JUDICIARY AS A PROTAGONIST IN REFORMING THE ADMINISTRATION, ADMISSION AND FEE STRUCTURE OF MINORITY EDUCATIONAL INSTITUTIONS IN INDIA

Dr. Sujit Kumar Biswas[1]

Education is a continual growth of personality, steady development of character, and the qualitative improvement of life.[2]

The Supreme Court has explained the meaning of education and educational institutions in *T.M.A. Pai Foundation* v. *State of Karnataka*[3] as-

> The expression "education" in the articles of the Constitution means and includes education at all levels from the primary school level up to the postgraduate level. It includes professional education. The expression "educational institutions" means institutions that impart education, where "education" is as understood hereinabove.[4]

The right to establish and administer educational institutions is guaranteed to all citizens under Articles 19(1)(g) and 26 and to minorities specifically under Article 30.[5] Educational institutions are of different types. They have been classified broadly into Government and Private educational institutions. Private educational institutions have 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.

Prior to 2002, the judiciary was confronted with the question of 'Right to Education'. As a result of the pronouncement of the judiciary that the right to education is a fundamental right, the legislature has been forced to insert 21-A by way of Constitutional (86th Amendment) Act, 2002 wherein it is provided "The State shall provide free and compulsory education for all children of the age of 6 to 14 years in such manner as the State may, by law, determine". Article 45 has also been modified which lays

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1 Assistant Professor, Department of Law, University of North Bengal, Raja Rammohunpur-734013, District Darjeeling, West Bengal

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

3 (2002) 8 SCC 481

4 *Ibid* at 711

5 *Ibid* at 711

down that "The State shall endeavor to provide early childhood care and education for all children until they complete the age of six years".

Inspite of laying down that the right to education is a fundamental right, the judiciary has many a times been confronted with cases relating to the status of minority education and educational institutions, but it has showed its zeal by laying down guidelines and norms to solve the same.

1. Rights of Minorities in establishment and administration of Educational Institutions - The Constitution uses the term 'minority' in Articles 29 and 30 without defining it. The burden was taken up by the judiciary in *Kerala Education Bill, 1957, Re*,[6] wherein the Supreme Court opined that while it is easy to say that minority means a community which is numerically less than 50 per cent, the important question is 50 per cent of what? Should it be of the entire population of India, or of State, or a part thereof? It is possible that that a community may be in majority in a State but in a minority in the whole of India. A community may be concentrated in a part of a State and may thus be in majority there, though it may be in minority in the State as a whole. If a part of a State is to be taken, then the question is where to draw the line and what unit is to be taken into consideration- a district, a town, a municipality or its wards. The Supreme Court did not define the term 'minority' with exact precision at that time.

In *D.A.V. College* v. *State of Punjab*[7] the Supreme Court rejected the contention of the State of Punjab that a religious or linguistic minority should be a minority in relation to the entire population of India. The Court has ruled that a minority has to be determined, in relation to the particular legislation which is sought to be impugned. If it is a State law, the minorities have to be determined in relation to the State population.

The Supreme Court has explained the meaning of minorities in *T.M.A.Pai Foundation* v. *State of Karnataka*[8] as-

> The person or persons establishing an educational institution who belong to either religious or linguistic group who are less than fifty percent of total population of the State in which the educational institution is established would be linguistic or religious minorities.[9]

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6 AIR 1958 SC 956

7 (1971) 2 SCC 269

8 (2002) 8 SCC 481

9 *Ibid* at 598. It was also discussed that the expression "minority" has been derived from the Latin word "minor" and the suffix "ity" which means "small in number" at 592.

Minority institutions can be unaided (which do not receive aid in the form of maintenance grant from the Central government, administration or local authority or any other authority designated by the Central government, administration or a local authority), aided (receiving government aid) and recognised (established and administered by minority communities which seek recognition but not aid from the government). The minorities have been guaranteed a two-fold right by way of Article 30(1) of the Constitution of India. The first right is the right to establish and secondly to administer educational institutions of their choice. This right is concomitant to the right under Article 29.[10]

The Supreme Court discussed the relation between Article 29(1) and 30(1) of the Constitution in *Kerala Education Bill, 1957, Re*[11] as follows-

> Article 30(1) gives certain rights not only to religious minorities but also to linguistic minorities….the right conferred on such minorities is to establish educational institutions of their choice. It does not say that minorities based on religion should establish educational institutions for teaching religion only, or that linguistic minorities should have the right to establish educational institutions for teaching their language only. What the Article says and means is that the religious and linguistic minorities should have the right to establish educational institutions of their choice. There is no limitation placed on the subjects to be taught in such educational institutions. As such minorities ordinarily desire that their children should be brought up properly and be eligible for higher university education and go out in the world fully equipped with such intellectual attainments as will make them fit for entering the public services, educational institutions of their choice will necessarily include institutions imparting general secular education also. In other words, the Article leaves it to their choice to establish such educational institutions as will serve their religion, language or culture and also for the purpose of giving a thorough good general education to their children.[12]

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[10] However, the Supreme Court in *St. John Inter College* v. *Giradhari Singh* AIR 2001 SC 1891 and *P.A. Inamdar* v. *State of Maharashtra* (2005) 6 SCC 537 has held that the minorities rights to manage institutions of their choice is not an absolute one.

[11] AIR 1958 SC 956

[12] *Ibid*. See also *Anjuman-e-Islamiah, Kurnool* v. *State of Andhra Pradesh* AIR 1997 AP 164

The Supreme Court further observed that 'the real import of Article 29(2) and Article 30(1) seems to us to be that they clearly contemplate a minority institution with a sprinkling of outsiders admitted into it. By admitting a non-member into it the minority institution does not shed its character and cease to be a minority institution'.[13]

In *D.A.V. College* v. *State of Punjab*[14] the Supreme Court while reading Articles 29 and 30 of the Indian Constitution observed-

> A religious or linguistic minority has a right to establish and administer educational institutions of its choice for effectively conserving its distinctive language, script or culture, which right however, is subject to the regulatory power of the State for maintaining and facilitating the excellence of its standards. This right is further subject to clause (2) of Article 29 which provides that no citizen shall be denied admission into any educational institution which is maintained by the State or receives aid out of State funds, on grounds only of religion, race, caste, language or any of them. While this is so these two Articles are not interlinked nor does it permit of their being always read together.[15]

The Supreme Court has further clarified in *St. Stephen's College* v. *University of Delhi*[16] that the choice of institution provided in Article 30(1) does not mean that the minorities could establish educational institution for the benefit of their own community people.[17]

In *T.M.A. Pai Foundation* v. *State of Karnataka*[18] a eleven Judge Bench of the Supreme Court has explained and laid down the right to establish and administer contemplated by Article 30(1) of the Indian Constitution as the following:

(a) to admit students;

(b) to set up a reasonable fee structure;

(c) to constitute a governing body;

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13 *Ibid*

14 (1971) 2 SCC 269

15 *Ibid* at 273

16 (1992) 1 SCC 558

17 *Ibid* at 607

18 (2002) 8 SCC 481. Referred in *G. Vallikumari* v. *Andhra Education Society* (2010) 2 SCC 497; *T. Verghese George* v. *Kora K. George* (2012) 1 SCC 369. In *Sindhi Education Society* v. *Govt. (NCT of Delhi)* (2010) 8 SCC 49, it was held that the constitutional intent of Articles 29 and 30 is to bring the minorities at parity or equality with the majority as well as to give them right to establish, administer and run minority educational institutions.

(d) to appoint staff (teaching and non-teaching); and

(e) to take action if there is dereliction of duty on the part of any employees.[19]

It was further held that-

> The right to administer is not absolute, but must be subject to reasonable regulations for the benefit of the institutions as the vehicle of education, consistent with national interest.[20]

In *Islamic Academy of Education* v. *State of Karnataka*[21] the Supreme Court has held that the right engrafted under Article 30(1) of the Constitution does not lay down any limitations or restrictions upon the right of a minority to administer its educational institution, yet the right cannot be used absolutely and unreasonably. It observed-

> Minorities, whether based on religion or language, however, have a fundamental right to establish and administer educational institutions of their choice. The right under clause (1) of Article 30 is not absolute, and subject to reasonable regulations which inter alia may be framed having regard to the public interest and national interest of the country. Regulations can also be framed to prevent maladministration as also for laying down the standard of education, teaching, maintenance of discipline, public order, health, morality, etc.[22]

In *Usha Mehta* v. *State of Maharashtra*[23] the petitioners had challenged the constitutional validity of the policy decision of the Maharashtra State Government whereby Marathi language was made compulsory throughout the schools in the State. As a result, the English-medium schools run by Gujarati linguistic minorities were compelled to teach four languages (Hindi, English, Marathi and mother tongue Gujarati) as against the accepted "three-language formula". The Supreme Court while reiterating the judgment of the Constitution Bench in *D.A.V. College* v. *State of Punjab*[24] and *D.A.V. College* v. *State of Punjab*[25] observed that the right

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[19] *Ibid* at 542. The same has been reiterated in *P.A. Inamdar* v. *State of Maharashtra* (2005) 6 SCC 537 at 599 and *Society for Unaided Private Schools of Rajasthan* v. *Union of India* (2012) 6 SCC 1

[20] *Ibid* at 578. See also *St. John Inter College* v. *Giradhari Singh* AIR 2001 SC 1891

[21] (2003) 6 SCC 697

[22] *Ibid* at 738

[23] (2004) 6 SCC 264

[24] (1971) 2 SCC 261

[25] (1971) 2 SCC 269

of minorities to establish and administer educational institutions of their choice under Article 30 (1) read with Article 29 (1) would include the right to have choice of medium of instruction but observed-

> This exercise of "choice" of instructive language in schools by the linguistic minorities is subject to the reasonable regulation imposed by the State concerned. A particular State can validly take a policy decision to teach its regional language.[26]

In *Brahmo Samaj Education Society* v. *State of West Bengal*[27] the Supreme Court while reading Article 19(1)(g) and Article 26(a) of the Indian Constitution together has held that religious minority have a right to establish and maintain educational institutions but the State can regulate the method of selection and appointment of teachers after prescribing requisite qualification for the same. It observed-

> Independence for the selection of teachers among the qualified candidates is fundamental to the maintenance of the academic and administrative autonomy of an aided institution. The State can very well provide the basic qualification for teachers. Under the University Grants Commission Act, 1956, the University Grants Commission (UGC) had laid down qualifications to a teaching post in a university by passing Regulations. As per these Regulations UGC conducts National Eligibility Test (NET) for determining teaching eligibility of candidates. UGC has also authorised accredited States to conduct State-Level Eligibility Test (SLET). Only a person who has qualified NET or SLET will be eligible for appointment as a teacher in an aided institution. This is the required basic qualification for a teacher. The petitioners' right to administer includes the right to appoint teachers of their choice among the NET-/SLET-qualified candidates.[28]

In *P.A. Inamdar* v. *State of Maharashtra*[29] a seven Judge Bench of the Supreme Court has reconciled the nature and content of Articles 29 and 30 as conferring protection on minorities rather than as a right. While following the judgment in *T.M.A. Pai Foundation* v. *State of Karnataka,*[30] it observed-

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[26] *Usha Mehta* v. *State of Maharashtra* (2004) 6 SCC 264 at 279

[27] (2004) 6 SCC 224

[28] *Ibid* at 229

[29] (2005) 6 SCC 537. Considered in *Indian Medical Assn*. v. *Union of India* (2011) 7 SCC 179

[30] (2002) 8 SCC 481

> No right can be absolute. Whether a minority or a non-minority, no community can claim its interest to be above national interest.[31]

The general principles relating to establishment and administration of educational institutions by minorities has been summarised by the Supreme Court in *Secy., Malankara Syrian Catholic College* v. *T. Jose*[32] as-

(i) The right of minorities to establish and administer educational institutions of their choice comprises the following rights:

  (a) to choose its governing body in whom the founders of the institution have faith and confidence to conduct and manage the affairs of the institution;

  (b) to appoint teaching staff (teachers / lecturers and Headmasters / Principals) as also non-teaching staff, and to take action if there is dereliction of duty on the part of any of its employees;

  (c) to admit eligible students of their choice and to set up a reasonable fee structure;

  (d) to use its properties and assets for the benefit of the institution.

(ii) The right conferred on minorities under Article 30 is only to ensure equality with the majority and not intended to place the minorities in a more advantageous position vis-à-vis the majority. There is no reverse discrimination in favour of minorities. The general laws of the land relating to national interest, national security, social welfare, public order, morality, health, sanitation, taxation, etc. applicable to all, will be equally apply to minority institutions also.

(iii) The right to establish and administer educational institutions is not absolute. Nor does it include the right to maladminister. There can be regulatory measures for ensuring educational character and standards and maintaining academic excellence. There can be checks on administration as are necessary to ensure that the administration is efficient and sound, so as to serve the academic needs of the institution. Regulations made by the State concerning generally the welfare of students and teachers, regulations laying down eligibility criteria and qualifications for appointment, as also conditions of service of employees (both teaching and non-teaching), regulations to prevent exploitation or oppression of employees, and regulations prescribing syllabus and curriculum of

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[31] *P.A. Inamdar* v. *State of Maharashtra* (2005) 6 SCC 537 at 590

[32] (2007) 1 SCC 386

study fall under this category. Such regulations do not in any manner interfere with the right under Article 30(1).

(iv) Subject to the eligibility conditions/qualifications prescribed by the State being met, the unaided minority educational institutions will have the freedom to appoint teachers/lecturers by adopting any rational procedure of selection.

(v) Extension of aid by the State does not alter the nature and character of the minority educational institution. Conditions can be impose by the State to ensure proper utilization of the aid, without however diluting or abridging the right under Article 30(1).[33]

In *Society for Unaided Private Schools of Rajasthan* v. *Union of India*[34], the Supreme Court has clearly stated that regulations may lawfully be imposed either by legislative or executive action as a condition of receiving grant or of recognition. However, the said regulation must satisfy the test of reasonableness and that such regulation should make the educational institution an effective vehicle of education for the minority community or for the persons who resort to it.

The judgments of the Supreme Court and the High Courts is a strategy of implementing the secular aspect as enshrined in the Preamble of the Constitution. The defining of the term 'minority' and the liberal interpretation of Articles 29 and 30 has given some relief to the minorities as well as keeping the communal forces at bay.

2. Admission, Common Entrance Exams and Reservation in Unaided (minority and non-minority) Educational Institutions- The admission of students in the educational institutions at all levels has been a matter of dispute in India although there has been a very steady growth of such institutions in India after independence. The situation has become more complex due to the concentration of admission in the engineering and medical sector. Although the judiciary has recognised the right to equal opportunity in the matter of education but the growth of population has resulted in a wide gap between the aspiring candidates and the availability of seats in many areas.

In *St. Stephen's College* v. *University of Delhi*,[35] exempting St. Stephan's College from the uniform procedure applicable to all affiliated and constituent colleges of the University of Delhi at the under graduate level, the Supreme Court has held admission of students is an important

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[33] *Ibid* at 399-400
[34] (2012) 6 SCC 1; AIR 2012 SC 3445
[35] (1992) 1 SCC 558

facet of administration. It can be regulated, but only to the extent that the regulation is conducive to the welfare of the minority institution or for the betterment of those who resort to it. However, Kasliwal, J., in a dissenting opinion, has expressed the view that-

> Education is a strong factor to unite the country and it was considered necessary that where any educational institution is maintained by the State or receives aid out of State funds then the right of equality was guaranteed to every citizen in the matter of admission in such institution. If the minorities, based on religion or language wanted to run any educational institution without any aid out of state funds, there was no restriction placed upon the minorities in the matter of admission in such educational institutions and they are free to admit students of their own community. But in a case where they were receiving aids out of State funds which money comes from the contributions by way of taxes from every citizen of this country, then such educational institutions run by minorities had to fall in line with all other educational institutions and were not entitled to deny admission to any citizen on the ground of religion, race, caste, language or any of them.
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> We cannot overlook that religious fundamentalism and linguistic parochialism leads to fissiparous tendencies and obstructs the national unity as a whole.[36]

In *Unni Krishnan, J.P. v. State of A.P.*[37] the Supreme Court while laying down merit as the sole criteria of admission observed-

> Admission within all groups and categories should be based only on merit. There may be reservation of seats in favour of the weaker sections of the society and other groups which deserve special treatment. The norms for admission should be pre-determined, objective and transparent.

The concept of Common Entrance Examination has therefore been stressed upon in *Priti Srivastava* v. *State of Madhya Pradesh.*[38] A five-Judge Constitution Bench of the Supreme Court observed-

> A common entrance examination, therefore, provides a uniform criterion for judging the merit of all candidates who come from different universities….The purpose of such a

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[36] *Ibid* at 638
[37] AIR 1993 SC 2178
[38] AIR1999 SC 2894

> common entrance examination is not merely to grade candidates for selection. The purpose is also to evaluate all candidates by a common yardstick….In the interest of selecting suitable candidates for specialized education, it is necessary that the common entrance examination is of a certain standard and qualifying marks are prescribed for passing that examination.[39]

While dealing with the lowering of the minimum qualifying marks for admission to super speciality medical courses in favour of the reserved category candidates, it further held that merit alone can be the criterion for selecting students to the super speciality courses in medical and engineering. It observed-

> At the super speciality levels there cannot be any relaxation in favour of any category of candidates. Admissions should be entirely on the basis of open merit. While the object of 15(4) is to advance the equality principle by proving for protective discrimination in favour of the weaker sections so that they may become stronger and be able to compete equally with others more fortunate, one cannot also ignore the wider interests of society while devising such special provisions. Undoubtedly, protective discrimination in favour of the backward, including Scheduled castes and scheduled tribes is as much in the interest of society as the protected groups. At the same time, there may be other national interests, such as promoting excellence at the highest level and providing the best talent in the country with the maximum available facilities to excel and contribute to society, which have also to be borne in mind. Special provisions must strike a reasonable balance between these diverse national interests.[40]

In *T.M.A.Pai Foundation* v. *State of Karnataka*[41] the Supreme Court, while dealing with the question of admission of students to minority educational institution, whether aided or unaided, made the following observations-

> Admission to students to unaided minority educational institutions viz. schools and undergraduate colleges where the scope for merit-based selection is practically nil, cannot be regulated by the State or University concerned, except

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[39] *Ibid* at 2908
[40] *Ibid* at 2920
[41] (2002) 8 SCC 481

> for providing the qualifications and minimum conditions of eligibility in the interest of academic standards.
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> The right to admit students being an essential facet of the right to administer educational of their choice, as contemplated under Article 30 of the Constitution, the State Government or the university may not be entitled to interfere with that right, so long as the admission to the unaided educational institutions is on a transparent basis and the merit is adequately taken care of. The right to administer, not being absolute, there could be regulatory measures for ensuring educational standards and maintaining excellence thereof, and it is so more so in the matter of admissions to professional institutions.
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> A minority institution may have its own procedure and method of admission as well as selection of students, but such a procedure must be fair and transparent, and the selection of students in professional and higher education colleges should be on the basis of merit. The procedure adopted or selection made should not be tantamount to maladministration. Even an unaided minority ought not to ignore the merit of the students for admission, while exercising its right to admit students to the colleges aforesaid, as in that event, the institution will fail to achieve excellence.[42]

The Supreme Court also accepted that in case of unaided professional institutions, passing of the common entrance test held by the State agency is necessary to seek admission.[43]

While discussing the procedure of admission in private minority institutions, the Supreme Court in *Islamic Academy of Education* v. *State of Karnataka*[44] observed-

> Admission, even of members of their community/language, must strictly be on the basis of merit except that in case of their own students it has to be merit inter se those students only. Further, it the seats cannot be filled up from members of their community/language, then the other students can be admitted only on the basis of merit based on a common entrance test conducted by government agencies.[45]

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42 *Ibid* at 708-709
43 *Ibid* at 709
44 (2003) 6 SCC 697
45 *Ibid* at 727-728

The Supreme Court directed the State Governments to appoint a permanent Committee, headed by a retired Judge of a High Court, in order to ensure that the common entrance test conducted by the association of colleges is fair and transparent.[46]

In *Islamic Academy of Education* v. *State of Karnataka*[47] the Supreme Court while dealing with the some issues relating to the fixation of fee structure by the minority and non-minority educational institutions observed with reference to Article 15 as-

> Clauses (3) and (4) are enabling provisions. The States were to take appropriate steps required therefor within the bounds, that is, limited only for uplifting the weaker sections and not for conferring upon them a preferential right. Reservation can be made, inter alia, by way of compelling State necessity. In any event the executive policy of the State cannot be trust upon the citizens without any valid legislation.[48]

In *Saurabh Chaudri* v. *Union of India*[49] writ petitions were filed involving the question of constitutionality of reservation whether based on domicile or institution in the matter of admission into postgraduate courses in government-run medical colleges. The five-Judge Bench answered in the negative on the question whether reservation on the basis of domicile is impermissible in terms of Article 15 (1) of the Constitution of India. The court was also against the institutional reservation in the present-day scenario. The Supreme Court came to the following conclusions:-

a) In the case of Central educational institutions and other institutions of excellence in the country the judicial thinking has veered around the dominant idea of national interest with its limiting effect on the constitutional prescription of reservations. The result is that in the case of these institutions the scope for reservations is minimal.

b) As regards the feasibility of constitutional reservations at the level of superspecialities, the position is that the judiciary has adopted the dominant norm i.e. "the higher the level of the speciality the lesser the role of reservation". At the level of superspecialities the rule of "equal chance for equal marks" dominates. This view equally applies to all superspeciality institutions.

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[46] *Ibid* at 729
[47] (2003) 6 SCC 697
[48] *Ibid* at 767
[49] (2003) 6 SCC 224

c) As regards the scope of reservation of seats in educational institutions affiliated and recognised by state universities, the constitutional prescription of reservation of 50% of the available seats has to be respected and enforced.

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

e) As regards private non-minority educational institutions distinction between government-aided and unaided institutions. While the Government/State can prescribe guidelines as to the process of selection and admission of students, the Government/State while issuing guidelines has to take into consideration the constitutional mandate of the requirement of protective discrimination in matters of reservation of seats as ordained by the decisional law in the country. Accordingly, the extent of reservation in no case can exceed 50% of the seats. The inter se merit may be assessed on the basis of a common all-India entrance test or on the basis of marks at the level of qualifying examination.

f) The position with respect to minority-aided institutions is that they are bound by the requirements of constitutional reservation along with other regulatory controls. However, the right to admit students of their choice being part of the right of religious and linguistic minorities, to establish and administer educational institutions of their choice, the managements of these educational institutions can *reserve seats to a reasonable extent*, not necessarily 50% as laid down in *Stephens College Case*. Out of the seats left after deduction of management quota, the State can require the observance of the requirement of constitutional reservation.

g) As regards the unaided institutions, they have a large measure of autonomy even in matters of admission of students as they are not bound by the constraints of the demands of Article 29(2). Nor are they bound by the constraints of the obligatory requirements of constitutional reservation.[50]

While discussing the *T.M.A. Pai Foundation* case, the Supreme Court in *P.A.Inamdar* v. *State of Maharashtra*[51] laid down that the unaided

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[50] *Ibid* at 185-186

[51] (2005) 6 SCC 537 Followed in *Federation of A.P. Minoruty Educational Institutions* v. *Admission & Fee Regulatory Committee* (2011) 12 SCC 358; *Modern Dental College & Research Centre* v. *State of M.P.* (2012) 4 SCC 707; *Rajan Purohit* v. *Rajasthan University of Health Sciences* (2012) 10 SCC 770; *Modern Dental College & Research Centre* v. *State of M.P.* (2013) 14 SCC 241

minority and non-minority institutions can legitimately claim unfettered fundamental right to choose the students to be allowed admission and the procedure therefore subject to the confirming of the triple test of being fair, transparent and non-exploitative. It observed-

> There may be a single institution imparting a particular type of education which is not being imparted by any other institution and having its own admission procedure fulfilling the test of being fair, transparent and non-exploitative. All institutions imparting same or similar professional education can join together for holding a common entrance test satisfying the abovesaid triple tests. The State can also provide a procedure holding a common entrance test in the interest of securing fair and merit-based admissions and preventing maladministration.[52]

A two Judge Bench of the Madras High Court relied on *Dr. Preeti Srivastava's case*[53] has held the decision to abolish Common Entrance Test for admission to B.L. Degree course in Tamil Nadu is wholly arbitrary and violates Article 14 of the Constitution of India.[54]

In *Ashoka Kumar Thakur* v. *Union of India*[55], while discussing the validity of the Central Educational Institutions (Reservation in Admission) Act, 2006 (5 of 2007) the Supreme Court observed that the said Act was not intended to provide reservation in "private unaided" educational institutions.

Furthermore, in *Indian Medical Assn.* v. *Union of India*[56], the Supreme Court observed-

> The level of regulation that the State can impose under Article 19 (6) on the freedoms enjoyed pursuant to Article 19 (1) (g) by non-minority educational institutions would be greater than what would be imposed on minority institutions under Article 30 (1) continuing to maintain minority status by admitting mostly students of the minority to which the minority institution claims it belongs to, except for a

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[52] *Ibid* at 604-605. However, in *Modern Dental College & Research Centre* v. *State of M.P.* (2009) 7 SCC 751, the Supreme Court observed a lacunae in the judgment of *P.A. Inamdar* (2005) 6 SCC 537 as it did not indicate any body or institution to decide/supervise whether private unaided educational institutions satisfied the triple test or otherwise.

[53] *Dr. Preeti Srivastava* v. *State of M.P.* AIR 1999 SC 2894. See also *Gulshan Prakash (Dr.)* v. *State of Haryana* (2010) 1 SCC 477

[54] *R. Nirmalkumar* v. *Registrar, T.N. Dr. Ambedkar Law University* AIR 2007 Mad 263

[55] (2008) 6 SCC 1

[56] (2011) 7 SCC 179; AIR 2011 SC 2365

> sprinkling of non-minority students. The critical difference in regulation that would be higher in the case of non-minority educational institutions is that they can only select students from the general pool, and based on merit as determined by marks secured in qualifying examinations. The ability to choose from a smaller group within the same pool, becomes available only to those who are constitutionally protected under Article 30 (1). Even that ability to choose from within the smaller group is not really a right to choose a "source". The source is given. The source can only be the the minority to which the minority educational institution claims it belongs to.[57]

In *Christian Medical College, Vellore* v. *Union of India*[58], the Supreme Court has observed that

> A minority institution may have its own procedure and method of admission as well as method of selection of students, but such a procedure must be fair and transparent and the selection of students in professional and higher educational colleges should be on the basis of merit and even an unaided minority educational institution should not ignore the merit of the students for admission for admission while exercising its right to admit students to professional institutions.[59]

The survey of the above judgments goes to show that the judiciary has played a role to balance the rights of the unaided (minority and non-minority) educational institutions without compromising on merit as the basis of admission in these institutions.

3. Capitation Fee and Fee Structure in Private Educational Institutions (Minority and Non-Minority)-The private educational institutions, in order to meet its requirements charges fees according to their sweet will, at the time of admission. As a result, the courts get flooded with a plethora of cases with regard to fee structure and capitation fee.

Capitation fee means charging amount beyond what is permitted by law.[60] The aspect of capitation fee was fully discussed in *Mohini Jain* v.

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[57] *Ibid* at 228
[58] (2014)2 SCC 305
[59] *Ibid*
[60] *Unni Krishnan, J.P.* v. *State of A.P.* AIR 1993 SC 2178

State of Karnataka,[61] also known as the 'Capitation Fee case'. The Supreme Court held that right to education is a fundamental right and observed-

> The "right to education", therefore, is concomitant to the fundamental rights enshrined under Part III of the Constitution. The State is under a constitutional mandate to provide educational institutions at all levels for the benefit of the citizens. The educational institutions must function to the best advantage of the citizens. Opportunity to acquire education cannot be confined to the richer section of the society.
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> Charging capitation fee in consideration of admission to educational institutions is a patent denial of a citizen's right to education under the Constitution.
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> Capitation fee is nothing but a price for selling education. The concept of "teaching shops" is contrary to the constitutional scheme and is wholly abhorrent to the Indian culture and heritage…
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> Capitation fee makes the availability of education beyond the reach of the poor. 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. [62]

The Supreme Court further observed-

> The capitation fee brings to the fore a clear class bias. It enables 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 whereas the rich can purchase the admission. Such a treatment is patently unreasonably, unfair and unjust. There is, therefore, no escape from the conclusion that charging of capitation fee in consideration of admissions to educational institutions is wholly arbitrary and as such infracts Article 14 of the Constitution….
>
> Capitation fee in any form cannot be sustained in the eyes of law. The only method of admission to the medical colleges in consonance with fair play and equity is by ways of merit and merit alone.

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[61] AIR 1992 SC 1858
[62] *Ibid* at 1864-1866

> We, therefore, hold and declare that charging of capitation fee by the private educational institutions as a consideration for admission is wholly illegal and cannot be permitted.[63]

The correctness of the decision of *Mohini Jain* v. *State of Karnataka*[64] was examined in *Unni Krishnan, J.P.* v. *State of A.P.*[65] The Supreme Court observed-

> Right to free education up to the age of 14 years is a fundamental right. Since fundamental rights and directive principles are complementary to each other, there is no reason why this fundamental right cannot be interpreted in this manner.
>
> It is simply not possibly for the private educational institutions to survive if they are compelled to charge only that fee as is charged in Governmental institutions. The cost of educating an engineering or a medical graduate is very high. All that cost is borne by the State in Governmental colleges but the State does not subsidise the private educational institutions. The private educational institutions have to find their own finances and that can come only from the students.[66]

The majority of the five Judge Bench accordingly held that admission to all recognised private educational institutions, particularly medical and engineering, shall be based on merit, but fifty percent of seats in all professional colleges be filled by candidates prepared to pay a higher fee. There shall be no quota reserved for the management or for any family, caste or community, which may have established such college and 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 requirement of higher fee by payment students.

However the Supreme Court in *T.M.A.Pai Foundation* v. *State of Karnataka*[67] reconsidered and overruled the *Unni Krishnan* case[68] in the aspect of grant of admission and fixation of fee. It observed-

> The private unaided educational institutions impart education, and that cannot be the reason to take away their choice in matters, *inter alia*, of selection of students and

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63 *Ibid* at 1867
64 AIR 1992 SC 1858
65 AIR 1993 SC 2178; (1993) 1 SCC 645
66 *Ibid*
67 (2002) 8 SCC 481
68 *Unni Krishnan, J.P.* v. *State of A.P.* AIR 1993 SC 2178

> fixation of fees. Affiliation and recognition has to be available to every institution that fulfils the conditions for grant of such affiliation and recognition.
>
> 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.
>
> A rational fee structure should be adopted by the management, which would not be entitled to charge a capitation fee.[69]

The Supreme Court agreed with the contention of the private institutions that imposition of condition for grant of affiliation or recognition by statutory authorities destroys the institutional autonomy and the very objective of establishment of the institution.

In *Islamic Academy of Education* v. *State of Karnataka*[70] the Five Judge Constitutional Bench of the Supreme Court tried to remove the doubt/anomalies of the *T.M.A. Pai Foundation case*. It directed the setting up of a Committee headed by a retired High Court Judge for deciding, approving and proposing the fee structure of the educational institutions. Capitation fee and profiteering was also forbidden.

In *Modern School v. Union of India*[71] a federation of parents' association filed a public interest litigation alleging large-scale commercialisation of education due to the fee hike. The court quoted extensively from The *T.M.A. Pai Foundation* case and the *Islamic Academy* case and reiterated that capitation fee and profiteering are forbidden.

Later in *P.A. Inamdar* v. *State of Maharashtra*[72] the Supreme Court observed that–

> Capitation fee cannot be permitted to be charged and no seat can be permitted to be appropriated by payment of capitation fee. "Profession" has to be distinguished from "business" or a mere "occupation". While in business, and to a certain extent in occupation, there is a profit motive, profession is primarily a service to society wherein earning is secondary or incidental. A student who gets a professional degree by payment of capitation fee, once qualified as a

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69 *T.M.A.Pai Foundation* v. *State of Karnataka*(2002) 8 SCC 481 at 539

70 (2003) 6 SCC 697

71 (2004) 5 SCC 583

72 (2005) 6 SCC 537. Relied on in *Cochin University of Science & Technology* v. *Thomas P. John* (2008) 8 SCC 82; *Charutar Arogya Mandal* v. *State of Gujarat* (2010) 13 SCC 420; *Indian Medical Assn.* v. *Union of India* (2011) 7 SCC 179

> professional, is likely to aim more at earning rather than serving and that becomes a bane to society. The charging of capitation fee by unaided minority and non-minority institutions for professional courses is just not permissible. Similarly, profiteering is also not permissible. Despite the legal position, this Court cannot shut its eyes to the hard realities of commercialisation of education and evil practices being adopted by many institutions to earn large amounts for their private or selfish ends. 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.
>
> No capitation fee can be charged.[73]

However, in *Society for Unaided Private Schools of Rajasthan* v. *Union of India*[74], the Supreme Court has observed that *Pai Foundation*[75] case and *P.A.Inamdar*[76] case casts a negative obligation on the private educational institutions in the sense that there shall be no profiteering, no demand of excessive fee, no capitation fee, no maladministration, no cross-subsidy, etc.

As a result of the dynamism of the judiciary and its initiative to make education reach to the poorest section of the community, the private educational institutions (minority and non-minority) are forced to stop profiteering and charging exorbitant fees.

Summing Up

The right to education received an impetus when the Supreme Court in *Mohini Jain* case[77] declared it to be concomitant to the fundamental right enshrined under Part III of the Constitution. Although the right to education was not included in Part III of the Constitution; but the pronouncement of the judiciary that the State is under a constitutional mandate to provide educational institutions at all levels for the benefit of the citizens made the legislature think about the right to education to be included in Part III of the Constitution. The approach of the Supreme Court in *Mohini Jain* case was

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73 *Ibid* at 605
74 (2012) 6 SCC 1
75 (2002) 8 SCC 481
76 (2005) 6 SCC 527
77 *Mohini Jain* v. *State of Karnataka* AIR 1992 SC 1858

accepted by the Supreme Court in *Unni Krishnan* case[78] wherein it was held that that the right to free education up to the age of 14 years is a fundamental right. The right to education as a fundamental right was further upheld and confirmed by the eleven judge constitutional bench of the Supreme Court, while deciding on minority rights in *T.M.A. Pai Foundation* case.[79] The dynamism of the judiciary of holding the right to education as a fundamental right has forced the legislature to insert 21-A by way of the Constitutional (86th Amendment) Act, 2002 wherein it is provided "The State shall provide free and compulsory education for all children of the age of 6 to 14 years in such manner as the State may, by law, determine". Article 45 has also been modified which lays down that "The State shall endeavor to provide early childhood care and education for all children until they complete the age of six years".

The judiciary has read the Directive Principles of State Policy in the light of the Fundamental Rights and has recognised them to be fundamental in matters of governance. This has strengthened Articles 41 and 45 of the Indian Constitution. The laying down of the right to education as a fundamental right[80] by the judiciary has prompted the legislature to insert Article 21A[81] providing for free and compulsory education for all children of the age of 6 to 14 years.

The judiciary has held that the minority rights in establishment and administration of educational institutions under Article 29 and 30 is not absolute. The dynamism of the judiciary has been seen in a series of judgments[82] where the judiciary while protecting the rights of the minorities has allowed education to reach all the classes of people. This is in tune with the concept of a plural society where all cultures and languages must be allowed to flourish. Furthermore, it is in conformity with the secular character of the country which is embodied in the Preamble of the Constitution. It is better if the duality (minority and majority) is permitted only in the area of religion and language and not to other areas.

The judiciary has taken the initiative of 'purifying' education by bringing it within the reach of every section of the society. The yardstick

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78 *Unni Krishnan, J.P.* v. *State of A.P.* AIR 1993 SC 2178

79 *T.M.A. Pai Foundation* v. *State of Karnataka* (2002) 8 SCC 481

80 *Mohini Jain* v. *State of Karnataka* AIR 1992 SC 1858; *Unni Krishnan, J.P.* v. *State of A.P.* AIR 1993 SC 2178; *T.M.A.Pai Foundation* v. *State of Karnataka* (2002) 8 SCC 481

81 The Constitutional (86th Amendment) Act, 2002

82 *Kerala Education, 1957, Re* AIR 1958 SC 956; *D.A.V. College* v. *State of Punjab* (1971) 2 SCC 261; *T.M.A.Pai Foundation* v. *State of Karnataka* (2002) 8 SCC 481; *Islamic Academy of Education* v. *State of Karnataka* (2003) 6 SCC 697; *P.A.Inamdar* v. *State of Maharashtra* (2005) 6 SCC 537

that merit alone can be the guiding factor in case of admission to any educational institution is the brainwork of the judiciary.[83] When merit is considered as the yardstick for admission, common entrance tests plays a vital part. This has also been highlighted by the judiciary in its various judgments.[84] The direction of setting up of a Committee in each State for fixing the fee structure in private educational institutions[85] has dealt a blow to the commercialisation of education in India. The charging of exorbitant fees by the private educational institutions in the name of capitation fees has also been checked[86] due to the dynamism of the judiciary. The net result is that the poor can now afford education which was once considered to be the exclusive domain of the rich.

The question of reservation of the backward classes in any educational institution has been a very knotty socio-political issue from the time of independence. The judiciary was quick to realize this and frame various norms and guidelines by providing for reservation to the socially and economically backward classes after excluding the creamy layer from it.[87] This has achieved a double objective by securing reservation of seats to the needy and at the same time has excluded those who wanted to take the benefit of reservation without being eligible for it. At the same time, the judiciary has sounded a note of caution that in super speciality levels of admission there should not be any reservation.[88] The approach of the judiciary is most welcome as it is a very important step towards maintenance of a semblance of standard in education.

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83 *Unni Krishnan, J.P.* v. *State of A.P.* AIR 1993 SC 2178; *T.M.A.Pai Foundation* v. *State of Karnataka* (2002) 8 SCC 481; *Islamic Academy of Education* v. *State of Karnataka* (2003) 6 SCC 697

84 *Priti Srivastava* v. *State of Madhya Pradesh* AIR 1999 SC 2894; *T.M.A.Pai Foundation* v. *State of Karnataka* (2002) 8 SCC 481; *Islamic Academy of Education* v. *State of Karnataka* (2003) 6 SCC 697; *P.A.Inamdar* v. *State of Maharashtra* (2005) 6 SCC 537

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

86 *Mohini Jain* v. *State of Karnataka* AIR 1992 SC 1858; *T.M.A.Pai Foundation* v. *State of Karnataka* (2002) 8 SCC 481; *P.A.Inamdar* v. *State of Maharashtra* (2005) 6 SCC 537

87 *Indra Sawhney* v. *Union of India* AIR 1993 SC 477; *Ashok Kumar Thakur (8)* v. *Union of India* (2007) 4 SCC 361; *Ashok Kumar Thakur (8)* v. *Union of India* (2007) 4 SCC 397; *Ashok Kumar Thakur* v. *Union of India* (2008) 6 SCC 1

88 *Priti Srivastava* v. *State of Madhya Pradesh* AIR 1999 SC 2894; *A.I.I.M.S. Students Union* v. *A.I.I.M.S.* AIR 2001 SC 3262