COMMERCIALISATION OF HIGHER EDUCATION IN INDIA: THE THRIVING ISSUES AND ITS JUDICIAL REPARATION

Mrs. Priya Roy[1]

I. Introduction

Indian Higher Education comes directly under the purview of the Ministry of Human Resource Development, Government of India. Educational institutions must operate as non-profit institutes set up under a Trust/Society and not merely for 'profiteering'. The Indian Constitution has through Article-21A specifically mandated that it shall be the duty of the Government to impart free and compulsory education among students of six to fourteen years of age and the State must also 'within the limits of its economic capacity and development' make effective provision for securing the right to education, as per Article-41. Article-19(1)(g) provides the right to all citizens to practice any profession, or to carry on any occupation, trade or business in which right to establish an educational institution subjected to reasonable restriction under Article-19(6). Similar educational rights have been expressly laid under Articles-29 and 30 for the minorities with an added advantage to admit students of their 'own choice'. The unavailability of enough governmental funds for higher education added upon by the vision to increase enrollment ratio to 30% by 2020-21 has caused India from the past few decades to experience the mushrooming of private educational institutions, which could either be aided or unaided. The education sector has lately caught the attention of mains Multi-national Companies and the Corporately, experiencing large amount of investments, as the education sector is rescission protected and yields high incentive with comparatively less investment.

II. Commercialisation of Higher Education in India

In pursuance of the various constitutional provisions and precedents there has been a spurt of establishment of educational institutions on commercial basis in the country. The most important issue arising out of the private higher educational institutes is that whether in such institutes there could be any governmental regulations and if so then to what extent? Problem further elevates since the rules for one sect could not be levied upon another sect and such private institutes are further divided into 'Private unaided non-minority educational institute', 'Private unaided professional colleges', 'Private aided non-minority professional institutions', 'Other aided institutes'. Generally, 'commercialisation' of education refers to the

[1] Research Scholar, Department of Law, University of North Bengal

process of private ownership and management of higher educational institutions where investment is made with the intention to earn profit. The judicial pronouncement in the *Unni Krishnan J.P. v. State of Andhra Pradesh,*[2] held that commercialisation of education cannot and should not be permitted while the opinion was partially modified in the *T.M.A.Pai Foundation and Others v. State of Karnataka and Others* [3] by opposing 'profiteering' but to permit 'reasonable revenue surplus' for the development of higher education and expansion of the institute. It was also observed that commercialisation of education arises when the surplus is generated over and above the cost incurred and when the surplus so generated is purely appropriated as the investor's income. Thus it could be observed that there is a necessity to accept reasonable commercialisation, but any kind of hidden personal usage or hidden commercialisation must be controlled.

Commercialisation has always been disfavoured in our country, whether it is by UGC, MCI or the AICTE, such Acts specifically prevents commercialisation in higher educational institutes by laying down conditions for standard higher education. Matter of illegal practice to earn profit came before the High Court of Patna in *Pramila Kumari v. State of Bihar*[4], which on being questioned by the court submitted the counter affidavit where the superintendent of the Nalanda Medical College and Hospital revealed that the admissions in the college were taken on the basis of forged mark-sheets. Observing that there is a gross violation of admission and reservation policies because of which the deserving meritorious students were denied the admission, and the institute was more inclined for making profit than educating was held to be guilty. Taking note of such situation the Court issued two important directions first, to initiate criminal proceedings against the violators and secondly, the State government was also instructed to take stern action against the college authorities including the superintendent.

The need is to provide such a mechanism by which commercialisation could be checked, as well as sufficient incentive be earned by the private investors. In order to control covert and prospect the overted commercialization, it is necessary to undermine the powers and functions of the universities, regulatory agencies and the governments, both at the central as well as at the state level. Important issues arising due to the commercialisation of higher education and its redressal by the judiciary needs to be highlighted so as to undermine the basic regularities and to ascertain the overt law prevalent on such matters.

---

2 AIR 1993 SC 217.
3 (2002) 8 SCC 481.
4 AIR 1994 Pat 1.

II.I. Establishment and Administration

The description of the term 'occupation' is very comprehensive and generic including every species of the genus and encompasses within its ambit all the incidental and direct requirements of one's vocation, calling or business. The right to establish and administer educational institutions is guaranteed to all the citizens, including the minorities as per the Constitution under Article-19(1)(g). The cultural and religious rights of the minorities including right to establish and administer educational institutions are expressly laid down but the controversy arises to regard education as an 'occupation'. It was observed in the *Unni Krishnan case* that education could never be regarded as commerce in India, by considering it such, one is opposed to the ethos, tradition and sensibilities of this nation. Imparting of education has never been treated as a trade or business, rather it has been treated as a religious duty and a charitable activity. Overruling this *dicta* in Unni Krishnan case that the education could never be compartmentalised as a business or occupation within the meaning of the Article-19(1)(g) in T.M.A.Pai Foundation case, the Supreme Court observed that occupation comprehends the establishment of educational institutions. All citizens have a right to establish and administer educational institutions under Article 19(1)(g) and 26. However, this right is subjected to provisions of Articles-19(6) and 26-(a) and thus does not provide the justification of malpractices by the private enterprisers.[5]

In *P.V.G.Raju v. Commissioner of Expenditure*[6], it was observed that the term occupation is of wider import than vocation or profession. Occupation is that with which a person occupies himself either temporarily or permanently or for a considerable period with continuity of activity. There could be any business, profession, vocation or occupation without any profit motive or on 'no profit no loss basis.' The profit making or earning of income is not an essential constituent of any activity to be termed as business, profession, vocation or occupation. It could be asserted that due to judicial interpretation much reformed view has been accepted whereby establishing an educational institution is considered as an occupation but subjected to certain limitations since quality of higher education could not be disregarded at any cost.

Summarising the extent of the minorities' right to establish and administer educational institution the case of *Malankara Syrian Catholic College v. T.Jose*[7] could be herewith highlighted which observed that the right of the minorities comprises (i) the right to choose its governing body, appoint teaching and non-teaching staff and to take action against any

---

5 *Islamic Academy of Education v. State of Karnataka*, (2003) 6 SCC 697.
6 (1972) 86 ITR 267 (AP).
7 AIR 2007 SC 570 at para 17.

dereliction of duty, admit eligible students and set up reasonable fee structure, and to use property for the betterment of the institute; (ii) The right so conferred on minorities is to ensure equality with the majority and not to give any advantageous position to minorities; (iii) Such right of the minorities is neither absolute nor it includes the right to maladminister. There could be regulations made by the State for the benefit of the students and teachers; (iv) Subject to the regulations prescribed, the unaided minority educational institutes have the freedom to appoint teaching staff by adopting any rational appointment method.

II.II. Autonomy and Affiliation

Private unaided educational institutions enjoy greater autonomy in matters of administration including the fixation of fee structure. However such autonomy is not unregulated and must follow the constitutional restrictions. Minority right under Article-30 predicates institutional autonomy but it could not deny the power to the State to frame regulations in the interest of such institutes itself with regard to excellence of standard of education and to check maladministration. Generally autonomy is understood to mean 'self-governance' or functional freedom without any restriction from outside interferences. The most acceptable and reasonable observation was proposed in the Radhakrishnan Commission, 1948 (First Education Commission). It was stated in the Report that higher education is undoubtedly an obligation of the State but aiding should never be confused with the control of the State. Dr. P.B.Gajendragadkar (1971) in the Report regarding the governance of universities pointed that in order that the universities perform their functions it is necessary that the autonomy of such institutes must be untouched and respected by the legislatures and executives.[8] The revised UGC guidelines of 1987 and 2003 suggested that the autonomous colleges should have freedom to determine their own syllabus, admission and reservation rules, evolve teaching methods, conduct examinations and most importantly ensure accountability of the institution. Thereafter, the Yashpal Committee (2009), while advocating the importance of autonomous institutes pointed that governance is necessary for preservation of such institutes, especially in the academic and financial matters.

The next dimension associated with establishment and autonomy of any educational institution is the affiliation or recognition of such institute. No educational institution including private unaided institutes could run if they are not recognized or affiliated by the government or any other appropriate authority whether it is a minority or a non-minority institute. It has been a settled observation that every citizen has a right to establish an

[8] K.K. Bajaj, *Accountability and Autonomy in Higher Education* 97-98 in Veena Bhalla et al. eds., (Association of Indian Universities, 2005).

educational institute as an occupation but it does not connote that there is also any attached right to seek affiliation or the recognition. Clearing the meaning of the terms 'affiliation' and 'recognition' the Supreme Court held in *Bhartia Education Society v. State of H.P.*[9] that 'affiliation' enables and permits an institution to let the students of such institute to participate in the public examinations conducted by the examining body and secure degrees, diplomas or certificates while 'recognition' is the license given to the institution. Thus there are two sets of conditions set for any higher educational institution ie., of the Regulatory Bodies and that of the Examining Body. Another landmark case which settled the arguments related to conditions necessary for the grant of recognition and the position of students studying in any of such non-affiliated or unrecognized institute was laid in *NCTE v. Venus Public Education Society.*[10] After keen scrutiny of the various provisions of the NCTE Act and Regulation it was clarified that the university or the examining body is required to issue affiliation after formal recognition is issued. Without recognition from NCTE and affiliation from the University/affiliating body the educational institution could not admit the students. It was further stated that the institute had the anxious enthusiasm to commercialise education and earn money, forgetting the fact that such act leads to disaster. The petition of the respondent college on the grounds of sympathy for the students is not acceptable and thus admission without any valid recognition/affiliation is held to be invalid. It was further observed that the NCTE should have acted with more promptitude and must not create any feeling of harassment among the educational institutes; objectivity, reliability and trust must be the motto of NCTE and the committees working under it.

In *St. Stephen's College v. The University of Delhi*[11] the Supreme Court observed that the character of the minority educational institutes so established under the Article-30(1) could never be abridged since it possesses a distinct identity of its own. Though reasonable regulations are permissible but these conditions should be of regulatory in nature and not violative of the right so conferred by the said Article. It must be noted that the application of regulations on recognition and affiliation are uniformly applied by the different authorities and the words are used interchangeably but the purpose and meaning of both the terms are different. The judgment of seven-member Bench in the case of *P.A.Inamdar* case gains importance in the regard that it further clarified the rules regarding recognition to a minority higher educational institute. It was stated that regulation accompanying affiliation or recognition must satisfy the four tests: (i) the test of reasonableness and rationality; (ii) it must be conducive in making the

[9] (2011) 4 SCC 527.
[10] (2013) 1 SCC 223.
[11] (1992) 1 SCC 558.

institution an effective vehicle to provide education; (iii) must be directed towards attaining in excellence of education and efficiency of administration; and (iv) the character of the institution must not be abridged.

II.III. Fixation of Fees and Charging of Capitation Fees

'Capitation Fee' according to 'The Higher Educational Institutions (Regulation of Fees) Bill, 2017' under Section-2 (b) means any amount, (by whatever name called), demanded or charged or collected, directly or indirectly, for, or, on behalf of any institution, or paid by any person in consideration for admitting any person as student in such institution; and which is in excess of the fee payable towards tuition fee and other fees and other charges declared by any institution in its prospectus for admitting any person as student in such institution. The question of capitation fee arose for the first time before a two-Judge Bench of the Supreme Court in *Mohini Jain v. State of Karnataka*. By issuing a notification under the Act, the Karnataka Government fixed Rs. 2000/- per year as tuition fee payable by candidates admitted against 'government seats', but other students from the State were to pay Rs. 25,000/- per annum. The Indian students from outside the State were to pay Rs. 60,000/- per annum. The Apex Court quashed the notification and characterised capitation fee as "nothing but a price for selling education" which amounts to commercialisation of education adversely affecting educational standards. Charging of any amount beyond the fees charged by the government in its colleges, was described as capitation fees. The court also characterised such institutions charging capitation fee as "teaching shops". Such a treatment is patently unreasonable, unfair and unjust, therefore, there is 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.[12]

However, later in the *Unni Krishnan case* such contention was argued as an impossible condition since it would not be practically possible for the private higher educational institutes to survive if they charge the same amount what a government institute charges as there is no government subsidy available to private educational institutes. The quantum of fees to be charged must be settled by the concerned private educational institute only. In *T.M.A.Pai case*, the Court drew a reasonable nexus between the fixation of fees by the private unaided educational institutions and the standards maintained by them. The Apex Court opined the *ratio* regarding fixation of fee structure that in the case of unaided private institutions, maximum autonomy has to be with the management with regard to administration including the right of appointment, disciplinary powers, admission of students and the fees to be charged which needs to be rational. After the

[12] (1992)3 SCC 666 at para 19.

judgment of *Pai Foundation* case a Bench of five judges was formed in *Islamic Academy of Education and Another v. State of Karnataka and Others*[13] to clarify the doubts and anomalies raised. Clarifying the stand of reasonable fee structure and harmonising it with the interests of the educational institutions to earn reasonable surplus and to prevent the commercialisation of education, the Court summarised that there can be no fixing of a rigid fee structure by the Government. Educational institutions must be able to fix fees so as to generate surplus and while fixing the fee structure for each institution, the infrastructure and facilities available, the investments made, salaries paid to the teachers and staff, future plan for expansion and/or betterment of the institution etc. must be kept in regard. Later in *P.A.Inamdar and Others v. State of Maharashtra and Others*[14]**,** case the court held that no capitation fee can be charged, directly or indirectly, or in any form. The State can interfere in the matters of fee regulation where it deems fit that the institution is exploiting the students by providing inadequate facilities which is not commensurate to the fee charged. In the name of infrastructure and various facilities to be made available most of the private educational institutions charges exorbitant fees from the students, and in order to evade such a situation formation of 'Fee Regulatory' committees were proposed which would undermine the various factors for fixing the fees of the educational institutes before its academic session.

Prior to the Higher Educational Institutions (Regulation of Fees) Bill, 2017, the Private Professional Educational Institutions (Regulation of Admission and Fixation of Fee) Bill, 2005 was proposed to provide for the regulation of admission and fixation of fee in private professional educational institutions and the matters connected therewith and incidental thereto. Both the bills emphasise that the term 'Fee' means all fees including tuition fee and development charges. The factors which needs to be undermined before fixing the fees by the Fee Regulating Committee are (i) the location of the professional institution, (ii) the nature of the professional course, (iii) the cost of land and building, (iv) the available infrastructure, (v) the expenditure on administration and maintenance, (vi) a reasonable surplus required for growth and development of the professional institution, (vii) the revenues foregone on account of waiver of fee, if any, in respect of students belonging to the Scheduled Castes, Scheduled Tribes and, wherever applicable to the socially and educationally backward classes and other economically weaker sections of the society, to such extent as shall be notified by the appropriate authority from time to time and, (viii) any other relevant factor.[15] Such committees on an application of

---

[13] (2003) 6 SCC at paras 154-156, 159 and 161.

[14] (2005) 6 SCC 537.

[15] The Private Professional Educational Institutions (Regulation of Admission and Fixation of Fee) Bill, 2005, section-9(1).

concerned institutions decides the matter of fixation of fees after going through the various relative factors. None of the higher educational institute whether unaided/aided would be entitled to charge or demand any other fee of compulsory nature from the students including capitation fee in any form or kind.

II.IV. Admission

Another malpractice in question regarding higher education is the admission of the students in such institutes. The basic norm followed for admission is to select the best and meritorious students and if any violation is committed then that would entertain the governmental and judicial regulations. Violation of admission schemes for personal or pecuniary benefits would always act as a hindrance to the objective of achieving excellence in higher education. Malpractices regarding admission, executed by the private unaided higher educational institutions are like admitting students without merit, surpassing the admission norms set by the governing statute of the university or the State, enhancing the number of seats authorized in order to be benefitted or providing quota under the guise of foreign/NRI or management with the intent to admit preferred students.

Issue was also raised regarding the preference given by the minority educational institutes to the candidates belonging to their own community and it was advocated that the minority institutes have privilege over the educational and cultural rights of other sects. It was however observed in the *St. Stephen's College case* that preference given to the students of any specific sect is violative of Article-29(2), such institutional preference given to minority candidates on the ground of religion amounts to Constitutional discrimination which could never be allowed in the guise of right to establish and administer educational institute. Criteria for admission in any educational institute should not be discriminatory and if it is so then the Courts are bound to interfere. After the judgment of the eleven Bench was delivered on 31/10/2002 in *T.M.A.Pai* Foundation case various litigations were filed in Courts thus all the petitions were placed before the Bench of five Judges so that anomalies created may be clarified.[16] It was submitted before the Court that the unaided private institutes had been given complete autonomy not only regarding the admission but also to determine their own fee structure, which could include a reasonable surplus for the purpose of development and expansion and as long there is no charging of capitation fees by the institute there would be no interference by the Government. On the basis of such submission the matter arose that whether private unaided professional college are entitled to fill-in all their seats and if not then to what extent? The majority judgment delivered by *Khare, C.J.* and *Variava,*

[16] *Islamic Academy of Education and Another v. State of Karnataka and Others* at paras 13-19, 36, 196-206.

Balakrishnan and Pasayat, JJ., held that in cases of unaided non-minority professional colleges "a certain percentage of seats" would be reserved for admission by the management and the rest would be filled through counselling by the State agencies on merit basis through the common entrance test (CET) conducted by the State agencies. While in cases of unaided minority professional colleges "a different percentage of seats", since the rights of the minorities under Article-30 could not be abrogated, taking into regard the local needs vis-à-vis the interests of their specific community. Minority professional colleges could admit student of their community under it management quota in preference to student of another community however, while selecting students among their own community *inter se* merit must be ascertained.

Further observing the importance of Common Entrance Examination the Supreme Court in *Preeti Srivastava (Dr.) v. State of M.P.*,[17] opined that in the interest of selecting the suitable candidates it is necessary that standard common entrance examination and its qualifying marks be prescribed. Such act alone would balance the competing equities of having competent students and providing reservation to the backward. It would however be determined by the expert body like the MCI to prescribe the lower qualifying marks for the candidates and also whether it would be uniform for all the students or there would be different marks for the reserved and general candidates. Violating the norms of merit the educational institute admitted students and exercising its power under Article-142, the Supreme Court with the intent to provide equitable justice to the admitted students in the case of *Rajan Purohit v. Rajasthan University of Health Sciences*[18], held that the irregular admission of the 117 students admitted should not be disturbed however some penalty must be imposed on the college as the deterrent measure and thus was ordered to surrender 107 seats to the State Government. The 117 students who were irregularly admitted in the GM College were ordered to pay Rs.3 lakhs each to the State Government and the total amount so received would be spent on the development of infrastructure and laboratories of the government medical colleges.

Thus the norm laid after the various judgments is very simple which provided that private educational institutes whether minority or not could apply their own policy for admission but it must be made the basis of merit. Common entrance examination is the best mode to regulate admission and National Eligibility cum Entrance Test (NEET) is a welcome step towards achieving that. By conducting uniform common entrance exam the unscrupulous and money-minded businessmen operating in the field of

---

[17] AIR 1999 SC 2894.

[18] (2012) 10 SCC 770 at paras 31, 32, 43, 44 and 46.

education would be regulated and the practice of treating education as a 'commercial commodity' by providing seats to less meritorious students in lieu of capitation or donation fees would be constrained. Recently, in *Sankalp Charitable Trust v. Union of India*[19] the common entrance examination (NEET) for medical and dental (graduate and post-graduate) courses were held valid and operative. In order to regulate the malpractice regarding admission in private higher educational institutions the common entrance examination is the best regulation available which must be implemented for all the professional courses unanimously and for other private higher educational institutes uniform admission policies must also be introduced.

II.V. Reservation

Reservation means giving of some special rights, power or privileges to certain specific classes of persons on the ground of 'reasonable classification' with the intent to protect and provide equality so as to remove historical social distortions. Reservation has been awarded as the fundamental right to the classes falling under the criteria under Articles- 15, 16 and 46 of the Indian Constitution. However, certain provisions pertaining to reservation for SEBCs (Socially and Educationally Backward Classes) or SCs/STs regarding admission in educational institutes including private institutions whether aided or not except minority educational institutes and reservation in promotion under Article-15(5)[20] and 16(4A)[21] has been widely criticised. Treating reservation as a constitutional mandate the Supreme Court in the case of *Ashok Kumar Gupta v. State of Uttar Pradesh*[22] observed that though the policy of reservation is part of socio-economic justice laid down under Articles- 14, 15(4), 16(1), 16(4), 16(4A), 46 and 335 but still it is not a fundamental right, reservation policy is actually the obligation of the State to follow by treating everyone equal which does not create any corresponded individual's right in favour of the members of the beneficiary groups.

Reservation to the deserving reserved category students is a necessity, however the creamy layer among the backward class needs to be excluded from claiming any kind of reservation since they are socially and educationally advanced enough to compete for the general seats with other candidates. One of the landmark cases regarding the reservation policies in super-specialty educational institutes is the case of *Preeti Srivastava (Dr.) v.*

---

19 Writ Petition (Civil) No. 261/2016.

20 Inserted by the Constitution (Ninety-third Amendment) Act, 2005.

21 Inserted by the Constitution (Seventy-seventh Amendment) Act, 1995 and substituted by the Constitution (Eighty-fifth Amendment) Act, 2001 having retrospective effect from1995.

22 (1997) 7 SCC 201.

State of M.P.[23] where by majority judgment it was observed that in the interest of selecting suitable candidates for specialized education it is necessary that the common entrance test and the qualifying marks are prescribed. Generally the passing marks for passing any examination must be uniform for all categories of students however, it is for the expert body like MCI to ascertain that the qualifying marks for post-graduation for reserved category be different from the general category students. Even if there is special provision for the SC/ST candidates regarding minimum qualifying marks, it needs to be at minimal difference from the general category students. In this case the disparity of qualifying marks was 20% for reserved category and 45% for the general category which was held not to be sustainable. If reserved seats remains unfilled for any academic session then it must be retrieved back to the meritorious students of general category, rather than lowering the qualifying marks for reserved category students. Later the SC while discussing institutional reservation observed in *AIIMS Students' Union v. AIIMS*[24] that the basic rule is 'equality of opportunity' which is a constitutional guarantee being applicable to every person in the country. Merit alone must be the test to choose the best candidate and be followed in every level of education, especially higher education courses. However reservation is an exception to the rule of merit justifying the educationally handicapped classes so as to remove any regional or class inadequacy, but even there the quantum of reservation should not be excessive. Upholding and further clarifying the observation made by the SC in the T.M.A.Pai Foundation case, this court reiterated that the State cannot regulate admission in any private unaided professional educational institute, since it would lead to nationalization of seats which could not be approved.[25] The framing and insertion of Article-15(5) through 93rd Amendment effective from 2005 was to forestall the above judicial pronouncements since it expressly provides for reservation of SCs/STs and SEBCs in case of admission to educational institutes including the private institutes whether aided or unaided, other than minority educational institutes.

The 93rd Amendment Act of the Constitution and the validity of the Central Educational Institutions (Reservation in Admissions) Act was challenged in the case of *Ashoka Kumar Thakur v. Union of India.*[26] Speaking for the majority judgment *Balakrishnan, C.J.* observed that reservation is one of the tool used for promoting equality to the disadvantaged groups and the State must also take positive steps to remove

---

[23] AIR 1999 SC 2894 at paras 26, 29, 32, 58 and 59.

[24] AIR 2001 SC 3262.

[25] *P.A.Inamdar and Others v. State of Maharashtra and Others*, at paras 110, 124 to 129 and 132.

[26] (2008) 6 SCC 1.

the barriers of inequality. Articles-15(4) and 15(5) are designed to provide educational, economical and social opportunities to those who are lagging and once progress is achieved such benefit could not be further availed since it would result in reverse discrimination. Further regarding the 27% reservation for OBCs it was held to be valid since such quantum has been fixed by the Parliament depending upon the facts available and the burden of disproving such fact lies with the petitioners who were not able to do so. However *Bhandari, J.,* forming the minority view stated that the intention of our forefathers was to form a casteless and classless society and the principle of reservation is a hurdle in achieving that and further opined that the 93rd Amendment is unconstitutional so far as private educational institutes are concerned.

Reservation policies does not only incorporates privilege for SCs/STs, OBCs but could also be made on the basis of gender, physically handicapped, defence personnel, domicile or institutional, by the Government the total of which cannot be more than 70%-80%. With the intent to regularize the reservation in admission to the central educational institutes, *The Central Educational Institutions (Reservation in Admission) Act, 2006* with amendment in 2010 was enacted, based on which the different States also passed its respective state laws governing the same subject matter. The object of the Act is to provide for the reservation in admission of the students belonging to the SCs, STs and OBCs but its application is only on the central educational institutes, maintained or aided by the central government, though the Act is silent regarding the reservation policies in private unaided institutes and is not applicable in case of institutes of national importance and a minority educational institute.

II.VI. Teachers

For maintaining educational standards in any educational institute, it is necessary that the institute must be adequately and competently staffed. Conditions of service which prescribe minimum qualifications required for the appointment, pay scales, other benefits available and the safeguard measures require to be followed before the removal or dismissal from the service are some of the regulatory measures applicable over the educational institutes but the problem arises in case of private unaided and minority educational institutes since such institutes enjoy autonomy in administrative matters thus there arises certain malpractices which in absence of any concrete enactments are judicially redressed. Merely because the petitioners were receiving aid the autonomy in administration of the institute cannot be totally restricted and treated as equivalent to government educational institute however State could impose certain minimum standards so as to check maladministration. The State prescribes minimum qualification for appointment and the method for appointment of teachers into any educational institute. Under the UGC Act qualifications required for the

appointment of the teachers has been prescribed by way of regulations passed, according to which National Eligibility Test (NET) and State-level Eligibility Test (SLET) are conducted to determine the teaching ability of the candidates. Candidates who clear the test are eligible for appointment and from such short-listed candidates, the petitioner institute holds the right to appoint teachers of their choice, which cannot be regulated.[27]

UGC passed *UGC (Minimum Qualifications for Appointment of Teachers and other Academic Staff in Universities and Colleges and Other Measures for the Maintenance of Standards in Higher Education) Regulations, 2010* where it has been expressly mentioned that if any institute contravenes with the regulations laid then the UGC could withhold the grants proposed from its fund. It has been further provided that the faculty members must be recruited directly on the merit basis through all India advertisement and selections be made by the duly constituted Selection Committees, having minimum qualification of 55% at the master's level and must have qualified National Eligibility Test (NET) or SET/SLET with the exception of those who have been awarded Ph.D. Degree in accordance with 2009 UGC Regulations for the appointment of Assistant Professors. The matter regarding the appointment of the Principal in a law college came before the Court in *Bar Council of India v. Board of Management, Dayanand College of Law*.[28] The U.P. Higher Education Services Commission Act, 1980 provided that only such candidate could be appointed as the principal of the law college affiliated to the university who is duly qualified in law. It was finally held that such restriction for the appointment would be in the interest of the students and should be construed harmoniously with the BCI Rules and the Advocates' Act. Appellant possessing Master's degree and Ph.D. in Political Science was selected for the post of Reader in Public Administration and the appointment was thus challenged.[29]

The appointment of the staff especially the teaching staff must be made in accordance to the affiliating university and the statute. In *Jagdish Prasad Sharma v. State of Bihar*[30] UGC with the intent to enhance pay scale and superannuation age from 62 to 65 years in the Central Universities/ educational institutions framed the scheme, which was questioned while regarding its extent upon State universities, colleges and other educational institutes. It was held that the State Government are at liberty to frame its own laws relating to education but where the State decides to follow the

---

[27] *Brahmo Samaj Education Society v. State of West Bengal*, (2004) 6 SCC 224 at paras 6 and 7.

[28] AIR 2007 SC 1342.

[29] *Rajbir Singh Dalal (Dr.) v. Chaudari Devi Lal Unversity*, (2008) 9 SCC 284.

[30] (2013) 8 SCC 633.

central UGC scheme or regulations then it has to abide by the stipulated conditions laid. The scheme/regulations would not be automatically applicable in a state unless the State Government takes the decision with its attached financial implications but if the scheme is adopted then all the consequences will be automatically followed.

The fear of the teaching staff for being terminated at several occasions fosters discipline among them however, unregulated or irregular termination of services is against the law of equity and good conscience. In *Yunus Ali Sha v. Mohd. A. Kalam*, the power to terminate the academic staff at the minority educational institute was questioned and the Court held that appointment and termination of teachers is an important aspect of the educational rights of minorities which is exercised under the Article-30(1). The provision does not have any *non obstante* clause thus the Constitutional power conferred to minorities would never be eclipsed by the said Article, therefore minority educational institutes have the power to terminate but it should not be interpreted so as to be indiscriminately, arbitrary or unreasonably applied.[31] It could finally be concluded regarding the appointment of teachers and their termination that the private educational institutes enjoy more autonomy than the government educational institutes. However, certain minimum standards must be followed by the institutes so as to provide better working conditions for the faculty member which would ultimately benefit the students and the institutes itself.

III. Conclusion and Suggestions

It is apparent that the best universities in India are public and it is also emerging that the smartest universities are privately funded but unfortunately with a few exceptions none of them rank in the global ranking of universities. It would be a wrong statement to presume that all the private higher educational institutes elucidates 'commercialisation' and are running with the sole intention for 'profiteering' as there are some of the renowned institutes which being private have international standards and are not connected with profit-making like, Indian Institute of Science, Bangalore; Birla Institute of Technology and Science, Pilani; Banaras Hindu University; Dayanand Anglo Vedic; St.Xavier; St.Stephen's, IIIT, IITs and IIMs. In higher education, we have three choices: first we can have a government-dominated system where education is subsidised; secondly, we can allow private universities and colleges to come up with the freedom to charge whatever the students can bear and thirdly by allowing private institutions' to be established with reasonable restrictions and by making provisions for subsidising needy students.

[31] AIR 1999 SC 1377.

The basic notion that has to be borne in mind while forming any statute or imposing any regulation on such institutions is that education is a charitable occupation, in which the private players are allowed to earn profits but not to profiteer, i.e. to make unreasonable or excessive profits. A workable formula, which is not rigid in nature, needs to be formulated so that the institutions can be allowed to earn reasonable surplus, taking into consideration the nature of the course. The objective is not only to fix a reasonable fee structure vis-à-vis educational institutions, but also that the students must get commensurate facilities and quality education in exchange of the fee paid by them. Reservation on caste basis must be denied, especially at the super speciality level even for SCs/ STs/SEBCs. 'Institutional reservation' may be provided by private higher educational institutes on the principle of intelligible differentia but all the seats in higher education whether reserved or not must be fulfilled by implementing the basic principle of *inter se merit*, since merit cannot be compromised. In order to provide equitable and socio-economic justice the backward classes be provided aiding in education and subsidy in chargeable fees but not at the cost of qualitative education by providing reservation to less deserving candidates. Regulations regarding NEET must be clarified without the exception of any state and in order to achieve such uniformity it is necessary that syllabus for the entrance examination must be centralised and the curriculum of elementary and higher secondary education be reformed. Educational institutes with 'for profit' motive be accepted which would have full autonomy on all the matters and not be interfered with by the government in academic or administrative matters but accreditation of the courses conducted must be compulsorily made to ensure the interests of all the stakeholders. Most importantly it is high time that the regulatory bills which are pending in the Parliament be passed immediately with the required amendments having uniform application on all private higher educational institutes whether aided or unaided, minority or non-minority.