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Higher Education in India: The Legal Conundrum

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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 communal advancement of the country. The Indian higher education system is dealing with an extraordinary alteration in the coming period. This change is being determined by economic and statistic change. The efforts are being made by India for the improvement in the higher education system since half century but the outcomes is limited or even minimum in terms of universal alteration. The paper shall inspect the character of the courts in being crucial to the controlling countryside of Indian higher education and claims that it an vital performer determining the controlling countryside of higher education, but it confuse so much by their decision. It shall analyze some important cases decided by the Hon'ble Court. It highlights that the Courts have been giving unpredictable and unclear conclusions that shifts its locus from doubting private sector to the recognition of the current truth 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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Introduction

The active role has been played by the court in shaping the private higher education in the nation. From the 19s to present date, various confusing opinion has been made by the Supreme Court and shift its position from doubting private area to the recognition and approval of the current truth.[1]The impact of globalization has been a major issue of debate in the last decade and a half. Manuel Castells, Spanish social scientist and principle expert on globalization stated that the globalization impact on universities is drastic compare to the others like urbanization, industrialization, and secularization united. It is the major task that has been faced by university 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 judgement made by the Supreme Court, in *St. Stephens* v. *University of Delhi*[3] in which stated that the educational institutes are not the house of commerce and should not produce the wealth. Later in 1993, the Supreme Court in case of *Unni Krishnan v. State of Andhra Pradesh*[4] reentered the right of the nation and involved into the admission strategy and payment structure related to private specialized institutes. The Education comes under the fundamental rights, which cannot be the aims of profit seeking action. The Court ruled that the capitation fee is obviously irrational and unfair and thus the private colleges having high fee structure should be band. The claim was mad by the Supreme Court as all private colleges would be warned that education is not aim of making advantage on a business level and the payment structure should be well-matched with the doctrines of "merit and social fairness equally." It further said that registration of 50% of the seats in private schools should be occupied by the candidates of the university and government depends of merit list having the payment structure approved for government institutes. And left seat (50%) should be occupied by taking the entrance test and fee structure should be fixed by the committee that could encounter all the spending, containing fee seats with some profit to the management departments. Through this decision, the development of the taxation colleges would be covert in the term of 'self-financing' colleges.[5] However, the money of the students continued patently.

In its presiding, the judgment opined that:

> "Education has not ever been business in this country. Building it one is different to the ethos, custom and sense of this country. The dispute on the conflicting has an unblessed ring to it."[6]

According to the state, there is not enough fund to build the institution similar to the private schools. But if the salary of the private school is restricted the growth will be stop because of the deficiency of moneys. If this decreasing of morals from quality to a level of unevenness is to be evaded, the nation has to pay for the variance, which, subsequently, carries us to a brutal loop to the initial issues that is the deficit of nation funds. The only way out would seem to lie in the states not using their uncommon equipments to maintain institutes that would be able

[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.

to sustain yourselves out of the payments charges, but in refining the amenities and organization of state-run colleges and in funding the fees billed by the scholars there. This is in the concern of the common community that new decent schools are recognized, independence and non-regulation of the school management in the right of selection, enrollment of the scholars and the payment to be charged will confirm that this types of schools are recognized."[7]

If something, this presiding only recognized the secular lack of precision and clearness in the court of law. Its remedy for enrollment and payments (fees) was intensely marked and reflected the engrained customs of India's intelligent choice. The best resolutions thus ensued in patronizing feelings that had minute to prepare with practicality or the behavior significances of an act.[8]

In 2002, the case TMA Pai Foundation v. State of Karnataka was hold by eleven-judge Constitution in the Supreme Court while keeping the principle that in education field, no unaffordable fee or profiteering should be allowed and claimed that "rational extra to encounter the price of enlargement and extension of amenities.[10] It observed that, "There has been a important alteration in the manner of perceiving the higher education."[9]

In post-secondary education, the most active and rapidly rising segments are private education since 21st century. The combination of supreme demand for higher education access and the incapability or reluctance of government to offer the essential backing has taken private higher education to the forefront. In the history of many countries, Private institutions are increasing in volume and number, and has become a most important part of the world that depend on more or less wholly on the community area.[10]

Not simply has request besieged the capability of the administrations to afford edification, it is an important alteration in perceiving the higher education. The academic degree is related to "private good" that welfares for the individual compare the "public good" for people is today generally understood. The sense of today's finances and philosophy of denationalization have funded to the reappearance of private higher edification, and the initiation of private institutes where there was no or less institute established before.[11] The decision creates three declarations to support this as if they are universal truths. [12]

i. The awareness regarding the private good is only useful for an individual rather than the society who take benefits of public good has been accepted widely.
ii. The sense of today's finances and the philosophy of denationalization have donated to the reappearance of private higher edification.
iii. It is well recognized for gaining the professional education. It is mandatory to pay.

This is the gospel of globalization for education in which the Hon'ble judges apparently have great faith.[13] Education refers as an activity that is generous in nature. Education should not be treated as a trade or commerce where motivation is only profit. If the question is raised about the education whether it is profession or not, it is categorized into the occupation.[14] Hence, the Constitutional Seat of the Supreme Court for the first time decided that education is a fundamental right due to which the educational institutes should be established, given in the Article 19(1) (g) of constitution.

In Pai Foundation Case, eleven judge of Supreme Court, the decision of the review which was given

[7] note 1 at 20.
[8] *Supra* note 1 at 18.
[9] *Supra* note 9 at 48.
[10] *Ibid.*
[11] *Supra* note 9 at para 49.
[12] note 2.
[13] *Ibid.*
[14] *Supra* note 9 at para 20.

by Justice Kirpal, found the Unnikrishnan conclusion to license intrusion in private specialized institutes in an irrational way. In this judgment also the court acknowledged the function of private initiatives and observed that "the State having the restricted properties and slow affecting equipment is incapable to completely grow the brain of the Indian people." The court ultimately held: "we grasp that the judgment in *Unnikrishnan*'s case, insofar as it mounted the structure connecting to the enrollment and the setting of the payment, was not accurate, and to that degree, the said judgment and the consequential instructions set for AICTE, UGC, Medical Council of Indian Central and State Governments, etc., are mastered. It further said that placing a ceiling on fees and enrollment proposed in the Unnikrishnan case prohibited accretion of 'reasonable surpluses'. Also, it disturbed the right of private, unassisted institutes to fix their personal values of enrollment etc.[19]

The Court in *Pai Foundation* case observed that the *Unni Krishnan* decision has formed certain troubles, and elevated up sharp matters. In its apprehension to form the education commercialization, a structure of "permitted" and "fee" seats was established on the possibility that the financial capability of primary 50% of enrolled students would be superior to the left 50% seats, whereas the opposing has evidenced to be the realism.[15]

The decision had a comprehensive dialogue praising private initiative in edification as "one of the most active growing sections of post-secondary edification for which 'a mixture of situations and the incapability or reluctance of government to offer the essential backing are accountable." This became the verification of court to evade and restrict the state in the interference in the process of private institutes run. It cited the 1948 Radhakrishnan Commission, which had notified that the selective control of edification by the nation was a formula for 'totalitarian tyrannies' and advises against 'organizational or administration interfering" that could destabilize the freedom of all private unassisted institutes but left a vague picture as to how these institutes can make a benefits of pupils, team and faculty.[16]

The judgment had quite a few anomalies obligating a clarification issued by the Constitutional bench in *Islamic Academy of Education v. State of Karnataka*.[17] It reflected on two different queries: first one is religious minorities' educational rights compare to the majority; and, second one is the liberty existing to private, unassisted institutes. 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.[18]

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, various State governments, the Union of India and educational institutes agreed the majority judgement in different perceptions. Different statues/rules were passed/mounted by various State governments. This led to litigation in several courts. While these issue was raised before a Bench of the Supreme Court of law, the gatherings to the writ requests and superior leave request endeavored to deduce the majority judgment in their individual manner as appropriate them and hence at their demand all these, issues were located before Seat of five juries. Below these conditions, the present Constitution Bench of five judges was entrusted so that suspicions/anamolies, if any, could be simplified."[24]

[15] note 9 at para 37.
[16] *Supra* note 1 at 20.
[17] *Islamic Academy of Education* v. *State of Karnataka,* (2003) 6 SCC 697.

[18] 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*

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.[19] In the case of *Islamic Academy*, the Supreme Court of law deduced the *T.M.A. Pai* decision that unassisted professional institutes are allowed to self-government in their management, but in the same duration, they are not allowed to resign or abandon the code of merit. Secondly, it was persist that there should be some reserved seat for the students who passed the common entrance test in unassisted non-minority professional colleges, and lest seat should be occupied on the basis of counselling through state organization. Thirdly, the Bench proposed that there should be a provision for poor and backward sections' students by unassisted professional colleges. It said the government could mention the seats percentage as per the local needs, and for the minority and non-minority institutes, there should be difference in the seat percentage.[20]

In case of *P.A Inandar & Anr. v. State of Maharashtra,* seven judge bench of Supreme Court held that States are not able to remove the seats reserved for the students in unassisted private professional educational institutions as well as they are not compel them to put into rehearsal the State's strategy on registration. It added that every institute is free to plan for the structuring its own fee but overcharge and taxation are banned. Retired judge hold the committee which projected as a controlling measures for protecting the interests of the students. Though, 15% seats should be allowed for NRIs ordered by judge. This was a fundamental approval of a legal validity for altering education into product which is sold in the market and consumer have to pay for it.[21]

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 institutes 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.

> 'In the old times, Education used to be (emphasis added) a charity or philanthropy. Gradually it became an profession. Some of the legal dictates go on to pleasure it as an business.'[29]

TMI Pai decision later protected by '*Inamdar'* is virtually a *magna carta* for tycoons in the area of education. It has been made a 'policy framework' for setting the private professional colleges. The policy is so important but have the troubles to bring it in work. Though it seemed that eleven judges approved the rights of majority and minority to 'inaugurate and administer' educational institutes on their free will and choice, fortunately. Some paragraphs of *TMA Pai* also gives a suspicion that the education sector was not completely freed from states. While rest of the part of the decision relaxed the education segment, paragraph 68[22] of the decision put a ceiling on it. Opposing to the widespread idea of deregulation enclosed in the ruling, paragraph 68 spoke about the State and its powers to control. Learners who read the judgment became confused and so did the juries. The decision equally supported together the school of opinions so to say, pro liberalization and pro regulation. For addressing this perplexity, Khare, Chief Justice and four juries take a seat in Constitution Bench, and tried to clarify the ratio of *TMA Pai*, and finally we got the decision of constitution Bench in *Islamic Academy* case. Five Juries, found something more realistic in para 68 of *TMA Pai* and carried in plan for directing inspections and gathering of fee. Advocates of *TMA Pai* understood *Islamic Case* as if an effort by Five Juries to overrule Eleven Juries of *TMA Pai*. The misunderstanding continued and to end with the same, R.C. Lahoti, Chief Justice

[19] note 23.
[20] V. Venkatesan, "Turning the Clock Back", 22(8) *The Frontline* 24 (2005).
[21] Vijendra Sharma, "Commercialization of Higher Education" 33(9/10) *Social Scientist* 69 (2005). 29
note 23 at 167.
[22] Para 68

founded a Seven Justice Bench, generally known as *Inamdar* case, to explain *TMA Pai* once more. *Inamdar* just boosted *TMA Pai* attitude, eliminating 'impure paragraphs' which deliberated about public governor![23]

What we know through the epigrammatic history of the interference of law court? A pair of opinions as *First*, the Judges have before been uncertain of private initiative in edification. There is a resentful acknowledgement of its presence, but the efforts are being made by the court to form an equality the procedure of admission. *Second*, the intrusion of Courts is regarding the technical facet of fairness. The court made an effort very minute to assist higher education to be more broadly accessible or have tiny influence on excellence. *Third*, thee concern is increased regarding the profession of engineering and medicine because the most of the pupils are enrolled in the old-style science and Arts courses. *Finally*, here is an unusual public-private division that the Benches have also armored, and this divided can be agreed in relations of stages of user fees. The Courts are unimpressed to approve fees climbs in public institutes (based on the suggestion that university dues be attached at least to the near of fees paid in high colleges). The courts faced very economic issues regarding public institutes – which they need the private sector to reestablish now! [24] One curiosity in this is that though the secondary college area has been left fruitful with liberties (although decisively talking that is also a non-profit area). Higher education is viewed as a zone where a official standard of fairness of chance is most strongly declared. This principle is called as the formal as it supports the justifiable idea that the fee does not matter for enrolling in the institutes. But the way in which this code is applied guarantees that enough equipment will not be gathered for enhancing the excellence and capacity of edification and that *de facto* disparity in edification will expand, because private expenditure external steady institutes greatly controls future prospects. It would be challenge to see what reason of political budget controls the Courts interferences. In the respect of their Lordships, it can be said that the Court's role for higher edification has been more doubtable statement rather than clearness.[25]

[23] 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).

[24] *Supra* note 1 at 23.

[25] *Ibid.*