SUPREME COURT OF INDIA

Saurabh Chaudri

Vs.

Union of India

Writ Petn. Civil Nos. 29 of 2003

(V. N. Khare, C.J.I., R. C. Lahoti, B. N. Agrawal, S. B. Sinha and Dr. A. R. Lakshmanan, JJ.)

04.11.2003

JUDGEMENT

V. N. KHARE, C.J.I. (For himself and on behalf of **R. C. LAHOTI** and **B. N. AGRAWAL, JJ.**):-

1. Leave granted in the Special Leave Petition.

2. The core question involved in these writ petitions and appeal centres round the constitutional validity of reservation whether based on domicile or institution in the matter of admission into Post-Graduate Courses in Goverment run medical colleges.

3. For determination of the said question factual matrix of the matter, is being noticed from Writ Petition (Civil) No. 29 of 2003.

4. The petitioners who are 52 in number are original residents of Delhi. They joined various medical colleges out of Delhi for undertaking their MBBS Courses of studies against the 15% all-India quota on being qualified therefor in the All India Medical Entrance Examination.

5. The appellants intended to join the medical colleges of Delhi for their Post-Graduate Medical Courses. They applied for and were granted admission forms having regard to the decision of this Court in Dr. Parag Gupta v. University of Delhi and others ((2000) 5 SCC 684). In the Bulletin of Information issued by the University of Delhi, it was stated, that candidates like the appellants would be entitled for admission in Post-Graduate Courses subject to the decision of a matter pending in this Court, i.e. Magan Mehrotra and others v. Union of India and others, since reported in (2003) 3 Scale 101. AIR 2000 SC 2319 : 2000 AIR SCW 2406

6. A three-Judge Bench of this Court in Magan Mehrotra (supra) inter alia, therein held that apart from institutional preference, no other preference including reservation on the basis of residence is envisaged in the Constitution, in view of the decision of this Court in Dr. Pradeep Jain and others v. Union of India and others ((1984) 3 SCC 654). AIR 1984 SC 1420

7. The Delhi University on or about 31-12-2002 relying on or on the basis of the decision of this Court in Magan Mehrotra (supra) issued the following Notification :

"In view of the judgment of the Hon'ble Supreme Court of India dated 17-12-2002 in Writ Petition (C) No. 417 of 2002. It is hereby notified that for admission of P.G. Courses during the Academic Session 2003, only Delhi University Medical Graduates would be eligible against the 75% reserved seats of the students from Delhi who have taken admission in the University/States under the 15% All-India quota will not be eligible to seek admission in the P.G. Degree/Diploma Courses of Delhi University against the 75% reserve seats. All concern may please be note.

Accordingly the students who have done MBBS under 15% All-India quota from the University/States other than Delhi University and have applied for admission to the P.G. Degree/Diploma Courses are not eligible to appear in P.G. Medical Entrance Test 2003 to be held on 9-2-2003. They are advised to apply for the return of the Bank Draft/Cheque."

8. The appellants claiming themselves to be "the residents of Delhi" and "sons of the soil" filed the writ petition in the Court questioning the aforementioned notification dated 31-12-2002 as also reservation made by way of institutional preference for admission to Post-Graduate Medical Courses.

9. A Division Bench of this Court having regard to the decision in Magan Mehrotra's case (supra)

which was rendered by a three-Judge Bench of this Court, referred the matter to a Bench of three-Judges by order dated 3-2-2003. However, when the matter was placed before a three-Judge Bench, it by an order dated 7-2-2003 directed the matter to be placed before a Bench of five-Judges considering the importance of the matter, but no reason was assigned therefor.

10. The question which was initially raised in the writ petition was as to whether reservation made by way of institutional preference is ultra vires Arts. 14 and 15 of the Constitution of India; but during hearing a larger issue viz. as to whether any reservation, be on residence or institutional preference is constitutionally permissible, was raised at the Bar.

11. In view of the importance of the question involved, this Bench in terms of order dated 1-4-2003 directed issuance of notice to all the States and Union Territories. Pursuant whereto, except State of A.P. and State of Jammu and Kashmir all the States filed their returns and were heard.

12. Shri Harish Salve, learned senior counsel appearing on behalf of the appellants raised two contentions in support of the writ petition. He submitted that in view of the equality clause contained in Arts. 14 and 15(1) of the Constitution of India, reservation whether based on domicile or AIR 1955 SC 334 in stitutional preference would be unconstitutional. The learned counsel took us through the decisions of this Court operating in the field and urged that in view of the passage of time no reservation should be permitted either on the basis of residence or on institutional preference. Reservation on residential criteria, the learned counsel contended, is squarely hit by Cl. (1) of Art. 15 of the Constitution of India. Placing reliance on the debates on the subject at the time of framing of the Constitution, Shri Salve urged that the 'place of birth' being synonymous with 'domicile' the observations made contrary thereto in D. P. Joshi v. State of Madhya Bharat and another ((1955) 1 SCR 1215) are not correct.

13. Shri Salve further contended that in terms of the constitutional scheme, reservation is permissible only when there exist compelling Government objectives therefor and that too on nominal basis if it can be demonstrated that 'rule of merit' should not be allowed to be sustained and when the class in whose favour a departure is sought to be made constitutes a homogeneous group and such departure satisfies the tests of social justice for securing equality upon comparison of such disability suffered by such class or group of persons. The learned counsel submitted that in the matter of reservation the State must scrupulously follow the requirements of Cl. (4) of Art. 15 of the Constitution of India, namely, that the same is needed for the weaker section of society or a homogeneous class and identified by a presidential order issued in that behalf.

14. In a case involving higher education even, Shri Salve argued, such a provision must be handled with care and keeping in view a large number of decisions of this Court including M. R. Balaji and others v. State of Mysore (AIR 1963 SC 649 : 1963 Supp (1) SCR 439) not more than 50% of the total seats can be reserved. The learned counsel would contend that if such reservation is prima facie

impermissible having regard to the constitutional scheme the same would fall within the purview of 'suspected classification' and, thus, must pass the 'strict scrutiny test' or 'intermediate scrutiny test'. Any executive order providing for such reservation, the learned counsel urged, must be construed having regard to the preamble, the fundamental rights of the citizens and in particular Art. 19(1)(d), as also the Directive Principles of the State policy as contained in Part IV of the Constitution of India and in particular Arts. 41 and 47 of the Constitution of India. It was argued that meritorious students suffer from lack of mobility as contra distinguished from the mobility of the employees, and are required to be protected so as to suffer any discrimination only on a specious plea of the State "our money, our people." Domicile of all the citizens of India, Shri Salve urged, should be one; as the concept of State domicile has no role to play in our constitutional scheme. He emphasised that keeping the same in view, a profile check is required to be made so far as meritorious students are concerned, as those who are born and brought up in small towns also would like to have higher education in the metropolitan towns where having regard to the better infrastructures and higher resources, the institution therein would provide a better academic pursuit for them. In terms of Art. 14 of the Constitution of India, Shri Salve argued, students cannot form different class nor any such classification made amongst them would be in public interest. Relying heavily upon the observations made in paragraph 10 of the judgment of this Court in Dr. Pradeep Jain's case (supra), the learned counsel submitted that as all students are entitled to equal opportunities all sorts of reservations must be given a go-bye. AIR 1984 SC 1420

15. The learned counsel next contended that in any event, the students like the appellants should not be held to have lost their residential status only because they had gone out of their State of origin for pursuing their MBBS Course for a period of five years.

16. According to Shri Salve, Magan Mehrotra (supra), does not lay down the correct law and it is required to be overruled.

17. Assailing reservation by way of institutional preference, Shri Salve, further submitted that the very premise upon which it is based is fallacious inasmuch as the majority of students, in view of the decision of this Court in Dr. Pradeep Jain's case (supra) having taken admission on the criteria of domicile alone, would again be considered for pursuing their Post-Graduate Studies only on that basis and, thus, reservation by way of AIR 1984 SC 1420 institutional preference would amount to indirect way of doing things as the same would for all intent and purport would be based on domicile and, thus, is liable to be struck down.

18. Shri Salve further contended that Delhi University or the States were required to place before this Court sufficient materials to prove that such classification on institutional preference is based on an intelligible differentia. Drawing our attention to the statements made in the counter-affidavit, the learned counsel urged that no such material has been placed except that the said practice is in vogue for a long time.

19. Shri R. F. Nariman, learned senior counsel appearing on behalf of some of the students of All India Institute of Medical Sciences (AIIMS) submitted that in view of the decision of this Court in All India Institute of Medical Sciences Students' Union v. All India Institute of Medical Sciences and others ((2002) 1 SCC 428), out of 40 students only 6 were offered admission in non-clinical subjects which the most of the students would not like to pursue. Shri Nariman urged that plight of the students of AIIMS should be considered having regard to the stand taken by or the practice prevalent in other Universities, namely, institutional preference and in that view of the matter the students of the institution are also entitled to equal opportunity to compete with the students of other Universities. AIR 2001 SC 3262 : 2001 AIR SCW 3143

20. Shri Shanti Bhushan, learned senior counsel appearing on behalf of the students of Delhi University, on the other hand, submitted that Magan Mehrotra's case (supra) has correctly been decided. The learned counsel contended that keeping in view the decisions of this Court e.g. D. P. Joshi (supra); Dr. Jagdish Saran and others v. Union of India ((1980) 2 SCC 768) and Pradeep Jain (supra), it must be held that reservation by way institutional preference has held the field for a long time. The impugned notification, Shri Shanti Bhushan urged, having been issued pursuant to the directions of this Court, it is futile to urge that the action on the part of Delhi University in following the same has resulted in arbitrariness. According to the learned counsel reservation by way of institutional preference is not only a matter of convenience but also forms part of the educational policy. If such a policy is not allowed to have a little play, a student while undergoing different courses of studies may have to take admissions in different parts of the country wherefor he would face problems involving different languages, different cultures and different environments. It may not be feasible even for the parents of middle class family to send their children out of the State. Furthermore, the learned counsel contended that the chances that the local students would serve the local people cannot be completely ruled out and, thus, such a criteria cannot be said to be illogical or bad in law. AIR 1955 SC 334

AIR 1980 SC 820

AIR 1984 SC 1420

21. As regards application of strict scrutiny test, Shri Shanti Bhushan relying on or on the basis of the decision in Shri Ram Krishna Dalmia v. Justice S. R. Tendolkar and others ((1959 SCR 279) submitted that this Court has laid down the law that the constitutionality of a statute must be presumed and onus to prove that the statute is unconstitutional is upon the person who asserts the same. Only two tests, namely, as to whether the classification is reasonable and based on an intelligible differentia stood the test of time and there is no reason to deviate therefrom. Shri Shanti Bhushan argued that reservation by way of institutional preference had been holding the field since this Court decided Dr. Pradeep Jain's case (supra) and nothing has been pointed out by the petitioners to show that the said principle should be departed from. AIR 1958 SC 538

AIR 1984 SC 1420

22. Shri A. Mariarputham, learned counsel appearing on behalf of Delhi University, supplementing

the arguments of Shri Shanti Bhushan, submitted that reservation by way of institutional preference is a definite and identifiable criteria and in that view of the matter it satisfies the test of valid classification as contained in Art. 14 of the Constitution of India. The reasons assigned in support of the institutional preference in various decisions of this Court are still relevant and as such there being no change in the situation, any fresh look or reconsideration thereof is not warranted. This Court, the AIR 1984 SC 1420 learned counsel urged that having framed a scheme in Dr. Pradeep Jain's case (supra) which is binding on all concerned in view of the provisions contained in Arts. 141, 142, 143 and 144 of the Constitution of India, may not depart therefrom in view of the fact that this Court in Magan Mehrotra's case (supra) upon issuance of notice to all States had clearly directed that the law relating to institutional preference laid down in Dr. Pradeep Jain's case (supra) should be followed and in particular directed that the States of Assam, Karnataka, Tamil Nadu and Goa to follow reservation by way of institutional preference alone.

23. The learned counsel contended that all the States have since amended their rules so as to consider the candidature of those students who had studied in any of the institutions situated in that State on 15% all India quota and in that view of the matter the said students do not require a further indulgence. According to the learned counsel apart from the fact that the students who had gone to pursue their MBBS courses outside the State are entitled to take part in all-India open competition, they having regard to the amendments made in the rules framed by the States of Karnataka, Assam and others being entitled to institutional preference in the State where they had studied, may not be held to be entitled to a further indulgence of competing with the students of Delhi University in 75% quota on the ground that they are residents of Delhi and thereby bringing back the concept of reservation on domicile indirectly again.

24. Shri Sanjay Hegde, learned counsel appearing on behalf of the State of Karnataka, Shri A. Phukan, learned counsel appearing for the State of Assam and Shri R. S. Suri, learned counsel appearing for the State of Punjab, however, submitted that the States should be allowed to set apart some seats for the local candidates. It was pointed out that unlike other studies Post-Graduate Medical Courses involve practical training and the students are required to work in the hospitals wherein they are paid stipends by the States. It was urged that the States have been finding it extremely difficult to get good number of local doctors to serve the rural population and, thus, such a criteria, according to the learned counsel, cannot be said to be unconstitutional.

25. Before we embark upon the questions raised at the Bar, we may notice that the States before the decision of this Court in Dr. Parag Gupta's case (supra) had been following different criteria as regard grant of preference i.e. either on institution basis or on residence basis or both. The positions prevailing in different States before and after Dr. Parag Gupta's case (supra) and at present are given as under : AIR 2000 SC 2319 : 2000 AIR SCW 2406

POSITION BEFORE PARAG GUPTA

Sl	State	Nature of Preference
1.	U. P.	Institutional
2.	Delhi	Institutional
3.	Maharashtra	Institutional
4.	Gujarat	Institutional
5.	West Bengal	Institutional
6.	Assam	Residence
7.	TamilNadu	Residence
8.	Goa	Residence
9.	Karnataka	Residence
10.	Madhya Pradesh	Institutional OR Residence
11.	Haryana	Institutional OR Residence
12.	Punjab	Institutional OR Residence
13.	Rajasthan	Institutional OR Residence
14.	Kerala	Institutional OR Residence
15.	Orissa	Institutional OR Residence
16.	Himachal Pradesh	Institutional OR Residence
17.	Bihar	Institutional OR Residence
18.	Pondicherry	25% all India quota + 37.5% Institutional of available seats + 37.5% of available seats open for all

POSITION BEFORE PARAG GUPTA

Sl	State	Nature of Preference
1.	U. P.	Institutional Residence (15%)
2.	Delhi	Institutional Residence (15%)
3.	Maharashtra	Institutional

4. Gujarat Institutional

5. West Bengal Institutional

6. Assam Residence

7. Tamil Nadu Residence

8. Goa Residence(10 years)

9. Karnataka Residence

10. Madhya Pradesh Institutional OR Residence

11. Haryana Institutional OR Residence

12. Punjab Institutional OR Residence

13. Rajasthan Institutional OR Residence

14. Kerala Institutional OR Residence

15. Orissa Institutional OR Residence

16. HimachalPradesh Institutional OR Residence

17. Bihar Institutional OR Residence

18. Pondicherry 25% all India quota + 37.5% Institutional of available seats + 37.5% of available seats open for all

PRESENT POSITION

Sl State Nature of Preference

1. U. P. Institutional

2. Delhi Institutional

3. Maharashtra Institutional

4. Gujarat Institutional

5. West Bengal Institutional

6. Assam Residence

7. Tamil Nadu Residence

8. Goa Residence(10 years)

9. Karnataka Residence(10 years)

10. Madhya Pradesh Institutional OR Residence

11. Haryana Institutional OR Residence

12. Punjab Residence

13. Rajasthan Institutional OR Residence

14. Kerala Institutional OR Residence

15. Orissa Institutional OR Residence

16. Himachal Pradesh Institutional OR Residence

17. Bihar Institutional OR Residence

18. Pondicherry 25% all India quota + 37.5% Institutional of available seats + 37.5% of available seats open for all

26. It is neither in doubt nor in dispute that before the scheme was evolved in Dr. Pradeep Jain's case (supra), notices had been issued to all the States and all of them were fully heard. But despite the same, the orders passed by this Court in Dr. Pradeep Jain's case (supra) had been flouted with impunity, inter alia, by the States of Assam, Karnataka, Goa and Tamil Nadu. Now it transpires that even the State of Punjab has also not been following the said decision. AIR 1984 SC 1420

27. The necessity of issuing notices by this Court again in Magan Mehrotra's case (supra) must be considered from that angle. In Magan Mehrotra's case (supra), this Court not only reiterated that the reservation by way of institutional preference be maintained but also directed the aforementioned States to follow the same.

28. The questions must, therefore, be considered in the aforementioned factual backdrop.

29. The first question that arises for consideration is, whether the reservation on the basis of domicile is impermissible in terms of Cl. (1) of Art. 15 of the Constitution of India? The term 'place of birth' occurs in Cl. (1) of Art. 15 but not 'domicle.' If a comparison is made between Art. 15(1) and Art. 16(2) of the Constitution of India, it would appear that whereas the former refers to 'place of birth' alone, the latter refers to both 'domicile' and 'residence' apart from place of birth. A distinction, therefore, has been made by the makers of the Constitution themselves to the effect that

the expression 'place of birth' is not synonymous to the expression "domicile" and they reflect two different concepts. It may be true, as has been pointed AIR 1955 SC 334 out by Shri Salve and pursued by Mr. Nariman, that both the expressions appeared to be synonymous to some of the members of the constituent Assembly but the same, in our opinion, cannot be a guiding factor. In D. P. Joshi's case (supra), a Constitution Bench held so in no uncertain terms.

30. This Bench is bound by the said decision.

31. In State of Uttar Pradesh and others v. Pradip Tandon and others ((1975) 1 SCC 267), this Court observed : AIR 1975 SC 563, para 29

"The reservation for rural areas cannot be sustained on the ground that the rural areas represent socially and educationally backward classes of citizens. This reservation appears to be made for the majority population of the State. Eighty per cent. of the population of the State cannot be a homogeneous class. Poverty in rural areas cannot be the basis of classification to support reservation for rural areas. Poverty is found in all parts of India. In the instructions for reservation of seats it is provided that in the application form a candidate for reserved seats from rural areas must submit a certificate of the District Magistrate of the District to which he belonged that he was born in rural areas and had a permanent home there, and is residing there or that he was born in India and his parents and guardians are still living there and earn their livelihood there. The incident of birth in rural areas is made the basic qualification. No reservation can be made on the basis of place of birth, as this would offend Art. 15."

32. Answer to the said queston must, therefore, be rendered in the negative.

33. The second question that arises for our consideration is, whether reservation by way of institutional preference comes within suspected classification warranting strict scrutiny test?

34. Once it is held that Cl. (1) of Art. 15 of the Constitution of India is not attracted, the only question which survives is as to whether the same attracts the wrath of Art. 14 of the Constitution of India. Article 14 forbids class legislation but permits reasonable classification subject to the conditions that it is based on an intelligible differentia and that the differentia must have a rational relation to the object sought to be achieved.

35. In Shri Ram Krishna Dalmia's case (supra), this Court categorically held : AIR 1958 SC 538, para 11

". . . . .It is now well established that while Art. 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and, (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different basis, namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of this Court that Art. 14 condemns discrimination not only by a substantive law but also by a law of procedure.

The principle enunciated above has been consistently adopted and applied in subsequent cases. The decisions of this Court further establish

(a) that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself.

(b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;

(c) that it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;

(d) that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;

(e) that in order to sustain the presumpnto consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and

(f) that while good faith and knowledge of the existing conditions on the part of a legislature are to

be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the Court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislaton.

The above principles will have to be constantly borne in mind by the Court when it is called upon to adjudge the constitutionality of any particular law attacked as discriminatory and violative of the equal protection of the laws."

36. The strict scrutiny test or the intermediate scrutiny test applicable in the United States of America as argued by Shri Salve cannot be applied in this case. Such a test is not applied in Indian Courts. In any event, such a test may be applied in a case where a legislation ex facie is found to be unreasonable. Such a test may also be applied in a case where by reason of a statute the life and liberty of a citizen is put in jeopardy. This Court since its inception apart from a few cases where the legislation was found to be ex facie wholly unreasonable proceeded on the doctrine that constitutionality of a statute is to be presumed and the burden to prove contra is on him who asserts the same. The Courts always lean against a construction which reduces the statute to a futility. A statute or any enacting provision therein must be so construed as to make it effective and operative "on the principle expressed in the maxim : ut res magis valeat quam pereat." (See CIT v. Teja Singh (AIR 1959 SC 352) and Tinsukhia Electric Supply Co. Ltd. v. State of Assam (AIR 1990 SC 123).

37. Applying the test of presumption of constitutionality no case has been made out for invoking the doctrine of strict construction or intermediate construction.

38. The third question that arises for our consideration is, whether the reservation by institutional preference is valid? India is one country and all its citizens should equally be treated. The essence of equality is enshrined in Art. 14 of the Constitution of India. But does it mean that equality clause must be applied to all citizens to all situations? It is true that the country should strive to achieve a goal of excellence which in turn would mean that meritorious students should not be denied pursuit of higher studies. This itself brings us the question, who is to judge the merit and what are the standards therefor? It is extremely difficult to lay down a fool proof criteria. Success or failure of a candidate in one examination or the other may not lead to infallible conclusion as regard the merit of a candidate so as to achieve excellence. The larger question, therefore, would be how to and to what extent balance should be struck.

39. Ideal situation, although it might have been to see that only meritorious students irrespective of caste, creed, sex, place of birth, domicile/residence are treated equally but history is replete with situations to show that India is not ready therefor. Sociological condition prevailing in India compelled the makers of the Constitution to bring in Arts. 15 and 16 in the Constitution. The said

articles for all intent and purport are species of Art. 14 which is the genies in a sense that they provide for exception to the equality clause also. Preference to a class of persons whether based on caste, creed, religion, place of birth, domicile or residence is embedded in our constitutional scheme. Whereas larger interst of the country must be perceived, the law makers cannot shut their eyes to the local needs also. Such local needs must receive due consideration keeping in view the duties of the State contained in Arts. 41 and 47 of the Constitution of India.

(Emphasis mine)

40. For the last five decades this Court times without number had adopted the efficacy of one criteria or the other for giving preference to a section of students.

41. Constitutional interpretation is a difficult task. Its concept varies from statute to statute, fact to fact, situation to situation and subject-matter to subject-matter. Perceptions are yet to be perceived by the Court which would meet all situations while laying down emphasis for achieving excellence in all spheres of life keeping in view Chapter IV-A of the Constitution of India which provide for fundamental duties, circumstances and compulsions faced by the State in this behalf led the Courts to uphold a statute providing for reservation for a special class of people. Mostly they suffer from disability either being belonging to an oppressed community or by way of economical, cultural or social imbalances. The Courts shall all along strive hard for maintaining a balance. While interpreting the Constitution, we must notice the following view of Justice Holmes expressed in Missouri v. Holland (252 US 416 (433)) :

"When we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realise that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realise or to hope that they had created an organism, it has taken a century and has cost their successors must sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."

(Emphasis supplied)

42. Equally important is an elucidation of Justice Frankfurter contained in an article "Some Reflections on the Reading of Statutes." This Court also in Jagadish Saran and others v. Union of India ((1980) 2 SCC 768), a decision which is applicable in the fact situation of this Court, stated the law thus : AIR 1980 SC 820, para 7

"Law, constitutional law, is not an omnipotent abstraction or distant idealization but a principled, yet pragmatic, value-laden and result-oriented, set of propositions applicable to and conditioned by a concrete stage of social development of the nation and aspirational imperatives of the people. India Toay - that is the inarticulate major premise of our constitutional law and life."

43. In D. P. Joshi's case (supra) advantage given to local residents as regard payment of capitation fee was upheld. A Constitution Bench of this Court in Km. Chitra Ghosh and another v. Union of India and others ((1969) 2 SCC 228) stated the law thus : AIR 1955 SC 334

AIR 1970 SC 35, para 9

"It is the Central Government which bears the financial burden of running the medical college. It is for it to lay down the criteria for eligibility. From the very nature of things it is not possible to throw the admission open to students from all over the country. The Government cannot be denied the right to decide from what sources the admission will be made. That essentially is a question of policy and depends inter alia on an overall assessment and survey of the requirements of residents of particular territories and other categories of persons for whom it is necessary to provide facilities for medical education. If the sources are properly classified whether on territorial, geographical or other reasonable basis it is not for the Courts to interfere with the manner and method of making the classification."

(Emphasis supplied)

44. The matter came up for consideration again in D. N. Chanchala v. State of Mysore and others ((1971) 2 SCC 293); M. R. Mini (Minor) represented by hee Guardian and father M. P. Rajappan v. State of Kerala and another ((1980) 2 SCC 216), wherein a similar note was struck. AIR 1971 SC 1762

AIR 1980 SC 838

45. In Dr. Jagdish Saran's case (supra) this Court had an occasion to consider the question as to whether grant of institutional preference was a valid basis for admission. This case dealt with admission in Post-Graduate Courses of the Delhi University. Krishna Iyer, J. with whom Pathak, J. concurred in no uncertain terms upheld such preference. AIR 1980 SC 820

46. A large number of decisions on the point were taken into consideration by this Court in Dr. Pradeep Jain's case (supra). Upon a detailed analysis of the constitutional provisions, case laws as also the practical difficulties faced by the States, students as also the institutions, it was held : AIR 1984 SC 1420, para 10

". . . . .What is, therefore, necessary is to set up proper and adequate structures in rural areas where competent medical services can be provided by doctors and some motivation must be provided to the doctors AIR 1980 SC 820 servicing those areas. But, as the position stands today, there is considerable paucity of seats in medical colleges to satisfy the increasing demand of students for admission and some principle has, therefore, to be evolved for making selection of students for admission to the medical colleges and such principle has to be in conformity with the requirement of Art. 14. Now, the primary imperative of Art. 14 is equal opportunity for all across the nation for

education and advancement and, as pointed out by Krishna Iyer, J. in Jagdish Saran v. Union of India "this has burning relevance to our times when the country is gradually being 'broken up into fragments by narrow domestic walls' by surrender to narrow parochial loyalities." What is fundamental, as an enduring value of our polity, is guarantee to each of equal opportunity to unfold the full potential of his personality. Anyone anywhere, humble or high agrestic or urban, man or woman, whatever be his language or religion, place of birth or residence, is entitled to be afforded equal chance for admission to any secular educational course for cultural growth, training facility, speciality or employment. It would run counter to the basic principle of equality before the law and equal protection of the law if a citizen by reason of his residence in State A, which ordinarily in the commonality of cases, would be the result of his birth in a place situate within that State, should have opportunity for education or advancement which is denied to another citizen because he happens to be resident in State B. It is axiomatic that talent is not the monopoly of the residents of any particular State; it is more or less evenly distributed and given proper opportunity and environment, everyone has a prospect of rising to the peak. What is necessary is equality of opportunity and that cannot be made dependent upon where a citizen resides. If every citizen is afforded equal opportunity, genetically and environmentally, to develop his potential, he will be able in his own way to manifest his faculties fully leading to all round improvement in excellence. The philosophy and pragmatism of universal excellence through equality of opportunity for education and advancement across the nation is part of our founding faith and constitutional creed. The effort must, therefore, always be to select the best and most meritorious students for admission to technical institutions and medical colleges by providing equal opportunity to all citizens in the country and no citizen can legitimately, without serious detriment to the unity and integrity of the nation, be regarded as an outsider in our constitutional set up. Moreover, it would be against national interest to admit in medical colleges or other institutions giving instruction in specialities, less meritorious students when more meritorious students are available, simply because the former are permanent residents or residents for a certain number of years in the State while the latter are not, though both categories are citizens of India. Exclusion of more meritorious students on the ground that they are not resident within the State would be likely to promote substandard candidates and bring about fall in medical competence, injurious in the long run to the very region. "It is no blessing to inflict quacks and medical midgets on people by wholesale sacrifice of talent at the threshold. 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." The primary consideration in selection of candidates for admission to the medical colleges must, therefore, be merit. The object of any rules which may be made for regulating admissions to the medical colleges must be to secure the best and most meritorious students."

But it was observed :

". . . . . .Whether consistently with the constitutional values, admissions to a medical college or any other institution of higher learning situate in a State can be confined to those who have their 'domicile' within the State or who are residents within the State for a specified number of years or can any reservation in admission be made for them so as to give them precedence over those who do not possess 'domicile' or residential qualification within the State, irrespective of merit. . . . . ."

47. The right of development in a developing country is acknowledged in International Treaties,

Charters and Conventions.

48. Referring to the State mentality and pointing out to the law that there does not exist any separate State domicile in India, this Court specifically banished the AIR 1984 SC 1420, para 22 residential requirement for the purpose of admission into Post-Graduate Medical Courses for all times. It directed :

"So much for admission to the MBBS course, but different consideration must prevail when we come to consider the question of reservation based on residence requirement within the State or on institutional preference for admission to the post-graduate courses, such as, MD, MS and the like. There we cannot allow excellence to be compromised by any other considerations because that would be detrimental to the interest of the nation. It was rightly pointed out by Krishna Iyer, J. in Jagdish Saran case, and we wholly endorse what he has said :- AIR 1980 SC 820

The basic medical needs of a region or the preferential push justified for a handicapped group cannot prevail in the same measure at the highest scales of speciality where the best skill or talent, must be handpicked by selecting according to capability. At the level of PhD, MD, or levels of higher proficiency, where intentional measure of talent is made, where losing one great scientist or technologist in the making is a natinal 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. (SCC pp. 778-79, para 23) AIR 1980 SC 820, paras 23, 39 and 44

* * * * * *

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 like post-graduate courses. After all, top technological expertise in any vital field like medicine is a nation's human asset without which its advance and development will be stunted. The role of high grade skill or special talent may be less at the lesser levels of education, jobs and disciplines of social inconsequence, but more at the higher levels of sophisticated skills and strategic employment. To devalue merit at the summit is to temporise with the country's development in the vital areas of professional expertise. In science and technology and other specialised fields of developmental significance, to relax lazily or easily in regard to exacting standards of performance may be running a grave national risk because in advanced medicine and other critical departments of higher knowledge, crucial to material progress, the people of India should not be denied the best the nation's talent lying latent can produce. If the best potential in these fields is cold shouldered for populist considerations garbed as reservations, the victims, in the long run, may be the pople themselves. Of course, this unrelenting strictness in

selecting the best may not be so imperative at other levels where a broad measure of efficiency may be good enough and what is needed is merely to weed out the worthless. (SCC p. 785, para 39)

* * * * *

Secondly, and more importantly, it is difficult to denounce or renounce the merit criterion when the selection is for post-graduate or post-doctoral courses in specialised subjects. There is no substance for sheer flair, for creative talent, for fine-tuned performance at the difficult heights of some disciplines where the best alone is likely to blossom as the best. To sympathise mawkishly with the weaker sections by selecting sub-standard candidates, is to punish society as a whole by denying the prospect of excellence say in hospital service. Even the poorest, when stricken by critical illness, needs the attention of super-skilled specialists, not humdrum second rates. So it is that relaxation on merit, by overruling equality and quality altogether, is a social risk where the stage is post-graduate or post-doctoral. (SCC p. 786, para 44) These passages from the judgment of Krishna Iyer, J. clearly and forcibly express the same view which we have independently reached on our own and indeed that view has been so ably expressed in these passages that we do not think we can usefully add anything to what has already been said there. We may point out that the Indian Medical Council has also emphasised that playing with merit, so far as admissions to post-graduate courses are concerned, for pampering local feeling, will boomerang. We may with advantage reproduce the recommendation of the Indian Medical Council on this point which may not be the last word in social wisdom but is certainly worthy of consideration :

Students for post-graduate training should be selected strictly on merit judged on the basis of academic record in the under-graduate course. All selection for post-graduate studies should be conduced by the Universities.

The Medcial Education Review Committee has also expressed the opinion that "all admissions to the post-graduate courses in any institution should be open to candidates on an all-India basis and there should be no restriction regarding domicile in the State/Union Territory in which the institution is located." So also in the policy statement filed by the learned Attorney-General, the Government of India has categorically expressed the view that :

So far as admission to the institutions of post-graduate colleges and special professional colleges is concerned, it should be entirely on the basis of all-India merit subject to constitutional reservations in favour of Scheduled Castes and Scheduled Tribnes.

We are therefore of the view that so far as admissions to post-graduate courses, such as MS, MD and the like are concerned, it would be eminently desirable not to provide for any reservation based on residence requirement within the State or on institutional preference. But, having regard to broader considerations of equality of opportunity and institutional continuity in education which has its own importance and value, we would direct that though residence requirement within the State shall not be a ground for reservation in admissions to post-graduate courses, a certain percentage of seats may

in the present circumstances, be reserved on the basis of institutional preference in the sense that a student who has passed MBBS course from a medical college or University, may be given preference for admission to the post-graduate course in the same medical college or University but such reservation on the basis of institutional preference should not in any event exceed 50 per cent. of the total number of open seats available for admission to the post-graduate course. This outer limit which we are fixing will also be subject to revision on the lower side by the Indian Medical Council in the same manner as directed by us in the case of admission to the MBBS course. But, even in regard to admissions to the post-graduate course, we would direct that so far as super specialities such as neuro-surgery and cardiology are concerned, there should be no reservation at all even on the basis of institutional preference and admissions should be granted purely on merit on all-India basis."

It in no uncertain terms directed :

"The decisions reached by us in these writ petitions will bind the Union of India, the State Governments and Administrations of Union Territories because it lays down the law for the entire country and moreover we have reached this decision after giving notice to the Union of India and all the State Governments and Union Territories. . . . . "

49. A scheme, thus, came to be framed by this Court which is a law within the meaning of Art. 141 of the Constitution of India and is binding on all the States in terms of Art. 144 of the Constitution of India. The principal considerations which weighed with the Court for arriving at the aforementioned conclusion were :

". . . . .There can be no doubt that the policy of ensuring admissions to the MBBS Course on all-India basis is a highly desirable policy, based as it is on the postulate that India is one nation and every citizen of India is entitled to have equal opportunity for education and advancement, but it is an ideal to be aimed at and it may not be realistically possible, in the present circumstances, to adopt it, for it cannot produce real equality of opportunity unless there is complete absence of disparities and inequalities - a situation which simply does not exist in the country today. There are massive social and economic disparities and inequalities not only between State and State but also between region and region within a State and even between citizens and citizens within the same region. There is a yawning gap between the rich and the poor and there are so many disabilities and injustices from which the poor suffer as a class that they cannot avail themselves of any opportunities which may in law be open to them. They do not have the social and material resources to take advantage of these opportunities which remain merely on paper recognised by law but non-existent in fact. Students from backward States or regions will hardly be also to compete with those from advanced States or regions because, though possessing an intelligent mind, they would have had no adequate opportunities for development so as to be in a position to compete with others. So also students belonging to the weaker sections who have not, by reason of their socially or economically disadvantaged position, been able to secure education in good schools would be at a disadvantage compared to students belonging to the affluent or well-to-do families who have had the best of school education and in open all-India competition, they would be likely to be worsted. . . . .

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50. A distinction was made therefor between the Undergraduate Course i.e. MBBS Course and Post-Graduate Medical Course as also super speciality courses. The Court, therefore, sought to strike a balance of rights and interests of all concerned.

51. However, the percentage of seats to be allotted on all-India basis, however, came to be modified in Dr. Dinesh Kumar and others v. Motilal Nehru Medical College, Allahabad and others ((1985) 3 SCC 22) in the following terms :- AIR 1985 SC 1059, para 5

"We would also like to clear up one misunderstanding which seems to prevail with some State Governments and Universities in regard to the true import of our judgment dated June 22, 1984. They have misinterpreted our judgment to mean that 30% of the total number of seats available for admission to MBBS course in a medical college should be kept free from reservation on the basis of residence requirement or institutional preference. That is a total misreading of our judgment. What we have said in our judgment is that after providing for reservation validly made, whatever seats remain available for non-reserved categories, 30% of such seats at the least, should be left free for open competition and admission to such 30% open seats should not be based on residence requirement or institutional preference but students from all over the country should be able to compete for admissions to such 30% open seats. To take an example, suppose there are 100 seats in a medical college or University and 30% of the seats are validly reserved for candidates belonging to Scheduled Castes and Scheduled Tribes. That would leave 70 seats available for others belonging to non-reserved categories. According to our judgment 30% of 70 seats, that is, 21 seats out of 70 and not 30% of the total number of 100 seats, namely, 30 seats, must be filled up by open competition regardless of residence requirement or institutional preference."

52. Changes were made in the formula in Dr. Dinesh Kumar and others (II) v. Motilal Nehru Medical College, Allahabad and others ((1986) 3 SCC 727 at page 733). This Court thereafter times without number issued directions from time to time regulating admissions in different courses of studies, meticulous supervisions and conduct of examinations by the Universities as also all-India tests in the following : AIR 1986 SC 1877at p.1883

1. Dr. Dinesh Kumar (III)-((1987) 4 SCC 122) AIR 1987 SC 2396

2. Dr. Dinesh Kumar (IV)-((1987) 4 SCC 459)

3. Dr. Dinesh Kumar (V)-((1989) Supp 2 SCC 428)

4. Dr. Dinesh Kumar (VI)-((1987) 1 Scale 1232)

5. Dr. Dinesh Kumar (VII) -(1987) 2 Scale 222)

6. Dr. Dinesh Kumar (VIII)-((1988) 1 Scale 428)

7. Dr. Dinesh Kumar (IX)-((1990) 4 SCC 627). AIR 1990 SC 2030

53. The State of Assam, it appears, was specifically directed to follow institutional preference by this Court by an order dated 2-2-1996 in Writ Petition (Civil) No. 625 of 1995.

54. A deviation to the said dicta, however, was sought to be made by a two-Judge Bench of this Court in Dr. Parag Gupta's case (supra). In the said decision some of the students complained that whereas the students who had undergone studies in other Universities were entitled to reservation by way of domicile or institutional preference, but they, although had successfully completed in All India AIR 2000 SC 2319 : 2000 AIR SCW 2406 Enrance Test in MBBS Course, are not being permitted to compete with their fellow students of Delhi University on the ground of institutional preference, althought they belong to the same class of students.

55. This court in Dr. Parag Gupta (supra) did not lay down any law. It dealt with the situation on equitable and humanitarian grounds but while doing so it indisputably deviated from the law laid down in Dr. Pradeep Jain's case (supra) only by way of an interim arrangement. It inadvertently created reservation on domicile which was forbidden in Dr. Pradeep Jain's case (supra). The said provisional directions being binding on Delhi University came to be followed in subsequent years. The sympathetic consideration shown by this Court in Dr. Parag Gupta's case (supra) came to be misapplied by the Allahabad High Court in Vineet Singh's case wherein the High Court directed consideration of cases of the students who belonged to the State of U.P. irrespective of the fact that whether they had gone out of their home State on 15% all-India quota or not. This Court in State of U.P. and others v. Vineet Singh and Others [(2000)7 SCC 262] clarified the position holding that the High Court was wrong in extending the benefit in Dr. Parag Gupta's case (supra) to other students and retierated that Dr. Parag Gupta's decision was confined to the students who had gone to other States under 15% all-India quota. The ratio of the judgment in Dr. Parag Gupta's case (supra) came to be reiterated in Abhinav Aggarwal and another v. Union of India and others [(2001) 3 SCC 425]. AIR 2000 SC 2319 : 2000 AIR SCW 2406

AIR 1984 SC 1420, AIR 2000 SC 2766 : 2000 AIR SCW 3013 : 2000 All LJ 2423, AIR 2000 SC 2319 : 2000 AIR SCW 2406, AIR 1984 SC 1420

AIR 2001 SC 961 : 2001 AIR SCW 729

56. In Dr. Prachi Almeida v. Dean, Goa Medical College and others [(2001)7 SCC 640], a problem was faced by a student from Delhi who was admitted into Goa Medical College under the 15% all-India quota. She was denied admission in Goa on the ground that she was not resident of the said State. She, however, was married in Goa. This Court followed Dr. Pradeep Jain's case (supra) and directed that the student cannot be denied admission on the basis of residence requirement holding that if the candidate has done MBBS Course in that State such a candidate would be eligible for admission in Post Graduate Medical course therein. AIR 2001 SC 3418 : 2001 AIR SCW 3278

AIR 1984 SC 1420

57. Some students of the Delhi University, thereafter filed a writ peti-tion questioning the residential reservation in Magan Mehrotra and others v. Union of India and others since reported in (2003)3 SCALE 101. A Bench of this Court therein by an order dated 11-9-2002 noticing the conflict between the decisions in Dr. Pradeep Jain (supra) on the one hand and Dr. Parag Gupat (supra) on the other, issued notices to all the States excepting the States of Jammu and Kashmir and Andhra Pradesh and referred the matter to a three-Judge Bench. In Magan Mehrotra (supra), this Court held that the decision in Dr. Parag Gupta (supra) is contrary to the decision in Dr. Pradeep Jain (supra) stating : AIR 1984 SC 1420

AIR 2000 SC 2319 : 2000 AIR SCW 2406

AIR 2000 SC 2319 : 2000 AIR SCW 2406

AIR 2000 SC 2319 : 2000 AIR SCW 2406

AIR 1984 SC 1420

"..... A bare look at the judgment of the 3-Judge Bench in Pradeep Jain's case and two-Judge Bench in Parag Gupta's case in relation to the question of preference in the post-graduate course it cannot but be held that the Parag Gupta's case took a different view by upholding the residential preference, in essence, which was contrary to the judgment of the three-Judge Bench in Pradeep Jain's case. Independently on examining the 7 issues of preference, we are also of the considered opinion that the decision rendered by this Court in Pradeep Jain's case had taken a correct criteria into consideration and we, therefore, agree with the principles evolved and the ratio given in Pradeep Jain's case so far as it relates to admission into the post-graduate courses and the question of institutional preference to be given to those who had studied their under-graduate course in the very institutions against the 15% quota on the All India basis. In this view of the matter, the impugned Bulletin of Information issued by the Delhi University in relation to the Post-doctoral (D. M./M. Ch.) Post-Graduate Degree must be held to be contrary to the direction of this court in Pradeep Jain's case and the same is accordingly quashed. However, this order shall be made effective from the next academic session. We, however, direct the States of Assam, Tamil Nadu, Goa and Karnataka to follow the pattern of institutional preference as has been indicated by this Court in Pradeep Jain's case and reiterated by us today...."

58. We may, however, notice that this Court in K. Duraisamy and another v. State of Tamil Nadu and others ((2001) 2 SCC 538) upheld the sources for admission by giving preference to the doctors working in the hospitals in the Post-Graduate courses on the ground that the same constitutes a valid classification. AIR 2001 SC 717 : 2001 AIR SCW 448

59. The discussions on this topic would remain incomplete if we fail to notice a recent decision of this Court in All India Institute of Medical Sciences Student's Union (supra) rendered by one of us, Hon'ble Lahoti, J. wherein this Court, keeping in view the peculiar situation obtaining in the case of AIIMS, held institutional reservation to be unconstitutional. It, however, keeping in view the necessity of giving institutional preference to students who had studied from AIIMS, directed that such preference be given to the extent of 25% of students instead of 33%. However, keeping in view the fact that there were 40 seats in MBBS Course whereas 132 seats in Post-Graduate Courses, the institutional preference to be given to the students of AIIMS came to about 82.5%. AIR 2001 SC 3262 : 2001 AIR SCW 3143

60. In this context it is relevant to examine the relevance of an entry in the State List or Concurrent List.

61. 'Education' appears both in Union List as also in the Concurrent List. The relevant entries in the Constitution are as under :

"66. List I - Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions."

"25. List III - Education, including technical education, medical education and Universities,subject to the provisions of entries 63, 64, 65 and 66 of List I; vocational and technical training of labour."

62. An argument has been advanced that different interpretation is needed having regard to the shift of constitutional entry from List II to List III. One of us T. M. A. Pai Foundation and others v. State of Karnataka and others ((2002 (8) SCC 481), had to say the following : AIR 2003 SC 355 : 2002 AIR SCW 4957, para 183

"Further, under clause (2) of Article 246 Paliament and subject to clause (1) the Legislature of any State are empowered to make law with respect to any of the matters enumerated in List III, Seventh Schedule and under clause (3) of Article 246, the Legislature of any State is empowered to enact law with respect to any of the matters enumerated in List II in the Seventh Schedule subject to

clauses (1) and (2). From the aforesaid provisions it is clear that it is Article 246 and other articles which either empower Parliament or State Legislature to enact law and not the entries finding place in three lists of the Seventh Schedule. Thus the function of entries in three Lists of the Seventh Schedule is to demarcate the area over which the appropriate Legislatures can enact laws but do not confer power either on Parliament or the State Legislatures to enact laws. It may be remembered, by transfer of the entries, the character of the entries is not lost or destroyed. In this view of the matter by transfer of contents of Entry 11 of List II to List III as entry 25 has not denuded the power of the State Legislature to enact law on the subject "Education" but has also conferred power on Parliament to enact law on the subject "Education"."

63. Shifting of the entry from the State List to the Concurrent List is not, thus, relevant inasmuch the State in absence of any Parliamentary act has the legislative competence to enact a statute laying down reservation for entry in any course of studies including the medical courses.

64. The sole question, therefore, is as to whether reservation by way of institutional preference is ultra vires Article 14 of the Constitution of India. We think not. Article 14, it will bear repetition to state, forbids class legislation but does not forbid reasonable classification, which means-(1) must be based on reasonable and intelligible differentia; and (2) such differentia must be on rational basis.

65. Hence, we may also notice the argument, whether institutional reservation fulils the aforementioned crietria or not must be judged on the following :-

1. There is a presumption of constitutionality;

2. The burden of proof is upon the writ petitioners as they have questioned the constitutionality of the provisions;

3. There is a presumption as regard the State's power on extent of its legislative competence;

4. Hardship of few cannot be the basis for determining the validity of any statute.

66. The Court while adjudicating upon the constitutionality of the provisions of the statute may notice all relevant facts whether existing or conceived.

67. This Court may, therefore, notice the following:

(i) The State runs the Universities.

(ii) It has to spend a lot of money in imparting medical education to the students of the State.

(iii) Those who get admission in Post-Graduate Courses are also required to be paid stipends. Reservation of some seats to a reasonable extent, thus, would not violate the equality clause.

(iv) The criteria for institutional preference has now come to stay. It has worked out satisfactorily in most of the States for last about two decades.

(v) Even those States which defied the decision of this Court in Dr. Pradeep Jain's case (supra) had realized the need for institutional preference. AIR 1984 SC 1420

(vi) No sufficient material has been brought on record for departing from this well-established admission criteria.

(vii) It goes beyond any cavil of doubt that institutional preference is based on a reasonable and identifiable classification. It may be that while working out the percentage of reservation invariably some local students will have preference having regard to the fact that domicile /residence was one of the criteria for admission in MBBS Course. But together with the local students 15%, students who had competed in All India Entrance Examination would also be getting the same benefit. The percentage of students who were to get the benefit of reservation by way of institutional preference would further go down if the decision of this Court in Dr. Pradeep Jain's case (supra) is scrupulously followed. AIR 1984 SC 1420

(viii) Giving of such a preference is a matter of State Policy which can be invalidated only in the event of being violative of Article 14 of the Constitution of India.

(ix) The students who would get the benefit of institutional preference being on identifiable ground, there is hardly any scope.

(x) for manipulation.

68. In Km. N. Vasundara v. State of Mysore and another ((1971)1 Supp SCR 381) , it was observed : AIR 1971 SC 1439, Para 8

"But cases of hardship are likely to arise in the working of almost any rule which may be framed for selecting a limited number of candidates for admission out of a long list. This, however, would not render the rule unconstitutional."

69. As noticed hereinbefore, in D. N. Chanchala's case (supra), M. R. Mini's case (supra) and Jagadish Saran's case (supra) institutional preference has been preferred. It has been reiterated in the law laid down by way of a scheme evolved in Dr. Pradeep Jain (supra) and reiterated in Magan Mehrotra (supra). AIR 1971 SC 1762, AIR 1980 SC 838, AIR 1980 SC 820, AIR 1984 SC 1420

70. We, therefore, do not find any reason to depart from the ratio laid down by this Court in Dr. Pradeep Jain (supra). The logical corollary of our finding is that reservation by way of institutional preference must be held to be not offending Article 14 of the Constitution of India.

71. However, the test to uphold the validity of a statute on equality must be judged on the touchstone of reasonableness. It was noticed in Dr. Pradeep Jain's case (supra) that reservation to the extent of 50% was held to be reasonable. Although subsequently in Dr. Dinesh Kumar's case (supra) it was reduced to 25% of the total seats. The said percentage of reservation was fixed keeping in view the situation as then existing. The situation has now changed to a great extent. Twenty years have passed. The country has during this time have produced a large number of Post-Graduate doctors. Our Constitution is AIR 1984 SC 1420

AIR 1985 SC 1059 ongoing and with the passage of time, law must change. Horizons of constitutional law are expanding.

72. Having regard to the facts and circumstances of the case, we are of the opinion that the original scheme as framed in Dr. Pradeep Jain's case (supra) should be reiterated in preference to Dr. Dinesh Kumar's case (supra). Reservation by way of institutional preference, therefore, should be confined to 50% of the seats since it is in public interest.

73. For the purpose of selecting the candidates, it is necessary to hold an All India Entrance Examination by an impartial and reputed body. We must, therefore, lay down the criteria therefor. AIIMS in terms of an order passed by this Court has been conducting the said examination. It may continue to do so unless a competent body is created by the Central Government in terms of a Parliamentary Act or otherwise. All expenses for conducting such examination shall be borne by the Central Government which would also provide the requisite infrastructure therefor. One test shall be held for all the students taking admission throughout the country. This order is passed keeping in view the fact that now one common entrance test is held for admission against 25% of all India quota and other tests are being held by the respective Universities. Disparities in such tests should be done away with and merit of the students should be judged on the basis of one test held therefor.

74. AIIMS is an institution of excellence. It is a class by itself and pride. We are, therefore, of the opinion that in the AIIMS and the medical colleges of the Central University, merit should have primacy subject of course to institutional preference to the extent of 50% of the total seats in the MBBS course. In all other respects the decision of this Court in All India Institute of Medical Sciences Students' Union's case (supra) shall operate. AIR 2001 SC 3262 : 2001 AIR SCW 3143

75. Our directions aforementioned, however, are interim in nature. The Parliament having regard to Entry 66, List I of the Seventh Schedule of the Constitution of India has the legislative competence which would take care of the country as a whole. While making such a legislation, the Parliament undoubtedly would take into consideration the special needs of some small States, having regard to their backwardness economic, social and educational as also geographical conditions.

76. The Parliament has also the legislative competence in terms of Entry 25, List III of the Seventh Schedule of the Constitution. It for education and particularly higher education where excellence is required, while enacting law must also foresee that in the era of liberalisation and globalisation, Indian citizens must compete with their counterparts of the developed countries. Merit, thus, must be allowed to explore to the fullest extent. Genius hidden in the citizens must be allowed to blossom. Despite 55 years of India's existence as an independent nation, a National policy on higher education has not come into being. Its significance and importance was highlighted in Dr. Pradeep Jain's case (supra); but the Parliament did not pay any heed thereto. AIR 1984 SC 1420

77. The Courts are normally reluctant to issue any direction to the Central Government for making law. Following our practice, we refrain ourselves to issue any direction in this regard. We hope and trust that the Central Government expeditiously consider of making legislation or taking such steps as are necessary in this behalf keeping in view requirement of co-ordination in higher education in terms of Entry 66, List I of the Seventh Schedule of the Constitution of India.

78. For the aforesaid reasons, we do not find any merit in the contentions advanced on behalf of the

petitioners. The petitioners are not entitled to any relief. With the aforesaid directions, these writ petitions and the appeal are disposed of.

79. There shall be no order as to costs.

80. **S. B. SINHA, J.:-**

I have had the advantage of reading the draft opinion of Hon'ble the Chief Justice of India. While concurring with the said judgment, I would like to add a few words of mine.

81. The core question involved in these appeals is as to whether by providing for institutional reservation, the equality clause is violated.

82. Article 14 of the Constitution of India prohibits discrimination in any form. Discrimination at its worst form would be violative of the basic and essential feature of the Constitution. It is trite that even the fundamental rights of a citizen must conform to the basic feature of the Constitution. Preamble of the Constitution in no uncertain terms lays emphasis on equality.

83. In Kesavananda Bharati v. State of Kerala ((1973) 4 SCC 225), Shelat and Gover, JJ. stated that : AIR 1973 SC 1461, Paras 599, 677

"582. . . . . (5) The dignity of the individual secured by the various freedoms and basic rights in Part III and the mandate to build a welfare State contained in Part IV would be violative of basic feature of the Constitution of India."

Further, Hegde and Mukherjee, JJ. stated the law thus :

"661. . . . . The broad contours the basic elements or fundamental features of our Constitution are clearly delineated in the preamble. Unlike in most of the other Constitution, it is comparatively easy in the case of our Constitution to discern and determine the basic elements or the fundamental features of our Constitution. For doing so, one has only to look to the preamble."

84. Kesavananda Bharati (supra) has been followed in L. Chandra Kumar v. Union of India and others ((1997) 3 SCC 261). AIR 1973 SC 1461

AIR 1997 SC 1125 : 1997 AIR SCW 1345 : 1997 Lab IC 1069 , AIR 1981 SC 2354, Para 21

85. In Maharao Sahib Shri Bhim Singhji v. Union of India and others ((1981) 1 SCC 166), Krishna Iyer, J., however, in his characteristic style opined :

"20. . . . . The question of basic structure being breached cannot arise when we examine the vires of an ordinary legislation as distinguished from a constitutional amendment. Kesavananda Bharati cannot be the last refuge of the Proprietariat when benign legislation takes away their 'excess' for societal weal. Nor, indeed, can every breach of equality spell disaster as a lethal violation of the basic structure. Peripheral inequality is inevitable when large-scale equalization processses are put into action. If all the Judges of the Supreme Court in solemn session sit and deliberate for half a year to produce a legislation for reducing glaring economic inequality their genuis will let them down if the essay is to avoid even peripheral inequalities. Every large cause claims some martyr, as sociologists will know. Therefore, what is a betrayal of the basic feature is not a mere violation of Art. 14 but a shocking, unconscionable or unscrupulous travesty of the quintessence of equal justice. If a legislation does go that far it shakes the democratic foundation and must suffer the death penalty."

86. Recently a question came up before the US Supreme Court in Jennifer Gratz and Patrick Hamacher v. Lee Bollinder decided on 23rd June, 2003 likely to be reported in (2003) 539 US wherein the guidelines providing for selection method under which every applicant from an under-represented racial or ethnic minority groups was to be automatically awarded 20 points out of 100 points needed to guarantee admission, was struck down as has been violative of equality protection clause. It was observed :

"The very nature of a college's permissible practice of awarding value to racial diversity means that race must be considered in a way that increases some applicants chances for admission. Since college admission is not left entirely to inarticulate intuition, it is hard to see what is inappropriate in assigning some stated value to a relevant characteristic, whether it be reasoning ability, writing style, running speed, or minority race. Justice Powell's plus factors necessarily are assigned some values. The college simply does by a numbered scale what the law school accomplishes in its "holistic review," Grutter, post, at 25, the distinction does not imply that applicants to the undergraduate college are denied individualized consideration or a fair chance to compete on the basis of all the various merits their applications may disclose."

87. Delivering his minority opinion on his own behalf as also on behalf of Justice Souter, Justice Ginsburg, however, held :

"Our jurisprudence ranks race a "suspect" category, "not because (race) is inevitably an impermissible classification, but because it is one which usually, to our national shame has been drawn for the purpose of maintaining racial inequality."

Norwalk Core v. Norwalk Redevelopment Agency, 395 F 2d 920, 931-932 (CA2 1968) (footnote omitted). But where race is considered "for the purpose of achieving equality," id., at 932, no automatic prescription is in order. For as insightfully explained, "the Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination. "United States v. Jefferson County Bd. of Ed., 372 F 2d 836, 876 (CA5 1966) (Wisdom, J.); see Wechsler, The Nationalization of Civil Liberties and Civil Rights Supp. To 12 Tex. Q. 10, 23 (1968) (Brown may be seen as disallowing racial classifications that "imply an invidious asssessment" while allowing such classifications when "not invidious in implication" but advanced to "correct inequalities"). Contemporary human rights documents draw just this line, they distinguish between policies of oppression and measures designed to accelerate de facto equality. See Grutter, post, at 1 (Ginsburg, J. concurring) (citing the United Nations - initiated Conventions on the Elimination of All Forms of Racial Discrimination and on the Elimination of All Forms of Discrimination against Women)."

88. The validity of institutional reservation must be judged on the touchstone of equality clause.

89. While considering the reasonableness of the institutional reservation, we have taken into consideration the effect of equality clause contained in Articles 14 and 15 of the Constitution of India.

90. The question as regard merit of the students vis-a-vis right of development and human rights angle had been considered at some length in Islamic Academy of Education and another v. State of Karnataka and others (JT 2003 (7) SC 1) and following Pradeep Jain v. Union of India ((1984) 3 SCC 654) it has been held :AIR 2003 SC 3724 : 2003 AIR SCW 4240 para 175, AIR 1984 SC 1420

"For the purpose of achieving excellence in a professional institution, merit indisputably should be a relevant criterion. Merit, as has been noticed in the judgment may be determined in various ways (para 59). There cannot be, however, any fool-proof method whereby and whereunder the merit of a student for all times to come may be judged. Only, however, because a student may fare differently in a different situation and at different point of time by itself cannot be a ground to adopt different standards for judging his merit at different points of time. Merit for any purpose and in particular

for the purpose of admission in a professional college should be judged as far as possible on the basis of same or similar examination. In other words, inter se merit amongst the students similarly situated should be judged applying the same norm or standard. Different types of examinations, different sets of questions, different ways of evaluating the answer books may yield different results in the case of the same student.

Selection of students, however, by the minority institutions even for the members of their community cannot be bereft of merit. Only in a given situation less meritorious candidates from the minority community can be admitted vis-a-vis the general category; but therefor the modality has to be worked out. For the said purpose de facto equality doctrine may be applied instead of de jure equality as every kind of discrimination may not be violative of the equality clause. (See Pradeep Jain v. Union of India, 1984 (3) SCC 654). AIR 1984 SC 1420

91. Even applying the said tests, institutional reservation cannot be held to be unconstitutional.

92. Mr. Nariman contended that provision for reservation being a suspect legislation the strict scrutiny test should be applied. Even applying such a test, we do not think that the institutional reservation should be done away with having regard to the present day scenario. We may notice that such a test has been applied for upholding a statute recently in Balram Kumawat v. Union of India ((2003) 7 SCC 628). AIR 2003 SC 3268 : 2003 AIR SCW 4658

93. **Dr. AR. LAKSHMANAN, J.:-**

While concurring with the conclusion arrived at by Hon'ble the Chief Justice, I would like to add the following few lines for streamlining the policies and processes for admission to Medical Courses and other Professional Courses. The issues and options are discussed below :

94. Every year during the admission season several lakhs of students undergo immense suffering and harassment in seeking admission to Professional Courses caused by uncertain policies, ambiguous procedures and inadequate information. The miseries of students and parents are escalating year after year due to boundless expansion in the number of professional institutions and their intake capacity, emergence of a large variety of newer disciplines and mobility of students seeking admissions beyond the boundaries of States. The students who are about to complete their High School education go through a period of acute anxiety caused by the uncertain situation about their chances for further education. The number of qualified students wanting to go for higher studies has been swelling largely motivated by hopes of better economic security and partly by a desire to attain greater upward social mobility. Then begins their trauma due to many prevailing unfair practices in admissions and devious ways of fee collections exploiting the anxiety of students

and uncertainty of procedures. Most of the efforts to deal with these problems are ad hoc in nature often decided under judicial orders. Different State and Central authorities take many different actions often leading to severe inconsistencies. There is substantial scope for streamlining the admission process, even within the regulatory powers of the authorities, provided these issues are not dealt with on an emergency basis during the admission season but done in a co-ordinated and comprehensive manner ahead of time.

ISSUE NUMBER ONE:

Entry Qualification :

95. For admissions to under-graduate programmes, there are several different eligibility norms among the different categories of institutions and among the various States. Some are based on Twelfth Standard marks or grades only, some are based on the Entrance Examination only, and some are determined by a combination of these with different weightages. There is endless number of justifications for each of the above, confusing the students from different parts of the country.

96. The preferred option, in my view, should be for a designated agency or the University concerned to conduct the entrance examination for professional as well as non-professional institutions in the specified subjects (an option suggested by this Court). The marks awarded in those subjects should be the basis for determining the merits of the students for admission to the institutions to which they apply.

ISSUE NUMBER TWO :

UNPLANNED GROWTH OF INSTITUTIONS

97. The growth of the Professional Institutions has been at an geometrical rate during the last five years. During recent years the expansion of educational facilities for higher education has been nearly exclusively in the private unaided sector due to the financial incapacity of Governments.

98. Those who have ventured to start the new institutions are motivated by commercial interests and not by educational and social interests. Political considerations have become paramount in sanctioning of colleges. There has been a high level of exploitation of students in certain disciplines through unethical and illegal collection of unauthorized payments. The discontent among the meritorious students is simmering also because only those, even with poor competence, but who

could pay high illegal amounts can get into many institutions.

Options :

1. The country needs to evolve urgently a predictable pattern of growth for the Higher Education System in Technical, Managerial, and other Professional disciplines as well in Science and Humanities at least for the next five years. The present level of ad hoc approach and stampede should be eliminated.

2. The national blue print and the road map for the development of professional education should be based on maintaining credible level of quality standards and anticipated demand structure in economic and social sectors.

ISSUE NUMBER THREE:

FEE STRUCTURE:

99. This Court states : "A rational fee structure should be adopted by the Management, which would not be entitled to charge a capitation fee. Appropriate machinery can be devised by the State or University to ensure that no capitation fee is charged and that there is no profiteering."

Options :

One possible remedy is to make a rule under the Prevention of the Capitation Fee Act that collecting any fee that was not previously announced in the college publications and any fee collected without a formal receipt should be punishable offences. This rule should be strictly enforced.

ISSUE NUMBER FOUR:

CERTIFICATE HASSLES:

100. When we consider the size of our country and the large number of institutions and huge volume of applicants, the man hour and money lost in running around for getting the certificates during the admission season must run into equivalent of several crores of rupees. A more hassle-free system for authenticating the required information from students should be evolved.

Options :

101. Every student be provided with a basic identity certificate while he/she is in the higher secondary stage (10th to 12th Std.). This should provide all essential information such as date of birth, community, domicile, photo identity etc., authenticated by a designated official. This should be acceptable for admission requirements in any institution and in any State in India.

Superspeciality institutions and institutions where highly skilled Training/Education is imparted :

102. On the issue whether there can be Article 15(4) reservations in superspeciality courses, this Court was categorical when it 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."

103. Similar view was already taken by this Court in Pradeep Jain v. Union of India, AIR 1984 SC 1420.

104. In similar vein, in Jagdish Saran v. Union of India, AIR 1980 SC 820, this Court observed that 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. This Court further observed that the host of variables influence the qualification of the reservation as one factor deserves great emphasis, the higher the level of the speciality the lesser the role of reservation.

105. In the case of Article 15(4) reservations, this 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.

106. The view was approved by this Court in the case of Indra Sawhney v. Union of India. If one looks at this issue in the light of the spirit of the ratios laid down in Preeti Srivastava v. State of M. P., AIR 1999 SC 2894 and in AIIMS Students' Union v. A.I.I.M.S., AIR 2001 SC 3262, one would come to the inevitable conclusions that the constitutional reservations contemplated under Art. 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. 1999 AIR SCW 2795 : 1999 All LJ 1947

2001 AIR SCW 3143

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

108. As regards the constitutional validity of institutional/regional/University wise reservation/preference, in view of this 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 institutions.

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-specialities, the position is that the judiciary has adopted the dominant norm, i.e., "the higher the level of the speciality the lesser the role of reservation". At the level of super-specialities the rule of "equal chance for equal marks" dominates. This view equally applies to all super-speciality 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% of the available seats has to be respected and enforced.

4) The institutional preference should be limited to 50% and the rest being left for open competition based purely on merits on an All-India basis.

5) As regards private non-minority educational institutions distinction between Government aided and unaided institutions. While Government/State can prescribe guidelines as to the process of selection and admission of students, 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. The 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.

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 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.

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

109. Before parting with this case, I am of the opinion that the younger generation in our society nurturing fond hopes and aspiration for their future professional careers should feel it as a pleasurable experience to explore the available options in higher education. They should be spared from the mental torture due hassles and unsavoury experiences in getting to the first base. To the extent possible they should be made to feel that they are part of one nation. Tensions and frustrations at their impressionable age will surely result in a society with distorted and negative values damaging the foundations of a healthy society. The policies and procedures for admissions should be viewed from the larger impact on the future of India.

Order accordingly.