P.A.Inamdar Vs Maharashtra: in a fit of forgetfulness?

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Chief Justice R.C.Lahoti begins his judgement in P.A.Inamdar vs State of Maharashtra[1], quoting a 'learned academician' who is said to have commented about the judgement of the eleven judge bench in T.M.A Pai Foundation vs State of Karnataka[2], that 'the lack of clarity in the judgement allows (subsequent benches applying it) judicial creativity'. The Chief Justice apparently missed the sarcasm, for he quotes it as a prefatory comment, and proceeds to write a judgement equally lacking in clarity.

Except in one matter. He is categorical that private unaided educational institutions cannot be ordered by the Government to follow the rule of reservations. P.A.Inamdar is supposed to be a judgement that was merely explaining T.M.A.Pai (because the latter lacked in clarity), and so in saying that the rule of reservations does not apply to private unaided educational institutions, the judgement says it is merely explaining what is already contained in T.M.A Pai. But in fact a reading of the two judgements makes it amply clear that at least in the matter of reservations, the later judgement (P.A. Inamdar) was not merely explaining the earlier one (T.M.A. Pai). It has definitely added to it. A cynical view may conclude that the earlier judgement came close to saying the same thing but hesitated at the brink, and the shove was delivered by the later judgement. May be, but it is in nobody's interest that the judiciary is seen to be dissimulating. If the Supreme Court in the year 2005 wanted to say what it hesitated to say in 2003, it should have constituted a bigger bench and said so instead of taking refuge in a doubtful exegesis of the infamous paragraph 68 of the T.M.A Pai judgement.

Not that plainness would have made the view – that it is unconstitutional to ask unaided private educational institutions to follow the rule of reservations – correct. It is demonstrably wrong and has been made possible by a selective consideration of the Constitutional provisions and a tendentious formulation of the issue.

It is true that Parliament has undone the damage by amending the Constitution, an act that editorial writers have described as populism and vote bank politics, which view the judiciary may by and large concur with. Fortunately for the country, its policy initiatives are not in the hands of unelected elites like editorial writers and judges, but persons –

[1] AIR 2005 SC 3226
[2] AIR 2003 SC 355

however corrupt or venal - who need to get elected to make or change policy, and most of the votes are with the poor or the systemically disadvantaged. Policies will *always* be guided by 'vote bank' politics, whether judges and newspaper editors like it or not.

But the fact that Parliament has undone the damage should not mean that we do not look critically at the judgement of the Supreme Court, for tomorrow there could well be issues on which such unanimity is lacking in the political circles and the damage done by the judiciary goes unrepaired.

In concluding that private unaided educational institutions cannot be asked to follow the rule of reservations for the socially backward, the Supreme Court has come very close to adopting a style of argument commonly heard in the bazaar: when the entrepreneur has not depended upon the Government to fund his enterprise how can the Government impose conditions on the conduct of his business? Is this impeccable logic of the bazaar Constitutionally valid? Here is what the Supreme Court says:

> The State cannot insist on private educational institutions which receive no aid from the State to implement the State's policy on reservation for granting admissions on lesser percentage of marks i.e on any criterion except merit. (para 121)
>
> Merely because the resources of the State in providing professional education are limited, private educational institutions, which intend to provide better professional education, cannot be forced by the State to make admissions available on the basis of reservation policy to less meritorious candidate. Unaided institutions, as they are not deriving any aid from State funds, can have their own admissions if fair, transparent, non-exploitative and based on merit. (para 122)

As an aside, the repeated reference to 'merit' and 'meritorious' is curious. Once it is decreed that students have to pay their way through College to the full extent of the education they receive, 'merit' is subordinated to the capacity to pay. The unctuous tone in which the expression 'less meritorious candidate' is used is meaningless. Did it strike the Supreme Court that in a given case it may well happen that a candidate selected against a quota of reservation may have actually got more marks in the qualifying test than one who has been selected in the unreserved ('merit') quota, let alone the NRI quota? In fact, immediately after these two paragraphs extolling 'merit' comes paragraph 128 where an NRI quota of 15% is approved for which high fees may be charged by the College, on the consideration that NRI's suffer from a patriotic desire to reintegrate their wards with Indian culture and ethos, and the equally patriotic desire that their foreign-

earned wealth should 'reach their motherland' in the form of high fees paid to Indian educational entrepreneurs, and the further make belief that these high fees will be used by the College to help out poor students. We – and this includes judges – certainly believe what we want to believe. Patriotism, it appears, is a good enough substitute for merit. Why not social justice as well?

But let us get back to the reasoning of the Supreme Court as set out in the extracts from paragraphs 121 and 122 above. It is clear that what ought to have been the question is put out as the answer. The question is: in spite of the fact that an unaided private educational institution does not take funds from the Government, can the Government lay down a binding rule of reservation for such institutions? Why is a 'no' taken as the obvious answer? Why, in other words, is the logic of the bazaar accepted as the logic of the Constitution? It needs no emphasis that unlike with the logic of the bazaar, private enterprise carries no absolute freedom under the Indian Constitution. Notwithstanding that a private entrepreneur may owe nothing to State patronage or assistance, his business may still be regulated by law 'in the interests of the general public'. This is what Art 19(6) says, but the Supreme Court does not even remind itself of this fact. Art 19(6) is referred to for the purpose of looking at only one particular instance of the 'interests of the general public', namely that the law can lay down technical or professional qualifications for the carrying on of any occupation, trade or business.

But it was held long ago that reasonable restrictions can be imposed on the freedom to carry on any trade, occupation or business on grounds of social and economic policy, in particular one aimed at realising the Directive Principles of State Policy (Part IV of the Constitution). Such restrictions were held to be 'in the interests of the general public', which has been held to be an expression of 'wide import'. The argument that an action can be 'in the interests of the general public' only if it is in everybody's interest and not in any section's interest was rejected, and it was held that if it serves 'public order, public health, public security, morals, economic welfare of the community and the objects mentioned in Part IV of the Constitution', it is in the 'interests of the general public'[3]. All labour law has been upheld by the Courts on this ground. After all, does not the logic of the bazaar apply against labour welfare law too? When an entrepreneur does not seek financial aid or assistance from the Government but runs his enterprise on his own, how can the Government force him to share his profits with his workers in the form of bonus and gratuity payments, Provident Funds contribution, etc? The Courts said it can, because it subserves the object of welfare of workers which is a Constitutional directive in Art 43.

[3] Municipal Corporation of Ahmedabad vs Jan Mohd. Usmanbhai, AIR 1986 SC 1205

Furthering with 'special care' the educational interests of the 'weaker sections of the people, in particular the Scheduled Castes & Scheduled Tribes' is equally a Constitutional directive in Art 46. So how is the insistence on unaided private educational institutions following the rule of reservations for the 'weaker sections', in the language of Art 46, different from the Payment of Bonus Act or the Payment of Gratuity Act? The most the Court could have said was that the Government must make a law in this matter and cannot merely issue executive orders.

Apart from not looking at its own past interpretation of 'interests of the general public', the Supreme Court in P.A.Inamdar has formulated the issue in a most peculiar fashion. Asking the unaided private educational institutions to follow the rule of reservations is repeatedly described in the judgement as the Government taking over some of the seats in the institution to be given to persons of its choice. 'Compelling them to give up a share of the available seats to candidates chosen by the State', 'imposition of quota of State seats', 'appropriation of seats (by the State)', 'appropriation of quota by the State and enforcement of its reservation policy', 'the State insisting on seat sharing in the unaided private professional educational institutions by fixing a quota between the management and the State': such are the expressions used. The choice of language is bewildering. The weaker sections of society, it appears, are wards exclusively of the State. Neither the educational entrepreneurs who have monopolised the business of education nor the

Courts have any responsibility towards them. Like an orphanage that looks after abandoned children, the State is going around demanding of educational institutions that they part with a few seats for its wards, the Scheduled Castes and Scheduled Tribes. They, in their generosity, may accommodate the State's wards (para 123) but the State has no power to force its meritless wards on them. That amounts to 'nationalisation' of seats, which is declared to be impermissible.

Offensive is a mild word for this attitude.