in its entirety. Fundamental duties though not enforceable by a writ*

[36] See Article 51A of the *Constitution of India.*

of the court, yet provide a valuable guide and aid to interpretation of constitutional and legal issues. In case of doubt or choice; people's wish as manifested through Article 51A, can serve as a guide not only for resolving the issue but also for constructing or moulding the relief given by the courts. Constitutional enactment of fundamental duties, if it has to have any meaning, must be used by courts as a tool to tab, even a taboo, on State action drifting away from constitutional values.

This decision lays down the following fundamental propositions which will apply to the consideration of Article 15(4) reservations.

(a) The Article 15(4) reservations would have to be not only sustainable on the anvil of the Constitutional prescriptions but also be reasonable to be constitutionally permissible.

(b) The test whether Article 15(4) reservation is constitutionally sustainable depends upon the question whether the character and quantum of reservation would stall or accelerate the achievement of the ultimate goal of excellence enabling the nation constantly to raise to higher levels.

(c) The fundamental duties embodied in Article 51A though not enforceable would provide a valuble guide and aid to the interpretation of constitutional issues of reservation.

If one applies these propositions to the issue of Article 15(4) reservations, then, these constitutional reservations, as envisaged under that provision, have to be kept to the minimum not only in terms of the quantum of reservations but also in terms of the level and kind of course for which the reservation has been effected.

It is in the light of these above mentioned judicial guide lines that one has to examine the constitutional validity of the issue of reservation of seats in higher educational institutions as envisaged in Article 15(4) of the Constitution in the case of the following categories of educational institutions.

Category I: Institutions of Excellence such as IITs, IIITs, IIMs, AIMS, Central Universities and newly emerging Law Universities.

In *Indra Sawhney v. Union of India*[37], while examining the scope of Article 16(4) reservations, Justice Jeevan Reddy, delivering the leading opinion of the Court, observed[38]:

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[37] *AIR* 1993 SC 477.
[38] Id. at p.576.

> While on Article 335, we are of the opinion that there are certain services and positions where either an account of the nature of duties attached to them or the level (in the hierarchy) at which they obtain, merit.... alone counts. In such situations, it may not be advisable to provide for reservations. For example, technical posts in research and development organisations / departments / institutions, in specialties and super-specialties in medicine, engineering and other such courses in physical sciences and mathematics, in defence services and in the establishments connected therewith. Similarly, in the case of posts at the higher echelons, e.g., professors (in Education), Pilots in Indian Airlines and Air India, Scientists and technicians in nuclear and space application, provision for reservation would not be advisable.

The logic and spirit of this observation would be equally applicable to the Article 15(4) reservations. This is so, if one takes into consideration Justice Sujata V. Manohar's observation in the *Preeti Srivatsava*[39] case where she applied Article 335 requirements indirectly to Article 15(4) reservations by maintaining that admission to super-specialties courses in medicine would amount to recruitment to posts and services in hospitals.

Therefore, in these institutions of excellence, it is necessary and imperative to adhere to the principle of merit so that in the era of globalisation, as the Supreme Court says, where India, as a nation, will have to compete and survive, the goal of the achievement of excellence at all levels is kept at the forefront of the constitutional values. This is all the more so, when Article 15(4) which is a mere enabling provision, does not confer any fundamental right to reservations[40].

Category 2: Superspeciality institutions and institutions where highly skilled training / education is imparted.

On the issue whether there can be Article 15(4), reservations in super-specialty courses Justice Sujata V. Manohar, speaking for the Constitution Bench, was categorical when she declared that there could not be any reservation at the level of super-specialisation in medicine because any dilution of merit at the level would adversely affect the national interest in having the best possible at the highest level of professional and educational training[41].

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[39] See supra n. 30 at p. 2908.

[40] *Ajit Singh v. State of Punjab*, (2000) 4 *SCC* 640.

[41] See supra n. 30 at 2920. See also *Faculty Association, PQI v. Union of India*, *AIR* 1993 P&H 46.

Similar view was already taken by the Supreme Court in *Pradeep Jain v. Union of India*[42] where the court declared that even in regard to post-graduate courses, so far as super-specialties such as neurosurgery and cardiology were concerned, there should be no reservation at all and admission should be granted on merit on all India basis[43].

In a similar vein, in *Jagdish Saran v. Union of India*[44], the Supreme Court held that the basic medical needs of a region or preferential treatment justified for a handicapped group cannot prevail in the same measure at the highest scales of specialty where the best skill or talent, must be handpicked by selecting according to capabilities. The court observed that at the level of Ph.D. or M.D. or the level of higher proficiency where international measure of talent is made, where losing one great scientist or technologist in-the-making is a national loss, the considerations we have expanded upon as important, lose their potency. Here equality, measured by matching excellence, has more meaning and cannot be diluted much without grave risk. If equality of opportunity for every person in the country is the constitutional guarantee, a candidate who gets more marks than another is entitled to preference for admission. Merit must be the test when choosing the best, *according to this rule of equal chance for equal marks.* This proposition has greater importance when we reach the higher levels of education for postgraduate courses. The Court further observed that the host of variables influence the qualification of the reservation but one factor deserves great emphasis, *the higher the level of the specialty the lesser the role of reservation*[45].

Category 3: State Universities

In the case of Article 15(4) reservations the Supreme Court has made it clear that the claims of national interest demands that these reservations can never exceed 50% of the available seats in the concerned educational institutions. They must be 50% or less than 50%. How much less? depends upon facts and circumstances of each case[46]. This view was approved by the Supreme Court in *Indra Sawhney v. Union of India*[47], while dealing with the

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[42] *AIR.* 1984 SC 1420..
[43] Id. at p.1442.
[44] *AIR* 1980 SC 820.
[45] Id. at p. 829 (emphasis added) See also *N.M. Prasad v. Director, Institute of Cardiology, AIR* 1994 Kant. 309.
[46] *Balaji v. State of Mysore* A.I.R. 1963 SC 649.
[47] *AIR* 1993 SC 477.

Article 16(4) reservations. Justice Jeevan Reddy, who delivered the leading opinion, observed[48]:

> It needs no emphasis to say that the principal aim of Articles 14 and 16 is equality and equality of opportunity and that clause (4) of Article 16 is but a means of achieving the very same objective. Clause (4) is a special provision – though not an exception to clause (1). Both the provisions have to be harmonised keeping in mind the fact both are but the restatements of the principle of equality enshrined in Article 14..... It is relevant to point out that Dr.Ambedkar himself contemplated reservation being "confined to a minority of seats"....From the above discussion, the irresistible conclusion that follows is that the reservation contemplated in clause (4) of Article 16 should not exceed 50%.

This observation equally applies to the Article 15(4) reservations.

If one looks at this issue in the light of the spirit of the ratios laid down in *Preeti Srivatsava*[49] and *A.I.I.M.S. Students Union v. A.I.I.M.S*[50]., one would come to the inevitable conclusion that the constitutional reservations contemplated under Article 15(4) should be kept at the minimal level so that national interest in the achievement of the goal of excellence in all fields is not unduly affected. If this is the measuring standard, then the Article 15(4) reservations cannot be more than 25% of the total seats available in the concerned educational institution. Again, in the *Preeti Srivatsava* case, the Supreme Court, while emphasising the need for common entrance test for admissions, also held that there should not be too much difference in the qualifying marks between the reserved candidates and general candidates who compete for admission. In this context the court observed[51]:

> Normally, passing marks for any examination have to be uniform for all categories of candidates...There cannot, however, be a big disparity in the qualifying marks for the reserved category and the general category of candidates at post-graduate level...A large differentiation in the qualifying marks between the two groups of students would make it very difficult to maintain the requisite standard of teaching and training at the post graduate level...It is for the Medical Council of India to prescribe any special

[48] Id. at p. 566.
[49] *AIR* 1999 SC 2894.
[50] *AIR* 2001 SC 3262.
[51] See supra n. 49 at p. 2909.

> qualifying marks for the admission of the reserved category candidates to the post-graduate medical courses. However, the difference in the qualifying marks should be at least the same as for admission to the undergraduate medical courses, if not less.

Of course, as between the reserved category candidates, there should be inter-se merit observed. This has been emphasised by the Supreme Court in several cases.

As regards the constitutional validity of institutional /regional/ University wise reservation/preference, in view of the Supreme Court's emphasis on the need to strive for excellence which alone is in the national interest, it may not be possible to sustain its constitutional validity. However, the presently available decisional law is in support of institutional preference to the extent of 50% of the total available seats in the concerned educational institution[52]. Thus, *Jagdish Saran v. Union of India*[53] reservation of 70% of seats for the local candidates in admission to the Post Graduate Medical Courses in Delhi University was struck down. In this context the court observed[54]:

> But it must be remembered that exceptions cannot overrule the rule itself by running riot or by making reservations as a matter of course in every university and every course....you cannot wholly exclude meritorious candidates as that will promote sub-standard candidates and bring about a fall in medical competence injurious in the long run to the very region. ...Nor can the very best be rejected from admission because that will be a national loss and the interests of no region can be higher than those of the nation. So, within those limitations without going into excesses there is room for play of the State's policy choices...You cannot extend the shelter of reservation where minimum qualifications are absent. Similarly, all the best talent cannot be completely excluded by wholesale reservation....A fair preference, a reasonable reservation, a just adjustment of the prior needs and real potentials of the weak with the partial recognition of the presence of competitive merit – such is the dynamic of social justice which animates the three egalitarian articles of the Constitution.

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52 *Pradeep Jain v. Union of India AIR* 1984 SC 1420.
53 *AIR* 1980 SC 820.
54 Id. at p. 828.

The Supreme Court, while approving the university wise quotas and the reservations on the basis of institutional continuity and domicile and residence, limited the extent of reservations to 70% in MBBS course and upto 50% of seats in the Post-graduate courses in medicine. The Court ruled that there would be no reservations at the level of super specialties[55].

Category 4: Government Aided and Unaided Private Non-Minority Educational Institutions

a) Government unaided private non-minority institutions

The right to establish private educational institutions as enshrined in Articles 19(1)(g) read with Article 19(6) and 26(a) of the Constitution comprehends within its ambit the right to admit students of the management's choice subject to the State's regulation prescribing minimum qualifications necessary for admission. The State also can provide regulations that will ensure excellence in education. It can also forbid the charging of Capitation fee and profiteering by the institution. However, it must be noted that unaided private educational institutions are entitled to maximum autonomy in their administration.

As regards the issues of admission of students to these institutions and reservation of seats in these institutions, the Supreme Court has clarified the position in its latest decision in *T.M.A. Pai Foundation v. Karnataka*[56]. In this case, the Supreme Court disapproved a Court imposed scheme on unaided private educational institutions which, among other things, provided that (a) 50% of seats in every professional college should be filled by the nominees of the Government or University, selected on the basis of merit determined by a common entrance examination, which will be referred to as "free seats"; the remaining 50% seats (payment seats) should be filled by those candidates who pay the fee prescribed thereof, and the allotment of students against payment seats should be done on the basis of inter-se merit determined on the same basis as in the case of free seats, (b) there should be no quota reserved for the management or for any family, caste or community, which may have established such a college and (c) it should be open to the professional college to provide for reservation of seats for constitutionally permissible classes with the approval of the affiliating university. Disapproving the scheme, the Court held[57]:

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[55] *Pradeep Jain v. Union of India, AIR* 1980 SC 1420; *Jagdesh Saran v. Union of India, AIR* 1980 SC 820
and *A.I.I.M.S. Student's Union v. A.I.I.M.S., AIR* 2001 SC 3262.

[56] 2002(8) *SCALE* 1.

[57] Id. at p. 21.

> It appears to us that the scheme framed by this Court and thereafter followed by the Governments was one that cannot be called a reasonable restriction under Article 19(6) of the Constitution...The restrictions imposed by the scheme, in Unni Krishnan's case, made it difficult if not impossible, for the educational institutions to run efficiently. Thus, such restrictions cannot be said to be reasonable restrictions...

The Court further held[58]:

> The private unaided educational institutions impart education and that cannot be the reason to take away their choice in matters, inter-alia, of selection of students and fixation of fees....The private institutions are right in submitting that it is not open to the Court to insist that statutory authorities should impose the terms of the scheme as a condition for grant of affiliation or recognition, this completely destroys the institutional autonomy and the very objective of establishment of the institution.

Holding that the scheme has destroyed the institutional autonomy in matters of student selection, the Court observed[59]:

> Any system of student selection would be unreasonable if it deprives the private unaided institution of the right of rational selection, which it devised for itself, subject to the minimum qualification that may be prescribed and to some system of computing the equivalence between different kinds of qualifications, like a common entrance test. Such a system of selection can involve both written and oral tests for selection, based on principle of fairness... Surrendering the total process of selection to the State is unreasonable, as was sought to be done in the Unni Krishnan scheme.

The Court was of the view that while the State has the right to prescribe qualifications necessary for admission, private unaided colleges had the right to admit students of their choice, subject to an objective and rational procedure of selection and the compliance of conditions, if any, requiring admission of a small percentage of students belonging to weaker sections of the society by granting them scholarships or freeships[60]. According to the Court, for

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[58] Ibid.
[59] Id. at p. 22.
[60] Id. at p. 24.

admission into any professional institution merit must play an important role and excellence in professional education would require that greater emphasis be laid on the merit of a student seeking admission[61].

Dealing with the issue of admissions to unaided professional colleges the Court held[62]:

> It must be borne in mind that unaided professional institutions are entitled to autonomy in their administration while, at the same time, they do not forgo or discard the principle of merit. It would, therefore, be permissible for the university or the government, at the time of granting recognition, to require a private unaided institution to provide for merit-based selection while, at the same time, giving the Management sufficient discretion in admitting students.

(b) Government Aided Private Non-Minority Educational Institutions:

Dealing with the issue of admissions to the aided private professional institutions the Supreme Court held that "It would be permissible for the authority giving aid to prescribe rules or regulations, the conditions on the basis of which admission would be granted to different aided colleges by virtue of merit coupled with reservation policy of the State"[63]. The Court was of the view that "merit may be determined either through a common entrance test conducted by the University or the government followed by counselling, or on the basis of an entrance test conducted by individual institutions – the method to be followed is for the university or the government to decide[64]". Obviously these institutions are bound by the prescription of constitutional reservation envisaged under Article 15(4) of the Constitution.

Category 5: Minority unaided and aided educational institutions.

(a) Aided minority educational institution

Both linguistic and religious minorities have a right to establish and administer educational institutions of their choice which include professional institutions also[65]. However, their right is not absolute as it is subject to the other provisions of Part III of the Constitution. In *T.M.A. Pai Foundation v. Karnataka* [66] the Supreme Court, rejecting the *Siddhraj Bhai* ratio that the regulatory measures must be in the interest of the minority educational

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[61] Id. at p. 28.
[62] Id. at p. 29.
[63] Id. at p. 30.
[64] Ibid.
[65] See Article 30(1) of the *Constitution of India.*
[66] See supra n. 55.

institution only and not in the interest of the general public or nation as a whole, held that the State could not be prevented from making regulations that were in the national interest. The Court was of the view that any regulation framed in the national interest must necessarily apply to all educational institutions, whether run by the majority or the minority as such limitation must necessarily be read into Article 30(1) Constitution[67].

On the issue of minority management's right to admit students belong to its own community to the exclusion of majority community students, the Supreme Court in this case slightly modified the Stephen's ratio which allowed the minority management to reserve upto 50% of seats to its own students. In this case the Court, while agreeing in principle with the Stephen's ratio, did not accept 50% formula as a rigid rule. In this context, Chief Justice Kirpal, delivering the leading opinion, observed[68]:

> The right to admit students being an essential facet of the right to administer educational institutions of their choice as contemplated under Article 30 of the Constitution,... an aided minority educational institution... would be entitled to have the right of admission of students belonging to the minority group and at the same time would be required to *admit a reasonable extent of non-minority students so that the rights under Article 30(1) are not substantially impaired and further the citizens rights under Article 29(2) are not infringed.* What would be a reasonable extent would vary from the types of the institution, the courses of education for which admission is being sought and other factors like educational needs. The concerned State Government has to notify the percentage of the non-minority students to be admitted in the light of the above observations. Observance of inter-se merit amongst the applicants belonging to the minority group could be ensured. In the case of aided professional institutions, it can be stipulated that passing of the common entrance test held by the State agency is necessary to seek admission. As regards non-minority students who are eligible to seek admission for the remaining seats, admission should normally be on the basis of the common entrance test held by the State agency followed by counselling.

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[67] Id. at p.41.

[68] Id. at p.62 (emphasis added).

(b) Unaided minority educational institutions:

In the case of these educational institutions maximum administrative autonomy is conceded. According to the Court, the State Government or the University may not be entitled to interfere with that right in respect of unaided minority institutions provided however that the admission to the unaided educational institutions is on a transparent basis and the merit is the criteria. However, the right to administer not being an absolute right, there could be regulatory measure for ensuring educational standards and maintaining excellence thereof[69]. From the above diseussion the following Proposations may be dedneed.

Conclusions

1) In the case of Central educational institutions and other institutions of excellence in the country the judicial thinking has veered around the dominant idea of national interest with its limiting effect on the constitutional prescription of reservations. The result is that in the case of these institutions the scope for reservations is minimal.

2) As regards the feasibility of constitutional reservations at the level of super-specialties, the position is that the judiciary has adopted the dominant norm, i.e., "the higher the level of the specialty the lesser the role of reservation". At the level of super-specialties the rule of "equal chance for equal marks" dominates. This view equally applies to all super-specialty institutions.

3) As regards the scope of reservation of seats in educational institutions affiliated and recognised by State Universities, the constitutional prescription of reservation of 50% or less of the available seats has to be respected. At the same time, the inter-se merit among the reserved category of candidates has to be maintained by having a minimum percentage of marks obtained in a common entrance test conducted on an all India basis by the concerned State University.

4) The practice of institutional/regional/residential preferences should be discouraged as they would be in disharmony with dominant ideal of national interest which essentially lies in the achievement of the goal of excellence in all fields of national life. If institutional preferences are inevitable, then, they should be limited to 50% and the rest being left for open competition based purely on merit on an all India basis.

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[69] Ibid.

5) As regards private non-minority educational institutions distinction between government aided and unaided institutions. The government/ state can prescribe guidelines as to the process of selection and admission of students. But the government / State while issuing guidelines has to take into consideration the constitutional mandate of the requirement of protective discrimination in matters of reservation of seats as ordained by the decisional law in the country. Accordingly, the extent of reservation in no case can exceed 50% of the seats. It should always be less than 50%. But, how much less, depends upon the facts of each case. However, in view of the ratios laid down in *Preeti Srivastava* and *A.I.I.M.S. Students Union* cases, the extent of constitutional reservation should not exceed 25% of total seats with the observance of inter-se merit among the reserved category candidate. This inter-se merit may be assessed on the basis of a common all India entrance test or on the basis of marks at the level of qualifying examination.

As regards the position in respect of unaided institutions the general rule is that they enjoy maximum autonomy even in matters of student admission subject to the overall requirement of eligibility conditions. In this respect, it may be noted that the Supreme Court in the *T.M.A.Pai Foundation* case had disapproved a Court prepared scheme foisted on them by the Court in the *Unni Krishnan* case. Therefore, the position appears to be that they are not bound by the constraints of the constitutional reservations.

6) The position with respect to minority aided institutions is that they are bound by the requirement of constitutional reservation along with other regulatory controls. However, the right to admit students of their choice being part of the right of religious and linguistic minorities, to establish and administer educational institutions of their choice, the managements of these educational institutions can *reserve seats to a reasonable extent*, not necessarily 50%, as laid down in the *Stephens College* case. Out of the seats left after the deduction of management quota, the State can require the observance of the requirement of constitutional reservation.

As regards the unaided institutions, they have large measure of autonomy ever in matters of admission of students as they are not bound by the constraints of the demands of Article 29(2). Nor are they bound by the constraints of the obligatory requirement of Constitutional reservation.

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