

EDUCATION: TRADE, PROFESSION, OCCUPATION OR BUSINESS

By Justice H. Suresh

CONTENTS

Capability Deprivation	-	Arguments rejected
Deprivation at the primary level	-	Education is a "mission"
Art.21. Right to life includes Right to education	-	Running educational institution is 20. "supplemental" to the activity carried on by the State
Right to education as a basic human right		Scheme of dividing the students into payment and free students
Right to education at all levels - is a human right		Establishing Educational Institution, held to be "Occupation" for the first time
Obligation of the State		Scheme of Unnikrishnan - unreasonable
Art. 38(2) and Art. 41 of the Constitution		"Privatisation"
Right to run educational institutions is not a human right		No Profit, but reasonable surplus permissible
Private educational institutions discharge obligations of the State	-	Sale of education
"Teaching shops"	-	Justice V.R. Krishna Iyer's scathing criticism
Private Medical Colleges are the Agents of the State	-	Professional education becomes the monopoly of the rich
Education -not a commodity for sale	-	Islamic Academy case ad-hoc approach
Vilification campaign	-	Equal fee and affordable to all'
Unnikrishnan case	-	Govt to reallocate public spending on education
Education Institution as "Charity"	-	
Educational Institutions cannot be commercialized		

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

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

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

In very many cities, a child is sent to K.G. or Nursery Classes, when the child just totters a little, here or there, not that the child is capable of learning anything, but as a sure-step for admission to a recognized school, later on. So, the business of education starts at that level. Again even in the schools, what is taught is of no consequence. As the child reaches the Secondary school, parents are made to think that Tutorial Classes are more important than the schools. These Tutorial Classes are not educational institutions. They are shops which sell education on a commercial basis. They are a class of exploiters mainly serving the rich, the upper classes and the newly emergent affluent class who have amassed wealth by means other than legitimate. It is not the weak or the failed students who attend these Tutorial Classes. On the contrary, the failed students continue to be in the schools while the rank - holders and best students join the tutorials. Again who takes the credit - it is not the schools, but it is the Tutorial Classes

who claim that it is their students who get the ranks. Tutorial Classes are an aberration in any educational system and has to be recognized as an evil. Unfortunately, the Government has made no attempt to eliminate or even to regulate the same. The reason is evident. It helps a particular class, the rich who intend to monopolise major professions such as medicine, engineering, technology, business management, and etc. all for themselves in perpetuity.

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

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

Art. 21. Right to life includes Right to education

In fact the right to education is a basic human right. Article 26 of Universal Declaration of Human Rights says :-

Right to education as a basic human right

"Art. 26:

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

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

Art. 13: ICESCR:

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

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

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

*Right to
education at all
levels -is a
humanright*

What is important, here, is that while primary education shall be compulsory and free for all, secondary and higher education shall be available and accessible to all. The key words are: "available and accessible to all" "appropriate means" and "progressive introduction of free education." It is wrong to assume that it ceases to be human right beyond the stage of primary education. Right to education should be made available and accessible to all, on the basis of the capacity, at the higher level — in fact, at all levels. In Mohini Jain's case (Supra) the Supreme Court had rightly said that it extends to provide educational institutions "at all levels for the benefit of the citizens". While education at the higher levels may not be free the State has an obligation, progressively, to provide for free education.

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

Art. 2 : ICESCR:

"1. Each State Party to the present Covenant undertakes to take steps, individually and through interna-

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

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

*Obligation of
the State*

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

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

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

In other words no one questioned the Govt., how could it afford to spend less and less on education which was

contrary to their obligation both under the constitution and under the International Humanitarian Law.

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

*Right to run
educational
institutions is
not a human
right*

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

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

*Private
educational
institutions
discharge
obligations of
the State*

"17. we hold that every citizen has a "right to education" under the Constitution. The State is under an obligation to establish educational institutions to enable the citizens to enjoy the said right. The State may discharge its obligation through state-owned or state-recognized educational institutions. When the State Government grants recognition to the private educational institutions it creates an agency to

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

In an earlier passage, the Court said :

"14. The "right to education", therefore, is concomitant to the fundamental rights enshrined under Part III of the Constitution. The State is under a constitutional mandate to provide educational institutions at all levels for the benefit of the citizens. The educational institutions must function to the best advantage of the citizens. Opportunity to acquire education cannot be confined to the richer section of the society. Increasing demand for medical education has led to the opening of large number of medical colleges by private persons, groups and trusts with the permission and recognition of State Governments. The Karnataka State has permitted the opening the several new medical colleges under various private bodies and organizations. These institutions are charging capitation fee as a consideration for admission. Capitation fee is nothing but a price for selling education. The concept of 'teaching shops' is contrary to the constitutional scheme and is wholly abhorrent to the Indian culture and heritage."

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

"Teaching shops"

The Court had further said that "Restricting admissionbelonging to the richer section of society and denying the same to the poor meritorious, is wholly arbitrary, against the constitutional scheme and as such cannot be legally permitted" (Para 20) This is violative of Article 14 of the Constitution.

***Private Medical
Colleges are the
Agents of the
State***

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

***Education -not a
commodity for
sale***

The Court rightly did not go into the question as to how one should run one's educational institution — its economic viability, its budgeting and expenses, etc. The Court is just not qualified to lay down any scheme for running an educational institution. The Court took note of the fact that to "establish and administer educational institutions is considered a religious and charitable object. Education in India has never been a commodity for sale" (Para 18). The Court was concerned with the State action or inaction and whether it would defeat the constitutional mandate. The Court came to the conclusion that the "State action in permitting capitation fee to be charged by State - recognized educational institutions, is wholly arbitrary and as such violative of Article 14 of the Constitution of India (Para 18).

***Vilification
campaign***

However, as against this perfectly valid judgement, a vilification campaign both by the legal fraternity and the vested interest group was carried on to say that the Supreme Court ruling was against private commercial initiatives and the State has no resources and manpower to provide universal and all round education to all at all stages. The Editor of Supreme Court Cases Reporter wrote a 6 page editorial note criticizing the judgement, without even understanding, "Right to Education" is a recognized human right under the UDHR and ICESCR, and how the State is required to discharge its obligations, both under the Constitution and as enunciated under Art. 2 of ICESCR and even forgetting Municipal Council, Ratlam V/s. Vardichand (1980). It is even suggested that for

preventing extortion, the commercial enterprise should be allowed to grow "so that it turns from a seller's market to a buyer's market" — as if the private professional colleges are sellers and the students are buyers. Again has the extortion become less, now? Fortunately even the latest judgement has not fully endorsed this. (How many such Editorial Notes have been written when several judgements which were apparently wrong and contrary to earlier precedents were delivered?)

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

*Unnikrishnan
case*

Considering educational institutions as "Charity" as understood under the English Law, it considers them to be "trusts" for the advancement of education. The beneficiaries are the students, and there can be no question of trusts being funded by the beneficiaries. In St. Stephen's College v/s. University of Delhi (1992) 1 SCC 558, at 609-610, it is said : "The educational institutions are not business houses. They do not generate wealth. They cannot survive without public funds or private aid". There has to be a restraint on collection of student's fees. Public funds could be the State aid, and private aid could be the self-generated wealth or donations from the philanthropic public.

*Education
Institution as
"Charity"*

The Court then rambles into concepts of "self-financing educational institutions" and "cost-based educational institutions" which could not be the concern of the Court. How does one

*Educational
Institutions
cannot be
commercialized*

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

*Arguments
rejected*

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

*Education is a
"mission"*

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

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

Again at para 198:

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

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

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

"It is not an independent activity. It is an activity supplemental to the principal activity carried on by the State. No private educational institution can survive or subsist without recognition and/or affiliation. The bodies which grant recognition and/or affiliation are the authorities of the State. In such a situation, it is obligatory - in the interest of general public - upon the authority granting recognition or affiliation to insist upon such conditions as are appropriate to ensure not

only education of requisite standard but also fairness and equal treatment in the matter of admission of students. Since the recognizing/affiliating authority is the State, it is under an obligation to impose such conditions as part of its duty enjoined upon it by Article 14 of the Constitution. It cannot allow itself or its power and privilege to be used unfairly. The incidents attaching to the main activity attach to supplemental activity as well."

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

Scheme of dividing the students into payment and free students

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

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

Then comes T.M.A. Pai Foundation Case (Supra):

In this case the Judges agreed that establishing an educational institution is not any trade, profession or business, but they held that it is an "occupation" within the meaning of Art. 19(1)(g) of the Constitution. They said that it is "occupation" i.e. an activity of a person undertaken as a means of livelihood or mission of life. They rely on Sodhan Singh's case (1989) 4 S.C.C. 155 where it has been said that occupation "is any activity carried on by any citizen to earn his livelihood". So we are to imagine that a large number of mushroom educa-

tional institutions sprang up "as a means of livelihood." So in Maharashtra, the following politicians who run various Professional Colleges should be considered as "earning their livelihood" by carrying on this "occupation".

Datta Meghe (NCP) - 5 Professional Colleges.
Rohidas Patil (Congress) - 2 Professional Colleges.
Kamalkishore Kadam (NCP) - 2 Professional Colleges.
Patangrao Kadam (Congress) - 2 Professional Colleges.
Satish Chaturvedi (Congress) - 2 Professional Colleges.
Dr. Padamsinh Patil (NCP) - 2 Professional Colleges.
Ranjit Deshmukh (Congress) - 1 Professional Colleges.
Balasaheb Vikhepatil (Shiv-sena) - 1 Professional Colleges.
Narayan Rane (Shiv-sena) - 1 Professional Colleges.
Gopinath Munde (BJP) - 1 Professional Colleges.
Vilasrao Deshmukh (Congress) - 1 Professional Colleges.
Ramrao Adhik (Congress) - 1 Professional Colleges.
Ravindra Mane (Shiv-sena) - 1 Professional Colleges.
Shankarrao Kolhe (NCP) - 1 Professional Colleges.
Shivajirao Patil Nilangekar (Congress) - 1 Professional Colleges.

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

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

*Scheme of
Unnikrishnan -
unreasonable*

"The idea of an academic degree as a "private good" that benefits the individual rather than a "public good" for society is now widely accepted. The logic of today's economics and an ideology of privatization

have contributed to the resurgence of private higher education, and the establishing of private institutions where none or very few existed before."

"Privatisation"

Look at the terms: "privatisation", "logic of today's economics" - all applicable to business! Then they say "The fixing of a rigid fee structure, dictating the formation and composition of a governing body, compulsory nomination of teachers and staff for appointment or nominating students for admissions would be unacceptable restrictions." (Para 54).

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

***No Profit, but
reasonable surplus
permissible***

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

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

Sale of education

So education begins as a "charity", but it soon becomes an "occupation", no profiteering, but a "reasonable

surplus". Is it not sale of education — cost plus reasonable surplus?. Of course for "future development and expansion" — whose development, whose expansion! And profit is for what - for future development?

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

***Justice V.R
Krishna Iyer's
scathing
criticism***

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

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

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

ferent terminology to outwit judicial vocabulary....."

"..... How naive to uphold "reasonable surplus to meet cost of expansion and augmentation of facility". The fluid phraseology facilitates exploitation without compunction as if this generation of students must fund future development about which there is no plan, no record, no restraint nor no definite direction, no verification of viability.

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

"....The Court has the last word but the common people should not have the least word. The classroom, it has been said, shapes the destiny of the nation and education is too serious a matter to be left only to the robed brethren. Our crimson Constitution has a value vision to blink at which is to miss its social mission."

*Professional
education -
becomes the
monopoly of the
rich*

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

*Islamic Academy
case ad-hoc
approach*

In the meanwhile the Supreme Court in the Islamic Academy case (2003) tried to introduce a system of checks and balances, to regulate the hyper commercialization of professional education. It has directed the State Governments to set up a committee headed by a retired High Court Judge and including a Chartered Accountant and representatives of the Central and State Agencies in the field to assess the

colleges and prescribe a fee structure commensurate with the infra-structure and academic facilities provided by them. For admissions, the apex court has fixed a 50:50 seat sharing formula for the government and the management quotas, but filled through a common entrance test and selection process. While allowing the States to fix a quota for the private minority institutions, the Court has recognized the 'preferential right' of these institutions to accord priority in admission to students from their communities. There are two other clear directions from the Bench: admissions must be based on merit and through a common entrance test; and provision must be made for quotas for the poor and the backward.

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

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

In all professional colleges - private or public - the fee has to be equal and affordable to all. It can never be based on the basis of the costs involved in running each institution. If fees are fixed on the basis of costs, or costs plus any surplus, it amounts to sale of education which has been universally condemned. All professional college should have a minimum infra-structure as may be prescribed by their respective pro-

*Equal fee and
affordable to all*

Professional Councils or the State. However, if anyone chooses to provide any extra infra-structures, he cannot charge the students for the same. If such excess fee or charge is allowed, it will sooner or later divide the students as between the rich, and the not so-rich, the education of the 'haves' and the education of the 'have not'—which is antithetical to any concept of social and economic justice.

*Govt to
reallocate public
spending on edu-
cation*

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

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

There are basically three mutually reinforcing methods that could overcome some of the problems in financing education. The first method is to recover the public cost of higher education and reallocate government spending on education towards the level with the highest social returns, i.e. in primary education. The second method is to develop a credit market for education, together with selective scholarships, especially in higher education. The third method is to decentralize the management of public education and encourage the expansion of private and community-supported schools.

India currently faces two major challenges in her path to progress - income poverty and information poverty. Income poverty arises due to poor skill sets, low access to material and knowledge resources, exploitation by intermediaries and environmental degradation.

There are about 400 million people in India facing income poverty. Poverty and illiteracy go hand in hand. India has to visualize education, apart from economic growth and development, as a means of liberating the poor from deprivation and poverty."

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

COMMERCIALISATION OF EDUCATION

SJ
14/02/06