
**Unni Krishnan, J.P. and others Vs State of Andhra Pradesh and others
etc. etc.**

Writ Petition (C) No. 607 of 1992 with W.P. (C) No's. 657, 602 and 678 of 1992, S.L.P. (C) No. 11852 of 1992, W.P. (C) No's. 701, 770 and 729 of 1992, S.L.P. (C) No. 13263, 12830 and 13913 of 1992 with I.A. No's. 2-5, 13914 and 12845-58 of 1992, W.P. (

Court: Supreme Court of India

Date of Decision: Feb. 4, 1993

Acts Referred:

Constitution Of India, 1950 " Article 12, 14, 15, 15(1), 16, 16(1), 19, 19(1), 19(1)(c), 19(1)(g), 19(2), 19(6), 20, 21, 22(1), 22(2), 22(4), 22(5), 23(1), 23(2), 25, 25(1), 26, 26(1), 27, 28(1), 29(1), 29(2), 30, 31(1), 31(2), 30(1), 32, 37, 38, 38(1), 39(a), 39(d), 39(e), 39(f), 41, 42, 45, 45A, 46, 49, 64, 226, 256, 358, 371D#Partnership Act, 1890 " Section 45#Indian Partnership Act, 1932 " Section 2(b), 2(e), 3, 4, 4(2), 4(3), 5#University Grants Commission Act, 1956 " Section 12A, 22, 23#Law commission Act, 1965 " Section 3(1)(e)#Supreme Court Act, 1981 " Section 31, 31(2), Order 53 Rule (2)#Andhra Pradesh Education Act, 1982 " Section 1(3)# Andhra Pradesh Intermediate Education Act, 1971 " Section 2, 2(12), 18, 19, 20, 20A, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33#Indian Medical Council Act, 1956 " Section 2(h), 10A, 10B, 10C, 11, 13, 19, 21, 27, 32, 33#All India Council For Technical Education Act, 1987 " Section 3, 10#Gujarat Secondary Education Act, 1972 " Section 33#Andhra Pradesh Educational Institutions (Regulation Of Admission And Prohibition Of Capitation Fee) Act, 1983 " Section 3, 3(1), 3A, 7#Maharashtra Educational Institutions (Prohibition Of Capitation Fee) Act, 1987 " Section 4#Karnataka Educational Institutions (Prohibition Of Capitationfee) Act, 1984 " Section 5#Tamil Nadu Educational Institutions (Prohibition Of Collection Of Capitation Fee) Act, 1992 " Section 4

Citation: AIR 1993 SC 2178 : (1993) 1 JT 474 : (1993) 1 SCALE 290 : (1992) 2 SCALE 703 : (1993) 1 SCC 645 : (1993) 1 SCR 594

Hon'ble Judges: L. M. Sharma, C.J; S. Ratnavel Pandian, J; S. P. Bharucha, J; S. Mohan, J; B.P. Jeevan Reddy, J

Bench: Full Bench

Final Decision: Allowed

1. We have had the benefit of going through the two judgments of our learned Brothers B.P. Jeevan Reddy and S. Mohan, JJ. We are in

agreement with the judgment of Brother B.P. Jeevan Reddy, J. except to the extent indicated below.

2. The question which arose in the case of 271563 as also in the present cases before us, is whether a citizen has a Fundamental Right to education

for a medical, engineering or other professional degree. The question whether the right to primary education, as mentioned in Article 45 of the

Constitution of India, is a Fundamental Right under Article 21 did not arise in Mohini Jain's case and no finding or observation on that question

was called for. It was contended before us that since a positive finding on that question was recorded in Mohini Jain's case it becomes necessary

to consider its correctness on merits. We do not think so.

3. Learned arguments were addressed in support of and against the aforesaid view which have been noticed in the judgments of our learned

Brothers. It was contended by learned Counsel appearing for some of the parties before us that Article 37 in Part IV of the Constitution expressly

states that the provisions contained in Part IV shall not be enforceable by any court and that, therefore, assuming the right under Articles 45 to be

included within the ambit of Article 21, it would still not be enforceable. Emphasis was also laid upon the language used in Article 45 which

requires the State to "endeavor to provide" for the free and compulsory education of children. A comparison of the language of Article 45 with that

of Article 49 was made and it was suggested that whereas in Article 49 an "obligation" was placed upon the State, what was required by Article

45 was "endeavor" by the State. We are of the view that these arguments as also the arguments of counsel on the other side and the observations

in the decisions relied upon by them would need a thorough consideration, if necessary by a larger Bench, in a case where the question squarely

arises.

4. Having given our anxious consideration to the arguments in favour of and against the question aforementioned, we are of the view that we should

follow the well established principle of not proceeding to decide any question which is not necessary to be decided in the case. We, therefore, do

not express any opinion upon this question except to hold that the finding given in Mohini Jain's case on this question was not necessary in that

case and is, therefore, not binding law. We are of the view that if it becomes necessary to decide this question in any subsequent case then, for the

reasons set out above and having regard to its vast impact, inter alia on the country's financial capacity, the question may be referred to a larger

Bench for decision.

5. For the purposes of these cases, it is enough to state that there is no Fundamental Right to education for a professional degree that flows from

Article 21.

MOHAN J

6. I have had the advantage of perusing the judgment of my learned brother Justice J.P. Jeevan Reddy. Though, I am in agreement with his

conclusion, I would like to give my own reasonings. Since my learned brother has set out the facts, I will confine myself to answering the three

questions, namely:

1. Whether the Constitution of India guarantees a fundamental right to education to its citizens?

2. Whether there is a fundamental right to establish an educational institution under Article 19(1)(g)?

3. Does recognition or affiliation make the educational institution an instrumentality?

7. All these matters raise a burning issue; as to how to put an end to the evil of capitation fee or at least to regulate it.

8. As a prelude, the importance of education may be set out.

9. The immortal Poet Valluvar whose Tirukkural will surpass all ages and transcend all religions said of education:

Learning is excellence of wealth that none destroy; To man nought else affords reality of joy.

10. Therefore, the importance of education does not require any emphasis.

11. The fundamental purpose of Education is the same at all times and in all places. It is to transfigure the human personality into a pattern of

perfection through a synthetic process of the development of the body, the enrichment of the mind, the sublimation of the emotions and the

illumination of the spirit. Education is a preparation for a living and for life, here and hereafter.

12. An old Sanskrit adage states: ""That is Education which leads to liberation"" - liberation from ignorance which shrouds the mind; liberation from

superstition which paralyses effort, liberation from prejudices which blind the Vision of the Truth.

13. In the context of a democratic form of government which depends for its sustenance upon the enlightenment of the populace, education is at

once a social and political necessity. Even several decades ago, our leaders harped upon universal primary education as a desideratum for national

progress. It is rather sad that in this great land of ours where knowledge first lit its torch and where the human mind soared to the highest pinnacle

of wisdom, the percentage of illiteracy should be appalling. Today, the frontiers of knowledge are enlarging with incredible swiftness. The foremost

need to be satisfied by our education is, therefore, the eradication of illiteracy which persists in a depressing measure. Any effort taken in this

direction cannot be deemed to be too much.

14. Victories are gained, peace is preserved, progress is achieved, civilization is built up and history is made not on the battle-fields where ghastly

murders are committed in the name of patriotism, not in the Council Chambers where insipid speeches are spun out in the name of debate, not

even in factories where are manufactured novel instruments to strangle life, but in educational institutions which are the seed-beds of culture, where

children in whose hands quiver the destinies the future, are trained. From their ranks will come out when they grow up, statesmen and soldiers,

patriots and philosophers, who will determine the progress of the land.

15. The importance of education has come to be recognised in various judicial decisions.

16. In *Oliver Brown v. Board of Education of Topeka* (U.S. Supreme Court Reports 98 Law. Ed. U.S. 347) it was observed:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great

expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the

performance of our most basic public responsibilities, even service in the armed forces. It is very foundation of good citizenship. Today it is a

principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to

his environment.

17. Various fundamental rights enumerated under part III of our Constitution can be divided into two classes.

1. Injunction restraining the State from denying certain fundamental rights like Articles 14 and 21.

2. A positive conferment of such fundamental rights under Articles 19, 25 and 26 etc.

18. In this connection, the following passage from *Addl. Dist. Magistrate v. S.S. Shukla* 1976 Supp. SCR 172 may be quoted:

Part III of our Constitution confers fundamental rights in positive as well as in negative language. Article 15(1), 16(1), 19, 22(2), 22(5), 25(1), 26,

29(1), 30 and 32(1) can be described to be Articles in positive language. Articles 14, 15(2), 16(2), 20, 21., 22(1), 22(4), 27, 28(1), 29(2), 31(1)

and (2) are in negative language. It is apparent that most categories of fundamental rights are in positive as well as in negative language. A

fundamental right couched in negative language accentuates by reason thereof the importance of that right. The negative language is worded to

emphasise the immunity from State action as a fundamental right. (See *The State of Bihar v. maharajadhiraja Sir Kameshwar Singh of Darbhanga*

and Ors.) These fundamental right conferred by our Constitution have taken different forms. Some of these fundamental right are said to have the

texture of Basic Human Rights (See *A.K. Gopalan's case* (supra) at pp. 96-97, 248-293 and *Bank Nationalisation case* (supra) at pp. 568-71,

576-78).

Articles 21 reads as follows:

Perfection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law.

19. It would be clear that it acts as a shield against deprivation of life or personal liberty.

20. A question may be asked as to why it did not positively confer a fundamental right to life or personal liberty like Article 19. The reason is, great

concepts like liberty and life were purposefully left to gather meaning from experience. They relate to the whole domain of social and economic

fact. The drafters of this Constitution knew too well that only a stagnant society remains unchanged.

21. Unlike such rights as required to be enumerated it has long been recognised that the individual shall have full protection in person. It is a

principle as old as law. However, it has been found necessary from time to time to define a new the exact nature and the extent of such protection.

Political, social and economic changes essential the recognition of new rights and the law in its eternal youth grows to meet the demands of society.

The right to life and liberty inhere in every man. There is no need to provide for the same in a positive manner.

22. While dealing with the scope of Article 21 it was observed in *Maneka Gandhi v. Union of India* AIR 1978 579 that:

It is obvious that Article 21, though couched in negative language, confers the fundamental right to life and personal liberty. So far as the right

personal liberty is concerned, it is ensured by providing that no one shall be deprived of personal liberty except according to procedure Prescribed

by law. The first question that arises for consideration on the language of Article 21 is: what is the meaning and content of the words "personal

liberty" as used in this Article? This question incidentally came up for discussion in some of the judgments in 282068 and the observations made by

Patanjali Sastri, J., Mukherjee, J. and S.R. Das, J. seemed to place a narrow interpretation on the words "personal liberty" so as to confine the

protection of Article 21 to freedom of the person against unlawful detention. But there was no definite pronouncement made on this point since the

question before the Court was no so much the interpretation of the words "person liberty" as the inter-relation between Articles 19 and 21. It was

in 279388 that the question as to the proper scope and meaning of the expression personal liberty" came up pointedly for consideration for the first

time before this Court. The majority of the Judges took the view ""that "personal liberty" is used in the article as a compendious term to include

within itself all the varieties of rights which tgo to makeup the "personal liberties" of man other than those dealt with in the several clauses of Article

19(1). In other words, while Article 19(1) deals with particular species of attributes of that freedom, personal liberty" in Article 21 takes in and

comprises the residue"". The minority Judges, however, disagreed with this view taken by the majority and explained their position in the following

words:

No doubt the expression "personal liberty is a comprehensive one and the right to move freely is an attribute of personal liberty. It is said that the

freedom to move freely is carved out of personal liberty and, therefore, the expression ""personal liberty" in Article 21 excludes that attribute. In our

view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping. There is no question of one being

carved out of another. The fundamental right of life and personal liberty has many attributes and some of them are found in Article 19. If a person"s

fundamental right under Article 21 is infringed, the State can rely upon a law to sustain the action, but that cannot be a complete answer unless the

said law satisfies the test laid down in Article 19(2) so far as the attributes covered by Article 19(2) so far as the attributes covered by Article

19(1) are concerned.

There can be no doubt that in view of the decision of this Court in 282049 the minority view must be regarded as correct and the majority view

must be held to have been overruled.

(Emphasis supplied)

23. Therefore, it is not correct to state that because the article is couched in a negative language, positive rights to life and liberty are not conferred

as argued by Mr. Tarkunda, learned Counsel.

24. This Court in 279388 interpreted the word "liberty" on the lines of the meaning accorded to liberty in the 5th and 14th amendments to the U.S.

Constitution by in *Munn v. Illinois* (1877) 94 U.S. 113. Accordingly it was held:

Personal Liberty" in Article 21 takes in all the rights of man.

25. The 4th Amendment of U.S. Constitution guaranteed "the right to be secure on their persons, houses...."

26. This right was read into Article 21 and it was held that "there cannot be an unauthorised intrusion into a person's home".

27. In 272997 *Mathew, J.* stated therein that the fundamental rights themselves have no fixed content, most of them are empty vessels into which

each generation must pour its content in the light of its experience. It is relevant in this context to remember that in building up a just social order it

is sometimes imperative that the fundamental rights should be subordinated to directive principles.

28. In 274242, it has been stated:

The attempt of the court should be to expand the reach and ambit of the fundamental rights rather than accentuate their meaning and content by

process of judicial construction.... Personal liberty in Article 21 is of the widest amplitude.

29. In this connection, it is worthwhile to recall what was said of the American Constitution in *Mussouri v. Holland* 252 U.S. 416 :

When we are dealing with words that also are constituent act, like the Constitution of the United States, we must realize that they have called into

life a being the development of which could not have been foreseen completely by the most gifted of its begetters.

30. In *State of M.P. v. Pramod Bhyaratiya and Ors.* 1922 (2) Scale 791 it is stated:

Because Clause (d) of Article 39 spoke of "equal pay for equal work" for both men and women it did not cease to be part of article.

14. To say that the rule having been stated as a directive principle of State Policy, and not enforceable in court of law is to indulge in sophistry.

Parts IV & III of Constitution are not supposed to be exclusionary of each other. They are complementary to each other. The rule is as much a

part of Article 14 as it is of Clause (1) of Article 16.

31. This Court has held that several unremunerated rights fall within Article 21 since personal liberty is of widest amplitude.

32. The following rights are held to be covered under Article 21:

1. 281045

2. 284762

In this case reliance was placed on the American decision in *Griswold v. Connecticut* 381 US 479 .

3. 276776

4. 291207

5. 278155

6. 284764

7. 279409

8. 277017

9. 286818

10. The Right against public hanging

A.G. of India v. Lachmadevi

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11. 285792

12. 258808

33. If really Article 21, which is the heart of fundamental rights has received expanded from time to time there is no justification as to why it cannot

be interpreted in the light 45 wherein the State is obligated to provide education upto 14 years of age, within the time limit.

34. So much for personal liberty.

35. Now coming to life: this Court interpreted in *Bandhua Mukti Morcha v. Union of India* (3) SCC 161 :

It is the fundamental right of everyone in this country, assured under the interpretation given Article 21 by this Court in *Francis Mullin's* case, to live

with human dignity, free from citation. This right to live with human dignity enshrined in Article 21 derives its life breath the Directive Principles of

State Policy and particularly Clauses (e) and (f) of Article 39 Articles 41 and 42 and at the least, therefore, it must include protection of the health

and strength of workers, men and women, and of the tender age of children against abuse, unities and facilities for children to develop in a healthy

manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the

minimum requirements which must exist in order to enable a person to (with human dignity and no State - neither the Central Government nor any

State eminent has the right to take any action which will deprive a person of the enjoyment basic essentials. Since the Directive Principles of State

Policy contained in Clauses (e) and (f) of Article 39, Articles 41 and 42 are not enforceable in a court of law, it may not be possible to compel the

State through the judicial process to make provision by statutory enactment or executive fiat for ensuring these basic essentials which go to make

up a life of dignity but where legislation is already enacted by the State providing these basic requirements to the workmen and thus investing their

right to live with basic human dignity, concrete reality and content, the State can certainly be obligated to ensure observance of legislation for

inaction on the part of the State in securing implementation of such Nation would amount to denial of the right to live with human dignity enshrined

in Article 21, more so in the context of Article 256 which provides that the executive power of every State so exercised as to ensure compliance

with the laws made by Parliament and any "s which apply in that State.

36. This, was elaborated in 282640

As we have stated while summing up the petitioners' case, the main plank of their argument is that the right to life which is guaranteed by Article 21

includes the right to livelihood and since, they will be deprived of their livelihood if they are evicted from their slum and pavement dwellings, their

eviction is tantamount to deprivation of their life and is hence unconstitutional. For purposes of argument, we will assume the factual correctness of

the premise that if the petitioners are evicted from their dwellings, they will be deprived of their livelihood. Upon that assumption, the question

which we have to consider is whether the right to life includes the right to livelihood. We see only one answer to that question, namely, that it does.

The sweep of the right to life conferred by Article 21 is wide and far reaching. It does not mean merely that life cannot be extinguished or taken

away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one

aspect of the right to life. An equally important facet of that right is the right to livelihood because, no person can live without the means of living,

that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right life, the easiest way of depriving a person

of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of

its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance

with the procedure established by law, if the right to livelihood is not regarded as a part of the right to live. That, which alone makes it possible to

live, leave aside what makes life liveable, must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood

and you shall have deprived him of his life. Indeed that explains the massive migration of the rural population to big cities. They migrate because

they have no means of livelihood in the villages. The motive force which propels their desertion of their hearts and homes in the village is the

struggle for survival, that is the struggle for life. So unimpeachable is the evidence of the nexus between life and the means of livelihood. They have

to eat to live: Only a handful can afford the luxury of living to eat. That they can do, namely, eat, only if they have the means of livelihood. That is

the context in which it was said by Douglas, J. in Baksey that the right to work is the most precious liberty that man possesses. It is the most

precious liberty because, it sustains and enables a man to live and the right to life is a precious freedom. "Life", as observed by Field, J. in *Munn v.*

Illinois, means something more than mere animal existence and the inhibition against the deprivation of life extends to all those limits and faculties by

which life is enjoyed. This observation was quoted with approval by this Court in *Kharak Singh v. State of U.P.*

Article 39(a) of the Constitution, which is a Directive Principle of State Policy, provides that the State shall, in particular, direct its policy towards

securing that the citizens, men and women equally, have the right to an adequate means of livelihood. Article 41, which is another Directive

Principle, provides, inter alia, that the State shall, within the limits of its economic capacity and development, make effective provision for securing

the right to work in cases of unemployment and of undeserved want. Article 37 provides that the Directive Principles, though not enforceable by

any court, are nevertheless fundamental in the governance of the country. The principles contained in Articles 39(a) and 41 must be regarded as

equally fundamental in the understanding and interpretation of the meaning and content of fundamental rights. If there is an obligation upon the State

to secure to the citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to life. The State

may not, by affirmative action, be compellable to provide adequate means of livelihood or work to the citizens. But, any person, who is deprived

of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life

conferred by Article 21.

(Emphasis supplied)

37. If, thus, personal liberty and life have come to be given expanded meaning, the question to be addressed is whether life which means to live

with dignity, would it be incorrect to hold that stakes within it education as well? To put it more emphatically, whether right to education flows from

right to life? Before we go to 271563 it may be necessary to refer to 282911 it is stated:

Lastly it was urged that such test affected the personal liberty of the candidates secured under Article 21 of the Constitution. We fail to see how

refusal of an application to enter a medical college can be said to affect one's article. Everybody, subject to the eligibility prescribed by the

University, was at liberty to apply for admission to the medical college. The number of seats being limited compared to the number of applicants

every candidate could not expect to be admitted. Once it is held that the test is not invalid the deprivation of personal liberty, if any, in the matter of

admission to a medical college was according to procedure established by law. Our attention was drawn to the case of *Spottwood v. Sharpe*, in

which it was held that due process clause of the Fifth Amendment of the American Constitution Prohibited racial segregation in the District of

Columbia. Incidentally the Court made a remark (at p. 887): "Although the Court has not assumed to define 'liberty' with any great precision, that

term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to

pursue, and it cannot be restricted except for a proper governmental objective. Segregation in public education is not reasonably related to any

proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation

of their liberty in violation of the Due Process Clause.

The problem before is altogether different. In this case everybody subject to the minimum qualification prescribed was at liberty to apply for

admission. The Government objective in selecting a number of them was certainly not improper in the circumstances of the case.

38. It requires to be carefully noted that deprivation of personal liberty if done by a valid procedure established by law, the fundamental right under

Article 21 was not, in any manner, affected. That is the crux of this ruling.

39. Now, coming to Mohini Jain's case (supra) it was observed at pages 679-80:

Right to life"" is the compendious expression for all those rights which the courts must enforce because they are basic to the dignified enjoyment of

life. It extends to the full range of conduct which the individual is free to pursue. The right to education flows directly from right to life. The right to

life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education. The State Government is

under an obligation to make endeavor to provide educational facilities at all levels to its citizens.

40. Education is enlightenment. It is the one that lends dignity to a man as was rightly observed by Gajendragarkar, J. (as he then was) in 285531

Education seeks to build up the personality of the pupil by assisting his physical, intellectual, moral and emotional development.

41. If life is so, interpreted as to bring within it right to education, it has to be interpreted in the light of directive principles. This Court has uniformly

taken the view that harmonious interpretation of the fundamental rights vis-a-vis the directive principles must be adopted. We will now refer to

some of the important cases.

42. In 292539 it was held: ""There is complete unanimity of judicial opinion of this Court that the Directive Principles and the Fundamental Rights

should be construed in harmony with each other and every attempt should be made by the Court to resolve apparent inconsistency.

The Directive Principles contained in Part IV constitute the stairs to climb the High edifice of a socialistic State and the Fundamental Rights are the

means through which one can reach the top of the edifice.

The Directive Principles form the fundamental feature and the social conscience of the Constitution which enjoins upon the State to implement these

Directive Principles. The Directives, thus provide the policy, the guidelines and the end of socio-economic freedom and Acts. 14 and 16 are the

means to implement the policy to achieve the ends sought to be promoted by the Directive Principles. So far as the Courts are concerned where

there is no apparent inconsistency between the Directive Principles contained in Part IV and the Fundamental Rights mentioned in Part III, there is

no difficulty in putting a harmonious construction which advances the object of the constitution.

43. In 274242 it was observed:

In fact in the case of His Holiness Kesavananda Bharati Sripadagalavaru v. State of Kerala all the Judges constituting the Bench have with one

voice given the Directive Principles contained in the Constitution a place of honour. Hegde and Mukherjea, JJ. as they then were have said that the

fundamental rights and the Directive Principles constitute the "conscience" of our Constitution. The purpose of the Directive Principles is to fix

certain socio and economic goals for immediate attainment by bringing about a non-violent social revolution. Chandrachud, J. observed that our

Constitution aims at bringing about a synthesis between Fundamental Rights" and the "Directive Principles of State Policy" by giving to the former a

place of pride and to the latter a place of permanence.

In a latter case 292539 one of us (Fazal Ali, J.) after analysing the Judgement delivered by all the judges in the Kesvananda Bharati's case (supra)

on the importance of the Directive Principles observed as follows:

In view of the principles adumbrated by this Court it is clear that the Directive Principles form the fundamental feature and the social conscience of

the Constitution and the Constitution enjoins upon the State to implement these directive principles. The directives thus provide the policy, the

guidelines and the end of socio-economic freedom of Articles 14 and 16 are the means to implement the policy to achieve the ends sought to be

promoted by the directive principles. So far as the courts are concerned where there is no apparent inconsistency between the directive principles

contained in Part III, which in fact supplement each other, there is no difficulty in putting a harmonious construction, which advances the object of

the Constitution. Once this basic fact is kept in mind, the interpretation of Articles 14 and 16 and their scope and ambit become as clear as day".

In the case of The State of Bombay v. R.M.D. Chamarbaugwala this Court while stressing the importance of directive principles contained in the

Constitution observed as follows: "The avowed purpose of our Constitution is to create a welfare State. The directive principles of State Policy

set forth in Part IV of our Constitution enjoins upon the State the duty to strive to promote the welfare of the people by securing and protecting, as

effectively as it may, a social order in which justice, social, economic and political, shall inform all the institutions "of the national life.

In the case of Fatehchand Himmatlal and Ors. v. State of Maharashtra etc. (supra) the Constitution Bench of this Court observed as follows:

Incorporation of Directive Principles of State Policy casting the high duty upon the State to strive to promote the welfare of the people by securing

and protecting as effectively as it may, a social order in which justice social, economic and political - shall inform all the institutions of the national

life, is not idle point but command to action. We can never forget, except at our peril, that the Constitution obligates the State to ensure an

adequate means of livelihood to its citizens and to see that the health and strength of workers, men and women are not abused, that exploitation,

moral and material, shall be extradited. In short, State action defending the weaker sections from social injustice and all forms of exploitation and

raising the standard of living of the people, necessarily imply that economic activities, attired as trade or business or commerce, can be de-

recognised as trade or business.

286068 it was observed:

There is no doubt that broadly interpreted and as a necessary logical corollary, right to life would include the right to livelihood and, therefore, right

to work. It is for this reason that this Court in *Olga Tellis v. Bombay Municipal Corporation* while considering the consequences of eviction of the

pavement dwellers had pointed out that in that case the eviction not merely resulted in deprivation of shelter but also deprivation of livelihood in as

much as the pavement dwellers were employed in the vicinity of their dwellings. The Court had, therefore, emphasised that the problem of eviction

of the pavement dwellers had to be viewed also in that context. This was, however, in the context of Article 21 which seeks to protect persons

against the deprivation of their life except according to procedure established by law. This country has so far not found it feasible to incorporate the

right to livelihood as as fundamental right in the constitution. This is because the country has so far not attained the capacity to guarantee it, and no

because it considers it any the less fundamental to life. Advisedly, Article 41 of which enjoins upon the State to make effective provision for

securing the same ""within the limits of its economic capacity and development"". Thus even while giving the direction to the State to ensure the right

to work, the Constitution makers thought it prudent not to do so without qualifying it.

44. Such a conclusion may not be open to criticism so interpreted it advances social justice.

45. In Vol.VII at pages 909 and 910 of the Constituent Debates (1948-49) it is stated:

The Honourable Shri K. Santnanam: Sir, you will remember that throughout Europe; after the first World War, all that the minorities wanted was

the right to have their own schools, and to conserve their own cultures which the Fascist and the Nazis refused them. In fact, they did not want

even the State Schools. They did not want State aid, or State assistance. They simply wanted that they should be allowed to pursue their own

customs and to follow their own cultures and to establish and conduct their own schools. Therefore I do not think it is right on the part of any

minority to depreciate the rights given in Article 23(1). Sir, in Clause (2) of Article 23 they are protected against discrimination. It is just possible

that there may be many provinces based on language and therefore the Government, the ministry and the legislature will be composed dominantly

by members of the majority language. This right of non-discrimination will then become fundamental and valuable. And then in Clause (3) of this

article, it is provided that when the State gives aid to education, it shall not discriminate against any educational institution, on the ground that it is

under the management of a minority, whether based on community or on language, and this will be particularly applicable to the linguistic minorities.

In every province, there are islands of these? linguistic minorities. For instance, in my own province of Tamil Nadu there are islands, in almost

every district, of villages where a large number of Telugu-speaking people reside. In this connection we have to hold the balance even between

two different trends. First of all, we have to give to large linguistic minorities their right to be educated - especially in the primary stages in their own

language. At the same time we should not interfere with the historical process of assimilation. We ought not to think that for hundred and thousands

of years to come these linguistic minorities will perpetuate themselves as they are. The historical processes should be allowed free play. These

minorities should be helped to become assimilated with the people of the locality. They should gradually absorb the language of the locality and

become merged with the people there. Otherwise they will be aliens as it were, in those provinces. Therefore, we should not have rigid provisions

by which every child is automatically protected in what may be called his mother-tongue. On the other hand, this process should not be sudden, it

should not be forced. Wherever there are large numbers of children, they should be given education-primary education-in their mother-tongue. At

the same time, they should be encouraged and assisted to go to the ordinary schools of the provinces and to imbibe the local tongue and get

assimilated with the people. If feel this clause does provide for these contingencies in the most practicable fashion. Sir, Mr. Lari wanted an

amendment which seeks to provide that every child, rather than every section of the citizens, shall be entitled to have primary education imparted to

its children through the medium of the language of that section. I suppose what he means is that wherever primary education is imparted at the

expense of the State, such provisions should be made. But this, I think, would give the minority or section of people speaking a language the

complete and absolute right to have primary education which the people of this country do not have today. In the directives we have provided that

in fifteen years" time there should be universal primary education. But no one knows whether the financial and other conditions in the country

would permit of universal primary education to be established even then. Today no one in India can ask for primary education as a right as only ten

per cent of the population get primary education. Therefore, it is not possible to accept Mr. Lari's amendment, because that would lead to all

kinds of difficulties. If it were passed, then anyone can go to the Supreme Court and say that his child must get education in a particular language.

That is not practicable, and I do not think even his intention is at all that.

At the same time. I think, what he has pleaded for must be kept in mind as a general policy. It should be direction of the Central and the Provincial

Governments to see that wherever there are congregations of boys and girls having a distinct mother tongue, schools should be provided in that

language. I hope, that will be the policy adopted all over the country, especially as, if there is going to be new linguistic revisions of the boundaries,

all the border areas will be full of this problem. I hope the report of the Linguistic Provinces Commission will contain some wise provisions to be

adopted in this behalf. There should be no difficulty or hardship whatsoever in provinces when they are rearranged on a linguistic basis. For

instance, if a Telugu goes to one area or the other, he should not have any hardship. As I said, this is a most difficult and complicated problem and

it cannot be dealt with in detail in the fundamental rights. This Article 23 provides as much security as can be done in the Constitution. Other

securities will have to be provided for both by Parliamentary and provincial legislation, and I hope it will be done in due course.

46. It is true the framers of the Constitution took that view. But the position as on today is very different. The reason is Article 45 states as under:

Provision for free and compulsory education for children. The State shall endeavor to provide, within a period often years from the commencement

of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.

47. 14 years, spoken to under the Article, had long ago come to an end. We are in the 43rd year of Independence. Yet, if Article 45 were to

remain a pious wish and a fond hope, what good of it having regard to the importance of primary education? A time limit was prescribed under this

Article. Such a time limit is found only here. If, therefore, endeavor has not been made till now) make this Article reverberate with life and articulate

with meaning, we should think the Court Should step in. The State can be obligated to ensure a right to free education of every child upto age of

14 years. On this aspect a useful reference could be made to what has been observed in Human Rights and Education Vol. 3 edited by Norma

Bernstein Tarrow at page 41:

The State is directed to strive for the right to education, make provision for free and compulsory education (Article 45), and promote the

educational interests of Scheduled Castes and Tribes, and other weaker sections (including women). Education is primarily the responsibility of the

State Governments, but the Union Government has certain responsibilities specified in the Constitution on matters such as planning, higher

education and promotion of education for weaker sections. Most states have enacted legislation for compulsory education. At the end of the sixth

Five Year Plan (1985) primary education for ages 6-11 is free in all states, and for age group 11-14 it is free in all except Orissa, Uttar Pradesh

and West Bengal. In these states, girls and members of Scheduled Castes and Tribes get free education, and incentives such as mid-day meals,

free books and uniforms, are provided. At the secondary stage several states have free education for all children and those which do not make free

education available to all, do so for girls, Scheduled Castes and Tribes. Thus, free education in all states is provided at the primary and secondary

stages for girls, Scheduled Castes and Tribes.

48. Again at page 43 it is stated:

Useful measures of achievement in terms of the right to education are literacy and enrolment levels. The contemporary picture, however, is not as

good as one would expect after 39 years of independence. The literacy rate has risen from 16.6 percent in 1951 to 36.6 percent according to the

1981 census. But regional variations indicate a range of above 60 percent literacy in Kerala to below 20 percent in some states. Nearly 120 million

in the functional age group of 15-35 are still illiterate (Bhandari, 1981). Over the last three decades of planned development, rapid growth in

facilities has attempted to provide access for minorities and girls. The number of educational institutions has more than doubled, while the number

of teachers and students has multiplied many times. But despite the fact that 93 percent of the rural population have access to schools, nearly 30

percent Of 6-14 year old (60 million) do not go to school and 77 percent drop out. A large percentage of the dropouts are girls and Schedule

Caste and Tribe members. The main problems are socio-economic constraints which result in educational constraints. Poverty is a major cause for

keeping children away from school.

49. Article 26(1) of the Universal declaration of Human Rights states:

Everyone has the right to education. Technical and professional education shall be made generally available and higher education shall be equally

accessible to all on the basis of merit.

(Emphasis supplied)

50. In the World of Science and the rule of Law by John Ziman 1986 Edition at page 49 it is stated:

The principal global treaty which covers this right is the ICESCR, whose Article 13 recognizes the general right to education enunciated by the

UDHR, but then goes on to add the following more specific provisions:

(2) The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

(a) Primary education shall be compulsory and available free to all;

(b) Secondary education in its different forms, including technical and vocational 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;

(c) Higher education shall be made equally accessible to all, on the progressive introduction of free education;

(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whose

period of their primary education;

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the

material conditions of teaching staff shall be continuously improved.

The status of this Article is a useful reminder of the problems inherent in any attempt to create a "social" right of this kind for individuals against

their states.

51. No doubt, the above extract from Mohini Jain's case (supra) states ""education at all levels"" but we consider the law has been somewhat

broadly stated and, therefore, must be confined to what is envisaged under Article 45.

52. The criticism by Mr. Ashok Desai, learned Counsel that Article 37 has not been adverted to and the reliance on directive principles is

untenable, in view of what we have stated above.

53. Higher education calls heavily on national economic resources. The right to it must necessarily be limited in any given country by its economic

and social circumstances. The State's obligation to provide it is, therefore, not absolute and immediate by relative and progressive. It has to take

steps to the maximum of its available resources with a view to achieving progressively the full realization of the right of education by all appropriate

means. But, with regard to the general obligation to provide education, the State could be said to have violated the same. If it the State could be

said to have violated the same. If it deliberately starved its educational system by resources that it manifestly had available unless it could show that

it was allocating them to some even more pressing programme. Therefore, by holding education as a fundamental right upto the age of 14 years this

Court is not determining the priorities. On the contrary, reminding it of the solemn endeavor has to take, under Article 45, within a prescribed time,

which time limit has expired long ago.

54. Mr. K.K. Venugopal, learned Counsel contends that in the U.S. Supreme Court in the case of San Antonio Independent School District v.

Rodriguez (1973). U.S 411 . it was observed: ""It is not province of this Court to create substantive constitutional rights in the name of guaranteeing

equal protection of the laws. Thus the key to discovering - whether education is ""Fundamental"" is not to be found (imcomparisons) of the relative

societal significances of education as opposed to subsistence or housing.... Rather, the answer lies in assessing whether there is a right to education

explicitly or implicitly guaranteed by the Constitution"".

55. But, if really the fundamental rights and the directive principles are complementary to each other we are unable to see why this fundamental

right cannot be interpreted in this manner. The American Constitution does not have a directive principle like Article 45. Therefore, the contrary

view was struck in San Antonio Independent School District (supra).

56. While dealing with the American Law on this aspect in Vol. 57 1969 California Law Review at page 380 it was stated:

It is true that the quotation from the Brown opinion seems stunningly relevant. Taken literally it would be decisive in some sense upon the question

of this Article. Education ""must be made available to all on equal terms."" From the vantage point of 1968, however, it is no longer clear that Brown

was specially concerned about the interest in education. The decision had scarcely appeared before the ""fundamental"" character of education

become the fundamental character of golf and swimming rights, and all the cases since Brown, even the cases involving education, have shown

complete preoccupation with the racial factor. Meanwhile the Court has done nothing further to suggest that education enjoys a constitutional life of

its own.

57. As to the present position of primary education in India, the additional affidavit on behalf of Union of India filed by Mr. H.C. Baveja, Assistant

Education Advisor in the Ministry of Human Resources Development, Government of India, Department of Education, New Delhi, puts the

position thus;

STATUS OF ELEMENTARY EDUCATION IN INDIA

1. Provision of free and compulsory education to all children until they complete the age of 14 years is a Directive Principle of the Constitution.

Recognising the need for literate population and provision of elementary education as crucial input for nation building, the policy of the Government

has been to provide all children the free and compulsory education at least upto elementary level (primary and upper primary level). The 6th Five

Year Plan document made a serious reference to desirability of a time bound plan to achieve universal enrolment. The 7th Plan conveyed a sense

of urgency about the need to achieve this objective. This was reinforced mid-way by the National Policy on Education, 1986.

PROGRESS OVER THE YEARS:

2. Concerted efforts to reach the target has led to manifold increase in institutions, teachers and students as shown in the table below:

3. This increase provided Indian Education System with one of the largest systems in the world, providing accessibility within 1 km walking

distance of Primary schools to 8.26 lakhs habitations containing about 94% of the country's population. Growth in enrolment in the decade of 80s

showed an acceleration that has now brought enrolment rates close of 100% at primary stage.

FREE EDUCATION:

4. In the endeavor to increase enrolment and achieve the target of UEE, all State Governments have abolished tuition fees in Government Schools

run by local bodies and private aided institutions is mostly free in these States. However, in private unaided schools which constitute 3.7% of the

total elementary schools in the country, some fee is charged. Thus, overall, it may be said that education upto elementary level in practically all

schools is free. Other costs of education such as text books, uniforms, school bags, transport etc. are not borne by States except in a very few

cases by way of incentives to children of indigent families or those belonging to Scheduled Caste/Schedule Tribes categories, The reason why the

State Government are unable to bear this additional expenditure is that 96% of expenditure on elementary education goes in meeting the salaries of

teaching and non-teaching staff. COMPULSORY EDUCATION

5. 14 States and 4 Union Territories have enacted legislation to make education compulsory but the socio-economic compulsions that keep the

children away from schools have restrained them from prescribing the rules and regulations whereby those provisions can be endorsed.

58. Thus, it has to be concluded that the right to free education upto the age of 14 years is a fundamental right.

59. The next question is whether there is a fundamental right to establish an educational institution. That takes us to Article 19(1)(g). That reads as

follows:

to practice any profession, or to carry on any occupation, trade or business,

60. The question now is: what is the meaning to be attributed to the words ""profession"", ""occupation"", ""trade"" or ""business"".

61. In P. Ramanatha Aiyar's Law Lexicon Reprint Edition 1987 at page 897 ""Occupation"" means:

The principal business of one's life, vocation, calling, trade, the business which a man follows to procure a living or obtain wealth: that which

occupies or engages one's time or attention, vocation, employment, calling, trade; the business in which a man is usually engaged, to the

knowledge of his neighbour.

62. According to Black's Law Dictionary Fifth Edition at page 973 ""Occupation"" means:

Possession; control; tenure; use. The act or process by which real property is possessed and enjoyed. Where a person exercises physical control

over land.

That which principally takes up one's time thought, and energies, especially, one's regular business or employment; also, whatever one follows as

the means of making a livelihood. Particular business, profession, trade, or calling which engages individual's time and efforts; employment in which

one regularly engages or vocation of his life.

63. In P.V.G. Raju v. Commissioner of Expenditure 36 ITR . 267 it is observed thus:

The activity termed as ""Occupation"", if of wider import than vocation or profession. It is also distinct from a hobby which can be resorted to only in

leisure hours for the purpose of killing time. Occupation, therefore, is that with which a person occupies himself either temporarily or permanently

or for a considerable period with continuity of activity. It is analogous to a business, calling or pursuit. A person may have more than one

occupation in a previous year. The Occupations may be seasonal or for the whole year.

Firstly, there can be a business, profession, vocation or occupation without any profit motive or on ""no profit on loss basis"". To, illustrate, co-

operative societies or mutual insurance companies may carry on business without earning any income or without any profit motive. The vocation or

occupation to do social service of various kinds for the uplift of the people would also come under this category. The profit motive or earning of

income is not an essential ingredient to constitute the activity, termed as business, profession, vocation or occupation.

If any authority is needed, we find it in 699905 wherein it was held that the educational activities of the assessee amounted to an occupation within

the meaning of Section 5(a) and that no profit motive is necessary to treat an activity as a vocation or occupation within the meaning of Section

5(a). For all these reasons, we must negative this submission of Mr. Ramarao relating to the interpretation of the words "business, profession,

vocation or occupation" in Section 5(a) of the Act.

64. In P.K. Menon v. Income Tax Commissioner 1959 Supp. (1) SCR 133 this Court held as follows:

We find no difficulty in thinking that teaching is a vocation if not a profession. It is plainly so and it is not necessary to discuss the various meanings

of the word "vocation" for the purpose or to cite authorities to support this view. Nor do we find any reason why, if teaching is a vocation, teaching

of Vedanta is not. It is just as much teaching and therefore, a vocation, as any other teaching. It is said that in teaching Vedanta the appellant was

only practising religion. We are unable to see why teaching of Vedanta as a matter of religion is not carrying on of a vocation.

It is said that as the word "Vocation" has been used along with the words "business" and "profession" and the object of business and profession, is

to make a profit, only such activities can be included in the word "Vocation" the object of which likewise is to make a profit. We think that these

contentions lack substance. We do not appreciate the significance of saying that in order to become a vocation an activity must be organised. If by

that a continuous, or as was said, a systematic activity, is meant, we have to point out that it is well known that a single act may amount to the

carrying on of a business or profession.

65. The meaning of "business" can be gathered from Law Lexicon Edition 1987 by Ramnath Iyer:

Business is that which engages the time, talent and interest of a man" and is what a man proposes to himself. There may be a "Business" without

pecuniary profit being at all contemplated.

Business" and "Trade: "Business" has a more extensive meaning than "Trade", (per Willes, J. Harris v. Amery 35 C.P. 92 But "Ordinarily speaking,

Business is synonymous with "Trade", (per Chatterton V.C. Delany v. Delany, 15 L.R. Ir. 67. There may, however, be a "Business" without

pecuniary profit being at all contemplated. In such connection, "Business" is a very much larger word than "Trade" and the word "Business" is

employed in order to include occupations which would not strictly come within the meaning of the word "Trade" (per person, J. Rolls -vs- Miller,

53 LJ. Ch. 101 per Scrutton. L.J. The words "Trade" and "Business" do not mean the same thing...on business, though usually business is carried

on for profit. It is to be presumed that the Railways are run on a profit, though it may be that occasionally they are run at a loss.

Monetary consideration for service is, therefore, not an essential characteristic of industry in a modern State.

66. In 271476 it is observed:

A person to be a dealer within the meaning of the Act must carry on the business of selling or supplying goods in Orissa. The expression ""business

is not defended in the Act. But as observed by this Court in 261212

The expression ""business"" though extensively used as a word of indefinite import, in taxing statutes it is used in the sense of an occupation, or

profession which occupies the time, attention and labour of a person, normally with the object of making profit. To regard an activity as business

there must be a course of dealings, either actually continued or contemplated to be continued with a profit motive, and not for sport or pleasure.

In 274754 it is observed:

The expression ""business"" does not necessarily mean trade or manufacture only. It is being used as including within its scope profession, vocations

and callings from a fairly long time. The shorter Oxford English Dictionary defines ""Business"" as stated occupation, profession or trade"" and a man

of business"" is defined as meaning ""an attorney"" also. In view of the above dictionary meaning of the word ""business"" it cannot be said that the

definition of business given in Section 45 of the Partnership Act, 1890 (53 & 54 Viet. C. 39) was an extended definition intended for the purpose

of that Act only. Section 45 of that Act says:

The expression ""Business"" includes every Trade, occupation, or profession.

Section 2(b) of the Indian Partnership Act, 1932 also defines ""Business"" thus:

Business"" includes every trade, occupation and profession.

The observation of Rowlatt, J. in *Christopher Barker & Sons, v. Commissioner of Inland Revenue* (1919) 2 KB 222. ""All professions are

businesses, but all businesses are not professions,..."" also supports the view that professions are generally regarded as business. The same learned

Judge in another case *Commissioner of Inland Revenue vs Marine Steam Turbine Co. Ltd.* (1920) 1 KB. 193 held:

The word ""Business"" however is also used in another and a very different sense, as meaning an active occupation or profession continuously

carried on and it is in this sense the word is used in the Act with which we are here concerned"". ""The word ""Business"" is one of wide import and it

means an activity carried on continuously systematically by a person by the application of his labour skill with a view to earning an income. We are

of the view that in the context in which the expression ""business"" is used in Section 9(1) of the Act, there is no warrant for giving a restricted

meaning to it excluding professional connections from its scope.

67. [In each of these cases, depending upon the statute, either ""occupation"" or ""business"" has to be defined. Certainly, it cannot be contended that

establishment of an educational institution would be ""business"". Nor again, could that be called trade since no trading activities carried on. Equally,

it is not a profession. It is one thing to say that teaching is a profession but it is a totally different thing to urge that establishment of an educational

institution would a profession. It may perhaps fall under the category of occupation provided no recognition is sought from the State or affiliation

from the University is asked on the basis that it is a fundamental right. This position is explained below:

68. However, some of the learned Counsel relied on 261253 o urge that the activity of running an educational institution was an industry. In that

case, Krishna Iyer, J. observed:

To Christian education as a mission, even if true, is not to negate is being an Industry, we have to look at education activity from the angle of the

Act and so viewed the ingredients of education are fulfilled. Education is, therefore, an industry nothing can stand in the way of that Conclusion.

69. This ruling was relied on in Miss Sundarambai v. Government of Goa 1988 Supl. 1 SCR 6088,. It was held:

Thus it is seen that even though an educational institution has to be treated as an industry in view of the decision in the Bangalore Water Supply and

Sewerage Board v. R. Rajappa (supra) the question whether teachers in an educational institution can be considered as workmen still remains to

be decided.

70. It requires to be carefully noted that while considering as to what would constitute an industry under the Industrial Disputes Act, these

observations came to be made. Certainly, that is very different from claiming a fundamental right under Article 19(1)(g).

71. Even on general principles, the matter could be approached this way. Educational institutions can be classified under two categories:

1. Those requiring recognition by the State and
2. Those who do not require such a recognition.

It is not mere an establishment of educational institution, that is urged by the petitioners, but, to run the educational institution dependant on

recognition by the State. There is absolutely no fundamental right to recognition in any citizen. The right to establishment and run the, educational

institution with State's recognition arises only on the State permitting, pursuant to a policy decision or on the fulfilment of the conditions of the

Statute. Therefore, where it is dependent on the permission under the Statute or the exercise of an executive power, it cannot qualify to be a

fundamental right. Then again, the State policy may dictate a different course.

72. The logical corollary of holding that a fundamental right to establish an educational institution is available under Article 19(1)(g) would lead to

the proposition, right to establish a university also. In fact, this Court had occasion to point out in 5. 282633 at page 848 thus:

Before we do so we should like to say that the words ""educational institutions"" are of very wide import and would include a university also. This

was not disputed on behalf of the Union of India and therefore it may be accepted that a religious minority had the right to establish a university

under Article 30(1). The position with respect to the establishment of Universities before the Constitution came into force in 1950 was this. There

was no law in India which prohibited any private individual or body from establishing a university and it was therefore open to a private individual

or body to establish a university. There is a good deal in common between educational institutions which are not universities and those which are

universities. Both teach students and both have teachers for the purpose. But what distinguishes a university from any other educational institution is

that a university grants degrees of its own while other educational institutions cannot. It is this granting of degrees by a university which distinguishes

it from the ordinary run of educational institutions. (See St. David's College, Lampeterv. Ministry of Education 1951 1. All E.R. 559. Thus in law

in India there was no prohibition so established it must of necessity be granting degrees before it could be called a university. But though such a

university might be granting degrees it did not follow that the Government of the country was bound to recognise those degrees.

73. If there is no fundamental right to establish a university a fortiori a fundamental right to establish an educational institution is not available.

74. By implication also a fundamental right of the nature and character conferred under Article 30 cannot be read into Article 19(1)(g). The

conferment of such a right on the minorities in a citizen of the country.

75. In 279299 it is observed:

The right to establish and administer educational institutions of their choice has been conferred on religious and linguistic minorities so that the

majority who can always have their right by having proper legislation do not pass a legislation prohibiting minorities to establish and administer

educational institutions of their choice. If the scope of Article 30(1) is made an extension of the right under Article 29(1) as the right to establish

and administer educational institutions for giving religious instruction or for imparting education in their religious teachings or tenets the fundamental

right of minorities to establish and administer educational institution of their choice will be taken away.

(Emphasis supplied)

76. At page. 192 it is observed:

Article 30 is a special to minorities to establish educational institutions of their choice. This Court said that the two Articles create two separate

right though it is possible that the rights might meet in a given case.

The real reason embodied in Article 30(1) of the Constitution is the conscience of the nation that the minorities, religious as well as linguistic, are

not prohibited from establishing and administering educational institutions of their choice for the purpose of giving their children the best general

education to make them complete men and women of the country. The minorities are given this protection under Article 30 in order to preserve

and strengthen the integrity and unity of the country. The sphere of general secular education is intended to develop the commonness of boys and

girls of our country. This is in the true spirit of liberty, equality and fraternity through the medium of education. If religious or linguistic minorities are

not given protection under Article 30 to establish and administer educational institutions of their choice, they will feel isolated and separate.

General secular education will open doors [of perception and act as the natural light of mind for our countrymen to live in the whole.

77. Then again, at page 224 it is observed:

The idea of giving some special right to the minorities is not to have a kind to privileged or pampered section of the population but to give to the

minorities a sense of security and a feeling of confidence. The great leaders of India since time immemorial had preached the doctrine of tolerance

and catholicity of outlook. Those noble ideas were enshrined in the Constitution. Special rights for minorities were designed not to create

inequality. Their real effect was to bring about equality by ensuring the preservation of the minority institution and by guaranteeing to the minorities

autonomy in the matter of the administration of these institutions. The differential treatment for the minorities by giving them special rights is intended

to bring about an equilibrium, so that the ideal of equality may not be reduced to a more abstract idea but should become a living reality and result

in true, genuine equality, an equality not merely in theory but also in fact. The majority in a system of adult franchise hardly needs any protection. It

can look after itself and protect its interests. Any measure wanted by the majority can without much difficulty be brought on the statute book

because the majority can get that done by giving such a mandate to the elected representatives. It is only the minorities who need protection, and

Article 30, besides some other articles, is intended to afford and guarantee that protection.

(Emphasis supplied)

78. The argument that every activity or occupation by the mere fact of its not being obnoxious or harmful to society, cannot by itself be entitled to

protection as fundamental right. As pointed out above, some rights, by the very nature, cannot be qualified to be protected as fundamental rights.

79. Accordingly, it is 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 purposes of educating

the students he could do so but Sections 22 and 23 of the University Grants Commission which prohibits the award of degrees excepts by a

University must be kept in mind.

80. The next question which calls for determination is: does recognition or affiliation make the educational institution an instrumentality? We

propose to examine this question with reference to the following cases.

81. In 270189 it was Observed:

The tests for determining as to when a corporation can be said to be an instrumentality or agency of Government may now be called out from the

judgment in the International Airport Authority's case. These tests are not conclusive or clinching, but they are merely indicative indicia which have

to be used with care and caution, because while stressing the necessity of a wide meaning to be placed on the expression "other authorities", it must

be realised that it should not be stretched so far as to bring in every autonomous body which has some nexus with the Government within the

sweep of the expression. A wide enlargement of the meaning must be tempered by a wise limitation. We may summarise the relevant tests gathered

from the decision in the International Airport Authority's case as follows:

(1) One thing is clear that if the entire share capital of the corporation is held by Government it would go a long way towards indicating that the

corporation is an instrumentality or agency of Government.

(2) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication

of the corporation being impregnated with governmental character.

(3) It may also be a relevant factor...whether the corporation enjoys monopoly status which is the State conferred or State protected.

(4) "Existence of deep and pervasive State control may afford an indication that the Corporation is a State agency or instrumentality.

(5) If the functions of the corporation of public importance and closely related to governmental functions, it would be a relevant factor in classifying

the corporation as an instrumentality or agency of Government.

(6) Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference of the

corporation being an instrumentality or agency of Government.

If on a consideration of these relevant factors it is found that the corporation is an instrumentality or agency of government, it would, as pointed out

in the International Airport authority's case, be an "authority" and, therefore, "State" within the meaning of the expression in Article 12.

We find that the same view has been taken by Chinnappa Reddy, J. in a subsequent decision of this Court in 271318 and the observations made

by the learned Judge in that case strongly reinforced the view we are taking particularly in the matrix of our constitutional system.

82. Ranganath Mishra, J. (as he then was), speaking for the Court, after a succinct analysis of the entire case law on the subject concludes in

277382 as under:

We have several cases of societies registered under Societies Registration Act which have been treated as "State" but in each of those cases it

would appear on analysis that either governmental business had been undertaken by the Society or what was expected to be the public obligation

of the State" had been undertaken to be performed as a part of the Society's function. In a Welfare State, as has been pointed out on more than

one occasion by this Court, governmental control is very pervasive and in fact touches all aspects of social existence. In the absence of a fair

application of the tests to be made, there is possibility of turning every non-government society into an agency or instrumentality of the State. That

obviously would not serve the purpose and may be far from reality. A broad picture of the matter has to be taken and a discerning mind has to be

applied keeping the realities and human experiences in view so as to reach a reasonable conclusion. Having given our anxious consideration to the

facts of this case, we are not in a position to hold that ICPS is either an agency or instrumentality of the State so as to come within the purview of

other authorities" in Article 12 of the Constitution. We must say that ICPS is a case of its type - typical in many ways and the normal tests may

perhaps not properly apply to test its character.

83. The same learned Judge, after referring to the tests adumbrated in *Ajay Hasia (supra)*, holds in *All India Sainik Schools Employees' Ass. v.*

Sainik Schools Society 1989 Supp (1) SCC 205:

...that the Sainik School Society is also "State" The entire funding is by the State Governments and the Central Government. The overall control

vests in the governmental authority. The main object of the Society is to run schools and prepare students for the purpose of feeding the National

Defence Academy. Defence of the country is one of the regal functions of the State.

84. Applying these tests, we find it impossible to hold that a private educational institution the recognition or affiliation to the university could ever

be called an instrumentality of State, Recognition is for the purposes of conforming to the standards laid down by the State. Affiliation I regard to

the syllabi and the course of study. Unless and until they are in accordance with the prescription of the university, degrees would not be conferred.

The educational institutions the students for the examination conducted by the university. Therefore, they are obliged the syllabi and the course of

the study. 85. As a sequel to this, an important question arises: what is the nature of functions discharged these institutions? They discharge a public

duty. If a student desires to acquire a degree, for example, in medicine, he will have to route through a medical college. These medical colleges are

he instruments to attain the qualification. If, therefore, what is discharged by the educational 15 Institution, is a public duty that requires, duty to act

fairly.

86. In such a case, it will be subject to Article 14.

87. 281285 is an interesting case where a writ of mandamus was issued a private college. In paragraph 12 at page 697 it was held:

The essence of the attack on the maintainability of the writ petition under Article 226 may now be examined. It is argued that the management of

the college being a trust registered under the Bombay Public Trust Act is not amenable to the writ jurisdiction of the High Court. The contention in

other words, is that the trust is a private institution against which no writ of mandamus can be issued. In support of the contention, the counsel

relied upon two decisions of this Court: (1) 280462 and (b) 269052 . In the first of the two cases, the respondent institution was a Degree College

managed by a registered co-operative society. A suit was filed against the college by the dismissed principal for reinstatement. It was contended

that the Executive Committee of the college which was registered under the Co-operative Societies Act and affiliated to the Agra University (and

subsequently to Meerut University) was a statutory body. The importance of this contention lies in the fact that in such as case, reinstatement could

be ordered if the dismissal is in violation of statutory obligation. But this Court refused to accept the contention. It was observed that the

management of the college was not a statutory body since not created by or under a statute. It was emphasised that an institution which adopts

certain statutory provisions will not become a statutory body and the dismissed employee cannot enforce a contract of personal service against a

non-statutory body.

88. At paragraphs 15 to 20 it was held:

If the rights are purely of a private character no mandamus can issue. If the management of the college is purely a private body with no public duty

mandamus will not lie. These are two exceptions to mandamus. But once these are absent and when the party has no other equally convenient

remedy, mandamus cannot be denied. It has to be appreciated that the appellants-trust was managing the affiliated college to which public money

is paid as government aid" Public money paid as government aid plays a major role in the control, maintenance and working of educational

institutions. The added institutions like government institutions discharge public function by way of imparting education to students. They are subject

to the rules and regulations of the affiliating University. Their activities are closely supervised by the University authorities. Employment in such

institutions, therefore, is not devoid of any public character. (See the Evolving Indian Administrative Law by M.P. Jain (1983) p. 226). So are the

service conditions of the academic staff. When the University takes a decision regarding their pay scales, it will be binding on the management. The

service conditions of the) academic staff are, therefore, not purely of a private character. It has super-added protection" by University decisions

creating a legal right-duty relationship between the staff and the? management. When there is existence of this relationship, mandamus cannot be

refused to the aggrieved party.

The law relating to mandamus has made the most spectacular advance. It may be recalled that the remedy by prerogative writs in England started

with very limited scope and suffered from many procedural disadvantages. To overcome the difficulties, Lord Gardiner (the Lord Chancellor) in

pursuance of Section 3(1)(e) of the Law Commission Act, 1965, requested the Law Commission "to review the existing remedies for the judicial

control of administrative acts and omission with a view to evolving a simpler and more effective procedure". The Law Commission made their

report in March 1976 (Law Commission made their report in March 1976 (Law Commission Report No. 73). It was implemented by Rules of

Court (Order 53) in 1977 and given statutory force in 1981 by Section 31 of the Supreme Court Act, 1981. It combined all the former remedies

into one proceeding called Judicial Review. Lord Denning explains "the scope of this "judicial review":

At one stroke the courts could grant whatever relief was appropriate. Not only certiorari and mandamus, but also declaration and injunction. Even

damages. The procedure was much more simple and expeditious. Just a summons instead of a writ. No formal pleadings. The evidence was given

by affidavit. As a rule no cross-examination, no discovery, and so forth. But there were important safeguards. In particular, in order to qualify, the

applicant had to get the leave of a judge.

The statute is phrased in flexible terms. It gives scope for development. It uses the words "having regard to". Those words are very indefinite. The

result is that the courts are not bound band and foot by the previous law. They are to "have regard to it. So the previous law as to who are and

who are not - public authorities, is not absolutely binding. Nor is the previous law as to the matters in respect of which relief may be granted. This

means that the judges can develop the public law as they think best. The they have done and are doing. (See The Closing Chapter by Rt. Hon.

Lord Denning p. 122).

There, however, the prerogative writ of mandamus is confide only to public authorities to compel performance of public duty. The "public

authority" for them mean every body which is created by statute-and whose powers and duties are defined by statute. So government

departments, local authorities, police authorities, and statutory undertakings and corporations, are all "public authorities". But there is no such

limitation for our High Courts to issue the writ in the nature of mandamus". Article 226 confers wide powers on the High Courts to issue writs in

the nature of prerogative writs. This is a striking departure from the English law. Under Article 226, writs can be issued to "any person or

authority". It can be issued "for the enforcement of any of the fundamental rights and for any other purpose.

18. Article 226 reads:

226. Power of High Courts to issue certain writs. - (1) Notwithstanding anything in Article 32, r every High Court shall have power, throughout the

territories in relation to which it exercises jurisdiction, to issue to any person or authority including in appropriate cases, any government, within

those territories directions, orders and writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or

any of them, for the enforcement of any of the rights conferred by Part II and for any other purpose.

The scope of this article has been explained by Subba Rao, J., In *Dwarkanath v. ITO* 1965 3 SCR 535:

This article is couched in comprehensive phraseology and it ex-facie confers a wide power on the High Courts to reach injustice wherever it is

found. The Constitution designedly used a wide language in describing the nature of the power, the purpose for which and the person or authority

against whom it can be exercised. It can issue writs in the nature of prerogative writs as understood in England; but the scope of those writs also is

widened by the use of the expression ""nature"", for the said expression does not equate the writs that can be issued in India with those in England,

but only draws an analogy from them. That apart, High Courts can also issue directions, orders or writs other than the prerogative writs. It enables

the High Court to mould the relief to meet the peculiar and complicate requirements of this country. Any attempt to equate the scope of the power

of the High Court under Article 226 of the Constitution with that of the English courts to issue prerogative writs is to introduce the unnecessary

procedural "restrictions grown over the years in a comparatively small country like England with a unitary form of government into a vast country

like India functioning under a federal structure. Such a construction defeat the purpose of the article itself.

The term ""authority"" used in Article 226 the context must receive a liberal meaning unlike the term in Article 12. Article 12 is relevant only for the

purpose of enforcement of fundamental right under Article 32. Article 226 confers power on the High Courts to issue writs for enforcement of the

fundamental rights as well as non-fundamental rights. The words ""any person or authority"" used in Article 226 are, therefore, not to be confined

only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the

body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of

positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed, if a positive obligation

exists mandamus cannot be denied.

89. The emphasis in this case is as to the nature of duty imposed on the body. It requires to be observed that the meaning of authority under Article

226 came to be laid down distinguishing the same term from Article 12. In spite of it, if the emphasis is on the nature of duty on the same principle

it has to be held that these educational institutions discharge public duties. Irrespective of the educational institutions receiving aid it should be held

that it is a public duty. The absence of aid does not detract from the nature of duty.

90. In *R v Panel on Take-Overs* 1987(1) All E R 564 it is observed: ""The principle issue in this appeal, and the only issue which may matter in the

longer term, is whether this remarkable body is above law. Its respectability is beyond question. So is its bona fides. I don not doubt for one

moment that it is intended to and does operate in the public interest and that the enormously wide discretion which it aggregates to itself is

necessary if its is to function efficiently and effectively. While not wishing to become involved in the political controversy on the relative merits of

self-regulation and governmental or statutory regulation, I am content to assume for the purposes of this appeal that self-regulation is preferable in

the public interest. But that said, what is to happen if the panel goes off the rails? Suppose, perish the thought, that it were to use its powers in a

way in which was manifestly unfair. What then? Counsel for the panel submits that the panel would lose the support of public opinion in the

financial markets and would be unable to continue to operate. Further or alternatively, Parliament could and would intervene. Maybe, but how long

would that take and who in the meantime could or would come to the assistance of those who were being oppressed by such conduct?

91. At page 574 it is held:

The picture which emerges is clear. As an act of government it was decided that, in relation to take-overs, there should be a central self-regulatory

body which would be supported and sustained by a periphery of statutory powers and penalties wherever non-statutory powers and penalties

were insufficient or non-existent or where EEC requirements called for statutory provisions.

At page 577 it is held:

In fact given its novelty, the panel fits surprisingly well into the format which this Court had in mind in R v Criminal Injuries Compensation Board. It

is without doubt performing a public duty and an important one. This is clear from the expressed willingness of the Secretary of State for Trade and

of the Secretary of State for Trade and Industry to limit legislation in the field of takeovers and mergers and to use the panel as the centerpiece of

his regulation of that market. The rights of citizens are indirectly affected by its decisions, some, but by no means all of whom, may in a technical

sense be said to have assented to this situation, "e" "g" the members of the Stock Exchange. At least in its determination of whether there has been

a breach of the code, it has a duty to act, judicially and its asserts that its raison de"tre is to do equity between one shareholder and another. Its

source of power is only partly based on moral persuasion and the assent of institutions and thirty members, the bottom line being the statutory

powers exercised by the Department of Trade and Industry and the Bank of England. In this context I should be very disappointed if the courts

could not recognise the realities of executive power and allowed their vision to be clouded by the subtlety and sometimes complexity of the way in

which it can be exerted.

Given that it is really unthinkable that, in the absence of legislation such as affect trade unions, the panel should go on its way cocooned from the

attention of the courts, in defence of the citizenry, we sought to investigate whether it could conveniently be controlled by established form of

private law eg torts such as actionable combinations in restraint of trade, and, to this end, pressed counsel for the applicants to draft a writ. Suffice

it to say that the result was wholly unconvincing and, not surprisingly, counsel for the panel did not admit that it would be in the least effective.

92. At page 584 it is held:

More recently in *Rv. BBC, expleville* (1983) 1 All ER 2451 (1983) 1 WLR 23 Woolf J had to consider an application for judicial review where

the relief sought was an injunction under Order 53, Rule 1(2). The case was brought by an employee of the BBC. In refusing relief Woolf J said

(1983) 1 All ER 241 , 1983 1 WLR 23 :

Paragraph (2) of Rule 1 of Order 53 does not strictly confine applications for judicial review to cases where an order for mandamus, prohibition or

certiorari could be granted. It merely required that the court should have regard to the nature of the matter in respect of which such relief may be

granted. However, although applications for judicial review are not confined to those cases where relief could be granted by way of prerogative

order, I regard the wording of Ord 53, Rule 1(2) and Sub-section (2) of Section 31 of the Supreme Court Act 1981 as making it clear that the

application for judicial review is confined to reviewing activities of a public nature as opposed to those of a purely private or domestic character.

The disciplinary appeal procedure set up by the BBC spends purely on the contract of employment between the applicant and the BBC and

therefore it is a procedure of a purely private or domestic character.

93. Private Colleges and their role:

The Union of India takes the stand that the Central Government does not have the resources undertake any additional financial responsibility for

medical or technical education. Taking the case of medical education, the total plan outlay of the health sector is 3.2 per cent and medical education

gets a prorata share after apportionment of priorities and allocation of available funds. Priorities include promotions of primary health, hospital

services etc. The Government in particular is unable to aid any private educational institution financially at levels higher than at present. Certain

statistical details regarding the cost of medical education have been given in the counter affidavit of the Central Government. Paragraphs 5 to 9 of

the affidavit may kindly be seen in this connection.

94. It has, therefore, been the policy of the Central Government to involve private and voluntary efforts in the sector of education in conformity

with accepted norms and goals. The consequences which will follow if private educational institutions have to limit themselves to a structure which is

charged in Government medical and technical educational institutions been enumerated in paragraph 9 of the counter affidavit of the Union of India.

95. The Central Government's policy on education was formulated in the year 1986. Modifications were undertaken in 1992.

96. The relevant extract from the National Policy on Education, being paragraph 6.20, 10.1, 10.9 and 11.2 are set out herein below:

6.20 In the interests of maintaining standards and for several other valid reasons, the commercialization of technical and professional education will

be curbed. An alternative system will be devised to involve private and voluntary effort in this sector of education, in conformity with accepted

norms and goals.

10.1 An overhaul of the system of planning and the management of education will receive high priority. The guiding considerations will be:

a) Evolving a long-term planning and management perspective of education and its integration with the country's developmental and manpower

needs:

b) Decentralisation and the creation of a spirit of autonomy for educational institutions;

c) Giving pre-eminence to people's involvement, including association of non-governmental agencies and voluntary effort;

d) Inducting more women in the planning and management of education;

e) Establishing the principle of accountability in relation to given objectives and norms." ""10.9 Non-Government and voluntary effort including

social activist groups will be encouraged, subject to proper management, and financial assistance provided. At the same time, steps will be taken to

prevent the establishment education.

11.2 Resources, to the extent possible will be raised by mobilising donations, asking the beneficiary communities to maintain school buildings and

supplies of some consumables raising fees at the higher levels of education and effecting some savings by the efficient use of facilities. Institutions

involved with research and the development of technical and scientific manpower should also mobilize some funds by levying a cess or charge on

the user agencies, including Government departments, and entrepreneurs. All these measures will be taken not only to reduce the burden on State

resources but also for creating a greater sense of responsibility within the educational system. However, such measures will contribute only

marginally to the total funding. The Government and the community in general will find funds for such programmes as; the universalization of

elementary education; liquidating illiteracy; equality of access to educational opportunities to all sections throughout the country; enhancing the

social relevance, quality and functional effectiveness of educational programmes; generating knowledge and developing technologies in scientific

fields crucial to self-sustaining economic development and creating a critical consciousness of the values and imperatives of national survival.

97. Therefore, as on today, it would be unrealistic and unwise to discourage private initiative in providing educational facilities, particularly for

higher education. The private sector should be involved and indeed encouraged to augment the much needed resources in the field of education,

thereby making as much progress as possible in achieving the constitutional goals in this respect. It could be concluded that the private colleges are

the felt necessities of time. That does not mean one should tolerate the ""so-called colleges"" run in thatched huts with hardly any equipment, with no

or improvised laboratories, scarce facility to learn in an unhealthy atmosphere, far from conducive to education. Such of them must be put down

ruthlessly with an iron hand irrespective of who has started the institution or who desires to set up such an institution. They are poisonous weeds in

the field of education. Those who venture are financial adventurers without morals e scruples. Their only aim is to make money, driving a hard

bargain, exploiting eagerness to acquire a professional degree which would be a passport for employment in a country rampant with

unemployment. They could be even called pirates in the high seas of education.

98. At this juncture, it is worthwhile to refer to the Resolution passed at the 48th All Medical Conference:

Resolution No. 2

Racketeering in Medical Education:

Whereas, a number of institutions have sprung Up in the country that style themselves:

Medical College; and

Whereas, such institutions charge large sums as capitation fees, a practice which the Indian Medical Association and the Medical Council of India

have opposed a number of times; and Whereas, such institutions neither have suitable buildings, nor proper equipment and even lack adequate staff

of requisite qualifications and further it has come to light that these institution"s swindle the public by taking large sums of money from students

although these institutions have not been recognized by the authorities;

This 48th All India Medical Conference urges upon the Governments to take stringent measures against persons/institutions who/which run such

medical colleges and close them and recommend to the Medical Council of India not to grant them recognition.

(48th Conference Dec. 29, 31, 1972 at Ahmedabad)

99. However, a word of caution requires to be uttered. Not all the private institutions belong to this category. There are institutions which have

attained great reputation by devotion and by nurturing high educational standards. They surpass the colleges run by the Government in many

respects. They require encouragement. From this point of view regulatory controls have to be continued and strengthened. The commercialisation

of education, the racketeering must be prevented. The State should strive its utmost in this direction.

100. Regulatory measures must so ensure that private educational institutions maintain minimum standards and facilities. Admission within all groups

and categories should be based on merit. There may be reservation of seats in favour of the weaker sections of the society other groups which

deserve special treatment. The norms for admission should be pre-lined, objective and transparent.

101. Before the scheme, a question may arise whether a mandamus could issue for the enforcement of scheme if proposed by the Court. For this,

we may look up at 283934

The Medical Council of India is directed to formulate a proper constitutional basis for determining the selection of candidates for nomination to

seats in Medical Colleges outside the State in the light of the observations contained in this judgement. Until a policy is so formulated and concrete

criteria are embodied in the procedure selected, the nominations shall be made by selecting candidates strictly on the basis of merit, the candidates

nominated being those, in order of merit, immediately below the candidates selected for admission to the Medical Colleges of the home State.

102. It cannot be gained that profiteering is an evil. If a public utility like electricity could controlled, certainly, the professional colleges also require

to be regulated.

103. In Kerala State Electricity Board v. S.N. Govinda Prabhu 1986 (3) SCR it is held:

It is a public utility monopoly undertaking which may not be driven by pure profit motive not that profit is to be shunned but that service and not

profit should inform its actions. It is not the function of the Board to so manage its affairs as to earn the maximum profit even as a private corporate

body may be inspired to earn huge profits with a view to paying large dividends to its shareholders. But it does not follow that the Board may not

and need not earn profits for the purpose of performing its duties and discharging its obligations under the statute. It stands to common sense that

the Board must manage its affairs on sound economic principles. Having ventured into the field of Commerce, no public service undertaking can

afford to say it will ignore business principles which are as essential to public service undertakings as to Commercial ventures.

104. At pages 650-51 it is held:

The Board may not allow its character as a public utility undertaking to be changed into that of a profit motivated private trading or manufacturing

house. Neither the tariffs nor the resulting surplus may reach such heights as to lead to the inevitable conclusion that the Board has shed its public

utility character. When that happens the Court may strike down the revision of tariffs as plainly arbitrary.

105. In 278266 it is held:

The notion that the "cost plus" basis can be the only criterion for fixation of prices in the case of public enterprises stems basically from a concept

that such enterprises should function either on a no profit no loss basis or on a minimum profit basis. This is not a correct approach. In the case of

vital commodities or services, while private concerns must be allowed a minimal return on capital invested, public undertakings or utilities may even

have to run at losses, if need be and even a minimal return may not be assured. In the case of less vital, but still basic commodities, they may be

required to cater to needs with a minimal profit margin for themselves. But given a favourable area of operation, ""commercial profits"" need not be

either anathema or forbidden fruit even to public sector enterprises.

In 290676 it is held:

This Court expressly rejected the submission which had found favour with the Kerala High Court that in the absence of a specification by the State

Government, the position would be as it was before the 1978 amendment, that is, the Board was to carry on its affairs and adjust the tariffs in such

a manner as not to incur a loss and no more. While rejecting the submission, this Court held as under: SCC pp. 213-14, para 10)

We are of the view that the failure of the government to specify the surplus which may be generated by the Board cannot prevent the Board from

generating a surplus after meeting the expenses required to be met Perhaps, the quantum of surplus may not exceed what a prudent public service

undertaking may be expected to generate without sacrificing the interests it is expected to serve and without being obsessed by the pure profit

motive of the private entrepreneur. The Board may not allow its character as a public utility undertaking to be changed into that of a profit

motivated private trading or manufacturing house. Neither the tariffs nor the resulting surplus may reach such heights as to lead to the inevitable

conclusion that the Board has shed its public utility character. When that happens the Court may strike down the revision of tariffs as plainly

arbitrary. But not until then. Not, merely because a surplus which can by no means be said to be extravagant. The court will then refrain from

touching the tariffs. After all, as has been said by this Court often enough price fixation is neither the forte nor the function of the court.

It cannot be contended that education must be available free and it must be run on a charitable basis. In this connection, we may usefully quote

P.R. Ganapathy Iyer"s. The Law relating to Hindu , and Mahomedan Endowments, as to the concept of charity which is elastic. At page 46 of

Chap. III it is stated:

A charitable establishment is a choultry, college, dispensary etc., while a religious establishment is a mosque, temple etc. For these endowments

may be made.

At page 47 it is stated:

In English law the word ""charity"" has both a popular and as technical meaning. The popular meaning of the word does not coincide with its legal or

technical meaning. Even according to the popular or ordinary meaning the word is used in more senses than one. In a narrow and limited sense the

ordinary acceptance of the word is ""relief of physical necessity or want"". (Per Lord Shand in Baird"s Trustees v. (Lord Advocate 15 sess. Cas.

4th Series 682) In a somewhat more extended sense, the ordinary and popular acceptance of the word is ""relief of poverty"" and a charitable act or

purpose"" consists in relieving poverty or want. (Ibid per Lord President (Inglis). In a still more extended sense and in its popular and ordinary

acceptation ""charity"" comprehends all benefits, whether religious, intellectual or physical bestowed upon persons who, by reason of their poverty,

are unable to obtain such benefits for themselves without assistance. (Per Lord Wastson in Commissioners for special purposes of Income Tax v.

Pemsel (1891) A.C. 531 .

106. At page 49 it is stated:

Charity in its legal sense as understood in the English Law comprises four principal divisions: (i) trusts for the relief of poverty; (2) trusts for the

advancement of education; (3) trusts for advancement of religion; (4) and trusts for other purposes beneficial to the community not falling under any

of the preceding heads.

107. In B.K. Mukherjee on the Hindu Law of Religious and Charitable Trust at page 58 para 2.7A it is stated:

2.7A. Education - The second category of charitable trusts in Lord MacNaghten's classification comprises trusts for education. These trusts need

not be meant exclusively for the poor. Of course, there must be a public purpose, something tending to the benefit of the community. There must

be general public benefit through the advancement or furtherance of some educational purpose. But if this important condition is satisfied, the scope

of ""education"" would appear to be fairly wide in several respects.

108. In 274152 it is held:

The educational institutions are not business houses. They do not generate wealth. They cannot survive without public funds or private aid. It is said

there is also restraint on collection of students fees. With the restraint on collection fees, the minorities cannot be saddled with the burden of

maintaining educational institutions without grant-in-aid. They do not have economic advantage over others. It is not possible to have educational

institutions without State aid. This was also the view expressed by Das, C.J., in 280210 . The minorities cannot, therefore, be asked to maintain

educational institutions on their own.

109. The time is not yet ripe to hold that education must be made available on a charitable basis. It is true whenever trusts are made for

advancement of education it was held to be charitable purpose. In Special Commissioners of Income Tax v. Pemsel 3 Tax Cas 53 the dictum of

Lord Macnaghten is as follows:

No doubt, the popular meaning of the words ""charity"" and ""charitable"" does not coincide with their legal meaning, and no doubt it is easy enough

to collect from the books a few decisions which seem to push the doctrine of the Court to the extreme, and to present a contrast between the two

meanings in an aspect almost ludicrous. But still it is difficult to fix the point of divergence, and no one has yet succeeded in defining the popular

meaning of the word ""charity"". The learned Counsel for the Crown did not attempt the task. Even the paraphrase of the Master of the Rolls is not

quite satisfactory.... ""Charity"" in its legal sense comprises four principle divisions: trusts for the relief of poverty, trusts for the advancement of

education, trusts for the advancement of religion, and trusts for other purposes beneficial to the community not falling under any of the preceding

heads. The trusts last referred to are not the less charitable in the eye of the law because incidentally they benefit the rich as well as the poor, as

indeed every charity that deserves the name must do, either directly or indirectly.

110. The next case to which reference can be made is *The King v. The Commissioner for Special Purposes of the Income Tax* 5 Tax cas 408.

The question arose whether the University College of North Wales could be held as established for charitable purposes. *Fletcher Moulton*, L.J.

relying on *Pemsel*'s case (*supra*) held that a trust for advancement of education was charitable.

111. In *The Abbey Malvern Wells, Ltd. v. Minister of Town and Country planning* 1951 (2) I All E LR 154 it was held:

In the present case, it seems to me that one is entitled, and indeed, bound, to look at the constitutional of the company to see who, in fact, is in

control. I find that, by Article 3 of the company's articles, the company is controlled entirely by a body called a council, a, body of persons, and,

by Article 64 that body of persons must be the trustees of the trust deed. Therefore, while the company, theoretically, has the power to apply its

property and assets for the purpose of making profits and devoting the resulting profit to the distribution of dividend among the members, I find that

the persons who regulate the operations of the company are not free persons unrestricted in their operations, but are the trustees of the trust deed,

and, under the terms of the trust deed, they may use the property of the company only in a particular way and."" must not make use of the assets of

the company for the purpose of a profit-making concern. I find that they are strictly bound by the trusts of the trust deed, and that those trusts are

charitable trusts. It seems to me, therefore, that, while nominally the property of the company is held under the provisions of the memorandum and

articles of association, in actual fact the property of the company is regulated by the terms of the memorandum and articles of association plus the

provisions of the trust deed, and, therefore, the company is restricted in fact in application, of its property and assets and may apply them only for

the charitable purposes which are mentioned in the trust deed.

112. This may be so, for the purpose of defining charity, but, in a country like ours it is impossible to hold that such theories could be advanced or

implemented.

B.P. JEEVAN REDDY, J.

113. In these writ petitions, filed by private educational institutions engaged in or. proposing to engage in imparting medical and engineering

education - the correctness of the decision rendered by a Division Bench comprising Kuldip Singh and R.M. Sahai, JJ. in *Miss Mohini Jain v. State*

of Karnataka and Ors. is called in question. The petitioners, running medical/engineering colleges in the States of Andhra Pradesh, Karnataka,

Maharashtra and Tamil Nadu, say that if Mohini Jain is correct and is followed and implemented by the respective State Governments as indeed

they are bound to they will have to close down; no other option is left to them. It is, therefore, necessary in the first instance to ascertain what

precisely does the said decision lay down.

114. The Karnataka Legislature enacted, in the year 1984, the Karnataka Educational Institutions (Prohibition of Capitation fee) Act. The

preamble to the Act recites:

An Act to prohibit the collection of capitation fee for admission to educational institutions in the State of Karnataka and matters relating thereto;

Whereas the practice of collecting capitation fee for admitting students into educational institutions is widespread in the State;

And whereas this undesirable practice beside contributing to large scale commercialisation of education has not been conducive to the maintenance

of educational standards;

And whereas it is considered necessary to effectively curb this evil practice in public interest by providing for prohibition of collection of capitation

fee and matters relating thereto;

Be it enacted by the Karnataka State Legislature in the Thirty-Fourth Year of the Republic of India as follows

115. Clause (b) of Section 2 defines the expression "capitation fee" in the following words: ""2(b). ""Capitation fee"" means any amount, by whatever

name called, paid or collected directly or indirectly in excess of the fee prescribed u/s 5, but does not include the deposit specified under the

proviso to Section 3.

116. Section 3 prohibits collection of capitation fees by any educational institution or anyone connected with its management, notwithstanding any

other law for the time being in force. The Section along with its proviso reads thus:

3. Collection of capitation fee prohibited. - Notwithstanding anything contained in any law for the time being in force, no capitation fee shall be

collected by or on behalf of any educational institution or by any person who is incharge of or is responsible for the management of such institution:

Provided....

117. Section 5, which is the other provision referred to in the aforesaid definition reads as follows:

5. Regulation of fees etc. - (1) It shall be competent for the Government, by notification, regulate the tuition fee or any other fee or deposit or other

amount that may be received or classes of students.

(2) No education institution shall collect any fees or amount or accept deposits in excess of the amounts notified under Sub-section (1) or

permitted under the proviso to Section 3.

(3) Every educational institution shall issue an official receipt for the fee or capitation fee or deposits or other amount collected by it.

(4) All monies received by any educational institution by way of fee or capitation fee or deposits or other amount shall be deposited in the account

of the institution, in any Scheduled Bank and shall be applied and expended for the improvement of the institution and the development of the

educational facilities and for such other related purpose and to such extent and in such manner as may be specified by order by the Government.

(5) In order to carry out the purposes of Sub-section (4), the government may require any education institution to submit their programmes or

plans of improvement and development of the institution for the approval of the Government.

118. Section 4 provides for regulation of admission in the educational institutions in the State, it ding to Sub-section (1), the maximum number of

students for admission that can be admitted a course of study and the minimum qualifications shall be fixed by the Government. However, the case

of a course of study in an institution maintained by or affiliated to the University and t by the Government. Sub-sections (2) and (3) of Section 4

pertain to ""regulation of capitation fee during the period specified under the proviso to Section 3. In view of their importance, these sub-sections

may be set out in full:

(2) in order to regulate the capitation fee charged or collected during the period specified f under the proviso to Section 3, the government may,

from time to time, by general or special order, specify in respect of each private educational institution or class or classes of such institutions.

(a) the number of seats set apart as Government seats:

(b) the number of seats that may be filled up by the management of such institution,

(i) from among Karnataka students on the basis of merit, oh payment of such cash deposits refundable after such number of years, with or without

interest as may be specified therein, but without the payment of capitation fee; or

(ii) at the discretion:

Provided that such number of seats as may be specified by the Government but not less than fifty percent of the total number of seats referred to in

the Clauses (a) and (b) shall be filled from among Karnataka students.

Explanation - For the purpose of this section Karnataka students means persons who have studied in such educational institutions in the State of

Karnataka run or recognised by the Government and for such number of years as the government may specify;

(3) an educational institution required to fill seats in accordance with item (i) of Sub-clause (b) of Clause (2) shall form a committee to select

candidates for such seats. A nominee each of the Government and the University to which such educational institution is affiliated shall be included

as members of such committee.

119. These two sub-sections, in short, say: (i) it shall be open to the Government to specify the number of seats that may be set apart as

Government seats"" in any private educational institution or in a class or classes of such institutions; (ii) The Government can also specify that out of

the seats to be filled by the Management (Management quota), a particular number of seats may be filled from among Karnataka students, on the

basis of merit on payment of such refundable deposit as may be prescribed; The Government can also specify the number of seats that may be

filled at, the discretion of the management. (It is obvious that if the seats to be filled on the basis of merit refundable deposit are not specified, all the

seats other than ""Government seats"" can be filled at the discretion of the management;) (iii) the number of Karnataka students" (which expression is

defined by the explanation) should not be less than 50% over-all; (iv) in case, the number of seats to be filled on merit-cum-refundable deposit are

specified, a selection committee, as contemplated by Sub-section (3) has to be formed for making the selection. The expression ""Government

seats"" is defined in Clause (e) of Section 2 in following words:

(e). ""government Seats"" means such number of seats in such educational institution or class or classes of such institutions in the state as the

Government may, from time to time, specify for being filled up by it in such manner as may be specified by it by general or special order on the

basis of merit and reservation for Scheduled Castes, Scheduled Tribes, Backward Classes and such other categories, as may be specified, by the

Government from time to time, without the requirement of payment of capitation fee or cash deposit.

120. In exercise of the power conferred by Section 5 of the Act, the Government of Karnataka issued a notification on June 5, 1989. It provided

that from the academic year 1989-90, the fees payable in private medical colleges shall be Rs. 2,000/- p.a. in case of students admitted against

government Seats"" (the same as in the government Medical Colleges), Rs. 25,000/- in the case of other Karnataka students and Rs. 60,000/- in

the case of non-Karnataka students.

121. Miss Mohini Jain, a non-Karnataka student (she was from Meerut in Uttar Pradesh) applied for admission in M.B.B.S. course in one of the

private medical colleges in Karnataka. She was informed by the college that if she pays Rs. 60,000/- towards the first year's tuition fee and

furnishes a Bank guarantee for the fees payable for the remaining years of the M.B.B.S. course, she will be admitted. Her parents were not in a

position to pay the same and hence she could not be admitted. Her further case, which was denied by the Management of the college, was that she

was asked to pay a capitation fee of Rs. 4,50,000/- as a condition of admission. She approached this Court under Article 32 challenging the

aforesaid notification of the Karnataka Government and asking for a direction to be admitted on payment of the same fee as was payable by the

Karnataka students admitted against the ""Government Seats"".

122. The bench which heard and disposed of the writ petition framed four questions as arising for its consideration viz., (i) Is there a "right to

education" guaranteed to the people of India under the Constitution? If so, does the concept of "capitation fee" infract the same?

(ii) Whether the

charging of capitation fee in consideration of admission to educational institutions is arbitrary, unfair, unjust and as such violates the equality clause

contained in Article 14 of the Constitution? (iii) Whether the impugned notification permits the Private Medical Colleges to charge capitation fee in

the guise of regulating fees under the Act? and (iv) Whether the notification is violative of the provisions of the Act which in specific terms prohibits

the charging of capitation fee by any educational institution in the State of Karnataka?

123. On the first question, the Bench held, on a consideration of Articles 21, 38, 39(a) and (f), 41 and 45 of the constitution:

(a) the framers of the Constitution made it obligatory for the State to provide education for citizens"";

(b) the objectives set forth in the preamble to the Constitution cannot be achieved unless education is provided to the citizens of this country;

(c) the preamble also assures dignity of the individual. Without education, dignity of the individual cannot be assured;

(d) Parts III and IV of the Constitution are supplementary to each other. Unless the "right to education" mentioned in Article 41 is made a reality,

the fundamental rights in part III will remain beyond the reach of the illiterate majority;

(e) Article 21 has been interpreted by this Court to include the right to live with human dignity and all that goes along with it. ""The ""right to

education" flows directly from right to life."" In other words, "right to education" is concomitant to the fundamental rights enshrined in part II the

Constitution. The State is under a constitutional mandate to provide educational Institutions at all levels for the benefit of citizens."" The benefit of

education cannot be confined to richer classes.

(f) Capitation fee is nothing but a consideration for admission. The concept of ""teaching hops"" is alien to our Constitutional scheme. Education in

India has never been a commodity for sale.

(g) ""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-recognised - 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

citizen"s right to education under the Constitution.

124. On the second question, the bench held that ""the State action in permitting capitation fee be charged by state-recognised educational

institutions is wholly arbitrary and as such violative of Article 14 of the Constitution of India.... The Capitation fee brings to the fore a clear class

bias."" Admission of no meritorious students by charging capitation fees - in any form whatsoever strikes at the very root of the constitutional

scheme and our educational system. D.P. Joshi does not come to the rescue of the private institutions.

125. On the third question, the Bench held that having regard to the scheme of the Act, charging of Rs. 60,000/- for admission is ""nothing but a

capitation fee"". The private medical colleges have further been given a free hand in the matter of admission of non-Karnataka students irrespective

merit. It held further: ""if the State Government fixes Rs. 2000 per annum as the tuition fee in government colleges and for ""Government Seats"" in

private medical colleges then it is the state responsibility to see that any private college which has been set up with Government permission being

run with Government recognition is prohibited from charging more than Rs. 2000 from any student who may be resident of any part of India. When

the State Government permits private medical college to be set up and recognises its curriculum and degrees then the said college is performing a

function which under the Constitution has been assigned to the State Government. We are therefore of the view that Rs. 60,000 per annum

permitted to be charged from Indian students from outside Karnataka in Para 1 (d) of the notification is not tuition fee but in fact a capitation fee

and as such cannot be sustained and is liable to be struck down.

126. The notification impugned was accordingly held to be outside the scope of the Act and bad. (It was declared that the judgment shall not be

applicable to foreign students and N.R.Is.). The writ petition was allowed accordingly but Mohini Jain was denied admission since ""she was not

admitted to the college on merit and secondly the course commenced in March-April, 1991"". (The decision was rendered on 30.7.1992). It was

directed that the said decision shall have only prospective operation and shall not affect the admissions already made in accordance with the said

notification.

127. It is the above propositions that have provoked this batch of writ petitions.

128. Mohini Jain was followed by a Full Bench of the Andhra Pradesh High Court in 951806 . The Respondents in those writ petitions including

the State of Andhra Pradesh have filled a number of S.L.Ps. seeking leave to appeal against the said judgment. In the said S.L.Ps., certain issues

peculiar to those matters arise, which we are not dealing with herein. This decision is concerned mainly with the correctness of Mohini Jain and the

following three questions, which were framed by us at the hearing. The three questions are:

(1) Whether the Constitution of India guarantees a fundamental right to education to its citizens?

(2) Whether a citizen of India has the fundamental right to establish and run an education institution under Article 19(1)(g) or any other provision in

the Constitution?

(3) Whether the grant of permission to establish and the grant of affiliation by a University imposes an obligation upon an educational institution to

act fairly in the matter of admission of the students?

129. Before we deal with the above questions, it would be appropriate to notice the legal and relevant factual position obtaining in three others

States, namely Andhra Pradesh, Maharashtra and Tamil nadu. All the matters before us arise from these four States only. Notice in these matters

were however directed to all the States in the country. None has appeared excepting the above four States.

ANDHRA PRADESH

130. The Andhra Pradesh Education Act, 1982 was enacted by the State Legislature with a view to consolidate and amend the laws relating to the

educational system in the State of Andhra Pradesh, for reforming, organising and developing the said educational system and to provide for matters

connected therewith or incidental therewith. By virtue of Sub-section (3) of Section 1, it applies to all education institutions and tutorial institutions

in the State except those governed by the University Acts or the A.P. Intermediate Education Act, 1971. Section 2 defines certain expressions

occurring in the Act. Clause (11) defines the expression "college" to include a medical college established or maintained and administered by or

affiliated to or associated with or recognised by any University in the State, Clause (18) defines "educational institution to mean recognised schools

and colleges including Medical Colleges. Chapter-VI (Sections 18 to 33) deals with establishment of educational institutions, their administration

and control. Section 18 says that Government may, for the purpose of implementing the provisions of the Act, provide adequate facilities for

imparting education either by establishing and maintaining educational institutions by itself or by permitting any local authority or private body of

persons to establish and maintain educational institutions. Section 19 classifies the educational institutions into (a) State institutions (b) local

authority institutions and (c) private institutions. Section 20 deals with grant of permission for establishment of nal institutions. It says that the

competent authority (as defined in Clause (12) of Section 2) shall from time to time conduct a survey to identify the educational needs of the "

under its jurisdiction and notify in the prescribed manner through the local newspapers for applications from the educational agencies desirous of

establishing educational institutions. In pursuance of such notification, applications may be filed either by existing institutions or new institutions as

also by local authorities for establishment of new institutions expansion of the existing ones. Sub-section (3) prescribes the requirements which have

to be satisfied by an applicant, the matters with respect to which the competent authority has satisfied before grant of permission and the steps that

have to be taken by the person (to whom the permission is granted) within the specified period. According to the sub-section, an application has to

be accompanied by (1) title deeds relating to the site for building, play-grounds and garden proposed to be provided. (2) Plans approved by the

local authorities concerned which shall conform to the rules prescribed there for and (3) documents evidencing availability of the financing needed

for constructing the proposed buildings. The Authority satisfied before granting the permission that there is a need for providing educational titles to

the people in the locality, that there is adequate financial provision for continued Efficient maintenance of the institution as prescribed by the

competent authority and that the institution is proposed to be located in sanitary and healthy surroundings. The authority or the body of persons to

whom the permission is granted has to appoint the teaching staff qualified according to the rules made by the Government in this behalf and other

requirements laid down by the Act, rules and the orders made there under, within the period specified by the authorities. In default of such

compliance, it shall be competent to authority to cancel the permission. Sub-section (4) makes it punishable for anyone to Wish an educational

institution otherwise than in accordance with the provisions of the Anyone running an institution after cancellation of the permission is also

punishable.

131. Section 20-A declares that on and from the commencement of the A.P. Education (Amendment) Act, 1987, no individual shall establish a

private institution. The institutions already established by individuals however are not affected by the said provision. Sectional With grant and

withdrawal of recognition of institution. It provides that the competent authority may by order in writing grant recognition to an educational

institution permitted to established u/s 20 subject to such conditions as may be prescribed in regard to the accommodation, equipment,

appointment of teaching staff and so on. It further provides the any local authority or other private educational institution fails to fulfill all or any of

the conditions of recognition or commits any of the other irregularities mentioned in Sub-section (2), its recognition may be withdrawn. It is not

necessary to notice the other provisions Act.

132. In the year 1983, the Legislature of Andhra Pradesh enacted the Andhra Pradesh Educational Institutions (Regulation of Admission and

Prohibition of Capitation Fee) Act, 1983. The Act was made to provide for regulation of admission into educational institutions and to prohibit

collection of capitation fee in the State of Andhra Pradesh. It would be appropriate to notice the Preamble to the Act. It reads:

Whereas the undesirable practice of collecting capitation fee at the time to admitting students educational institutions is on the increase in the State;

whereas, the said practice has been contributing to large scale commercialisation of Education;

And whereas, it is considered necessary, to effectively curb this evil practice in order to avo frustration among the meritorious and indigent students

and to maintain excellence in I students of education;

Be it enacted the Legislature of the State of Andhra Pradesh in the Thirty fourth year of the Republic of India as follows:

133. The Act was brought into force on and with effect from 30th January, 1983. Section 2 contains the interpretation Clause. Clause (b) defines

the expression ""Capitation fee"" to mean any amount collected in excess of the fee prescribed u/s 7. Section 3 provides that admission into educational

institutions in the State shall be made on the basis of the marks obtained in the qualifying examination or on the basis of the ranking assigned in the

entrance test conducted by such authority and in such manner as may be prescribed. So far as Medical and Engineering Colleges are concerned, it is

provided that admission thereto shall be exclusively on the basis of the ranking assigned in the entrance test. The State has also reserved to itself

the power to specify seats for Scheduled Castes, Scheduled Tribes and Backward classes. Section 4 provides that even a minority educational

institutions shall have to admit students on the basis of merit while admitting the students belonging to that minority or other students. Section 5

prohibits the capitation fee. It says ""the collection of any capitation fee by any educational institution or by any person who is in charge of or is

responsible for the management of the institution is hereby prohibited."" Section 6 says that any donations made to educational institutions shall be

made only in the prescribed manner and not otherwise that the money so received shall be deposited and applied in the prescribed manner.

134. Section-7 regulates the fee that can be charged by an educational institution. It would be appropriate to read the section here in its entirety:

7. (1) ""It shall be competent for the Government by notification, to regulate the tuition fee and any other fee that may be levied and collected by and

educational institutions in respect of each class of students.

(2) No educational institution shall collect any fees in excess of the fee notified under Sub-section (1).

(3) Every educational institution shall issue an official receipt for the fee collected by it;

135. Section 9 provides for penalties in case of contravention of the provisions of the Act. Punishment prescribed is not less than three years and

not exceeding seven years, in addition to fine. Section 15 confers upon the Government the power to make rules to carry out the purposes of

the enactment.

136. The 1983 Act was amended in the year 1992 by inserting Section 3-A, which Section reads as follows:

Notwithstanding anything contained in Section 3, but subject to such rules as may be made in this behalf and the Andhra Pradesh Educational

Institutions (Regulation of Admission Order 1974), it shall be lawful for the management of any un-aided private Engineering College, Medical

College, Dental College and such other class of un-aided educational institutions as may be notified by the Government in this behalf to admit

students into such colleges or educational institutions to the extent of the half of the total number of seats from among those who have qualified in

the common entrance test or in the qualifying examination, as the case may be, referred to in Sub-section (1) of Section-3 irrespective of the

ranking assigned to them in such test or examination and nothing contained in Section 5 shall apply to such admission.

137. It is necessary to notice what precisely this Section provides for. It starts with a nonobstante clause - "Notwithstanding anything contained in

Section 3, but subject to such rules as may be made in this behalf and the Andhra Pradesh Educational Institutions (Regulation of Admission)

Order 1974 (Presidential order issued under Article 371-D of the Constitution)"; that it shall be lawful for the management of any un-aided private

Engineering I Medical College, Dental College and such other class of un-aided education institution as may be notified by the Government in this

behalf to admit students into such Colleges or educational institutions to the extent of 50 per cent of the seats from among those in the entrance test

or the qualifying examination, as the case may be the section says leather curiously - that the educational institution shall be entitled to admit them

irrespective of the ranking assigned to them in the entrance test or qualifying examination and at nothing contained in Section 5 shall apply to such

admission. In short it means that it is open to a private medical/engineering college to admit students of its choice to the extent of 50 per cent - so

long as they have qualified in the common entrance test - without regard ranking and/or merit. The dispensing with of the Section 5 for the above

purpose is a indication that it is open to the institution to collect such capitation fee as it can from such Of course, the "tuition fee" shall be the same

as is prescribed by the Government u/s 7.

138. Section 3-A came into force on 15.4.1992. No Rules have been made by the Government under the Section so far.

139. On 25.5.1992, the Government issued a notification inviting applications for permission establish medical, Dental and Engineering Colleges.

The last date prescribed for receipt of applications was 8.6.1992. The applications for Medical Colleges had to deposit within the flute a sum of

rupees one crore in cash, furnish bank guarantee for another one crore in furnish bank guarantee for another one crore and produce evidence of

financial viability extent of four crores. A committee was appointed to inspect the land and other facilities by the applicants. The Committee

formulated its guidelines on 28.6.1992 and flitted its report on 21.7.1992 recommending as many as 12 Medical Colleges and 8 Dental feges. The

then Chief Minister approved the same on 27.7.1992 and a G.O.; was issued on same day granting permission. A number of Writ Petitions were

immediately filed in the Court challenging the said grant as well as Section 3-A.

140. There are a number of private engineering colleges in the State. Until the current academic (1992-1993), all the seats in these colleges were

filled in by the convener of the common entrance examination. The management had no discretion or choice in the matter of admission students.

They were, however, permitted to charge a particular fees which was relatively than the fees charged in the Government Engineering Colleges.

Nothing more. But Section 3-A was introduced in the 1983 Act on 15.4.1992, these private engineering colleges took the stand that they are

entitled to admit students to the extent of 50 per cent of seats according to their choice, irrespective of merit, so long as they have qualified in the

entrance test. It is obvious that such a stand meant collection of capitation fee as much as they could. There was an uproar among the student and

teaching community against such admissions. Even the Government could not ignore the said protest and intimated the private engineering colleges

on 26.7.1992 not to make any admissions till the Rules are made u/s 3-A. The engineering colleges, however, took the stand that they have

already made the admissions according to their choice to the extent of 50 per cent. Indeed all this was facilitated by the fact that convenor allotted

students to these engineering colleges only to extent of 50 per cent of their respective capacity instead of 100% as usual thereby sending a explicit

signal that the colleges were free to fill up the rest on their own. Be that as it may, the admissions led to the filing of a batch of write petitions in the

Andhra Pradesh High Court. Following Mohini Jain and also on certain other grounds, a Full Bench of the Andhra Pradesh High Court allowed the

Write Petitions, it declared Section 3-A un-Constitutional. It also declared that the admissions made by the private Engineering Colleges to the

extent of 51 cent at their own choice was illegal. The Court further declared that the grant of permission to 12 Medical and 8 Dental Colleges was

equally invalid. It is against the said decision that the State of Andhra Pradesh, certain educational institutions and the students admitted at the choice of the managements have come forward with a number of Special leave petitions.

141. Leave is granted in all the Special leave petitions preferred against the Full Bench decision of the Andhra Pradesh High Court dated 18th

September, 1992 in Writ Petition No. 8248 of 1992 and batch. Besides the appeals, there are a few writ petitions from this State questioning the

correctness of the dicta in Mohini Jain.

STATE OF MAHARASHTRA

142. The Maharashtra Legislature enacted the Maharashtra Educational Institutions (Prohibition of Capitation Fee) Act, 1987. (being Maharashtra

Act No. VI of 1988) to prohibit collection of capitation fee for admission of students to, and their promotion to a higher standard or class in, the

educational institutions in the State of maharashtra and to provide for matters connected therewith. The Preamble to the Act declaims :

WHEREAS the practice of collecting capitation fee for admitting students into educational; institutions and at the time of promoting students to a

higher standard or class at various stages of education is on the increase in the State;

AND WHEREAS this undesirable practice has been contributing to large scale commercialisation of education which is not conducive to the

maintenance of educational standards;

AND WHEREAS the National Policy on Education 1986 envisages that the commercialisation of technical and professional education should be

curbed and that steps should be taken to prevent the establishment of institutions set up to commercialize education;

AND WHEREAS with a view to effectively curb this evil practice, it is expedient in the public interest to prohibit collection of capitation fee for

admission of students to, and their promotion to a higher standard or class in, the educational institutions in the State of Maharashtra and to provide

formatters connected therewith; it is hereby enacted in the Thirty-eighth Year of the Republic of India as follows :

143. Section 2 defines certain expressions occurring in the Act. Clause (a) defines capitation fee to mean ""any amount, by whatever name called,

whether in cash or kind, paid or collected, directly or indirectly, in excess of the prescribed or, as the case may be, approved, rates of fees

regulated u/s 4"". Sub-section (1) of Section 3 prohibits the collection of capitation fee either for admission of a student or for his promotion to

higher class. Sub-section (2), however, permits the management of an educational institution to collect and accept donations from benevolent

persons, organisations, trusts and other associations but says that no seats shall be reserved in consideration thereof. The moneys so received shall

have to be deposited and dealt with in the prescribed manner. Sub-section (3) provides that if in any case it is found that any private educational

institution has contravened any provisions of the Act or the Rules made there under, it shall be directed to refund the to the person from whom it

was collected. Section 4 empowers the government to regulate the tuition fee that may be received or collected by any educational institution for

admission to any of study in such institution. Separate fee shall have to be prescribed for aided institutions" un-aided institutions. In the case of un-

aided institutions, the tuition fee shall be prescribed having regard to the usual expenditure excluding any expenditure on lands and buildings or on

other item as the State Government may notify. Different scales of tuition fee can be prescribed for different institutions or different areas or

different courses of study, as the case may [Section 7 provides for punishment which may extend to three years and fine in case of aviation of any

provisions of Act or Rules.

144. It is stated that the government of Maharashtra had prescribed an uniform fee of Rs. 6,500/per annum in the case of private un-aided

engineering colleges, which was raised to Rs. 8,500/1991, In 1992, the fees was raised only in the case of outside students (students outside the

Maharashtra State) to Rs. 17,000/-.

145. It is also stated that the government of Maharashtra has issued a notification directing that of the seats in any private engineering college shall

be filled by nominees of the Government and the remaining 10 per cent by the management at its discretion. In the case of medical colleges, the fee

prescribed in the case of private un-aided medical colleges for the current academic year is Rs. 30,000/- for Maharashtra students and Rs.

60,000/- in the case of outside dents. In the case of medical colleges, 20% of the seats are allowed to be filled by the management at their

discretion. Remaining 80% seats are to be filled by the Government nominees.

146. Mahatma Gandhi Mission, Nanded, the appellant in C.A. No. 3573 of 1992 was permitted " the State Government to start an un-aided

medical college at Aurangabad. It is stated that the appellant is a Public Charitable Trust registered under societies Registration Act, 1860 as well

as Bombay Public Trust Act, 1950. The medical college is affiliated to Marathwada University and also recognised by the Maharashtra medical

council. The total intake capacity is 100 seats each. The permission to start medical college was accorded to the appellant on no-grant-in-aid sis.

The appellant was allowed to fill 20% of the seats at their discretion from among those students who have obtained a minimum of 50% of the

marks in the aggregate in specified subjects have passed the qualifying examination in their first attempt. (There is no system of common entrance

test in Maharashtra) Admissions were accordingly made for the current academic year. soon after the decision of this Court in Mohini Jain, a large

number of students filled a write petition in the High Court of Bombay (Aurangabad Bench) claiming refund of the fee collected Dm them in excess

of the fee prescribed by the Government for students admitted in government medical colleges for such course. A Division Bench made an interim

order on 27th August, 1992 directing the appelant institution to furnish a bank guarantee to the extent of 50% of the excess amount collected by

them from the students, i.e., in a sum of Rs. 42 lakhs pending disposal of the fit petition. It was further directed that pending disposal of the writ

petition, the institution shall not collect any amount in excess, of Rs. 3,000/- from any of the students. The said interlocutory order is challenged by

the appellant in Civil Appeal No. 3572 of 1992.

147. Writ Petition 855 of 1992 is filed by Jammu and Kashmir Parents Association of Students questioning the notification issued by the

Government of Maharashtra obligating the outside-Maharashtra students to pay double the tuition fee payable by the Maharashtra students.

148. Writ Petition 678 of 1992 is preferred by Maharashtra Institute of Technology, Pune questioning the correctness of Mohini Jain and praying

for issuance of a declaration that the petitioner has a fundamental right under Article 19(1)(g) of the Constitution of India to establish and run a self-

financing engineering college subject to compliance with the regulatory requirements of the statute. The petitioner has also invoked Article 19(1)(c)

as conferring upon him a right to establish/form any association to run an engineering college on self-financing basis.

TAMIL NADU

149. Soon after the decision in Mohini Jain, the Governor of Tamil Nadu promulgated an ordinance being ordinance No. 10 of 1992 called the

Tamil Nadu Educational Institutions (Prohibition of collection of capitation fee) Ordinance, 1992. The ordinance has since been substituted by an

Act - Tamil Nadu Educational Institutions (Prohibition of collection of capitation fee) Act, 1992, being Act No. 57 of 1992. The Act is designed to

prohibit the collections in the State of Tamil Nadu and provide for matters relating thereto. The preamble to the Act recites :

WHEREAS the practice of collecting capital fee for admitting students into educational institutions is widespread in the State;

AND WHEREAS this undesirable practice, besides contributing a large scale commercialisation of education, has not been conducive to the

maintenance of educational standards;

AND WHEREAS it is considered necessary to effectively curb this undesirable practice, in public interest, by prohibiting the collection of

capitation fee and to provide for matters relating thereto;

BE it enacted by the Legislative Assembly of the State of Tamil Nadu in the Forty third Year of the Republic of India as follows :

150. The Act has been given effect from 20th day of August, 1992, the date on which the ordinance was issued. The expression "capitation fee" is

defined in Clause (a) of Section 2 to mean ""any amount, by whatever name called, paid or collected, directly or indirectly, in excess of the fee

prescribed u/s 4."" Section 3 prohibits the collection of capitation fee by any educational institution or by any person on its behalf. Section 4

empowers the government to regulate the fee chargeable in educational institutions. Once such a notification is issued, no institution can charge or

collect any fee over and above the fee prescribed. The Section reads thus:

4. (1) Notwithstanding any contained in any other law for the time being in force, the Government may, by notification, regulate the tuition fee or

any other fee or deposit that may be received or collected by any educational institution or class or classes of such educational institutions in

respect of any or all class or classes of students:

Provided that before issuing a notification under this sub-section, the draft of which shall be published in the Tamil Nadu Government Gazette

stating that any objection or suggestion which may be received by the Government, within such period as may be specified therein, shall be

considered by them.

(2) No educational institution shall receive or collect any fee or accept deposit in excess of the amount notified under Sub-section (1).

(3) Every educational institution shall issue an official receipt for the fee or deposit received or collected by it.

151. Section 5 empowers the Government to regulate the maintenance of accounts by the educational institutions in such manner as may be

prescribed. Similarly, Section 6 empowers the Government to call upon the educational institutions to submit such returns or statements in such

form and in such manner as may be prescribed for carrying out the purposes of the Act. Section 7 provides for penalties in case of contravention

of any of the provisions of the Act or the rules made there under. The minimum punishment is three years imprisonment which may extend upto

seven years in addition to fine. Besides penalty, the educational institution is also made liable to refund excess amount/capitation fee collected to the

concerned students/persons. Section 12 gives an overriding effect to the provisions of the Act over any other law for the time being in force. Section 14

confers upon the Government the power to make rules to carry out the purposes of the Act. It is not brought to our notice that rules have been

made under the Act as yet. Sri P.R. Seetharaman, learned Counsel for the State of Tamil Nadu, however, filed a statement ""THE PRESENT

EMISSION FORMULA IN RESPECT OF SELF-FINANCING PRIVATE MEDICAL ALLEGES AND ENGINEERING COLLEGES IN TAMIL NADU"". It is necessary to set out the statement in full. It reads :

The Government of Tamil Nadu has also recently constituted a committee for examining proposals regarding regulation of fixation of fees in respect

of self-financing colleges of medical and engineering and of Art and Science as well as unaided courses of private aided colleges. True copy of the

order is annexed hereto. The self-financing Medical Colleges in Tamil Nadu are allowed to admit candidates of their choice upto 60% of the

approved intake of the college adhering to the minimum mark rule prescribed for Government Medical Colleges in Tamil Nadu are allowed to

admit candidates of their choice upto 60% of the approved intake of the college adhering to the minimum mark rule prescribed for Government

Medical Colleges. The remaining 40% of the seats are allowed by the Director of Medical Education every year and this is filled from among the

approved list of candidates selected for admission to Government and Private Medical Colleges. The self-financing private Engineering Colleges

are allowed to admit candidates of their choice upto 50% of the approved intake of the college under Management quota. The remaining 50% of

the seats are allowed by the Director of Technical Education every year from among the approved list of candidates selected for admission to

Government and aided colleges. True copies of the orders passed by the Government of Tamil Nadu are annexed hereto.

DATED AT DELHI THIS 10TH DAY OF DECEMBER, 1992.

COUNCIL FOR TAMIL NADU.

152. Sri Seetharaman further stated that the Government will insist that from the students admitted against 40% government seats, only the fee

collected in government medical colleges will be allowed to be collected. He also brought to our notice that the government has constituted

committee to go into and frame rules regulating the fee structure in self-financing medical, engineering and other colleges, (vide G.O.M.S 1172

Education (JI) Deptt. dated 30.11.1992.).

153. Writ Petition 701 of 1992 is filed by the Annamalai University and its Pro-Chancellor, v. M.A.M. Ramaswamy questioning the provisions of

the above Act and the correctness of the principles enunciated in Mohini Jain. A Writ of mandamus is sought by this institution directed the

respondents (State of Tamil Nadu, Union of India and the University Grants Commission) forbear from in any manner interfering with the right of

the petitioner to collect capitation fees whatever nomenclature the said fee or payment may be described from the students seeking admission into

various degree courses in the colleges under the control of the petitioner University cover a reasonable return on the capital investment and meet

the recurring expenditure every year running the course in the colleges including for running Rajah Sir Muthiah Medical college and Hospital from

the various students who seek admission and who have the requisite merit to be admitted and who are ready and willing to pay such amount." Yet

another mandamus is sought greeting the respondents to ensure that the petitioners are not compelled to charge merely the rates of fees as charged

by colleges run by the State government from the students who have the requisite merit for admission irrespective of their capacity to contribute for

the maintenance and running of the college as any by way of payment of fees by whatever nomenclature it may be called.

154. The petitioners have come forward with the following case: Annamalai University is an autonomous residential unitary university established

and incorporated under the Annamalai University Act, 1928 enacted by the then Madras Legislature. It has 45 faculties including Engineering and

Technology and Medicine. So far as the medical college is concerned, the annual intake is 125. Against this strength of 125, the petitioner admits

50 students belonging Scheduled Castes, Scheduled Tribes and backward classes. Only a nominal fee is collected from them. From the remaining

75 students, a sum of Rs. 4 lakhs is collected by way of fees. This sum of Rs. 4 lakhs is hardly sufficient to meet the cost of medical education.

Unless this minimum fee of Rs. 4 lakhs is collected from at least 75 students, it is not possible for the petitioner to run the medical college which is

attached to a hospital. While so, the Governor of Tamil Nadu has issued the aforesaid ordinance prohibiting the capitation fee. This ordinance has

evidently been issued pursuant to the decision of this Court in *Mohini Jain*. If the petitioner is compelled to collect only that fee which is charged by

the Government in Government Medical Colleges, it would be impossible to run the medical college. It has to close down. The impugned ordinance

(by the date of filing of the writ petition the Act replacing the ordinance had not yet come into force) is violative of the fundamental right of the

petitioners to establish and administer a medical college by collecting appropriate amounts from the students who are ready and willing to pay the

same for their admission into the medical college, says the petitioner.

PART - II

Question No.]: "Whether the Constitution of India guarantees a fundamental right to education to its citizens ?

155. Right to education is not stated expressly as a fundamental right in Part III. This court has, however, not followed the rule that unless a right is

expressly stated as a fundamental right, it cannot be treated as one. Freedom of Press is not expressly mentioned in Part-III, yet it has been read

into and inferred from the freedom of speech and expression - 286078 . More particularly, from Article 21 has sprung up a whole lot of human

rights jurisprudence viz., right to legal aid and speedy trial 278099 to A.R. Antulay- 1992 (1) S.C.R. 225, the right to means of livelihood (Olga

Tellis -1985 Suppl. (2) S.C.R. 51, right to dignity and privacy 279388 , right to health (Vincent v. Union of India- : [1987]2SCR468 , right to

pollution-free environment 272651 and so on. Let us elaborate.

156. In 286078 it has been held:

The freedom of speech comprehends the freedom of press and the freedom of speech and press are fundamental and personal rights of the

citizens.

157. Article 21 declares that no person shall be deprived of his life or personal liberty except according to the procedure established by law. It is

true that the Article is worded in negative terms but is now well-settled that Article 21 has both a negative and an affirmative dimension. As far

back as 1962, a Constitution Bench (comprising of six learned Judges) in 279388 decided on 18th December, 1962 considered the content of the

expression ""personal liberty"" occurring in Article 21. Rajagopala Ayyangar, J. speaking for the majority, observed:

We shall now proceed with the examination of the width, scope and content of the expression ; ""personal liberty "" in Article 21. We feel unable to

hold that the term was intended to bear only this narrow interpretation but on the other hand consider that ""personal liberty"" is used in the Article as

a compendious term to include within itself all the varieties of rights which go to make up the ""personal liberties"" of man other than those deal with

in the several clauses of Article 19(1). In other words, while Article 19(1). In other words, while Article 19(1) deals with particular species or

attributes of that freedom, ""personal liberty"" in Article 21 takes in and comprises the residue.

The learned Judge quoted the dissenting opinion of Field, J. (one of those dissenting opinions which have out-lived the majority pronouncements) in

Munn v. Illinois 1877 (94) U.S. 113 attributing a broader meaning to the word ""life"" in the fifth and fourteenth amendments to the U.S.

Constitution, which correspond inter alia to Article 21 of our Constitution. The learned Judge held that the word ""personal liberty"" would include

the privacy and sanctity of a man's home as well as the dignity of the individual.

158. The minority judges, however, placed a more expansive interpretation on Article 21. They lid:

No doubt the expression "personal liberty" is a comprehensive one and the right to move freely is an attribute of personal liberty. It is said that the

freedom to move freely is carved out of personal liberty and, therefore, the expression ""personal liberty" in Article 21 excludes that attribute. In our

view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping. There is not question of one being

carved out of another. The fundamental right of life and personal liberty has many attributes and some of them are found in Article 19. If a person's

fundamental right under Article 21 is infringed, the state can rely upon a law to sustain the action, that cannot be a complete answer unless the said

law satisfies the test laid down in Article 19(2) so far as the attributes covered by Article 19(1) are concerned.

159. In *Maneka Gandhi v. Union of India* 1978 S.C. 597 Bhagwati, J. held that the judgment in *R.C. Cooper v. Union of India* 1970 S.C. 564

has the effect of overruling the majority opinion and of approving the minority opinion in *Kharak Singh*.

160. In *Boiling v. Sharpe* 98 L Ed. 884 Warren, C.J. speaking for the U.S. Supreme Court observed "although the court has not assumed to

define "liberty" with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range

of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective." Having said so, the

learned Judge proceeded to observe ["segregation in public education is not reasonably related to any proper governmental objective, [and thus it

imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due

Process clause.

161. The word "life" occurring in Article 21 too has received a broad and expansive interpretation, while it is not necessary to refer to all of them,

reference must be made to the [decision in *Olga Tellis v. Bombay Municipal Corporation* 1985 Supp. (2) S.C.R. 51. Chandra-chud, C.J. speaking

for a Constitution Bench of this Court observed:

The sweep of the right to life conferred by Article 21 is wide and far reaching. It does not mean merely that life cannot be extinguished or taken

away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one

aspect of the right to life. An equally important facet of that right is the right to livelihood because, no person can live without the means of living,

that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a

person his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the

life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in

accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. That, which alone makes it

possible to live, leave aside what makes life viable, must be deemed to be an integral component of the right to life. Deprive a person of his right to

livelihood and you shall have deprived him of his life.... Article 39(a) of the Constitution, which is a Directive Principle of State Policy, provides that

the State shall, in particular, direct its policy towards securing that the citizens, men and women equally, have the right to an adequate means of

livelihood. Article 41, which is another Directive Principle provides, inter alia, that the State shall, within the limits of its economic capacity and

development, make effective provision for securing the right to work in cases of unemployment and of undeserved want. Article 37 provides that

the Directive Principles, though not enforceable by any court, are nevertheless fundamental in the governance of the country. The Principles

contained in Articles 39(a) and 41 must be regarded as equally fundamental in the understanding and interpretation of the meaning and content of

fundamental rights. If there is an obligation upon the State to secure to the citizens an adequate means of livelihood and the right to work, it would

be sheer pedantry to exclude the right to livelihood from the content of the right to life.

162. In 280488 Bhagwati, J. while affirming the proposition that Article 21 must be construed in the light of the Directive Principles of the State

Policy observed thus:

This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly

Clauses (e) and (f) of Article 39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of workers

men and women, and of the tender age of children against abuse, opportunities and facilities of children to develop in a healthy manner and in

conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum

requirements which must exist in order to enable a person to live with human dignity....

163. In 272737 a Constitution Bench explained the significance of the addition of the expression ""Socialist"" in the preamble of our Constitution in

the following words:

During the formative years...socialism aims at providing all opportunities for pursuing the educational activity....

There will be equitable distribution of national cake....

164. In Vincent v. Union of India : [1987]2SCR468 , it was held by a Division Bench of this Court that:

In a welfare State, therefore, it is the obligation of the State to ensure the creation and the sustaining of conditions congenial to good health.... In a

series of pronouncements, during the recent years, this Court has culled out from the provisions of Part-IV of the Constitution, the several

obligations of the State and called upon it to effectuate them in order that the resultant pictured by the Constitution fathers may become a reality.

165. In A.R. Antulay v. R.S. Naik 1992 (1) S.C.R. 225, a Constitution Bench of this Court held that Article 21 creates a right in the accused to

be tried speedily and that the said right encompasses all the stages of a criminal case. It was held that the violation of this right of the accused may

entail the very quashing of the charges.

Interplay of Parts III and IV:

166. This Court has also been consistently adopting the approach that the fundamental rights and directive principles are supplementary and

complementary to each other and that the provisions in Part-III should be interpreted having regard to the Preamble and the directive principles of

the State policy. The initial hesitation to recognise the profound significance of part " has been given up long ago. We may explain.

167. While moving for consideration the interim report on fundamental rights, Sardar Vallabhai Patel described both the rights mentioned in Parts

III and IV as "fundamental rights"-one justiciable and other nonjusticiable. In his supplemental report, he stated:

There were two parts of the report; one contains fundamental rights which were justiciable and the other part of the report refers to fundamental

rights which were not justifiable but were directives.

168. This statement indicates the significance attached to directive principles by the founding fathers. It is true that in 281270 , fundamental rights

were held permanent vis-a-vis Directive Principles but since then there has been a perceptible shift in this Court's approach to the inter-play of

Fundamental Rights and Directive Principles.

169. As far back as in 1958, in the Kerala Education Bill a Special Bench of this Court speaking through S.R. Das, C.J., while affirming the

primacy of Fundamental Rights, qualified the same with the following observations:

Nevertheless, in determining the scope and ambit of the fundamental rights relied upon by or on behalf of any person or body, the court may not

entirely ignore these directive principles of State policy laid down in Part-IV of the Constitution but should adopt the principle of harmonious

construction and should attempt to give effect to both as much as possible.

170. This is also the view taken in *Hanif v. State of Bihar* 1959 S.C.R. 629 at 655.

171. In *Keshavananda Bharati v. State of Kerala* 1973 Suppl. 521 more than one learned Judge adverted to this aspect. In the words of Hegde

and Mukherjee, JJ.:

The Fundamental Rights and Directive Principles constitute the conscience" of the Constitution.... To ignore Part IV is to ignore the sustenance

provided for in the Constitution, the hopes held out to the nation and the very ideals on which our Constitution is built.... There is no anti-thesis

between the Fundamental Rules and the Directive Principles.... One Supplements the other

Shelat and Grover, JJ. in their judgment observed:

Both Parts III and IV have to be balanced and harmonised...then alone the dignity of the individual can be achieved.... They (Fundamental Rights

and Directive Principles) were meant to supplement each other.

172. Mathew, J. while adopting the same approach remarked:

The object of the people in establishing the Constitution was to promote justice, social and economic liberty and equality. The modus operandi to

achieve these objectives is set out in Parts III and IV of the Constitution. Both Parts III and IV enumerate certain moral rights. Each of these parts

represents in the main the statements in one sense of certain aspirations whose fulfillment was regarded as essential to the kind of society which the

Constitution makers wanted to build. Many of the articles, whether in Part III or Part IV, represent moral rights which they have recognised as

inherent in every human being in his country. The task of protecting and realising these rights is imposed upon all the organs of the State, namely,

legislative, executive and judicial. What then is the importance to be attached to the fact that the provisions of Part III are enforceable in a Court

and the provisions in Part IV are not? Is it that the rights reflected in the provisions of Part III are somehow superior to the moral claims and

aspirations reflected in the provisions of Part IV? I think not. Free and compulsory education under Article 45 is certainly as important as freedom

of religion under Article 25. Freedom from starvation is as important as right to life. Nor are the provisions in Part III absolute in the sense that the

rights represented by them can always be given full implementation.

173. Y.V. Chandrachud, J. (as he then was) put the same idea in the following words:

As I look at the provisions of Parts III and IV, I feel no doubt, that the basic object of conferring freedoms on individuals is the ultimate

achievement of the ideals set out in Part-IV. May I say that the directive principles of State policy should not be permitted to become ""a mere rope

of sand." If the State fails to create conditions in which the fundamental freedoms can be enjoyed by all, the freedoms can be enjoyed by all, the

freedom of the few will be at the mercy of the many and then all freedoms will vanish.

174. In *State of Karnataka v. Ranganatha Reddy*, Krishna Iyer, J. stated:

Our thesis is that the dialectics of social justice should not be missed if the synthesis of Part III and Part IV is to influence State action and Court

pronouncements.

175. In *U.P.S.C. Board v. Harishankar* AIR 1979 S.C. 65 it was observed: ""Addressed to courts, what the injunction (Article 37) means is that

while courts are not free to direct the making of legislation, courts are bound to evolve, affirm and adopt principle of interpretation which will

further and not hinder the goals set out in the Directive Principles of State Policy. This command of the Constitution must be ever present in the

minds of the Judges while interpreting statutes which concern themselves directly or indirectly with matters set out in the Directive Principles of

State Policy."" This is on the view that the ""State" in Article 36 read with Article 12 includes the judiciary as well.

176. In 267328 *Chandrachud*. C.J. quoted with approval the similier of Granville Austin that Parts III and IV are like two wheels of a chariot and

observed that ""to give absolute primacy to one over the other is to disturb the harmony of the Constitution."" The learned Chief Justice observed

further:

Those rights (Fundamental Rights) are not an end in themselves but are the means to an end.

The end is specified in Part-IV.

177. It is thus well established by the decisions of this Court that the provisions of Parts III and IV are supplementary and complementary to each

other and that Fundamental Rights are but a means to achieve the goal indicated in Part-IV. It is also held that the fundamental Rights must be

construed in the light of the Directive Principles. It is from the above stand-point that Question No. 1 has to be approached.

ARTICLE 21 AND RIGHT TO EDUCATION:

178. In *Bandhua Mukti Morcha* this Court held that the right to life guaranteed by Article 21 does take in ""educational facilities"". (The relevant

portion has been quoted herein before). Having regard to the fundamental significance of education to the life of, an individual and the nation, and

adopting the reasoning and logic adopted in the earlier decisions of this Court referred to herein before, we hold, agreeing with the statement in

Bandhua Mukti Morcha, that right to education is implicit in and flows from the right to life guaranteed by Article 21. That the right to education

has been treated as one of transcendental importance in the life of an individual has been recognised not only in this country since thousands of

years, but all over the world. In *Mohini Jain*, the need of education has been duly and rightly stressed. The relevant observations have already set

out in para 7 herein before. In particular, we agree with the observation that without education being provided to the citizens of this country, the

objectives set forth in the Preamble the Constitution cannot be achieved. The Constitution would fail. We do not think that the importance of

education could have been better emphasised than in the above words. The importance of education was emphasised in the ""*Neethishatakam*"" by

Bhartruhari (First Century in the following words:

Translation:

Education is the special manifestation of man;

Education is the treasure which can be preserved without the fear of loss;

Education secures material pleasure, happiness and fame;

Education is the teacher of the teacher;

Education is God incarnate;

Education secures honour at the hands of the State, not money.

A man without education is equal to animal.

179. The fact that right to education occurs in as many as three Articles in Part-IV viz., Articles 1, 45 and 46 shows the importance attached to it

by the founding fathers. Even some of the Articles in Part-III viz., Articles 29 and 30 speak of education.

180. In *Brown v. Board of Education* 98 L Ed. 873, Earl Warren, C.J., speaking for the U.S. Supreme Court emphasised the right to education in

the following words :

Today, education is perhaps the most important function of state and local governments.... It is required in the performance of our most basic

responsibilities, even service the armed forces. It is the very foundation of good citizenship. Today it is the principal instrument in awakening the

child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is

doubtful any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

181. In *Wisconsin v. Yoder* 32 L.Ed. 2d. 15, the court recognised that:

Providing public schools ranks at the very apex of the function of a State.

182. The said fact has also been affirmed by eminent educationists of modern India like Dr. Dhakrishnan, J.P. Naik, Dr. Kothari and Ors.

183. It is argued by some of the counsel for the petitioners that Article 21 is negative in character and that it merely declares that no person shall be

deprived of his life or personal liberty except according to the procedure established by law. Since the State is not depriving the respondents-

students of their right to education, Article 21 is not attracted, it is submitted. If and when the State makes law taking away the right to education,

would Article 21 be attracted, according to them. His argument, in our opinion, is really born of confusion; at any rate, it is designed to confuse the

e. The first question is whether the right to life guaranteed by Article 21 does take in the right to education or not. It is then that the second question

arises whether the State is taking away that right. The mere fact that the State is not taking away the right as at present does not mean that right of

to education is not included within the right to life. The content of the right is not determined by perception of threat. The content of right to life is

not to be determined on the basis of existence or absence of threat of deprivation. The effect of holding that right to education is implicit in the

Right to life is that the State cannot deprive the citizen of his right to education except in accordance with the procedure prescribed by law.

184. In the above state of law, it would not be correct to contend that Mohini Jain was wrong in so far as it declared that "the right to education

flows directly from right to life." But the question is what is the content of this right? How much and what level of education is necessary to make the

life meaningful? Does it mean that every citizen of this country can call upon the State to provide him education of his choice? In other words,

whether the citizens of this country can demand that the State provide adequate number of medical colleges, engineering colleges and other

educational institutions to satisfy all their educational needs? Mohini Jain seems to say, yes. With respect, we cannot agree with such a broad

proposition. The right to education which, implicit in the right to life and personal liberty guaranteed by Article 21 must be construed in the light of

the directive principles in Part IV of the Constitution. So far as the right to education concerned, there are several articles in Part IV which

expressly speak of it. Article 41 says that the ""State shall within the limits of its economic capacity and development, make effective provision for

securing the right to work to education and to public assistance in cases of unemployment old age, sickness and disablement, and in other cases of

undeserved want."" Article 45 says that ""the State shall endeavor to provide, within a period of ten years from the commencement of the

Constitution, for free and compulsory education for all children until they complete the age fourteen years."" Article 46 commands that ""the State

shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular of the Scheduled

Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation. Education means knowledge and

knowledge itself is power. As right observed by John Adams, the preservation of means of knowledge among the lowest ranks is more importance

to the public than all ""property of all the rich men in the country"" (Dissertation on canon and feudal law, 1765). It is this concern which seems to

underlie Article 46. It is the tyrants and bad rulers who are afraid of spread of education and knowledge among the deprived classes. Witness

Hitler railing against universal education. He said: ""Universal education is the most corroding and disintegrating poison that liberalism has ever

invented for its own destruction.""¹ (Rauschnig, The voice of destruction; Hitler speaks). A true democracy is one where education! is universal,

where people understand what is good for them and the nation and know how to govern themselves. The three Articles 45, 46 and 41 are

designed to achieve the said goal among others. It is in the light of these articles that the content and parameters of the right to education: have to

be determined. Right to education, understood in the context of Articles 45 and 41 means: (a) every child/citizen of this country has a right to free

education until he completes the age of fourteen years and (b) after a child/citizen completes the age of 14 years, his right education is

circumscribed by the limits of the economic capacity of the State and its developments. We may deal with both these limbs separately.

185. Right to free education for all children until they complete the age of fourteen years (45A). It is noteworthy that among the several articles in

part IV, only Article 45 speaks of a time-limit; no other article does. Has it no significance? Is it a mere pious wish, even after 44 years of the

Constitution? Can the State flout the said direction even after 44 years on the ground that the article merely calls upon it to ""endeavor to provide

the same and on the further ground that the said article is not enforceable by virtue of the declaration in Article 37. Does not the passage of 44

years - more than four times the period stipulated in Article 45 - convert the obligation created by the article into an enforceable right? In this

context, we feel constrained to say that allocation of available funds to different sectors of education in India discloses an inversion of priorities

gated by the Constitution. The Constitution contemplated a crash programme being undertaken by the State to achieve the goal set out in Article

45. It is relevant to notice that Article 45 does not speak of the "limits of its economic capacity, and development" as does Article 41, which inter alia

speaks of right to education. What has actually happened is - more money is spent and attention is directed to higher education than to - and at the

cost of - primary education. (By primary education, we mean the education, which a normal child receives by the time he completes 14 years of

age). Neglected more so are the rural sectors, and the weaker sections of the society to in Article 46. We clarify, we are not seeking to lay down

the priorities for the government - we are only emphasising the constitutional policy as disclosed by Articles 45, 46 and, 41. Surely the wisdom of

these constitutional provisions is beyond question. This inversion of priorities has been commented upon adversely by both the educationists and

economists,

186. Gunnar Myrdal, the noted economist and sociologist, a recognised authority on South Asia, in his book "Asian Drama" (abridged Edition -

published in 1972) makes these perceptive observations at page 335:

But there is another and more valid criticism to make. Although the declared purpose was to give priority to the increase of elementary schooling in

order to raise the rate of literacy in the population, what has actually happened is that secondary schooling has been rising much faster and tertiary

schooling has increased still more rapidly. There is a fairly general tendency for planned targets of increased primary schooling not to be reached,

whereas targets are overreached, sometimes substantially, as regards increases in secondary and, particularly, tertiary schooling. This has all

happened in spite of the fact that secondary schooling seems to be three to five times more expensive than primary schooling, and schooling at the

tertiary level five to seven times more expensive than at the secondary level.

What we see functioning here is the distortion of development from planned targets under the influence of the pressure from parents and pupils in

the upper strata who everywhere are politically powerful. Even more remarkable is the fact that this tendency to distortion from the point of view of

the planning objectives is more accentuated in the poorest countries, Pakistan, India, Burma and Indonesia, which started out with far fewer

children in primary schools and which should therefore have the strongest reasons to carry out the programme of giving primary schooling the

highest priority. It is generally the poorest countries that are spending least, even relatively, on primary education, and that are permitting the largest

distortions from the planned targets in favour of secondary and tertiary education.

187. In his other book "Challenge of World Poverty" (published in 1970) he discusses Elaborately - in chapter 6 "Education" - the reasons for and

the consequences of neglect of basic Education in this country. He quotes J.P. Naik, (the renowned educationist, whose Report of the Education

Commission, 1966 is still considered to be the most authoritative study of education scene in India) as saying ""Educational development...is

benefitting the ""haves"" more than the have nots"". This is a negation of social justice and ""planning" proper"" - and our Constitution speaks repeatedly

of social justice (Preamble and Article 38(1). As late as 1985, the Ministry of Education had this to say in para 3.74 of its publication ""Challenge

of Education - a policy perspective"". It is stated there:

3.74. Considering the constitutional imperative regarding the universalisation of elementary education it was to be expected that the share of this

sector would be protected from attribution. Facts, however, point in the opposite direction. From a share of 56 per cent in the First Plan, it

declined to 35 per cent in the Second Plan, to 34 Per cent in the Third Plan, to 30 per cent in the Fourth Plan. It started going up again only in the

Fifth Plan, when it was at the levels 32 per cent, increasing in Sixth Plan to 36 per cent, still 20 per cent below the First Plan level. On the other

hand, between the First and the Sixth Five Year Plans, the share of university education went up from 9 per cent to 16 per cent.

188. Be that as it may, We must say that at least now the State should honour the command of Article 45. It must be made a reality - at least now.

Indeed, the "National Education Policy - 1986 says that the promise of Article 45 will be redeemed before the end of this century. Be that as it

may, we hold that a child (citizen) has a fundamental right to free education upto the age of 14 years.

189. This does not however mean that this obligation can be performed only through the State schools. It can also be done by permitting,

recognising and aiding voluntary non-governmental organisations, who are prepared to impart free education to children. This does not also mean

that unaided private schools cannot continue. They can, indeed, they too have a role to play. They me the demand of that segment of population

who may not wish to have their children educated it State-run schools. They have necessarily to charge fees from the students. In this judgmental

however, we do not wish to say anything about such schools or for that matter other private education institutions except "professional colleges".

This discussion is really necessitated on| account of the principles enunciated in Mohini Jain and the challenge mounted against those principles in

these writ petitions.

190. At this juncture, it would be appropriate to refer to the additional affidavit filed by the Union of India. In this affidavit, the present state of

primary and upper primary education is set out. (Primary stage means Classes I to v. Upper primary stage means classes VI to VIII). After setting

out the particulars of number of schools and enrollment therein, it is stated in para 3 that if ""this increase provided Indian Education System with

one of the largest systems in the world, providing accessibility within 1 Km. walking distance of Primary schools to 8.26 lakhs habitations

containing about 94% of the country"s population. Growth in enrollment in the decade of 80s showed an acceleration that has now brought

enrollment rates close of 100% at primary stage." Again in para 4, under the sub-heading "Free education", the following statement occurs:

4. In the endeavor to increase enrollment and achieve the target of UEE, all State Governments have abolished tuition fees in Government Schools

run by local bodies and private aided institutions is mostly free in these States; however, in private unaided schools which constitute 3.7% of the

total elementary schools in the country, some fee is charge. Thus, overall, it may be said that education upto elementary level in practically all

schools is free. 1 Other costs of education, such as text books, uniforms, schools bags, transport etc. are not borne by States except in a very few

cases by way of incentives to children of indigent families or those belonging to Scheduled Caste/Scheduled Tribes categories. The reason why the

State Government are unable to bear this additional expenditure is that 96% of expenditure only elementary education goes in meeting the salaries

of teaching and non-teaching staff.

191. Para 5 of the affidavit deals with "compulsory education". It reads as follows: "5.14 States and 4 Union Territories have enacted legislation to

make educational compulsory but the socio economic compulsions that keep the children away from schools have restrained them from prescribing

the rules and regulations whereby those provisions can be endorsed.

192. The affidavit also mentions the steps taken by Central and State governments in pursuance of National Education Policy including "Operation

Blackboard" and its contribution to the increase in primary education. It was indeed gratifying to note these facts, though much more remains to be

done to raise the quality of instruction.

193. Before proceeding further, we think it right to say this: We are aware that "Education is Second highest sector of budgeted expenditure after

the defence. A little more than three per cent of the Gross National Product is spent in education", as pointed out in para 2.31 of Challenge of

Education". But this very publication says that "in comparison to many countries, India spends much less on education in terms of the proportion of

Gross National Product" - and further "in spite of the fact that educational expenditure continues to be the highest item of expenditure next only to

Defence the resource gap for educational needs is one of the major problems. Most of the current expenditure is only in the form of salary

payment. It hardly needs to be stated that additional capital expenditure would greatly augment teacher productivity because in the absence of

expenditure on her heads even the utilisation of staff remains low." We do realise that ultimately it is a question of resources and resources-wise this

country is not in a happy position. All we are saying is that while allocating the available resources, due regard should be had to the wise words of

Founding Fathers in Articles 45 and 46. Not that we are not aware of the importance and significance of higher education. What may perhaps be

required is a proper balancing of the various sectors of education.

194. Right to education after the child/citizen completes the age of 14 years.

195. The right to education further means that a citizen has a right to call upon the State to provide educational facilities to him within the limits of its

economic capacity and development. By saying so, we are not transferring Article 41 from part IV to Part III - we are merely relying on Article 41

to illustrate the content of the right to education flowing from Article 21. We cannot believe that any State would say that it need not provide

education to its people even within limits of its economic capacity and development. It goes without saying that the limits of economic capacity are,

ordinarily speaking, matters within the subjective satisfaction of the State.

196. In the light of the above enunciation, the apprehension expressed by the counsel for the petitioners that by reading the right to education into

Article 21, this Court would be enabling each and every citizen of this country to approach the courts to compel the State to provide him such

application as he chooses must be held to be unfounded. The right to free education is available only to children until they complete the age of 14

years. Thereafter, the obligation of the State to provide education is subject to the limits of its economic capacity and development. Indeed, we are

not stating anything new. This aspect has already been emphasised by this Court in 270055 . While elaborating the scope of right guaranteed under

Article 21, this Court stated:

But the question which arises is whether the right to life is limited only to protection of limb or faculty or does it go further and embrace something

more. We think that the right to life includes right to live with human dignity and all that goes along with it viz., the bare necessities of life such as

adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about the mixing and

commingling with fellow human beings. Of course, the magnitude and content of the components of this right would depend upon the extent of the

economic development of the country, but it must in any view of the matter, include a right to the basic necessities of life and also the right to carry

on such functions and activities as constitute the bare minimum expression of the humankind.

197. We must hasten to add that just because we have relied upon some of the directive principles of state policy to locate the parameters of the right to

education implicit in Article 21, it does not follow automatically that each and every obligation referred to in Part IV gets automatically include

within the purview of Article 21. We have held the right to education to be implicit in the right to life because of its inherent fundamental

importance. As a matter of fact, we have referred to Articles 41, 45 and 46 merely to determine the parameters of the said right.

PART - III

Questions No. 2 and 3:

198. It would be convenient to deal with questions No. 2 and 3 together. The contention urged by the counsel for the petitioners can be broadly

summarised in the following words:

(a) The State has no monopoly in the matter of imparting education. Every citizen has the fundamental right to establish an educational institution as

a part of the right guaranteed to him by Article 19(1)(g) of the Constitution. This right extends even to the establishment of an educational institution

with a profit motive i.e., as a business adventure. The said right, no doubt, is subject to such reasonable restrictions as may be placed upon it by a

law within the meaning of Clause (6) of Article 19. But for the said restrictions, the right is absolute.

(b) The vice lies not in the establishment of educational institutions by individuals and private bodies but in unnecessary State control. The law of

demand and supply...what may be called the "market forces...must be allowed a free play. Because there are more number of persons seeking

admission than the existing institutions can provide that the several ills complained of have developed.

(c) The establishment of an education institution is no different from any other venture e.g., starting a business or industry. It is immaterial whether

the institution is established with or without profit motive. Indeed, only when there is profit motive that persons with means would come forward to

open more and more schools and colleges. There are not many persons available today who are prepared to donate large funds for establishing

such institutions by way of charity or philanthropy.

(d) Even if it is held, for any reason, that a person has no right to establish an educational institution as a business venture, he has at least the right to

establish a self-financing educational institution. Such an institution may also be described as an institution providing cost-based education. This

means that it is open to a person to collect amounts from willing parties and establish an institution to educate such persons or their children, as the

case may be. Even in an established institution, the fees that may be collected from the students must be such as not only to defray the expenditure of

running the institution but also for improvement, expansion, diversification and growth. In such institutions, the quantum of the fees to be charged

should be left to the concerned institutions. The Government should have no say in the matter. So far as the court is concerned, it is not possible for

it, in the very nature of things, to go into this issue. The needs of each educational institution may be different. The standard of education imparted

and the facilities provided may be different from institution to institution. May be, the Government or the Court may insist that as a condition for

running such institution, a reasonable number of seats should be allotted to students purely on merit, who shall be asked to pay only such fees as is

charged in similar Governmental institutions. If this is done-to which the petitioners have no objection-it will not only meet the needs of education of

those who have the capacity to pay but it will also meet the needs of other meritorious students who are not able to obtain position in the

Governmental institutions and are also not in a position to pay the fees fully charged such private institutions. Several facts and figures are furnished

to show how in each State these private educational institutions are providing a large number of "free seats" to the nominees of the Government. It

is pointed out that all these 5 fits would not have had an opportunity of studying the course of their choice but existence of these private educational

institutions.

(e) Mohini Jain's case was not right in saying, in the above situation, that charging of any amount, by whatever name it is called, over and above

the fee charged by the Government in its own colleges, must be described as capitation fee. Saying so amounts an impossible condition. It is simply

not possible for the private educational institutions to survive if they are compelled to charge only that fee as is led in Governmental institutions. The

cost of educating an engineering or a Cal graduate is very high. All that cost is borne by the State in Governmental Bs but the State does not

subsidise the private educational institutions. The private educational institutions have to find their own finances and that can come only the

students.

(f) Even if the right to establish an educational institution is not trade or business within meaning of Article 19(1)(g), it is certainly an "occupation"

within the remaining of the clause. Indeed, 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. In such a situation, it is not necessary for the petitioners to pinpoint to which particular does their activity

relate. It is enough to say that the petitioners do have the right to establish private educational institutions - at any rate, self-financing/cost-based

educational institutions. This right can be restricted only by a law as contented by Clause (6) of Article 19.

(g) The right to establish and administer an educational institution (by a member of the majority community, religion or linguistic) arises 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 therefrom. (h) The Government or the University cannot insist or stipulate as a condition of recognition/affiliation that the private

educational institutions should admit students exclusively on merit. It has been well recognised by this Court that one who pays for education is also

entitled to stipulate the manner in which he will admit students, there is no reason why such a right should not be recognised in the case of the

private educational institutions. Moreover, there may be several kinds of private educational Institutions; they may be established for achieving certain

specified purposes. For example, a medical or engineering college may be established to cater to the needs of particular region or a district.

Similarly, another educational institution may have been established by members of a particular community to educate their own children. The

Gulbarga Medical College in the State of Karnataka, it is pointed out, is established "to meet the educational needs in the field of medicine to the

students belong to Gulburga, Raichur and Bidar districts, formerly included within the Nizam's dominions and which were included in the State of

Karnataka on the reorganisations of States, nilarly, the Kempe Gowda Medical College in Karnataka, it is submitted, has been established by

members of Vokkaliga community. Their wishes and objectives have-; to be respected. There may be yet another institution which may have been

established with the aid of a large donation made by a charitable-minded person e.g., Annamalai University in Tamil Nadu. If such University

stipulates that members of the founder's family or their nominees will be admitted every year to the extent of a certain percentage, no fault can be

found therewith.

(i) By virtue of mere recognition and/or affiliation these private educational institutions do not become instrumentalities of the State within the

remaining of Article 12 of the Constitution. The concept of "State action" cannot be extended to these colleges so as to subject them to the

discipline of Part 111. It may be a different matter if the institution is in receipt of any aid, partially and wholly, from the State. In such a situation,

the command of Article 29(2) comes into play but even that does not oblige the institution to admit the students exclusively on the basis of merit -

but only not to deny admission to anyone on any of the grounds mentioned therein.

199. On the other hand, it is contended by the learned Counsel for the respondents as also, by the learned Counsel for Indian Medical Council and

All India Council for Technical Education. that: (a) imparting of education has always been recognised in this country from times immemorial as the

religious duty. Both Hinduism and Islam treated it as such. It has also been recognised a charitable object. But never has it been recognised as a

trade or business. It is a mission, not a trade. Commercialisation of education has always been looked upon with disfavor in this country. far back

as in 1956, the Parliament expressed its intention by enacting the University Grant Commission Act which specified the prevention of

commercialisation of education as one of the duties of the University Grants Commission. The same intention has been expressed by several

enactments made by the Parliament and State Legislatures since then.

(b) Imparting of education is the most important function of the State. This duty may be discharged by the State directly or through the

instrumentality of private educational institutions. But when the State permits a private body or an individual to perform the said function it is its duty

to ensure that no one gets an admission or an advantage on account of his economic power to the detriment of a more meritorious candidate.

(c) The very concept of collecting the cost of education - that is what the concept of cost-based or self-financing educational institutions means-is

morally abhorrent and is opposed to public policy. A capitation fee does not cease to be a capitation fee just because it is called cost-based

education or by calling the institution concerned as a self-financing institution. These expressions are but a cover- a mere pretence-for collecting

capitation fee. It is nothing but exploitation. It is an elitist concept basically opposed to the constitutional philosophy. By allowing such education,

two classes will come into being, the concept suffers from class bias.

(d) If, for any reason, it is held that a citizen or a person has a right to establish an educational institution, the said right does not carry with it the

right to recognition or the right to affiliation, as the case may be. It has been repeatedly held by this Court that even a minority educational

institution has no fundamental right to recognition or affiliation. If so, no such right can be envisaged in the case of majority community or in the case

of individuals or persons. Once this is so, it is open to the State or the University according recognition or affiliation to impose such conditions as

they think appropriate in the interest of fairness, merit, maintenance of standards of education and on. In short, it is open to the Government or the

University to make it a condition of recognition/affiliation that the admission of students, in whichever category it may be, shall be on the basis of

merit and merit alone. The institutions obtaining recognition/affiliation will be bound by such condition and any departure there from renders the

recognition/affiliation liable to be withdrawn.

(e) Even if the Government or the University does not expressly impose such a condition, such condition is implicitly by virtue of the fact that in

such a situation, the activity of the private educational institution is liable to be termed as "State action". The fact that these institutions perform an

important public function coupled with the fact that their activity closely inter-twined with governmental activity, characterises their action as "State

sation". At the minimum, the requirement would be to act fairly in the matter of admission of students and probably in the matter of recruitment and

treatment of its employees as well. These institutions are further bound not to charge any fee or amount over and above what is charged in similar

governmental institutions. If they need finances, they must find them through donations or with the help of religious or charitable organisations. They

"cannot also say that they will first collect capitation fees and with that money, they will establish an institution. At the worst, only the bare running

charges can be charged from the students. The capital cost cannot be charge from them.

200. Before we express ourselves upon the rival contentions urged by the parties, it would be appropriate to notice the relevant statutory

provisions:

UNIVERSITY GRANTS COMMISSION ACT:

201. The University Grants Commission Act was enacted by the Parliament 1956 to provide the coordination and determination of standards in

Universities and for that purpose to establish University Grants Commission. Chapter-III deals with the powers and functions of the mission.

Section 12 empowers the Commission to take, in consultation with the Universities other concerned bodies, all such steps as it may think fit for the

promotion and coordination University education and for the determination and maintenance of standards of teaching, examination and research in

the Universities. Section 12-A is relevant for our purposes. Clause (a) Sub-section (1) defines the expression "affiliation". It reads:

"Affiliation" together with its grammatical variations, includes in relation to a college, recognition or such college, association of such college with,

and admission of such college to the privileges of a University.

202. Clause (b) defines the expression "college" in the following words:

College" means any institution whether known as such or by any other name which provides for a course of study for obtaining any qualification

from a University and which in accordance with the rules and regulations of such University is recognised as competent to provide for such course

of study and present students undergoing such course of study for the examination for the award of such qualification.

203. Sub-section (2) empowers the Commission inter alia to regulate the fee chargeable in constituent and affiliated colleges, if such a course is

found to be necessary to ensure that ""no candidate secures admission to such course of study by reason of economic power and thereby events a

more meritorious candidate from securing admission to such course of study."" It would : appropriate to set out Sub-section (2) in its entirety. It

reads:

Without prejudice to the generality of the provisions of Section if, having regard to,

(a) the nature of any course of study for obtaining any qualification from any University,

(b) the types of activities in which persons obtaining such qualification are likely to be engaged on the basis of such qualification,

(c) the minimum standards which a person possessing such qualification should be able to maintain in his work relating to such activities and the

consequent need for ensuring, so far as may be, that no candidate secures admission to such course of study by reason of economic power and

thereby prevents a more meritorious candidate from securing admission to such course of study; and

(d) all other relevant factors,

the Commission is satisfied that it is necessary so to do in the public interest, it may, after consultation with the University or Universities

concerned, specify the regulations the matters) in respect of which fees may be charged, and the scale of fees in accordance with which fees: shall

be charge in respect of those matters on and from such date as may be specified in then regulations in this behalf, by any college providing for such

course of study from or in relation to any student in connection with his admission to and prosecution of such course for study: Provided that

different matters and different scales of fees may be so specified in relation to different Universities or different classes of colleges or different

areas.

204. Sub-section (3) then says that where regulations for the nature referred to in Sub-section (2) have been made, no college shall levy or charge

fees in excess of what is specified. Sub-section (4) provides the consequence of violation by any college of such regulations. Sub-section (5) says

that violation shall also mean disaffiliation. Section 14 prescribes the consequences of failure of Universities to comply with the recommendations of

the Commission. It includes withholding of funds. Sub-section (1) of Section 22 which occurs in Chapter-IV declares that "the right of conferring

or granting degree shall be exercised only by a University established or incorporated by or under a Central Act, a provincial Act or a State Act or

an institution deemed to be a University u/s 3 or an institution specially empowered by an Act of Parliament to confer or grant degrees." Sub-

section (2) emphatically declares that "save as provided in Sub-section (1), no person or authority shall confer or grant or hold himself or itself out

as entitled to confer or grant any degree." Sub-section (3) defines the expression "degree". It means "any such degree as may, with the previous

approval of the Central Government, be specified in this behalf by the Commission by notification in the official gazette." Section 23 prohibits the

use of the word "University" in the name of any institution other than a University established or incorporated under an enactment or a deemed

University. Section 24 provides for penalties for violation of Sections 22 and 23. Section 25 confers the rule making power upon the Central

Government while Section 26 confers the regulation making power upon the Commission.

INDIAN MEDICAL COUNCIL ACT :

205. The Indian Medical Council Act, 1956 was enacted by the Parliament to provide for the reconstitution of the Medical Council of India and

the maintenance of a medical register for India and for matters connected therewith. The expression "recognised medical qualification" is defined in

Clause (h) of Section 2 to mean "any of the medical qualifications included in the schedules." The expression "approved institution" has been

defined in Clause (a) to mean "a hospital, health center or every such institution recognised by a University as an institution in which a person may

undergo training, if any, required by his course of study before the award of any medical qualification to him." Section 11 declares that the medical

qualifications granted by any University or medical institution in India which are included in the first schedule to the Act shall be recognised medical

qualifications for the purposes of the Act. It also the procedure for any University or Medical institution applying to the Central Government for

recognising new or other qualifications. Section 13 says that the medical qualifications granted by medical institutions in India not included in the

First Schedule but (Jed in Part-I of the Third Schedule shall also be recognised medical qualifications for the as of the Act. Section 19 provides for

withdrawal of recognition in cases where the I finds lowering of standards of proficiency, knowledge or skill. Section 21 provides maintenance of

an Indian Medical Register. Section 27 says that a person registered in Indian Medical Council Register shall be entitled to practice as a medical

practitioner in of India and to recover in due course of law in respect of such practice any expenses, charges or fees to which he is entitled. Section

32 confers the rule making power upon the Government while Section 33 confers the regulation making power upon the Council. The Schedule

mentions the names of the Universities and the recognised medical qualifications awarded by them. Same is done by Part I of the Third Schedule.

ALL INDIA COUNCIL FOR TECHNICAL EDUCATION ACT, 1987:

206. This Act has been made by the Parliament for the establishment of the "All India Council technical Education" with a view to the proper

planning and coordinated development of technical education system throughout the country, promotion of qualitative improvement such education

and other allied matters. Section 3 of the Act provides for the establishment he Council while Section 10 specifies the functions of the Council.

Apart from directing generally that the Council shall take all such steps as it may think fit for ensuring coordinated and integrated development of

technical education and maintenance of standards, the Act specifically empowers the Council, inter alia, to ""(j) fix norms and guidelines for charging

an and other fees; (k) grant approval for starting new technical institutions and for introduction of new courses of programmes in consultation with

the agencies concerned, and Hake all necessary steps to prevent commercialisation of technical education."" It is true, is no express provisions in

the Act which says that no engineering college or any other He or institution imparting technical education shall be established except with the

permission of the Council. But this may be for the reason that such a power was intended to exercised by the Council itself if it thinks necessary to

do so. We are of the opinion that vast powers conferred upon the Council by Section 10, including those specified above, extend to and entitle it

to issue an order to the above effect. It can also say that even in the listing institutions, no new course, faculty or class shall be opened except with

its approval, also pass appropriate directions to the existing institutions as well for achieving the poses of the Act. Such an order may indeed be

necessary for a proper discharge of the wide-ranging functions conferred upon the Council.

207. It is brought to our notice by the learned Counsel appearing for the Council that the Council has evolved a proforma of undertaking which

should be executed by the person-in-charge of any institution proposed to be established stating inter alias that such institution will I only observe

the several orders and instructions issued by the Council but it shall not charge capitation fee from the students/guardians of the students in any

form. The proforma further stipulates that in the event of non-compliance of any of the orders and directions issued the Council or the terms of the

undertaking, it shall be open to the Council to take lproper action including withdrawal of its approval or recognition, which automatically Hails

stoppage of financial grant or assistance from the Central and State Government. It is also brought to our notice that the Council has issued

guidelines for admission to Engineer in Degree and Engineering Diploma programmes in G.S.R. 320 dated 15th June, 1992 in exercise. of the

power conferred upon it by Section 23(1) of the Act (Section 23 of the Act confers the regulation making power upon the Council).

STATE ENACTMENTS:

208. As mentioned in Part-1 of this judgement, the States of Andhra Pradesh, Karnataka Maharashtra and recently the State of Tamil Nadu have

all enacted legislation prohibiting charging of capitation fee. We had also set out the Preamble to the Andhra Act which Preamble is to be found

almost in every such enactment. We had referred to the A.P. Education Act, 1983 as well which provides that no educational institution shall be

established in the State except; with the permission of the competent authority.

INDIAN MEDICAL COUNCIL (AMENDMENT) ORDINANCE, 1992:

209. The last of the statutory provisions to be noticed is of great relevance herein viz., the; Indian Medical Council (Amendment) Ordinance, 1992

being Ordinance No. 13 of 1992 issued by the President of India on 27th August, 1992. By this Ordinance, Section 10-A to, 10-C have been

added besides amending Section 33. Section 10-A provides that notwithstanding anything contained in the Indian Medical Council Act or any

other law for the time being in force, no medical college shall be established nor any new or higher course of study or training opened in an existing

institution nor shall it increase its admission capacity in any course of study or training, except with the previous permission of the Central

Government obtained in accordance with the provisions of the said section. The section prescribes the procedure for submitting the application, the

matters which the Central Government shall take into account while considering the said application, the obligatory consultation with the Council

and the manner in which the application shall be disposed of. It also provides the matters which the Council should take into consideration while

making its recommendation to the Central Government. Suffice it to mention that the several matters which the Council and the Central

Government are directed to take into consideration are designed to ensure that a properly equipped institution is in place before it is permitted to

impart medical education. Section 10-B provides for non-recognition of medical qualifications awarded by institutions which have been established

without the previous permission of the Central Government or by an institution which violates any of the conditions in Section 10-A. Section 10-C

provides that if any person has established a medical college or has opened a new or higher course of study in an existing college, he shall, within

one year from the date of the commencement of the Ordinance, seek permission of the Central Government in accordance with Section 10-A.

GROUND REALITY:

210. Notwithstanding the fact that education is the second highest sector of budgeted expenditure after the Defence, the outlay on education is

woefully inadequate to the needs of the people. Whereas many other countries spend six to eight per cent of their Gross National Product on

education, our expenditure on education is only three per cent of the Gross National Product. Seventy five to eight per cent of the expenditure

goes in paying the salaries of the teachers and other connected staff. These are the statements made in the Government of India publication

Challenge of Education - a policy perspective"" referred to herein before. Even so, on account of lack of proper supervision, lack of self-discipline

and commitment, the quality and standard of instruction in most of the Government schools and colleges - except the professional colleges - is

woeful. This has provided an occasion and an opportunity to educational institutions to fill the void, both in terms of meeting the need and more

particularly in the matter of quality of instruction. Because, the State is in no position to devote resources and also because the need is constantly

growing, it is not possible to do without educational institutions. In this context, it is appropriate - may, necessary, to notice of the Government of

India in this behalf. It is thus: the Central Government does have the resources to undertake any additional financial responsibility for medical or

technical education; it is unable to aid any private educational institution financially at a level or, than at present; therefore the policy of the Central

Government is to involve private and voluntary efforts in the education sector in conformity with accepted norms and goals: however, the private

educational institutions cannot be compelled to charge only that fee as barged in Governmental institutions; in 1986, the Central Government has

evolved the Education Policy" - according to it, ""in the interests of maintaining the standards and for reason other valid reasons, the

commercialisation of technical and professional education will be curbed. An alternative system will be devised to involve private and voluntary

effort in this sation of education, in conformity with accepted norms and goals."" (vide paras 6-20); the amendments proposed to I.M.C. Act, 1956

in 1987 have not materialised so far; so far as Engineering colleges are concerned, permission is being granted by the A.I.C.T.E. subject to

condition that they do not collect any capitation fee; according to the guidelines issued by A.I.C.T.E., the technical colleges will be permitted to

recover "only a graded percentage he average cost of student education, depending on whether the institution is Government funded, Government-

aided or un-aided." (According to these guidelines, it is stated, the students will be asked to pay 20% of the cost in Government-funded

institutions, 30-35% in Government-aided and 70% in un-aided institutions). It is finally submitted that:

(a) Conferring unconditional and unqualified right to education at all levels to every citizen involving a constitutional obligation on the State to

establish educational institutions either directly or through State agencies is not warranted by the Constitution besides being unrealistic and

impractical.

(b) When the Government grants recognition to private educational institutions it does not create an agency to fulfill its obligations under the

Constitution and there is no scope to import concept of agency in such a situation.

(c) The principles laid down in Mohini Jain's case do require reconsideration.

(d) It would be unrealistic and unwise to discourage private initiative in providing educational facilities particularly for higher education. The private

sector should be involved and indeed encouraged to augment the much needed resources in the field of education, thereby making much progress

as possible in achieving the Constitutional goals in this respect.

(e) At the same time, regulatory controls have to be continued and strengthened in order to prevent private educational institutions from

commercializing education.

(f) Regulatory measures should be maintained and strengthened so as to ensure that private Educational institutions maintain minimum standards

and facilities.

(g) Admissions within all groups and categories should be based on merit. There may be reservation of seats in favour of the weaker sections of

the society and other groups which deserve special treatment. The norms for admission should be pre-determined and transparent.

211. The stand of the State Governments of Andhra Pradesh, Karnataka, Maharashtra and Jamil Nadu is no different.

212. The hard reality that emerges is that private educational institutions are a necessity in the present day context. It is not possible to do without

them because the Governments are in no position to meet the demand - particularly in the sector of medical and technical education which call for

substantial outlays. While education is one of the most important functions of the Indian State it has no monopoly therein. Private educational

institutions - including minority educational institutions too have a role to play.

213. Private educational institutions may be aided as well as un-aided. Aid given by the Government may be cent per cent or partial. So far as

aided institutions are concerned, it is evident, they have to abide by all the rules and regulations as may be framed by the Government and/or

recognising/affiliating authorities in the matter of recruitment of teachers⁴ and staff, their conditions of service, syllabus, standard of teaching and

so on. In particular, in the matter of admission of students, they have to follow the rule of merit and merit alone - subject to any reservations made

under Article 15. They shall not be entitled to charge any fees higher than what is charged in Governmental institutions for similar courses. These

are) and shall be understood to be the conditions of grant of aid. The reason is simple: public funds, when given as grant - and not as loan - carry the

public character wherever they go; Public funds cannot be donated for private purposes. The element of public character necessarily means a fair

conduct in all respects consistent with the constitutional mandate of Articles 14 and 15. All the Governments and other authorities in charge of

granting aid to educational institutions shall expressly provide for such conditions (among others), if not already provided, and shall ensure

compliance with the same. Again aid may take several forms. For example, a medical college does necessarily require a hospital. We are told that

for a 100 seat medical college, there must be a fully equipped 700-bed hospital. Then alone, the medical college can be allowed to function. A

private medical college may not have or may not establish a hospital of its own. It may request the Government and the Government may permit it

to avail of the services of a Government hospital for the purpose of the college free of charge. This would also be as form of aid and the conditions

aforesaid have to be imposed-may be with some relaxation in the matter of fees chargeable-and observed. The Governments (Central and State)

and all other authorities granting aid shall impose such conditions forthwith, if not already imposed. These conditions shall apply to existing as well

as proposed private educational institutions.

214. So far as un-aided institutions are concerned, it is obvious that they cannot be compelled to charge the same fee as is charged in

Governmental institutions. If they do so voluntarily, it is perfectly welcome but they cannot be compelled to do so, for the simple reason that they

have to meet the cost of imparting education from their own resources-and the main source, apart from donations/charities, if any, can only be the

fees collected from the students. It is here that the concepts of "self-financing educational institutions" and "cost-based educational institutions"

come in. This situation presents several difficult problems. How does one determine the "cost of education" and how and by whom can it be

regulated? The cost of education may vary, even within the same faculty, from institution to institution. The facilities provided, equipment,

infrastructure, standard and quality of education obtaining may vary from institution to institution. 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. Even so, some questions do arise-whether cost-based

education only means running charges or can it take in capital outlay? Who pays or who can be made to pay for establishment, expansion and

improvement/diversification of a private educational institutions? Can an individual or body of persons first collect amounts (by whatever name

called) from the intending students and with those monies establish an institution-an activity similar to builders of apartments in the cities? How

much should the students coming in later years pay? Who should work out the economics of each institution? Any solution evolved has to take into

account all these variable factors. But one thing is clear: commercialisation of education cannot and should not be permitted. The Parliament as well

as State Legislatures have expressed this intention in unmistakable terms. Both in the light of our tradition and from the stand-point of interest of

general public, commercialisation is positively harmful; it is opposed to public policy. As we all presently point out, this is one of the reasons for

holding that imparting education cannot trade, business or profession. The question is how to encourage private educational institutions without

allowing them to commercialise the education? This is the troublesome question facing the society, the government and the courts today. But before

we proceed to Evolve a scheme to meet this problem, it is necessary to answer a few other questions raised before us.

RIGHT TO ESTABLISH AN EDUCATIONAL INSTITUTION;

215. Article 19(1)(g) of the Constitution declares that all citizens of this country shall have the K ""to practice any profession, or to carry on any

occupation, trade or business"". Clause (6) of the 19, however, says:

Nothing in Sub-clause (g) of the said clause shall affect the operation of any law in so far as imposes or prevents the State from making any law

imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said clause and, in particular,

nothing in the said sub-clause shall affect the operation of any existing law in so as it relates to or prevents the State from making any law relating

to:

(i) the professional or technical qualifications necessary for c any profession or on any occupation, trade or business, or

(ii) carrying on by the State, or by a corporation owned or controlled by the State or any trade, lousiness, industry or service whether to the

exclusion, complete or partial, of citizens or Otherwise.

216. While we do not wish to express any opinion on the question whether the right to establish 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 make 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 commerce in this country. Making it one is opposed to the ethos, tradition and eligibilities of this nation. The

argument to the contrary has an unholy ring to it. Imparting education has never been treated as a trade or business in this country since times

memorial. It has been treated as a religious duty. It has been treated as charitable activity. Jut never as trade or business. We agree with

Gajendragadkar, J. that ""education in its true Inspect is more a mission and as vocation rather than a profession or trade or business, however

Wide may be the denotation of the two latter words...""(see University of Delhi 1961(1) SCR 03. The Parliament too has manifested its intention

repeatedly (by enacting the U.G.C. Act____, Act and A.I.C.T.E. Act 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. The very same intention is expressed by the

Legislatures of Andhra Pradesh, Karnataka, Maharashtra and Tamil Nadu in the Preamble to their respective enactment prohibiting charging of

capitation fee.

217. We are, therefore, of the opinion, adopting the line of reasoning in 281480 , that imparting education cannot be treated as 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. A

law, existing or future, ensuring against it would be a valid measure within the meaning of Clause (6) of Article 19. We cannot, therefore, agree

with the contrary proposition enunciated in 1968 Bombay 91, 1984 A.P. 251 and 1986 Karnataka 119.

218. The learned Counsel for the petitioners relied upon certain decisions in support of their contention that right to establish an educational

institution flows from Article 19(1)(g). The first is in 261356 , a decision of a Bench consisting of E.S. Venkataramiah and Ranganath Misra, JJ. At

page 60, while dealing with Section 33 of Gujarat Secondary Education Act empowering the Government to take over of an educational

institution in certain situations for a period not exceeding five years, the learned Judges observed that "the said provisions is introduced in the

interest of the general public and does not in any way affect prejudicially the fundamental right of the management guaranteed under Article 19(1)

(g) of the Constitution." Actually, the issue now before us was not raised or considered in the said decision. Moreover, the decision does not say

whether it is as profession, occupation, trade or business.

219. Reliance is then placed upon the Seven Judge Bench decision in 261253 . Krishna Iyer, J. dealing with the meaning of the expression

industry" in I.D. Act observed that even educational institutions would fall within the purview of "industry". We do not think the said observation in

a different context has any application here.

220. So far as the other decision in State of Maharashtra v. Lok Shikshan Sanstha 1971 Supp. S.C.R. 879 is concerned, all that the court held

there was that in view of the operation of emergency, Article 19 is not available to the petitioners seeking to establish an educational institution.

Article 358 was held to be a bar. But the decision does not say that such a right does inhere in the petitioners.

221. We are also of the opinion that the said activity cannot be called a "profession" within the meaning of Article 19(1)(g). It is significant to

notice the words "to practice any profession". Employees v. Industrial Tribunal AIR 1962 S.C. 1085. Establishing educational institutions can by

no stretch of imagination be treated as ""practicing any profession"". Teaching may be as profession but establishing an institution, employing teaching

and non-teaching staff, procuring the necessary intrastate for running a school or college is not "practising profession". It may be anything but not

practising a profession. We must make of clear that we have not gone into the precise meaning and content of the expressions profession,

occupation, trade or business for the reason that it is not necessary for us to do so in view of the approach we are adopting hereinafter, which

would be evident from succeeding paragraphs. Our main concern in the entire preceding discussion is only to Wish that the activity of establishing

and/or running an educational institution cannot be of commerce.

222. For the purpose of these cases, we shall proceed on the assumption that a person or body Sons has a right to establish an educational

institution in this country. But this right, we I make it clear, is not an absolute one. It is subject to such law as may be made by the State s interest of

general public.

223. We must, however, make it clear, and which is of crucial importance herein, that the right Stablish an educational institution does not carry

with it the right to recognition or the t to affiliation. In 279299 it has been held uniformly by all the nine learned Judges that there is no fundamental

right to affiliation. Ray, C.J, stated that this has been ""the consistent view of this Court."" They also recognised that recognition or affiliation is

essential for a meaningful exercise of the right to establish and Minister educational institutions. Recognition may be granted either by the

Government or Mother authority or body empowered to accord recognition. Similarly, affiliation may be stated either by the University or any

other academic or other body empowered to grant an educational institution, admit students, impart education conduct to other educational

institutions. In other words, it is open to a person to establish Jeducational institution, admit students, impart education, conduct examination and

award certificates to them. But he, or the educational institution has no right to insist that the "fificales or degree (if they can be called as such)

awarded by such institution should be recognised by the State - much less have they the 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. The institution

has to seek such cognition or affiliation from the appropriate agency. Grant of recognition and/or affiliation of a matter of course nor is it a

formality. Admission to the privileges of a University is power to be exercised with great care, keeping in view the interest of the general public and

nation. It is a matter of substantial significance-the very life-blood of a private educational Stitution. Ordinarily speaking, no educational institution

can run or survive unless it is recognised by the Government or the appropriate authority and/or is affiliated to one or the her Universities in the

country. Unless it is recognised and/or affiliated as stated above, its Certificates will be of no use. No one would join such educational institution.

As a matter of fact, by virtue of the provisions of the U.G.C. Act____, noticed hereinabove, no educational institution in this country except a

University is entitled to award degrees. It is for this reason that all the private educational institutions seek recognition and/or affiliation with a view

to enable them to send the students trained by them to appear at the examinations conducted by the Government/University. The idea is that if such

students pass the said examination, the Government/University will award its degree/diploma/certificate to them. These educational Institutions

follow the syllabus prescribed by the Government/University, have the same courses of study, follow the same method of teaching and training. They

do not award their own degrees/qualifications. They prepare their students for University/Government examinations, request the

University/Government to permit them to appear at the examinations conducted by them and to award the appropriate degrees to them. 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 ideal to contend

that imparting of education is a business like any other business or that it is an activity akin to another activity like building of roads, bridges etc. In

short, the position is this: No educational institution except a University can award degrees (Sections 22 and 23 of the U.G.C. Act____)." private

educational institutions cannot award their own degrees. Even if they award certificates or other testimonials they have no practical, value in as

much 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. 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 recognising 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 it self

or its power and privilege to be used unfairly. The incidents attaching to the main activity attach supplemental activity as well. Affiliation/recognition

is not there for anybody to get it gratis or unconditionally. In our opinion, no Government, authority or University is justified or is? entitled to grant

recognition/affiliation without imposing such conditions. Doing so would amount to abdicating its obligations enjoined upon it by Part-III its activity

is bound to be: characterised as unconstitutional and illegal. To reiterate, what applies to the main activity applies equally to supplemental, activity.

The State cannot claim immunity from the obligations arising from Articles 14 and 15. If so, it cannot confer such immunity upon its affiliates.

Accordingly, we have evolved-with the help of the counsel appearing before us; and keeping in view the positive features of the several Central

and State enactments referred; to herein before - the following scheme which every authority granting recognition/affiliation shall impose upon the

institutions seeking such recognition/affiliation.

224. The idea behind the scheme is to eliminate discretion in the management altogether in the matter of admission. It is the discretion in the matter

of admission that is at the root of the, several ills complained of. It is the discretion that has mainly led to the commercialisation of education.

"Capitation fee" means charging or collecting amount beyond what is permitted by law; all the Acts have defined this expression in this sense. We

must strive to bring about a situation where there is no room or occasion for the management or any one of its behalf to demand or collect any

amount beyond what is permitted. We must clarify that charging the permitted fees by the private educational institutions - which is bound to be

higher than the fees charged in similar governmental institutions by it self cannot be characterised as capitation fees. This is the policy underlying all

the four States enactments prohibiting capitation fees. All of them recognise the necessity of charging higher fees by private educational institutions.

They seek to regulate the fees that can be charged by them - which may be called permitted fees and to bar them from collecting anything other

than the permitted fees, which is what "Capitation fees" means. Our attempt in evolving the following scheme precisely is to give effect to the said

legislative policy. It would be highly desirable if this scheme is given -a a statutory shape by incorporating it in the Rules that may be framed under

these, enactments.

225. The scheme evolved here with is in the nature of guidelines which the appropriate Governments and recognising and affiliating authorities shall

impose and implement 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. We are confining the scheme - for the present - only to "professional colleges."

226. The expression "professional colleges" in this scheme includes:

(i) medical colleges, dental colleges and other institutions and colleges imparting Nursing, Pharmacy and other courses allied to Medicine,

established and/or run by private education institutions,

(ii) colleges of engineering and colleges and institutions imparting technical education including electronics, computer sciences, established and/or

run by private education institutions, and

(iii) such other colleges to which this scheme is made applicable by the Government, recognising and/or affiliating authority.

227. The expression ""appropriate authority"" means the Government, University or other authority as is competent to grant permission establish or

to grant recognition to a professional college.

228. The expression "competent authority" in the scheme means the Government/University or other authority, as may be designated by the

Government/University or by law, as is competent to allot students for admission to various professional colleges in the given State.

229. It is made clear that only those institutions which seek permissions to establish and/or recognition and/or affiliation from the appropriate

authority shall alone be made bound by this scheme. This scheme is not applicable to colleges run by Government or to University colleges. In

short, the scheme hereinafter mentioned shall be made a condition of permission, recognition or affiliation, as the case may be. For each of them

viz., grant of permission, grant of recognition, grant of affiliation, these conditions shall necessarily be imposed, in addition to such other conditions

as the appropriate authority may think appropriate. No private educational institution shall be allowed to sent its students to appear for an

examination held by it or under any law or to any examination held by any University unless the concerned institution and the relevant course of

study is recognised by the appropriate authority and/or is affiliated to appropriate University, as the case may be.

(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 permitted 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 with drawn. (In this connection reference may be had to Rule 86(2) of Maharashtra Grant-in-aid code

(referred to in State of Maharashtra v. Lok Shikshan Sanstha -1971 Supp. S.C.R. 879 which provided that schools which are not registered

under the Societies Registration Act, shall not be eligible for grant. Grant of recognition and affiliation is no less significance).

(2) At least, 50% of the seats in every professional college shall be filled by the nominees of the government of 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 in done in the State of Andhra Pradesh. The remaining 50% seats (payment seats) shall be filled by those candidates

who are prepared to pay the fee prescribed there for and 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 for constitutionally permissible classes with

the approval of the affiliating University. 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 applications 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 for 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, center 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, upto three professional

colleges.

(5) Each professional college shall intimate the 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 u/s 12A (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 u/s 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 conditions for grant of

permission to new medical colleges u/s 10-A and to impose such a condition on existing colleges u/s 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.I.C.T.E.) coordinate their efforts and evolve a broadly

uniform criteria in this behalf. Until the Central government, U.G.C, I.M.C. and A.I.C.T.E. issue orders/regulations in 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.I.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-may, 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 entitle 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 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 a 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 an

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 "dropout" 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.

It is made clear that it shall be open to the appropriate authority and the competent authority to issue such further instructions or directions, as they

made think appropriate not inconsistent with this scheme, by way of elaboration and elucidation.

This scheme shall apply to and govern the admissions to professional colleges commencing from the academic year 1993-94.

We are aware that until the commencement of the current academic year, the Andhra Pradesh was following a somewhat different pattern in the

matter of filling the seats in private unaided engineering colleges. Though all the available seats were being filled by the allottees of the convenor

(State) - and the managements were not allowed to admit any student on their own - a uniform fee was collected from all the students. The

concepts of free seats; and "payment seats" were therefore not relevant in such a situation - all were payment seats only. We cannot say that such

a system is constitutionally not permissible. But our idea in devising this scheme has been to provide more opportunities to meritorious students,

who may not be able to pay the enhanced fee prescribed by the government for such colleges. The system devised by us would mean

correspondingly more financial burden on payment students whereas in the aforesaid system (in vogue in Andhra Pradesh) the financial burden is

equally distributed among all the students. The theoretical foundation for our method is that a candidate/student who is stealing a march over his

compatriot on account of his economic power should be made not only to pay for himself but also to pay for another meritorious student. This is

the social justification behind the fifty percent rule prescribed in Clause (2) of this scheme. In the interest of uniformity and in the light of the above

social theory, we direct the State of Andhra Pradesh to adhere to the system derived by us.

230. In view of the above, we do not think it necessary to go into or answer Question No. 3. On our opinion, the said question requires debate in

a greater depth and any expression of opinion thereon at this juncture is not really warranted.

PART-IV

VALIDITY OF SECTION 3-A OF THE ANDHRA PRADESH

EDUCATIONAL INSTITUTIONS (REGULATION OF

ADMISSION AND PROHIBITION OF CAPITATION

FEB) ACT, 1983.

231. Section 3-A of the aforesaid Act, as introduced by the Andhra Pradesh Amendment Act 12 of 1992, read as follows:

Notwithstanding anything contained in Section 3, but subject to such rules as may be made in this behalf and the Andhra Pradesh Educational

Institutions (Regulation of admission) Order, 1974, it shall be lawful for the management of any unaided private engineering college, dental college

and such other class of unaided educational institutions as may be notified by the Government in this behalf to admit students into such colleges or

educational institutions to the extent of one half of the total number of seats from among those who have qualified in the common entrance test or in

the qualifying examination, as the case may be, referred to in Sub-section (1) of Section 3 irrespective of the ranking assigned to them in such test

or examination and nothing contained in Section 5 shall apply to such admissions.

232. A Full Bench of the Andhra Pradesh Court has struck it down as being violative of Article 14 of the Constitution and also on the ground of

repugnancy with Section 12-A of the University Grants Commission Act, 1956 951806 The correctness of the said decision is assailed before us.

233. This Section is in truth, in the nature of an exception to the other provisions of the Act. It says that notwithstanding anything contained in

Section 3, but subject to the rules as may be framed by the Government in this behalf, the private educational institutions of the nature mentioned

therein, shall be entitle to admit students to the extent of half the number of seats from among those who have qualified in the common entrance test

or the qualifying examination, as the case may be. This statement is accompanied by two significant features viz., (1) admission of such students

could be irrespective of the ranking assigned to them in the common entrance test or other qualifying examination, as the case may be; and (2) it is

made clear that nothing continued in Section 5 shall apply to such admissions. The Section is, thus, an exception to Section 3, 5. Section 3, it may

be remembered, provides that admissions have to be made, to all categories, strictly in accordance with merit. The Section, read as a whole, leads

to the following consequences:

(a) It is open to the private educational institutions to charge as much amount as they can for admission. It will be matter of bargain between the

institution and the student seeking admission.

(b) The admission can be made without reference to inter-se merit of paying candidates. The institution will be entitled to pick and choose the

candidates among the applicants on such consideration as it may deem fit.

(c) Section 5, which prohibits collection of capitation fee by an education institution, is expressly made inapplicable to such admissions. This is not

without a purpose. The purpose is to permit the institutions to charge as much as they can in addition to the collection of the prescribed tuition fee.

234. We have held hereinbefore that the educational activity of the private educational institutions is supplemental to the main effort by the State

and that what applies to the main activity applies equally to the supplemental activity as well. If Article 14 of the Constitution applies - as it does,

without a doubt - to the State institutions and compels them to admit students on the basis of merit and merit along (subject, of course, to any

permissible reservations - wherein too, merit inter-se has to be followed) the applicability of Article 14 cannot be excluded from the supplemental

effort/activity. The State Legislature had, therefore, no power to say that a private educational institution will be entitled to admit students of its

choice, irrespective of merit or that it is entitled to charge as much as it can, which means a free hand for exploitation and more particularly,

commercialisation of education, which is impermissible in law. No such immunity from the constitutional obligation can be claimed or conferred by

the State Legislature. On this ground alone, the Section is liable to fail.

235. In the circumstances, it is not necessary for us to go into the question whether the section is bad on account of repugnancy with Section 12-A

of the University Grants Commission Act. It is enough to say that the said section falls foul of Article 14 for the reason given above and must

accordingly fail. We agree that the offending portions of Section 3-A cannot be severed from the main body of the section and, therefore, the

whole section is liable to fall to the ground.

236. It is not brought to our notice that the enactments of other three States viz., Karnataka, Tamil Nadu and Maharashtra contain similar

offending provisions. Indeed, they do not. None of their provisions says that the Management of a private educational institution can admit

students, against "payment seats", "Irrespective of the ranking assigned to them in such test (entrance test) or examination." Much less do they say

that to such admissions, the provision prohibiting capitation fee shall not apply. True, they do not say expressly that such admissions shall be made

on the basis of merit, but that, according to us, is implicit. If the notifications, or orders issued thereunder provide otherwise, either expressly or by

implication, they would be equally bad for the reason given above.

237. Once Section 3-A is struck down, the question arises as to what should happen to the students who were admitted by the Private

Engineering Colleges in this State, at their own discretion, to the extent of the 50% of the available seats. The High court has invalidated these

admissions but they are continuing now by virtue of the orders of stay granted by this Court. A Ct which must be kept in mind in this behalf is this:

Until the previous year, the Government of Andhra Pradesh has been permitting these private engineering colleges to collect a higher fees from the

students allotted to them. (We are told that the fees permitted to be collected was Rs. 10,000/- per annum for the previous year). Of course, all

the available seats were filled up by students Slotted by the convenor of the common entrance exam; no one could be admitted by these colleges

their own. Now, for the current year, these colleges admitted 50% of the students in their own discretion-which necessarily means collection of

capitation and/or arbitrary admissions for their private reasons. At the same time, these colleges have been collecting the same fees (Rs. 10,000/-

per annum) both from the students allotted by the convenor as also from those admitted themselves. Thus they have reaped a double advantage.

238. It is submitted by Shri Shanti Bhushan the learned Counsel for these students that they were innocent parties and had obtained admission in a

bonafide belief that their admissions were being made properly. They have been studying since then and in a few months their academic year will

come to a close. May be, the managements were guilty of irregularity, he says, but so far as students are concerned they have done nothing

contrary to law to deserve the punishment awarded by the Full Bench to the High Court.

239. It is true, as pointed out by the High Court that these admissions were made in a hurry. The fact remains that they have been continuing in

the said course under the orders of this Court the last about four months. As stated hereinbefore, the present situation has been brought by a

combination of circumstances namely viz; the enactment of Section 3-A, the allotment of students to the extent of 50% only by the convenor and

the failure of the Government to immediately rectify the misunderstanding of the convenor. In the circumstances we are not satisfied that these

students should be sent out at this stage. May be, the result is rather unfortunate but we have to weigh all the relevant circumstances. At the same

time we are of the opinion that the managements of these private engineering colleges should not be allowed to walk away with: double advantage

referred to above. Since they have admitted students of their own choice to the extent of 50% and also because it is not possible to investigate or

verify for what consideration those admissions were made, we think it appropriate to direct that these colleges should charge only that fee from the

50% "free students" as is charged for similar courses in the concerned university engineering colleges. For the remaining years of their course these

colleges shall collect only the said fee, which for the sake of convenience may be called the "government fee". The balance of the amount which

they have already collected during this year shall be remitted into the Government account within six weeks from today, in default whereof the

recognition and affiliation given to these colleges shall stand withdrawn. In other words whichever college fails to comply with the above direction it

will stand disaffiliated on the expiry of six weeks from today and the recognition granted to it, if any, by any appropriate authority shall also stand

withdrawn

240. So far as Writ Petition 855 of 1992 is concerned, it complains of charging of double the tuition fee in case of students coming from outside

the Maharashtra. The matter stands concluded against the petitioners by a decision of a Constitution Bench of this Court in 278528 . This Writ

Petition is accordingly dismissed.

241. Coming to Civil Appeal No. 3573 of 1992 filed by Mahatma Gandhi Mission, we are inclined, in all the facts and circumstances of the case

of stay the operation of the impugned order which is only an interlocutory order effective till the disposal of the main Writ Petition.
Writ Petition

may be disposed of according to law and in the light of this Judgment.

PART-V

242. For the above reasons the Writ Petitions and Civil Appeals except (W.P. (C) 855/92, C.A. 3573/92 and the Civil Appeals arising from S.L.

Ps. 13913 and 13940/92) are disposed of in the following terms:

1. 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 child/citizen of this country has a

right to free education until he completes the age of fourteen years. Thereafter his right to education is subject to the limits of economic capacity

and development of the State

2. 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 and

merely recognition or affiliation is granted it may not be insisted that the private education institution shall charge only that fee as is charged for

similar courses in governmental institutions. The private educational institutions have to and are entitled to charge a higher fee, not exceeding the

ceiling fixed in that behalf. The admission of students and the charging of fee in these private educational institutions shall be governed by the

scheme evolved herein - set out in Part-III of this Judgment.

3. A citizen of this country may have a right to establish an educational institution but no citizen, person or institution has a right much less a

fundamental right, to affiliation or recognition or to grant-in-aid from the State. The recognition and/or affiliation shall be given by the State subject

only to the conditions set out in, and only accordance with the scheme continued in Part-III of this Judgment. No Government/University or

authority shall be competent to grant recognition or affiliation except in accordance with the said scheme. The said scheme shall constitute a

condition of such recognition or affiliation, as the case may be, in addition to such other conditions and terms which such Government, University

or other authority may choose to impose. Those receiving aid shall, however, be subject to all such terms and conditions, as the aid giving authority

may impose in the interest of general public.

4. Section 3-A of the Andhra Pradesh Educational Institutions (Regulation Of Admission And Prohibition of Capitation Fee) Act, 1983 is violative

of the equality Clause enshrined in Article 14 and is accordingly declared void. The declaration of the Andhra Pradesh High Court in this behalf is

affirmed.

5. Writ Petition No. 855 of 1992 is dismissed.

Civil Appeal No. 3573 of 1992 is allowed and the impugned order is set aside. The main Writ Petition wherein the said interim order has been

passed may now be disposed of according to law.

6. Civil Appeals arising from SLP 13913 and 13940/92 (preferred by students who were admitted by private unaided engineering colleges in

Andhra Pradesh, without an allotment from the convenor of the common entrance examination) are allowed. The students so admitted for the

academic year 1992-93 be allowed to continue in the said course but the management shall comply with the direction given in para 77

hereinabove.