

CHAPTER V:
PRIVATE EDUCATIONAL INSTITUTIONS AND
COMMERCIALIZATION OF EDUCATION

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CHAPTER: V

PRIVATE EDUCATIONAL INSTITUTIONS AND COMMERCIALISATION OF EDUCATION

A. RIGHT TO ESTABLISH AND ADMINISTER:

The expression “*Education*” in the different articles of the Constitution means and includes education at all levels, i.e. from the primary school level up to the post-graduation level. It includes professional education also. The expression “Educational Institution” means institutions that impart education, where education is understood here as in above. The “Educational Institutions” are of different types. They have been classified broadly in Government/Private educational institutions. Private educational institutions have further been classified into majority and minority educational institutions. There is a further classification on the basis of receipt of aid, i.e., classification into aided and un-aided educational institutions. A further classification exists on the basis of level of education that it imparts, e.g., schools, under-graduate or post-graduate colleges and professional institutions. The present chapter aims at to deal with the various facets of establishment and administration of educational institutions, commercialization of education, concept of capitation fees particularly in professional colleges etc.

India is a land of diversity of different castes, peoples, communities, languages, religions and culture. Although these people enjoy complete political freedom, a vast part of the multitude is illiterate and lives below the poverty line. The single most powerful tool for the upliftment and progress of such diverse communities is education. The State, with its limited resources and slow-moving machinery, is unable to fully develop the genius of the Indian people. Very often, the impersonal education that is imparted by the state, devoid of adequate material content that will make the student self-reliant, only succeeds in producing potential pen-pushers, as a result of which sufficient jobs are not available.

It is in this scenario where there is a lack of quality education and adequate number of schools and colleges that private educational institutions have been established by educationists, philanthropists and religious and linguistic minorities. Their grievance is that the unnecessary and unproductive load on their back in the form of governmental control, by way of rules and regulations, has thwarted the progress of quality education. It is their contention that the government must get off their back, and that they should be allowed to provide quality education uninterrupted by unnecessary rules and regulations, laid down by the bureaucracy for its own self-importance. The private educational institutions, both aided and un-aided, established by minorities and non-minorities, in their desire to break free of the unnecessary shackles put on their functioning as modern educational institutions and seeking to impart quality education for the benefit of the community for whom they were established, and others asserting their right to establish and administer educational institutions of their choice unhampered by rules and regulations that unnecessarily impinge upon their autonomy.¹

Educational and Legislative Competence:

The framers of the Constitution have provided for legislation an education by competent legislature. The Forty-Second Amendment² to the constitution included education in the *concurrent list* under *Entry 25*. That, however, does not in any way change the position with regard to the determination of a “religious” or “linguistic minority” for the purposes of Art 30. By transfer of 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 state legislature to enact law on the subject ‘Education’ but rather has also conferred power on parliament to enact law on the subject.

As regards legislative competence regarding education, following entries may be referred to-

¹ *T.M.A.Pai Foundation & others v. State Of Karnataka & others*. AIR 2003 SC 355, 2002 (8) SCC 481.

² Constitution 42nd Amendment Act 1976.

A. Entries Mentioned in the Union List:

Entry 63: “The institution known at the commencement of the constitution as the *Benaras Hindu University*, the *Aligarh Muslim University* and the *Delhi University*; the university established in pursuance of Art 371-E; any other institution declared by Parliament by law to be an institution of national importance”.

Various universities like Jawaharlal Nehru University have been established by parliament under this Entry.

Entry 64: “Institutions for scientific or technical education financed by the government of India wholly or in part and declared by Parliament by Law to be an institution of national importance”.

Various IITs have been established by Parliament under this Entry.

Entry 65: Union agencies and institutions for:

- (a) Professional, vocational or technical training including training of police officers;
- (b) The promotion of special studies of research, or;
- (c) Scientific or technical assistance in the investigation or detection of crime.

Entry 66: Co-ordination and determination of standards of institutions for higher education of research and scientific and technical institutions.

The University Grants Commission has been established under this Entry.

B. Entries mentioned in the concurrent List:

Entry 25: “Education, including technical education, medical education and universities, subject to the provisions of *Entries* 63,64,65 and 66 of the *list I*, vocational and technical training of labour.”

Entry 26: Legal, medical and other professions.

Thus, State legislature may establish universities under *Entry 25*. But these universities may also be controlled by the Union List Entries mentioned as above. Hence, every legislation seeking to establish a state university is required to be cleared by the Union Government under the provisions of the Constitution. By virtue of Entry 25 List. III (Concurrent List) *predominance has been given to the center in matters of education.*

Art 30 confers fundamental right to linguistic and religious minorities to establish and administer educational institutions of their choice. The tests who are linguistic or religious minorities within the meaning of Art 30 would be one and the same either in relation to a State legislation or Central legislation. There can not be two tests; one in relation to Central legislation and other in relation to State legislation. The meaning assigned to linguistic or religious minorities would not be different when the subject 'education' has been transferred to the concurrent list from the State list. The test who is linguistic of religious minorities as settled in *Kerala Education Bill's*³ Case continues to hold good even after the subject 'education' was transposed into Entry 25 List III of the seventh Schedule⁴ by the Forty-Second Amendment Act, 1976. It is remarkable to note that Justice V.N. Khare said in *T.M.A. Pai Foundation v State of Karnataka*⁵ that entries in Lists of VIIth Schedule are not powers of legislation but field of legislation.

(i) Right to set up Educational Institutions is Fundamental Right

With regard to the establishment of educational institutions, three Articles of the Constitution come into play. Article 19(1) (g)⁶ gives the right to all the citizens to practice any professions or to carry on any occupation, trade or business; this right is subject to restrictions that may be placed under Article (19) (6).

Article 19(1) (g) employs four expressions, viz., profession, occupation, trade and business. Their fields may overlap, but each of them does have a content of its own. Education is *per se* regarded as an activity that is charitable in nature⁷. Education has so

³ *Re Kerala Education Bill*. 1959 SCR, 995.

⁴ Constitution of India 1950.

⁵ *Supra note 1*.

⁶ *Supra note 4*.

⁷ *The State of Bombay v. R.M.D. Chamarbaugwala*. AIR 1957 SC 699.

far not been regarded as a trade or business where profit is the motive. Even if there is any doubt about whether education is a profession or not, it does appear the education will fall within the meaning of the expression “occupation”. Article 19(1) (g) uses the four expressions so as to cover all activities of a citizen in respect of which income or profit is generated, and which can consequently be regulated under Article 19(6). In Webster’s⁸ International Dictionary, “occupation” is, *inter alia*, defined as “an activity in which one engages” or “a craft, trade, profession or other means of earning a living”.

According to *Law Lexicon*⁹ “Occupation” means:

“The principal business of one’s life, vocation, trade, the business which a man follows to procure a living or obtain wealth: that which occupies or engages one’s time or attention, vocation, employment, calling trade; the business in which a man usually engaged, to the knowledge of his neighbour.”

According to *Black’s Law Dictionary*¹⁰, “Occupation” means:

“Possession; control; tenure; use. The act or process by which real property is possessed and enjoyed. Where a person exercises physical control over land.

That which principally takes up one’s time, thought, and energies, especially, one’s regular business or employment; also, whatever one follows as the means of making a livelihood. Particular business, profession, trade, or calling which engages individual’s time and efforts; employment in which one regularly engages or vocation of his life.”

In *Corpus Juris Secundum*¹¹, the word “occupation” is defined as under:-

⁸ Webster’s Third New International Dictionary, p. 1650.

⁹ P. Ramanatha Aiyer, *Law Lexicon*, 1987. p. 897

¹⁰ *Black’s Law Dictionary*, 5th Edition. p. 973

¹¹ *Corpus Juris Secundum*, Vol. LXVII as quoted in *Pai Foundation Decision*.

“The word “occupation” also is employed as referring to that which occupies time and attention; a calling; or a trade; and it is only as in this sense that the word is discussed in the following paragraphs.

There is nothing ambiguous about the word “occupation” as it is used in the sense of employing one’s time. It is a relative term, in common uses with a well understand meaning and very broad in its scope and significance. It is described as a generic and very comprehensive term, which includes every species of the genus, and compasses the incidental, as well as the main, requirements of one’s vocation, calling, or business. The word “occupation” is variously defined as meaning the principal business of one’s life ; the principal or usual business in which a man engages; that which principally takes up one’s *time, thought* and energies that which occupies or engages the time or attention; that particular business, profession, trade, or calling which engages the time and efforts of an individual; the employment in which one engages, or the vocation of one’s life; the state of being occupied or employed in any way; that activity in which a person, natural, or artificial, is engaged with the element of a degree of permanency attached”.

In *P.V.G. Raju v. Commissioner of Expenditure*¹², it was observed thus:

“The activity termed as ‘occupation’. If of wider import than vocation or profession. It is also distinct from a hobby which can be resorted to only in leisure hours for the purpose of killing time. Occupation, therefore, is that with which a person occupies himself either temporarily or permanently or for a considerable period with continuity of activity. It is analogous to a business, calling or pursuit. A person may have more than one occupation in a previous year. The occupations may be seasonal or for the whole year.”

“Firstly, there can be a business, profession, vocation, or occupation without any profit motive or on “no profit no loss basis”. To, illustrate, co-operative societies or mutual insurance companies may carry on

¹² ITR (1972) 86. p. 267. A.P.

business without earning any income or without any profit motive. The vocation or occupation to do social service of various kinds for the uplift of the people would also come under this category. The profit motive or earning of income is not an essential ingredient to constitute the activity, termed as business, profession, vocation or occupation.”

If any authority is needed, we find it in *Commissioner of Expenditure Tax v. Mrs. Manorama SaraBhai*,¹³ where in it was held that the educational activities of the assessee amounted to an occupation within the meaning of section 5(a)¹⁴ and that no profit motive is necessary to treat an activity as a vocation or occupation within the meaning of section 5(a). For all these reasons, we must negative this submission of Mr. Ramarao relating to the interpretation of the words “business, profession, vocation or occupation’ in section 5(a) of the Act.

A Five Judges Bench in *Sodan Singh and Others v. New Delhi Municipal Committee and Others*,¹⁵ observed as follows:

“....The word occupation has a wide meaning such as any regular work, profession, job, principal activity, employment, business or a calling in which a individual is engaged. The object of using four analogous and overlapping words in Article 19(1)(g) is to make the guaranteed right as comprehensive as possible to include all the avenues and modes through which a man may earn his livelihood. In a nutshell the guarantee takes into its fold any activity carried on by a citizen of India to earn his living.....”

In *Unni Krishnan’s*¹⁶ Case, while referring to education, it was observed as follows:-

“...It may perhaps fall under the category of occupation provide no recognition is sought from the State or affiliation from the University is asked that it is a fundamental right.....”

¹³ AIR 1963 Guj 166.

¹⁴ Income Tax Act 1961.

¹⁵ (1989)4 SCC 155. p.174.

¹⁶ AIR 1993 SC 2178. p.687

While the conclusion that “occupation” comprehends the establishment of educational institutions is correct, the proviso in the aforesaid observation to the effect that this is so provided no recognition is sought from the State or affiliation from the concerned university is, with the utmost respect, erroneous. The fundamental right to establish an educational institution cannot be confused with the right to ask for recognition or affiliation. The exercise of a fundamental right may be controlled in a variety of ways. For example, the right to carry on a business does not entail the right to carry on a business at a particular place. The right to carry on a business may be subject to licensing laws so that a denial of the licence prevents a person from carrying on that particular business. The question of whether there is a fundamental right or not cannot be dependent upon whether it can be made the subject matter of controls.

The establishment and running of an educational institution where a large number of persons are employed as teachers or administrative staff, and an activity is carried on that results in the imparting of knowledge to the students, must necessarily be regarded as an occupation, even if there is no element of profit generation. It is difficult to comprehend that education, per se, will not fall under any of the four expressions in Article 19(1)(g). “Occupation” would be an activity of a person undertaken as a means of livelihood or a mission in life. The above quoted observations in *Sodan Singh’s*¹⁷ case correctly interpret the expression “occupation” in Article 19(1) (g).

The right to establish and maintain educational institutions may also be sourced to Art. 26(a) which grants, in positive terms, the right to every religions, denomination or any section there of to establish and maintain institutions for religious and charitable purposes, subject to public order, morality and health. Education is a recognized head of charity. Therefore, religious denominations or sections, thereof, which do not fall within the special categories, carved out in Art 29(1) and 30(1), have the right to establish and maintain religious and educational institutions. This would allow members belonging to any religious denominations, including the majority religious community, to set up an educational institution. Given this, the phrase ‘private-educational institutions’ as used in

¹⁷ *Supra* note 16

the *T.M.A.Pai Foundation v State of Karnataka*¹⁸ would include not only those educational institutions set up by secular persons or bodies, but also educational institutions set up by religious denominations; the word 'private' is used in contradiction to Government Institutions.

Justice Quadri (concurring) in the same case¹⁹ said that the right under Art 26(a)²⁰ is a group right and is available to every religious denomination or any section thereof, be it majority or any section thereof. It is evident from the opening words of Art 26 that this right is subject to public order, morality and health.

However, the scheme in *Unni Krishnan's*²¹ case has the effect of nationalizing education in respect of important features, viz., and the right of a private unaided institution to give admission and to fix the fee. By framing this scheme, which has led to the State Governments legislating in conformity with the scheme, the private institutions are indistinguishable from the government institutions; curtailing all the essential features of the right of administration of a private unaided educational institution can neither be called fair or reasonable. Even in the decision in *Unni Krishnan's* case, it has been observed by *Jeevan Reddy, J*²²., as follows:

"The hard reality that emerges is that private educational institutions are a necessity in the present context. It is not possible to do without because the Government 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."

¹⁸ *Supra* note 1.

¹⁹ *Ibid.*

²⁰ *Supra* note 4.

²¹ *Supra* note 16.

²² *Ibid.*p.749

That private 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. For example, in the State of Karnataka there are 19 medical colleges out of which there are only 4 government-maintained medical colleges. Similarly, out of 14 Dental Colleges in Karnataka, only one has been established by the government, while in the same State, out of 51 Engineering Colleges, only 12 have been established by the government. The aforesaid figures clearly indicate the important role played by private unaided educational institutions, both minority and non-minority, which cater to the needs of students seeking professional education.

Any system of student selection would be reasonable if it deprives the private unaided institution of the right of rational selection, which it devised for itself, subject to the minimum qualification that may be prescribed and to some system of computing the equivalence between different kinds of qualification, like a common entrance test. Such a system of selection can involve both written and oral tests for selection, based on principal of fairness²³.

(ii) Extent of Government Control over Private Educational Institutions:

Essential ingredients of management of private institutions include recruiting students and staff and guarantee of the chargeable as such fixing of a rigid fee structure, dictating formation and composition of a governing body, compulsory nomination of teachers and staff for appointment or nominating students for admission would be unacceptable restrictions. Regulations to ensure that merit is not disregarded, capitation fee is not charged and institutions not run with profit motive may be made by government. But right to reject and otherwise qualified student should not be denied.

In private un-aided colleges, nomination of teachers either directly by the department or through a service commission will be an unreasonable in road and an unreasonable restriction on the autonomy of private unaided educational institutions. The right to

²³ *Supra* note 1.

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 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 nominating students for admissions would be unacceptable restrictions²⁴.

There can be no doubt that in seeking affiliation or recognition, the board or the university or the affiliating or recognizing authority can lay down conditions consistent with the requirement authority to ensure the excellence of education. It can, for instance, indicate the quality of the teachers by prescribing the minimum qualifications that they must possess and the courses of study and curriculum it can, for the same reasons, also stipulates the existence of infrastructure sufficient of its growth as a pre-requisite. But the essence of a private educational institution is the autonomy that the institution must have in its management and administration. There, necessarily, has to be a difference in the administration of private unaided institution and the government aided institution.²⁵

(iii) Autonomy of Unaided Private Schools: Right to Admission

The private educational institution have a personality of their own, and in order to maintain their atmosphere and traditions, it is but necessary that they must have the right to choose and select the students who can be admitted to their course of studies.²⁶

(i) Schools and Undergraduate Non-technical Colleges

In the case of an unaided private school maximum autonomy has to be left with the management with regard to administration, including the right of appointment, disciplinary powers, admission of students and the fees to be charged. At the school level, it is not possible to grant admissions on the basis of merit. It

²⁴ *Supra note 1.*

²⁵ *Ibid.*, p.515

²⁶ *Ibid.*, p.517

should also be possible for private unaided undergraduate colleges that are non-technical in nature to have maximum autonomy similar to a school.²⁷

(ii) Un aided Private Professional Colleges

Regarding unaided private professional colleges regulation can be required to provide for merit-based admission. Sufficient discretion however should be left with management in admitting students for example, by fixing management quota-machinery to ensure that capitation fee is not charged and there is no profiteering by institution. Unaided private professional institutions are entitled to autonomy in their administration while, at the same time, they should not forge or discard the principal of merit.²⁸

Establishment of a college is an important matter in the emerging fundamental right to education. The states have failed to perform their duty on the ground of financial bankruptcy; and therefore, other agencies have to be encouraged to make available to 'We, the people of India', the right to education. But the case law in this area paints a gloomy picture where the sanctioning authority did not allow establishment of professional educational institutions either on flimsy grounds or due to non-application of mind or by sheer, discrimination. The judiciary in all the cases set aside the illegal action. The mass misactions of the state point towards not only a dictatorial regime but also violation of the directive principles and the fundamental right to education. Should not the judiciary take such wrong doers to task? In this regard the question is: will anybody make investment to build up infrastructure in the expectation to get sanction?

B: FEES AND CAPITATION FEES

The Indian civilization recognizes education as one of the pious obligation of the human society. To establish and administer educational institutions is always considered

²⁷ Ibid. p.516

²⁸ Swarupma Chaturvedi, "Right to Education and Be Educated under Indian Constitution, IBR, Vol. XXX(4) 2003. p.570.

as religious object of the state. Education in our country has never been a commodity for sale. Looking at the economic-front, even sixty years after achieving independence thirty percent of the population is living below poverty line and the bulk of the remaining population is struggling for existence under poverty conditions. The preamble promises and the directive principles oblige the state to eradicate poverty so the poor of this country can enjoy the right to life guaranteed under the constitution.²⁹ The state action or inaction which defeats the constitutional mandate is per se arbitrary and can not be sustained.

Fees are the life blood of any educational institution. Facilities offered to students, teachers, even contract staff is dependent on the income of a private institution solely by way of fees paid by students at the time of admission and at various junctures through an academic term. While salaries of teachers and staff is the biggest component of an institution's monthly recurring expenses, it further follows that good working conditions will attract better teachers. Again, more amenities ensure that better students seek admission to that institution. Providing good amenities to the students in the form of component teaching faculty and other infrastructure costs money and here commences the series of hiccups by the heavy fee paying parent. The fine difference between reasonable '*fees*' and '*capitation fee*' continues to be a point of contention today for the student community and the administrative authorities even though Indian courts and statutory provisions of various education related laws have clearly and unambiguously spelt out the offence of collecting capitation fees and punishment for the same.

In India, education is not promoted as a money making venture instead it is considered to be a noble cause and a charitable venture. Educational institutions are thus expected to portray '*nobility*' in thought, word and deed, and are strongly frowned upon for any overt instances of aggressive money making ploys of enterprise. An educational institution's resources include land, buildings, furniture and fixtures, laboratories equipped with expensive gadgets, computer laboratories having servers, computers,

²⁹ Article 21 of the Constitution of India .

buses, cars and other vehicles etc. In our Indian academic calendar³⁰ it is easy to discern that a university is holidaying for about 165 days in a year- where the academic calendar has a five-day working week, two-month vacation and about twenty gazetted holidays. No one wonders that assets worth crores of rupees remain unutilized for almost half of the year, where these assets have been paid for by student fees (besides grants) collected for these purposes.

Academic Period for payment of fees

An academic period includes a semester, trimester, quarter, or other period of study such as a summer school session of an educational institution. Where an educational institution uses credit hours or clock hours and does not have academic terms, each payment can be treated as an academic period.

(i) Component of fees

Fees can take on various heads of payments which may include: Tuition Fees, Special Fees, Caution Deposit, Development Fee, Sports, Medicare, Library, and Cultural Activities. Fees collected from students are adjusted towards payments for teachers, salaries, maintenance of the institution's premises and equipment, laboratory tools and equipment, playgrounds, institutional literature, fans, lights, water and sanitation, payments to various authorities are all routed through the fees accumulated from students. However, it is usually observed that an institution which collect amounts under one head can utilize these amounts only towards expenses and maintenance of such head of expense and cannot interchange one for the other. Fixing of a rigid fee structure, dictating the formation and composition of a governing body, compulsory nomination of teachers and staff for appointment or nominating students for admissions would be unacceptable restrictions imposed on an educational institution.³¹

Illustrations of mode and manner of fees collected by educational institutions:

³⁰ Anita Abraham, *Formation and Management & Educational Institutions*, Universal Law Publishing Co. 2005. p.248.

³¹ *Supra note 30*. p.250.

Example 1

Jayant is a first year student in the University's degree program in dentistry. For his first year course, over and above his tuition fee, he has to pay a fee to the university for the rental of the dental equipment he will use in the course of his academic program. The equipment rental fee must be paid to the University at the stage of enrolment and admittance and Jayant's equipment rental fee is an item that can be included in the dues payable by Jayant to the University.

Example 2

When Mary enrolled in college for her first year, she had to pay a separate student activity fee in addition to her tuition. This activity fee is used solely to fund on-campus organizations and activities run by students, such as the student magazine and the student union. No portion of the fee covers personal expenses.

Cost of studying in India

The justification by an educational institution to increase the fees, annual charges, admission fees and security deposits have been attributed to increase in expenses, in particular the salaries of teachers in compliance with the fifty Pay Commission's recommendations. On the other hand the various cost associated grievances of studying in a reasonably good private school expressed by parents associations include:

- (a) Allegations that the amounts collected under the head 'tuition fee' are sometimes in excess of the actual expenditure incurred by an educational institution;
- (b) Huge amounts taken from parents as interest-free loan for granting admission to children;
- (c) Huge amounts collected under the head 'building fund' remain unspent by the institution.

(ii) UGC Act³² on Fees

In recent years, a very serious situation has arisen because of mushroom growth of private educational institutions, specially engineering, medical and management colleges in certain states, which charge huge sums of donations as capitation fees for admission to various courses of study offered by them. To tackle this evil which have grave deleterious consequences, the parliament through University Grants Commission (Amendment) Act³³ 1997, inserted a new section 12-A, in the UGC Act providing for “regulation of fees and prohibition of donations in certain cases. By the said amendment Act clauses (h), (i) and (j) were also inserted in section 26.

Section 12A of the UGC Act-Regulation of fees and prohibition of donations in certain cases. ----

“... (2) Without prejudice to the generality of the provisions of section 12 if having regard to--

- (a) the nature of any course of study for obtaining any qualification from any university;
- (b) the types of activities in which persons obtaining such qualification are likely to be engaged on the basis of such qualification;
- (c) the minimum standards which a person possessing such qualification should be able to maintain in his work relating to such activities and the consequent need for ensuring, so far as may be, that no candidate secures admission to such course of study by reasons of economic power and thereby prevents a more meritorious candidate from securing admission to such course of study; and
- (d) all other relevant factors, the Commission is satisfied that it is necessary so to do in the public interest, it may, after consultation with the university or Universities concerned, specify by regulations the matters

³² University Grants Commission Act 1956.

³³ These Amendments have come into force from 16-05-1998, the date of application in the Gazette of India.

in respect of which fees shall be charged, and the scale of fees in accordance with which such fees shall be charged in respect of those matters on and from such date as may be specified in the regulations in this behalf, by any college providing for such course of study from, or in relation to, any student in connection with his admission to and prosecution of, such course of study:

Provided that different matters and different scales of fees may be so specified in relation to different universities or different classes of colleges or different areas.

- (3) Where regulations of the nature referred to in sub-section (2) have been made in relation to any course of study, no college providing for such course of study shall-----
- (a) levy or charge fee in respect of any matter other than a matter specified in such regulations;
 - (b) levy or charge any fees in excess of the scale of fees specified in such regulations; or
 - (c) accept, either or directly or indirectly, any payment (otherwise than by way of fees) or any donation or gift (whether in cash or kind), from, or in relation to, any student in connection with his admission to, and prosecution of, such course of study.
- (4) If, after making, in relation to a college providing for a specified course of study, an inquiry in the manner provided by regulations, and after giving such college a reasonable opportunity of being heard, the Commission is satisfied that such college has contravened the provisions of sub-section (3), the Commission may, with the previous approval of the Central Government, pass an order prohibiting such college from presenting any students then undergoing such course of study therein to any university for the award of the qualification concerned.....”

It is submitted that a bare reading of sub-section (2) of s.12-A of the UGC Act, as reproduced above, makes it abundantly clear that the parliament has empowered the UGC alone to specify by regulations the matter in respect of which fees may be charged, and the scale of fees in accordance with which fees shall be charged in respect of those matters by any college providing a specified course of study from, or in relation to, any student in connection with his admission to , or continuation of his studies in the given course. Sub-section (3) creates a complete restraint against the affiliated colleges from charging any fee under any head except those provided under the Regulations or from charging fee in excess of scale of fees as statutorily provided. The parliament in unequivocal terms has provided that no college can accept either directly or indirectly any payment other than the prescribed fee or any donation or gift either in cash or in kind from any student in connection with his admission or continuation of his studies.

Sub-section (4) of S. 12-A of the UGC Act is a penal provision in the sense that any college found guilty of violating the regulations framed under S. 12-A has to suffer an action, which may virtually lead to its closure. Sub-section (7) of S.12-A is non-obstante clause providing that the provisions contained therein and the regulations framed there under will have an overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

Thus, in the present statutory set up, it is only the University Grants Commission, which has the parliamentary sanction, to specify the fees structure chargeable by the affiliated colleges and deemed Universities imparting any specialized course of study.³⁴

(iii)Capitation Fees

Some private educational institutions indulge in charging exorbitant capitation fees from the students more particularly in the professional courses of medicine or engineering. This charge often disguised as a charge towards development of the institution, is in fact a charge of capitation fees and the claim for development funds has degenerated into profiteering.

³⁴ *S.M.C. Students Parents Association v. Union of India* AIR 2001 Kant 457. p.463.

Capitation fee makes the availability of education beyond the reach of the poor. The state action in permitting capitation fee to be charged by the state recognized educational institution is wholly arbitrary and as such violative of Article 14 of the Constitution of India.³⁵

The education is enlightenment. It is the one that lends dignity to man as it was rightly observed by *Gajendragadkar J.* (as he then was) in *University of Delhi v. Ram Nath*³⁶: “Education seeks to built up the personality of the pupil by assisting his physical, intellectual, moral and emotional development.”

He further opined that “education in its true aspect is more a missions and a vocation rather than a profession an trade or business, however wide may be denotations of the two words....”

However the whole problems pertaining to capitation fee was considered by the apex court comprised of Justice Kuldip Singh and R.M. Shari in *Mohini Jain's case*³⁷ (popularly Known as the Capitation Fee case'). In this case the petitioner had challenged the validity of notification issued by the government under the Karnataka Educational Institutions (prohibition of Capitation Fee) Act 1984, which was passed to regulate tuition fee to be charged by the private Medical Colleges in the state. Under the notification the tuition fee to be charged from students Karnataka was Rs.60, 000 per annum. The petitioner was denied admission on the ground that she was unable to pay the exorbitant tuition fee of Rs.60,000 p.a. The court held that the right to education at all level is a fundamental right of citizen under Article 21 of the constitution and charging capitation fee for admission to educational institutions is illegal and amounted to denial of citizen's right to education and also violative of Article 14³⁸, being arbitrary unfair and unjust.

³⁵ *Mohini Jain v. State of Karnataka* AIR 1992 SC 1858, p.1866.

³⁶ AIR 1964 SC 1873, .p. 1875

³⁷ *Ibid.* p.1858

³⁸ Article 14 of the Constitution of India.

What is Capitation Fee

The next question which arises in this regard is: what is capitation fee? It is essentially a peculiar concept that has arisen in India due to the commercialization of education. We may define capitation fee as a charge of lump sum in lieu of merit, for admission to an educational institutions. It is a charge of capital nature that is not in return for the cost of education actually imparted. It includes any amount by whatever name called, paid or collected directly or indirectly in excess of the prescribed fees. Capitation fee is nothing but a consideration for admission. The concept of “teaching shop” is alien to our constitutional scheme.³⁹

Law lexicon⁴⁰ : A fee for each person dealt with by the persons who receives it; as where a school master, in addition to its salary, or instead of it, is paid one pound per annum for each boy in the school.

Section 2 (a)⁴¹ Capitation fee means: any amount by whatever name called, whether in cash or kind, in excess of the prescribed or as the case may be approved, rate of fees regulated under Section 4⁴², the word prescribed refers to the rate fixed as for aided schools. So far as unaided schools are concerned, the questions of capitation fee arise only if there is any approval rate of fees. Prescribed rate of fees only apply to aided educational institutions. So far as unaided schools are concerned the statute confer an option on the state government to approve the rate of fees.

Section 4⁴³ defines the expression “capitation fee” to mean any amount by whatever name called, paid or collected directly or indirectly in excess of the fee prescribed under section 4. Section 4 of the same Act states that any amount collected in excess of the fee so prescribed is prohibited in the following terms:

³⁹ *Unni Krishnan JP v. State of A.P.* AIR 1993 SC 2178

⁴⁰ A.S. Oppe, *Law Lexicon*. Universal Pub. Co. 2001. p.163

⁴¹ Maharashtra Educational Institutions (Prohibition of Capitation fee) Act 1988

⁴² *Ibid.*

⁴³ The Tamil Nadu Educational Institutions (Prohibition of Collection of Capitation fee) Act 1992

“Regulation of fee etc. --- (1) Notwithstanding anything contained in any other law for the time being in force, the government, may by notification, regulate the tuition fee or any other fee or deposit that may be received or collected by any educational institution or class or classes of such educational institutions in respect of any or all class or classes of students:

Provided that before issuing a notification under this sub-section, the draft of which shall be published, in the Tamil Nadu Government Gazette stating that any objection or suggestion which may be received by the government within such period as may be specified therein, shall be considered by them.

(2) No educational institution shall receive or collect any fee or accept deposit in excess of the amount notified under sub-section (1).

(3) Every educational institution shall issue an official receipt for the fee or deposit received or collected by it.”

Any student or parent can lodge a complaint about demand for capitation fee or donation by any college management to the University Vice-Chancellor, or the Director of Technical Education. The Government would proceed against any erring institution as per sections 7 and 8 of the Tamil Nadu Educational Institutions (prohibition of Collection of Capitation Fee) Act, 1992, and they could face a punishment of imprisonment extending from three to seven years, and a levy of a fine.

*In Unni Krishnan, J.P. v. State of Andhra Pradesh*⁴⁴

The Hon'ble Supreme Court held that it is the lookout of the state including the legislature to prevent “commercialization of education” and that prohibition of collecting capitation fee has been envisaged by the Act for the purpose of preventing such malady. Majority of the unaided minority institutions cannot be compelled to charge the same fees as is charged in the government institutions for the simple reason that they have to meet the cost of imparting education from their own resources and the main source can only be

⁴⁴ AIR 1993 SC 2178

the fees collected from the students. Nonetheless, learned Judge deprecated any kind of commercialization of education, and pointed to the reason of collecting exorbitant amount in the name of capitation fee or even other fees. Following passage in the said judgment is worth to be noticed in this context:

“Even so, some question to arise-whether coat-based education only means running charges or it take in capital outlay? Who pays or who can be made to pay for establishment, expansion and improvement/diversification of private educational institution? Can an individual or body of persons first collect amounts (by whatever name called) from the intending students and with these monies establish an institution-an activity similar to builders of apartments in the cities? How much should the students coming in later years pay? Who should work out the economics of each institution? Any solution evolved has to take into account all these variable factors. But one thing is clear: commercialization of education cannot and should not be permitted. Parliaments as well as state legislature have expressed this intention in unmistakable terms. Both in the light of our tradition and from the standpoint of interest of general public commercialisation is positively harmful; it is opposed to public policy. As we shall presently point out, this is one of the reasons for the holding that imparting education cannot de trade, business or profession. The question is how to encourage private educational institutions without allowing them to commercialize the education? This is the troublesome question facing the society, the court and the institution today.”

From the constitutional perspective regarding charging of capitation fee, the court held that “the state action in permitting capitation fee to be charged by state recognized educational institutions is wholly arbitrary and as such violative of Article 14 of the constitution of India”. The capitation fee brings to the fore a clear class bias. Admission of non-meritorious students by charging capitation fee-in any form whatsoever strikes at the very root of the Constitutional scheme and our educational system.

(iv) Current Trend in Fixing Fees

In *T.M.A. Pai Foundation v. State of Karnataka*⁴⁵

On the matter fixing the fees, an Eleven Member Bench of the Supreme Court observed:

“An educational institution is established for the purpose of imparting education of the type made available by the institution. Different courses of study are usually taught by teachers who have to be recruited as per qualifications that may be prescribed. More amenities will ensure that better working conditions will attract better teachers. More amenities will ensure that better students seek admission to that institution. One cannot lose sight of the fact that providing good amenities to the students in the form of competent teaching faculty and other infrastructure costs money. It has, therefore, to be left to the institution, if it chooses not to seek any aid from the government, to determine the scale of fee that it can charge from the students. One also cannot lose sight of the fact that we live in a competitive world today, where professional education is in demand. We have been given to understand that a large number of professional and other institutions have been started by private parties who do not seek any government aid. In a sense, a prospective student has various options open to him/her where, therefore, normally economic forces have a role to play. The decision on the fee to be charged must necessarily be left to the private educational institution that does not seek or is not dependent upon any funds from the government.”

In *Islamic Academy of Education v. State of Karnataka*⁴⁶, the Supreme Court held that there could be no rigid fee structure fixed by the government. The Supreme Court in this case considered the issue “whether educational institutions are entitled to fix their own fee structure” and came up with specific answers and recommendations on charge of fee and fee structure in an educational institution which include the following:-

⁴⁵ AIR 2003 SC 355.

⁴⁶ (2003)6 SCC 697

- (a) There can be no rigid fee structure fixed by the government. Institutes must be accorded freedom to fix their fee structure while taking into account the need to generate funds to run the institution, to provide facilities for the benefit of students and also to generate a surplus which is to be used for the growth of the institution.
- (b) The fee structure of the educational institution is to be put to scrutiny (in advance of the academic year) in each state by a Committee headed by a retired High Court judge. The fee-scrutiny Committee would include a chartered accountant, an eminent doctor or an engineer as applicable, Secretary of Medical Education or Technical Education of the State Government and a person of repute in the educational field.
- (c) The fees announced by the most of the medical colleges are so hefty that it is impossible for parents to afford such education for their children.
- (d) Fees once decided will remain in force for three years. Ideally, the fees should remain the same for the entire course period so that the parents are not unaware of the total they will be called upon to pay when they admit their wards.
- (e) Noting the fact that several institutions were charging fees for an entire four or five years course (in view of students leaving midstream on certain occasions, and seats lying vacant to the prejudice of the institute's interest) the Bench said no institution could charge fee for more than one semester or at the most for a year; alternatively a bond/bank guarantee for the balance fees to cover the instance of student leaving midstream could be arranged for.
- (f) Holding that each institution could have separate fee structures depending on the facilities, infrastructure, salary paid to its staff and the investments made for future, the Bench said that the professional colleges would be required to submit their proposed fee structure to the Committee. Once the fee is fixed by the Committee the institute cannot charge either directly or indirectly any other amount over and above the fixed fees.
- (g) The Committee after scrutinizing the details of various aspects could fix a fee structure which would remain valid for three years and only thereafter the institution could approach the Committee again for revision.

Similarly, in *Modern School v. Union of India*,⁴⁷ the Supreme Court laid down guidelines to prevent profiteering by private unaided schools in Delhi and blatant commercialisation of education. Huge sums of money sometimes even to the tune of Rs. 8000 per month have been collected as tuition fee and other annual fees by schools towards 'development' which often meant constructing more buildings, financing other schools run by the management and even creating and maintaining swimming pools. The SC order covers the following points:

- (a) It empowers government to check private schools in Delhi from charging excessive fees;
- (b) Directs schools to file accounts to Director, Education. The Director is authorized to regulate the fees and other charges to prevent the commercialization of education; Director to analyse the statements of fees of the schools; schools ought to apply the principles of accounting applicable to non-profit organizations/non-business organizations;
- (c) Private (unaided) schools would have to fulfill their statutory obligation to admit students (25% of the students) from the economically lower strata to comply with one of the conditions on which they had been allotted land at concessional rates.

It is submitted that in past fifteen years there has been radical changes from rigid to liberal approach of the court on the matter of capitation fee. The journey from *Mohini Jain* to *T.M.A. Pai foundation* reflects the judicial liberalization, but it is important to note that the capitation fee enable the rich to take admission whereas the poor has to withdraw due to financial inability. A poor student with better merit cannot get admission because he has no money to apply whereas the rich can purchase the admission. There is, therefore, no escape from the conclusion that charging of capitation fee in consideration of admissions to educational institution is utter violation of our Constitutional provisions.

C: COMMERCIALISATION AND CORRUPTION

The study of India's historical past suggests that education has always been recognized as the religious duty and charitable object. It was never a trade or business. The duty cast on

⁴⁷ AIR 2004 SC 2236

the state to provide education, stems from India's historical past. Originally in the *varna* system, all individuals had equal opportunities for learning. When Brahmins the teacher of knowledge realized that it was not always possible for their kin to attain the intellectuals height of their fathers, they caused the path to the attainment of the status of brahmine to restrict by an interpretative modification in the method of attainment of that status.⁴⁸ The status of 'brahmin' latter cause to be associated with, birth, rather than intellectual attainment. The Brahmins closed the doors of learning to all except their kin. The king failed in his duty to prevent this process.

If keeping the doors of learning opens is the objective, it is hardly necessary to keep education outside the domain of private power. What should be ensured is that the state adheres to his duty to provide educations. The state should also have the right to control the subject matters of educations, and the manner in which it is taught. Education is so essential requirement that private right to run it as a business for profit should not be granted for of this was done, the price of education would go beyond the means of a large sections of the population thus leading to a divided and unequal society. Therefore, running of education institution as a business is hazardous to the society.

Commercialization's of education has always been looked upon with disfavour in our country. As far back as in 1956, Parliament expressed its intention by enacting the University Grant Commission Act, Indian Medical Council Act. Advocate Act was enacted in 1961 and All India Council for Technical Education in 1987 which specified the prevention of commercialization of education as one of the duties of the aforesaid enactments.⁴⁹

Moreso, the National Policy on Education 1986, envisages that the commercialization of technical and professional educations should be curbed and that steps should be taken to prevent the establishment of institutions set up to commercialize education.

⁴⁸ The path to the attainment of the status of brahmin, according to the Rig Veda- samscarat dwija uchyate- by virtues of refinement you became a twice born; Veda pathena viprasyet-by virtues of the study of the Veda's you shall be a vipra-brahmajanani its brahmana-by reason of attaining the knowledge of the absolute you are a Brahman. *Quoted in Student Advocate* vol.5,1993. p 86.

⁴⁹ *Unni Krishnan v. State of A.P.*, AIR 1993 SC 2178. p.2237.

In the *Unni Krishnan*⁵⁰ the Supreme Court has held that imparting education can not be treated as a trade or business and that education can not be allowed to be converted into commerce. *B.P. Jeevan Reddy, J.*, one of the learned judges constituting the five Judges Bench of the court in that case observed that

“Trade or business normally connotes an activity carried on with a profit motive. Education has never been commerce in this country. Making it one is opposed to the ethos, tradition and sensibilities of this nation....”

The decision of the court in allowing the capitation fee does not tally with the above reasons. Commercialization of education cannot and should not be permitted. The Parliament as well as the state legislatures has expressed this intention in unmistakable terms. Both in the light of our tradition and from the stand point of interest of general public, commercialization is positively harmful; it is opposed to public policy.⁵¹

Now the question is whether the right to establish an educational institution can be said to be carrying on any occupation within the meaning of Article 19(1) (g), the Supreme Court in *Unni Krishnan's* case⁵² opined that such activity can neither be a trade or business nor can it be a profession within the meaning of Article 19(1) (g). the court adopted the above opinion in the line of reasoning taken in *State of Bombay v. R.M.D.C*⁵³, where the court opined that imparting education could not be treated as a trade or business, education can not be allowed to be converted into commerce nor can the petitioners seeks to obtain the said result by relying upon the wider meaning of ‘occupation’. The content of the expression ‘occupation’ has to be ascertained keeping in mind the fact that clauses (g) of Article 19(1) employs, all the four expressions namely, ‘profession’, ‘occupation’, ‘trade’ and ‘business’. Their field may overlap but each of them does certainly have a content of its own distinct from the others. It is clear-impairing of education is not and cannot be allowed to become commerce.

⁵⁰ AIR 1993 SC 2178. p .2243.

⁵¹ *Vidyaranya Education Society, Koppolu v. Director of School Education* AIR 1995 A.P. 295, p.301.

⁵² Ibid. p.2244

⁵³ AIR 1957 SC 699.

Thus, commercialization of education leads to lowering of standards and corruption. This view is best explained by Mohan J:⁵⁴

“Their only aim is to make money during a hard bargain, exploiting eagerness to acquire a professional degree which would passport for employment in a country rampant with unemployment. They could be even called pirates in the high seas of education. The commercialization of education, the racketeering must be prevented.”

Competition among various businesses only leads to higher standards at lesser prices. When educational institutions have to compete with one another in the quality of the training they offer, when they have to compete for the value that is to be attached to the diplomas they issue, educational standards would necessarily rise. Competition for the services of the best teachers will result in a rise in the caliber of teaching and in the salaries of teachers.

The most important a question remains to be addressed is whether how should allow the spread of education through private initiatives? Unquestionably, the best method is to allow the private sector to enter the field and run education as a business for profit with profit as an incentive, entrepreneurs will set up institution, and compete with each other to provide the best possible education. The supply of education will also be increased. As supply catches up with demand, even the unregulated price of education in the market will come down, competition will ensure not only high standards of education, but high remuneration to the best of teachers, a situation would sadly does not exist in India today. Commercialization of education in the light of our tradition and from the standpoint of interest of general public is positively harmful and it should not be permitted at all. That would be contrary to the constitutional objective and goals in the preamble and Directive Principle obliging the state to take up the job⁵⁵. Such educational system led to corrupt activities of the temple and jeopardize the academic atmosphere in general and merits in particular.

⁵⁴ *Supra* note 49. p.2182, per Mohan, J.(Majority view).

⁵⁵ Articles 14 and 15. Constitution of India.

However, the Judiciary has been coming forward to rescue the victims whose career is being spoiled due to educational pollution at the educational institutions. *Pramila Kumari v. State of Bihar*⁵⁶ is one of such example where a sordid state of affairs in the matter of admission to the general nursing and midwifery training courses existed. The counter affidavit filed by the respondent. Superintendent of *Nalanda Medical College and Hospital*, revealed that the admissions were taken on the basis of forged mark sheets and flagrant violations of reservation policy. In this under world game⁵⁷, the respondent-superintendent, *NMCH* also contributed by not rendering proper assistance in verification of documents as was ordered by the court. The net result was that the honest and high rankers had to suffer as compared to the dishonest and undeserving candidates whom the court allowed because of “the end of first year course”. But the petitioner who moved the Patna High Court, were directed to wait for the next session to begins as it was difficult to take their admission in the mid-stream of the course.

G.C. Bharkula, J. speaking for self and Aftab Alam J. showed great concern for the education system touching the lowest level’ and issued two important directions. First, to initiate criminal prosecution against the alleged criminals; and secondly, the state government to take appropriate legal and disciplinary action against the college authorities including the superintendent. One of the contributions, needing appreciation, was that the court directed⁵⁸ the superintendent to pay Rs. 1000/- to each petitioner which would be recoverable from the officers involved in the above illegalities. Thus the court developed the principle of accountability in the above case which was reasonably required to check the corruption in educational institutions as well as to punish the negligent officials.

Moreover, the *Veena Gupta*⁵⁹ case is one more addition to the corruption jurisprudence in the law of education where the principal of the institution silently and secretly wanted to murder meritorious in favour of his own daughter in super specialist courses such as

⁵⁶ AIR 1994 Pat 1.

⁵⁷ Criticed by C.M. Jariwala, XXX, ASIL p.246

⁵⁸ Ibid.

⁵⁹ *Dr. Veena Gupta v. University of Delhi* AIR 1994 Del 108.

MD. The Delhi High Court again comes to the rescue of merit and for this serious unacademic exercise the Full Bench observed⁶⁰

“We strongly deprecate the action of the principal who was occupying a position of trust unfortunately-city the desire to secure a chosen discipline for his daughter made him act in a manner which was unbecoming of a principle of an educational institution.”

The above opinion of the court, It is submitted is not enough for the grave pollution in the Medical College of repute and the accomplice of the conspiracy should not be allowed to go scot free. The consumers of the educational excellence whose interest is violated must be adequately compensated.

Increase in fee is necessitated generally for two reasons: increase in the cost of education; and introduction of self-financing courses. But in many cases fees have been increased to make huge profit as a commercialized venture. Asking the students in paid and NRI seats to deposit the entire amount of fee for 4 ½ years in one installment is another method resorted to which was fortunately not upheld.⁶¹

In institutes of management studies there is a growing tendency to increase the fee exorbitantly. This is done in view of the fact that there are large numbers of candidates who aspire to take admission in such institutes and their students are well placed after finishing the studies. The hike raises question as to whether such institutes are meant to cater to the needs of the elite class only shattering the constitutional dream of justice, social, economic and other; and whether the faculty of management studies is different from other faculties so far as education is concerned. The court has yet to give an answer to the above questions. It has simply weighed on one side the expenditure and on the other the income from fee.⁶²

⁶⁰ Ibid, p.110.

⁶¹ *Ankur Aggarwal v. State of M.P.* AIR 2000 MP 310.

⁶² Ibid.

Another glaring example of commercialization of education by authorities of educational institutions, claiming tax exemption for the commutation of their students and other staff through vehicles owned and possessed by them can be seen through a decision by the Patna High Court in *D.A.V College Management Committee v. State of Bihar*⁶³, where The Bihar State Legislature, in order to give incentive to educational institutions for the commutation of their students and other staff through vehicles owned and possessed by them, provided exemption to such educational institutions from payment of road tax which was later on withdrawn. An educational institution, making money out of such concession, challenged the withdrawal of the aforesaid exemption. To evade the liability, alternatively it was further unsuccessfully urged that the school/college buses should not be treated as 'transport vehicles' and the rate applicable to such vehicles be not charged for the institutional buses. To attract the court's relief, the appellant took cover of articles 21, 41, 45 and 46 of the Constitution. The Patna High Court, dismissing the appeal, upheld the withdrawal in view of the fact that the state had an inherent right to withdraw when the exemption was made a source of 'making huge profit year after year' and further that this surplus was not transferred to the benefit of the poor and downtrodden students. In this case one finds a commercial venture in running the school and also exploitation of those who have no alternative except to send their wards to a school having all facilities, including the transportation of students.

In modern times, commercialization of education has been a problem area, all over the world and education is a big business. On 18th June, 1996, professor G. Roberts Chairman of the Committee of Vice-Chancellors and principals commented⁶⁴:

"The annual turnover of the higher education sector has now passed the £ 10 billions mark. The massive increase in participation that has led to this figure, and the need to prepare for further increases, now demands that we make revolutionary advances, in the way we structure, manage and fund higher education."

⁶³ AIR 2000 Pat 285.

⁶⁴ As quoted in *Modern School v. Union of India*. AIR 2004 SC 2237

In the book titled '*Higher Education Law*' (Second Edition) by David Palfreyman and David Warner⁶⁵. In modern times, all over the world, education is big business. On account of consumerism, the students all over the world are restless. Those schools in private sector which charge fees may be charitable provided they are not run as profit-making ventures. That education charity must be established for the benefit of the public rather than for the benefit of the individuals. That while individuals may derive benefits from an educational charity, the main purpose of the charity must be for the benefit of the public.

With the object of preventing commercialization of education, the Supreme Court in *Modern School v. Union of India*⁶⁶ declared that the Directorate of Education had the authority to regulate quantum of fees charged by the recognized unaided schools. The court also directed that the accounts required to be maintained by schools were to be on principle of accounting applicable to non business organizations known as 'fund based system of accounting'. It was further held that private unaided schools were entitled to set up a development fee. It remains to be seen whether the collection of development fee would indirectly bring in capitation fee through the backdoor.

Moreso, the question before the Hon'ble Court⁶⁷ arose-----

"Whether cost-based education only means running charges or can it take in capital outlay? Who pays or who can be made to pay for establishment, expansion and improvement/diversification of private educational institution? Can an individual or body of persons first collect amounts (by whatever name called) from the intending students and with those monies establish an institution an activity similar to builders of apartments in the cities? How much should be students coming in later years pay? Who should work out the economics of each institution? Any solution evolved has to take into account all these variable factors. But one thing is clear; commercialization of education cannot and should not be permitted. The Parliament as well as State Legislatures has expressed this intention in unmistakable terms. Both in the light of our tradition and from the standpoint

⁶⁵ Ibid. p.2242.

⁶⁶ Ibid. p. 2237.

⁶⁷ Ibid. p. 2242.

of interest of general public, commercialization is positively harmful; it is opposed to public policy. As we shall presently point out, this is one of the reasons for holding that imparting education cannot be trade, business or profession. The question is how to encourage private educational institutions without allowing them to commercialize the education? This is the troublesome question facing the society, the Government and the Courts today.”

In the matter of regulation of fees, one of the most contentious issues, the court in *Inamdar*⁶⁸ upheld the freedom of every unaided educational institution ‘to devise its own fee structure subject to the limitation that there can be no profiteering and no capitation fee can be charged directly or indirectly, or in any form’.

The court showing an awareness of the ground realities of commercialization of education, stated:⁶⁹

If capitation fee and profiteering is to be checked, the method of admission has to be regulated so that the admissions are based on merit and transparency and the students are not exploited. It is permissible to regulate admission and fee structure for achieving the purpose just stated.

In a similar vein, the court again observed:⁷⁰

Unless the admission procedure and fixation of fees is regulated and controlled at the initial stage, the evil of unfair practice of granting admission on available seats guided by the paying capacity of the candidates would be impossible to curb.

...Professional education should be made accessible on the uniform basis. Minorities or non-minorities, in exercise of their educational rights in the field of professional education have an obligation and a duty to maintain requisite standards of professional education by giving admissions based on merit and making education equally accessible to eligible students

⁶⁸ *P.A. Inamdar v. State of Maharashtra*, (2005)6 SCC 537.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.* p. 607.

through a fair and transparent admission procedure and based on a reasonable fee structure.

While one may wholeheartedly agree with the above observations which reveal the court's concern for merit, accessibility and standards of education, the question whether the decision in *Inamdar* has actually succeeded in advancing these values remains debatable.

The court, fully conscious of its limitations in the field of educational policy making, ends the judgment urging the government to enact a comprehensive legislation⁷¹. Indeed, this is a step the central government should have taken long back. However, even after *Inamdar* there seems to be total apathy on the part of the government. The only response has been the enactment of the Constitution (93rd Amendment) Act in January 2006 providing for reservation of seats in private unaided educational institutions in favour of scheduled castes, scheduled tribes and socially and educationally backward classes. There seems to be no serious effort for following up the amendment with effective legislation, which is necessary to carry out the objective of the amendment. The demand for a comprehensive legislation to regulate self-financing institutions and to put an end to commercialization of education remains a cry in the wilderness!

Thus it is submitted that the commercialization and corruption in education and educational systems, which has been seen in recent years has reached an alarming situation on account of the failure of the government to perform its statutory functions. It is suggested that the only way through which this practice could be checked is, by enacting a uniform central legislation through Parliament.

D: PROFESSIONAL COLLEGES

The demand and the availability of the educational avenues in India are not equally distributed in respect of various disciplines of education. In particular the concentration

⁷¹ Ibid. p.609.

towards the professional education increased very high from the third decade of the Constitution.

This raises a question of admission as well as catering to the needs of the students by the government institutions. This led to the emergence of a large number of medical and engineering colleges in respect of technical educations. It is therefore the matter of commercialization and corruption in respect of the professional colleges finds a discussion here separately to highlight the judicial approach in this area as well as to find out a viable solution to the above problems.

The practice of collection of capitation fee has ushered in an era where education is viewed as a new lucrative industry. The problem basically stems from the inadequacy of suitable educational facilities in the country. A purely economic solution to this would be to increase the number of educational institutions to keep pace with the increasing demand.⁷² Economist, Swaminathan Ankleshwar Aiyer claimed that in such a situation, the market itself would be best able to regulate the quality of education in private institutions.⁷³ However, this has not proved to be correct. Over the last decade, there has been a mushrooming of private institutions collecting exorbitant amount as capitation fee in consideration for sub-standard educational facilities.

In the yester years, the problem of capitation fee in professional colleges particularly in medical and engineering colleges has been the subject of two erroneous decisions by the Supreme Court of India. Viz. *Mohini Jain*⁷⁴ and *Unni Krishnan*⁷⁵. However, the problem was prevalent even before these decisions.

In *D.P. Joshi v. State of Madhya Bharat*⁷⁶. The question that arises was whether the petitioner who was a resident of Delhi and has been admitted in July, 1952, by the state of Madhya Bharat as a student in the Mahatma Gandhi Memorial Medical College at

⁷² G. Thimmiah, Economic Advisor to the Govt. Seminar on *Mohini Jain*, University Law college, Bangalore, 25 August 1992.

⁷³ Praveen Swami, *A State obligation*, *Frontline*, 10 Feb 27, Mar. 12 1993 at 94.

⁷⁴ *Mohini Jain v. State of Karnataka*, AIR 1992, SC 1858.

⁷⁵ *Unni Krishnan v. State of A.P.* (1993) 1. S.C.C.645.

⁷⁶ AIR 1955 SC 334.

Indore and who has been called upon to pay a sum of Rs. 1,500 per annum as capitation fee, in addition to the tuition fees and other charges payable by all the students of the college in general, is entitled to a writ restraining the authorities concerned from levying that capitation fee on the ground that the rule under which he was asked to pay is repugnant to the constitution. The court held that the classification between Madhya Bharat students and non-Madhya Bharat students might validly be made on a geographical basis. Such a classification would be eminently just and reasonable where it relates to education which is concern primarily of the state. The contention therefore, that the rule imposing capitation fee on non-Madhya Bharat students is not in contravention of Article 14 or 15(1) of the Constitution.

The Supreme Court in *Mohini Jain v. State of Karnataka*⁷⁷ decided on the constitutionality of the practice of charging capitation fees in medical Colleges. The Court held that charging of tuition fee of Rs.25000 in private Medical College as against tuition fee of Rs. 2,000 only in government medical college is unconstitutional. Apart from error on the merits of the decisions, the judgment in *Mohini Jain* is really a non-judgment, i.e. nonest.being a flagrant violation of the imperative mandate of the Indian Constitution, Article 145(3), that the minimum number of judges who are to sit for deciding a case involving substantial question of law as to the interpretation of the constitution shall be five. Hence, the case should have been decided by a bench of five judges and not a truncated bench of two judges. Apart from constitutional infirmity, the decision itself involved the error of failing to notice that education in government medical colleges is subsidized education, and there was no principle of constitutional law or justice of wisdom which would require private medical college to provide medical education at less than the cost.⁷⁸

Subsequently, in *Unni Krishnan*⁷⁹, the Constitution Bench of five judges was concerned with medical education as well as engineering education. And in this case the Supreme Court laid down a scheme abolishing capitation fees and regulating the functioning of

⁷⁷ *Supra note.73.*

⁷⁸ JILI, 1994 vol.36 p.385.

⁷⁹ *Supra note 74.*

private medical and technical institutions. It added that no individual or a group of individuals, company or firm can establish or administer professional, technical, engineering or medical colleges. Only registered trust can do so. There is thus, limit on the extent of privatization that can be allowed in the education system.

The scheme evolved⁸⁰ herewith was in the nature of guidelines which the appropriate Governments and recognizing and affiliating authorities shall impose and implement in addition to such other conditions and stipulations as they may think appropriate as conditions for grant of permission, grant of recognition or grant of affiliation, as the case may be. We are confining the scheme-for the present only to 'professional colleges'.

The expression 'professional colleges' in this scheme includes:

- (i) "medical colleges, dental colleges and other institutions and colleges imparting Nursing, Pharmacy and other courses allied to Medicine, established and/or run by educational institutions,
- (ii) colleges of engineering and colleges and institutions imparting technical education including electronics, computer sciences, established and/or run by private educational institutions, and
- (iii) such other colleges to which this scheme is made applicable by the Government, recognizing and/or affiliating authority."

The expression "appropriate authority" means the Government, University or other authority as is competent to grant permission to establish or to grant recognition to a professional college.⁸¹

The expression 'competent authority' in this scheme means the Government/University or other authority, as may be designated by the Government/University or by law, as is competent to allot students for admission to various professional colleges in the given state.⁸²

⁸⁰ Ibid p.2247.

⁸¹ *Supra* note 74.

⁸² Ibid.

It is made clear that only those institutions which seek permission to establish and/or recognition and/or affiliation from the appropriate authority shall alone be made bound by this scheme. This scheme is not applicable to colleges run by Government or to University colleges. In short, the scheme hereinafter mentioned shall be made a condition of permission, recognition or affiliation, as the case may be. For each of them viz., grant of permission, grant of recognition, grant of affiliation, and these conditions shall necessarily be imposed, in addition to such other conditions as the appropriate authority may think appropriate. No private educational institution shall be allowed to send its students to appear for an examination held by any Government or other body constituted by it or under any law or to any examination held by any University unless the concerned institution and the relevant course of study is recognized by the appropriate authority and/or is affiliated to the appropriate University, as the case may be.⁸³

- (1) A professional college shall be permitted to be established and/or administered only by a Society registered under the Societies Registration Act, 1860 (or the corresponding Act, if any, in force in a given state), or by a public Trust, religious or charitable, registered under the Trusts Act, Wakfs Act (or the corresponding legislation, if any, e.g., Tamil Nadu Religious and Charitable Endowments Act and A.P. Religious and Charitable Endowments Act). No individual, firm, company or other body of individuals, by whatever appellation called-except those mentioned above-will be permitted to establish and/or administer a professional college. All the existing professional colleges which do not conform to the above norm shall be directed to take appropriate steps to comply with the same within a period of six months from today. In default whereof, recognition/affiliation accorded shall stand withdrawn.⁸⁴
- (2) Atleast, 50% of the seats in every professional college shall be filled by the nominees of the Government or University, as the case may be, hereinafter referred to as "free seats". These students shall be selected on the basis of merit determined on the basis of a common entrance examination where it is held or in the absence of an entrance examination, by such criteria as may be determined by

⁸³ Ibid.

⁸⁴ *Supra* note 74.

the competent authority or the appropriate authority, as the case may be. It is, however, desirable and appropriate to have a common entrance exam for regulating admissions to these colleges/institutions, as is done in the State of Andhra Pradesh. The remaining 50% seats (payment seats) shall be filled by those candidates who are prepared to pay the fee prescribed therefore and who have complied with the instructions regarding deposit and furnishing of cash security/Bank guarantee for the balance amount. The allotment of students against payment seats shall also be done on the basis of *inter se* merit determined on the same basis as in the case of free seats. There shall be no quota reserved for the management or for any family, caste or community which may have established such college. The criteria of eligibility and all other conditions shall be the same in respect of both free seats and payment seats. The only distinction shall be the requirement of higher fee by the “payment students”. The management of a professional college shall not be entitled to impose or prescribe any other and further eligibility criteria or condition for admission either to free seats or to payment seats. It shall, however, be open to a professional college to provide for reservation of seats for constitutionally permissible classes with the approval of the affiliating University. Such reservations, if any, shall be made and notified to the competent authority and the appropriate authority atleast one month prior to the issuance of notification calling for applications for admissions to such category of colleges. In such a case, the competent authority shall allot students keeping in view the reservations provided by a college. The rule of merit shall be followed even in such reserved categories.⁸⁵

- (3) The number of seats available in the professional college (to which this scheme is made applicable) shall be fixed by the appropriate authority. No professional college shall be permitted to increase its strength except under the permission or authority granted by the appropriate authority.⁸⁶
- (4) No professional college shall call for applications for admissions separately or individually. All the applications for admissions to all the seats available in such

⁸⁵ *Supra* note 84.

⁸⁶ *Ibid.*

colleges shall be called for by the competent authority alone, along with applications for admission to Government/University colleges of similar nature. For example, there shall be only one notification by the competent authority calling for applications for all the medical colleges in the State – and one notification for all the engineering colleges in the state and so on. The applications forms for admission shall be issued by the competent authority (from such offices, centres and places as he may direct). The application form shall contain a column or a separate part wherein an applicant can indicate whether he wishes to be admitted against a payment seat and the order of preference, up to three professional colleges.⁸⁷

(5) Each professional college shall intimate the competent authority, the State Government and the concerned University in advance the fees chargeable for the entire course commencing that academic year. The total fees shall be divided into the number of years/semesters of study in that course. In the first instance, fees only for the first year/semester shall be collected. The payment students will be, however, required to furnish either cash security or bank guarantee for the fees payable for the remaining years/semesters. The fees chargeable, in each professional college shall be subject to the ceiling prescribed by the appropriate authority or by a competent Court. The competent authority shall issue a brochure, on payment of appropriate charges, along with the application form for admission, giving full particulars of the courses and the number of seats available, the names of the colleges' their location and also the fees chargeable by each professional college. The brochure will also specify the minimum eligibility conditions, the method of admission (whether by entrance test or otherwise) and other relevant particulars.⁸⁸

(6) (a) Every State Government shall forthwith constitute a committee to fix the ceiling on the fees chargeable by a professional college or class of professional colleges, as the case may be. The Committee shall consist of a Vice-Chancellor, Secretary for Education (or such Joint Secretary, as he may nominate) and

⁸⁷ Ibid.

⁸⁸ Ibid.

Director, Medical Education/Director Technical Education. The committee shall make such enquiry as it thinks appropriate. It shall however, give opportunity to the professional colleges (or their association(s), if any) to place such material, as they think fit. It shall, however, not be bound to give any personal hearing to anyone or follow any technical rules of law. The Committee shall fix the fee once every three years or at such longer intervals, as it may think appropriate.

(b) It would be appropriate if the U.G.C. frames regulations under Section 12A (3) of the U.G.C. Act, regulating the fees which the affiliated colleges, operating on no-grant-in-aid basis, are entitled to charge. The Council for Technical Education may also consider the advisability of issuing directions under Section 10 of the A.I.C.T.E. Act regulating the fees that may be charged in private unaided educational institutions imparting technical education. The Indian Medical Council and Central Governments may also consider the advisability of such regulation as a condition for grant of permission to new medical colleges under Section 10-A and to impose such a condition on existing colleges under Section 10-C.

(c) The several authorities mentioned in sub-paras (a) and (b) shall decide whether a private educational institution is entitled to charge only that fee as is required to run the college or whether the capital cost involved in establishing a college can also be passed on the students and if so, in what manner. Keeping in view the need, the interest of general public and of the nation, a policy decision may be taken. It would be more appropriate if the Central Government and these several authorities (U.G.C., I.M.C. and A.I.C.T.E.) co-ordinate their efforts and evolve a broadly uniform criterion in this behalf. Until the Central Government, U.G.C., I.M.C and A.I.C.T.E. issue orders/regulations in this behalf, the committee referred to in the sub-para (a) of this para shall be operative. In other words, the working and orders of the committee shall be subject to the orders/regulations, issued by Central Government, U.G.C., I.M.C. or A.I.C.T.E., as the case may be.

- (d) We must hasten to add that what we have said in this clause is merely a reiteration of the duty-any, obligation-placed upon the Governments of Andhra Pradesh, Maharashtra Karnataka and Tamil Nadu by their respective legislatures to writ, Section 7 of Andhra Pradesh Act 5 of 1983, Section 4 of Maharashtra Act 6 of 1988, Section 5 of Karnataka Act of 1984 and Section 4 of Tamil Nadu Act 57 of 1992. Other States too may to have similar provisions, carrying statutory force.
- (7) Any candidate who fulfils the eligibility conditions would be entitled to apply for admission. After the free seats in professional colleges are filled up, atleast 10 days' time will be given to the candidates (students) to opt to be admitted against payment seats. The candidates shall be entitled to indicate their choice for any three colleges (if available). In such case, he shall comply with the deposit and cash security/Bank guarantee-taking the institution charging the highest fees as the basis-within the said period of ten days. If he is admitted an institution, charging less fee, the difference amount shall be refunded to him. (The cash security or Bank guarantee shall be in favour of the competent authority, which shall transfer the same in favour of the appropriate college if that student is admitted)⁸⁹.
- (8) The result of the entrance examination, if any, held should be published atleast in two leading newspapers, one in English and other in vernacular. The payment candidates shall be allowed to different professional colleges on the basis of merit-cum-choice. The allotment shall be made by the competent authority. A professional college shall be bound to admit the students so allotted. The casual vacancies or unfilled vacancies, if any, shall also be filled in the same manner. The management of a professional college shall not be permitted to admit any student other than the one allotted by the competent authority - whether against free seat or payment seat as the case may be. It is made clear that even in the matter of reserved categories, if any; the principle of interse merit shall be followed. All allotment shall be published in two leading newspapers as aforesaid and on the notice boards of the respective colleges and at such other places as the

⁸⁹ *Supra note 88.*

competent authority may direct, along with the marks obtained by each candidates in the relevant entrance test or qualifying examination, as the case may be. No professional college shall be entitled to ask for any other or further payment or amount, under whatever name it may be called, from any student allotted to it whether against the free seat or payment seat.⁹⁰

- (9) After making the allotment, the competent authority shall also prepare and publish a waiting list of the candidates along with the marks obtained by them in the relevant test/examination. The said list shall be followed for filling up any casual vacancies or 'drop-out' vacancies arising after the admissions are finalized. These vacancies shall be filled until such date as may be prescribed by the competent authority. Any vacancies still remaining after such date can be filled by the management.⁹¹

The Supreme Court's scheme, It is submitted is an advice to the legislature and does not have the effect of a decision, as the case before the court stood disposed off by the decision that there is no fundamental right to free education in medical and engineering colleges, and that where private medical and engineering colleges charge fee on the cost basis that can not be characterized as capitation fee Jeevan Reddy, J, observed, "it would be highly desirable if the scheme is given statutory shape by incorporating it in the rules that may be framed under the said enactments."⁹²

The next Case in which the Supreme Court had an occasion to consider the concept of capitation fee in respect of the government self financing institution is *Institute of Human Resources Development and Others v. T.R. Rameshkumar*⁹³. In this case the question before the court was whether schemes framed in Unni Krishnan regarding admission in and fees chargeable by private professional colleges is applicable in government self financing institution. The brief facts in this case goes as, two engineering colleges (appellants) have been set up by the state of Kerala as self-financing institutions. One started by the institutes of Human Resources Development for Electronics at Chengannar

⁹⁰ Ibid. p.2250

⁹¹ Ibid.

⁹² Ibid.

⁹³ (1995)4 SCC 210.

and other started by the Lal Bahadur Shastri Engineering Research and Consultancy Centre at Kasargod. These institutions are fully controlled by the state of Kerala.

The appellant sought exemption from providing 50% free seats in the light of the fact that the state already was running or aiding nine engineering colleges which were financed by it and which provided 2391 free seats. It was pointed out that if the financing of the colleges spread over all the available seats, the fees required to be charged would be much lower than if the expenses had to be covered by the fees from only 50% of the seats. In consequences, the fees changes were substantially lower than fees charged for payment seats in other engineering colleges thus benefiting a large number of students who may not be in a position to pay the substantially lower fees charged in these two colleges.

The court held that the basic difference between institutions governed by the scheme in *Unni Krishnan* and the present institutions is that these institutions are controlled by the state and, therefore their working and utilization of funds are under the control of the state. The essence of the *Unni Krishnan* on the other hand, can be summed up on one sentence: There should be no commercialization or profit taking by private educational institutions. In terms the *Unni Krishnan* scheme provides that it will not be applied to government institutions. It is proved that *Unni Krishnan* did not contemplate self financing institution setup by or sponsored by the government. But looking to the confidence reposed by *Unni Krishnan* in the govt. in fixing proper fees even for private self-financing educational institutions, it is clear that the scheme applies only to purely private educational institutions which are self financing. It is designed to ensure that they do not make undue profits or exploit students.

The court further opined that the hard reality that emerges in the private educational institutions is a necessity in the present-day context. It is not possible to do without them because the govt. are in no position to meet the demand particularly in the sector of professional education which call for substantial outlays while education is one of the most important functions of the Indian state it has no monopoly therein.

However, in *T.M.A. Pai Foundation v. State of Karnataka* an eleven Judges Constitution Bench overruled the scheme framed by the Supreme Court and the direction given to impose the scheme in *Unni Krishnan's* case and held unconstitutional except to the extent where it was held that primary education is a fundamental right. The principle that there should not be capitation fee or profiteering is correct. Profiteering does not include reasonable surplus to meet the cost of expansion and augmentation of facilities.

The judgment of the court will go a long way in preventing the commercialization of professional education. It makes amply clear that merit alone should be the basis of access to higher education. Though the private college can charge higher fee than Government College but this cannot be done on the cost of merit. As the state does not have enough money to provide facilities for professional education private initiative is bound to play an important role. In the circumstance the court has done to regulate the private activities in order to ensure equality of opportunity to all.