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Higher Education in India: The Legal Conundrum

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Abstract:

Abstract: In the recent times and into the foreseeable future, it is hard to overemphasize the significance of education, and specially higher education, to the economic and social advancement of the country. The Indian higher education system is facing an unprecedented transformation in the coming decade. This change is being driven by economic and demographic change. India has been trying to reform its higher education system for more than a half-century but the results in terms of systemic change have been minimal. The paper shall examine the role of the judiciary in being crucial to the regulatory landscape of Indian higher education and argue that it an important actor shaping the regulatory landscape of higher education, but in a manner that has done as much to confound as clarify. It shall analyze some important cases decided by the Hon'ble Court. It highlights that the Courts have been giving inconsistent and confusing judgments shifting its position from suspecting private sector to the recognition of the present reality and there is reason to believe that educational jurisprudence of the Supreme Court has been influenced by globalization.

Keywords: *Higher Education, education, supreme court of India, globalization.*

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THE COURTS have played a proactive role in shaping the private higher education in the country. Ever since early nineties till date, the Supreme Court have been giving differing and confusing opinion, shifting its stand from suspecting private sector to the recognition and acceptance of the present reality.[1]The impact of globalization has been a major issue of debate in the last decade and a half. The wellknown Spanish social scientist Manuel Castells, one of the principal authorities on globalization says, "The effect of globalization on the university will be more drastic than on industrialization, urbanization and secularization combined. It is the biggest challenge the university has faced in more than a century and a half." There is reason to believe that educational jurisprudence of the Supreme

Court has been influenced by globalization.[2]

In 1992, the Supreme Court, in its judgment in *St. Stephens* v. *University of Delhi*[3] ruled that "educational institutions are not business houses; they do not generate wealth." Later in the landmark judgment of *Unni Krishnan v. State of Andhra Pradesh*[4] in 1993, the Supreme Court revisited the right of the State to interfere in the admission policy and fee structure of private professional institutions. It held that education, being a fundamental right, could not be the objective of profit-seeking activity. The Court ruled that the capitation fee is patently unreasonable, unfair and unjust, and unconstitutional and thus it practically banned high fee charging private colleges, popularly known as capitation fee colleges. The Supreme Court argued that all private colleges would be subject to the constraint that education cannot be the object of "profiteering" and the fee structure should be compatible with the principles of "merit and social justice alike." It further held that reservation of at 50% of the seats in private colleges to be filled by the nominees of the government or the university as 'free seats' on the basis of merit with a fee structure prescribed for government institutions. It called for a common entrance test and the appointment of a committee to fix the fee structure for the rest of the 50% that could meet all the expenditure, including that of the fee seats, plus leave some profit to the management and the like. This judgment facilitated the growth of the capitation fee colleges in the name of 'self-financing' colleges.[5] However, the loot of the students continued blatantly.

In its ruling, the judgment opined that:

> "Education has never been commerce in this country. Making it one is opposed to the ethos, tradition and sense of this nation. The argument on the contrary has an unholy ring to it."[6]

"The state says that it has no funds to set up institutions of the similar level of excellence as private schools. But by restricting the income of such private schools, it immobilizes these schools from affording the best amenities because of a lack of funds. If this lessening of standards from quality to a level of mediocrity is to be avoided, the state has to afford the difference, which, consequently, brings us back to a vicious circle to the original problem, viz, the deficit of state funds. The only way out would appear to lie in the states not using their scarce resources to support institutions that are able to otherwise sustain themselves out of the fees charged, but in improving the facilities and infrastructure of state-run schools and in subsidizing the fees payable by

[1] Devesh Kapu and Pratap Bhanu Mehta, *Indian Higher Education Reform: From Half-Baked Socialism to Half-Baked Capitalism* (2004) (Working paper no.108, Centre for International development at Harvard University).

[2] K.N. Panikkar and M. Bhaskaran Nair, *Globalization and Higher Education in India* 158(Pearsons Publications, New Delhi, 2012).

[3] *St. Stephens* v. *University of delhi*, AIR 1992 SC 1630.

[4] *Unni Krishnan* v. *State of Andhra Pradesh*, AIR 1993 SC 217.

[5] Vijendra Sharma, "Indian Higher Education: Commodification and Foreign Direct Investment" *available at:* http://cpim.org/marxist/200702_marxist_v.sharma_edu.pdf (Visited on 29th April, 2014).

[6] *Supra* note 4 at para 216.

the students there. It is in the interest of the general public that more good schools are established, autonomy and non-regulation of the school administration in the right of appointment, admission of the students and the fee to be charged will ensure that more such schools are established."[7]

If anything, this ruling only established the unholy lack of precision and clarity in the court itself. Its remedy for admissions and fees was deeply blemished and mirrored the entrenched habits of India's intellectual elite. The best of intentions thus resulted in condescending sentiments that had little to do with realism or the behavioral consequences of a law.[8]

In 2002, a majority of an eleven-judge Constitution bench of the Supreme Court, in *TMA Pai Foundation v. State of Karnataka*,[9] while upholding the principle that there should not be capitation fee or profiteering, argued that "reasonable surplus to meet the cost of expansion and augmentation of facilities, does not however, amount to profiteering."[10] It observed that, "There has been a significant change in the way higher education is perceived."[10]

Private education is one of the most dynamic and rapidly growing segments of post-secondary education at the turn of the twenty-first century. An amalgamation of unparalleled demand for access to higher education and the inability or reluctance of government to provide the necessary support has brought private higher education to the vanguard. Private institutions, with a long history in many countries, are intensifying in capacity and quantity, and are becoming gradually more significant in parts of the world that relied more or less exclusively on the public sector.[11]

Not only has demand besieged the capability of the governments to provide education, there has also been a momentous change in the way that higher education is perceived. The idea of an academic degree as a "private good" that benefits the individual rather than a "public good" for society is now widely acknowledged. The logic of today's economics and an ideology of privatization have contributed to the renaissance of private higher education, and the establishing of private institutions where none or very few existed before.[12] The judgment makes three statements to support this as if they are universal truths. [13]

i. The idea of an academic degree as a private good that benefits the individual rather than a 'public good' for the society is now widely accepted.
ii. The logic of today's economics and the ideology of privatization have contributed to the resurgence of private higher education.
iii. It is well established all over the world that those who seek professional education must pay for it.

This is the gospel of globalization for education in which the Hon'ble judges apparently have great faith.[14] Education is per se regarded as an activity that is charitable in nature. Education has not so far been treated as a trade or business where profit is the motivation. Even if there is any uncertainty about whether education is a profession or not, it does appear that education will fall within the meaning of the expression 'occupation'.[15] Hence, the Constitutional Bench of the Supreme Court for the first time decided that there is a fundamental right to establish educational institutions under article 19(1) (g) in effect treating education as a trade and legitimizing commercialization of education which had already begun. This marks a fundamental shift in the understanding of a

[7] note 1 at 20.
[8] *Supra* note 1 at 18.
[9] *T.M.A.Pai Foundation & Ors* v. *State of Karnataka & Ors*, (2002) 8 SCC 481. 10
Id at para 69.
[10] *Supra* note 9 at 48.
[11] *Ibid.*
[12] *Supra* note 9 at para 49.
[13] note 2.
[14] *Ibid.*
[15] *Supra* note 9 at para 20.

fundamental right. This has become a virtual license for commercialization of education.[16]

The majority of an eleven judge constitution bench of the Supreme Court in *Pai Foundation* case, the verdict of the review (given by Justice Kirpal) found the Unnikrishnan judgment to permit intervention in private professional institutions in an unreasonable manner. In this judgment also the court acknowledged the function of private initiatives and observed that "the State with its limited resources and slow moving machinery is unable to fully develop the genius of the Indian people." The court ultimately held: "we hold that the decision in *Unnikrishnan*'s case, insofar as it framed the scheme relating to the grant of admission and the fixing of the fee, was not correct, and to that extent, the said decision and the consequent directions given to UGC, AICTE, Medical Council of Indian Central and State Governments, etc., are overruled."[17] While endorsing the opinion that there should not be capitation fee or profiteering, argued that 'reasonable surplus to meet the cost of expansion and augmentation of facilities, does not however, amount to profiteering'. It further said that putting a ceiling on fees and admission proposed in the Unnikrishnan case prohibited accretion of 'reasonable surpluses'. Also, it violated the right of private, unaided institutions to set their own criteria of admission, etc.[19]

The Court in *Pai Foundation* case observed that the *Unni Krishnan* judgment has created certain tribulations, and raised thorny issues. In its apprehension to check the commercialization of education, a scheme of "free" and "payment" seats was developed on the supposition that the economic competence of first 50% of admitted students would be greater than the remaining 50%, whereas the contrary has proved to be the reality.[18]

The decision had a comprehensive dialogue extolling private enterprise in education as "one of the most dynamic and fastest growing segments of post-secondary education for which 'a combination of circumstances and the inability or unwillingness of government to provide the necessary support are responsible." This became the court's validation for preventing and restricting the state from intruding in the running of private institutions. It cited the 1948 Radhakrishnan Commission, which had cautioned that the exclusive control of education by the state was a formula for 'totalitarian tyrannies' and warns against 'bureaucratic or government interference" that could destabilize the independence of all private unaided institutions but left a vague picture as to how these institutions could be held to account from taking advantage of students, staff and faculty.[19]

The judgment had quite a few anomalies obligating a clarification issued by the Constitutional bench in *Islamic Academy of Education v. State of Karnataka*.[20] It deliberated on two divergent questions: first the educational rights of religious minorities in comparison to the majority; and, second, the liberty available to private, unaided institutions. Although the *Pai Foundation* case settled some of the issues, it gave rise to new issues that gave new twist to old issues. What followed *Pai Foundation* judgment is a very inquisitive development of interpretation and elucidation of the judgment by smaller constitutional benches.[21]

The judgment of the *Islamic Education and another v. State of Karnataka and others*, 2003, said "After the delivery of the 11- judge Bench on 31st October, 2002 in T.M.A. Pai Foundation case, the Union of India, various State governments and educational institutions understood the majority decision in diverse perspectives. Different statues/regulations were enacted/framed by different State governments. This led to litigation in several courts. While these matters came up before a Bench of the Supreme Court, the parties

[16] *Supra* note 2 at 162.

[17] K.D. Raju, "Private Initiatives in Higher Education: Enabling Legislations, Regulations And Judicial Interpretations in India", *available at:* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=813246 (Visited on 12 April, 2014) 19 *Ibid.*

[18] note 9 at para 37.

[19] *Supra* note 1 at 20.

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

[21] Ninan Koshy, "Implications of a Landmark judgment for Higher Education and Minority Rights" in K.N. Panikkar and M. Bhaskaran Nair (eds.) *Globalization and Higher Education in India* 163 (Pearsons Publication, New Delhi, 2012). 24 *Ibid*

to the writ petitions and special leave petition endeavored to interpret the majority judgment in their own way as appropriate them and therefore at their request all these, matters were placed before Bench of five judges. Under these circumstances, the present Constitution Bench of five judges was entrusted so that doubts/anamolies, if any, could be clarified."[24]

The judgment of the *Islamic Education* case did find some incongruity and inconsistency in the *Pai* case and found that the course of interpretation necessitated rewriting of some segments of the judgment, however little.[22] In the *Islamic Academy* case the Supreme Court interpreted the *T.M.A. Pai* judgment as having declared that unaided professional institutions are entitled to freedom in their administration, but at the same time they should not relinquish or abandon the principle of merit. Secondly, it held that in unaided non-minority professional colleges a certain percentage of seats might be reserved by the management for students who had passed the Common Entrance Test held by itself or by the state/University, while the rest of the seats might be filled up on the basis of counseling by the state agency. Thirdly, the Bench suggested that unaided professional colleges must also make proviso for students from the poorer and backward sections of society. It said the government could recommend the percentage of seats according to local needs, and different percentages could be fixed for minority and non-minority institutions.[23]

In 2005, the seven-judge bench of the Supreme Court in the *P.A. Inamdar &Anr. v. State of Maharashtra*[24] held that States have no power to carve out for themselves seats in the unaided private professional educational institutions; nor can they compel them to put into practice the State's policy on reservation. It added that every institution is free to devise its own fee structure; but profiteering and capitation fee are banned. A Committee headed by a retired judge was proposed to act as a regulatory measure aimed at protecting the interests of the students. However, the Court allowed up to a maximum of 15% of the seats for the NRIs. This was a virtual authorization of giving a legal validity for converting education into product that can be sold in the market to those who can pay for it.[25]

Even though judicial pronouncements persist to refer to education as a charitable venture as a mantra, the Constitution Bench in *T.M.A. Pai Foundation* case unequivocally placed the right to found educational institutions under Article 19 (1) (g). Although the Court mainly deals with as 'occupation', the explanation and context easily extend it to 'trade, business or profession'. The *Inamdar* verdict makes this apparent.

> 'Education used to be (emphasis added) a charity or philanthropy in the good old times. Gradually it became an occupation. Some of the judicial dicta go on to treat it as an industry.'[29]

TMI Pai judgment later reinforced by '*Inamdar'* is virtually a *magna carta* for entrepreneurs in the field of education. It is more of a 'policy framework' proposed for those desire to set up private professional colleges. The policy is so far-reaching open, which an ultra rightist government would be troubled to bring in. Although it appeared that eleven judges agreed on rights of majority and minority to 'establish and administer' educational institutions on their free will and choice, providentially some

paragraphs of *TMA Pai* also gives an inkling that the education sector was not entirely decontrolled from states. While rest of the part of the judgment liberalized the education sector, paragraph 68[26] of

[22] note 23.
[23] V. Venkatesan, "Turning the Clock Back", 22(8) *The Frontline* 24 (2005).
[24] *P.A.Inamdar* v. *State of Maharashtra*, AIR 2005 SC 3226.
[25] Vijendra Sharma, "Commercialization of Higher Education" 33(9/10) *Social Scientist* 69 (2005). 29 note 23 at 167.
[26] Para 68 "It would be unfair to apply the same rules and regulations regulating admission to both aided and unaided professional institutions. It must be borne in mind that unaided professional institutions are entitled to autonomy in their administration while, at the same time, they do not forgo or discard the principle of merit. It would, therefore, be permissible for the university or the

the judgment put a ceiling on it. Opposing to the universal idea of deregulation contained in the ruling, paragraph 68 talked about the State and its powers to regulate. Novices who read the judgment became mystified and so did the judges. The judgment equally strengthened together the school of thoughts so to say, pro liberalization and pro regulation. To address this perplexity, Chief Justice Khare and four judges sat in Constitution Bench, and attempted to explain the ratio of *TMA Pai*, and that is how we got the Constitution Bench decision in *Islamic Academy* case. Five Judges, found something more reasonable in para 68 of *TMA Pai* and brought in policy for conducting examinations and collection of fee. Proponents of *TMA Pai* interpreted *Islamic Case* as if an attempt by Five Judges to overrule Eleven Judges of *TMA Pai*. The confusion sustained and to end with the same, Chief Justice R.C. Lahoti constituted a Seven Judge Bench, popularly known as *Inamdar* case, to clarify *TMA Pai* once more. *Inamdar* just bolstered *TMA Pai* philosophy, removing 'impure paragraphs' which discussed about state control![27]

What does this epigrammatic history of the intervention of courts tell us? A couple of points stand out. *First*, the Courts have previously been hesitant of private enterprise in education. There is a resentful recognition of its existence, but the court is still trying to bring together it with some formal equality in the admissions procedure. *Second*, the Courts interference is more about procedural facet of equality. They do very little to facilitate higher education to be more widely accessible or have little impact on quality. *Third*, there is an overemphasis of anxiety about professional education in medicine and engineering, even though the majority of students are enrolled in traditional Science and Arts courses. *Finally*, there is an unusual public-private divide that the Courts have also reinforced, and this split can be understood in terms of levels of user charges. By and large, the Courts, like the government, are unenthusiastic to authorize fees hikes in public institutions (even based on the proposal that university fees be pegged at least to the level of fees paid in high schools). The courts themselves have contributed to the very financial problems of public institutions – which they now want the private sector to restore! [28] One of the inquisitiveness in all this is that while the secondary school sector has been left abounding with freedoms (although decisively speaking that is also a non-profit sector). Higher education is regarded as an area where a formal standard of equality of opportunity is most robustly asserted. We call this principal "formal" because it upholds the justifiable idea that capacity to pay should not determine access to institutions. But the mode in which this principle is applied ensures that sufficient resources will not be mustered for increasing the quality and quantity of education and that *de facto* inequality in education will augment, because private spending outside regular institutions greatly determines future prospects. It is difficult to see what logic of political economy determines the Courts interventions. With all due respect to their Lordships, it is fair to say that the Court's contribution to higher education has been more confusion than clarity.[29]

government, at the time of granting recognition, to require a private unaided institution to provide for merit-based selection while, at the same time, giving the Management sufficient discretion in admitting students. This can be done through various methods. For instance, a certain percentage of the seats can be reserved for admission by the Management out of those students who have passed the common entrance test held by itself or by the State/University and have applied to the college concerned for admission, while the rest of the seats may be filled up on the basis of counselling by the state agency. This will incidentally take care of poorer and backward sections of the society. The prescription of percentage for this purpose has to be done by the government according to the local needs and different percentage can be fixed for minority unaided and non-minority unaided and professional colleges. The same principles may be applied to other non-professional but unaided educational institutions viz., graduation and post-graduation non-professional colleges or institutes."

[27] P.V. Dinesh, "Hyper Constitutionalism- the Journey from TMA Pai to NEET case" *available at:* http://www.livelaw.in/hyper-constitutionalism-the-journey-from-tma-pai-to-neet-case/ (Visited on 12 April, 2014).

[28] *Supra* note 1 at 23.

[29] *Ibid.*