Chapter III

Role of Judiciary in Higher Education
Policy-making

Education: Constitutional Status

The arrangements for educational development have a chequered history. The responsibility of the state, particularly of the Central government, has varied considerably over time. J. P Naik, an eminent educationist who was associated with the Department of Education in the 1960s and 1970s, observed that if the history of education in the Raj period were to be written in modern parlance Education had been in the exclusively Central List between 1833 and 1870, in the Concurrent List between 1870 and 1921, in the exclusive State List between 1921 and 1947 (Naik and Nurullah 1974).

In 1855, steps were taken to create Education Departments in the Provinces which strangely had no legal authority over education, while the Government of India had all the authority over education but no adequate machinery. Subsequent to 1870, authority over education was increasingly devolved to the Provinces. However, the doctrine of state withdrawal from direct educational enterprise held the field, and the Provincial governments did little more than pay grant-in-aid to private institutions and, in return, exercised some kind of a control over them (Naik and Nurullah 1974). The Central direction of education that Curzon initiated lasted till 1921, when education was transferred to the Provinces and entrusted to Indian ministers under the scheme of dyarchy introduced by the Government of India Act, 1919. Consequently the Central government ceased to be an executive authority in respect of education.

However, given the overriding consideration of transferring more and more subjects to Provinces and of encouraging the Congress and other parties to join the new federal scheme, the Government of India Act, 1935
did not provide for a greater role for the Centre in educational development.

The Constitution essentially preserved the allocation of subjects in the Government of India Act, 1935. Education was essentially in the State List, except for certain specific subjects in the Union List, such as determination of standards in institutions of higher education and research, establishment and maintenance of Central Universities as well as specified institutions for scientific and technical education and research. Subsequently there were repeated suggestions for shifting education to the Union or Concurrent List so as to promote uniform educational development all over the country (Kothari 1966).

Originally, education was a subject in the state list of Constitution. Education was shifted from the state list to the concurrent list by the 42nd Amendment act of 1976. Education is a 25th subject in concurrent list and it reads, “Education, including technical education, medical education and universities, subject to the provisions of entries 63, 64, 65 and 66 of List I; vocational and technical training of labour.”

**Constitution, Judiciary and Disputes Relating to Education**

The Indian Constitution, like any other guiding document, certainly envisages the attainment of certain goals, these being collectively referred to as the constitutional vision. At the same time, it is less certain whether the Constitution prescribes any doctrinaire means for the fulfillment of this vision. Ultimately, whether it is higher education or land reforms, the economic and social ideologies perpetrated and implemented by the power-holders in each epoch of India’s national evolution have probably kept changing according to political necessities. The constitutional vision, however, has always been the attainment of the noble goals enshrined in the preamble, the Directive Principles of State Policy, and several other constitutional provisions. Thus, when we look at privatization of higher education from the perspective of this constitutional vision, it is clear that there are two materially different issues to be addressed.
The first issue is that of permissibility. Is privatization of higher education constitutionally permissible in the first place? If the answer to this is in the affirmative, the next aspect of permissibility pertains to the extent of privatization as well as the restrictions on privatization. This issue of constitutional permissibility in the arena of privatization of higher education has been dealt with extensively by the Supreme Court of India as well. Therefore, a discussion of this issue also involves an analytical examination of the important judicial interpretations of the constitutional provisions that deal with private educational institutions.

The second issue, being one less discussed by judges and less considered by policy makers, is that of desirability. Here, the structuring of private higher education so as to attain this constitutional vision in the most desirable way is of primordial importance. This certainly involves a grasp of intricate policy choices pertaining to standards of education and autonomy in the management of private institutions. The unavoidable foray into the realm of policy when examining questions that have a bearing on the issue of desirability, has probably contributed to the judicial silence on this issue.

The Constitutional validity of privatization model, theoretically speaking, is inconsistent with the Constitution. The constitution has guaranteed both the rights of private players and the restrictions permissible on these rights. Here, emphasis has been placed on analyzing judicial and legislative approaches, and thereby demarcating the scope and extent of constitutionally permissible privatization of higher education in India. Keeping in mind the constitutionally permissible restrictions on private higher educational institutions, and the challenges imposed on higher education per se by the constitutional vision, it is desirable to examine how best this vision can be realized.

The Preamble to the Indian Constitution constitutes its spirit and backbone (Lahoti 2004), and therefore no better way to begin than from the very beginning. The Preamble promises a commitment by the people of India to secure to all Indian citizens the laudable objectives of liberty,
justice, equality and fraternity. Social, economic and political justice are arranged in that very order with a clear purpose: Economic justice is a hollow promise without the attainment of social justice, and only the joint assurance to an individual, of both these kinds of justice, can result in guaranteeing political justice. Similarly, the unity and integrity of the nation can be secured only through the guarantee of individual dignity. Without equality of status, equality of opportunity is an unattainable goal (Lahoti 2004).

This insightful vision enshrined in the Preamble must have influenced Chandrachud, C.J., in Minerva Mills v. Union of India, to express the view that “the edifice of our Constitution has been built upon the concepts crystallized in the Preamble.” Thus, it is evident that the ideals of social and economic justice, and equality of opportunity, form an integral part of the constitutional vision. This is further confirmed by the guarantee of equality as a fundamental right under Article 14 of the Constitution, and the desirable guidelines for policy-making as expressed through the Directive Principles of State Policy. Most importantly, the Preamble was amended by the 42nd Constitutional Amendment to specifically proclaim adherence to the socialist principle. The idea of socialism is therefore an integral part of the constitutional vision.

**Self Financing Education: Diverging Perceptions**

Privatization of higher education in India is a widely debated topic. Both the academia and the policy makers hold contradictory views about privatization of education, especially higher education (Patel 2004). Those who support privatization hold this view because they believe that the state has not sufficient funds to finance higher education and that through private initiatives alone there could be any improvement in the standard of colleges and universities, which are in a state of complete decay (Patel 2004). Similar view has been expressed by the ‘Ambani- Birla Committee’ set up by Prime Minister’s Office during the rule of NDA (Sharma 2001). It calls for a new vision for higher education, conversion of education into an
industry and promotion of private universities with separate fee structure and autonomy (Sharma 2001). It stipulates that the UGC should curtail financing higher education except in the field of liberal arts. It is important to note that entire thrust is given upon engineering, medical and management education. The reason behind it is clear that the humanities and social sciences have no commercial value in the contemporary times (Patel 2004).

Hot debates are also going on about the question, whether the higher education is a merit goods or non-merit good. In 1997, Government of India identified a large set of social and economic services, classified them into public goods, merit goods and non-merit goods, and proposed to reduce subsidies to non-merit goods (Tilak 2004). According this new typology education up to elementary level is considered as merit good and education beyond elementary level, i.e. secondary and higher education are labeled as non-merit goods (Tilak 2004). Primary education, public health, social welfare schemes etc. are called merit goods, because the benefits of this do not stop at immediate recipients. Policy makers contend that subsidizing higher education would not meet the interests of equity because the recipient and beneficiary in this case were the same (Yadav 2004).

The critics of self financing education hold on their arguments on the basis of ethical and developmental considerations. Generally, the expense of education is met out of public exchequer even in the rich/capitalist countries. Fabulous state subsidies are the spinal cord of their higher education system (Tilak 2005). The critics suggest that education should be considered as a public good and higher education at least as a quasi-public good, producing a wide variety and huge magnitude of externalities. Consumers of education confer external benefits on those who are not acquiring education (Tilak 2005). The social benefit of having a large population which has free access to higher education is to be considered as a positive index of development (Patnaik 2005). It is also argued that social
benefits of education cannot be reduced to individual self interest. Hence, by taxing those who receive these benefits and subsidizing the provision of education, the welfare of both groups and there by the society as a whole, can be assured (Patnaik 2005). State support to higher education is advocated on the grounds of providing equality of opportunity also (Tilak 2005). Ensuring equality of opportunity in education to everyone irrespective of socio-economic status is considered an important function of the modern state (Tilak 2005).

Education is to be understood as an effective instrument of equity. In the absence of state subsidies, only those who could afford to pay would enroll in educational institutions, especially higher education. The concern for equality of opportunity has contributed to develop a consensus in all modern democratic societies about government subsidizing the education. But globalization altered this consensus to a great extent. Importantly, the neoliberal policies hold a different perspective of higher education when compared to that of Keynesian welfare state model. Prior to globalization, education was viewed from the vantage point of its social utility. But, at present it is assessed on the basis of market value. This change in perspective affects not only the ownership pattern of institutions of higher education, but also the perception of education itself (Patel 2004). As commercialization is gaining momentum educational policies also began to promote those courses and streams which have greater market value. The best example would be the surge in IT education in countries like India at present (Patel 2004).

The changing trends of higher education in Kerala rightly reflect those occurred at the national level. But unlike other states, issues relating to this invoke wider social debates due to the critical left political forces and strong civil society. However, private participation in education is not a new thing in Kerala, which has the history of more than a century. But, the current controversy is related to rapid commercialization of higher education and the decline of social values and quality in this sector.
Concerns are also raised about private managements of education since most of them are solely motivated by the interest in making profit ignoring social responsibility (Rajan 2005). Privatization of education with a hidden agenda of commercialization is tantamount to convert education into industry and business. This is more so in the case of professional education in Kerala, since the managements are greatly enthusiastic about profitability. In a society like Kerala, where the educational achievement had been a part of the long history of social mobilization, obviously these debates become vibrant and widespread.

**Private Managements and their Rights**

Using a fundamental rights discourse, it is well settled that private managements have the right to establish and manage educational institutions under Article 19(1)(g) of the Indian Constitution, as they are necessarily carrying on an occupation of their choice (Thakore....). In the case of minority institutions, Article 30(1) guarantees religious and linguistic minorities the right to establish and administer educational institutions of their choice. The right to establish and administer educational institutions whether under Articles 19(1)(g) or 30(1) broadly comprises of the right to admit students, to set up a reasonable fee structure, constitute a governing body, appoint well-qualified faculty, and take disciplinary action in cases of dereliction of duty. As far as permissible restrictions are concerned, Article 19(6) allows the State to impose reasonable restrictions on the right guaranteed by Article 19(1)(g) in the interests of the general public. Article 30(1) on the other hand looks at first sight to be an absolute right, a matter of very important consequence for the minority institutions.

**Minority Rights and its Misuse**

Protection of the reasonable rights of minorities is the duty of a civilized society and it is essential for the working of a democratic system. On the basis of this idea, the constitution of India provides some special rights – cultural and educational rights – to the minorities. Article 29 and 30 of the Indian constitution deal with this right and it was realized after a lot of
discussions and debates in the constituent assembly. Article 29 is related to the right to protect the language, script and culture, and Article 30 ensures the right to establish and own the educational institutions (Basu 2007).

In course of time, Article 30 has been misused to protect the personal interest of a few and to escape from socio-political control in the case of self financing issue in Kerala (Sunil 2006). The professional colleges Acts of 2004 and 2006 are trying to establish a socio-political control over self financing colleges, failed due to the fact that they are violating minority rights. Now a day, this right is used to protect the interest of a few richer sections within the minority community (Swaraj 2006-07). This badly affects not only the majority people but a great majority of poor with in the minority community also. In Kerala, Christians and Muslims are considered as minorities. In the case of educational institutions, especially in the case of professional, above 80% is under the control of these two communities. In fact, minority rights are of crucial importance in debating the autonomy of private managements of self financing professional colleges in legal battles.

Minority politics also assumes greater relevance in the context of Kerala where the minorities enjoy constitutional protection and greater political leverage. They have special concerns about privatization of education since they own a majority of private education institutions. Even though the left front governments took several bold initiatives to regulate the profit seeking private managements the constitutional and legal hurdles prevent them to materialize their efforts. Even though the issue is discussed as a legal, constitutional problem in the popular media and among the general public it actually involves the class dimensions of public policies and the communal politics prevailing in the state. Thus the study shows that the issue of self financing professional colleges in Kerala speaks about the politics of class in greater volume.

**The Doctrine of Proportionality and the Reasonableness of Restrictions**

The concept of reasonableness plays an important role while gauging the permissibility of the restrictions on Article 19(1)(g). In *State of Madras v.*
V.G. Row, it was held that various factors such as the nature of the right alleged to have been infringed, the underlying purpose of the restriction, the extent and urgency of the evil sought to be remedied, the disproportion of the restriction, and the prevailing conditions at the time of imposition of the restriction, would all be relevant in determining the reasonableness of the restriction. Though the restriction in this case related to Article 19(2), the same principle was held applicable to Article 19(6) in Collector of Customs, Madras v. Nathella Sampathu Chetty. Unfortunately, in the Indian scenario, this has not been followed many a times. A good example is the price-fixation regime in socialist India and the judicial attitude of deference to the legislative and executive policy in this regard.¹ This attitude has in fact been criticised as showing complete disregard to the judicial evaluative process as laid down in V.G. Row and Chintaman Rao v. State of M.P.(Jain 2003). At a conceptual level, however, this principle of reasonableness assumes greater significance as a manifestation of the doctrine of proportionality in the Indian constitutional context. In Om Kumar v. Union of India, the Supreme Court held that the principle of proportionality was applied vigorously to State action in India ever since 1950, in the case of legislation relating to restrictions on fundamental freedoms. The principle expounded in V.G. Row was heavily relied upon to derive this conclusion. It was also conclusively pronounced that except in situations of challenge to legislative or administrative action on the ground of the ‘arbitrariness doctrine’ in Article 14, all State action having a restrictive effect on fundamental rights would be tested on the anvil of the doctrine of proportionality.

It is therefore imperative to understand the proportionality doctrine and its implication on the restrictions that may be imposed on the rights of both minority and non-minority private educational institutions. The doctrine of proportionality essentially involves a balancing of competing interests to ensure a proportionality of ends, as well as securing the proportionality of means by permitting only the least restrictive choice of measures by the legislature or the administrator for achieving the object of
the legislation or the purpose of the administrative order. Essentially, there are three important criteria used while applying the doctrine of proportionality. The necessity criterion prevents the State from taking any action that goes beyond what is necessary to achieve its aims, i.e. the method least burdensome to the affected persons. The suitability criterion insists that the means chosen be suitable for achieving those aims. As per the balancing criterion, the State must have balanced proportionately the burdens imposed on affected persons against the importance of the purposes sought to be achieved. In determining the reasonableness of any restriction using proportionality, the legislative objective should be sufficiently important to justify such a restriction, the measures designed to meet the legislative objective should be rationally connected to it, and the means used to impair the right or freedom should be no more than is necessary to accomplish the objective. These principles go to show that the nature of the competing interests play a significant role in ascertaining the limit on constitutionally permissible restrictions.

**Indian Higher Education: Pre-Colonial Period**

Ancient India became a renowned centre for higher education during the Gupta period (319 –455 CE), attracting scholars from around India and several foreign nations (Lahiri 2004). The Indian education system was validated by the fact that it sustained the Indian Civilization for centuries, beginning as early as 1,000 BCE (Lahiri 2004). Like most education in pre-colonial South Asia, religious influence permeated India’s system and relied heavily on the medieval practice of memorizing sacred texts and scriptures to facilitate learning (Langohr, n.d.). This reflected the basis for educational materials prevalent in Europe before the Enlightenment and Renaissance period. Education consisted of both sacred and secular subjects, with students from different religions often taking secular lessons together, but studying sacred material with students from their own religion (Langohr, n.d).

As the British university model began to produce graduates who, in turn, acquired lucrative jobs in the British bureaucracy and growing middle-
class sectors of the economy, Indians demanded more transformation of education to the British model (Choudhary 2008). Macaulay’s writ of 1835 and Wood’s dispatch of 1854 provided the framework of a British-based higher education system in India. Later, Curzon’s government introduced changes to higher education that changed “education of few” to “education of many” (Choudhary 2008). In spite of broader opportunities for higher education, India’s universities were located near urban centres of population. While many rural citizens became qualified to attend universities, the logistics of either commuting to the university or paying the fees to reside near the university kept higher education out of reach for many Indians.

Changes Imposed by Colonialism

Becoming an imperial power the British had many lessons to learn in dealing with the diverse cultures they encountered. Unlike the changes brought about in Europe by the Enlightenment, Renaissance, and Romance periods, the population of large nations and regions—like India—provided a much less homogeneous historical foundation on which to build colonial rule. British administrators made critical errors in establishing plans for education and governance in India. They made little attempt to acquire information on Indian governmental institutions, education systems, or defining cultural characteristics. Rather, they set up municipal committees, district councils, and eventually a Provincial Council, promoting British ideology and methodology without regard for indigenous practices of law, medicine, and education (Lahiri 2004).

Colonial control under the East India Company did not include an effort to transform India’s education system to a western model. It was not until Mountstuart Elphinstone’s 1823 writing suggesting the teaching of European science and English studies, and Macaulay’s subsequent admonishment that the British government should promote those subjects to the Indian people that transformation of Indian higher education took holds (Choudhary, 2008). Colonial governance and the introduction of
British standards of education lifted Indian education out of the medieval construct and provided some of the benefits realized by European systems in the Renaissance and Reformation periods, focused on two primary objectives:

1. Introduce the Indian elite to European, functionally spreading British culture throughout India and supporting sustained British rule; and

2. Produce a large cadre of educated Indians able to serve the British administration in India, including law, medicine, and teaching.

An unintended consequence of these influences was a disenfranchising of the rural population from the urban elite, as higher education in colonial India was both expensive and taught in English (Lahiri 2004). British administrators decided that educational reform based on class was a solution to India’s perceived educational deficit. Recognizing the need for educated leadership among the agriculture-rich provinces of India, three implications addressed the need for an educated leadership in the rural districts:

1. Educational efforts targets the agricultural “middle class”—village landlords;

2. It was assumed that the middle class would, in turn, educate the lower classes; and

3. Some of the newly educated Indians would fill lesser administrative posts and support British colonial administration (Mc Eldowney 1980).

Perhaps the most significant contribution from the European period of enlightenment infused into India’s educational systems was the shift in academic philosophy from a faith-based premise to a focus on scientific reasoning from a secular perspective—outside religious doctrine and tradition. Although a purely secular perspective mostly ignored local customs in medicine, law, and other community areas, it provided scientific—fact-based—instruction detached from faith and superstition. This secular focus served to inject the pure sciences, law, and literature into
Indian higher education. Subsequent to the shift away from faith-based education, missionary schools—that normally received the bulk of education subsidies—lost funding, reallocated to schools run by Indians (Langohr, n.d.).

**Educational Policy in Independent India**

Independent India’s first National Policy on Education came into effect in 1968; it was based on the report of Kothari Commission. The 42nd Amendment to the Constitution enacted in 1976 during the Emergency, shifted education to the Concurrent List. The Janata Government which assumed office after the general elections in 1977 expressed its intent to revoke the amendment. However, lacking the requisite majority in the Rajya Sabha it announced its intention to treat education as if it continued to be a state subject. It attempted to formulate a revised National Policy on Education but before the policy revision was completed there was a change in government. It is significant that though education continues to be in the Concurrent List, and Parliament is empowered to legislate on education, the Centre has been relying on persuasion and consultations to promote educational development (Ayyar 2009).

Education was one of the priority areas chosen for a national policy after Rajiv Gandhi became Prime Minister. The National Policy on Education (NPE) 1986 was developed through an intense nationwide consultative process. It was preceded by the publication of ‘Challenge of Education’. This document was extensively debated all over the country. When V P Singh became Prime Minister, the National Policy on Education Review Committee (NPERC) was set up under the chairmanship of Acharya Rammurthy to review the NPE. The committee submitted its report on 26 December 1990, by which time the V P Singh government had lost majority in the Parliament. After the general elections in 1991, Central Advisory Board of Education (CABE) set up a Committee on Policy to take into consideration the report of NPERC and other developments since the policy was formulated and to recommend modifications to be made in NPE. The
committee was headed by N. Janardhana Reddy, Chief Minister of Andhra Pradesh and included seven ministers of education from different parts of the country and belonging to different political parties (Ayyar 2009).

**Higher Educational Development in Independent India**

In the first three decades after independence, there was a phenomenal expansion of higher educational institutions and enrolment. During the period 1950-51 to 1980-81, the number of universities increased from 28 to 123, colleges from 578 to 4378, and enrolment from 0.2 million to 2.8 million (Ayyar 2009: 288). Apart from establishing government colleges, many state governments encouraged the establishment of private colleges through a generous grant-in-aid policy. Promoters of private colleges were guaranteed state support for fully meeting the recurring costs 3 to 5 years after establishing the college, and with little conditionality. They had full freedom to recruit staff and freedom to admit students. The more enterprising could harness University Grants Commission (UGC) capital grants for building and laboratories. With deteriorating state finances, by the late 1970s, most state governments found it difficult to sustain the grant-in-aid system. At about the same time there was a huge surge in the demand for technical education because of a widely perceived nexus between professional education and employment. The excess demand for technical education aroused the animal spirits of entrepreneurs who took advantage of the permissive environment in some states like Maharashtra and Karnataka to set up high-fee charging private institutions without any support from the government. A few of these reputed institutions were set up by religious and charitable trusts for philanthropic purposes. Because of the enormous excess demand for professional education, these institutions had the opportunity to charge what the market could bear through ‘donations’, capitation charges and higher fees. As demand outstripped supply, renter profits were there for the asking. It is therefore no wonder that many enterprising individuals or family groups saw the establishment of a technical institution as good business. In such institutions, the
promoters directly control the finances and administration. These institutions are incorporated as trusts or charitable societies, and hence, legally, they are not-for-profit institutions; however, most of them exhibit several characteristics of the private-for-profit institutions. Ironically, policymaking even by the judiciary proceeded on the premise that education is charitable activity and not a business; or people were expected to set up an educational institution out of love and affection for the country and its people (AIR 1957 SC 699). Similarly, at least from 1992, the need to mobilise non-budgetary resources began to be articulated. However, neither government nor academia seriously examined the policy implications of such measures; adequate attention was not given to the motivation and incentives that underlie investment of private resources in establishing educational institution (Ayyar 1996: 347-53).

The National Policy on Education (NPE), 1968 based on the report of Kothari Commission, was the first post-independent framework policy in the area of education. In 1986, after an extensive consultative process it was replaced by the NPE, 1986. In regard to higher education, the NPE, 1986 postulated that ‘in view of the need to effect an all round improvement, in the near future, the main emphasise will be on consolidation, and expansion of facilities, in existing institutions’, and that ‘urgent steps would be taken to prevent the degradation of the system’. In regard to technical education and management education, the NPE, 1986 postulated that the Ministry of Human Resource Development (MHRD) would coordinate the balanced development of engineering, vocational and management education. This was in spite of the establishment of the All India Council of Technical Education (AICTE), a major outcome of the 1986 policy. Prior to the enactment of the AICTE Act, the establishment of a private engineering college required the permission of the state government. For the students of such institutions to be awarded degrees, the institution had to be affiliated to a university. The emergence of a central statutory body that had overriding powers in regard to the sanction of new institutions, starting new courses in existing institutions, and
imposing and enforcing national standards for facilities and faculty changed the dynamics of the ‘markets’ for engineering education. Acquiring a deemed university\(^6\) status came to be a preferred strategy for private unaided engineering colleges. The revision in 2000 of the rules for granting deemed university status led to 25 such institutions acquiring deemed university status. The deemed university status has conferred another great advantage in that the private institution can now cater to the entire national market, instead of having to limit its operations to the region of the university to which it was earlier affiliated.

While policy intervention by the Centre was focused on questions of quality and maintenance of standards, state governments grappled with questions of admission and fees. Broadly speaking, states strove to ensure that:

i) Government had a significant ‘quota’ – a majority, if not more – of the total seats in an institution. That is to say there were two categories of seats in these institutions ‘government (free) seats’ and ‘private (payment) seats’.

ii) Government quota was as high as possible.

iii) Admission to all seats was through a common entrance examination conducted by the state government, except for an NRI quota within the payment seats.

iv) Allocation of candidates to different institutions including private institutions was regulated through a system of common counselling.

v) SCs and STs had a quota in all seats.

vi) Fees were regulated such that the fees for free seats were lower than that of payment seats.

vii) Candidates from the state enjoyed a preference in the matter of admission of fees.
These policy objectives were sought to be achieved through a seat-cum-fees structure that generated income for the managements sufficient to cover operational expenses as well as leave a margin for asset maintenance and upgradation. Central to the structure was the principle that payment seats would cross-subsidise free seats. The structure varied across states and over time. Even though several permutations and combinations were tried out, the fees structure was a matter of perennial discord. In the spate of litigation in the High Courts and the Supreme Court, private managements not only questioned the merit of the particular seat-cum-fees structure that was litigated but also the general principles of regulation as well as legislative competence. The fact that quite a few of these institutions were ‘minority institutions’ entitled to the guarantee under Article 30 of the Constitution\(^7\) made the litigation more complex. All in all, the admission and fees policy was in a state of constant flux. What follows is a narration of some landmark judgements of the Supreme Court.

**From Colonization to Globalization**

British colonial rule positively influenced India, but also created challenges, including a lack of cultural understanding and a growing gap between the educated urban elite and the agrarian rural populace. Developments in the nineteenth and early twentieth century addressed these challenges and resulted in a broadening of opportunities for higher education in India.

Notwithstanding the progress of India’s education system, even in the post-colonial period of the last 63 years, India faces new challenges as the world continues to adjust to the phenomenon of globalization. Globalization transformed global trade, communications, economics, and education. With some exceptions, students no longer bound by geographic borders, commuting distance or residential university expenses (David Arnold Institute, 2001). India is a leader in distributed education and distance learning, both as stand-alone programs and hybrid program components. For the first time in history, the global education marketplace is available to students.
With globalization comes a challenge previously limited to immigration of educated people from their homeland to countries where work is available or pays higher wages, as is the case with Eastern Europe. This phenomenon, known as the “brain drain,” leaves the originating country with less educated leadership than may be implied by examining numbers of university graduates. In India’s circumstance, students look to Australia, Britain, and the US for undergraduate and graduate studies. This has a potentially negative impact on Indian institutions of higher education in two ways: (1) the “best and brightest” students are not in Indian institutions, participating in classes with their peers and sharing their knowledge; and (2) students graduating outside India often become a part of the workforce in the country in which they graduate (David Arnold Institute, 2001).

It is now acknowledged that globalisation has changed radically the structure of higher education as the trade in this service now crosses national boundaries. Earlier education encouraged the movement of people across borders. Thus in order to access quality education, there was migration outside underdeveloped regions such as India. Now education migrates from its location to new locations in search of clients. This change affects not only the organisational structure of institutions of higher education, especially in underdeveloped countries like India, but also the way institutions of higher education perceive education and thus reorganise their authority structure (Patel 2004). Over the years, there have been two kinds of flows of human capital from India. The first took place prior to globalisation and led to emigration of knowledge workers to feed the western market. The second occurred after the inauguration of the new trade regime of WTO and GATS and involves new strata of students who are now being trained by western educational institutions based in India or established through a system of franchising.
Privatisation of Higher Education, Self Financing Education and Neoliberal Policies

Within Indian academia there have been two contradictory positions on the issue of privatisation. The first not only accepts but also promotes the policy of private control of education on the grounds that the state has no longer any funds for higher education and that through private initiatives alone there could be an improvement in accountability and efficiency in the management of colleges and universities, which are in a state of complete decay (Patel 2004). Some commentators have, instead, argued that one part of the contention is wrong – the state has funds for public institutions, but has no political will to mobilise and utilise them in the best interest of the public. They have contended that if the black economy (40 per cent of GDP) is tapped and taxed the state would have enough liquid funds to invest in education (Kumar 2004). Thus this position is highly sceptical of the role played by private sector in higher education suggesting that the state is the only body, which can define and manage public goods. It argues that because corporate houses or private trusts work for their own interests, there is no reason to believe that would eschew doing that in case of higher education. The choices of specialisation offered by private sector institutions reflect their profit motives. But the fact that the public sector did not respond to changing demands for higher education, as a result of the change in new employment opportunities in diverse fields, should not be ignored (Sahni and Kale 2004). Liberalisation in the economic sphere has generated diverse job opportunities, which demand training in fields hitherto unknown in mainstream graduation courses.

The changing trends of education policies shall be viewed against the backdrop of the changes at the national level, more particularly the changing role of State vis-à-vis economy, finance and development. The changing policy framework endorses the view that more than a public service (which is responsible on the one hand for providing young people with the skills needed for economic success) education is considered as a
tradable commodity (Stella and Gnanam 2005). An understanding of the past, of culture, and of democratic values, among other elements of education, is part of education, and these elements cannot be subsumed in the workings of global market place. However, the privatization of higher education driven by the motive of profiteering has much less interest in the maintenance of such traditions. The move towards privatization was supported by an influential section of the Indian middle class that can today realize the perceived benefits of increased access to the emerging tendency of internationalization of the labour markets for selected professions.

Once the government has initiated economic reform policies, and had frozen budgets for higher education, financial reforms were unveiled. The Government of India appointed two committees – one on central universities, under the chairmanship of Justice K Punnayya (UGC 1993), and another on technical education institutions under the chairmanship of D Swaminadhan (AICTE 1994), to outline methods of mobilisation of resources for higher education. Both committees seemed to have worked parallel to each other, and submitted their reports almost at the same time in 1993-94. The message and the recommendations originating from both committees were more or less identical. Though both stressed the importance of state financing of higher education, and argued for a firm commitment on the part of the government to finance higher education – a recommendation that was completely ignored, both suggested several measures to mobilise non-governmental resources for higher education (Tilak 2004). The recommendations that attracted the attention of the government include raising fee levels, introduction of self-financing courses etc. the government found it very convenient to accept these recommendations and to act upon them. As a result, many universities have made very significant upward revisions in fee levels, besides introducing different kinds of fees. A large number of universities have also launched self-financing courses, mainly to generate additional resources for the universities.
Higher education system faced a massive cut in public expenditure consequent to globalization since 1990s (Sharma 2005). A bill viz., Private Universities (Establishment and Regulation) Bill was introduced in Rajyasabha in August 1995. The NDA government tried to revive it. The statement of objects and reasons of the Bill clearly points out that the private universities will be “self financing universities not requiring any financial support from the government.” In 1997, the Finance Ministry proposed in ‘Government Subsidies in India: Discussion Paper’ that higher education including secondary education as a “non – merit good” for which the government subsidies needed to be drastically cut (Sharma 2005: 3-4).

During the NDA regime, UGC tried to grant autonomous status to colleges with complete liberty in managing financial and academic matters. In 1999, the UGC tried to identify around 200 ‘first rate’ colleges which would be invited to apply for autonomous status. According to the scheme, an autonomous college will have the freedom to determine and prescribe its own courses of study and syllabi, introduce new courses, rename obsolete courses by changing their content and update existing courses, prescribe rules of admission to suit its aim etc. Such a college would be free to start under – graduate and post – graduate diplomas or certificate courses and special need based short-term courses for the students of the college and can also be taken by outsiders (Tilak 2004). The decision of the academic council of the autonomous college will be final and not be subject to any further ratification by any statutory body of the University. The scheme was a prelude to the state’s withdrawal from these colleges and permitting them to become commercial in order to raise resources.

The NDA government through the Prime Minister’s Council on Trade and Industry (PMCTI) constituted a ‘special subject group on policy framework for private investment in education, health and rural development’ (Sharma 2007). The Prime Minister (A.B. Vajpayee) found no experts in the concerned areas but the noted industrialists, Mukesh Ambani (convenor) and Kumarmangalam Birla (member) to constitute this special
subject group (Sharma 2005). These two industrialists submitted their report namely ‘A Policy Framework for Reforms in Education’ to the PMCTI on April 24, 2000. They considered higher education as a very profitable market. They made a case for full cost recovery from students and immediate privatization of entire higher education except those areas of education involving “liberal arts and performing arts” (Sharma 2005). Ambani – Birla Report sought to convert the entire system of higher education in the country into a market where profit making will be the only consideration. Result, only those who will be able to pay exorbitant amount of fee will be enrolled in higher education.

While giving a new vision for higher education, Ambani – Birla Committee Report wanted to convert education into an industry and encourage the growth of private universities with its own fee structure. It wanted the UGC to curtail financing higher education except in the field of liberal arts (Patel 2004). It is important to note at this juncture those most self financing universities and colleges tend to promote engineering, medicine and management education. It is just because of the absence of commercial value of liberal arts based on humanities and social sciences. That means the commercial viability should be the criteria for the promotion of higher education.

The UGC issued a Concept Paper in October 2003 entitled “Towards Formulation of Model Act for Universities of the 21st Century in India” with a view “to prepare the Indian University system for the future.” (Yadav 2004). This paper advocated “commercial culture and corporate culture” for the governance of universities. The concept of the Model Act was to actually implement the plan of commercialization of higher education as proposed by the Birla – Ambani report (Prasad 2005).

All these prove that education is becoming an internationally traded commodity. Globalization of higher education is detectable in expanding trade in higher education, the growing influence of international actors in the regulation of higher education such as the WTO and the World Bank as
well as many multinational corporations (Sahni and Kale 2004). The government is now trying to give its initial proposals in order to bring higher education under the General Agreement in Trade in Service (GATS) (Sharma 2005). The GATS is a legally enforceable instrument which can be used against the welfare policies of a member government in the field of education as well. It will also lead to commercialization of higher education. The GATS 2000 divides the education ‘market’ into five categories or sub-sectors of service based on the United Nations’ Provisional Central Product Classification: Primary Education, Secondary Education, Higher Education, Adult Education and Other Education (Sharma 2005). The three categories that are most relevant for the current round of GATS re-negotiation in the sector of education are higher education, adult education and other education.

The GATS is not a neutral agreement; it is designed to benefit the emerging exporters of educational services like the US and Australia much more. Trade liberalization for whose benefit or at what cost are therefore emerging as key questions. The opening up of the sector to international institutions caused by trade agreements could deepen the regional disparity, mainly because the areas where the infrastructure for higher education is already available would be benefited (Sahni and Kale 2004).

Judicial Policymaking

Judicial policymaking occurs through the interpretation of statutes and the application of statutes to specific cases, and judicial review of legislative and executive action by the Supreme Court (Article 13(2) of the Constitution) and the High Courts (Article 226). Judges have considerably more discretion and autonomy than field level government functionaries. It is obvious that case law is law itself. The laws are made in general terms to cover many situations; their application to individual circumstances calls for exercise of mind. Variability of interpretation arises from doctrinal differences in jurisprudence and the malleability of legal issues, or to use a technical expression, the open texture of legal issues. The doctrinal hammer can beat
an issue without the issue ever breaking. In the long run, there is no such thing as settled law, as issues can be subdivided and previous decisions distinguished (Ayyar 2009).

In a series of decisions the Supreme Court has been counselling caution in the matter of relaxing *locus standi*, and trespassing upon the domain of the legislature and the executive. Thus, in *Divisional Manager, Aravali Golf Club & Anr. v. Chander Hass & Anr.*, Justices A. K. Mathur and Markandey Singh observed that:

In the name of judicial activism Judges cannot cross their limits and try to take over functions which belong to another organ of the State.... While exercising power of judicial review of administrative action, the court is not an appellate authority. The constitution does not permit the court to direct or advise the executive in matters of policy or to sermonize qua any matter which under the constitution lies within the sphere of legislature or executive, provided these authorities do not transgress their constitutional limits or statutory powers.... It needs to be remembered that courts cannot run the government.

The policy decision must be left to the government as it alone can decide which policy should be adopted after considering all relevant aspects from different angles. In matter of policy decisions or exercise of discretion by the government as long as the infringement of fundamental right is not shown. In assessing the propriety of a decision of the government, the Court cannot interfere even if a second view is possible from that of the government (*State of UP & others v. Chaudhari Ran Beer Singh & Anr*).

There is yet another issue that needs detailed consideration in the praxis of PIL. The judicial process traditionally does not take note of the consequence of a decision. Once it is determined that the petitioner has a right and is entitled to relief, the consequences of granting relief are immaterial. Such an approach is unexceptionable so long as judicial policymaking is limited. One can see in many areas such as environmental
regulation and forest conservation that policymaking through PIL litigation is emerging to be as important as legislative or executive policymaking (Ayyar 2009). Therefore, concerns like the size of the government, scope of intervention, costs and benefits, limited resources and competing priorities, externalities, implementability and sustainability, and impact on international competitiveness have to inform the adjudication of PILs.

The judicial intervention in policymaking is a general phenomenon in democratic states. However, the degree of interference and the power to intervene are varying from one to another. India is no exception from this judicial intervention. An important reason for this development is the fact that a void is often created by the wilful default of the legislature and executive in discharging their responsibilities. Mainly because of electoral compulsions, legislature and executive, the organs of the state that are expected to make policy and to take executive action, shy away from highly divisive and contentious issues. For the political executive there is an asymmetry in the impact of a policy (Ayyar 2009).

**Judiciary and Higher Education Policy: From Public Good to Private Good**

Generally education is publicly provided by every nation. Dominance of the state subsidies is an outstanding feature of most education systems. Such a unique position is shared only by a very limited range of goods and services such as national defence, internal security, courts, police etc. Even in those cases, where education is not publicly provided, it is subsidised by the state. Education, including higher education, is heavily subsidised by the state in almost all the countries of the world – developing countries and developed countries. There are several arguments that justify the role of the state in higher education. Education is a public good and higher education, a quasi public good. Consumers of education confer external benefits on those not acquiring education. The social benefits of having a large population, who has had access to higher education, go beyond the increase in GNP. It is also argued that social benefits of education cannot be reduced to individual self-interest (Tilak 2005).
Hence by taxing those who receive the benefits and subsidising the provision of education, the welfare of both groups, and thereby the society as a whole, can be improved. The externalities include improvement in health, reduction in population growth, reduction in poverty, improvement in income distribution, reduction in crime, rapid adoption of new technologies, strengthening of democracy, ensuring of civil liberties etc. These positive externalities constitute a powerful justification for the state to play a crucial role in education (Nerlove 1972).

State provision of higher education is advocated on the grounds of providing equality of opportunity. Ensuring equality of opportunity in education to everyone irrespective of not only social, racial and cultural background, but also economic background is considered an important function of the modern state. Education is found to be an effective instrument of equity. In the absence of state subsidies, only those who could afford to pay would enrol in educational institutions. The concern for equality of opportunity has led to almost universal agreement that the government should subsidise education (Tilak 2005).

Arguments against public subsidisation of education are essentially of three kinds. They are efficiency arguments, equity arguments and pragmatic considerations. First, much opposition to public subsidisation of education, particularly higher education, has emerged from estimates of rates of return to education. The social rates of return are found to be consistently lower than private rates of return to education. It was recommended that public subsidies could be reduced and individuals could be asked to pay for their education (World Bank 1994).

Secondly, it is argued that public subsidisation of education produces perverse effects on distribution. Public subsidisation of education, especially higher education, is increasing income inequalities by transferring the resources from the poor to the rich. The education subsidies accumulate more to the rich than to the poor (World Bank 2000). Thirdly, governments in developing countries are increasingly facing a resource
Economic reform policies adopted in many developing countries also necessitated cuts in public expenditures across the board. It is also felt that reduction in the role of the state and in state subsidies would not adversely affect the growth of higher education (Tilak 2005).

The debate between the state versus market is intensifying in the last decade. The arguments against the role of the state assume that the level of efficiency of the state sector is given and there is no scope for improvement in the same. The case against public subsidies in education in the recent years is based on the premise that governments in developing countries do not have adequate resources at their disposal. Despite the knowledge on the importance of the role of the state, higher education systems are in transition. The economic reform policies introduced in almost all developing countries required a drastic cut in public expenditures and promotion of markets in higher education (Tilak 2005). It should be noted that, in 1992, the Supreme Court, in its judgment in St. Stephens v. University of Delhi ruled that “educational institutions are not business houses; they do not generate wealth.” Education was regarded as a public good, a fundamental right needed for the enjoyment of citizen’s right to life.

**Education: A Fundamental Right**

In 1992, in Mohini Jain, Miss v. State of Karnataka & others, the Supreme Court declared the whole of education to be a Fundamental Right. The court discovered this right in the penumbra of Article 21 of the Constitution which lays down the right to life. It held that the State was under an obligation to establish educational institutions to enable the citizens to enjoy the right to education. The State may discharge this obligation either by setting up its own institutions or through the instrumentality of private institutions. By granting recognition to private educational institutions the State government created an agency to fulfil its obligation under the Constitution. If the State permitted such an institution to charge a fee higher than in government institutions, such a fee was not tuition fee but a capitation fee. Such an Act was violative of the right to
equality guaranteed under Article 14 of the Constitution (AIR SC 1858, 1992).

The judgement of the Supreme Court has huge significance in a context of state’s failure to maintain the endeavour set by article 45 of the Constitution (Tilak 1998). However, the judgment of the court resulted mixed reaction. While, some critic the court’s judgment as impractical and court’s role as unnecessarily proactive (Sathe 1992), others welcomed the court’s decision as logical and response to the call of hour. Others noted the judgment as the expression of judicial activism due to the fact that only a two judge’s bench made a substantial change in constitution.

Mohini Jain judgment of the Supreme Court was appeared at a time when liberalisation as a government policy was gathering momentum. Commercialisation of education was not rampant then. In the recent trend of liberalization and privatization it is a challenge to keep the conformity with the socialist structure of Constitution and the judgment was in the line of retaining the conformity (Nagasaila and Suresh 1992).

The most notable part of the judgment was its insistence that the right to education be read as an integral part of the right to life guaranteed under Article 21, in Part III. The decision of the Court that the fulfillment of the right to life requires a life of dignity and therefore, must be interpreted to include both the economic and social rights. Education is as basic as to ensure rights to food, water, and health. But, question arise whether right to education at all level is essential for citizens for living a decent life? Whether right to education should be limited to only right to primary and basic education? Whether, declaring right to education at higher education level actually increase status quo and unequal distribution of resources results in collapsing the entire education system in India? (Sathe 1992). According to some critic, the private educational institutions do not get any government grants and therefore should not be interpreted under the purview of Article 12 of the Constitution of India (Sathe 1992). Later
Supreme Court had to modify its judgment and limits the right to free and compulsory education up to 14 years of age (Tilak 1998).

The most important thing is there was a traditional look towards Directive Principle as idealistic preaching of the constitution. This case revisited the traditional ritualistic approach towards Directive Principles and provides a solid base of pragmatism.

**Cross-subsidisation in Higher Education**

In 1993, in the landmark *Unni Krishnan v. Andhra Pradesh*, the court reviewed the state’s right to interfere in the admission policy and the fee structure of private professional institutions. It held that education, being a fundamental right, could not be the object of profit-seeking activity. On this ground, the Court sought to regulate the activities of what came to be known as capitation fees colleges that charged students high fees to recover costs. In the view of the Courts, the government would continue to have jurisdiction over these colleges in two respects. Entrants would have to qualify under an exam common to these and all other colleges. At least 50 percent of seats in these colleges would be reserved for students who so qualified on the basis of merit, and the college would be entitled to charge only the level of fees prescribed for government institutions. Twenty-five percent of seats would be reserved for admission with merit, but the college would have discretion over the fees, while over the remaining twenty-five percent, the college would have jurisdiction with respect to both admission criteria and fees. The Supreme Court argued that all private colleges would be subject to the constraint that education cannot be the object of “profiteering” and the fee structure should be compatible with the principles of “merit and social justice alike.” The judgment argued that all colleges offering professional courses would have to reserve 50 percent of the seats for candidates selected through an entrance examination conducted by the government. In its ruling, the judgment opined, “Education has never been commerce in this country. Making it one is opposed to the ethos, tradition and sense of this nation. The argument on
the contrary has an unholy ring to it.” If anything, this ruling only confirmed the unholy lack of clarity in the court itself. Its redressal for admissions and fees was deeply flawed and mirrored the ingrained habits of India’s intellectual elite. The best of intentions thus resulted in lofty sentiments that had little to do with reality or the behavioural consequences of a law.

In Unni Krishnan, J P & others v. State of Andhra Pradesh & others, private unaided institutions challenged the Mohini Jain decision.

i) The State had no monopoly in the matter of imparting education; every citizen had the Fundamental Right to establish an educational institution as a part of the right guaranteed to him or her by Article 19(1)(g) of the Constitution, which extended even to the establishment of an educational institution with a profit motive, that is, as a business adventure.

ii) The vice was not in the establishment of educational institutions by individuals and private bodies but in unnecessary State Control; the law of demand and supply must be allowed a free play.

iii) The establishment of an educational institution was no different from any other venture, for example, starting a business or industry. It was immaterial whether the institution was established with or without profit motive; only when there was profit motive would persons with means come forward to open more and more schools and colleges.

iv) Even if it was held that a person had no right to establish a educational institution as a business venture, they had at least the right to establish a self-financing educational institution, which institution might also be described as one providing cost-based education.

v) It was not possible for the private educational institutions to survive if they were compelled to charge only the fee that was charged in governmental institutions; the cost of educating an engineering or
medical graduate was very high; all that cost was borne by the State in governmental colleges; since the State was not subsidising the private educational institutions, these institutions had to find their own means and that could come only from the students.

vi) Even if the right to establish an educational institution was not trade or business within the meaning of Article 19(1)(g), it was certainly an occupation within the meaning of the said clause; the use of the four expressions – profession, occupation, trade or business in Article 19(1)(g) was meant to cover the entire field of human activity.

vii) The right to establish and administer an educational institution by a member of the minority community arose by necessary implication from Article 30; the Constitution could not have intended to confine the said right only to minorities and deprive the majority communities therefore.

viii) Article 21 was negative in character and it merely declared that no person should be deprived of his life or personal liberty except according to the procedure established by law, and since the State was not depriving the respondents of their right to education, Article 21 was not attracted.

The Court held that:

a) The citizens of this country have a fundamental right to education. The said right flows from Article 21. This right is, however, not an absolute right. Its content and parameters have to be determined in the light of Articles 45 and 41. In other words, every citizen of this country has a right to free education until they complete the age of 14 years. Thereafter the right to education is subject to the limits of economic capacity and development of the State.

b) The obligations created by Articles 41, 45 and 46 of the Constitution can be discharged by the State either by establishing institutions of
its own or by aiding, recognising and granting affiliation to private educational institutions.

c) Where aid is granted, the State may insist that the private educational institution shall charge only that fee as is charged for similar courses in governmental institutions.

d) Where aid is not granted, private educational institutions have to and are entitled to charge a higher fee not exceeding the ceiling fixed in that behalf.

e) A citizen may have a right to establish an educational institution but no citizen, person or institution has a right, much less a Fundamental Right, to recognition or grant-in-aid from the State. The recognition and affiliation shall be given by the State subject only to the conditions set out in accordance with the scheme laid down by this Court.

The scheme laid down by the court stipulated that:

i) A private professional college can be set up only by a registered or a public trust.

ii) Government is entitled to earmark 50 per cent of the seats for meritorious students based on a common examination.

iii) The other 50 per cent of the seats could be payment-seats where the full costs of providing education would be charged at a rate to be fixed by the government, for students who qualify and would be appointed on inter-se merit, among those willing to pay more.

iv) There would be no ‘management quota’, as in the past.

v) The institutions could follow a reservation policy if they wished.

vi) The state government would appoint a committee to fix the fees.

vii) The clearance of the UGC and AICTE/MCI would have to be obtained in any case.
Education: A private good

a) TMA Pai Foundation & others v. State of Karnataka & others, 2002

The court revisited its own judgment in the Unnikrishnan case soon after it was delivered, and in revising, if not reversing it, the series of judgments make apparent both the ambivalence and confusion on the issue. In 2002, a majority of an eleven-judge Constitution bench of the Supreme Court headed by Justice B. N. Kirpal in TMA Pai Foundation vs State of Karnataka (popularly known as the Minorities case) ruled on whether the special educational rights given by the Constitution to religious and linguistic minorities was also applicable to members of the majority. The verdict of the review (given by Justice Kirpal) found the Unnikrishnan judgment to license interference in private professional institutions in an unreasonable manner. The Court held the scheme to be unconstitutional on two grounds: first, it violated the right of private, unaided institutions to set their own criteria of admission, etc.; second, while formally upholding “the principle that there should not be capitation fee or profiteering is correct,” the Court went onto argue that “reasonable surplus to meet the cost of expansion and augmentation of facilities, does not however, amount to profiteering.” The restrictions on fees and admission imposed in the Unnikrishnan case prevented the accumulation of “reasonable” surplus. In its ruling, the Court extended the freedom accorded to minority rights to all religious denominations under the broad banner of freedom of occupation. The court ruled that the freedom to pursue an occupation granted under Article 19(g) gives all citizens the right to establish educational institutions of their choice. Part of the conceptual difficulty lay in defining whether education is a profession (teaching) or an ‘occupation,’ namely the enterprise of the setting up of an institution where teachers are hired. The decision appeared to read Article 19.1(g) of the Constitution (granting the right to carry on any occupation), with Article 26 (which grants to citizens belonging to any religious denomination or its sections the freedom to establish and maintain institutions for ‘religious or charitable purposes’). The verdict
highlights the essentially charitable nature of educational activity in order to assign to all religious communities the right to establish educational institutions.

The verdict had an extended discussion extolling private enterprise in education as “one of the most dynamic and fastest growing segments of post-secondary education for which ‘a combination of circumstances and the inability or unwillingness of government to provide the necessary support’ are responsible.” This became the court’s justification for restraining the state from interfering in the running of private institutions. The verdict referred to ‘the logic of economics and the ideology of privatization’ as having contributed to the resurgence of private higher education. It cited the 1948 Radhakrishnan Commission, which had cautioned that the exclusive control of education by the state was a recipe for ‘totalitarian tyrannies’ and warns against ‘bureaucratic or government interference’ that could undermine the independence of all private unaided institutions but left unspecified how these institutions could be held to account from exploiting students, staff and faculty.

The scope of governmental regulation in unaided educational institutions was curtailed. The court held that the state cannot interfere if the admission was on merit and a reasonable fee was being charged. However, minority educational institutions receiving aid from the state would have to admit a reasonable number of students from non-minority groups.

The case has changed the legal landscape for higher education. Unaided Professional Educational institutions became more autonomous. Educational institutions started their own entrance examinations. Based on this, the Supreme Court in the Inamdar case held that reservation is private institutions is unconstitutional.

K.T. Thomas, former Judge of the Supreme Court, has called for review of the 11-member Bench judgment in the TMA Pai Foundation vs. State of Karnataka case, some of the assumptions of which are not helpful
in the realisation of the Directive Principles of State Policy. Justice Thomas made a plea for reviewing the judgment as the assumption in the majority judgment that “in the period of globalisation, it is usually accepted that those who want professional education must pay for it,” might go against the efforts to ensure social justice for the citizens (The Hindu 2010).


This judgment had several anomalies necessitating a clarification issued by a Constitutional bench headed by Justice V. N. Khare (Islamic Academy of Education vs State of Karnataka, 2003). It deliberated on two distinct questions: first the educational rights of religious minorities in comparison to the majority; and, second, the freedom available to private, unaided institutions. On the first of these issues the five-member bench led by Justice Khare clarified that the right given by Justice Kirpal’s verdict to the majority community was not on par with the right given specifically by the Constitution to religious minorities under Article 30. Justice Khare’s verdict concluded:

It is unfortunate that a Constitution Bench had to be constituted for interpreting an 11 Judge Bench judgment. In judicial history of India this has been done for the first time. It is equally unfortunate that all of us cannot agree on all the points, despite the fact that the matter involves construction of a judgment. In the name of interpretation we have to some extent, however little it may be, rewritten the judgment....

c) Saurabh Chaudri v. Union of India, 2003

Time and again the courts have been drawn into defining the rules for the allotment of seats in professional colleges and setting the fee structure for different categories of candidates. In 2003, in Saurabh Chaudri v. Union of India, the court had to rule on the constitutional validity of reservation, whether based on domicile or institution, in the matter of admission to post-graduate courses in government-run medical colleges. In this case,
three judges of the court delivered separate judgments of their own, though they concurred in reducing the quota for super special subjects from 75 to 50 percent for in-house candidates and opened the other half to all-India candidates. Justice A. R. Lakshmanan’s observations captured the chaotic state of affairs:

Every year during the admission season, several lakhs of students undergo immense suffering and harassment in seeking admission to professional courses. This is caused by uncertain policies, ambiguous procedures and inadequate information. The miseries of the students and parents are escalating year after year due to the boundless expansion in the number of professional institutions and their intake capacity, emergence of a large variety of newer disciplines and mobility of students seeking admission beyond the boundaries of their states.

The court recognized the rampant reality of the “many unfair practices in admissions and devious ways of fee collection exploiting the anxiety of the students and uncertainty of procedures.” The problems have been magnified by severe inconsistencies in policies both across different state and central governments and over time.

State governments continue to try to force deemed universities to implement their directives that deemed universities should allot 50 percent of the seats for admission through common entrance test conducted by the states. In 2004, the Supreme Court (citing its 1999 verdict in the Preeti Srivastava case) ruled that state governments have no control over deemed universities in the state, which are recognized by the University Grants Commission (UGC). But the implications for private autonomous colleges were confusing, since no sooner had the Supreme Court, in principle, given them autonomy, controls were imposed on them once again. Even in the judgment most supportive of private initiative in education, the Minorities Case, the Court had left open the door on fees caps and regulation of admission, in the name of clamping down on excess profiteering, and the
High Courts promptly used these to prevent the private higher educational institutions from setting their own policies.

d)  *P. A. Inamdar & others v. State of Maharashtra & others, 2005*

The Supreme Court in its judgement on August 12, 2005 ruled on the following issues in relation to minority and non-minority unaided higher education institutions. In fact, the Supreme Court through these judgments in this case has drafted a higher education policy having serious reparations in the education sector of the Nation vis-à-vis the following.

- a) reservation policy
- b) admission policy
- c) fee structure
- d) regulation and control by the state and
- e) the role of committees dealing with admission and fees,

The judgment necessitates a detailed analysis.

**Reservation policy**

Neither the policy of reservation can be enforced by the State nor any quota or percentage of admissions can be carved out to be appropriated by the State in a minority or non-minority unaided educational institution.

Minority institutions are free to admit students of their own choice including students of non-minority community as also members of their own community from other States, both to a limited extent only and not in a manner and to such an extent that their minority educational institution status is lost.

So far as appropriation of quota by the State and enforcement of its reservation policy is concerned, we do not see much of difference between non-minority and minority unaided educational institutions. The State cannot insist on private educational institutions which receive no aid from
the State to implement State's policy on reservation for granting admission on lesser percentage of marks, i.e. on any criterion except merit.

Merely because the resources of the State in providing professional education are limited, private educational institutions, which intend to provide better professional education, cannot be forced by the State to make admissions available on the basis of reservation policy to less meritorious candidate. Unaided institutions, as they are not deriving any aid from State funds, can have their own admissions if fair, transparent, non-exploitative and based on merit.

A limited reservation of seats, not exceeding 15%, in our opinion, may be made available to NRIs depending on the discretion of the management subject to two conditions. First, such seats should be utilized bona fide by the NRIs only and for their children or wards. Secondly, within this quota, the merit should not be given a complete go-by. The amount of money, in whatever form collected from such NRIs, should be utilized for benefiting students such as from economically weaker sections of the society, whom, on well defined criteria, the educational institution may admit on subsidized payment of their fee. To prevent misutilisation of such quota or any malpractice referable to NRI quota seats, suitable legislation or regulation needs to be framed. So long as the State does not do it, it will be for the Committees (constituted pursuant to the judgement in the Islamic Academy of Education case) to regulate.

Admission policy

Up to the level of undergraduate education, the minority unaided educational institutions enjoy total freedom.

Presumably this means up to and including undergraduate education in non-technical or non-professional courses, since the Court treats technical and professional education differently below.

However, different considerations would apply for graduate and post-graduate level of education, as also for technical and professional
educational institutions. Such education cannot be imparted by any institution unless recognized by or affiliated with any competent authority created by law, such as a University, Board, Central or State Government or the like. Excellence in education and maintenance of high standards at this level are a must. To fulfill these objectives, the State can and rather must, in national interest, step in. The education, knowledge and learning at this level possessed by individuals collectively constitutes national wealth.

In minority educational institutions, aided or unaided, admissions shall be at the State level. Transparency and merit shall have to be assured. The State can also provide a procedure of holding a common entrance test in the interest of securing fair and merit-based admissions and preventing mal-administration.

Whether minority or non-minority institutions, there may be more than one similarly situated institutions imparting education in any one discipline, in any State. The same aspirant seeking admission to take education in any one discipline of education shall have to purchase admission forms from several institutions and appear at several admission tests conducted at different places on same or different dates and there may be a clash of dates. If the same candidate is required to appear in several tests, he would be subjected to unnecessary and avoidable expenditure and inconvenience.

There is nothing wrong in an entrance test being held for one group of institutions imparting same or similar education. Such institutions situated in one State or in more than one State may join together and hold a common entrance test or the State may itself or through an agency arrange for holding of such test. Out of such common merit list the successful candidates can be identified and chosen for being allotted to different institutions depending on the courses of study offered, the number of seats, the kind of minority to which the institution belongs and other relevant factors. Such an agency conducting Common Entrance Test (CET, for short) must be one enjoying utmost credibility and expertise in the
matter. This would better ensure the fulfillment of twin objects of transparency and merit.

The Court seems to be recommending an entrance test like Common Admission Test (CAT) conducted by the IIMs for management admissions, which is accepted as the criteria for admissions by over 80 institutions apart from the IIMs. This works very well for management courses and could well be extended to other domains.

Pai Foundation has held that minority unaided institutions can legitimately claim unfettered fundamental right to choose the students to be allowed admissions and the procedure therefor subject to its being fair, transparent and non-exploitative. The same principle applies to non-minority unaided institutions.

Fee Structure

To set up a reasonable fee structure is also a component of "the right to establish and administer an institution" within the meaning of Article 30(1) of the Constitution, as per the law declared in the Pai Foundation case. Every institution is free to devise its own fee structure subject to the limitation that there can be no profiteering and no capitation fee can be charged directly or indirectly, or in any form.

According to the Constitution bench in the Islamic Academy Case, a provision for reasonable surplus can be made to enable future expansion. The relevant factors which would go into determining the reasonability of a fee structure, in the opinion of majority (in the judgement in the Islamic Academy Case) are:

i) the infrastructure and facilities available,

ii) the investments made,

iii) salaries paid to the teachers and staff,

iv) future plans for expansion and betterment of the institution etc.
S.B. Sinha, in his opinion in the judgement in the Islamic Academy Case defined what is 'capitation' and 'profiteering' (quoting Black's Law Dictionary, Fifth edition as: "Taking advantage of unusual or exceptional circumstances to make excessive profits") and also said that reasonable surplus should ordinarily vary from 6 per cent to 15 per cent for utilization in expansion of the system and development of education.

Presumably the Court in this judgement concurs with Justice Sinha's opinion in the Islamic Academy Case on anything upto 15% being a reasonable surplus. Justice Sinha in his opinion also stated “Future planning or improvement of facilities may be provided for. An institution may want to invest in an expensive device (for medical colleges) or a powerful computer (for technical college). These factors are also required to be taken care of."

Despite the legal position, this Court cannot shut its eyes to the hard realities of commercialization of education and evil practices being adopted by many institutions to earn large amounts for their private or selfish ends. If capitation fee and profiteering is to be checked, the method of admission has to be regulated so that the admissions are based on merit and transparency and the students are not exploited. It is permissible to regulate admission and fee structure for achieving the purpose just stated.

Regulation and Control by the State

The judgement in the Pai Foundation Case is unanimous on the view that the right to establish and administer an institution, the phrase as employed in Article 30(1) of the Constitution (Right of minorities to establish and administer educational institutions), comprises of the following rights:

a) to admit students;
b) to set up a reasonable fee structure;
c) to constitute a governing body;
d) to appoint staff (teaching and non-teaching); and
e) to take action if there is dereliction of duty on the part of any of the employees.

A minority educational institution may choose not to take any aid from the State and may also not seek any recognition or affiliation. Such institutions cannot indulge in any activity which is violative of any law of the land. They are free to admit all students of their own minority community if they so choose to do. (para 145, Pai Foundation)

Affiliation or recognition by the State or the Board or the University competent to do so, cannot be denied solely on the ground that the institution is a minority educational institution. However, the urge or need for affiliation or recognition brings in the concept of regulation by way of laying down conditions consistent with the requirement of ensuring merit, excellence of education and preventing mal-administration. For example, provisions can be made indicating the quality of the teachers by prescribing the minimum qualifications that they must possess and the courses of studies and curricula. The existence of infrastructure sufficient for its growth can be stipulated as a pre-requisite to the grant of recognition or affiliation. However, there cannot be interference in the day-to-day administration.

The essential ingredients of the management, including admission of students, recruiting of staff and the quantum of fee to be charged, cannot be regulated.

Apart from the generalized position of law that right to administer does not include right to mal-administer, an additional source of power to regulate by enacting condition accompanying affiliation or recognition exists. Balance has to be struck between the two objectives:

i) that of ensuring the standard of excellence of the institution, and

ii) that of preserving the right of the minority to establish and administer its educational institution.
Subject to reconciliation of the two objectives, any regulation accompanying affiliation or recognition must satisfy the triple tests:

i) the test of reasonableness and rationality,

ii) the test that the regulation would be conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it, and

iii) that there is no in-road on the protection conferred by Article 30(1) of the Constitution, that is, by framing the regulation the essential character of the institution being a minority educational institution, is not taken away. (para 122, Pai Foundation)

I am not sure how much of the above with respect to the extent of permissible regulation would apply in the case of non-minority unaided institutions.

Role of Committees dealing with Admissions and Fees

The two committees for monitoring admission procedure and determining fee structure in the judgment of Islamic Academy, are in our view, permissive as regulatory measures aimed at protecting the interest of the student community as a whole as also the minorities themselves, in maintaining required standards of professional education on non-exploitative terms in their institutions. The suggestion made on behalf of minorities and non-minorities that the same purpose for which Committees have been set up can be achieved by post-audit or checks after the institutions have adopted their own admission procedure and fee structure, is unacceptable for the reasons shown by experience of the educational authorities of various States. Unless the admission procedure and fixation of fees is regulated and controlled at the initial stage, the evil of unfair practice of granting admission on available seats guided by the paying capacity of the candidates would be impossible to curb.

Non-minority unaided institutions can also be subjected to similar restrictions which are found reasonable and in the interest of student
community. Professional education should be made accessible on the criterion of merit and on non-exploitative terms to all eligible students on a uniform basis.

A fortiori, we do not see any impediment to the constitution of the Committees as a stopgap or ad-hoc arrangement made in exercise of the power conferred on this Court by Article 142 of the Constitution until a suitable legislation or regulation framed by the State steps in. Such Committees cannot be equated with Unnikrishnan Committees which were supposed to be permanent in nature.

However, we would like to sound a note of caution to such Committees. It was pointed out by citing concrete examples that some of the Committees have indulged in assuming such powers and performing such functions as were never given or intended to be given to them by Islamic Academy.

We expect the Committees, so long as they remain functional, to be more sensitive and to act rationally and reasonably with due regard for realities. They should refrain from generalizing fee structures and, where needed, should go into accounts, schemes, plans and budgets of an individual institution for the purpose of finding out what would be an ideal and reasonable fee structure for that institution.

We make it clear that in case of any individual institution, if any of the Committees is found to have exceeded its powers by unduly interfering in the administrative and financial matters of the unaided private professional institutions, the decision of the Committee being quasi-judicial in nature, would always be subject to judicial review.

What does this brief history of the intervention of courts tell us? A couple of points stand out. First, the Courts have historically been suspicious of private enterprise in education. There is a grudging acceptance of its existence, but the court is still trying to reconcile it with some formal equality in the admissions process. Second, the Courts
interventions are more about procedural aspects of equality. They do very little to enable higher education to be more widely available or have little impact on quality. Third, there is an overemphasis of concern about professional education in medicine and engineering, even though the majority of students are enrolled in traditional Science and Arts courses (see Table 4). There is a PIL pending with the courts on the establishment of more general private universities, and it will be interesting to see what the Courts allow by way of private universities. Finally, there is a peculiar public-private split that the Courts have also reinforced, and this split can be understood in terms of levels of user charges. By and large, the Courts, like the government, are reluctant to sanction fees hikes in public institutions (even based on the proposal that university fees be pegged at least to the level of fees paid in high schools). The courts themselves have contributed to the very fiscal problems of public institutions – which they now want the private sector to redress!

One of the curiosities in all this is that while the secondary school sector has been left replete with freedoms (although strictly speaking that is also a non-profit sector). Higher education is regarded as the arena where a formal principle of equality of opportunity is most vigorously asserted. We call this principal “formal” because it upholds the defensible idea that ability to pay should not determine access to institutions. But the manner in which this principle is implemented ensures that adequate resources will not be mobilized for expanding the quality and quantity of education and that de facto inequality in education will increase, because private spending outside regular institutions greatly determines future prospects. It is difficult to see what logic of political economy determines the Courts interventions.

Of all, the absence of clear coherent long-term policy perspective on higher education in India is the hallmark of Indian higher education of the 1990s and even of the present decade of the 21st century. As a result, either ad-hocism continues to prevail, or in the absence of even ad-hoc policies chaos is created by the several actors of higher education – government –
central, states, UGC, AICTE, universities, colleges and most importantly the private sector (Tilak 2004). Market forces have become very active; but since the markets in developing countries like India are incomplete and imperfect, the outcomes are also far from perfect, in some areas, are disastrous.

In short, the recent trends indicate a growing public apathy for higher education, followed by reduction in public expenditures on higher education. Along with all these, absence of any policy on development of higher education, that is helping erratic and unregulated growth of private higher education, may lead us to argue that we are rapidly marching towards laissez-faireism in higher education in India. These could be attributed to the faulty assumptions that higher education is not important for development and the state can as well withdraw from its responsibility of providing higher education in favour of the markets.

Above all, the judicial intervention in policymaking on higher education and the series of contradictory verdicts of Supreme Court made the issue very complicated in India. The judicial activism limited the space of legislature and executive in India with regard making of higher education. Moreover, the contradictory verdicts of the apex court and its unnecessary interventions in government policies led to the chaos in higher education sector in India. For ten ling years, the law laid down by the Supreme Court in 1992 continued to operate. It was however discovered within a couple of years after the judgement that the Supreme Court formula of charging a very low fee – a legacy of the past – for the first 50 percent who qualified for admission after a test, and charging the full cost of education from the remaining 50 per cent was not pragmatic or faire (Singh 2004).

It was assumed by the Supreme Court that this formula would take care of the needs of poor students. It however became apparent in no time that the top 50 per cent were not necessarily poor. On the contrary, a substantial number of them belonged to the affluent middle class and would have been able to pay the higher fee only if it had been demanded.
By not doing so, the state had forgone a considerable amount of revenue and the system did not work in the interests of the poor students. Stung by what had happened, the Supreme Court reversed its earlier decision in 2002. Not only that, it swung over to the other extreme. It permitted professional institutions to fix their own fees. Even if it was on the high side, it was required to re-deploy the surplus in order to improve facilities, both academic and infrastructural. This was not observed in practice with the result that what was formulated as a desirable practice was not made statutorily enforceable.

This case has addressed almost all the issues of the policy making in the self financing higher education sector in India. The judgment marks the judiciary’s unchartered forays into the legislative domain of law making. The verdict in this case has sent the alarm bells to the executive/legislative wings of the union and state governments in India. As education falls in the Concurrent List and hence falls within the remit of state government’s policy making primarily, there was a proliferation of state legislations to contain or implement the essence of this decision. However, it has risen the legitimate expectations of the venture capitalist to invest in higher education sector, for they are now confident that the education has now been commodified and is a private good.

Judicial Interference and Issues of Equity and Justice in Self-Financing Education

Education has an important role in social change since it helps to create awareness among people about their rights. Right to education is a basic right of an individual and it is the duty of every democratic state to ensure equal opportunity to education (Tilak 2005). State education is necessary to ensure the educational rights of poor people and other marginalized groups who were denied education for various historical, social and economic reasons (Tilak 2005).

Education and knowledge in modern times is tantamount to other forms of capital without which nobody can strive for better life conditions.
It points out that when capitalism gains wider currency in the economy, the responsibility of the state has to increase rather than diminish. This is because ideally speaking it has to ensure that the weaker sections are not falling behind the richer sections in competition. To sum up, it shall be suggested that even though market may be permitted and the rewards may be on the basis of merit and competence of individuals, the state should take effective step to ensure ‘entitlement’ to everyone. A democratic vision of capitalist development substantiates this point. The emergence of self financing education and the withdrawal of state from the higher education sector, leads to the exclusion of those disadvantaged social groups who don’t have money to compete with the rich (Patel 2004). It raises problems of inequality and injustice. In the last two decades, India has been implementing the new economic reforms following the model of western capitalist nations and making policies in favour of the same. But, even in the capitalist countries, the state has a key role in their education sector and they are still maintaining positive interventions in the form of quality control and subsidies (Tilak 2004).

After the formation of Kerala, the positive intervention of the state helped the society to achieve equitable growth and better human development. The social reform movements led by different caste/communal groups and left movements also contributed to the human development cutting across the caste/community and class lines in the state (Naidu and Nair 2006: 45). A major factor behind this development was the development achieved in the field of education. All the social reform movements had arrived at a consensus about the point that social mobilization, social change and educational development are interrelated. The NSS, SNDP and Christian and Muslim Communities established their own schools and colleges with this vision (Varghese 1999: 372-73). History shows that these institutions became major assets – both economic and social - of these organizations in political bargain. Development experience of Kerala shows one thing very clearly that each caste/community was socially mobilized and politically organized giving due emphasis on
education. Whoever had failed to keep in tune with this trend they still continue to suffer from the lack of social mobility and political empowerment. Adivasis and dalits are the best examples.

Kerala would not have made major strides in higher education if the state did not support the demand of social groupings for education. The cost of education, including higher professional education, became affordable to a great majority of society due to the positive intervention of the state and it helped the upliftment of backward classes. In this respect, the state not only provided financial assistance but also it introduced progressive policies like reservation in admission and public jobs. All these show that the positive intervention of state played a major role in the education development of people which helped to bring about social equity and justice (Sankaranarayanan 2005: 261).

Since 1990s, self financing education gained currency in Kerala with a hidden thrust on commercialization of education, particularly professional education. Professional education is considered as a salable and profitable commodity and money determines its rules of procedure. Money has replaced merit plunging the quality in utter dismay. Vitally, it leads to the exclusion of the poor. The self financing sector is negating the right to equality and opportunity of poor people by several means (Thorat 2005: 59-61). In fact, the poor students find it hard to get admission because of economic backwardness and not because of lack of merit or competence. It is an irony that while they are denied opportunity students with relatively lesser quality gets admission when money rules over the admission.

It is the duty of state to ensure the equality of opportunity for poor people in the education sector (Tilak 2004: 355). But the state policies are in support of commercialization of education and it amply protects the interest of managements. Court is supposed to be another instrument to ensure equity and justice in a democratic society. Ideally it is supposed to protect the interest of poor and the weaker sections. But the court verdicts on self financing education give no sign of relief for the needy. This kind of
situation favours only the affluent sections and the private managements. Objectively speaking it deters the economic and social mobility of the backward classes in general.

The growth of self financing professional colleges involves many a negative social impact. The study also proves that while the privatization of professional education only helped to marginalize the poor students from technological knowledge, it seldom enhanced the quality of education since the criteria of admission is the capability of the students to pay higher fees and huge donation. Even though the courts have banned capitation fees clever managements and affluent students can violate it in clandestine ways. Elected governments also blink their eyes on many such occasions because the professional education in the state is controlled by the influential social sections of the society. Result, while the ineligible persons attain education by virtue of money power, those who have eligibility but no money are excluded and alienated from the higher/professional education.

In the next chapter, the effects of transition in judicial pronouncement is analysed vis-à-vis the higher education policy making in the state of Kerala.

1 The Supreme Court decision in Shree Meenakshi Mills v. Union of India, AIR 1974 SC 366, is a case in point. Here the Supreme Court went to the absurd limit of stating that even if some producers sustained loss for some time, it would not be enough to brand the price fixation as unreasonable. For more details about this see http://vlex.com/vid/29689637

2 Primarily, this included engineering, management, medical, dental and nursing education. Though law and agriculture also qualify for being considered as professional education, their demand supply dynamics are totally different; the forces that drove the growth of private institutions in other areas of professional education do not exist for the latter. This study mostly focus medical and engineering education, but the situation with dental, nursing and other professional education is very similar.

3 Tamil Nadu and Andhra Pradesh followed suit soon. These four states account for most of the private Engineering and Medical Colleges.
Usually called Private Self-financing Professional Colleges. The fees they charge are far higher than what government institutions charge.

This was reviewed and marginally modified in 1992. There has been no further revision thereafter.

A university can be set up only through Union or state legislation; only a university can confer degrees. However, the UGC can confer the power to grant degrees on institutions of higher learning which are not universities by declaring such institutions to be ‘Deemed to be University’, popularly known as deemed universities.

Article 30 of the Constitution vests in all minorities, whether based on religion or language, the right to establish and administer educational institutions of their choice. The scope of the right has been extensively litigated.

A eleven judge constitution bench was required because after the 42nd Amendment, the subject of education was transferred to the Concurrent List from the State List under the Seventh Schedule of the Constitution.

The case was brought by the Karnataka Government challenging the High Court's 1993 judgment on a petition from the Manipal Academy of Higher Education (MAHE). The Court had held that the Karnataka Capitation Fee Act under which the state was allocating students to MAHE was not applicable to deemed universities under the UGC Act. The State Government filed an appeal against the MAHE’s deemed university status given by the UGC. This has been dismissed by the apex court. “States have no control over deemed varsities: court,” Hindu Feb 27, 2004.