The Great Education Muddle

State failure and judicial jigsaw

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A comprehensive White Paper on India's higher education policy for a pragmatic programmatic for at least the next 20 years is urgently needed. Such a Paper should take stock of the present and required availability of access taking into consideration the size of the age-cohort population in the relevant age-groups, and cover all issues relating to higher education such as ensuring social justice through education for all, relevance of public-private partnership, admission policy, quotas, fee-structure, quality-control and other matters. Without this, higher education in India will continue to be in a mess with the state and the judiciary tossing issues around without moving towards a resolution on genuine concerns.

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The Supreme Court judgement of August 12, 2005 on unaided professional education institutions, minority or non-minority, and the hullabaloo over it adding grist to the much-hackneyed reservation mill, may help vested interests use the reservation-backward classes-minorities bugaboos for political ends, and the greed of those who have turned education into exploitation, chicanery and commerce.

While it is inarguably right that the judiciary is the principal arbiter of the laws of the land, it is also inarguably right that the people who are governed by these laws have an inviolable right to dissect judgments and if necessary express their dissent, which in a democracy can be vociferous. In this context two observations will be in order.

The first is from the speech delivered by Justice Markandey Katju, Chief Justice of the Madras High Court, on the first anniversary of the inauguration of the Madurai Bench (24 July 2005). In it he said that since the people are our masters, and we are their servants, surely the masters have a right to criticise us and take us to task if we do not function properly; so we should not take offence when the people criticise us; our authority rests on public confidence, and not on the power of contempt (Fali S. Nariman, 'A Judge Above Contempt', *The Indian Express*, August 5, 2005).

The second is from a statement of the former Judge of the Supreme Court, V.R. Krishna Iyer:

> I hold the Supreme Court, in its holistic dimension, in high esteem. Its great virtue is patient hearing, never furious outburst. Its wisdom is profound and

> never provoked by the executive or the legislature. After all, if the court goes wrong, it has the power to set itself right. Likewise, if the executive and the legislature go beyond their power or commit egregious error, the last word still belongs to the Supreme Court. Infallibility, however, is papal folly and authoritarian intoxication. Our great judges are free from 'never-error syndrome'. (*The Hindu*, August 24, 2005)

Viewed from the above perspectives, the flak that the August 12 judgment has drawn from a cross-section of the people – general public, lawyers, parliamentarians, other politicians, students, teachers, intellectuals, and so on - was only to be expected.

In fact, when the communal GO of the Madras Government was quashed by the Madras High Court and the Supreme Court, shortly after the Constitution came into force, the judiciary and the ministries in Madras and at the Centre were in hell and high water. There is no parallel to the agitation spearheaded by Periyar E.V. Ramasamy Naicker attacking the rulings. Periyar and his loyal fighting-shouting-sloganeering-brigade even demanded a new Constitution faulting the existing one as drawn up by Brahmins. There was no flare-up by the Chief Justice of the Madras High Court or the Chief Justice of India; and by the framers of the Constitution, many of whom were still alive. The agitation was seen in perspective by Prime Minister Pandit Nehru, who went in for the most durable, sensible, and workable solution. That is, adding clause (4) to Article 15 as part of the first amendment to the Constitution in 1951: "(4) 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".

The meaning and message of the above anecdotes can be found in the question repeatedly posed by Dr. B. R. Ambedkar" "When the salt has lost its savour wherewith is it to be salted?" Interpreted in the present context, it should mean that when the judiciary is the only limb of Indian democracy in which people still have some faith, an outburst of the kind (by the Chief Justice of India, R.C. Lahoti, on August 23 much against the usually expected equanimity and judicial reserve and even as the Court was hearing an entirely different case) "Should you [Attorney-General Milon K. Banerjee] not tell your clients to give the respect the courts deserve … tell us, we will wind up the courts, and then do whatever you want", against criticism of the August 12 judgment can dampen the judiciary, make it more vulnerable, further discredit it, and further unsettle people's faith in it.

In a nascent democracy - and the largest democracy of the world -, which has been struggling to keep above the quicksand of centuries-old hierarchy and recalcitrant social patterns, judicial interpretation of law should be sensitive to the crying needs of an unjust society, and its imperfections and inadequacies. Whether the August 12 judgment carries such sensitivity is questionable.

The judgement was by a seven-judge Bench, headed by Chief Justice Lahoti. The Bench was dealing with over 100 petitions filed by the All-India Medical and Engineering Colleges Association, individual colleges, the Government of India, and the Governments of Andhra Pradesh, Karnataka, Kerala, Madhya Pradesh, Maharashtra and Tamil Nadu.

In the prefatory to the judgment the Bench recorded that the real task before it was to cull out the ratio *decidendi* of Pai Foundation (the 11-Judge Bench decision in T.M.A. Pai Foundation v. State of Karnataka (2002)) and to examine if the explanation or clarification given in Islamic Academy (the seven-judge Bench interpretation of the 11-judge decision in the Islamic Academy of Education & Anr. v. State of Karnataka & Ors., (2003)) ran counter to Pai Foundation and if so, to what extent; and if the Bench found anything said or held in Islamic Academy in conflict with Pai Foundation, it shall say so as being a departure from the law laid down by Pai Foundation and on the principle of binding efficacy of precedents, over-rule to that extent the opinion of the Constitution Bench in Islamic Academy.

Going by these observations, and the fact that some of the Constitutional provisions have lost their original import, become infirm, and even socially dysfunctional when not implemented scrupulously, whether the judgment is well-grounded in broad social concerns of justice, equity, and fairness, is debatable.

Judicial jigsaw

The unanimous judgment of the Bench delivered by the Chief Justice, which is effective from the next academic year, deals with the tenability of government quota and reservation in minority or non-minority unaided educational institutions, and admission procedure, fee structure, and related issues in these institutions. The observations and rulings of the Bench run thus:

- Imposition of quota of State seats or enforcing reservation policy of the State on available seats in unaided professional institutions are acts constituting serious encroachment on the right and autonomy of private professional educational institutions.

- 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 candidates.
- A limited reservation of seats, not exceeding 15 percent may be made available to NRIs depending on management's discretion subject to the condition that such seats should be utilized bona fide by the NRIs only and for their children or wards; and that within this quota merit should not be given a complete go-by.
- Unaided institutions can have their own admissions if fair, transparent, non-exploitative, and based on merit.
- Every institution is free to devise its own fee structure and generate reasonable surplus to meet cost of expansion and augmentation of facilities, subject to the limitation that there can be no profiteering and no capitation fee can be charged directly or indirectly, or in any form.

The abolition of state quota and reservation may appear correct insofar as it is construed as interpretation of the law. For, one might ask (a) when the Constitutional provisions for job quotas are enforced only in the state services and not in the private sector, why fuss about extending the parallel provisions for educational advancement to the private sector; and say (b) as the Constitutional mandate for the social and educational advancement of the backward classes (SCs, STs, OBCs) is to the state it is for the state to honour it.

In response to the first, it is important to take note of the increasing pressure for reservation in the private sector also, the debate on which is still going on; and the fact that employment and educational reservations are qualitatively different. As education is a *sine qua non* for individual and social development, reaching the un-reached and including the excluded through education are the most important tasks of any humane society. Two quotes should drive this home. One is by Frederico Mayor: [1]

> The world we leave to our children depends in large measure on the children we leave to our world. The world's hopes for the future rest with today's young people and their readiness to take up the challenges of the coming century. On the threshold of the twenty-first century, the education of the young has never been more in need of our commitment and resources.

[1] In Foreword to UNESCO's *World Education Report 1998: Teachers and teaching in a changing world.*

The other is by Alan Gilbert:[2]

> Because good quality education promises an escape from poverty, powerlessness, and despair, creating aspirations, opportunities, and choices otherwise unimaginable, it has emerged more clearly than ever as the last best, yet often seemingly forlorn hope that humankind may use its Promethean resources to build a safe, peaceful, prosperous world. As H.G. Wells put it in a famous aphorism exactly 100 years ago, 'Human history becomes more and more a race between education and catastrophe.

In the same speech Gilbert pointed to the fact that for 15 per cent of the world's population educational opportunities are more widely available than ever before in human history and the other 85 per cent remain seriously disadvantaged and often dangerously frustrated by educational deprivation. He cautioned that access to higher education will be one of the most serious global challenges of the 21st century.

The response to the posture that it is for the state to honour its Constitutional mandate is that it is one thing to fault the state whose failure relating to the backward classes has been gross and tragic, and quite another thing to legally address the issues of the victims of its wrongs. As the state, like the judiciary, is a creation of the society its wrongs should not be allowed to shadow the society, and to be turned into double whammy for the deprived sections – first because of the state's failure; second, because of the judicial insistence that the state should withdraw from reaching out to the weak through the private sector education. In this context, it is important to reaffirm the earlier observation that as education is a *sine qua non* for individual and social development reaching the un-reached and including the excluded through education are the most important tasks of any humane society. In this sense a liberal interpretation of the Constitutional mandate to the state should necessarily mean that if its foray into the private sector serves the greater good it is well within its rights to do so. If the state has failed in its important social tasks it is for the judiciary, which is expected to be an epitome of humaneness (notwithstanding the flare-up by the CJI!) and social vision, to pull it up, and if necessary work in other ways to fill in the void and redress the wrongs.

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[2] In a speech *Education or Catastrophe*, General Conference of the Association of Commonwealth Universities, Queen's University, Belfast, Media Release, 1 September 2003; Web: www.acu.ac.uk/belfast2003.

Merit vs. reservation

The enunciation of the Bench that reservation for backward classes is contrary to merit is untenable for a number of reasons. Among others, the Mandal judgment by the nine-judge Bench had affirmed that reservation is not anti-meritarian. If reservation is anti-meritarian, it should be more so for employment. Experience has not proved this right; for Tamil Nadu with 69 percent reservation in state services (and education) is one of the relatively more advanced, and efficient states. The inference that private institutions provide better professional education whereas state-institutions do not do so because of the reservation policy is invidious and is not borne out by facts. More often than not, private professional institutions do not go by merit, and are the last resort of the less meritorious who by paying extra amount manage their admission.

When all is said, reservation policy has more to do with scarcity of resources and opportunities than merit, which in the context of education should be seen as lack of access to the small education cake. Whether the policy really addresses the needs of the really backward or whether the advanced among the backward corner the benefits which they really do not need, is a different issue, which the judiciary is expected to probe.

The following observations in an editorial in *The New Indian Express* throw more light on these and related issues:

> It is too facile to suggest that reservations are, by definition an anti-merit principle. The fact that reservations entail a compromise with strict indices of merit, does not automatically entail that they are anti-meritocratic. Merit should not be judged only by the criteria used for admission; merit can be judged also on the output side. And, indeed, while the concept of merit should not be ridiculed, we ought to admit more complex criteria for determining merit than are currently allowed. And there is nothing in reservations that is per se incompatible with producing meritocratic students… [The] Court… seems to think that merit as an issue applies particularly to professional colleges and not to other institutions like undergraduate colleges. This assumption that merit, whatever it is, applies only to a particular class of degrees is also untenable. A principle for facilitating access must not be confused with a claim about the merit of individual students who benefit from that access.
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> But it is equally important to think more imaginatively beyond reservations as a policy to promote access. We ought to all agree towards building an education system that promotes both excellence and access. An ideal system would be completely needs blind: anyone would be able to get the education appropriate to them, regardless of their financial circumstances. But we ought to reflect on the fact that our current investment, pricing and admissions policies in education have not enabled us to achieve this goal. Reservation has been an easy way to assuage our conscience that we are doing something to promote access, when in reality it confines more students from marginalised communities to third-rate institutions. Empowering students from marginalised

> communities with real choice will require a much more creative effort than reinstituting controls over private education ('Think this through'. *The New Indian Express*, August 20, 2005).

The suggestion by the Bench that within the NRI quota, merit should not be given a complete go-by, thereby meaning that private institutions can admit the less meritorious if they are children or wards of NRIs, appears inconsistent with its insistence that private institutions cannot be forced by the State to make admissions available on the basis of reservation policy to less meritorious candidates. This is notwithstanding the reservations expressed by the Bench about the NRI quota:

> In fact, the term 'NRI' in relation to admissions is a misnomer. By and large, we have noticed in cases after cases coming to this Court, neither the students who get admissions under this category nor their parents are NRIs. In effect and reality, under this category, less meritorious students, but who can afford to bring more money, get admission.

The NRI quota which the Bench suggested has another dimension, which columnist TJS George summed up in his inimitable style:

> Actually the Court gave a stick to the politician to beat it with. Even as it abolished quotas and reservations, it allowed 15 percent quota for NRIs with a tame caution that 'within this quota, merit should not be given a complete go-by.' What we can now expect is that the aforementioned RI will first become an NRI-RI and spend a few more lakhs to acquire the right to play with the lives of patients. Never has so much been done by so many to achieve so little for the common good ('Merit? What merit? Money has most merit'. *The New Sunday Express*, August 21, 2005).

Admission racket

The 'if' in the judgment that unaided institutions can have their own admissions *if fair, transparent, non-exploitative, and based on merit*, is a big IF. Many of these institutions have not been fair, transparent, and non-exploitative in their admissions, and their admissions are not really merit-based. One of the many incidents relating to admissions in Tamil Nadu this year should drive this home.

On the basis of a written test, a 'deemed university' in Chennai called candidates for 'counselling' in one of its colleges. But there was no counselling. Students were shown a printed card informing that seats in certain branches were available for the amounts shown against them, which in the case of engineering was anything between Rs. 2 lakhs and 5 lakhs per year. They were asked to pay then and there part of the amount to book the seat, and the remaining amount within a few days. To avoid losing the seat there without any guarantee of a seat anywhere else many anxious parents rushed to pay the entire amount.

When a senior academic met the 'chancellor' and chairman of this 'deemed university' at the instance of the vice-chancellor of one of the state-universities to change the admission of a candidate from one branch (for which he had paid the initial deposit) to another, his response was 'the candidate has got low marks in written test, we can shift him to the other branch if you paid Rs. 3 lakh extra for a seat on the same campus, and 1.5 lakh extra for a seat on another campus. When the person asked how these extras will improve the performance of the candidate in the test which he had already written, the 'chancellor' had no answer. When the person met the vice-chancellor of the university and apprised him of what happened, his response was "Professor, we feel 'humbled' before these persons; private management has ruined our education system".

With different private institutions charging different amounts of fee, with no idea of the likely fee-hike in the remaining years, with poor infrastructure facilities, poor teaching staff and other infirmities the private education system is a den of corruption, greed, incompetence, sleaze, unscrupulousness, and what have you; and the institutions hold the parents and students captive using the admission-uncertainty syndrome. Here it is important to remember that while private institutions have strong lobby, network and bargaining power through political clout, money power, all-India associations and consortia, parents and students have nothing to fall back upon.

The suggestion by the Bench that private institutions can have their own admissions and fee structure may not be practical; in the absence of standardization and state intervention the situation is already chaotic and disquieting.

Profiteering

While banning capitation fee and profiteering in private institutions, the Bench has also dwelt on these evils:

> Capitation fee cannot be permitted to be charged and no seat can be permitted to be appropriated by payment of capitation fee. 'Profession' has to be distinguished from 'business' or a mere 'occupation'. While in business, and to a certain extent in occupation, there is a profit motive, profession is primarily a service to society wherein earning is secondary or incidental. A student who gets a professional degree by payment of capitation fee, once qualified as a professional, is likely to aim more at earning rather than serving and that becomes a bane to the society. The charging of capitation fee by unaided minority and non-minority institutions for professional courses is just not permissible. Similarly, profiteering is also not permissible. Despite the legal position, this Court cannot shut its eyes to the hard realities of

> commercialization of education and evil practices being adopted by many institutions to earn large amounts for their private or selfish ends.

Though the Bench has held that if capitation fee and profiteering is to be checked, the method of admission has to be regulated so that the admissions are based on merit and transparency and the students are not exploited; as it has also ruled that every institution is free to devise its own fee structure, the rulings are not free from ambiguities and dilemmas. That apart, how effective and enduring the regulatory mechanisms can be in a corrupt society where it is easy to bribe and buy the regulatory authorities is a big question. In this context the following observations by TJS George are pertinent:

> As far back as in 1993 the Supreme Court had declared the levying of capitation fee by professional colleges as illegal. Even earlier Andhra Pradesh and Karnataka had put a ban on the practice. Tamil Nadu and Kerala and Maharashtra had followed. In August 2003 the Supreme Court put a complete ban on capitation fees and specifically said that under no circumstances should educational institutions be allowed to 'indulge in profiteering.' Yet, profiteering flourishes in professional education more uproariously than in, say, the edible oil adulteration business. This results in two disastrous consequences. First, when a Rich Idiot gets into the MBBS course just because he has Rs.40 lakhs to pay as capitation, he emerges as a doctor who is likely to destroy more lives than he saves. Those who are not too rich and not too idiotic will focus on just one thing: How to recover that 40 lakhs and make another 40 or 80 for his children's admission. The second disastrous consequence is that a poor kid simply won't get admission at all even if he has the most brilliant brain in the land. This, naturally enough is what the politician has seized. He says that the Supreme Court ruling is 'a blow to social justice,' and that it 'does not factor in social realities.' And he is right. ('Merit? What merit? Money has most merit'. *The New Sunday Express*, August 21, 2005).

The judgment insists on the adoption of 'a rational fee structure' that would not be 'capitation fee,' and suggests that the state or university should devise an appropriate machinery to ensure that (1) no capitation fee is charged, and (2) there is no profiteering. However, K.T. Thomas, retired judge of the Supreme Court, who was once on the 11-judge Bench that heard arguments in the Pai Foundation case, rightly asks how many State Governments will make regulations to ensure that the twin insistence is implemented, that a proper law is passed to prevent managements from collecting capitation fees and also to ensure that students of merit will not be denied admission owing to non-payment of bribe money camouflaged under other names. His related observation about capitation fee for appointments in private institutions should be a revelation:

> It became a regular practice for the private management to collect gratification with immunity from the appointees by calling it 'donation'. The range of such

> donations has swelled up to a two digit figure in lakhs. The unfortunate pattern on this aspect is that none of the managements receiving this corrupt money has chosen to call it that. Instead they call it 'donation', 'interest free loan', and so forth. If any of the appointees refuses or declines to pay the aforesaid amount, he or she is sure to forfeit the appointment. Collection of this money is really extortion, which is an offence. But the managements are adamant in not showing the basic honesty to admit this practice, lest they should forfeit their right to run the institutions ('Courts, colleges, and governments'. *The Hindu*, August 30, 2005).

Here a distinction needs to be made between minority institutions started several years ago, and minority and non-minority institutions started recently. Most of the institutions of the first category are known for their earnestness in purpose, and commitment to the cause of education. They do not work for profit. The websites of some of them contain a notice during admission time that 'the college does not collect capitation fee or donation; if anybody approaches you on behalf of the college for capitation fee or donation, please bring it to the notice of the authorities.' Such institutions are a category apart, and deserve encouragement. While they are also caught in the eddy of globalization and the related knowledge revolution, their contribution to the society and the education system is still invaluable.

It is institutions of the second category which are a menace, driving the education system haywire. The deemed university mentioned earlier is a case in point. Its website claims that its 'chancellor' began his foray into education by starting a school dedicated to his mother. How that school recently spawned so many state-of-the-art buildings and campuses, which may now fetch a few hundred crore rupees is a mystery. A number of other similar institutions are also flourishing in Tamil Nadu without scruples.

State's failure

No doubt, it is the state governments' abdicating their responsibility of expanding higher education, with the few government-aided colleges unable to meet the demand for engineering and medical courses, which first necessitated the establishment of unaided private institutions. In the absence of proper policy formulations by the state governments, the practice of establishing unaided private institutions soon turned into piracy, and the ongoing chaotic proliferation of professional institutions, particularly engineering colleges, especially in Tamil Nadu, other southern states, and Maharashtra. Justice Thomas in his write-up mentioned earlier draws attention to the mushrooming of 'self-financing private professional colleges' inspired by the huge wealth accumulated by the professional college racket

in Karnataka, and to the fact that a lobby developed and succeeded in wangling government sanction for starting such colleges in other States.

Conclusion

Given the above dismal scenario, notwithstanding the uproar against the judgment in Parliament and outside, and the assurance by the HRD Minister, Arjun Singh to get around the court order, as demanded by various political parties, legislation to circumvent the court order may not be the right solution to the issues thrown up by the judgment and other issues plaguing private education. We need to develop a holistic approach to higher education and evolve a comprehensive White Paper on India's higher education policy for a pragmatic programmatic for at least the next 20 years. This should take stock of the present availability of access and the required availability taking into consideration the size of the age-cohort population in the relevant age-groups, increase the availability on a war-footing, cover practically every conceivable issue relating to higher education such as ensuring social justice through education for all, relevance of public-private partnership, invasion of the higher education system by the MNCs, entry of, and partnership with foreign institutions many of which are little known, flexible and need-based admission policy, quotas for the backward, affordable fee-structure, quality-control for maintaining standards, proper conduct of examinations, improvement of institutional ambience, mechanisms to ensure that no institution collects capitation fee or donation, and committees to regulate all these and a lot more.

In this context the following observations by V.C. Kulandaisamy are pertinent to note:

> We have to consider the quantum of manpower with higher education needed for achieving a developed nation status by 2020. The advanced countries are moving towards mass higher education. The following information about the proportion of the relevant age group (18-23) entering higher education in some of the advanced countries may prove the point (2000): U.S. 80 percent; Canada 88 percent; Australia 80 percent; Finland 74 percent; and the U.K. 52 percent. In general, the advanced countries have more than 50 percent of the relevant age group in university level education. India with nearly 300 universities and 16,000 colleges has only seven percent of the relevant age group entering the portals of universities. This number has to be augmented if we are to become a developed nation: it may have to be at least 25 percent by 2020. Governments, by themselves, will not be able to meet this need. It is necessary to welcome and encourage the participation of the private sector, *but on a selective basis and with safeguards to ensure quality* (emphasis added; 'Reconstruction of higher education in India', *The Hindu*, May 18, 2005).

Of the 7 per cent of the relevant age group entering the portals of universities as mentioned by Kulandaisamy, the representation of the Scheduled Castes, Scheduled Tribes, and Muslims is too low as to be inconsequential to them and to the rest of society. It is in cases like these that India's affirmative action programme has to be reinterpreted as to make it really affirmative, and the judiciary has to be proactive without unduly being pedantic in its interpretation of the Constitutional provisions, and work in tandem with the executive and the legislative wings.

To conclude, in the reconstruction rightly suggested by Kulandaisamy the state governments and the Centre should be the major players in expanding higher education and augmenting facilities in the existing institutions, both in a time-bound manner, and ensuring that state-institutions are indeed the mainstream and backbone of the higher education system. Once this happens proliferation of unregulated private institutions will decline, many of the existing institutions will become redundant along with their advocacy groups, and the interests of the backward classes and other weaker sections will be protected. In this sense, the judgment has to be seen as writing on the wall.