

Entry of Foreign Educational Institutions in India—Problems and Prospects

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I. Introduction:

The right to education has been constitutionally recognised as a fundamental right under Article 21A of Constitution of India through 86th Amendment in the year of 2002. It is crystal clear that every child has a matter of right to get free and compulsory education and it's also the duty of the state to provide education to a child from the age of six to fourteen. This paper attempts to analyse the object of the right to education with respect to human rights and The Foreign Educational Institutions (Regulation of Entry and Operation) Bill, 2010, practical difficulties with regard to approval and implementation of the above said Bill, notion of education as a charity to commercialisation and suggestions etc.

II. Education as Human Rights:

Nowadays right to education is called as a basic human right. For the success of democratic system of government, education is one of the basic elements². Only an educated citizen will choose the able and efficient representatives who form the government. Education has paved the way for a person to get human dignity that develops him as well as contributes to the development of his country. The right to live with human dignity is a fundamental right according to Article 21 of the Constitution of India³. In the year of 1992, the Supreme Court held that there was a fundamental right to education up to any level including professional education like medicine and engineering⁴. But, this right does not include the right to participate in the student Union activities and to contest Union election⁵. The right to live with human dignity includes right to education also. The Supreme Court clearly stated⁶ and recognized in the year of 1993 that the fundamental right of every child for free and compulsory elementary education up to the age of

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2 Dr.J.N.Pandey, **The Constitution of India**, (Central law Agency 45th edn 2008), p.278.

3 Art,21-A of the Constitution of India states that “the state shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the state may, by law, determine”.

4 *Mohini Jain v. State of Karnataka* (1992), 3 SCC 666.

5 *University of Delhi v. Anand Vardhan Chandal*, (2000) 10 SCC 648.

6 *Unnikrishnan v. State of AP* (1993) 1SCC 645.

fourteen years as provided in the then Art.45 of the Constitution of India⁷. The court recognised a fundamental right to education in the right to life under Art, 21 of the Constitution of India. It also took help from Article 41⁸. But, there was a question like whether imparting of education is an occupation or not according to Art.19(1)(g) of the Constitution of India. The court held that imparting of education could be an occupation under Article 19(1)(g) of the Constitution of India. Consequently right to establish and administer educational institutions is now available to all citizens of India under article 19(1)(g) subject to reasonable restrictions that may be imposed on that right under Clause (6) of that article⁹. The court emphasized that educational institutions could not be used for profiteering and directed appointment of committees in each state for the purpose of setting up the fee structure and admission procedure in unaided private institution¹⁰. Again, the Supreme Court held that the right to establish an educational institution for charity of profit, being an occupation, is protected by Article 19(1)(g). It also held that “the regulation of non-minority unaided professional institutions is permissible under article 19(6) of the constitution to prevent profiteering, levy of capitation fee and selection of non minority candidates. Accordingly it suggested common entrance test for merit-based admission, freedom to devise fee structure to every institution subject to regulation for preventing profiteering and it disallowed charging of capitation fee and found reservation of seats in private unaided educational institutions an unreasonable restrictions on the right in Article 19(1)(g) not protected by Clause (6)¹¹.

Anyway, the court had denied that education could be trade, business or profession within the meaning of Article 19(1)(g) because all these activities are carried for profit while “education has never been commerce in this country”. The Court however conceded the education could perhaps fall under the category of occupation provided no recognition is sought from the state or affiliation is sought from the Universities on the basis that it is a fundamental rights¹². Even in case of reservation in educational institution also has been questioned before the Supreme Court. In a Petition challenging the validity of Central Educational

7 “the state shall endeavour to provide early childhood care and education for all children until they complete the age of six years”.

8 Article 41 states that “Right to work, to education and to public assistance in certain cases,—The state shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement and in other cases of undeserved want”.

9 *TMA Pai Foundation v. State of Karnataka* (2002) 8 SCC 48.

10 *Islamic Academy of Education v. State of Karnataka*, (2003), 6 SCC 697.

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

12 Mahendra P.Singh, V.N.Shukla’s Constitution of India, Eastern Book Company, Eleventh Edn (2008), p.161.

Institutions (Reservation in Admission) Act, 2006 providing reservation in higher education as well as of the Amendments introducing Clause (5) in Article 15 the court initially stayed the operation of the Act. But finally it upheld the amendment as well as the Act. It rejected the contention that Article 15(5), was contrary to Article 15(4) and upheld the exclusion of minority educational institutions from the purview of Article 15(5). The court also insisted for the exclusion of creamy layer from SEBCs as determined by the commission for purposes of Article 16(4). It decline to apply the creamy layer principle to SCs and STs¹³.

III. GATS and Higher Education:

General Agreement on Trade in Services (GATS, 1995) was one of the agreements that were signed under the purview of the World Trade Organization (WTO) which came into existence in 1995¹⁴. Under the GATS there are 12, among them one is Educational services. In 1996 the General Agreement on Trade in Services (GATS) was extended to educational Services, in particular, higher education. Prior to emergence of WTO there was no multilateral agreement on services because services invariably are place specific and were considered to be non-tradeable. Education accounts for US \$ 2trillion dollars of the work economy each year. The aim of GATS is to liberalize and increase international trade in education¹⁵. As said earlier, like other WTO Agreements, GATS rules are legally binding on Governments. Although some GATS rules apply to all services many only apply to those services which each Government agrees to list in the agreement. However, GATS commits Governments to increase, over time, the range of services included in the agreement, without any review of its impacts. On the face of it, GATS professes not to cover government services. Education would normally be considered a government service and thus outside the scope of “free trade”. However GATS defines government service as those “exercised in the control of governmental authority” and sees government authority as one that is “supplied neither on a commercial basis nor in competition with other suppliers”. The education system in most countries has commercial tertiary education providers and private universities, these become part of GATS negotiations¹⁶. As of now, GATS rules will apply to services like ‘Education’ in the following ways. Under GATS rules, a government cannot give better treatment to local companies than to foreign companies. This is known as “national treatment”, i.e., once a service provider from a member country enters another country, under specific commitment, it

13 *Ashok Kumar Thakur v. Union of India* (2007) 4 SCC 361.

14 <http://unesdoc.unesco.org/images/0014/001467/146742e.pdf>. Last visited on 03.08.2010.

15 <http://www.egyankosh.ac.in/bitstream/123456789/33026/1/Unit-10.pdf>. Last visited on 03.08.2010.

16 <http://www.egyankosh.ac.in/bitstream/123456789/33026/1/Unit-10.pdf>. Last visited on 03.08.2010.

cannot be discriminated from other (domestic) service providers in the country¹⁷. The GATS has defined meaning of services¹⁸. There is a two-way classification of trade in educational services. First, educational services are classified in various categories such as: 1. Primary Education, 2. Secondary Education, 3. Higher Education, 4. Adult Education and, 5. Other Education. It must be understood that GATS does not make it mandatory for member countries to open-up all the educational categories. In fact, one can reject opening-up of all the categories. Based on a country's assessment about prospective gains, specific categories can be opened up. For example, countries that are substantially dependent on trade have already opened-up all categories. These include some of the East-European countries and New Zealand. Larger economies such as United States (US) have so far committed to opening-up of Adult Education and Other Education categories, and, there are many other countries including India which have not made any commitments yet. The second classification is based on the nature of trade in (educational) services. Article I.2 of GATS classifies trade into the following four modes – Cross Border Supply: It includes courses through distance education, online courses through Internet, educational testing services and educational materials that are provided overseas. It will also include sale of paperback editions of books and sale of educational CDs. Consumption Abroad: This refers to import of educational services through movement of the consumers/students to other country for pursuing education. A clear example is that of Indian students studying abroad and spending on educational fees and all related expenses of their stay. Commercial Presence: It means actual presence of an educational service provider of a country in another country. For example, a foreign university may start a school of journalism in India, giving a foreign degree to the students. Movement of Natural Persons: As the title suggests, it involves people moving between countries to provide educational services. Indian teachers going abroad to teach in high schools in US are one such example. Thus, under any of the 20 category-cum-modes of trade in education, India will have to make specific commitments for opening-up, propose changes, and list specific educational services for negotiations. And, while doing this, India must ensure that the safeguard instruments available in the GATS document are credible and enforceable¹⁹.

17 Ibid.

18 Article I(3) (b) (c) of the GATS defined services. "Services" includes any service in any sector except services supplied in the exercise of governmental authority; and "a service supplied in the exercise of governmental authority" means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.

19 <http://www.iimahd.ernet.in/publications/data/2001-10-03SatishDeodhar.pdf>. Last visited on 03.08.2010.

IV. The Foreign Educational Institutions (Regulation of Entry and Operation) Bill, 2010:

The object of the bill is to regulate the entry and operation of foreign educational institutions imparting or intending to impart higher education (including technical education and medical education and award of degree, diploma and equivalent qualifications by such institutions) and for matters connected therewith or incidental thereto. Section 2(e) of the Bill states about foreign educational institution. It means “an institution established or incorporated outside India which has been offering educational services for at least twenty years in the country in which it has been established or incorporated and it offers educational services in India or proposes to offer courses leading to award of degree or diploma or certificate or any other award through conventional method including classroom teaching method not including distant mode in India independently or in collaboration, partnership or in a twinning arrangement with any educational institution situated in India. The Bill has defined the foreign education provider also²⁰. The Bill further mentioned about fee structure²¹.

The main intention of the legislators with regard to this Bill may be to maintain high standard in the higher education as well as to protect the interest of the student community. Any foreign educational institution which intends to impart education in India, shall submit an application, for being recognised and notified as a foreign education provider under this Act, to the Registrar and such application be duly endorsed by the concerned embassy or High Commission in India of the country in which such institution is established or incorporated and has been offering educational services in that country. Provided that a foreign educational institution providing educational services in India before the commencement of the Act, shall apply under this sub-section within a period of six months from the date of commencement of this Act if its application for recognition and notifying as foreign education provider has been rejected²².

It is important to note that no part of the surplus in revenue generated in India by such Foreign Education Provider, after meeting all expenditure in regard to its operations in India shall be invested for any purposes other than for the

20 Section 2(f) of the Bill states that “foreign education provider “means a foreign educational institution notified by the central government, as a foreign education provider, on the recommendation of the commission as an institution competent to impart education in India and to award degree, diploma or any other equivalent qualification (other than in the distance mode) at undergraduate, post graduate, doctoral or post doctoral level.

21 Section 2(d) of the Bill States that “fee” means all fees including tuition fee and development charges, by whatever name called ,payable by the students enrolled for pursuing courses or programmes of study.

22 See, Section 4 of the Foreign Educational Institutions (Regulation of Entry and Operations) Bill, 2010.

growth and development of the educational institutions established by it India. From this point of view it is pertinent to note that every revenue accumulated by the foreign educational provider should be used only for educational purposes only²³. One more important provision under the Bill is an alternative mechanism in case of withdrawal of recognition. In case of withdrawal of recognition and rescission of the notification issued under sub-section (8) of Section 4 in respect of the foreign education provider, the central Government shall, as soon as may be, take such measure as may be necessary to provide alternative and appropriate educational facilities for those students who were enrolled by such foreign educational provider²⁴. The penalty under the Bill is minimum which shall not be less than ten lakh rupees but may extend to fifty lakh rupee in addition to refund of the fee, so collected, to the persons from whom it was collected and confiscation of any gains made out of it²⁵.

IV. I. The pros and cons of The Foreign Educational Institutions (Regulation of Entry and Operation) Bill, 2010:

IV. I. I. The Bill has given complete freedom to the foreign educational institutions to determine the fee structure and admission criteria for students, even absolving them from the constitutionally mandated reservations for socially deprived sections.

IV. I. II. The Bill, in certain extent, will lead to distort the already elitist educational structure in the country and make education more commercial and will only lead to rampant commercialisations of higher education and create enclaves for the elite within the education system, undermining the principles of equity social justice and intellectual self reliance.

IV. I. III. There is every possibility in the Bill in keeping sub-standard foreign institutions at bay was nothing but eyewash, as the Bill Clause 13(1) allowed for foreign institutions that were not even notified as foreign educational providers to offer certificate courses in the country without any regulations provided in the Bill on the basis of criteria such as “reputation” and “International Standing of the Institution”. This provision made the bill a sure recipe for misuse and corruption.

V. Conclusion and Suggestions:

The foreign universities outside India play a major role in the Indian higher

23 See, Section 5(3) of the Foreign Educational Institutions (Regulation of Entry and Operations) Bill, 2010.

24 See, Section 7(6) of the Foreign Educational Institutions (Regulation of Entry and Operations) Bill, 2010.

25 See, Section 8(2) of the Foreign Educational Institutions (Regulation of Entry and Operations) Bill, 2010.

education sector. The thousands of students from India are getting admission in the universities abroad each year. They attract many thousands of Indian students to their campuses each year example 80,466 Indian students enrolled in U.S institutions alone in 2004-05 and at least eight other countries actively recruit Indian Students²⁶. Just imagine what greater opportunities would be available if accredited foreign institutions offered degree programmes in India to expand access to higher education to Indian students. Nowadays the Indian student population is growing at a fast pace and Indian institutions strapped for funds will be hard –pressed to create seats to accommodate the demands. Due to globalisation and technological development and a booming economy in the service sector industry, the time is right to prepare graduates for tomorrow’s careers. Minister of Human Resource Development Mr.Kabil Sibal, concedes that due to lack of policy or regulating regime it was difficult to make meaningful assessment of the operations of the foreign educational institutions. It said the absence of such assessment has given rise to chances of adoption of unfair practices besides commercialisation of higher education in the country²⁷. Mr.Sibal hopes that student aspiring for a foreign degree could earn it in India as a proposed Bill would facilitate the globally –renowned institutes to participate in India’s higher education sector and he further states that this is a milestone which will enhance choices, increase competition and benchmark quality²⁸. Whether the Foreign Educational Bill is populist or not depends on whether caste-based reservation will apply in the matter of student admissions. Every year India sends abroad over 1, 50,000 students for higher education and in the process spends \$ 10-\$ 12 billion that, its true, is a huge amount that deserves to be saved. It is not crystal clear that what the objectives of those universities are. If they want to attract talented Indian youth and set their fees accordingly, they will definitely do well. If their aim, however, is to milk the guilty of India families and admit mostly rich students of inferior ability, they are not likely to do much good. They are also students whose sole interest is to get foreign citizenship. They are likely to continue to go abroad.

An important weakness of the Bill lies in the fact that it does not in any way restrict our student going abroad. That is why it is difficult to say how much foreign exchange the country will save by this process. Another important question is that will these institutions invest in research? If it is not, they will do not much good for us. In case of faculty recruitment, money is not the only criteria which would attract the faculty. A right environment also is very important. It is important to note that so far none of the reputed institutions or universities announced its intention to set up campuses in India. The ones that were interested to enter were

26 www.Amrita.edu/news. Last visited on 02.08.2010.

27 www.hindubusinessline.com. Last visited on 02.08.2010.

28 <http://beta.thehindu.com>. Last visited on 02.08.2010.

teaching shops, whose sole motivation was to make quick profits by offering sub-standard courses that had little academic value. Moreover, it is doubtful that entry of foreign educational institutions will lead to develop the standard in the higher education system in India. Therefore instead of welcoming the foreign educational institutions in to India, its better to provide more fund to existing educational institutions in India, appoint more teaching staffs, scholarship for research activities and establish good infrastructure to maintain the high quality standard from the elementary level to higher education level.