INDIAN MEDICAL ASSOCIATION V. UNION OF INDIA[1] : THE TABLET OF ASPIR(IN)ATION

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"Where will this stop? How will this nation take the burden of such walled and divided portals of knowledge?"[2]

This comment seeks to examine the controversy surrounding reservations in private educational institutions post the decision in Indian Medical Association v. Union of India, in light of the freedom to carry on any occupation and the constitutional guarantee of Article 15(5). As the former has been inadequately addressed by the Court, this comment delves into the availability of Article 19(1)(g) to juristic persons vis-à-vis the elevated status of Article 15(5) as a Fundamental Right and as part of the Basic Structure.

THE DECISION

The Army Welfare Education Society (AWES) established the Army College of Medical Sciences (ACMS) in order to admit wards of army personnel (WOAP), disadvantaged due to their lack of access to education and economic hardship. Regimental funds[3] were utilised for its functioning; land for the college and access to the Army Hospital was provided by the Ministry of Defence. ACMS claimed exemption from the application of the reservation policy mandated under the Delhi Act[4] on the basis of a notification by the Government worded in favour of the Army.

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1 2011 (6) SCALE 86. [IMA]

2 *IMA*, ¶ 67.

3 Regimental funds are not public funds, *Union of India* v. *Chotelal*, (1999) 1 SCC 554 ¶ 6.

4 The Delhi Professional Colleges or Institutions (Prohibition of Capitation Fee, Regulation of Admission, Fixation of Non-Exploitative Fee and other Measures to Ensure Equity and Excellence) Act, 2007.

The Court examines two preliminary issues, first, whether ACMS is an instrumentality of the State or an aided institution and second, whether the exemptions granted by the Delhi Government are valid. The Court declined over-ruling the negative finding of the High Court on the first issue. The second issue was also answered in the negative as the power to claim exemption was not statutorily provided.

On the substantial question of whether ACMS can admit only WOAP, the Court distinguished between the regulation of minority and non-minority educational institutions in light of *P.A.Inamdar* v. *State of Maharashtra*[5], the difference between Article 19(1)(g) and Article 30 and noted the State's power to determine backward classes under Article 340.. The Court clarified that minority institutions do not determine their source for the intake of students; hence this right to choose a source cannot be made available to non-minority unaided institutions and that this proposition would lead to the "gated communities". It thus held that, ACMS can choose only from the general pool of candidates and cannot have 100% reservation for WOAP.[6]

The second issue addressed by the Court deals with the constitutional validity of Article 15(5) in light of Dalveer Bhandari J.'s opinion in *Ashok Kumar Thakur* v. *Union of India*[7] in which the majority had left the question regarding private unaided institutions unanswered. Expounding on the Basic Structure doctrine, the Court provides the much needed clarification to the ratio in *I.R.Coelho* v. *State of Tamil Nadu*.[8] Applying the 'essence of the rights' test of *M. Nagaraj* v. *Union of India*[9] the Court holds that since the essence of the freedom of occupation is not infringed, Article 15(5) is valid. The Court further cites the repercussions of the LPG regime, highlights the Egalitarian Code and the importance of fair opportunity in education to all.

5 (2004) 8 SCC 139. [P.A.Inamdar]
6 Similar observations in *Army Institute of Higher Education* v. *State of Punjab*, MANU/PH/0380/2007 though the Court doesn't make any mention of the same.
7 (2008) 6 SCC 1. [Ashok Kumar Thakur]
8 (2007) 2 SCC 1. [I.R.Coelho]
9 (2006) 8 SCC 202. [Nagaraj]

Critique of the Judgment

My critique shall not be confined to a re-examination of the above mentioned issues but shall be to analyse three particular aspects of the judgement from a different perspective, while, nevertheless, agreeing with the decision of the Court. This shall be done, first, by questioning the fundamental assumption of the availability of Article 19(1)(g) to juristic persons; second, by expounding on the present status of Article 15(5) in context of the broader constitutional scheme and third, by examining the effect of enforcing such a provision, a potential ramification of the judgment.

Foundational Inconsistencies: Article 19(1)(g) v. The Law of Citizenship

The Army Welfare Education Organisation (AWEO) was registered as AWES under the Societies Registration Act, 1860 on April 29, 1983 as a purely non-profit welfare organisation,[10] which the Court believes to be a trust. The fundamental right under Article 19(1)(g) to practice any profession or to carry on any occupation, trade or business is available only to citizens thus exempting juristic persons, in this case, societies registered under the Societies Registration Act, 1860.[11] If, as recognised by *T.M.A.Pai* v. *State of Karnataka*[12], the right to establish and administer educational institutions is located within the freedom to carry on any occupation, it is pertinent to note that, first, the requirement of establishing / administering educational institutions by a society was laid down in 1993[13] (wherein the Court left the question of education as occupation unanswered) and second, the Court in 2002 found it difficult to hold that 'education' was outside the ambit of the four expressions in Article 19(1)(g) and hence deemed occupation to be the most feasible and applicable expression (as they had to locate the right to establish/administer educational institutions somewhere in the Constitution and Part III).

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10 Brief History, Aims and Objectives of Army Welfare Education Society (AWES), http://www.awes.nic.in/circulars/blue%20book.pdf, accessed August 2011.

11 *State Trading Corporation of India Ltd.* v. *Commercial Taxes Officer*, [1964] 4 SCR 99 ¶ 9. Held inapplicable in *R.C.Cooper* v. *Union of India*, (1970) 1 SCC 248 ¶ 18 (upheld in *Bennett Coleman & Co.* v. *Union of India*, 1972 SCC (2) 788 ¶ 20-22; See also, *Excel Wear* v. *Union of India*, (1978) 4 SCC 224 ¶ 35.) in case of companies / corporations, held otherwise in *State of Gujarat* v. *Shri Ambica Mills*, (1974) 4 SCC 656 ¶ 25-26.

12 (2002) 8 SCC 481 ¶ 243. (T.M.A.Pai)

13 *Unnikrishnan P.J.* v. *State of Andhra Pradesh*, (1993) 1 SCC 645 ¶ 210. [Unnikrishnan]

A judgment of the High Court wherein it was held that BITS, Pilani registered under the Rajasthan Societies Registration Act, 1958 could not avail of Article 19(1)(g)[14] may be of persuasive value, however, resort was then taken to Article 26. The question that arises then is whether Article 19(1)(g) be applied in cases where Article 26 is not applicable? This question can be answered keeping in mind first, that the availability of an Article 19(1)(g) right to juristic persons has never been conclusively answered by the Court[15] and second, that the circumstances that merit the lifting of corporate veil and the nature of rights that are available to such corporate bodies and their constituent individuals remain in a state of flux. A viable solution to the question will entail re-examination of the law since *T.M.A.Pai* and enquiry into the necessity of locating the right to establish / administer educational institutions in Part III, given that educational institutions are in any case governed and administered by their respective state acts and University Grants Commission (UGC) guidelines. Most importantly, the text of Article 15(5) specifically excludes the operation of Article 19(1)(g) even if availed of by a citizen.

Even assuming that Article 19(1)(g) is available, it is highly questionable, first, whether the truncation of one activity of many activities of one occupation of the many occupations infringes the right, second, its relative importance in the constitutional scheme vis-à-vis equality and freedom[16] and third, whether Article 15(5) can be brought within the reasonable restrictions in Article 19(6). Further, if the theory of inter-relationship of rights was to be applied; Article 21 was to be considered a repository of the above mentioned right as part of the larger scheme of life and personal liberty; first, the debate centres around the availability of the right to juristic persons and not to citizens / non-citizens, second, taking into account the wide interpretation of Article 21, it is capable of being applied in almost every single factual matrix which remotely deals with life and personal liberty and third, on a holistic appraisal of judicial precedents, the

14 *The Coordinator, All India Engineering / Pharmacy / Architects Entrance Examination (AIEEE), Central Board of Secondary Education, New Delhi* v. *Union of India*, RLW 2005 (3) Raj 1700 ¶ 44.

15 *Supra* n. 11.

16 *R.K. Garg* v. *Union of India*, AIR 1981 SC 2138. Article 31-A and Article 31C (in respect of laws made under Article 39(b) and (c)) excluded application of Articles 14 and 19, upheld in *Waman Rao* v. *Union of India*, (1981) 2 SCC 362 and *Minerva Mills Ltd.* v. *Union of India*, (1980) 3 SCC 625. See also, Mahendra P. Singh, *Ashoka Thakur v. Union of India: A Divided Verdict on an Undivided Social Justice Measure*, 1 NUJS L. Rev. (2008).

Supreme Court has brought education singularly within the ambit of Article 21[17], not the right to establish / administer educational institutions.

"RESERVE" YOUR LOVE[18]

The social directive to promote educational and economic interests of the weaker sections of the society in particular Scheduled Castes and Scheduled Tribes[19] finds voice and enforceable status through Article 15(5). This incorporation of access to education as a "fundamental" right[20] is also in tandem with the understanding that the subject lies in the domain of the State – i.e. both the Centre and the State.[21] This is furthered by the fact that even private unaided educational institutions are required to apply for such recognition / affiliation from the State or the body empowered to do so in order to award degrees, grant certificates[22] and conduct examinations. In such cases, the institution is bound to comply with conditions as are necessary for the maintenance of the requisite standards of education; to accord fair and equal treatment in the matters of admission of students and in the matter of regulation of conditions of service of teachers due to the creation of an element of public interest, through the performance of a public function of imparting education or supplementing the effort of the State in educating people. As the central authority granting affiliation / recognition is subject to obligations arising from Articles 14 and 15, the same equally applies to bodies carrying out such supplemental activity. The State thus cannot grant immunity to such affiliates[23] especially when it is granting aid to the institution.[24]

17 *Miss. Mohini Jain* v. *State of Karnataka*, (1992) 3 SCC 666 ¶ 12, 14, 17, *Bandhua Mukti Morcha* v. *Union of India*, (1984) 3 SCC 161 ¶ 14 brings in "educational facilities" within the ambit of Article 21 albeit in the context of Bonded Labour.

18 Prakash Jha, "Aarakshan", http://aarakshanthefilm.com/, accessed August 2011.

19 Constitution of India Art. 46.

20 Mahendra P. Singh, *The Statics and the Dynamics of the Fundamental Rights and the Directives Principles - A Human Rights Perspective*, (2003) 5 SCC (Jour) 1.

21 INDIA CONST. List III, Entry. 25.

22 THE UNIVERSITY GRANTS COMMISSION ACT, 1956, § 22. In the present case, ACWS is affiliated to the Guru Gobind Singh Indraprastha University.

23 *Ahmedabad St. Xavier's College Society* v. *State of Gujarat*, (1974) 1 SCC 717. See also, *Shri Anadi Mukta Sadguru Shree Muktajee Vandasjiswami Suvarna Jayanti Mahotsav Smarak Trust* v. *V.R. Rudani*, (1989) 2 SCC 691.

24 *T.M.A.Pai*, ¶ 71, 72. See also, *Ashok Kumar Thakur*, ¶ 63. *IMA*, ¶ 9. For an understanding of the term "aid", refer to the opinion in *Unnikrishnan*, ¶ 213. (Some parts of this judgment are quoted with approval in T.M.A.Pai though in not so many words, for instance, in relation to this proposition.)

Article 15(4) inserted by the Constitution (First Amendment) Act, 1951 enables the State to make any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes. It is indubitable that access to education[25] is one, if not the most important aspect of advancement of an individual and society. While primary education is guaranteed through the Right to Education,[26] barriers restricting entry into the tertiary education sector - professional / technical education, identified as a prime-mover of the "second wave of nation building",[27] not only exclude the option to study in a particular institution but also give rise to "gated communities".[28] Moreover, Article 16(4) was deemed to preserve a power untrammelled by the other provisions of the article[29] and as an illustration of a constitutionally sanctified classification.[30] If it was so regarded, the obvious corollary to this is that of carving out an exception for backward classes of citizens with the intelligible differentia being that of historical and political exclusion and underdevelopment in nexus with the objectives of the modern Indian State stipulated in the Preamble and the Directive Principles of State Policy. Article 15(4) can similarly be considered as an empowering provision and an exception[31], a subset of which is Article 15(5),[32] unquestionably, both, being a part of the broader vision of Article 14.[33] It is thus submitted that Article 15(5) can be seen an aspect or an exposition of Article 15(4), this mode of affirmative action varying considerably from the measures prevalent in the United States of America.[34]

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25 "The expression "education" in the articles of the Constitution means and includes education at all levels from the primary school level up to the postgraduate level. It includes professional education. The expression "educational institutions" means institutions that impart education, where "education" is as understood hereinabove." – *T.M.A.Pai*, B. N. Kirpal, C.J.I. (Majority view) ¶ 9.

26 Constitution of India Art. 21A.

27 *Ashok Kumar Thakur*, ¶ 48, 70.

28 *IMA*, ¶ 67.

29 *T. Devadasan* v. *Union of India*, (1964) 4 SCR 680 ¶ 35.

30 *State of Kerala* v. *N.M. Thomas*, 1976 SCR (1) 906 ¶ 136.

31 *M.R.Balaji* v. *State of Mysore*, AIR 1963 SC 649 ¶ 19.

32 Observe the similar wording of Articles 15(4) and 15(5).

33 *Indra Sawhney* v. *Union of India*, 1992 Supp (3) SCC 212 ¶ 640.

34 Ashwini Deshpande, "Affirmative Action in India and the United States", Equity & Development World Development Report 2006 Background Papers, http://siteresources.worldbank.org/INTRANETSOCIALDEVELOPMENT/Resources/Affirmative_Action_India_Ashwini.pdf, accessed August 2011.

"STAT(E)"ING THE OBVIOUS

The consequence of rendering compliance with Article 15(5) or as a *sine qua non* leads to a situation where, in order to enforce the right, petitions have to be filed against the private institution (in conjunction with the State organ, in most cases) which leads to the anomalous situation of treating private bodies as State. The effect of the judgment today is the transcendence of Article 15(5) as an enabling provision to that which holds binding force, almost elevating its status to that of a Fundamental Right. This transcendence is significant given that there have been instances where the Court has granted relief to the aggrieved individual by enforcing Article 15(4)[35] though it has been observed (albeit by the High Court) that no person can claim any right of reservation in favour of a class or category.[36]

In the present context, a slew of cases have held that AWES and respective army colleges are not "State" within the meaning of Article 12.[37] It is to be noted that these judgments broadly deal with service matters of administration and employment, not admissions to educational institutions. Further, it is pertinent to note that writ petitions are maintained against private bodies including societies on the basis of Article 226 predominantly.[38] The proposition of enforceability of Fundamental Rights only against the State finds no explicit mention

35 *Dr. (Miss) Ritupurna Dash* v. *State of Orissa*, AIR 2010 Ori 177, *Dr. Kashyap Surendrabhai Naik* v. *Dr. D.N. Shah or his Successor Dean, Vadodara Medical College*, (2002) 1 GLR 517, *Shrivas Rajeshkumar Satyanarayana* v. *Chairman, Selection Committee*, AIR 1987 Guj 4, *Gurinder Pal Singh* v. *State of Punjab*, AIR 1974 P&H 125.

36 *Atyant Pichra Barg Chhatra Sangh* v. *State of Jharkhand*, 2003 (51) BLJR 941 ¶ 10.

37 "Any institute which is being run by Army Welfare Educational Society (AWES) cannot be termed to be a state within the definition of Article 12 of the Constitution of India and therefore, cannot be subjected to the writ jurisdiction." - *Abha Dave* v. *Director, Army Institute of Management and Technology*, MANU/DE/2226/2009 ¶ 10, 11. (The AWES has established both Professional Colleges and Army Public Schools, mentioned in the following judgments. Refer to: Army Welfare Education Society, http://www.awes.nic.in/ , accessed August 2011.) Punjab and Haryana High Court judgment dated 20.2.2009 - *Smt. Sudha Soin* v. *Government of India*, held, Army School, Ferozepur, is not a State in terms of Article 12, *Smt. Asha Khosa* v. *Chairman, Army Public School, Northern Command*, MLJ 1997 J&K 71 held, Army School, Udhampur, is not a State, *Army College of Medical Sciences* v. *Union of India*, LPA No. 606/2008, held, that to be classified as an aided institution, an overwhelming percentage of the day to day recurring and maintenance expenses would have to be borne by the Government on a regular basis.

38 The registered society Army Welfare Housing Organization Society was brought within the purview of Article 226 as it was performing a public function having a public character, *Smt. Saroj Devi (Widow)* v. *Union of India*, 156 (2009) DLT 429 ¶ 17-19. Allahabad High Court Judgment dated 16.5.2002 - *Anoop Kumar Pande* v. *Union of India*, held, the Air Force School, Allahabad, is State. Generally, *Arun Narayan* v. *The State of Karnataka*, AIR 1976 Kant 174.

in the Constitution. The Courts have been applying rights horizontally without explicitly acknowledging them and are steadily moving from the decision in *Vidya Verma* v. *Dr Shiv Narain Verma*[39] towards enforcing rights against private bodies.[40] As rightly observed by Reddy J., the economics of imparting education today has brought in private players. As they are recognised by the State, it is reasonable to expect compliance with the welfare goals of the State, not obviously to the extent of complete abrogation of private autonomy. Therefore, the dangers of the *P.A.Inamdar* ratio of recognising autonomy of a private educational institution by allowing them to prefer a particular class or group of students according to the objects and purposes of their institutions, like SC/ST in Ambedkar Medical College, students from backward area in Bijapur college and transport employees' children in Madras State Corporation Employees' College or the children of employees of Larson & Turbo Company in a college established by that company[41] while identified as the problem of creating "gated communities of exclusion" leading to each institution defining its own source, will still be curtailed by the requirement to fulfil the test of Article 14.

To rebuff other possible arguments against reservations, the decisions in *Ashok Kumar Thakur* and *Nagaraj* have clearly established that reservations are not anti-merit though it is significant that the term merit does not find any mention in the Constitution. Further, as per the observations in *I.R.Coelho*, Article 15 has been established as part of the Basic Structure, constituting one of the core values along with the Golden Triangle, which, if allowed to be abrogated, would change completely the nature of the Constitution.[42]

AND THE WALLS STAND DEMOLISHED

Much needs to be lauded in IMA, particularly, the strong emphatic case made out for an Egalitarian society in light of the contemporary times. John Rawls would be proud.[43] However, what

39 AIR 1956 SC 108 ¶ 6-8.

40 *National Campaign for Dignity and Rights of Sewerage and Allied Workers* v. *MCD*, 155 (2008) DLT 136 ¶ 9, *MC Mehta* v. *Union of India*, AIR 1987 SC 1086 ¶ 26, Sudhir Krishnaswamy, *Horizontal Application of Fundamental Rights and State Action in India* in HUMAN RIGHTS , JUSTICE AND CONSTITUTIONAL EMPOWERMENT 47-73 (C.Raj Kumar et al. eds. 2007).

41 *P.A.Inamdar*, ¶ 42.

42 *I.R.Coelho*, ¶ 75, 77.

43 John Rawls, A THEORY OF JUSTICE 566-571 (2nd Rev. ed. 1999).

issues most judgments dealing with reservations have failed to address, I have merely sought to highlight. These are as follows, first, while recognising the continual expansive interpretation of the term 'person', whether juristic persons can avail themselves of the Article 19(1)(g) freedom. On a closer examination, the Court's inconclusive answers douse us in a cloak of obscurity; though it is noted that educational institutions are governed and administered by their respective state acts and University Grants Commission (UGC) guidelines. Second, it is argued that analogous to Article 16(4), Article 15(4) seeks to constitutionally sanction a classification in favour of the weaker sections of the society and that Article 15(5) be seen as a mere extrapolation of the same. Given the nascent yet scarce discourse on the enforceable status of Article 15(4) by the courts, this argument can be seen as a justification for the Court's attempt to advance the status of Article 15(5) to that of a Fundamental Right[44]. The consequence of this is tying all State regulated bodies with the knot of constitutional imperatives which include, first and foremost, its affirmative action policies. Third, since the "right" now has to be recognised / enforced in a court of law, we see that most often in the educational sector, State regulated bodies are from the private sector which brings in the issue of applying rights horizontally. It is contended that though these bodies cannot be brought within the ambit of the business of direct state action, since they are recognised by the State, it is reasonable in the interests of justice and wider public policy to expect compliance with the welfare goals of the State while not tampering with the privilege of private autonomy.

Several colleges reserve seats for defence personnel[45] *inter alia* in fulfilment of the aim of providing equal education opportunities and in the interests of efficiency,[46] while, on the other hand, reserving seats on grounds of occupation and geographical location[47] have been rejected. It is possible to justify any new ground for reserving seats in educational institutions on satisfying the Rational Classification Test under Article 14. The Court acknowledges this danger, recognises its

44 Also refer to *I.R.Coelho's* recognition of Article 15 as part of the Basic Structure. Supra n. 46.

45 *Chanchala D.N.* v. *State of Mysore*, (1971) 2 SCC 293 ¶ 42-43.

46 Reservation of seats for in-service candidates in post graduate medical course upheld in *Pre-P.G. Medical Sangarsh Committee* v. *Dr. Bajarang Soni*, (2001) 8 SCC 694. See also, *Dr. Rajesh Garg* v. *State of Punjab*, (1995) 111 PLR 450.

47 *State of Uttar Pradesh* v. *Pradip Tandon*, (1975) 1 SCC 267 ¶ 42.

repercussions and strikes a note of caution by highlighting the issue of creation of "gated communities". This, I submit, is the most remarkable aspect of this judgment. By confining such recognition of classes to the domain of the State, the Court has prevented the fissuring of this country which anyway hangs in a delicate divided balance. Steeped in practical realities, it seeks to unify and equip every Indian with the indispensable tool of education and thus seeks to relieve the pain and rejection of the many bygone years. The right to development of these classes is not disputed, however, when economic conditions determine the kind of coaching one avails of for appearing in an entrance examination and when it is known that the private sector is not free from its "influence(s)", one understands the importance of the judgment. It has already created a furor.[48]

48 Abraham Thomas, "SC Notice to Centre, UP on Quota in Private Institutes" *The Pioneer*, June 22, 2011. http://www.dailypioneer.com/344545/SC-notice-to-Centre-UP-on-quota-in-private-institutes.html, accessed August 2011.