

No to Capitation Fee and Yes to Right to Education

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The apex court of our country has proved itself relevant and meaningful by illegalizing capitation fees and asserting the right of our citizens to education. In its judgment dated 4/2/93 in the matter of J.P. Unnikrishnan and State of Andhra Pradesh the five-member bench of the Hon'ble Supreme Court by its majority judgment categorically declared that "the citizens of this country have a fundamental right to education."

The Hon'ble Judges together with a large number of advocates for both sides had been toiling for days to reach to a solution to the problem of capitation fees prevalent in many private institutions of higher education especially that of medicine and engineering. The Hon'ble Court and in a way the whole country were facing the threat by private educational institutions that the declaration of capitation fees as illegal or the recognition of right to education as a fundamental right will kill all their educational initiatives and they will be forced to close down all such institutions. It is a pleasant surprise in the context of recent judicial developments of our country that the apex court courageously faced the threat and has come out with the most legal as well as humanitarian solution to the problem.

By declaring that the citizens have a right to fundamental education, the Hon'ble Supreme Court found that the said right flows from Article 21 of the Constitution of India. While explaining the length and breadth of the right to education the Court said that this right is not an absolute right. Its content and parameters have to be determined in the light of Articles 45 and 41.

There was another complex question regarding the right to education whether this right to education is limited to the education until a person completes the age of 14 years. Can there be a right to education in the matters of higher education as well? The Hon'ble Supreme Court has held that every child/citizen of this country has a right to free education until he completes the age of 14 years. Thereafter his right to education is subject to the limits of economic capacity and development of the state. Thus it can be said that the apex court has meticulously read the directive principles of State Policy into the fundamental rights and evolved the right to education as a fundamental right in a most healthy manner.

The Rationality of Right to Education being Made Applicable to Private Educational Institutions

Can the private educational institutions which are not even aided by the government, be amenable to the right to education of the citizens? In other words can the charging of capitation fees be declared illegal on the ground of right to education of the citizens? Dealing with this complex issue the apex court came to the conclusion that 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/or granting affiliation to private educational institutions. Where aid is not granted to private educational institutions but only recognition or affiliation is granted it may not be insisted that the private educational institution shall charge only that fee as is charged for similar courses in government institutions. The private educational institutions have to and/or entitled to

charge a higher fee not exceeding the ceiling fixed in that behalf. The Hon'ble court has evolved a scheme and has directed that the admission of students and the charging of fee in these private educational institutions shall be governed by such scheme.

Education not to Become Commerce

Dealing with the issue whether the right to establish an educational institution can be said to be carrying on any occupation within the meaning of Article 19(1)(g) the Hon'ble apex court has expressed its opinion that such activity can neither be a trade or business nor can be a profession within the meaning of the said Article.

Relying heavily on the great traditions of this country and the Constitutional ethos, the court held that "education has never been commerce in this country. Making it one is opposed to the ethos, tradition and sensibilities of this nation. The argument to the contrary has an unholy ring to it. Imparting of education has never been treated as a trade or business in this country since times immemorial." The court agreed with Justice Gajendra Gadkar that "education in its true aspect is more a mission and a vocation rather than a profession or trade or business, however wide may be the denotation of the two latter words...."

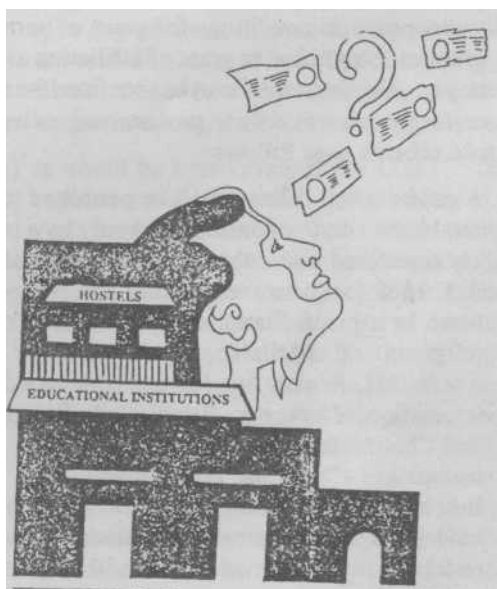
The Hon'ble Supreme Court identified and appreciated the intention of the Parliament in declaring that commercialisation of education is not permissible and that no person shall be allowed to steal a march over a more meritorious candidate because of his economic power.

Right to Establish Educational Institutions

According to some advocates of capitation fee, there existed a discrepancy between the right of private institutions to establish educational institutions and a citizen's right to education, which challenges the charging of capitation fee. The apex court has solved this problem also in a very commendable manner. According to the Hon'ble Judges the right to establish an educational institution does not carry with it the right to recognition or right to affiliation. Moreover, recognition or affiliation is essential for a mean-

ingful exercise of the right to establish and administer educational institutions. It is open to a person to establish an educational institution, admit students, impart education, conduct examination and award certificates to them. But he or the educational institution has no right to insist that certificates or degrees (if they can be called as such) awarded by such institution should be recognised by the State-muchless have they right to say that the students trained by the institution should be admitted to examinations conducted by the University or by the Government or any other authority, as the case may be.

Thus the Hon'ble court found that the charging of fees by recognised or affiliated educational institutions can be regulated and thus the charging of capitation fee can be totally banned. The court has explained the rationale behind this view. Clearly and indubitably, the recognised/affiliated private educational institutions supplement the function performed by the institutions of the State. Theirs is not an independent activity but one closely allied to and supplemental to the activity of the State. In the above circumstances, it is idle to contend that imparting of education is a business like any other business or that it is an activity akin to any other activity like building of roads, bridges, etc. In short, the position is this: No educational institution except an University can award



degrees (Sections 22 and 23 of the U.G.C. Act). The private educational institutions cannot award their own degrees. Even if they award any certificates or other testimonials they have no practical value inasmuch as they are not good for obtaining any employment under the State or for admission into higher courses of study. The private educational institutions merely supplement the effort of the State in educating the people, as explained above.

Thus it is clearly held that there is no fundamental right under Article 19(1)(g) to establish an educational institution, if recognition or affiliation is sought for such an educational institution. It may be made clear that any one desirous of starting an institution purely for the purpose of educating the students he could do so but Sections 22 and 23 of the University Grants Commission Act which prohibits the award of degrees except by a University must be kept in mind.

Scheme Prescribed by the Hon'ble Supreme Court

The Hon'ble Supreme Court has evolved a scheme in the nature of guidelines in the matter of admissions and charging of fees in professional colleges. These guidelines are expected to be imposed and implemented by the appropriate governments and recognising and affiliating authorities in addition to such other conditions and stipulations as they may think appropriate as conditions for grant of permission, grant of recognition or grant of affiliation as the case may be. The Supreme Court has confined the said scheme for the present only to professional colleges. The said scheme is as follows:

- (1) A professional college shall be permitted to be established and/or administered only by a society registered under the Societies Registration Act, 1860 (or the corresponding Act, if any, in force in a given State), or by a Public Trust, religious or charitable, registered under the Trusts Act, Wakfs Act (or the corresponding legislation, if any, e.g., Tamil Nadu Religious and Charitable Endowments Act and A.P. Religious and Charitable Endowments Act). No individual, firm, company or other body of individuals, by whatever appellation called—except those mentioned above—will be permit-

ted to establish and/or administer a professional college. All the existing professional colleges which do not conform to the above norm shall be directed to take appropriate steps to comply with the same within a period of six months from today. In default whereof, recognition/affiliation accorded shall stand withdrawn.

- (2) At least, 50 per cent of the seats in every professional college shall be filled by the nominees of the Government or University, as the case may be, hereinafter referred to as "free seats." These students shall be selected on the basis of merit determined on the basis of a common entrance examination where it is held or in the absence of an entrance examination, by such criteria as may be determined by the competent authority or the appropriate authority, as the case may be. It is, however, desirable and appropriate to have a common entrance exam for regulating admissions to these colleges/institutions, as is done in the State of Andhra Pradesh. The remaining 50 per cent seats (payment seats) shall be filled by those candidates who are prepared to pay the fee prescribed and therefore who have complied with the instructions regarding deposit and furnishing of cash security/Bank guarantee for the balance of the amount. The allotment of students against payment seats shall also be done on the basis of inter se merit determined on the same basis as in the case of free seats. There shall be no quota reserved for the management or for any family, caste or community which may have established such college. The criteria of eligibility and all other conditions shall be the same in respect of both free seats and payment seats. The only distinction shall be the requirement of higher fee by the 'payment students/ The Management of a professional college shall not be entitled to impose or prescribe any other and further eligibility criteria or condition for admission either to free seats or to payment seats. It shall, however, be open to a professional college to provide for reservation of seats with the approval of the affiliating University, for constitutionally permissible classes. Such reservations, if any, shall

be made and notified to the competent authority and the appropriate authority at least one month prior to the issuance of notification calling for application for admission to such category of colleges. In such a case, the competent authority shall allot students keeping in view the reservations provided by a college. The rule of merit shall be followed even in such reserved categories.

- (3) The number of seats available in the professional colleges (to which this scheme is made applicable) shall be fixed by the appropriate authority. No professional college shall be permitted to increase its strength except under the permission or authority granted by the appropriate authority.
- (4) No professional college shall call for applications for admission separately or individually. All the applications for admission to all the seats available in such colleges shall be called for by the competent authority alone, along with applications for admission to Government/University colleges of similar nature. For example, there shall be only one notification by the competent authority calling for applications for all the medical colleges in the State—and one notification for all the engineering colleges in the State and so on. The application forms for admission shall be issued by the competent authority (from such offices, centres and places as he may direct). The application form shall contain a column or a separate part wherein an applicant can indicate whether he wishes to be admitted against a payment seat and the order of preference, up to three professional colleges.
- (5) Each professional college shall intimate the competent authority, the State government and the concerned University in advance the fees chargeable for the entire course commencing that academic year. The total fees shall be divided into the number of years/semesters of study in that course. In the first instance, fees only for the first year/semester shall be collected. The payment students will be, however, required to furnish either cash security or bank

guarantee for the fees payable for the remaining years/semesters. The fees chargeable in each professional college shall be subject to the ceiling prescribed by the appropriate authority or by a competent court. The competent authority shall issue a brochure, on payment of appropriate charges, along with the application form for admission, giving full particulars of the courses and the number of seats available, the names of the colleges, their location and also the fees chargeable by each professional college. The brochure will also specify the minimum eligibility conditions, the method of admission (whether by entrance test or otherwise) and other relevant particulars.

- (6)(a) Every State Government shall forthwith constitute a Committee to fix the ceiling on the fees chargeable by a professional college or class of professional colleges, as the case may be. The Committee shall consist of a Vice-Chancellor, Secretary for Education (or such Joint Secretary, as he may nominate) and Director, Medical Education/Director Technical Education. The Committee shall make such enquiry as it thinks appropriate. It shall, however, give opportunity to the professional colleges (or their association(s), (if any) to place such material, as they think fit. It shall, however, not be bound to give any personal hearing to anyone or follow any technical rules of law. The Committee shall fix the fee once every three years or at such longer intervals, as it may think appropriate.
- (b) It would be appropriate if the U.G.C. frames regulations under Section 12 A(3) of the U.G.C. Act, regulating the fees which the affiliated colleges, operating on no-grant-in-aid basis, are entitled to charge. The Council for Technical Education may also consider the advisability of issuing directions under Section 10 of the A.I.C.T.E. Act regulating the fees that may be charged in private unaided educational institutions imparting technical education. The Indian Medical Council and the Central government may also consider the advisability of such regulation as a condition for grant of permission to new medical colleges under Section 10- A and to

impose such a condition on existing colleges under Section 10-C.

- (c) The several authorities mentioned in sub-paras (a) and (b) shall decide whether a private educational institution is entitled to charge only that fee as is required to run the college or whether the capital cost involved in establishing a college can also be passed on to the students and if so, in what manner. Keeping in view the need, the interest of general public and of the nation, a policy decision may be taken. It would be more appropriate if the Central Government and these several authorities (U.G.C., I.M.C. and A.L.C.T.E.) coordinate their efforts and evolve a broadly uniform criteria on this behalf. Until the Central Government, U.G.C., I.M.C. and A.L.C.T.E. issue orders/regulations on this behalf, the committee referred to in the sub-para (a) of this para shall be operative. In other words, the working and orders of the committee shall be subject to the orders/regulations, issued by Central Government, U.G.C., I.M.C. or A.L.C.T.E., as the case may be.
- (d) We must hasten to add that what we have said in this clause is merely a reiteration of the duty—nay, obligation—placed upon the Governments of Andhra Pradesh, Maharashtra, Karnataka and Tamil Nadu by their respective legislatures—to wit, Section 7 of Andhra Pradesh Act 5 of 1983, Section 4 of Maharashtra Act 6 of 1988, Section 5 of Karnataka Act of 1984 and Section 4 of Tamil Nadu Act 57 of 1992. Other States too may have to have similar provisions, carrying statutory force.
- (7) Any candidate who fulfils the eligibility conditions would be entitled to apply for admission. After the free seats *in* professional colleges are filled up, at least 10 days' time will be given to the candidates (students) to opt to be admitted against payment seats. The candidates shall be entitled to indicate their choice for any three colleges (if available). In such a case, he shall comply with the deposit and cash security/Bank guarantee—taking the institution charging the highest fees as the basis—within the said period of ten days. If he is admitted in an institution, charging less fee, the difference amount shall be refunded to him. (The cash security or Bank guarantee shall be in favour of the competent authority, who shall transfer the same in favour of the appropriate college if that student is admitted).
- (8) The results of the entrance examination, if any, held should be published at least in two leading newspapers, one in English and the other in vernacular. The payment candidates shall be allotted to different professional colleges on the basis of merit-cum-choice. The allotment shall be made by the competent authority. A professional college shall be bound to admit the students so allotted. The casual vacancies or unfilled vacancies, if any, shall also be filled in the same manner. The management of professional college shall not be permitted to admit any student other than the one allotted by the competent authority—whether against free seat or payment seat, as the case may be. It is made clear that even in the matter of reserved categories, if any, the principle of inter se merit shall be followed. All allotments made shall be published in two leading newspapers as aforesaid and on the notice boards of the respective colleges and at such other places as the competent authority may direct, along with the marks obtained by each candidate in the relevant entrance test or qualifying examination, as the case may be. No professional college shall be entitled to ask for any other or further payment or amount, under whatever name it may be called, from any student allotted to it—whether against the free seat or payment seat.
- (9) After making the allotments, the competent authority shall also prepare and publish a waiting list of the candidates along with the marks obtained by them in the relevant test/examination. The said list shall be followed for filling up any casual vacancies or 'drop-out' vacancies arising after the admissions are finalised. These vacancies shall be filled until such date as may be prescribed by the competent authority. Any vacancies still remaining after such date can be filled by the Management