Page 2647 - 2657 **DOI:** *https://doij.org/10.10000/IJLMH.114678*

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 6 | Issue 2

2023

EWS Reservation and Its Influence on Unaided and Private Educational Institution's Rights Under Article 19(1)(g) of The Indian Constitution

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ABSTRACT

The 103rd amendment to the Indian constitution provides for reservations in government jobs and educational institutions for economically weaker sections of society. However, this amendment has raised concerns about its potential impact on Article 19(1)(g), which guarantees the right to practice any profession, occupation, or trade. In this article, we examine the implications of the 103rd amendment on Art. 19(1)(g) and argue that while the right to practice a profession is important, it must be balanced against the larger goal of promoting social justice and equality. We also discuss the major concern, whether the fundamental right enshrined under Art. 19(1)(g) is really affected by the amendment and if so, in what all ways the amendment affects the fundamental right. It is also discussed here in this article, that which of the fundamental rights will dominate over the other, whether Art.19(1)(g) or the new amendment in Art. 15 and 16.

It is important to analyze the matter in such a wide aspect to realize the intention of the amendment and this article provides a route through which the readers can achieve the appropriate conclusion.

Keywords: *EWS reservation, Article 19(1)(g), Article 15, Article 16, 103rd Amendment Act 2019.*

I. INTRODUCTION

The Republic of India is a democratic country with a written constitution and a parliamentary system of government.

The Constitution of India provides reservations for socially and educationally backward classes, scheduled castes, and scheduled tribes in educational institutions under Articles 15(4) and 15(5), and reservations in appointments or posts for any backward class of citizens under Article 16(4).

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 [ISSN 2581-5369]

The Constitution makers used a quota system known as affirmative action to reserve seats for underrepresented categories of citizens in public employment, educational institutions, and legislative bodies.

A new pool of reservations called the "economically weaker section" through the Constitution (One Hundred and Third Amendment) Act, 2019, incorporating Articles 15(6) and 16(6). The state is authorised to provide a maximum of ten percent reservation for citizens who fall under the category of "economically weaker sections," apart from the scheduled castes, scheduled tribes, and the non-creamy layer of other backward classes. The amendment is not mandatory, but it enables reservation for the EWS category, with a ten percent limit on the ceiling.

Several petitions were against the Constitutional amendment and in te prominent case of ***Janhit Abhiyan v. Union Of India***[4] the Hon'ble Supreme Court of India upheld the constitutional validity of the 103rd amendment act of 2019. Still the matter regarding the amendment is leading to controversies and debates in the society.

II. EWS RESERVATION IN 103RD AMENDMENT AND ITS INFLUENCE ON RIGHTS OF PRIVATE AND UNAIDED EDUCATIONAL INSTITUTIONS IN INDIA UNDER ARTICLE 19(1)(G)

The newly added clauses to article 15 and article 16 of the Indian constituion in 103rd amendment act depict the implementation of EWS reservation in India. Before going to the impact of this reservation in educational institutions and their rights ensured under article 19(1)(g), we should have a close look into the amended articles.

The clauses (5)[5] and (6) of article 15 reads as follows;

(5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.

(6) Nothing in this article or sub-clause (g) of clause (1) of article 19 or clause (2) of article 29 shall prevent the State from making,

(a) any special provision for the advancement of any economically weaker sections of citizens

[4] Janhit Abhiyan v. Union of India 2022 SCC OnLine SC 1540.
[5] 93rd constitutional amendment Act of 2005

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other than the classes mentioned in clauses (4) and (5); and

(b) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5) in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30, which in the case of reservation would be in addition to the existing reservations and subject to a maximum of ten per cent. of the total seats in each category.

It has always been recognised while framing the Constitution as well as while interpreting the same that no right of a citizen can be absolute and every right would have reasonable restriction. The constitution itself provides an exceptional clause which empowers the state to impose reasonable restriction on these rights.

Article 19 of the Indian Constitution states as follows

Protection of certain rights regarding freedom of speech etc :

(1) All citizens shall have the right

(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

(c) to form associations or unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India; and

(f) omitted

(g) to practice any profession, or to carry on any occupation, trade or business

- Seeking into the constitutional validity of the amendment in relation with the infringement of article 19(1)(g) of the Constitution, there are two aspects regarding the same, in this article we are focussing on to all the major aspects of the positive and negative influence of this amendment act of 2019.

The exceptional clause of article 19(1)(g), that is, article 19(6) reads as follows;

(6) Nothing in sub clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public[6], reasonable restrictions on the exercise of the right conferred by the said sub

[6] Nitin Aggarwal v. State of Kerala, 2014 SCC OnLine Ker 15030

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clause, and, in particular, nothing in the said sub clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,

(i) the professional or technical qualifications necessary for practicing any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corp. owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise

The constitution itself provides the grounds for reasonable restrictions on the freedom conferred under article 19. This implies that the state can make laws which focus on upliftment of the society and general interests of the public; this is also emphasized in ***Pradeep Jain's case, and Saurabh Chaudri's case*** . The intention of the legislature in the inclusion of article 15(6) was to promote equality and to bridge the gap between different stratas of the society.

The decision in ***Society for Unaided Private Schools of Rajasthan v. Union of India and Anr.***[7] which upheld twenty-five per cent. reservation in favor of EWS under the Right of Children to Free and Compulsory Education Act, 2009, which was further affirmed by 5-Judge Bench in Pramati Educational and Cultural Trust (Registered) and Ors. v. Union of India and Ors.

In ***Pramati Educational and Cultural Trust and Anr v. Union Of India and Ors.***[8] case, the validity of clause (5) of Article 15 of the Constitution inserted by the Constitution (Ninety-third Amendment) Act, 2005 was in question in reference to the private unaided educational institutions as also the validity of Article 21-A of the Constitution inserted by the Constitution (Eighty-sixth Amendment) Act, 2002. The Court denied that there was any basic structure violation while observing, inter alia, as under:-

"We accordingly hold that none of the rights under Articles 14, 19(1)(g) and 21 of the Constitution have been abrogated by clause (5) of Article 15 of the Constitution and the view taken by Bhandari, J. in ***Ashoka Kumar Thakur v. Union of India***[9]that the imposition of reservation on unaided institutions by the Ninety-third Amendment has abrogated Article 19(1)(g), a basic feature of the Constitution is not correct. Instead, we hold that the Constitution (Ninety-third Amendment) Act, 2005 inserting clause (5) of Article 15 of the Constitution is valid."

[7] Society for Unaided Private Schools of Rajasthan v. Union of India and Anr. (2012) 6 SCC 1
[8] Pramati Educational and Cultural Trust and Anr v. Union Of India and Ors.(2014) 8 SCC 1
[9] Ashoka Kumar Thakur v. UOI (2008) 6 SCC 1

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The judgment in the above case[10] suggests that, in exercising this additional power, the State may pass laws requiring admissions to private unaided schools, provided that the laws are made to provide free and compulsory education to children aged 6 to 14 and that they require the admission of children from poorer and weaker sections of society to a small percentage of the seats in private educational institutions to achieve the constitutional goals of equality of opportunity and social justice set out in the Preamble of the Constitution, such a law would not be destructive of the right of the private unaided educational institutions under Article 19(1)(g) of the Constitution.

The Article 15(5) of the Constitution is a provision that empowers the State to make special provisions for the advancement of socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes in relation to their admission to educational institutions, including private institutions. In ***M.R. Balaji and Others v. State of Mysore[11]*** the case supports the fact that Article 46 of the Constitution charges the State with promoting the educational and economic interests of weaker sections of society. In light of this Article 15(5) is a continuation of this process and it is necessary for the State to ensure affirmative equality by providing opportunities to socially and educationally backward classes[12] in higher education, especially since elementary education has been made a fundamental right.

The eleven-judge bench ruling in ***T.M.A. Pai Foundation v. State of Karnataka[13]*** has recognized that Article 19(1)(g) of the Constitution embraces the right to establish private educational institutions as an avocation. The insertion of Article 21A, and later Article 15(5) added a new dimension. These amendments are to be viewed as society's resolve that all institutions – public and private – have to join in the national endeavor to promote education at all levels. Education in this context is to be seen as a "material resource" of the society, meant to benefit all its segments.The judgments have established that unaided private institutions, including those that provide professional education, cannot be considered as separate from the national mainstream. The concept of reservations in private institutions is not necessarily a violation of the basic structure, as stated in the aforementioned judgments. Therefore, it cannot be ruled out that reservations can be applied in private institutions that provide education, even though they may not be run by the State or its instrumentalities. These institutions contribute to the national effort of developing skills and spreading knowledge, making them important

[10]Ashoka Kumar Thakur v. UOI (2008) 6 SCC 1
[11]M R Balaji v. State of Mysore 1963 AIR 649, 1962 SCR Supl. (1) 439
[12]In the Constituent Assembly, B.R. Ambedkar in reply as to who were backward classes for the purposes of article 16(4) said: "A Backward community is a community which is backward in the opinion of the Government"
[13]T.M.A. Pai Foundation & Ors. v. State of Karnataka & Ors. (2002) 8 SCC 481

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resources.

The previous judgments have reflected that the state can introduce reservations in both unaided and private educational institutions for the development of the society and for the encouragement of education among children and youth apart from the economic and societal barriers that obstruct them from pursuing the career. This provision is consistent with the socialist goals set out in the Preamble and the Directive Principles in Part IV, and it is intended to ensure the progress of weaker sections towards an egalitarian society, which is mandated by the Constitution.

- Coming to the positive validity of Constitutional Amendment Act 2019 regarding to article 19(1)(g) of the constitution these strata of legal field can be covered as follows;

The Constitution specifically states that the States are responsible for ensuring that people receive an education, subject to the availability of funding, as stated in **Article 38** when read in harmony with **Articles 41, 45, and 46**. Nonetheless, the state may open up chances through private educational institutions if it is unable to offer equitable educational opportunities to all segments of the population. The phrase "within the economic capability" in Article 41 gives the states the authority to allow the establishment and independent management of private educational institutions. And for this, they should have the money they need, which will logically and properly come from the students in the form of fees that the institutions collect from them. Hence, the requirement for private institutions arises. Private institutions that operate independently are the cornerstone of the right to an education, and in the current environment, they are absolutely essential. The Supreme Court has recognised the following idea: In ***Unni Krishnan, J.P. &Ors. Etc., v. State of Andhra Pradesh & Ors.***[14], it has been observed as follows “The hard reality that emerges is that private educational institutions are a necessity in the present day context. It is not possible to do without them because the Governments are in no position to meet the demand -particularly in the sector of medical and technical education which call for substantial outlays. While education is one of the most important functions of the Indian State it has no monopoly therein. Private educational institutions - including minority educational institutions - too have a role to play."

Justice Kirpal, C.J in the ***Pai Foundation case***[15] recognised the importance of private unaided educational institutions by citing dismal figures that while the no. of Govt. colleges in certain states had remained stagnant, private institutions had constantly mushroomed: "That private

[14]Unni Krishnan J.P. & Ors. Etc., v. State of Andhra Pradesh & Ors. 1993 AIR 2178, 1993 SCR (1) 594
[15]T.M.A. Pai Foundation & Ors. v. State of Karnataka & Ors. (2002) 8 SCC 481, AIR 2003 SC 355

educational institutions are a necessity becomes evident from the fact that the number of government-maintained. Professional colleges has more or less remained stationary, while more private institutions have been established"

Without a doubt, education is a key sector that, in the modern world, is seen as lucrative and recession-proof. It has been established that since the beginning of time, education has been a business, by the apex court in the case of ***Modern School v. union of India***[16] in the following words: (Paras 3, 4 and 5 of the judgement) "In modern times, all over the world, education is big business." In the book titled **'Higher Education Law**[17]**' by David Palfreyman and David Warner**, it is stated that in modern times, "all over the world, education is big business..." It is for the same reason that for the past few decades India has experienced the mushrooming of private unaided educational institutions.

In Pai foundation case, the court was of the opinion that there has to be a distinction between the aided and unaided educational institutions and it would be unfair to apply the same set of restrictions and regulations to the two sets of institutions. The right of the private unaided educational institutions to regulate their fee structure for their respective courses derives its competence from the right to administer with sufficient autonomy. Noticed in the Pai foundation case, it was held in ***P.A. Inamdar's case***[18] "In T.M.A. Pai, it has been very clearly held at several places that unaided professional institutions should be given greater autonomy in determination of admission procedure and fee structure. State regulation should be minimal and only with a view to maintain fairness and transparency in admission procedure and to check exploitation of the students by charging exorbitant money or capitation fees." It was also observed, following the decision in T.M.A. Pai Foundation that greater autonomy must be granted to private unaided institutions as compared to private aided institutions the reason for this is obvious. The unaided institutions have to generate their own funds and hence they must be given more autonomy as compared to aided institutions, so that they can generate these funds." The notion was again envisaged by the apex court in the Pai foundation case in the following words: "In the case of unaided private schools, maximum autonomy has to be with the management with regard to administration, including the right of appointment, disciplinary powers, admission of students and the fees to be charged." Pai foundation case also stated that "The right to establish an educational institution can be regulated; but such regulatory measures must, in general, be to ensure the maintenance of proper academic standards, atmosphere and infrastructure (including

[16]Modern School v. UOI & Ors. (2004) 5 SCC 583
[17]Higher Education Law (Second Edn) by David Palfreyman and David Warner
[18]P A Inamdar v. State of Maharashtra AIR 2005 SC 3226

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qualified staff) and the prevention of maladministration by those in charge of management. The fixing of a rigid fee structure, dictating the formation and composition of a governing body, compulsory nomination of teachers and staff for appointment or nomination for admissions would be unacceptable restrictions. The right to establish and administer educational institutions is a fundamental right under Article 19(1)(g) of the Constitution, and that the state's power to regulate admissions cannot infringe upon this right." The Supreme Court in ***P.A. Inamdar v. State of Maharashtra***[19] held that it was constitutionally impermissible to impose any seat-sharing quota or reservation policy by the state on unaided private professional colleges. The court also added that any state-imposed reservation in unaided private educational institutions would be an unreasonable restriction in the exercise of a fundamental right under article 19(1)(g).

Imposition of regulatory measures is often construed as an unwanted interference with the minority's fundamental right to run educational institutions of their own choice.

It is crystal clear from the above stated judgements, that the private unaided institutions enjoy a special autonomy regarding matters such as admission. In such a situation, an unwanted restriction is created by the Amendment in question by regulating the managing authority of private and unaided institutions in the admission matters. As the private unaided institutions are institutions which are run and managed by private individuals or trusts and do not receive any funding in the form of government aid, interference with the management of these private institutions is contradictory to the definition of private institutions. The Government shall therefore not impose reservations in private and unaided colleges as it is a way of interfering in the management of the institution as it would decide which students the institutions should accept in their seats. This can be portrayed as a violation of the rights guaranteed by Article 19(1)(g). The right to practise a trade or profession is enshrined in Article 19(1)(g) of the India Constitution, which guarantees the right to carry on any occupation, trade, or business. Private, unaided educational institutions are exercising this fundamental right by running their educational institutions as a business, and the government's reservation policy violates this right. Moreover, it doesn't mean that the private institutions are not against the principle of reservation but the only thing is that they want the freedom to implement it on their terms. The state's imposition of reservation policy in private institutions violates their right to choose their own admission criteria and interferes with their autonomy and freedom to run their institutions. In the case of ***Islamic Academy of Education v. State of Karnataka***[20], the Supreme Court

[19]P A Inamdar v. State of Maharashtra AIR 2005 SC 3226
[20]Islamic Academy of Education v. State of Karnataka & Ors. 2003 Latest Caselaw 374 SC

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reiterated its earlier decision in T.M.A. Pai Foundation and held that "private, unaided educational institutions have the fundamental right to establish and administer their own institutions without interference from the state. The court also held that the state's reservation policy cannot be imposed on these institutions."

Moreover, Article 30(1) protects the right of minority communities to set up and run private educational institutions. Imposing regulatory measures like reservation in these institutions shall be seen as an interference by the state which is a clear violation of Article 30(1) of the constitution. This regulates the composition of students who get admission to these seats.

However, in ***Ashoka Kumar Thakur v. Union of India (2008)***[21], the Supreme Court held that "the state can impose its reservation policy on private, unaided educational institutions if they receive any aid from the state. The right to establish and administer educational institutions is not an absolute right, and that the state's power to regulate admissions can be used to ensure social justice and equality." But the amendment in question does not ensure social justice and equality in any manner.

Therefore, the amendment in question very clearly infringes the fundamental right of private and unaided institutions enshrined under Art.19(1)(g) as the restriction is not reasonable and does not ensure social justice and equality instead they violate it and thus could not bring under the reasonable restriction stated in the clause 6 of Art.19.

III. CONCLUSION

The reservation is based upon the economically weaker sections of the society and it is a new stepping stone to empower the economically backward sections of the specific classes who are neither included in list of beneficiaries nor getting any of the benefits under the constitutions of India. Thus, this is a unique legislation the paves a new chapter that opens up a broader perspective in the aspect of reservation. On the other hand, it also interferes in the rights empowered by the constitution to other communities and also some of the principles of basic structure there are so many controversies still going on the assemblies and in the society on the basis of the constitutionality of the amendment. Focussing upon the both angles of this issue there are several precedents and opinions of the prominent jurists which emphasizes the different perspectives dealt in the matter.

In the case of the rights of unaided and private educational institutional under article 19 (1)(g) of the constitution of India, on the first face of the issue it can be noted as the said amendment

[21]Ashoka Kumar Thakur v. UOI (2008) 6 SCC 1

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is not violative of the rights conferred to the institutions. Looking on to the deepest corners of the matter, the historical backgrounds and several precedents, it reflects the interference of the amendment to the freedom enshrined under article 19.

In this article every aspect of the constitutional amendment regarding to the rights under article 19(1)(g) is covered to the maximum extent by the help of precedents, previous case laws, articles, law notes, commentaries etc. Even though the judgement in the famous case ***Janhit Abhiyan v. Union of India*** [22]upheld the validity of the amendment still several controversies and debates are going on regarding the 103rd Constitutional Amendment Act 2019.

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[22] Janhit Abhiyan v. Union of India 2022 SCC OnLine SC 1540.

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