ACT TO CONTROL
SELF FINANCING COLLEGES

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Courts & Minority Education

Under the powerful impact of globalisation and privatisation, the mentality of the elite class has suffered a commercial conditioning even in jurisprudential understanding.

NO JUDGE writes on a wholly clean slate. Precedents persuade the Supreme Court but a larger Bench may overturn a lesser Bench. This is the fate of a recent ruling of the Court where eleven judges sat and, on a crucial point, overruled a smaller Bench. Although the Indian Constitution remains value-constant, the Executive has effectually reversed the social philosophy of the great instrument. Commercialising governance and `marketising' fundamentals are the bete noire of our Socialist Republic and judges are the sentinel on the qui vive preserving the paramountcy of the Constitution without further violation or erosion. The socio-economic vision of the Constitution is the lodestar that guides the court in its great hermeneutic task even though, as Cardozo observed long ago, the great tides and currents which engulf the rest of men do not turn aside their course and pass the judges by. It may equally strongly be mentioned that the predilections of the robed brethren do condition their rulings.

The latest pronouncement of the highest court in the TMA Pai Foundation case is no exception to the proposition of subtle psychic

bias influencing impalpably the interpretive perspective and subconscious conviction of those called upon to pronounce on contemporary issues. Today, under the powerful impact of globalisation and privatisation, the mentality of the elite class has suffered a commercial conditioning even in jurisprudential understanding.

In that event, the Constitution misses its protective mantle of the judges and this has unconsciously, I suspect, happened partly in the reasoning of the otherwise well-argued `majority opinion'. A few confusions on fundamentals have marginally marred the verdict. The majority judgment, though only of six, is a ruling of a formidable 11-judge bench which can be reconsidered only by a still larger number, not easy to expect under present conditions. The only course open is to so read the closely and correctly reasoned (if I may say so with respect) pronouncement of Justice B. N. Kirpal as Chief Justice of India as to impart a progressive meaning proximate to the Constitution's conscience. What is obvious, but still needs emphasis, is that the two basic features of the Constitution are secularism and equality. This reiteration has been rightly done by the Supreme Court at a time when secularism is on the cross and equality is on the retreat. It is a happy augury that the highest court has strengthened secular and egalitarian values in the field of education by this restatement. The semantic amplitude of secularism as a concept is also briefly brought out by the Supreme Court.

Says Justice Kirpal in an expansive mood of judicial metaphor and emphatic vividness of expression what I quote: "The one billion population of India consists of six main ethnic groups and fifty-two major tribes; six major religions and 6,400 castes and sub-castes; eighteen major languages and 1,600 minor languages and dialects. The essence of secularism in India can best be depicted if a relief map of India is made in mosaic, where the aforesaid one billion people are the small pieces of marble that go into the making of a map. Each person, whatever his/her language, caste, religion has his/her individual identity, which has to be preserved, so that when pieced together it goes to form a depiction with the different geographical features of India. These small pieces of marble, in the form of human beings, which may individually be dissimilar to each other, when placed together in a systematic manner, produce the beautiful map of India. Each piece, like a citizen of India, plays an important part in making of the whole. The variations of the

colours as well as different shades of the same colour in a map is the result of these small pieces of different shades and colours of marble, but even when one small piece of marble is removed, the whole map of India would be scarred, and the beauty would be lost.

"A citizen of India stands in a similar position. The Constitution recognises the differences among the people of India, but it gives equal importance to each of them, their differences notwithstanding, for only then can there be a unified secular nation. Recognising the need for the preservation and retention of different pieces that go into the making of a whole nation, the Constitution, while maintaining, inter alia, the basic principle of equality, contains adequate provisions that ensure the preservation of these different pieces.

"The essence of secularism in India is the recognition and preservation of the different types of people, with diverse languages and different beliefs, and placing them together so as to form a whole and united India. Articles 9 and 30 do not more than seek to preserve the differences that exist, and at the same time, unite the people to form one strong nation." (Para 158 to 161)

The real problem with the majority judgment arises primarily regarding unaided educational institutions. Several issues of deep import have been left open for decision by a `regular Bench'.

The country misses a great opportunity by this disinclination and may have to wait how long one never knows for a final adjudication. For instance, the court poses the question: can the followers of a sect or denomination of a particular religion claim protection under Article 30 (1), although the sect may belong to a religion which is in a majority in that State?

There are other practical questions arising in every State and may crop up even in dialect and denomination. Do they constitute a minority eligible for constitutional protection? Similarly, another issue: when an individual or group belonging to a minority religion or language sets up an educational institution with no religious or linguistic motivation or authorisation, does minority eligibility belong to this category? Again, the court evades and leaves the matter for a `regular Bench'. Evasion of decision today is invitation for profusion of litigation the next day and paves the way for docket explosion another day. An unaided institution set up for higher education

must naturally be subject to state regulation. Why? The Court's voice sounds sublime, though with a dark note at the end:

"We, however, wish to emphasise one point, and that is that in as much as the occupation of education is, in a sense, regarded as charitable, the government can provide regulations that will ensure excellence in education, while forbidding the charging of capitation fee and profiteering by the institution. Since the object of setting up an educational institution is by definition "charitable", it is clear that an educational institution cannot charge such a fee as is not required for the purpose of fulfilling that object. To put it differently, in the establishment of an educational institution, the object should not be to make a profit, in as much as education is essentially charitable in nature. There can, however, be a reasonable revenue surplus, which may be generated by the educational institution for the purpose of development of education and expansion of the institution." (Para 57)

SOMETIMES FAULTLESS logic may falter on fundamentals and that, I suspect, has partially vitiated the Court's jarring slant towards unaided institutions. The elite in India, since 1991, is obsessed with privatisation and globalisation in an almost totalitarian fashion. This bias is apparent in the unconcealed observation of the Kirpal judgment. I quote: "Private education is one of the most dynamic and fastest growing segments of post-secondary education at the turn of the twenty-first century. A combination of unprecedented demand for access to higher education and the inability or unwillingness of the Government to provide the necessary support has brought private higher education to the forefront. Private institutions, with a long history in many countries, are expanding in scope and number and are becoming increasingly important in parts of the world that relied almost entirely on the public sector."

Look at the ideological shift of the Court: "Not only has demand overwhelmed the ability of the Governments to provide education, there has also been a significant 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 accepted. The logic of today's economics and an ideology of privatisation have contributed to the resurgence of private higher education, and the establishing of private institutions where none or very few existed before." (Paras 48 and 49)

Commercialisation of education is the bete noire in a socialist democratic republic that India is under its great Preamble. Fortunately, the Court has provided for conditions of transparency and merit. The Court happily frowns upon preference being shown to less meritorious but more influential applicants. Why? Because, "excellence in professional education would require that greater emphasis be laid on the merit of a student seeking admission and appropriate regulations for this purpose may be made..." This lovely note notwithstanding, the privatisation predilection is an ideological deviation. The Court takes the view that in the case of unaided private schools maximum autonomy has to be with the management including the fees to be charged. The Court holds a brief in favour of private schools although it is a notorious racket that unaided private schools and colleges, with rare exceptions, are a law unto themselves and a trade in the matter of fees, admission, administration and the like flourishes.

"At the school level, it is not possible to grant admissions on the basis of merit. It is no secret that the examination results at all levels of unaided private schools, notwithstanding the stringent regulations of the governmental authorities, are far superior to the results of the government-maintained schools. There is no compulsion on students to attend private schools. The rush for admission is occasioned by the standards maintained in such schools, and recognition of the fact that state-run schools do not provide the same standards of education. The state says that it has no funds to establish institutions at the same level of excellence as private schools, it disables those schools from affording the best facilities because of a lack of funds. If this lowering of standards from excellence to a level of mediocrity is to be avoided, the state has to provide the difference which, therefore, brings us back in a vicious circle to the original problem, viz., the lack of state funds. The solution would appear to lie in the states not using their scanty resources to prop up institutions that are able to otherwise maintain themselves out of the fees charged, but in improving the facilities and infrastructure of state-run schools and in subsidising the fees payable by the students there. It is in the interest of the general public that more good quality 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 institutions are established. The fear that if a private school is allowed to charge fees commensurate

with the fees affordable, the degrees would be `purchasable' is an unfounded one." (Para 61)

Many Government colleges, the Court forgets, have been a pride in the field. Many professors in Universities have won laurels. Many students from University and Government colleges, professional or other, have established their merit. To generalise in favour of private institutions is to succumb to contra-constitutional prejudice when the winds of privatisation are blowing with propaganda power. My hunch is that while Justice Jeevan Reddy in Unnikrishnan's case castigates commercialisation of education, Justice Kirpal in the T.M.A. Pai case, reverses the process and advocates the cause of the private sector. Profiteering, no. Profit-making, yes. "This partition do their bounds divide."

A reasonable surplus for future expansion is, in the apex court diction, permissible profit but not profiteering. So students are to subsidise the educational charity out of their poverty. Founders, with philanthropic motivation and eleemosynary reputation must rely on social sources, donative channels and business barons for handsome grants, not fleece the poor parents who borrow for their child's future nor squeeze young students with educational hunger and meritorious talent. The vast poor have no claim to judicial compassion. That is privatisation and market methodology exciting for the affluent but the brilliant indigents are priced out of the educational bazaar!

Alas, unaided minority schools from the L.K.G, U.K.G and the very first standard have become a ubiquitous business with heavy capitation fees under various dubious disguises. Merit is measured by money and so public morality requires some measure of control. But the Court is inclined to overlook the rampant rage regarding the fee levy and discriminatory dimensions of `free to loot' unaided bodies. Regulation becomes justified not because state grant is given but because public education is a matter of serious social concern, that too, in a socialistic democratic republic. The term capitation fee is more a clever formality because these extra-levies have different terminology to outwit judicial vocabulary. The prescription of transparency and adequate attention to merit in the matter of admission to unaided colleges is more a placebo than an effective panacea.

While overruling Unnikrishnan the court salves its conscience by

holding, "however, the principle that there should not be capitation fee or profit theory is correct". How naive to uphold "reasonable surplus to meet cost of expansion and augmentation of facility". The fluid phraseology facilitates exploitation without compunction as if this generation of students must fund future development about which there is no plan, no record, no restraint nor no definite direction, no verification of viability.

There is no gainsaying the fact that social justice and equal opportunity for educational excellence at all levels have gone by default. Of course, globalisation, liberalisation, privatisation and marketisation have captured the Court's notice and the Preamble to the Constitution is de facto judicially jettisoned.

While Unnikrishnan has been extinguished in social philosophy, pragmatic operation and 50 per cent for admission of non-minority students, there is no firm, fool-proof indication, barring vague generalisations, as to what should be a just proportion of non-minority admission. The Court has the last word, but the common people should not have the least word. The classroom, it has been said, shapes the destiny of the nation and education is too serious a matter to be left only to the robed brethren. Our crimson Constitution has a value vision to blink at which is to miss its social mission. ■

Sitaram Yechury

Let's Caste Our Net Wide

The recent unfortunate exchange between the judiciary and the executive notwithstanding, the issue of exercising some degree of social control on the private and unaided educational institutions needs to be urgently addressed. While the question of social justice including reservations for the SC and the STs have been highlighted, the issue of social control has much wider implications. According to reports the Chief Justice has told the attorney general that, "you don't understand the judgment... all three judgments said that the government should come up with a legislation..."

This is precisely the need of the hour. It is good that the UPA government has begun consultations with political parties and others to consider the bringing in of such legislation. During the last three years, the Supreme Court had opined on the connected issues, first in October 2002, later in August 2003 and now again in August 2005. A reading of these judgment shows that according to existing laws the legal jurisdiction of the government both at the centre and the states is limited in regulating the opening and the functioning of private educational institutions. This has to be rectified in the larger interests of the country.

However, echoing an elitist lopsided attitude that merit and social justice are incompatible various reactions have hailed the so-called independence and autonomy of these private institutions. It would be patently absurd to suggest that since these institutions do not

receive any government funds they are not obliged to honour the commitments to equity and social justice. This is like suggesting that only government employees pay any tax since all others receive no income from the government! The larger question that this debate poses is the attitude to education itself. Is education a commodity that can be bought and sold in accordance to the vagaries of the privileged or is it a necessity for a civil society and hence a right for the nation.

It would be interesting to recall the origins and history of public education in modern civil society. Both in Britain and the United States of America the public education system was conceived, administered and financed by the State. Soon after American Independence in 1779, Thomas Jefferson with the far sightedness of the rising bourgeoisie moved the bill for "more general diffusion of knowledge" Though the bill was defeated at that time the philosophy behind it was to influence the development of the US education system in later years. Jefferson argued for a three-tier education system preparing the young people for one of the two groups in society, "labouring and the learned". The expenses for this entire system were to be borne solely from the state treasury. In the 1840s one Reverend George Washington Hosmer, who contested from Buffalo USA led a struggle for public education saying, "thousands among us have not dreamed of the effects of popular education; they have complained of its expensiveness, not foreseen that it will diminish vagrancy and pauperism and crime, but it will be an anti-dote to mobs; and prevent the necessity of a standing army to keep our own people in order. Every people may make their own choice, `to pay teachers or recruiting sergeants, to support schools, or constables or watchmen." The network of universal school education and publicly funded higher education that exists in all the developed countries today is the result of this accumulated experience that a healthy trained youth workforce is an asset for nation building and not a liability.

In independent India, to meet the above consideration as well as to redeem the aspirations of the people who sought an egalitarian social order, the newly formed government of Jawaharlal Nehru setup, in 1948, a university education commission under the chairmanship of Dr. S Radhakrishnan. This report speaks of reorganisng higher education in the country to face the "great problem, national and social, the acquisition of economic independence, the increase of general prosperity, the attainment

of an effective democracy overriding the distinctions of caste and creed, rich and poor, and a rise in the level of culture. For a quick and effective realisation of these aims, education is a powerful weapon if it is organised efficiently and in public interest. As we claim to be a civilized people, we must regard the higher education of the rising generation as one of our principle concerns". The report further states, "many of these proposals will mean increased expenditure, but this increase, we are convinced, is an investment for the democratic future of a free people." These views were reinforced by all subsequent education commissions, the Laxmanaswamy Mudaliar secondary education commission of 1952, the DS Kothari education commission of 1964 etc.

In recent years however, with the state funding of education declining as evidenced in the annual budget allocations, the opportunity and scope for private educational institutions has grown enormously. This has spelt a spree of commercialisation of higher education reinforcing the attitude to reduce education to the status of a commodity. However, in the absence of increased state funding of higher education lakhs of students have no option but to join such institutions. In the larger interests of the nation and the people it is absolutely necessary that these institutions follow certain socially accepted norms which should be part of the overall effort of the country to balance the triangle of quantity, quality and equity in Indian education. These three aspects compliment each other and are not in conflict as mistakenly assumed.

In today's context the effort to achieve a proper balance on this score is all the more important considering that 54 per cent of India's population is below the age of 25. This is India's future. If this youth can be both healthy and educated, only then can India transform itself truly into a knowledge society. India has to rise above from training personnel to man BPOs and call centres. In fact those who try to assert with justifiable price India's recent forays into the world's IT sector advances must recognise that all these are products of the post-independent state financed higher education system in our country. The likes of our president Dr. Abdul Kalam could never have been possible without such a public education system in place.

The UPA government must seriously consider reversing the trend of constantly declining state expenditures in education. In the meanwhile the mushrooming of private educational institutions must

be regulated. This is not to suggest that these institutions must function under governmental control. A regulatory mechanism can be established which can ensure that these institutions adhere to certain established norms regarding a) the fee structure, b) admissions policy including reservations, and c) the course content. This is the social control that must be seriously considered. In order to implement this, as education is in the concurrent list of our constitution, suitable central legislation must be enacted which shall empower the state governments to establish such mechanisms for social control.

Let us invest in our future. Let us truly hasten India's transition into a knowledge society. India already produces more skilled man power annually than the entire European Union put together. This is our strength. Let us not squander it. ■

By Justice H. Suresh (Retd.)

Education: Trade, Profession, Occupation or Business?

Amartya Sen, once described poverty as a matter of "capability deprivation". Poverty deprives you of your capacity to achieve status and dignity. You want to be a doctor - you want to be an Engineer - you want to be a top executive - But conditions are such that you are deprived of your opportunity to achieve your goal.

Pandit Jawaharlal Nehru in his "tryst with destiny" speech on the eve of independence had said that the tasks ahead were: "the ending of poverty, ignorance and disease, and inequality of opportunity". After 56 years of independence all these tasks have remained unachieved and unfulfilled. Every institution for human development is so organised that the poor, the marginalised, the disadvantaged are deprived of all opportunities for development.

Deprivation at the primary level

In the field of education, this deprivation is manifest at the primary level. The children of the poor have no choice but to attend Municipal Schools where we have an impoverished system of education. The rich get a better and superior system of education. The same disparity prevails as between rural schools and urban schools. Though constitutionally primary education is free and compulsory, it varies as between the rich and the poor. This disparity results in "capability deprivation" as we go for higher education.

In very many cities, a child is sent to K.G. or Nursery Classes, when the child just totters a little, here or there, not that the child is capable of learning anything, but as a sure-step for admission to a recognized school, later on. So, the business of education starts at that level. Again even in the schools, what is taught is of no consequence. As the child reaches the Secondary school, parents are made to think that Tutorial Classes are more important than the schools. These Tutorial Classes are not educational institutions. They are shops which sell education on a commercial basis. They are a class of exploiters mainly serving the rich, the upper classes and the newly emergent affluent class who have amassed wealth by means other than legitimate. It is not the weak or the failed students who attend these Tutorial Classes. On the contrary, the failed students continue to be in the schools hile the rank - holders and best students join the tutorials. Again who takes the credit - it is not the schools, but it is the Tutorial Classes who claim that it is their students who get the ranks. Tutorial Classes are an aberration in any educational system and has to be recognized as an evil. Unfortunately, the Government has made no attempt to eliminate or even to regulate the same. The reason is evident. It helps a particular class, the rich who intend to monopolise major professions such as medicine, engineering, technology, business management, and etc. all for themselves in perpetuity.

So the business thrives, the imbalance continues, and the latest judgement in T.M.A. Pai Foundation Case (2002) 8 SCC 481, perpetuates this imbalance. This has deprived and will deprive lakhs of young aspirants for higher education, by making education beyond their means.

Art.21. Right to life includes Right to education

Let us see, what is education? When I say "education", it includes two concepts: "Right to education" and "Right to impart education". "Right to run Education Institutions". When we interpreted "Right to Life" under Article 21 of the Constitution of India, we have expressly stated that "the right to life includes the right to live with human dignity and all that goes with it ....." (Francis Cralie A.I.R. 1981 SC 746) and more particularly in Mohini Jain (1992) 3 SCC 666, the Supreme Court had said. "The right to education flows directly from the right to life. The right to life under Art. 21 and the dignity of the individual cannot be assured unless it is accompanied by the right to education"

Right to education as a basic human right

In fact the right to education is a basic human right.

Article 26 of Universal Declaration of Human Rights says :-

"Art. 26:

1. Every one has the right to education. Education shall be free in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and Professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit."

This is elaborated in Article 13 of the International Covenant on Economic, Social and Cultural Rights:

Art. 13: ICESCR:

"1. The States Parties to the present Covenant

recognize the right of every one to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity..... and shall strengthen respect for human rights ..... and fundamental freedoms.

The States Parties to the present Covenant recognize that, with a view to achieve the full realization of this right;

Primary education shall be compulsory and free to all. Secondary education shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education.Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education."

Right to education at all levels - is a human right

What is important, here, is that while primary education shall be compulsory and free for all, secondary and higher education shall be available and accessible to all. The key words are: "available and accessible to all" "appropriate means" and "progressive introduction of free education." It is wrong to assume that it ceases to be human right beyond the stage of primary education. Right to education should be made available and accessible to all, on the basis of the capacity, at the higher level - in fact, at all levels. In

Mohini Jain's case (Supra) the Supreme Court had rightly said that it extends to provide educational institutions "at all levels for the benefit of the citizens". While education at the higher levels may not be free the State has an obligation, progressively, to provide for free education.

All human rights are obligations of the State. The State has essentially three obligations: (1) to recognize, (2) to protect, and (3) to fulfill or implement human rights. Under Article 2 of ICESCR:

Art. 2 : ICESCR:

"1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

Obligation of the State

Thus the State cannot abdicate its obligation to provide for higher education. On the contrary, it has to take steps progressively by all appropriate means. The Government must demonstrate what steps it has taken, progressively - not regressively -- year to year. We accepted these Covenants in 1976. From 1976 to 2003, what steps the Government has taken progressively to provide for larger access to education. If only Courts had insisted upon the State to demonstrate, year to year, what steps it had taken to the maximum of its available resources -- many of our citizens would have achieved a higher standard of living.

Art. 38(2) and Art. 41 of the Constitution

And what does our Constitution say? Article 38(2) says ..... "The State shall ..... strive to minimize inequalities of income, and endeavour to eliminate inequalities in status, facilities and opportunities." Again Article 41: "The State shall within the limits of its economic capacity make provision for work, education ....." The key words are "strive" ..... and "endeavour". It should be a continuous strife, progressively from year to year, to eliminate inequalities of income and opportunities. The limits of economic capacity should be an expanding venture and cannot be allowed to shrink from year to year, resulting in self-abnegation of its constitutional obligation.

But instead of progressively increasing spending on education, the Govt. is allocating less and less for education. In 1980-81, the Govt. Plan expenditure on education was 4% of the GNP. In 2001-02 it has been reduced to 2%. According to the annual plan expenditure on education (1992-97) was Rs.3920 Crores, whereas the annual loss of all State electricity Boards (1997-98) was Rs.10,864/- Crores which is 2.72 times the average annual expenditure on education.

In other words no one questioned the Govt., how could it afford to spend less and less on education which was contrary to their obligation both under the constitution and under the International Humanitarian Law.

Unfortunately, the Supreme Court never took into account the basic human right - the right of access to education in any of judgement.

Right to run educational institutions is not a human right

This is about Right to education. -- What about Right to impart education? What is it -- is it a Right? Or is it a liberty? State has an obligation to provide for access and availability of education for all. But if a private individual wants to take over or share that obligation, the State should not object to that provided that private individual is willing to comply with all the requirements of law and the standards. So, that private individual has a liberty, no compulsion, no obligation to start an educational institution. When we talk of fundamental right or human right as against liberty, there is a fundamental difference between the two. Human rights could be generally defined as those rights which are inherent in our nature and without which we cannot live as human beings. That is why UDHR proclaims these rights" as a common standard of achievement for all peoples and nations". Some of these human rights, we have incorporated in our Chapter on Fundamental Rights. But liberty to do a particular act or not to do a particular act may not have anything to do with the concept of human dignity or of any universally recognized standard.

In other words Right to establish an educational institution is not a human right. But the State has a fundamental duty to establish education institutions so that the citizen's right to education is made accessible and easily available to all. In Mohini Jain's case the Supreme Court rightly said as follows:

Private educational institutions

"17. we hold that every citizen has a "right to education" under the

Constitution. The State is under an obligation to establish educational institutions to enable the citizens to enjoy the said right. The State may discharge its obligation through stateowned or state-recognized educational institutions.

When the State Government grants recognition to the private educational institutions it creates an agency to fulfill its obligation under the Constitution. The students are given admission to the educational institutions -whether state-owned or state-recognized - in recognition of their "right to education" under the Constitution. Charging capitation fee in consideration of admission to educational institutions, is a patent denial of a citizen's right to education under the Constitution."

In an earlier passage, the Court said:

"14. 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. Increasing demand for medical education has led to the opening of large number of medical colleges by private persons, groups and trusts with the permission and recognition of State Governments. The Karnataka State has permitted the opening the several new medical colleges under various private bodies and organizations. These institutions are charging capitation fee as a consideration for admission. 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."

"Teaching shops"

Taking note of the mush-room growth of medical colleges, which thrive on capitation fees, the Court said that such institutions are nothing but teaching shops. The students who would not otherwise get admission in recognized medical colleges, would get a back-door entry into medical training "solely by the ability to pay one's way through".

The Court had further said that "Restricting admission ..... belonging to the richer section of society and denying the same to the poor meritorious, is wholly arbitrary, against the constitutional

scheme and as such cannot be legally permitted" (Para 20) This is violative of Article 14 of the Constitution.

Private Medical Colleges are the Agents of the State

There are three important findings in Mohini Jain: (1) Every citizen has a Right to education as a part of Article 21 (Or as a human right) at all levels (ii) The State is under an obligation to establish educational institutions, (iii) When the State Government permits a Private Medical College to be set up and recognizes its curriculum the said College is performing a function "which under the Constitution has been assigned to the State Government" (Page 28) Since all these State recognized private colleges are agents of the State, they cannot charge any fee more than the tuition fee charged in the Government College. All such fees charged more than the Government fixed tuition fee, are nothing but the capitation fee, "whatever name one may give to this extraction of money" (Para 28).

Education -not a commodity for sale

The Court rightly did not go into the question as to how one should run one's educational institution - its economic viability, its budgeting and expenses, etc. The Court is just not qualified to lay down any scheme for running an educational institution. The Court took note of the fact that to "establish and administer educational institutions is considered a religious and charitable object. Education in India has never been a commodity for sale" (Para 18). The Court was concerned with the State action or inaction and whether it would defeat the constitutional mandate. The Court came to the conclusion that 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 (Para 18).

Vilification campaign

However, as against this perfectly valid judgement, a vilification campaign both by the legal fraternity and the vested interest group was carried on to say that the Supreme Court ruling was against private commercial initiatives and the State has no resources and manpower to provide universal and all round education to all at all stages. The Editor of Supreme Court Cases Reporter wrote a 6 page editorial note criticizing the judgement, without even understanding, "Right to Education" is a recognized human right under the UDHR and ICESCR, and how the State is required to discharge its obligations, both under the Constitution and as

enunciated under Art. 2 of ICESCR and even forgetting Municipal Council, Ratlam V/s. Vardichand (1980). It is even suggested that for preventing extortion, the commercial enterprise should be allowed to grow "so that it turns from a seller's market to a buyer's market" -- as if the private professional colleges are sellers and the students are buyers. Again has the extortion become less, now? Fortunately even the latest judgement has not fully endorsed this. (How many such Editorial Notes have been written when several judgements which were apparently wrong and contrary to earlier precedents were delivered?)

Unnikrishnan case

The result is Unnikrishnan case (1993)1 SCC 645. All confusion started with this judgement. As Rajiv Dhavan says, from "half - baked socialism" to the present T.M.A. Pai Foundation case, "half-baked capitalism." It quotes Bangalore Water Supply case (1978) to note that an educational institution could be considered as an industry. Then they classify educational institutions as (1) those requiring recognition by the State and (ii) those who do not require recognition. Then it is stated where the State's recognition is required it can only be on the State permitting pursuant to a policy decision of the State or on fulfillment of certain conditions. In that case, there is no question of any fundamental right to establish an educational institution (Para 67a). Referring to an earlier case (S. Azeez Basha vs. Union of India, A.I.R. 1968 SC 662) where it was impliedly held that there was no fundamental right to establish a University, the Court observed, "a fortiori, a fundamental right to establish an educational is not available".

Education Institution as "Charity"

Considering educational institutions as "Charity" as understood under the English Law, it considers them to be "trusts" for the advancement of education. The beneficiaries are the students, and there can be no question of trusts being funded by the beneficiaries. In St. Stephen's College v/s. University of Delhi (1992) 1 SCC 558, at 609-610, it is said :

"The educational institutions are not business houses. They do not generate wealth. They cannot survive without public funds or private aid". There has to be a restraint on collection of student's fees. Public funds could be the State aid, and private aid could be the self-generated wealth or donations from the philanthropic public.

Educational Institutions cannot be commercialized

The Court then rambles into concepts of "self-financing educational institutions" and "cost-based educational institutions" which could not be the concern of the Court. How does one determine "the cost of education", and how and by whom it can be regulated? The Court itself answers "The Court cannot certainly do this. It must be done by Government or University or such other authority as may be designated in that behalf" (Para 196) Can it be compared to the activities of builders of apartments who collect money from the intending purchasers first and then build? Negativing all such ideas, the Court observes : "But one thing is clear; commercialization of education cannot and should not be permitted. .....Commercialization is positively harmful, it is opposed to public policy. As we shall presently point out, this is one of the reasons for holding that imparting education cannot be trade, business or profession (Para. 196)."

Arguments rejected

The Court expressly rejected the following arguments; (a). Every citizen has a fundamental right to establish an educational institution as a part of the right under Art. 19(1)(g) of the Constitution (b). The "market forces" must be allowed a free play; (e) Educational institution is a business or industry; (d) The Government should have no say in the matter of fees, because private educational institutions could be considered as institution providing cost-based education. After negating all those arguments the Court observed, more emphatically:

Education is a "mission"

"While we do not wish to express any opinion on the question whether the right to establish an educational institution can be said to be carrying on any "occupation" within the meaning of Article 19(1)(g), - perhaps, it is - we are certainly of the opinion that such activity can neither be a trade or business nor can it be a profession within the meaning of Article 19(1)(g). Trade or business normally connotes an activity carried on with a profit motive. Education has never been commerce in this country. Making it one is opposed to the ethos, tradition and sensibilities of this nation. The argument to the contrary has an unholy ring to it. Imparting of education has never been treated as a trade or business in this country since time immemorial. It has been treated as a religious duty. It has been treated as a charitable activity. But never as trade or business. We agree with Gajendragadkar, J. that "education in its true aspect is

more a mission and a vocation rather than a profession or trade or business, however wide may be the denotation of the two latter words....." (See University of Delhi) (1964). The Parliament too has manifested its intention repeatedly (by enacting the U.G.C. Act, I.M.C. Act and A.I.C.T.E. Act) that commercialization of education is not permissible and that no person shall be allowed to steal a march over a more meritorious candidate because of his economic power." (Para 197).

Again at para 198:

"We are, therefore, of the opinion, adopting the line of reasoning in State of Bombay v. R.M.D. Chamarbaugwala (1957 SCR 874 : AIR 1957 SC 699) that imparting education cannot be treated as a trade or business. Education cannot be allowed to be converted into commerce nor can the petitioners seek to obtain the said result by relying upon the wider meaning of "occupation". The content of the expression "occupation" has to be ascertained keeping in mind the fact that clause (g) employs all the four expressions viz., profession, occupation, trade and business. Their fields may overlap, but each of them does certainly have a content of its own, distinct from the others. Be that as it may one thing is clear - imparting of education is not and cannot be allowed to become commerce."

Running educational institution is "supplemental" to the activity carried on by the State

The Court further said that running a private educational institution "is not an independent activity but one closely allied to and supplemental to the activity of the State" (Para. 204). Again, more categorically:

"It is not an independent activity. It is an activity supplemental to the principal activity carried on by the State. No private educational institution can survive or subsist without recognition and/or affiliation. The bodies which grant recognition and/or affiliation are the authorities of the State. In such a situation, it is obligatory - in the interest of general public-upon the authority granting recognition or affiliation to insist upon such conditions as are appropriate to ensure not only education of requisite standard but also fairness and equal treatment in the matter of admission of students. Since the recognizing/affiliating authority is the State, it is under an obligation to impose such conditions as part of its duty enjoined upon it by Article 14 of the Constitution. It cannot allow itself or its

power and privilege to be used unfairly. The incidents attaching to the main activity attach to supplemental activity as well."

The key words are: "not an independent activity", "supplemental to the principal activity carried on by the State," and "fairness and equal treatment in the matter of admission".

Scheme of dividing the students into payment and free students

What is unfortunate in Unnikrishnaan's case is, that the Court after all such categorical observations as quoted above, was induced to full into a pitfall of going into the question of costs of running a private professional college, which could never have been the function of any Court. The Court came out with a scheme which is well known now to all of us as one dividing the students between "payment students" and "free students" a scheme which was bound to fail sooner or later. The Court evolved the scheme --" with the help of the Counsel appearing before us" -- as if the Counsel were more knowledgeable than the Judge in the matter of managing professional colleges! It was unprincipled on any social theory. In practice it operated exactly in the opposite way than originally intended. If did not ensure free seats for the poor and the economically weaker section. The rich could get both the free seats and the payment seats.

Establishing Educational Institution, held to be "Occupation" for the first time

Then comes T.M.A. Pai Foundation Case (Supra): In this case the Judges agreed that establishing an educational institution is not any trade, profession or business, but they held that it is an "occupation" within the meaning of Art. 19(1)(g) of the Constitution. They said that it is "occupation" i.e. an activity of a person undertaken as a means of livelihood or mission of life. They rely on Sodhan Singh's case (1989)4 S.C.C. 155 where it has been said that occupation "is any activity carried on by any citizen to earn his livelihood". So we are to imagine that a large number of mushroom educa-tional institutions sprang up "as a means of livelihood." So in Maharashtra, the following politicians who run various Professional Colleges should be considered as "earning their livelihood" by carrying on this "occupation".

Datta Meghe (NCP) - 5 Professional Colleges.
Rohidas Patil (Congress) - 2 Professional Colleges.

Kamalkishore Kadam (NCP) - 2 Professional Colleges.
Patangrao Kadam (Congress) - 2 Professional Colleges.
Satish Chaturvedi (Congress) - 2 Professional Colleges.
Dr. Padamsinh Patil (NCP) - 2 Professional Colleges.
Ranjit Deshmukh (Congress) - 1 Professional Colleges.
Balasaheb Vikhepatil (Shiv-sena) - 1 Professional Colleges.
Narayan Rane (Shiv-sena) - 1 Professional Colleges.
Gopinath Munde (BJP) - 1 Professional Colleges.
Vilasrao Deshmukh (Congress) - 1 Professional Colleges.
Ramrao Adhik (Congress) - 1 Professional Colleges.
Ravindra Mane (Shiv-sena) - 1 Professional Colleges.
Shankarrao Kolhe (NCP) - 1 Professional Colleges.
Shivajirao Patil Nilangekar (Congress) - 1 Professional Colleges.

In Maharashtra there are 16 private medical colleges and 137 private Engineering Colleges. In Karnataka there are 15 private Medical Colleges, 13 private dental Colleges and 51 Engineering Colleges - all for imparting education, but the real beneficiaries are all those who have been conferred a new-found "right" to run them as "occupation" earning their livelihood!

Scheme of Unnikrishnan -unreasonable

Having brought this new found "right" under Art. 19(1)(g), the Supreme Court said that the scheme as laid down in Unnikrishnan, amounts to unreasonable restriction. They said that it has the effect of "nationalizing education". In what sense? curriculum is not changed; the course is the same; the examinations are not touched; only the fee structure was sought to be altered. And that becomes "nationalization". The Supreme Court contracts this with what it expects it to be. (Para 49.)

"The idea of an academic degree as a "private good" that benefits the individual rather than a "public good" for society is now widely accepted. The logic of today's economics and an ideology of privatization have contributed to the resurgence of private higher education, and the establishing of private institutions where none or very few existed before."

"Privatisation"

Look at the terms: "privatisation". "logic of todays' economics" - all applicable to business! Then they say " The fixing of a rigid fee structure, dictating the formation and composition of a governing body, compulsory nomination of teachers and staff for appointment

or nominating students for admissions would be unacceptable restrictions." (Para 54).

And then more categorically: " ..... One also cannot lose sight of the fact that we live in a competitive world today, where professional education is in demand. We have been given to understand that a large number of professional and other institutions have been started by private parties who do not seek any governmental aid. In a sense, a prospective student has various options open to him / her where, therefore, normally economic forces have a role to play. 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." (Para 56).

No Profit, but reasonable surplus permissible

Of course, they repeat that there can be no capitation fee and profiteering (without realizing what they had said earlier). Again it is said : "..... The occupation of education is in a sense, regarded as charitable....." And "..... To put it differently, in the establishment of an educational institution, the object should not be to make a profit, inasmuch as education is essentially charitable in nature. There can, however, be a reasonable revenue surplus, which may be generated by the educational institution for the purpose of development of education and expansion of the institution". (Para 51)

And more categorically: " ..... Of course now by virtue of this judgement the fee structure, fixed under any regulation or enactment, will have to be reworked so as to enable educational institutions not only to break even but also to generate some surplus for future development / expansion and to provide for free seats." (Para 393).

Sale of education

So education begins as a "charity", but it soon becomes an "occupation", no profiteering, but a "reasonable surplus". Is it not sale of education - cost plus reasonable surplus?. Of course for "future development and expansion" - whose development, whose expansion! And profit is for what - for future development?

Justice V.R. Krishna Iyer's scathing criticism

So from "nationalization to "commercialization" Justice V.R. Krishna Iyer, in a scathing article (The Hindu dated 17th December, 2002) said :

"My hunch is that while Justice Jeevan Reddy in Unnikrishnan's case castigates commercialization of education, Justice Kirpal in the T.M.A. Pai case, reverses the process and advocates the cause of the private sector. Profiteering, no. Profit-making, yes. "This partition do their bounds divide."

"A reasonable surplus for future expansion is, in the apex court diction, permissible profit but not profiteering. So students are to subsidise the educational charity out of their poverty. Founders, with philanthropic motivation and eleemosynary reputation must rely on social sources, donative channels and business barons for handsome grants, not fleece the poor parents who borrow for their child's future nor squeeze young students with educational hunger and meritorious talent. The vast poor have no claim to judicial compassion. That is privatization and market methodology exciting for the affluent but the brilliant indigents are priced out of the educational bazaar!

Alas, unaided minority schools from the L.K.G., U.K.G. and the very first standard have become a ubiquitous business with heavy capitation fees under various dubious disguises. Merit is measured by money and so public morality requires some measure of control. But the Court is inclined to overlook the rampant rage regarding the fee levy and discriminatory dimensions of 'free to loot' unaided bodies, Regulation becomes justified not because state grant is given but because public education is a matter of serious social concern, that too, in a socialistic democratic republic. The term capitation fee is more a clever formality because these extra-levies have different terminology to outwit judicial vocabulary....." "..... How naïve to uphold "reasonable surplus to meet cost of expansion and augmentation of facility". The fluid phraseology facilitates exploitation without compunction as if this generation of students must fund future development about which there is no plan, no record, no restraint nor no definite direction, no verification of viability.

There is no gainsaying the fact that social justice and equal opportunity for educational excellence at all levels have gone by default. Of course, globalization, liberalization, privatization and marketisation have captured the Court's notice and the Preamble to the Constitution is de facto judicially jettisoned." ".....The Court has the last word but the common people should not have the least word. The classroom, it has been said, shapes the destiny of

the nation and education is too serious a matter to be left only to the robed brethren. Our crimson Constitution has a value vision to blink at which is to miss its social mission."

Professional education -becomes the monopoly of the rich

The professional education becomes the monopoly of the rich. Many professional colleges in Maharashtra announced the annual fees within a range of Rs.3.15 lakhs to Rs.3.90 lakhs. This became worse than the capitation fees. Large number of students could not think of getting admissions in these colleges. In the meanwhile, the Bombay High Court came with an adhoc formula whereby students were asked to pay 60% of the admission fees, first, and the balance to be paid subject to the decision of a committee headed by a Retired, High Court Judge, for fixation of the fees.

Islamic Academy case ad-hoc approach

In the meanwhile the Supreme Court in the Islamic Academy case (2003) tried to introduce a system of checks and balances, to regulate the hyper commercialization of professional education. It has directed the State Governments to set up a committee headed by a retired High Court Judge and including a Chartered Accountant and representatives of the Central and State Agencies in the field to assess the colleges and prescribe a fee structure commensurate with the infra-structure and academic facilities provided by them. For admissions, the apex court has fixed a 50:50 seat sharing formula for the government and the management quotas, but filled through a common entrance test and selection process. While allowing the States to fix a quota for the private minority institutions, the Court has recognized the 'preferential right' of these institutions to accord priority in admission to students from their communities. There are two other clear directions from the Bench: admissions must be based on merit and through a common entrance test; and provision must be made for quotas for the poor and the backward.

Yet poor and the needy will find it difficult to get admissions in many Colleges. That is how, the Govt. of Maharashtra, has announced to certain category of students from reserved class, grant of scholarships and subsidies amounting to Rs.17 Crores. Still, there may be various other students who will find professional college beyond their means, even though they may have merit.

Unfortunately, in all these cases, the right of access to education as a fundamental right - as a human right - is not considered at all,

as if, such a right does not exist. It is wrong to assume that the fundamental right to education is upto the age of fourteen only (as stated in Unnikrishnan) but it prevails at all level (as correctly stated in Mohini Jain). The obligation is essentially of the State. Upto the age of fourteen, it is free and compulsory, but thereafter, access to education should be available for all - for a fee equal and affordable to all. If private parties want to run educational institutions, it can only be as a supplemental agency for and on behalf of the State (again as correctly stated in Mohini Jain).

Equal fee and affordable to all

In all professional colleges - private or public - the fee has to be equal and affordable to all. It can never be based on the basis of the costs involved in running each institution. If fees are fixed on the basis of costs, or costs plus any surplus, it amounts to sale of education which has been universally condemned. All professional college should have a minimum infra-structure as may be prescribed by their respective pro-fessional Councils or the State. However, if anyone chooses to provide any extra infra-structures, he cannot charge the students for the same. If such excess fee or charge is allowed, it will sooner or later divide the students as between the rich, and the not so-rich, the education of the 'haves' and the education of the 'have not'-which is ante-thetical to any concept of social and economic justice.

Govt to reallocate public spending on education

Very often, it is said that the Government has no money to spend on education. A Policy Framework for Reforms in education (with Mukesh Ambani as Convenor and Kumar Mangalam Birla as member) of the Government of India recommends privatization of education. An executive summary of the Policy (April, 2000) inter-alia, states:

"Funding the huge expenditure demand should be by both an increase in quantum of public spending as well as increase in efficiency of public spending on education. Government has to reallocate public spending to education from other publicly funded activities such as defence and inefficient public sector enterprises. Private financing should be encouraged either to fund private institutions or to supplement the income of publicly funded institutions.

There are basically three mutually reinforcing methods that could overcome some of the problems in financing education. The first

method is to recover the public cost of higher education and reallocate government spending on education towards the level with the highest social returns, i.e. in primary education. The second method is to develop a credit market for education, together with selective scholarships, especially in higher education. The third method is to decentralize the management of public education and encourage the expansion of private and communitysupported schools.

India currently faces two major challenges in her path to progress - income poverty and information poverty. Income poverty arises due to poor skill sets, low access to material and knowledge resources, exploitation by intermediaries and environmental degradation. There are about 400 million people in India facing income poverty. Poverty and illiteracy go hand in hand. India has to visualize education, apart from economic growth and development, as a means of liberating the poor from deprivation and poverty."

Whatever it be, it is an obligation of the State - and the State and its agencies cannot be allowed to trade on education. Poor finance is always a poor alibi when the State has an obligation to recognize, to protect and implement a human right. If the Govt. of Maharashtra could pay Rs.17 Crores by way of Scholarship, it could as well have taken the management of many professional colleges. If private parties want to share the responsibility with the State, it cannot be as trade, business or profession, much less as an "Occupation". ■

K.K. Ragesh

'Supreme' Trade in Education
An Analysis of Two Judgements

The verdict of the Supreme Court in the TMA Pai Vs State of Karnataka as expected created chaos in the higher education sector. Even though the underlying philosophy of the Judgement is accepted by both the private managements and Union/State governments (barring the left governments), the interpretation by different State governments is varied. This is due to the ambiguity inherent in the Judgement and also the political and democratic atmosphere existing in respective states. The private managements not satisfied with the profits they are sucking out of the students and the assistance rendered by the state governments' to this end went again to the court. Popular pressure also had built against the free hand given to the private managements with students coming out in large numbers across the country. All this led to the constitution of the 5-member bench by the Supreme Court to reinterpret its earlier Judgement. This does not connote a reversal of its earlier Judgement. As had already declared by the Court itself it is just concerned about the admission process-the number of seats to be filled by the government and by the management-and also about the fee structure. Without a reconsideration of the entire philosophy of neo-liberalism embedded in the Judgement we cannot expect much from this exercise.

The essence of globalisation is to achieve an overall hegemony of

capitalist forces. The likely impact of the Indian State's increasing shift towards capitalist forces is to have a corresponding affect on the nature of the judiciary.

For the last decade and odd, the Union Ministry of Human Resources Development (HRD) and various state education departments have been paving way for enslaving the education sector to market-capital forces. While the HRD Ministry has been implementing an aggressive agenda of commercialisation of education through various academic bodies including the UGC, the Prime Minister's Office (PMO) came into the scene when the Prime Minister's Council on Trade and Industry appointed the Ambani-Birla committee to prepare a report on the higher education sector. The essence of the recommendations made by this report is to ensure the dominance of money power in higher education through privatisation and commodification of education. The report argues for the strict enforcement of the "user pay principle" and "credit market" for higher education and thereby, provides a complete justification to the privatisation drive being carried on by the Union HRD Ministry.

The recent Supreme Court verdict on private -minority educational institutions (TMA Pai Foundation V/s State o Karnataka) echoes the 'user pay principle' suggested by the Ambani-Birla report. The specious and callous principles of liberalized economic policies come out repeatedly in the 146-page judgment of the eleven member constitutional bench of the Supreme Court. The verdict deposes the existing concept of education by observing "it is well established all over the world that those who seeks professional education must pay for it" and "the idea of an academic degree as a 'private good' that benefits the individual rather than a 'public good' for society is now widely accepted". While giving absolute authority for private managements in admissions and charging of fees the supreme judicial body, venerates the policy deviation of the state.

Unnikrishnan Case And Social Control

Despite the fact that the petitions that came before the Supreme Court sought only to safeguard the special privileges of educational institutions owned by minority communities, the verdict in effect rebuffed the social control over private professional educational institutions and overruled the decisions in the Unnikrishnan case. The core of the pronouncement of the Supreme Court in the Unnikrishnan case (Unnikrishnan J.P V/s State of Andhra Pradesh)

was the social control over private educational institutions. In Unnikrishnan case, the court primarily considered the extent to which the government can interfere in the functioning of private professional colleges. In this regard, the judgment in Uniikrishanan case had recommended explicit criterion regarding admission of students and charging of fees.

As per the Unnikrishnan case judgment a professional college could be established or administered only by a society registered under the Societies Registration Act or by a public trust registered under the Trusts Act. The verdict strictly prohibited any individual, group of individuals, firm, company from establishing and administering professional education institutions. According to section 19(1) g (the right to practice any profession, or to carry on any occupation, trade or business,) the question was raised before the court whether the right to set up educational institutions is a fundamental right or not. Though the Court did not come to any conclusion it opined that trade or business connotes an activity carried on with a profit motive and education has never been commerce in our country.

The judgment also suggested that admissions to professional colleges should be from the merit list prepared on the basis of a common entrance test. A scheme for admissions was also suggested - 50% of total seats as 'free seats' and the remaining 50% as 'payment seats'. The court reiterated that the constitutional obligation of reservations for SC/ST and PH students must be maintained. While doing away with the management quota system, the judgment ordered that a certain percentage of seats should be reserved for the weaker sections of the society subject to the norms of the university to which the colleges are affiliated. The court also suggested to the state governments to constitute a committee to fix a ceiling on the maximum fees chargeable by a professional college and stated that the fee chargeable in each professional college in a state should be subject to the ceiling of that committee.

Supreme pronouncement of 'free trade' in education

With the recent verdict, the Constitutional Bench of the Supreme Court declared the Unnikrishnan scheme 'unconstitutional' hence sabotaged the limited social control over self-financing institutions ensured in the Unnikrishnan scheme. The court while reiterating the ban on capitation fee and forbidding profiteering, now allows for generating of 'reasonable'

surplus on the condition that it is to be spent for expansion of the institution or providing more facilities for students to ensure excellence.

The right to practice any profession, or to carry on any occupation, trade or business is a fundamental right as per article 19(1) g of the Constitution. Establishing and administering education institutions was not considered trade, business or profession and hence was never a fundamental right of citizens. That is why the Supreme Court in the Unnikrishnan case forbids any individual or group of individuals from establishing and administering educational institutions. But the new judgment identifies establishing and administering educational institutions as "occupation" that comes under article 19 (1) g of the Constitution and consequently falls under fundamental rights.

The scheme framed for admissions in self-financing institutions through 50% 'free seats' and 50% 'payment seats' in Unnikrishnan case has been replaced with a scheme of 100% payment seats in the new judgment. It is interesting to go through the logic that made the court arrive at a conclusion to discard the Unnikrishnan scheme. The judgment maintains the argument that the students who come from private schools and who belong to more affluent families are able to secure higher positions in the merit list of the common entrance test, and are able to seek admission to the free seats, and the students who come from less affluent families if at all, are able to seek admissions to payment seats since they secure lower position in the merit list. Thus, the court also quips that the scheme only helped the privileged sections and resulted in "adverse" financial impact on private professional educational institutions. Instead of suggesting ways to avoid lacunas in the present entrance system, the court unfortunately annulled the Unnikrishnan scheme and thus closed down the door of the limited opportunity for higher professional education to economically weaker sections of the society.

The judgement rules out any scope for the government intervention in the administration of private educational institutions. It allows the private management unlimited freedom to set up a "reasonable" fee structure and admit students, and consequently opens up all doors for the commercialisation of education. It is strange that the judgment even misinterprets the report of Dr. S. Radhakrishnan Commission (University Education

Commission 1948), to argue for permitting private managements to admit students by curbing government intervention. The court finds that government control in admissions and in fixing a reasonable fee structure is against the concept of "academic autonomy" suggested by the Radhkrishnan Commission report!

The Commission chaired by Dr. S. Radhakrishnan (University Education Commission), while disapproving of government control in the realm of academics ie, determining subjects and their syllabi, had only suggested that the academic autonomy for universities is vital because intellectual progress demands the maintenance of the spirit of free enquiry and the pursuit and practice of truth regardless of the consequences. This has been the ambition of all universities in post independent India. The commission reiterated that higher education is the responsibility of the state but state aid is not to be confused with State control over academic policies and practices. Even though the commission was suggesting for academic autonomy, the recent court verdict in effect is contrary to the recommendations of Dr. Radhakrishnan Commission. Unfortunately the court interpreted government control on admission policy as interference in academic freedom, thus allowing the private managements unlimited autonomy in charging of fees as well as in admissions. This will not ensure the goal of academic autonomy visualised in the Radhakrishnan Commission report, but ultimately have adverse qualitative impact on educational rights of the people by leading to commercialisation of higher education. It is the Dr. Radhakrishnan Commission that had suggested the financial burden of higher education should be met by the government and had recommended for the formation of the University Grants Commission (UGC) to provide financial assistance to universities. So, it is most unfortunate that the Commission report was misread to justify the views that were in fact strongly opposed by it.

The constitutional norms for reservation has also became void in private institutions due to this verdict. In the Unnikrishnan case the court had recommended reserving of 22.5% seats for SC, ST and other deprived sections. While annulling the Unnikrishnan scheme, the reservation for weaker sections of the society is also getting abolished. According to the verdict, only those institutions, which accept government aid, are liable to follow the reservation norms. What is silently eliminated with the privatisation and withdrawal of government from the education sector is the

constitutional reservation designed for the weaker sections of the society.

Dissimilarity In Verdict

The verdict of the eleven member Constitutional Bench reflects the influence of globalisation and private interest. It is prone to various interpretations with its dissimilarities in findings and conclusions. While giving unlimited freedom to private managements to set up fee structure and admitting the students, the Supreme Court opines that educational institutions are charitable institutions and the fee charged should not amount to profiteering. The court while observing that the article 30(1) of the Constitution allows minorities to establish educational institutions, maintains that the right is not absolute. As per this, the government or other educational bodies can interfere to ensure that the admission is on a transparent basis and merit is ensured. The verdict also says that the government can have more control in the case of professional educational institutions. It is not private managements but the government, universities and academic bodies like AICTE, MCI and DCI etc. that have the right to fix criteria for admission of students to professional educational institutions. Private management can make admissions only according to the criteria set by these academic bodies. The government can interfere to make sure that the admission is merit based and the fee charged is justified. Some of the self-proclaimed minority institutions in Kerala are misinterpreting the recent SC judgment and ignoring the above facts while admitting students on payment basis to the entire seats.

Here, it is worthwhile to mention the interim policy regulations issued by the AICTE in the light of the SC verdict. The AICTE while restricting the management quota in private institutions and minority institutions to 15% and 50% respectively suggests that the admission for the entire seats should be made only on the basis of a common entrance test.

Here, many questions become relevant. How far can the government intervene to ensure that the admissions are in fact merit based? While offering private managements with the right to fix a 'reasonable' fee structure and 'advising' them to keep away from profiteering, what mechanisms can ensure that only a reasonable fee is in fact collected? How can it be ensured that the 'advice' is followed? Will huge fees not result in depriving the meritorious

students from economically backward classes from higher education? Is it not the case that money will become the eligibility criteria rather than merit? While making the decision on more than two hundred writ petitions including that of TMA Pai Foundations, the judgement, in effect fails to give reasonable solutions but in fact opens the case for a number of future litigations.

Total Privatisation And The Diminishing Quality Of Education

The outcome of the Supreme Court verdict will be total privatisation and steep fall in the 'quality' of professional education. Even the court admits that the logic of today's economics and an ideology of privatisation have contributed to the resurgence of private higher education. But as observed by the court, the mushrooming of private higher educational institutions is not an all India phenomenon. The trend is confined only to the states like Karnataka, Maharashtra, Tamilnadu, Andhra Pradesh and Kerala. In Kerala private professional educational institutions were established very recently. With the recent Supreme Court verdict, even the existing aided institutions may transform themselves in to self-financing institutions by refusing government aid. The court while coming to terms with the proliferation of private professional education has failed to consider the quality of education offered in these institutions. How far are arguments such as "private education is one of the most dynamic and fastest-growing segments of post-secondary education at the turn of the twenty-first century. A combination of unprecedented demand for access to higher education and the inability or unwillingness of the government to provide the necessary support has brought the private higher education to the forefront" accurate? Studies show that in the states of Karnataka, Maharashtra and Tamilnadu private professional education has become an industry that gives return in excess of 50%. The centres of excellence like IITs, IISs and Roorkee, Jadavpur and Anna universities, the NITs and well established government or aided institutions have ensured quality in professional education. But it is a fact that mushrooming of self-financing professional institutions, which offer only degree programmes with little infrastructure and inadequate faculty have resulted in a serious decline in the quality of professional education. In IITs, the government spends Rs 85,000 per student in a year while in NITs the government spends Rs 21,000 to Rs 35,000 per annum. The AICTE stipulates that a minimum of Rs 16,800 should be spent on a single student per year for professional education.

Whereas the amount spent by more than 80% of the self-financing institutions is Rs 6,000 only.

It is a proven fact that increase in the number of self-financing institutions has failed to bring any qualitative progress in higher education. Instead, it has resulted in decrease in the quality of education. The net outcome is disturbing. For postgraduate and doctoral programmes, as high as 60% of the seats are not being filled up because the students produced from private institutions do not have the academic rigour to get through GATE, the qualifying examination. This trend will soon result in the scarcity of qualified faculty in the technical education sector. With greater privatization, the education sector is becoming an industry based on profit motive and the meritorious students are being ousted with merit being replaced with money. Total collapse in the quality of higher education and the toppling of the advancement that was made in the realm of science, technology and research till date, will be the balance sheet of the Supreme Court verdict.

The only way out is a new legislation in the parliament to control private management and a ban on the commercialisation of education.

Islamic Academy Judgement Confusion Persists

A dangerous state of affairs has been nagging the arena of professional education in India, with private managements and various state governments giving dubious interpretations to the October 2002 verdict of the eleven-member constitutional bench of the Supreme Court of India in the T.M.A.Pai Foundation case. Contradictory interpretations by different parties, especially vested interests, have created a lot of confusion. The verdict has caused chaos in the entire professional education system of our country, with many students loosing the opportunity of education due to unprecedented profiteering legitimised by this verdict. The ability to pay hefty kickbacks as the eligibility criteria to get admission into professional educational institutions is replacing academic excellence. Exorbitant fee hikes are further taking education beyond the reach of the common people.

The constitution bench formed by the Apex Court for interpreting it's own judgement was a response to the fears and queries of

many who had condemned the Supreme Court verdict in the T.M.A Pai Foundation case. The August 14th judgement of the constitutional bench of the Supreme Court on a number of special leave petitions and writ petitions filed by various state governments and self-financing college managements, as well as the interlocutory applications submitted by student's organisations including the SFI, has opened up new debates in the arena of private self-financing professional education.

The new verdict leaves many contentious issues involved in various pending cases between private managements and state governments to the regular benches for disposal on merit. However, it lays down clear-cut norms regarding ratio of management and government seats, and gives a specific directive on the question of fee structure. The verdict clarifies that admissions should be based only on merit lists prepared from common entrance tests. It rejects the argument that managements have absolute power over admitting students and deciding their fee structure. It also bans capitation fee and directs professional institutions to make provisions for ensuring reservation of students from economically and socially backward sections. The TMA Pai case verdict had given unbridled legitimacy to commercial interests and "user-pay-principle" in education. The new verdict, significantly, reinstates some rights to the government to impose "reasonable restrictions" on the functioning of private and professional educational institutions.

The Apex court makes a recommendation for forming a five-member-committee chaired by a retired High Court judge to take final decisions regarding fee structure and to supervise that merit is maintained while admitting students. Representatives of the Medical Council of India (MCI) or the All India Council for Technical Education (AICTE), a reputed charted accountant and another person of repute recommended by the chairperson will constitute the members of this committee. Medical / technical education secretaries of respective states would work as the secretaries of these committees. The committee has the right to ensure that capitation fee or exorbitant fees is not collected from students. Self-financing institutions can submit their proposed fee structure along with their annual accounts statement before this committee. The committee will be at liberty to approve or reject the proposed fee structure and recommend some other fee structure to the institution. The fee fixed by the committee shall be binding for a period of three years. The verdict further clarifies that no institute

can charge any other amount, directly or indirectly over and above the amount fixed as fees and if any excess amount is charged it would amount to charging capitation fee.

The verdict further directs that students admitted even through the management quota should be from the merit list prepared on the basis of the common entrance test. This entrance test must be conducted either by the association of managements or by government agencies. The court suggests certain methods for supervising the common entrance test conducted by the association of managements for ensuring that the test is conducted in a fair and transparent manner. This is a definite set back to the traders of education who want to replace the criteria of "merit" for admissions with "money power". It eventually discards the argument that private unaided managements enjoy complete autonomy in admitting students and fixing any fee structure.

With regard to management quota admissions in minority institutions, the Apex Court reiterates that while admitting students of their community/language in management quota, inter-se merit among the students of their community/language should be ensured for admissions. If management quota seats cannot be filled up from members of the minority community, then other students can be admitted, but only from the merit list prepared by government agencies. Moreover, government quota admissions must be done absolutely on the basis of the merit list prepared from the common entrance test conducted by government agencies. It is significant that the Supreme Court also recommends that provisions must be made for poorer and socially backward students in admissions.

According to the judgement, state governments in order to ensure transparency in the conduct of the proposed entrance test must form another committee headed by a retired High Court judge with the secretary in charge of medical or engineering education of respective state governments acting as the secretary of the committee. Besides, a prominent academician of the state, a Vice Chancellor of any university of the respective state and a doctor/ engineer too will be nominated as members of the committee. The committee shall have the right to call for the proposed question paper, to know the names and other details of the persons who prepare the question paper and also to check the methods adopted to ensure that the papers are not leaked. The committee will also be the ultimate decision making authority in matters of dispute

regarding fixing of seats according to the quotas allotted to different categories.

The Court allows respective state governments to decide the percentage of government and management seats in unaided professional colleges according to the local needs. The Court also categorically rejects the claim that the managements have the absolute right to admit students to the entire seats. While remaining silent on the fee structure, the Court has directed that a ratio of 50:50 must be maintained for admissions in various institutions for the current academic year. This has sparked a new controversy since the five-member committee, which rests with the right to stipulate fees, is not in place in most of the states, and the managements which only have the right to suggest and not to decide the fees structure are fully exploiting this situation by imposing hefty fees upon students. This practice by the managements is completely opportunistic and against the spirit of the court judgement. It is not the managements but the concerned state governments who must decide the interim fee structure.

Many interpretations of the Supreme Court judgement are still being forwarded by vested interests to benefit the commercial and profit oriented interests of private managements. It is being interpreted that the fee structure for the seats of both the managements and the state governments must be the same in view of the abolition of cross-subsidisation by the court. However, there is no logic in this argument since a common fee structure will completely invalidate the basis for having a government quota in the first place i.e. to provide equality of opportunity to the deprived sections of our society. It is necessary to ensure that the fee structure for merit seats from government quota in unaided professional institutes does not exceed the fee paid by the students from government institutes. The fact that the verdict of the Constitutional bench helps the governments to control the private-self financing managements is by itself a criticism of the principle of free trade in education and making profit out of it.

The Court has made many contradictory and disturbing observations in this judgement. Labelling education as a `charitable' exercise on the one hand and allowing managements to make `reasonable surplus' from fees on the other is by itself incompatible. It has also failed to make the common entrance test conducted by government agencies mandatory for admissions in all professional institutions

thereby leaving scope for having two separate examinations for admission to the same institution from different quotas. The suggestion of the Court to have a bond written by students stating that they will study for the entire duration of their course at the time of admission is also an undemocratic exercise, which will prevent students from going for better options.

The verdict lacks concrete suggestions to ensure the social accountability of the committees formed to control private-self-financing professional educational institutions. When the whole system is drowned in corruption - even judiciary being no exception- can it be expected that a committee which is not accountable can act judiciously? How can it be ensured that its decisions will not be affected by vested interests? These committees can also be used by governments committed to the policies of liberalisation to pass on the blame accruing out of their own anti-people policies.

In a democracy the policy making authority lays with the elected peoples representative bodies. The government cannot shy away from this responsibility and pass on the buck to the judiciary. If any government is trying to shift the blame away from itself and on the judiciary, it is trying to divert the ire of the people on the judiciary. The legislators should wake up much before the present judgement given by the five-member Constitution bench gives rise to numerous litigations. A suitable legislation should be immediately enacted to empower the state governments to control the private unaided institutions before they press for a seven-member bench to gain leeway! ■

Thomas Joseph

LEGISLATIVE COMPULSIONS OF THE JUDGMENT ON PRIVATE PROFESSIONAL EDUCATION

Inamdar Judgment: A Recipe for Trade in Education

The seven member bench judgment of the Supreme Court (P.A. Inamdar &Ors vs. State of Maharastra &Ors) on private professional education has at least one merit. It has exposed the extent to which the judgment in the TMA Pai Foundation case could be extended to judicially jettison the egalitarian principles of the constitution. It is true that the unanimous judgment delivered by R.C. Lahoti, Chief Justice of India on behalf of the seven member bench graciously acknowledges the importance of the egalitarian ethos of the constitution and its relevance in education against the background of the emerging knowledge society. It underscores the need for democratizing educational opportunities in the context of global competition:

"It is well accepted by the thinkers, philosophers and academicians that if JUSTICE, LIBERTY, EQUALITY and FRATERNITY, including social, economic and political justice, the golden goals set out in the Preamble to the Constitution of India are to be achieved, the Indian polity has to be educated and educated with excellence. Education is a national wealth which must be distributed equally

and widely, as far as possible, in the interest of creating an egalitarian society, to enable the country to rise high and face global competition"

But unfortunately, the practical implications of the judgment do not reflect the concern for the egalitarian ethos so forcefully set out in the preamble of the verdict. It is perhaps in recognition of this lacuna that the judgment is given effect only from the next academic year and a forceful recommendation made to Central / State governments to bring in appropriate legislation at the earliest, before this judgment could come into effect. Such a reading of the judgment becomes necessary against the background of the judicial observation that the TMA Pai Judgment is deficient in some fundamental requirements of a good verdict, namely clarity and consistency. I quote:

"We have placed on record in the earlier part of this judgment and, yet, before parting we would like to reiterate, that certain recitals, certain observations and certain findings in Pai Foundation are contradictory inter se... ...".

The seven member bench has clearly stated the constitutional limitations under which it has pronounced its judgment. A seven member bench cannot overrule an eleven member bench. All that it can do is to interpret and clarify the ratio given by the eleven member bench. What the seven member bench has actually done is to sit in judgment over the verdict of the five member bench in the Islamic Academy Case, which was itself constituted to clarify the doubts arising from the TMA Pai judgment. The seven member bench has now virtually overruled the verdict of the five member bench. It has ruled out Government quota in admission permitted by the five member judgment. It has cut the wings of the committees set up to regulate admission and fix fees in private institutions. Such committees cannot now conduct tests or fix fee, but only oversee such functions. It has introduced NRI quota of which no mention was made either in the Islamic Academy Judgment or in TMA Pai judgment. Though TMA Pai had categorically ruled out differential fees, the same has been permitted in NRI seats .But the bench did not introduce reservation for SC/ST on the pretext that there is no mention of it in TMA Pai/Islamic Academy. Though the seven member bench has unanimously overruled the majority view of the five member bench, it might still be asked as to how even the seven member bench could rule out different interpretive

possibilities inherent in the judgment of the 11 member bench. If a larger bench cannot be overruled by a smaller bench, the judgment of the 11 member bench with its myriad conflicting possibilities still holds the ground. The verdict of the seven member bench could give rise to fresh litigations exactly as the verdict of the five member bench had given rise to numerous litigations earlier. The only effect of the new verdict is to replace one set of litigants by another. The litigants in the earlier instance were private managements. This time the appellants could be hapless students and parents, if only they could afford to bear expenses involved in approaching the Supreme Court. In fact, their point of view has never been represented before the court, right from TMA Pai to the present case. That, incidentally, brings out two limitations in our system of delivery of justice. The first is the limitation of the adversarial system of justice practiced in Indian Courts as against the inquisitorial system prevalent in some other countries. Judges are only bound to choose between arguments presented before them. Though it is theoretically possible to seek expert assistance, it is seldom sought even in the most complicated situations. The other drawback is best summed up in the words of Justice Krishna Iyer, former judge of the Supreme Court, who, commenting on TMA Pai judgment, observed as follows:

"The latest pronouncement of the highest court in TMA Pai Foundation Case is no exception to the proposition of subtle psychic bias influencing impalpably the interpretive perspective and subconscious conviction of those called upon to pronounce on contemporary issues. Today, under the powerful impact of globalization and privatization, the mentality of the elite class has suffered a commercial conditioning even in jurisprudential understanding."

A close look at the major Supreme Court verdicts on higher education in the last one-decade and a half could illustrate the evolution of the jurisprudential moorings of the apex court from constitutional egalitarianism to competitive globalization. Mohini Jain (1992) declared that the citizen has a fundamental right to education at all levels and that imparting education, whether undertaken by the state or private agency, is a sovereign function. It held: "The right to education flows directly from right to life. The right to life under article21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education. The State Government is under obligation to make endeavor to provide educational facilities

at all levels to its citizens". It further held: "When the State Government grants recognition to the private educational institutions it creates an agency to fulfill its obligation under the Constitution. The students are given admission to the educational institutions-whether state-owned or state-recognized in recognition of their right to education under the Constitution". Unnikrishnan (1993) restricted the scope of this fundamental right to education of the citizen by holding that the right is available only up to the age of 14.At the same time Unnikrishnan opposed entrepreneurship in education: "Imparting education cannot be treated as trade or business. It is a religious duty, a charitable activity. Making it commerce is opposed to the ethos, tradition and sensibilities of this nation". Echoing the sentiments expressed in Mohini Jain, Unnikrishnan also held that private educational institutions imparting education undertake a state function: "Educational activity of the private educational institutions is supplemental to the main effort by the State and what applies to the main activity applies equally to the supplemental activity as well". It was on the basis of this understanding that the court evolved a scheme for admission and fees in private professional educational institutions, which would "eliminate discretion in the managements altogether in these matters".

TMA Pai turned the rules upside down. Openly imbibing the philosophy of liberalization and privatization, TMA Pai (2002) overruled Unnikrishnan and conceded the entrepreneurial rights of private operators in higher education. At the same time the court further restricted citizen's right to education by ruling that he has no fundamental right to education beyond the primary stage. Higher education was defined a private good: "The idea of an academic degree as a "private good" that benefits the individual rather than a "public good" for society is now widely accepted. The logic of today's economics and an ideology of privatization have contributed to the resurgence of private higher education, and the establishing of private institutions where none or very few existed before" .It was on the basis of this understanding that the court assumed that it was "well established all over the world that those who seek professional education must pay for it". But the court disallowed profiteering as educational activity was still regarded as "charitable activity", a sentiment that is at variance with the operative part of the judgment, which provided enough room for profit making in the form of "a reasonable revenue surplus, which may be generated

by the educational institution for the purpose of development of education and expansion of the institution". Charity, yes, in principle! But no obligation for charitable investment! .Inamdar (2005), giving a perverse twist to the logic of charity ruled that charity is no right ;it cannot be demanded or enforced; it is an act of benevolence on the part of the giver and therefore the Government has no right to prescribe the norms for and the extent of charity doled out to the weaker sections of society: "We make it clear that the observations in Pai Foundation in paragraph 68 and other paragraphs mentioning fixation of percentage of quota are to be read and understood as possible consensual arrangements which can be reached between unaided private professional institutions and the State". The State has no right except the right to make a prayerful supplication on behalf of the weaker sections!

In less than fifteen years, the role of the State in higher education has thus been reversed from that of a sovereign provider of facilities and arbitrator of social justice to that of a facilitator for private entrepreneurs and mediator for charity between them and the weaker sections of society. It is precisely during the same period that knowledge capital has emerged as the most crucial component of production--more important than land capital, natural resources and finance capital. The coincidence is not accidental. The Supreme Court, by arresting the march towards democratization of higher knowledge, has been acting as a handmaid to monopolistic capitalism in its attempt to perpetuate its stranglehold on the most crucial component of production in modern times, namely knowledge capital.

The manner in which the ratio of TMA Pai has been identified by Inamdar makes interesting reading. The interpretation of paragraph 68 of the TMA Pai Judgment by Inamdar is crucial to the understanding of the different ideological perceptions of TMA Pai and Inamdar. I quote below the entire paragraph from TMA Pai, as reproduced by the seven member bench:

"68. (I) 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 forego or discard the principle of

merit. It would, therefore, be permissible for the university or the 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.

(II) 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 counseling 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 percentages 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."

It may be noted that paragraph 68 in TMA Pai has been divided into two sections when reproduced in the new verdict. Part (1) is certified as part of the ratio of the judgment and part (11) merely as obiter:

".....a reading of the majority judgment in Pai Foundation in its entirety supports the conclusion that while the first part of para 68 is law laid down by the majority, the second part is only by way of illustration, tantamounting to just a suggestion or observation, as to how the State may devise a possible mechanism so as to take care of poor and backward sections of the society. The second part of para 68 cannot be read as law laid down by the Bench. It is only an observation in passing or an illustrative situation which may be reached by consent or agreement or persuasion".

Even while conceding that the part (11) is only illustrative and need not be followed verbatim, it is still difficult to see how the conclusion that the options available for State intervention suggested in part (11) could only be implemented through "consent or agreement or persuasion" has been reached. In fact, part (11) only forcefully projects some of the various alternatives available to the Government for enforcing its will on private institutions. The illustrations are not exhaustive. They are cited only as examples of the actions that could be taken. This would imply that the

Government has powers not only to enforce the alternative actions suggested, but also other similar options not specifically mentioned here .The conclusion arrived at by the seven member bench which precludes all intervention by the State is, to say the least, the most illogical.

Whatever be the legal niceties involved, there is little doubt that the new verdict will pave the way for unfettered commercialization of professional education, despite the ban imposed on capitation fee and profiteering. Ironically enough, the continued judicial recognition of education as a charitable activity---while prohibiting regulatory intervention by the Government to implement the principle in letter and spirit---would only serve to camouflage the exploitative practices of private managements. Even educational institutions run on purely commercial lines could now operate under the protective umbrella of the privileges reserved for charitable institutions. The practical outcome of the judgment is so undesirable and undemocratic that no popular Government worth its name can sleep over it for a long time. The Government has to take the initiative for corrective intervention through the legislature.

Draft Bill: Remedy Worse than the Disease

The Ministry of Human Resource Development has already circulated the draft of a central legislation for governing admission and fee in Private Professional Educational Institutions, for discussion among members of the Central Advisory Board of Education (CABE). The legislation had been necessitated by the public outcry against the unbridled freedom given by the apex court to private entrepreneurs in professional education through its verdicts in TMA Pai and Islamic Academy cases. By overruling the equitable arrangement for admission and fees in Unnikrishnan Judgment, the above verdicts had made professional education unaffordable even for the meritorious children among the middle classes. The legislation is also intended to fulfill the promise in the Common Minimum Programme (CMP) of the United Progressive Alliance (UPA) Government that "nobody will be denied professional education because he or she is poor". Student organizations had been vociferously demanding that the Central Government enact a legislation empowering the states to regulate admission and fees in unaided professional institutions. The legislation has become all the more urgent against the background of the new seven member bench judgment which has given judicial sanction to the most inequitable arrangement ever for making admission and fixing fee

in private professional educational institutions.

The draft proposals are unlikely to fulfill the expectations of those who had been actively campaigning for it. In fact, the existing problems in the field of self-financing professional education (prior to seven member bench verdict) are very likely to aggravate, if the proposed legislation is enacted in its present form. The provisions in the draft bill provide greater freedom to private entrepreneurs in education than is contemplated in TMA Pai and Islamic Academy judgments. At the same time, the draft bill also seeks to undo some of the positive directives in the TMA Pai judgment for the interpretation of minority rights as federal and equitable rights. Moreover, the scope of the legislation is not confined to unaided institutions alone. It confers on minority-aided institutions undue privileges, which cannot be justified even with reference to the interests of the communities in question.

The most disquieting aspect about the reservation of seats in minority aided and unaided institutions is that such reservation has been made under the "management category" rather than "community category". While up to 50% of the seats will be available to minority aided educational institutions under the management category, "not less than 50% of the sanctioned intake" (which, by implication, could extend to 100%) may be reserved under the same category in unaided minority institutions. It is not clear as to how the provision would benefit the individual applicants in the minority communities as the seats are reserved under the management quota, and not under community quota. The managements will not be obliged to fill the seats from among the applicants in the minority community on the basis of "inter se merit" as required by the TMA Pai judgment. It is more likely that they would sell the seats in the open market for the highest bidders. The provision for identification of minorities on the basis of a Central Government notification as provided for under section2 (f) of the National Commission for Minority Educational Institutions Act, 2004 is intended to *circumvent the directive in the TMA Pai judgment that minorities have to be identified state wise and that special privileges shall be conferred on minorities only to the extent required to offset any disadvantages they might have on account of their numerical shortcomings vis-à-vis the majority community.* This implies that demographic and socio-economic realities peculiar to each state will be crucial in the identification of minorities and conferring of special privileges. The proposed legislation along with

the earlier one on the establishment of the national commission for minority educational institutions would undo the directives of the apex court for observing federal and equitable ethos of the constitution in the confirmation of minority rights.

Private Deemed Universities, which run the same professional courses as run by affiliated self-financing institutions, are treated as a separate category for the purposes of admission of students. Each one of them can conduct its own test, provided the test is held at least in one center in each of the four metropolitan cities of Delhi, Chennai, Kolkota and Mumbai. This could help keep the essentially elitist character of the Deemed Universities in tact by ensuring that the aspirants from far-flung villages do not get the opportunity even to appear for the entrance test. The object is to promote the growth of a few "islands of excellence" which could serve the educational needs of the off springs of the rich and the powerful. The implications of the present practice of conferring deemed university status on new private universities which run professional courses at the undergraduate level as opposed to the earlier practice of conferring such status only on public institutions which are actively engaged in postgraduate teaching and research in rare subjects has to be understood against this background. In the Islamic Academy judgment, the permission to evolve its own criteria for admission to professional courses was granted only to institutions which had been established and had been following their own admission procedure at least for the last 25 years. The new stipulation would make the privilege available to all deemed universities, old and new, irrespective of their academic and philanthropic standing. To cap it all, Vice Chancellors of Private Deemed Universities could be nominated as Chairmen of the Admission and Fee Regulatory Committees. The door has been left ajar for the capitation lobby to sneak in. The provision for holding separate entrance test for the management category in affiliated colleges is also intended to serve the same purpose. Even the illogicality of holding two tests to prepare the merit list for the same course has not prevented the MHRD from holding out such a privilege to private institutions. The legislation will fail to meet its basic objective of sealing the loopholes in the Supreme Court verdicts for the collection of capitation fee.

State level and central level fee regulatory committees would fix the fee for state and central level institutions. The former would fix the fee for institutions affiliated to state universities and the latter

for institutions affiliated to central universities and deemed universities. Though it is not specifically stated so, *different institutions will have different fee structure* for the same course. This is evident from the stipulation that the fee would be fixed by taking into account such factors as the location of the institution, the cost of the land and building, the available infrastructure, the expenditure on administration and maintenance, "reasonable surplus" required for the growth and development of the institution and the revenues forgone on account of fee waiver for SC/ST and other backward community and economically weaker students (to the extent as shall be notified by the appropriate authority from time to time).The refusal to fix uniform fee for the same courses in the same state on the basis of *expenditure calculated in accordance with the norms of minimum standards* will lead to hard and unconscionable bargaining on the part of the managements for higher fixation of fee in their respective institutions. This could also introduce unhealthy classification of institutions on elitist considerations. Against the above background, the proviso that the fee fixed by the regulatory committee shall not amount to profiteering or commercialization of education would only amount to wishful thinking.

A Bill to Ensure Access, Equity and Excellence

The Supreme Court verdict and the draft legislation share one fundamental flaw. Both have given greater importance to the entrepreneurial rights of private providers in professional education than to the educational rights of ordinary citizens of a democratic country which still swears by socialism in the preamble of its constitution. In so doing, the court and the MHRD have overruled the dictum laid down in Unnikrishnan verdict that educational activity undertaken by private managements is supplemental to governmental activity and that the norms applicable to the latter should be equally applicable to the former.

In the process of overruling the Unnikrishnan dictum, both the Supreme Court and the MHRD have overlooked the obvious. The bane of the self-financing institutions is that most of them are teaching shops. By allowing them to charge "reasonable surplus" over and above the recurring expenditure for further expansion of the institution, the teaching shops have been given considerable room for maneuvering for profit. While the scheme laid down by

Unnikrishnan had the effect of eliminating discretion on the part of the management, the discretion given by the new verdict to each individual institution to fix fee has opened up the possibilities for unfettered profiteering in education. The private entrepreneurs in education, by and large, have little regard for equity and excellence in education. Any regulatory mechanism for self-financing institutions that does not address these issues has little relevance to the present realities in this field of education. It is not enough to define educational activity as a charitable activity. It also necessary to ensure that there is some provision for charitable investment on the part of the management. Only this could prevent unscrupulous elements from meddling with education with a profit motive. The management concerned should raise adequate finances for setting up the institution initially and for its further expansion. Such capital investment is a long-term asset for the management and individual students should not be made to contribute to capital investment on the part of managements.

The system of differential fee introduced in the Unnikrishnan judgment on the basis of merit as assessed by a common entrance examination was set aside by the TMA Pai judgment on the premise that this would lead to an unjust situation where the poor subsidize the rich as the rich often appropriate the top ranks in the entrance examinations. There is some merit in the argument. But the flaw is that the TMA Pai judgment does not provide for a more equitable *system of admission according to merit and payment according to means.* Moreover, application of the same criteria in all states for conferring special privileges on groups such as minorities without taking into account the demographic and socio-economic realities particular to each state will only tend to perpetuate the existing inequalities. Sidetracking federal principles of the constitution in so sensitive an issue as minority rights could legitimize accusations that the UPA is playing "minoritarian politics" as opposed to "majoritarian politics" played by the previous NDA regime. At the same time implementation of the directive in the Inamdar judgment that minority institutions will have to admit a majority of minority students in order to retain their minority character would put unnecessary fetters on the operative freedom of minority institutions vis-à-vis non-minority institutions.

The issues involved are too complex to be settled through a straight jacket central regulation equally applicable to all states. The right thing for the Central Government to do

is not to enact a comprehensive legislation applicable to the entire country but to enact an umbrella legislation enabling the states to regulate admission and fee in unaided professional educational institutions in such a way as to ensure access, equity and excellence in professional education. The draft legislation is a far cry from UPA's promises in this regard.

The new legislation at the central level should incorporate the following principles:

1. Admission to self -financing colleges should be made on the basis of merit through a common rank list prepared by the agency of the state by giving equal weightage the marks received in the Common Entrance Test (CET) conducted by the state and the marks received in the qualifying examination. Reservation should continue as per norms existing at present in each state.

2. A system of free ships and scholarships for a certain percentage of the admitted students has to be introduced purely on the basis of the parent's financial status. The criteria for assessing financial capacity of the parent could be evolved at the state level.

3. Only recurring expenditure should be collected from students in the form of fees. A committee as envisaged in the Islamic Academy judgment should be entrusted with the task of fixing the average of the recurring institutional expenditure for each state which could also take care of the revenue lost through free ships and scholarships. Fee thus fixed could be revised after three years. The system of fixing different fee for different institutions as proposed by seven bench judgment should not be implemented.

4. In addition to free ships and scholarships granted by self-financing institutions on the basis of specified norms, the central and state governments should also take some responsibility for ensuring equity in self-financing education. Provision should be made for raising a corpus fund by the central and state governments from which students should be able to get long-term educational loans at zero/ minimal rates of interest.

5. Higher Education should be defined a "merit good" setting at rest all speculations about education beyond a certain stage as "non-merit good". The legislation should guarantee the right to higher education, on condition that the right will be subject to the

limitations imposed by the requirements of scholastic merit and aptitude.

6. Central agencies like the UGC, AICTE, IMA and the Universities concerned will be responsible for ensuring excellence in standards. Affiliation should be given only on the basis of an assessment of the professional requirements of the nation/state in each field of study and only after the institution concerned satisfies all conditions regarding infrastructure facilities and other academic norms. Universities should fix the minimum qualification for teachers and ensure their selection on the basis of merit and payment of salary as per norms prevailing for similar placements in Government service in the state concerned. Universities should also have the power and obligation for proper monitoring of the working of the institutions and take corrective /punitive action wherever required.

7. The central legislation should provide for determination of minority status state-wise as mandated by the Supreme Court in TMA Pai Judgment and incorporate a provision for reservation of a certain percentage of seats for students belonging to the minority community which runs the institution .The percentage of seats thus set apart should be fixed by the state government taking into account the demographic pattern and social and economic status of the minority community in question in each state. However individual minority institutions should have the freedom to admit a lesser quota of minority students than fixed by the state without surrendering their minority rights. Admission should be made through centralized counselling on the basis of inter se merit from among minority students in the common merit list prepared by the state.

8. The central law should be applicable to all self-financing institutions, whether universities or colleges, in private or public sector, minority or non-minority, Indian institutions or foreign institutions operating in India.

9. The central legislation should come into effect at the earliest so that complementary legislations could be made at the state level before the beginning of the next academic year.

10. Adequate provision must be made to protect the legislation from judicial scrutiny. ■

(Author is the President of AIFUCTO)

K.N. Panikkar

Kerala Education Act: A Model For The Nation

The Kerala Professional Colleges Act (KPC ACT), 2006, passed unanimously by the Legislative Assembly on July 2 has been a bone of contention between the State Government and the managements of private professional colleges. The latter approached the High Court, which ordered status quo in matters of admission for this year without going into the substantive issue of the validity of the Act. The State Government has preferred an appeal in the Supreme Court against the order of the Kerala High Court, which is slated for hearing on Monday, August 7.

The KPC Act was the outcome of popular mandate, reflected in the 2006 elections to the State Assembly in which unethical practices followed by the managements of private educational institutions had figured as a prominent issue. That the Assembly took steps to place the KPC Act on the statute book in the very first session of the Assembly with the full support of the Opposition was a measure of the strength of the popular will.

The significance of the Act, however, is not limited to the control it sought to exercise over the highly unethical state of professional

education. It heralded the possibility of a new educational culture in a society in which equity and excellence had given way to the power of lucre and political influence. The Act with its focus on merit and social justice as the criteria for admission to professional courses was widely perceived as a welcome beginning. It was believed that the new initiative in the professional education sector would eventually lead to a complete overhauling of the existing system of education. That it has aroused apprehensions in several quarters is not the least surprising; education after all is one of the main props that enable the perpetuation of social power.

In the existing system, the private managements controlled a major chunk of the available opportunities. The exorbitant tuition fees and capitation charges have made these institutions much more lucrative than what their name, self-financing, suggests. In fact, they are a source of profit greater than what other investments can provide. Capitation charges are openly demanded and obtained, ranging from Rs.30 lakh to Rs.40 lakh for admission to medical colleges and slightly lower for engineering. Needless to say, the access to these institutions is restricted to a select segment of society, which, in turn, is interested in perpetuating this system. The opposition to the KPC Act, expressed in the legal wrangle, is motivated both by mercenary considerations and social interests. That they are able to draw support from a variety of patrons is not the least surprising. Religious and political leaders have rallied behind them. The Bishops of seven Christian denominations have addressed a pastoral letter and have exhorted the believers to launch a liberation struggle on the lines of the movement of 1959. Their appeal did not arouse any enthusiasm, as the political consciousness in Kerala has undergone a sea change since 1959. In fact, the members of many a parish openly objected to the attempt of their religious leaders to oppose the Act. The common man in Kerala has realised the Act is a symbol of his empowerment.

What aroused the ire of the managements and the forces supporting them are mainly three provisions of the KPC Act: 1) Procedure for admission; 2) Regulation of fees; 3) Reservation based distribution of seats. The Act provides that "admission of students in all professional colleges or institutions to all seats, except non-resident Indian seats, shall be made through common entrance test conducted by the state followed by centralised counselling through a single window system." This introduces fairness and transparency in the procedure, which ensures opportunity for the meritorious. At

the same time it eliminates the possible manipulations that appear to have been so rampant in the selection to the management list.

Secondly, the Act through a fee regulatory committee allowed uncontrolled management fee only for the 15 per cent admitted from among the non-resident Indians. This is a crucial factor as it considerably bridled the mercenary interests of the management. Thirdly, the Act ensured the social distribution of seats in conformity with the nationally accepted norms of reservation. It meant that 10 per cent shall be earmarked for the Scheduled Castes and the Scheduled Tribes, 25 per cent for socially and educationally backward classes, three per cent for the physically challenged, one per cent for cultural achievement, one per cent for sportspersons, and another 12 per cent for those who were not covered by the above. When the 15 per cent management quota and the 15 per cent NRI quota are also factored in, only 18 per cent was available to those who actually wield social and political power. This naturally tends to upset the existing equilibrium. All these factors along with the apprehension about the minority interest in certain quarters emboldened the managements to challenge the Act in the court. Incidentally the Act in no way impinges upon the rights of the minority to establish and run educational institutions.

When approached by the managements the Kerala High Court did not set aside the Act. The reason the Court gave was that "there is always a presumption in favour of the constitutional validity of any legislation and unless the same is set aside after final hearing, normally the operation of the Act would not be stayed." Nevertheless the Court decided to follow the provisions of the impugned Act of 2004 for which the justification given was "that the Court should not abrogate its duty of granting interim relief when justice may so require." Justice is then handed out to 50 per cent students admitted by the management "who cannot be made to suffer an untold misery with which they would certainly be afflicted if the admissions are upset at this stage." It was reported to the Court that the test conducted by the managements for the admission of these students was not in conformity with accepted norms and was without transparency. It is intriguing that the Court did not show any concern for the interests of the 85 per cent students who were sought to be admitted through the admission test conducted by the government. The verdict of the Court unfortunately provides legitimacy to a system that has been the target of universal condemnation except by those who are its beneficiaries. There is something amiss in the

considerations that led the court to this conclusion.

The essence of the matter is that the existing system is unjust and undefendable. The government has a duty to the people of the State from which it should not shy away, even in the face of concerted opposition of vested interests. It is apparent that the managements had not conducted the test according to the criteria laid down by the Supreme Court in the Inamdar case. The failure of the management to respect these criteria invests the government with enough freedom to intervene and to cancel the admission conducted by these institutions. The Kerala High Court also has empowered the government to take action expeditiously within a month if definite and positive material before it suggest "that the consortium test for the admission of students from medical stream was a farce and the management and the institutions indulged in profiteering at the cost of merit, they may proceed against such institutions and the students by initiating proceedings before the Chairperson of Admission Supervisory Committee or by any other means as may be permissible under law." The government, it appears, has enough leeway to implement the provisions of law. Arriving at a consensus in matters such as education is desirable, but not always possible, because of conflicting interests. That, however, should not impede society from advancing towards social justice and equality. The duty of the government is to pave the way for it.

The problem of self financing colleges, though acute, is not limited to Kerala. The other States are equally the victims of this system, as brought to the notice of the Supreme Court in the cases of TMA Pai and Inamdar. When the Kerala Act is finally placed on the statute book it can serve as a model for the nation. ■

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M A Baby

KERALA PROFESSIONAL COLLEGES ACT, 2006

Promoting Equity And Excellence In Professional Education

The Kerala Professional College Bill, 2006 unanimously adopted by the state legislature on June 30, will go down in history as the first legislative measure of the new Left Democratic Front government to honour its promises to the people. The build up to the passage of the Bill witnessed a revival of the spirit of the first EMS government of 1957-59. Reports comparing the Bill to the Education Bill of Professor Mundassery appeared again and again in the press. The pros and cons of the Bill were widely debated. As the d-day came closer, doubts were expressed about the smooth passage of the Bill in the Assembly and there was even a whispering campaign that the governor would refuse to give assent to the bill. The unsavoury haste shown by the National Minority commission in granting minority status to some unaided professional colleges created the impression of a constitutional crisis in the offing. But it was a different story on the day of reckoning. Though the Opposition kept up the pretence of a protest and insisted on division in respect of some provisions in the bill, the Bill was passed unanimously at the end of the day. The Honourable governor, who was away from the Capital, was gracious enough to stamp his assent from his

camp office at Kochi so that the there would be no delay in holding admissions to professional courses on the basis of the provisions of the new Act. Clearly, much water has flown down the Periyar since 1957. The days of farcical liberation struggle are over.

In framing the law, the government had to act within the framework of the directives laid down by the Supreme Court. In the absence of a comprehensive Central legislation to regulate un-aided professional educational institutions, the State had to undertake the responsibility. The expectations of the people were so high that nothing less than a perfect solution to the vexing issues in unaided professional sector would satisfy them. The government was compelled to perform a delicate balancing act, which would give maximum satisfaction to the people without overstepping the limited powers at its disposal. The only option before the government was to make maximum use of the positive provisions in various Supreme Court judgement and 93rd Constitutional amendment to arrive at a compromise formula for promoting equity and excellence in unaided professional education.

The Act has incorporated provisions for fulfilling almost all the promises made in the LDF manifesto in respect of unaided professional education. The following promises had been made:

1. Ensure social justice in admission and fees.
2. Ensure excellence in education through merit-based admission.
3. Prevent capitation fee and commercialisation of education.
4. Set up a Higher Education Fund for giving assistance to the needy students
5. Scientific revision of the norms for selection to professional courses.

The last item on the list has not been taken up in the present legislation. However, the government has decided to constitute an expert committee to go into the question in all its details. Based on the recommendations of the Committee, a new legislation will be attempted next year. The present legislation has confined itself to addressing the concerns in the first four items.

Maximum reliance has been placed on the authority given by the Supreme Court to the states for regulating admission in order to ensure that it is conducted in a fair, transparent and non-exploitative

manner. Accordingly, the Bill provides for admission to be held under single window system to 85 per cent of the total seats. The state commissioner for Entrance Examinations will hold a Common Entrance Examination to prepare a common rank list. Applicants to various categories will be selected and admitted by the Commissioner on the basis of interse merit from the rank list. Fees for all categories of seats would be fixed by a quasi-judicial authority headed by a former judge of the Supreme Court/High Court. There is provision for penalty up to a maximum of rupees three lakhs and imprisonment up to three years for those who try to circumvent the provisions of the Act. Punishment could be imposed on both the giver and taker of capitation fee. Similarly those who issue and make use of false income certificates to avail free ship under the scheme are liable to be punished.

The promise of equitable opportunities for education to socially, educationally and economically backward sections of the people has been fulfilled to a large extent. 35 per cent of the seats have been set apart as mandatory reservation giving full effect to the 93rd constitutional amendment. Provision has been made for reservation by consensus to weaker sections of the population not covered under the mandatory reservation, 3 per cent of the seats have been reserved for the physically challenged and 12 per cent for others not covered by mandatory reservation under this category. Not less than 50 per cent of the students admitted will get free ship on merit cum means basis. However all SC/ST students will enjoy this benefit without reference to their family income that does not exceed rupees two and a half lakhs. The amount required for this massive subsidy scheme will be raised from the excess generated under 15 per cent NRI quota, charity on the part of managements and contributions from the government for providing free ship to SC/ST students. The government would also set up a Higher Education Scholarship Fund from which needy students could avail loan scholarship at nominal rates of interest. The fund would be raised through government contribution, voluntary contributions form philanthropists and fines levied under the Act.

While the Bill addresses the genuine concerns of the minorities, adequate care has been taken to prevent the misuse of the rights. The peculiar demographic and socio- economic complexion prevailing in the state makes Kerala very unique in the context of minority rights. The Supreme Court has defined minority rights as federal, equitable and secular rights. Accordingly minorities have

to be identified state wise. While there is every justification for positive discrimination to translate the principle of equality into a social reality, the State has to ensure that such positive discrimination does not in effect cause reverse discrimination. The bill has identified three norms of demographic equivalence between minority and non-minority communities on the basis of which minority status could be conferred on unaided professional educational institutions. It is for the first time in the country that such concrete norms for the identification of minority educational institutions have been framed. In the absence of clear-cut norms laid down by the Centre, the state has every right to fix such norms. It is expected that the state norms arrived at on the basis of the broad principles laid down by the Supreme Court would stand judicial scrutiny and could become a model for other states to follow.

The scheme laid down in the bill for regulating admission and fee in unaided professional educational institutions in the state is qualitatively different from the scheme laid down in the 2004 Act on the same subject in the state. The 2004 Act only provided for a scheme for seat sharing between the state and managements in a 50:50 ratio. The managements had complete freedom both in the selection of students and in the fixation of fee in seats allotted to them. More over the beneficiaries of fee concession were mostly students from the upper strata of society as free ship was decided on the basis of merit without any reference to means. The UDF government had virtually reinstated an inequitable scheme, which was held to be unconstitutional by the Supreme Court. Apart from devising a new scheme whereby the rich could provide for the poor, the new bill has also attempted to provide adequate room for promotion of talent not only in academics, but even in the fields of sports and culture. Two percent of the total seats would be reserved for students who have excelled in the fields of sports and culture.

The Kerala Professional Colleges Bill, 2006 is in short an honest attempt to bring about a happy blending of tradition and modernity. While every attempt has been made to preserve and strengthen the long tradition of providing equitable opportunities for learning to all sections of society, the concerns of an emerging competitive knowledge economy have also been addressed. Hence the scheme of the bill and the principles that guided the formulation of the scheme deserves to be discussed at the national level. ■

K K Ragesh

MINORITY EDUCATION BILL
Who Will Benefit: Minorities or Elite In Minorities?

The National Minority Education Commission Bill, which allows direct affiliation of minority educational institutes to central universities, was passed by a voice vote in the parliament during the recent winter session. Earlier, on November 11, in spite of knowing fully well that the parliament was scheduled to meet in a month's time, the central government had in haste issued an ordinance on the same matter, seeking to bypass many legitimate and necessary discussions on this crucial issue. Of the various amendments proposed by Left MPs to this bill, regarding consulting the state governments while granting such affiliations, only one was accepted by the parliament.

UNFORTUNATE ASPECT

According to this bill, any minority educational institutes seeking affiliation to a central university will be granted such affiliation. The various central universities named for the purpose, in the schedule of the bill, are: University of Delhi, Pondicherry University, North Eastern Hill University, Assam University, Nagaland University and Mizoram University. If a university named in the schedule denies

affiliation to an institute, a three-member commission (with all the three belonging to the minority community) would give the final and binding ruling. This committee will be headed by a High Court judge and vested with all relevant executive and judicial powers. This commission can advise the central and state governments on any question relating to the minorities' education, which are referred to it. According to the bill, the commission can "look into specific complaints regarding deprivation or violation of rights of minorities to establish and administer educational institutions of their choice and any dispute relating affiliation to a scheduled university and report its findings to the central government for its implementation." Only the central government shall have the powers to overrule the decisions of the commission.

The National Common Minimum Programme (NCMP) of the United Progressive Alliance (UPA) mentions that minority educational institutions will be given direct affiliation to central universities. It is a known fact that during its tenure the BJP-led regime had discriminated against and harassed many minority educational institutions. This discrimination was in line with the BJP's open opposition to the constitutional rights granted to the minorities under Article 30. It is because of the discrimination meted out to the minority institutes in BJP-ruled state like Gujarat and Madhya Pradesh that the UPA incorporated the said objective in its NCMP. Unfortunately, instead of protecting the minority communities' right to set up educational institutes of their choice and thus cater to the interests of the whole communities, the bill seeks to protect the interests of a select few. The latter are the very vested interests who run minority educational institutes on self-financing basis, without taking into account many relevant and genuine concerns raised by many concerned academics and sections over the past several years.

ART. 30: IMPORT & IMPORTANCE

The constitution of India provides for special rights to both linguistic and religious minorities "to establish and administer educational institutions of their choice" under Article 30. Hence no such law can be framed as may discriminate against such minorities with regard to the establishment and administration of the educational institutions vis-à-vis other educational institutions. Article 30 is a special right conferred on the religious and linguistic minorities because of their numerical handicap and to instil in them a sense of confidence. In the St Xavier's College case, the Supreme Court

has rightly pointed out, "The whole object of conferring the right on the minorities under Article 30 is to ensure that there will be equality between the majority and the minority. If the minorities do not have such special protection they will be denied equality."

While upholding these rights, the Supreme Court has, in the TMA Pai case, also endorsed the concept that there should be no reverse discrimination and opines that "the essence of Article 30(1) is to ensure equal treatment between the majority and the minority institutions. No one type or category of institution should be disfavoured or, for that matter, receive more favourable treatment than another. Laws of the land, including rules and regulations, must apply equally to the majority institutions as well as to the minority institutions."

The Supreme Court has time and again, in many judgements, ruled that minority status can be decided only by taking the state as a unit. It has reasoned that since 'religious' and 'linguistic' are mentioned at the same time in Article 30 of the constitution, and since the states were carved out in India by taking language as the criterion, the classification of 'minority' cannot be based on some other principle. Accordingly, a state government can confer minority status on an educational institute only after considering the socio-economic backwardness of the minorities in that state. This is the reason why, even though 90 per cent of the educational institutions (aided or unaided) in Kerala are run by person(s) belonging to the minority communities, the same have not been accorded minority status.

CAUSES OF APPREHENSION

Evidently, the above mentioned realities were not taken into consideration by the union government when it was drafting the bill which was passed by parliament. Some provisions contained in the bill strengthen these apprehensions.

The bill defines a minority institute as "a college or institution (other than a university) established or maintained by a person or group of persons from amongst the minorities." Thus, just on account of the minority identity of the management, an institute is to be accorded the minority status, irrespective of whether or not that particular institute is serving the interests of the minority community in its entirety. It is a well known fact that majority of the institutes established in the name of minorities are not serving the real interests of the minorities, especially those of the socially and

economically underprivileged sections. Students are admitted on the basis of their money power and not on the basis of their merit or minority identity. A select few elites among the minorities are abusing this right at the cost of the welfare of the poor among them.

Thus, when this bill becomes an Act, it will further fasten this process and will serve the interests of the economic minority instead of the religious and linguistic minorities. The institutions that are indulging in profiteering by commercialising education, and are abusing the minority status for the purpose, have been left uncontrolled by the government. Instead of addressing this issue of naked and blatant commercialisation of education that has crept into the arena of education, the bill encourages this trend. It is not that the government accorded this priority or doled out benefits to a select few among the minorities (the economic minority) out of oversight; rather it was a wanton Act of indulgence. This was done to further their class interests.

The central university affiliation granted to minority institutes would also give them such prominence as is unwarranted in view of the quality of education they impart. The degrees put up for sale in these institutions will be much in demand because of the weight they carry due to the affiliation to a prestigious university like the University of Delhi. Moreover, the bill has a provision that enables the central government to add or remove universities from the said schedule. Hence a government at the centre may add universities with better 'commercial value' to the schedule in order to quench the thirst for profit of the minority managements.

STATES AT THE RECEIVING END

This also makes it almost sure that when the bill becomes a law, a majority of the minority institutes affiliated to state universities will apply for de-recognition and ask for affiliation to the central universities. This will mean nothing but centralisation of education, with the state governments losing their effective right to monitor and control these institutes.

There is a long pending demand for the re-inclusion of education to the state list. During the Emergency, the Congress government had included education in the concurrent list of our constitution, to the detriment of the principles of federalism. Instead of accepting the righteous and genuine demand of the people and honour its

commitment to strengthen federalism, however, the UPA government's said bill goes against it. Also, it is the minimum duty of the union government to consult the states before taking a decision on an issue of such vital importance. It cannot shy away from its responsibility by stating that further discussions were not needed as the issue was mentioned in the NCMP. Incidentally, the government has expressed inability to enact a central legislation empowering the state governments to control the unaided institutes, citing the reason that proper consultations with the state governments have not yet taken place and their consensus is not yet taken. Everybody hailed this attitude as one in the correct spirit, showing respect to the federal principles. It is, therefore, highly unfortunate that the government has chosen to forget this very principle while deciding upon the minority institutions issue.

THE BILL'S FAILINGS

This bill has been passed in the backdrop of many reported cases of minority students being denied admission in majority institutes because they did not suit the commercial interests of the management. The government needs to concentrate attention on such issues and ensure that none of the eligible and qualified minority students is deprived of her/his rights.

The government also needs to enforce strict rules and regulations to ensure quality in education. Those violating the government stipulated guidelines after securing affiliation should be punished. The commercial aspirations of the managements should be curtailed, as this is the basic hindrance before minority students in pursuing the careers of their choice.

Yet, unfortunately, the bill does not address these very basic concerns related to the democratic spread of education among the minorities. As a famous educationist once said, an educational institution minus students is zero; what he meant to say is that the prime motive for the establishment of an institute should be the students' interests. The union government must have taken this point into consideration before taking any policy decision on education.

Moreover, minorities too would have been really happy if something more concrete and egalitarian had resulted from the proposed bill. But unfortunately this very thing is absent from the legislation. Public opinion could also have been mobilised in support of the bill

if it had provisions to protect the interests of the poor majority in the minority communities and to halt the commercialisation of education. But the government has woefully failed on all such counts.

VITAL QUESTIONS REMAIN UNANSWERED

In the TMA Pai case, the 11-member constitution bench of the Supreme Court had left some vital questions unanswered even after a lengthy and prolonged legal battle that went on for years. One such question is: What are the indices for treating an educational institution as a minority educational institution? Would an institution be regarded as a minority educational institution because it was established by a person(s) belonging to a religious or linguistic minority or it was being administered by a person(s) belonging to a religious or linguistic minority? The government tried to answer this question of vital importance in the definition portion of the ordinance/bill without a proper discussion, and both the answer given and the manner in which it was given are highly objectionable. In fact, the government should have initiated a thorough discussion involving academicians, students, parents and other concerned citizens, their organisations and political parties. But the lack of such a process of dialogue has wasted the opportunity to address some of the unanswered questions raised by the Supreme Court in the TMA Pai case.

Some more of these unanswered questions are as below: Where can a minority institution be operationally located? If a religious or linguistic minority in a state establishes an educational institution in the state, can that institution grant preferential admission/ reservation and other benefits to members of the same religious/ linguistic group from other states where that group is not a minority? Or, only the members of that minority in the original state will be treated as the members of the minority vis-à-vis that institution? Whether the member of a linguistic non-minority in one state can establish a trust or society in another state and claim minority status in that state? And so on.

It is clear that the government should have brought a bill only after a thorough discussion, thereby making the bill more comprehensive. This would have answered many unanswered questions raised by the Supreme Court and would also have put an end to unnecessary legal battles in the future.

SENSE OF URGENCY MISPLACED

As for the government's contention that the setting up of a minority

commission was an Act of "utmost urgency," the sense of urgency shown by the government could really serve the purpose if it had addressed the real educational needs of the poor and deprived minorities, instead of satisfying the needs of only the elite among the minorities. There are many more urgent issues that warrant the attention of the government and its HRD minister. The enactment of a central legislation to empower the state governments to control the self-financing institutes is one such issue. The government has been dragging its feet on this issue of overriding importance.

While the bill on minority education commission threatens further centralisation of education, the government is defending the move in the name of the communal threat in the BJP ruled states. But centralisation is not the way to meet this threat as nobody can predict the results of the future Lok Sabha elections. The communal threat of the saffron brigade and its attacks on the minority rights can be combated only through a persistent and ardent political struggle on all planes. A majority of our people who are secular can be mobilised into this struggle only when the abuse of rights is curtailed and genuine rights and interests are protected. ■