Unni Krishnan J. P. And Others
Vs
State Of Andhra Pradesh And Others

CASE NUMBER

Writ Petition (C) No. 607 of 1992 (Under Article 32 of the Constitution of India), with W.P.(C) Nos. 657, 602, 678, 701, 770, 729, 785, 836, 779, 870, 855 of 1992, 2337-2338 of 1983, SLP (C) Nos. 11852, 13263,12830, 13913, 12843-44, 12845-58, 13940, 13914 and 15039, of 1992, C.A. No. 3573 of 1992

EQUIVALENT CITATION

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CORAM

B P Jeevan Reddy
L M Sharma
S Mohan
S P Bharucha
S. R. Pandian

DATE OF JUDGMENT

04.02.1993

JUDGMENT

SHARMA, C.J. (for himself and Bharucha, J.) (partly dissenting)

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 Mohini Jain v. State of Karnataka ((1992) 3 SCC 666) 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 case ((1992) 3 SCC 666) 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 case ((1992) 3 SCC 666) 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 Article 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 decision 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 finding given in Mohini Jain case ((1992) 3 SCC 666) 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. (concurring)- I have had the advantage of perusing the judgment of my learned Brother Justice B. 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 education institution under Article 19(1)(g) ?

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

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.

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

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

"Learning is excellence of wealth that non destroy; To man bought else affords reality of joy."

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

10. 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. Educations a preparation for a living and for life, here and hereafter.

11. An old Sanskrit adage states : "That is education which leads to liberation"- liberation from ignorance which shrouds the mind liberation fro superstition which paralyses effort, liberation from prejudices which blind the vision of the Truth.

12. 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.

13. Victories are gained, peace is preserved, progress is achieved, civilization is built up and history is made not on the battlefields 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 education institutions which are the seed-beds of culture, where children in whose hands quiver the destinies of 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.

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

15. In Brown v. Board of Education (98 L Ed 873: 347 US 483 (1954)) 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 profession training, and in helping him to adjust normally to his environment."

16. 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, 26 etc.

17. In this connection, the following passage from A.D.M. v. Shivakant Shukla ((1976) 2 SCC 521, 578 : 1976 Supp SCR 172, 229- 30) may be quoted : (SCC p. 578, para 65)

"Part III of our Constitution confers fundamental rights in positive as well as in negative language. Articles 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 State of Bihar v. Kameshwar Singh (1952 SCR 889 : AIR 1952 SC 252)). These fundamental rights conferred by our Constitution have taken different forms. Some of these fundamental rights are said to have the texture of basic human rights [see A. K. Gopalan case (1950 SCR 88 : AIR 1950 SC 27 : 51 Cri LJ 1383) at pp 96-97, 248-293 and Bank Nationalisation case ((1970) 1 SCC 248 : AIR 1970 SC 564 : (1970) 3 SCR 530) at pp 568-71, 576-78 (SCC pp 282-285, 288-290).]"

18. Article 21 reads as follows :

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

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

19. 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 drifters of this Constitution knew too well that only a stagnant society remains unchanged.

20. 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 anew the exact nature and the extent of such protection. Political, social and economic changes entail 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.

21. While dealing with the scope of Article 21 it was observed in Maneka Gandhi v. Union of India ((1978) 1 SCC 248 : AIR 1978 SC 597) that : (SCC pp. 278-79, para 5)

"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 to 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 A. K. Gopalan v. State of Madras (1950 SCR 8 : AIR 1950 SC 27 : 51 Cri LJ 1383) and the observations made by Patanjali Sastri, J. Mukherjea, 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 not so much the interpretation of the words 'personal liberty as the inter-relation between Articles 19 and 21. It was in Kharak Singh v. State of U.P.((1964) 1 SCR 332 : AIR 1963 SC 1295 : (1963) 2 Cri LJ 329) 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 go to make up 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(1) are concerned.'

There can be no doubt that in view of the decision of this Court in R.C. Cooper v. Union of India ((1970 1 SCC 248 :AIR 1970 SC 564 :(1970) 3 SCR 530) the minority view must be regarded as correct and the majority view must be held to have been overruled."

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. Tarkunde, learned counsel.

22. This Court in Kharak Singh v. State of U.P.((1964) 1 SCR 332,345 347, 349: AIR 1963 SC 1295 :(1963) 2 Cri LJ 329)interpreted the word 'liberty 'on the lines of the meaning accorded to liberty in the 5th and 14th Amendments to the U.S. Constitution in Munn v. Illinois ((1877) 94 US 113 : 24 L Ed 77 (1877)) . Accordingly it was held :

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

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

24. This right was read into Article 21 and it was held that "there cannot be an unauthorised intrusion into a persons home."

25. In Kesavananda Bharati v. State of Kerala Mathew,((1973) 4 SCC 225: 1973 Supp SCR 1) J stated therein that the fundamental rights them selves 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.

26. In Pathumma case ((1978) 2 SCC 1 :(1978) 2 SCR 537) 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."

27. In this connection, it is worthwhile to recall what was said of the American Constitution in Missouri v. Holland (252 US 416,433 : 64 L Ed 641 (1919)) :

"[W]hen 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."

28. In State of M. P. v. Pramod Bhartiya ((1993) 1 SCC 539 :1993 SCC (L&S) 221 : (1992) 2 Scale 791) it is stated : (SCC p. 541, para 1)

"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 is not enforceable in a court of law is to indulge in sophistry. Parts IV and 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."

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

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

1. The right to go abroad. Satwant Singh Sawhney v. D. Ramarathnam A.P.O., New Delhi.((1967) 3 SCR 525 : AIR 1967 SC 1836)

2. The right to privacy. Gobind v. State of M.P.((1975) SCC 148 : 1975 SCC (Cri) 468 : (1975) 3 SCR 946) In this case reliance was placed on the American decision in Griswold v. Connecticut.(381 US 479, 510 : 14 L Ed 2d 511 (1965)

3. The right against solitary confinement Sunil Batra v. Delhi Administration.((1978) 4 SCC 494, 545 : 1979 SCC (Cri) 155)

4. The right against bar fetters. Charles Sobraj v. Supdt. Central Jail.((1978) 4 SCC 104 : 1978 SCC(Cri) 542 :(1979) 1 SCR 512)

5. The right to legal aid. M. H. Hoskot v. State of Maharashtra. ((1978) 3 SCC 544 : 1978 SCC (CrI) 468 : (1979) 1 SCR 192)

6. The right to speedy trail. Hussainara Khatoon v. Home Secretary State of Bihar.((1980) 1 SCC 81 : 1980 SCC (CrI) 23 : (1979) 3 SCR 169)

7. The right against handcuffing. Prem Shankar Shukla v. Delhi Administration.((1980) 3 SCC 526 : 1980 SCC (Cri) 815 : (1980) 3 SCR 855)

8. The right against delayed execution. T. V. Vatheeswaran v. State of T.N.((1983) 2 SCC 68 : 1983 SCC (Cri) 342 : AIR 1983 SC 361)

9. The right against custodial violence. Sheela Barse v. State of Maharashtra.((1983) 2 scc 96 : 1983 scc (Cri) 353)

10. The right against public hanging A.G. of India v. Lanchama Devi (1989 Supp (1) SCC 264 : 1989 SCC (Cri) 413 : AIR 1986 SC 467

11. Doctor's assistance. Paramanand Katra v. Union of India. ((1989) 4 SCC 286 : 1989 SCC (Cri) 721)

12. Selter. Shantistar Builders v. N. K. Totame. ((1990) 1 SCC 520)

31. If really Article 21, which is the heart of fundamental rights, has received expanded meaning from time to time there is no justification as to why it cannot be interpreted in the light of Article 45 wherein the State is obligated to provide education up to 14 years of age, within the prescribed time-limit.

32. So much for personal liberty.

33. Now coming to life: this Court interpreted in Bandhua Mukti Morcha v. Union of India ((1984) 3 SCC 161 : 1984 SCC (L&S) 389) : (pp 183-84, para 10)

"... It is the fundamental right of every one in this country, assured under the interpretation given to Article 21 by this Court in Francis Mullin case ((1981) 1 SCC 608 : 1981 SCC (Cri) 212) to live with human dignity, free from exploitation. 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 for children to develop in a healthy manner and in conditions of freedom and dignity, education 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 and no State- neither the Central Government nor any State Government- has the right to take any action which will deprive a person of the enjoyment of these 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 human 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, with concrete reality and content, the State can certainly be obligated to ensure observance of such legislation for inaction on the part of the State in securing implementation of such legislation 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 shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State."

34. This, was elaborated in Olga Tellis v. Bombay Municipal Corporation ((1985) 3 SCC 545) : (pp. 571-73, paras 32 and 33)

"As we have stated while summing up the petitioners' cases, 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 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 to 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 make it possible to live, leave aside what makes life livable, 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 hearths 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 Baskey (347 MD 442 (1954)) 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 ((1877) 94 US 113 : 24 L Ed 77 (1877)) 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.((1964) 1 SCR 332 : AIR 1963 SC 1295 : (1963) 2 Cri LJ 329)

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. 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."

35. If, thus, personal liberty and life have come to be given expended meaning, the question to be addressed is, whether life which means to live with dignity, will take within it education as well ? To put it more emphatically, whether right to education flows from right to life ? Before we go to Mohini Jain case ((1992) 3 SCC 666) it may be necessary to refer to State of A.P. v. Lavu Narendranath. ((1971) 1 SCC 607) At page 614 it is stated : (para 18)

"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 ones personal liberty guaranteed under that Article. Every body, 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 Spottswood T. Bolling v. Sharpe (98 LEd 884 : 347 US 497 (1953)) in which it was held that due process clause of the Fifty 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 terms 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 us is altogether different. In this case every body 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."

36. 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.

37. Now, coming to Mohini Jain case ((1992) 3 SCC 666)it was observed at pages 679-80 : (para 12)

"'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 facility at all levels to its citizens."

38. Education is enlightenment. It is the one that lends dignity to a man as was rightly observed by Gajendragadkar, J. (as he then was) in University of Delhi v. Ram Nath ((1964) 2 SCR 703, 710 : AIR 1963 SC 1873 : (1963) 2 LLJ 335) : (SCR p. 710)

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

39. 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.

40. In State of Kerala v. N. M. Thomas ((1976) 2 SCC 310 : 1976 SCC (L&S) 227 :(1976) 1 SCR 906)it was held : (SCC p. 377, para 158)

"... There appears to be a 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.

"...[T]he directive principles from 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 and 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 principle contained in Part IV and the fundamental rights mentioned 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." (SCC p. 379, para 174)

41. In Pathumma v. State of Kerala ((1978) 2 SCC 1: (1978) 2 SCR 537)it was observed : (SCC pp. 10-11, paras 9-12)

9. "In the fact in the case of Kesavananda Bharati v. State of Kerala ((1973) 4 SCC 225 : 1973 Supp SCR 1) 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 social and economic goal for immediate attainment by 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.

10. In a later case State of Kerala v. N. M. Thomas ((1976) 2 SCC 310 : 1976 SCC (L&S) 227 : (1976) SCR 906, 914)one of us (Fazal Ali, J) after analysing the judgment delivered by all the Judges in the Kesavananda Bharati v. State if Kerala ((1973) 4 SCC 225 : 1973 Supp SCR 1) on the importance of the directive principles observed as follows : (SCC p. 379, para 164)

'In view of the principles adumbrated by this Court it is clear that the directive principles from 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.'

11. In the case of State of Bombay v. R. M. D. Chamarbaugwala (1957 SCR 874 : AIR 1957 SC 699)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 wel-fare State. The directive principles of State policy set forth in Part IV of our Constitution enjoin 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.'

12. In the case of Fatehchand Himmatlal v. State of Maharashtra ((1977) 2 SCC 670)the Constitution Bench of this Court observed as follows : (SCC p. 680, para 22)

'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 print 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 extradite. 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.'"

42. In Delhi Development Horticulture Employees' Union v. Delhi Administration, Delhi, ((1992) 4 SCC 99,110 : 1992 SCC (L&S) 805) it was observed : (SCC p. 110, para 20)

"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 ((1985) 3 SCC 545) while considering their consequences of eviction of the pavement dwellers had pointed our that in that case the eviction not merely resulted in deprivation of shelter but also deprivation of livelihood inasmuch 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 a fundamental right in the Constitution. This is because the country has so far not attained the capacity to guarantee it, and not because it considers it may the less fundamental to life. Advisedly, therefore, it has been placed in the Chapter on directive principles, 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."

Such a conclusion may not be open to criticism. So interpreted its advances social justice.

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

"The Honourable Shri K. Santhanam: 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 event he 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 given 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 this linguistic minorities. For instance, in may own province of Tamil Nadu there are islands, in almost every distinct, of villages where a large number of Telugu-speaking people reside. In this connection we have to hold the balance even between tow 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 hundreds 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 top the ordinary schools of the provinces and to imbibe the local tongue and get assimilated with the people. I 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 that 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 percent of the population get primary education. Therefore, it is not possible to accept Mr. Lari 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. This 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 nay 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 of both by Parliamentary and provincial legislation, and I hope it will be done in due course."

44. 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 of then years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years."

Ten 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, endeavour has not been made till now to 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 up to the 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 provisions 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 these which do not make fee 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."

Again at page 43 it is stated :

"Useful measures of achievement in terms of the right to education are literacy and enrollment 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 per cent in 1951 to 36.6 per cent according to the 1981 census. But regional variations indicated a range of above 60 per cent literacy in Kerala to below 20 per cent 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 facilitates 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 per cent of the rural population have access to schools, nearly 30 per cent of 6-14 year old (60 million) do not go to schools and 77 per cent drop out. A large percentage of the dropouts are girls and Scheduled 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."

45. Article 26(1) of the Universal Declaration of Human Rights states :

"Everyone has the right to education. Technical and professional and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit."

46. 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 for intensified as far as possible for those persons who have not received or completed the whole 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."

47. No doubt, the above extract (Ed.: See para 37,above) from Mohini Jain case ((1992 3 SCC 666) 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.

48. The criticism by Mr. Ashok Desai, learned counsel that Article 37 has not been adverted

to and the reliance on directive principle is untenable, in view of what we have stated above.

49. 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 but relative and progressive. It has to take steps to the maximum of its available resources with a view to achieving progressively the full realisation of the right of education by all appropriate means. But, with regard to the general obligation to provide education, the State is bound to provide the same if it deliberately starved its educational system by resources that it manifestly had available unless it could show that is was all locating them to some even more pressing programme. Therefore, by holding education as a fundamental right up to the age of 14 years this Court is not determining the priorities. On the contrary, reminding it of the solemn endeavour, it had to take, under Article 45, within a prescribed time, which time-limit has expired long ago.

50. Mr. K. K. Venugopal, learned counsel contends that in the U.S. Supreme Court in the case of San Antonio Independent School District v. Demetrio P. Rodriguez (411 US 1 :36 L Ed 2d 16 (1973)) 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 in comparisons of the relative societal significance 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."

51. 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 principled like Article 45. Therefore, the contrary view was struck in San Antonio Independent School District.(411 US 1 :36 LEd 2d 16 (1973))

52. 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 (98 L Ed 873 : 347 US 483 (1954))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 the Brown (98 L Ed 873 : 347 US 483 (1954))was specially concerned about the interest in education. The decision had scarcely appeared before the 'fundamental' character of education became the fundamental character of golf and swimming rights, and all the cases since Brown,(98 L Ed 873 :347 US 483 (1954)) even the cases involving education, have shown complete preoccupation with their racial factor. Meanwhile the Court has done nothing further to suggest that education enjoys a constitutional life of its own."

53. As to the present position of primary education in India, the additional affidavit on behalf

of Union of India filed by Mr. H. C. Bavej, Assistant Education Adviser in the Ministry of Human Resources Development, Government of India, Department of Education, New Delhi, put the position thus :

STATUS OF ELEMENTARY EDUCATION IN INDIA

1. Provisions of free and compulsory education to all children until they complete the age of 14 years is a Directive Principle of the Constitution. Recognizing the need for literate population and provision of elementary education as a crucial input for nation building, the policy of the Government has been to provide all children the free and compulsory education at least up to elementary level (primary and upper primary level). The 6th Five Year Plan document made a serious reference to the desirability of a time bound plan to achieve universal enrollment. The 7th Plan conveyed a sense of urgency about the need to achieve this objective. This was reinforced midway 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 enrollment in the decade of 80s showed and acceleration that has now brought enrollment rates close of 100% at primary stage.

Free Education :

4. In the endeavour to increase enrollment and achieve the target of UEE, all State Governments have abolished tuition fees in Government Schools run by local bodies and (sic education in) private aided institutions is mostly fee 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 up to elementary level in practically all schools is free. Other costs of education such as textbooks, 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/Scheduled Tribe 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.

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

55. 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-

"(g) to practice any profession, or to carry on any occupation, trade or business."

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

56. 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."

57. 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 exercise 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."

58. In P. V. G. Raju v. Commissioner of Expenditure Tax ((1972) 86 ITR 267 (AP))it is observed thus :

"The activity termed as 'occupation', is of wide 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 no loss basis. To illustrate, cooperative 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 kind of 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 Commissioner of Expenditure Tax v. Manorama Sarabhai (Mrs.) ((1966) 59 ITR 262 (Guj)) 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."

59. In P. K. Menon v. CIT (1959 Supp 1 SCR 133,137 : AIR 1959 SC 75 : (1959) 35 ITR 48) this Court observed 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. Now 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 nay other teaching. It is said that in teaching Vedanta the appellant was only practicing 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 a business and a profession, is to make a profit, only such activities can be included in the word 'vocation' the object of which likewise 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 organized. 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."

60. The meaning of "business" can be gathered from Law Lexicon, Edition 1987, by Ramanath Aiyer: "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 LJ CP 89 : 13 LT 504)). But ordinarily speaking, business is synonymous with 'trade', (per Chatterton, V. C. Delany v. Delany (15 LR Ir 55)). 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 ode to include occupations which would not strictly come within the meaning of the word 'trade' (per Person, J. Rolls v. Miller (53 LJ Ch 682 :50 LT 597)) Pe Scrutton, L.J. the words 'trade' and 'business' do not mean the same thing...on business, though usually business is carried on of 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 of series is, therefore, not an essential characteristic of industry in a modern State."

61. In Hindustan Steel Ltd. v. State of Orissa ((1969) 2 SCC 627 :(1970) 1 SCR 753)it is observed : (SCC p. 630, para 10)

"A person to be a dealer within the meaning of the Act must carry on the business or selling or supplying goods in Orissa. The expression 'business' is not defined in the Act. But as observed by this Court in State of A.P. v. Abdul Bakhi.((1964) 7 SCR 664 :AIR 1965 SC 531 : (1964) 15 STC 644)

'The expression "business" though extensively used is 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 labor of a person, normally with the object of making profit. To read an activity as business there must be a course of dealings, either actually contained or contemplated to be continued with a profit motive, and nor for sport of pleasure.'"

62. In Barendra Prasad Ray v. ITO ((1981) 2 SCC 693 : 1981 SCC (Tax) 149 : AIR 1981 SC 1047 : (1981) 3 SCR 387) it is observed : (SCC pp. 702-03, paras 16 to 19)

"16. The expression 'business' odes not necessarily mean trade or manufacture only. It is being used as including within its scope professions, 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(54 & 54 Vict. 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.'

17. Section 2(b) of the Indian Partnership Act, 1932 also defines 'business' thus :

'"Business" includes every trade, occupation and profession.'

18. The observation of Rowlatt, J. in Christopher Barker & Sons v. IRC ((1919) 2 KB 222 :88 LJKB 947), 'all professions are businesses, but all businesses are not professions,...' also supports the view that professions are generally regarded as businesses. The same learned Judge in another case IRC v. Marine Steam Turbine Co. Ltd. ((1920) 1 KB 193 : 12 TC 174) 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.'

19. The word 'business' is one of wide import and it means an activity carried on continuously

and systematically by a person by the application of his labour or skill with a view to earning an income. We are of the view that in the context in which the expression 'business connection' 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."

63. In each of these cases, depending upon the statue, either "occupation" or "business" has come 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 are 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 be 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.

64. However, some of the learned counsel relied on Bangalore Water Supply and Sewerage Board v. R. Rajappa ((1978) 2 SCC 213 : 1978 SCC (L&S) 215 : (1978) 3 SCR 207) to urge that the activity of running an educational institution was an industry. In that case, Krishnan Iyer, J. observed : (SCC p. 266, para 98)

"To christen education as a mission, even if true, is not to negate its being an industry. We have to look at educational activity from the angle of the Act, and so viewed the ingredients of education are fulfilled. Education is, therefore, an industry and noting can stand in the way of that conclusion."

65. This ruling was relied on in A. Sundarambal (Miss) v. Government of Goa, Daman and Diu.((1988) 4 SCC 42,45 : 1988 SCC (L&S) 892 : 1988 Supp 1 SCR 604,608 B) It was held : (SCC p. 45, para 6)

"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 ((1978) 2 SCC 213 : 1978 SCC (L&S) 215 : (1978) 3 SCR 207) the question whether teachers in an educational institution can be considered as workmen still remains to be decided."

66. 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).

67. 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.

67a. It is not merely an establishment of educational institution, that is urged by the

petitioners, but, to run the educational institutional dependent 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 fulfillment 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.

68. 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 S. Azeez Basha v. Union of India ((1968) 1 SCR 833, 848 : AIR 1968 SC 662)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 prohibit nay privateer 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, Lampeter v. Ministry of Education ((1951) 1 All ER 559). Thus in law in India there was no prohibition against establishment of Universities by private individuals or bodies and if any University was 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."

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

69. 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 positive way under Article 30 negates the assumption of a fundamental right in this behalf in every citizen of the country.

70. In Ahmedabad St. Xaviers College Society v. State of Gujarat ((1974) 1 SCC 717 : (1975) 1 SCR 173) it is observed : (SCC p. 743, para 8)

"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

rights by having proper legalization 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 institutions of their choice will be taken away."

At page 192 it is observed : (SCC pp. 743-44, paras 11 and 12)

"Article 30 is a special right to minorities to establish educational institutions of their choice. This Court said that the two Articles create two separate rights it is possible that the rights might need 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."

Then again, at page 224 it is observed : (SCC p. 772, para 77)

"The idea of giving some special rights to the minorities is not to have a kind of 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 institutions and by guaranteeing to the minorities autonomy in the matter of the administration of those institutions. The differential treatment for the minorities by giving them special rights is intend to bring about an equilibrium, so that the ideal of equality may not be reduced to a mere abstract idea but should become a living reality and result in true, genuine equality, and equality not merely in theory but also in fact. The majority in a system of adult franchise hardly need 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 needed protection, and Article 30, besides some other Articles, is intended to afford and guarantee that protection."

71. 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 their very nature, cannot be qualified to be protected as fundamental rights.

72. Accordingly, it is held that there is not 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 anyone desirous of starting an institution purely for the purposes of educating the students could do so but Sections 22 and 23 of the University Grants Commission Act which prohibits the award of degrees except by a University must be kept in mind.

73. 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.

73a. In Ajay Hasia v. Khalid Mujib Sheravardi ((1981) 1 SCC 72,736-37 : 1981 SCC (L&S) 258 : (1981) 2 SCR 79,96,97)it was observed : (SCC pp. 736-37, paras 9 and 10)

"The tests for determining as to when a corporation can be said to be an instrumentality or agency of Government may now be culled out from the judgment in the International Airport Authority case ((1979) 3 SCC 489) . 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 place 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 he decision in the International Airport Authority case ((1979) 3 SCC 489)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. (SCC p. 507, para 14)

(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. (SCC p. 508, para 15)

(3) It may also be a relevant factor...whether the corporation enjoys monopoly status which is State conferred or State protected. (SCC p. 508, para 15)

(4) Existence of deep and pervasive State control may afford and indication that the corporation is a State agency or instrumentality. (SCC p. 508, para 15)

(5) If the functions of the corporation are 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. (SCC p. 509, para 16)

(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.' (SCC p. 510, para 18)

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 case ((1979) 3 SCC 489)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 the U.P. Warehousing Corporation v. Vijay Narayan Vajpayee ((1980) 3 SCC 459 : 1980 SCC (L&S) 453) and the observations made by the learned Judge in that case strongly reinforced in view we are taking particularly in the matrix of our constitutional system."

74. Ranganath Misra, J. (as he then was), speaking for the Court, after a succinct analysis of the entire case-law on the subject concludes in Tekraj Vasandi v. Union of India ((1988) 1 SCC 236 : 1988 SCC (L&S) 300)as under : (SCC p. 257, para 20)

"We have several case 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 had 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-governmental 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."

75. The same learned Judge, after referring to the tests adumbrated in Ajay Hasia ((1981) 1 SCC 722 : 1981 SCC (L&S) 258), holds in All India Sainik Schools Employees' Assn. v. Sainik Schools Society (1989 Supp (1) SCC 205, 212 : 1989 SCC (L&S) 264; (1989) 9 ATC 827): (SCC p. 212, para 9)

"[T]hat 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 governments

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."

76. Applying these tests, we find it impossible to hold that a private educational institution either by 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 is with regard to the syllabi and the courses of study. Unless and until they are in accordance with the prescription of the University, degrees would not be conferred. The educational institutions prepare the students for the examination conducted by the University. Therefore, they are obliged to follow the syllabi and the courses of the study.

77. As a sequel to this, an important question arises: what is the nature of functions discharged by 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 the instruments to attain the qualification. If, therefore, what is discharged by the educational institution is a public duty, that requires duty to act fairly. In such a case, it will be subject to Article 14.

78. Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Samarak Trust v. V. R. Rudani ((1989) 2 SCC 691)is an interesting case where a writ of mandamus was issued to a private college. In paragraph 12 at page 697 it was held :

"12. 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: (a) Executive Committee of Vaish Degree College, Shamli v. Lakshmi Narain ((1976) 2 SCC 58 : 1976 SCC (L&S) 176) (b) Dipak Kumar Biswas v. Director of Public Instruction ((1987) 2 SCC 252; (1987) 3 ATC 505). In the first of the two cases, the respondent-institution was a Degree College managed by a registered cooperative 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 Cooperative 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 a 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."

At paragraphs 15 to 20 it was held :

"15. 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 tow 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 aided 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. 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.

16. 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 omissions with a view to evolving a simpler and more effective procedure. The 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 hand 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. That they have done and are doing.(See Yhe Closing Chapter by Rt. Hon . Lord Denning, p. 122)'

17. There, however, the prerogative writ of mandamus is confined 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, 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 III and for any other purpose.'

19. The scope of this article has been explained by Subba Rao, J., in Dwarkanath v. ITO ((1965) 3 SCR 536 :AIR 1966 SC 81 : 75 ITR 349):

'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 reliefs to met the peculiar and complicated 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 defeats the purpose of the article itself.'

20. 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 rights 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."

79. 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 discharges 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.

80. In R. v. Panel on Take-overs ((1987) 1 All ER 564)it is observed : (p. 568)

"The principal issue in this appeal, and the only issue which many matter in the longer term, is whether this remarkable body is above law. Its respectability is belong question. so is its bona fides. I do 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 arrogates to itself is necessary if it is to function efficiently and effectively. While no 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 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 ?"

At page 574 it is held :

"The picture which emerges is clear. As an act of Government is 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 ((1967) 2 All ER 770 :2 QB 864). 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 Industry to limit legislation in the field of take-overs 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 it asserts that its raison d'etre 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 their 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 realties 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 affects 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 forms of private law e.g. 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."

At page 584 it is held :

'More recently in R. v. BBC ((1983) 1 AllER 241 : (1983) 1 WLR 23) Woolf, J. had to consider an application for judicial review where the relief sought was an injection under Order 53, Rule 1(2). These case was brought by an employee of the BBC. In refusing relief Woolf, J. said :

'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 requires that the court should have regard to the nature of the matter in respect of which such relief may be granted. However, although application for judicial review are not confined to those cases where relief could be granted by way of prerogative order, I regard the wording of Order 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 depends 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.'"

Private Colleges and Their Role :

81. The Union of India takes the stand that the Central Government does not have the resources to undertake any additional financial responsibility for medical or technical education. Taking the case of medical education, the total plan outlay for the health sector is 3.2 per cent and medical education gets a pro rate share after apportionment of priorities and allocation of

available funds. Priorities include promotion 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 the connection.

82. 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 adverse consequences which will follow if private educational institutions have to limit themselves to a fee structure which is charged in Government medical and technical educational institutions have been enumerated in paragraph 9 of the counter-affidavit of the Union of India.

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

84. The relevant extracts from the National Policy on Education, being paragraphs 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 commercialisation 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 of institutions set up to commercialise 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 too the total funding. The Government and the community in general will find funds for such programmes as: the universalisation 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 filed crucial to self-sustaining economic development and creating a critical consciousness of the values and imperative of national survival."

85. 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 filed 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 or 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.

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

"RESOLUTION NO. 2

Racketeering in Medical Education

Whereas, a number of institutions have sprung up in the country that style themselves as medical college; and

Whereas, such institution 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 institution neither have suitable buildings, nor proper equipment and even lack adequate staff of requisite qualifications and further it has come to light that these institutions swindle the public by taking large sums of money from students although these institutions have not been recognised 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 an recommend to the Medical Council of India not to grant them recognition." (48th Conference, December 29-31, 1972 at Ahmedabad)

87. 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.

88. Regulatory measures must so ensure that private educational institutions maintain minimum standards and facilities. Admission within all groups and categories should be based only on merit. There maybe 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 predetermined, objective and transparent.

89. Before the scheme, a question may arise whether a mandamus could issue for the enforcement of the scheme if proposed by the Court. For this, we may look up at Suman Gupta v. State of J & K ((1983 4 SCC 339, 345 : (1983) 3 SCR 985,991):(SCC p. 345, para 10)

"... 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 judgment. Until a policy is so formulates and concrete criteria are embodies 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."

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

91. In Kerala State Electricity Board v. S. N. Govinda Prabhu ((1986) 4 SCC 198, 208 : 1986) 3 SCR 628) it is held : (SCC p. 208, para 5)

"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 principal which are as essential to public service undertakings as to commercial

ventures."

At pp. 650-51 (SCC p. 214, para 10) 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."

92. In O.N.G.C. v. Association of Natural Gas Consuming Industries of Gujarat (1990 Supp SCC 397, 399) 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 service, 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 favorable area of operation, 'commercial profits' need not be either anathema or forbidden fruit even to public sector enterprises."

93. In Hindustan Zinc Ltd. v. A.P.S.E.B. ((1991) 3 SCC 299, 306-07)it is held : (SCC pp. 306-07, para 10)

"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 :

'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 served 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 changes 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 the. Not, merely because a surplus has been generated, 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.'"

94. 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 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 a technical meanings. 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 acceptation of the word is 'relief of physical necessity or want'. (Per Lord Shand in Baird's Trustees v. Lord Advocate. ((1888) 15R (Ct of Sess) 682 : 25 Sc LR 533)) In a somewhat more extended sense, the ordinary and popular acceptation of the word is 'relief of poverty' and 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 Watson in Commissioners for Special Purposes of Income Tax v. Pemel.((1891) AC 531, 557 : (1891- 94) All ER Rep 28 : 3 Tax Cases 53))"

At page 49 it is stated :

"Charity in its legal sense as understood in the English Law comprises four principal division- (1) trusts for the relief of poverty; (2) trusts for the advancement of education; (3) trusts for advancement of religion; and (4) trusts for other purposes beneficial to the community not falling under any of the preceding heads."

95. In B. K. Mukherjea on The Hindu Law of Religious and Charitable Trusts at page 58 para, 2.7-A it is stated :

"2.7-A. Education.- The second category of charitable trusts on Lord Mac Naghetens'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."

96. In St. Stemphen's College v. University of Delhi ((1992) 1 SCC 558,609-10)it is held : (SCC pp. 609-10, para 89)

"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 of 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 institution without State aid. This was also the view expressed by Das, C.J., in Kerala Education Bill, 1957 case (1959 SCR 995 : AIR 1958 SC 956). The minorities cannot, therefore, be asked to maintain educational institutions on their own."

97. 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 a charitable purpose. In commissioners for Special Purposes of Income Tax v. Pemel ((1891) AC 531,557 : (1891-94) All ER Rep 28 : 3 Tax Cases 53)the dictum of Lord Mac-Naghten is as follows :

"No doubt, the popular meaning of the words 'charity' and 'charitable' does not coincide with their legal meanings the no doubt it is easy enough to collect from the books a few decisions which seems 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 four the Crown did not attempt the task. Even the paraphrases of the Master of the Rolls is not quite satisfactory....'Charity' in its legal sense comprises four principal 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 deserved the name must do either directly or indirectly."

98. The next case to which reference can be made is The King v. Commissioner for Special Purposes of the Income Tax.(5 Tax Cases 408) The question arose whether the University College of North Wales could be held as established for charitable purpose. Fletcher Moulton, L.J. relying on Pemsel case held that a trust for advancement of education was charitable.

99. In The Abbey, Malvern Wells, Ltd. v. Minister of Town and Country Planning ((1951 2 All ER 154, 160-61)it was held :

"In the present case, it seems to me that one is entitled, and, indeed, bound, to look at the constitution 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 dividends 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."

100. 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. (for Pandian J. and himself)- 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 Mohini Jain v. State of Karnataka ((1992) 3 SCC 666)is called in question. The petitions, running Medical/Engineering Colleges in the States of Andhra Pradesh, Karnataka, Maharashtra and Tamil Nadu, say that if Mohini Jain ((1992) 3 SCC 666)is correct and is followed and implemented by the respective State Government- 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.

102. 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 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 where as 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."

103. 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 under Section 5, but does not include the deposit specified under the proviso to Section 3;"

104. Section 3 prohibits collection of capitation fees by any educational institution or any one 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 begin in force, no capitation fee shall be collected by or on behalf of any educational institution or by any person who is in charge of or is responsible for the management of such institution :

Provided...."

105. 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, to regulate the tuition fee or any other fee or deposit or other amount that may be received or collected by any educational institution or class of such institutions in respect of any or all classes of students.

(2) No educational 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 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 purposes and to such extend 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 educational institution to submit their programmes or plans of improvement and development of the institution for the approval of the Government."

106. Section 4 provides for regulation of admission to the education institutions in the State. According to sub-section (1), the maximum number of students for admission that can be admitted to a course of study and the minimum qualifications shall be filed by the Government. However, in the case of a course of study in an institution maintained by or affiliated to the University, the minimum qualifications shall be fixed by the University and not by the Government. Sub-section (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-

"4. (2) in order to regulate the capitation fee charged or collected during the period specified under the proviso to Section 3, Government may, from time to item, 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 Governments 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, on 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 not less than fifty per cent of the total number of seats referred to in 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 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 items (i) of sub-clause (b) of clause(2), shall from a committed 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."

107. 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) 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 desecration of the management); (iii) the number of 'Karnataka students' (which expression is defined by the explanation) should not be less than 50% overall; (iv) in case, the number of seats to be filed 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 :

"2. (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;"

108. 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. 2000 p.a. in case or 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.

109. 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 by the Karnataka students admitted against the "Government seats".

110. The Bench which heard and disposed of the writ petition framed four question 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 churning of capitation fee in consideration of admission to educational institutions is arbitrary, unfair, unjust and as such violates the quality 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 ?

111. 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 its citizens;"(Ed.: SCC P. 677, PARA 7)

(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 III of 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 shops' is line 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-recognition 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 a citizen's right to education under the Constitution."(Ed.: SCC P. 682, para 17)

112. On the second question, the Bench held that "the State action in permitting capitation fee to 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" (SCC pp 682, 683, paras 18 and 19). Admission of non-meritorious students by charging capitation fees-in any form whatsoever- strikes at the very not of the constitutional scheme and our educational system. D. P. Joshi ((1955) 1 SCR 1215 : AIR 1955 SC 334) does not come to the rescue of the private institutions.(Ed.: SCC P. 683, PARA 20 AND SCC P. 685, PARA 23)

113. 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 College have further been given a free hand in the matter of admission of non-Karnataka students irrespective of merit. It held further : (CC p. 689, para 28)

"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 and is 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 a Private medical College to be set up and reactances 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 India 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."

he notification punged 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 (NRIs) 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". (Ed.: SCC P. 690, PARA 31) (The decision was rendered on July 30, 1992.) It was directed that the said decision shall have only prospective operation and shall not affect the admission already made in accordance with the said notification.

114. It is the above proposition that have provoked this batch of writ petitions.

115. Mohini Jain was followed by a Full Bench of the Andhra Pradesh High Court in Krnath Sangram Parishad v. N. J. Reddy.((1992) 3 ALT 99) The respondents in those writ petitions including the State of Andhra Pradesh have filed a number of SLPs seeking leave to appeal against the said judgment. In the said SLPs, 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 ((1992) 3 SCC 666) and the following three questions, which were framed by must 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 and educational 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 ?

116. Before we deal with the above questions, it would be appropriate to notice the legal and relevant factual position obtaining in three other 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

117. 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 applied to all educational 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) defends 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 meant recognised schools and colleges including medical colleges. Chapter VI (Section 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 institution (b) local authority institutions and (c) private institutions. Section 20 deals with grant of permission for establishment of educational 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 locality under its jurisdiction and notify in the prescribed manner through the local newspapers calling for applications from the educational agencies desirous of establishing educational institutions. In pursuance of such notification, applications may be filed dither by existing institutions or for expansion of the existing ones. Sub-section (3) prescribes the requirements which have to be satisfied by an applicant, the matter with respect to which the competent authority has to be 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 buildings, playgrounds and garden proposed to be provided, (2) plans approved by the local authorities concerned which shall confirm to the rules prescribed therefore and (3) documents evidencing availability of the financing needed for constructing the proposed buildings. The authority must be satisfied before granting the permission that there is a need for providing educational facilities to the people in the locality, that there is adequate financial provision for continued and efficient maintenance of the institution as prescribed by the competent authority and evidence that the institution is proposed to be located in sanitary and healthy surroundings. The local authority or the body of person 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 satisfy other requirements laid down by the Act, rules and the orders made thereunder, within the period specified by the authorities. In default of such compliance, it shall be competent for the authority to chance the permission. Sub-section (4) makes it punishable for anyone to establish an educational institution otherwise than in accordance with the provisions of the Act. Anyone running an institution after cancellation of the permission is also punishable.

118. 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. Section 21 deals with grant and withdrawal was of recognition of institution. It provides that the competent authority may be order in writing grant recognition to an educational institution permitted to be established under Section 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 that if any local authority or other private staff and so on. It further provides that if 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), it recognition may be withdrawn. It is not necessary to notice the other provisions in the Act.

119. 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 the 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 of admitting students into educational institutions is on the increase in the State;

And 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 avoid frustration among the meritorious and intelligent student and to maintain excellence in the students of education;

Be it enacted by the Legislature of the State of Andhra Pradesh in the Thirty-fourth year of the Republic of India as follows :"

120. The Act was brought into force on and with effect from January 30, 1993. Section 2 contains the interpretation clause. Clause (b) defines the expression "capitation fee" to mean any amount collected in excess of the fee prescribed under Section 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 made 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 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 institution shall be made only in the prescribed manner and not otherwise, and that the money so received shall be deposited and applied in the prescribed manner.

121. 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. Regulation of fees.- (1) It shall be competent for the Government by notification, to regulate the tuition fee or any other fee that may be levied and collected by any educational institution is 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."

122. Section 9 provides for penalties in case of contravention of the provisions of the Act. The punishment prescribed is not less than three years and 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.

123. The 1983 Act was amended in the year 1992 by inserting Section 3-A, which section reads as follows :

"3-A. Special provision in respect of unaided educational institutions.- Notwithstanding anything contained in Section 3 but subject to such rules a 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, Medical 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, refereed 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."

124. It is necessary to notice what precisely this section provides for. It starts with a non-obstante 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)" it then says that it shall be lawful for the management of any unaided Private Engineering College, Medical 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 50% of the seats from among those qualified in the entrance test or the qualifying examination, as the case may be the section says further- rather 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 further that 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%- so long as they have qualified in the common entrance test- without regard to the ranking and/or merit. The dispensing with of Section 5 for the above purpose is a clear indication that it is open to the institution to collect such capitation fee as

it can from such students. Of course, the 'tuition fee' shall be the same as is prescribed by the Government under Section 7.

125. Section 3-A came into force on April 15, 1992. No rules have been made by the Government under the Section so far.

126. On May 25, 1992, the Government issued a notification inviting applications for permission to establish medical, dental and engineering colleges. The last date prescribed for receipt of applications was June 8, 1992. The applicant for medical colleges had to deposit within the said date a sum of rupees one crore in cash, furnish bank guarantee for another one crore and produce evidence of financial ability to the extent of four crores. A committee was appointed to inspect the land and other facilities offered by the applicant. The committee formulated its guidelines on June 28, 1992 and submitted its report on July 21, 1992 recommending as many as 12 medical college and 8 dental colleges. The then Chief Minister approved the same on July 27, 1992 and a G.O. was issued on the same day granting permission. A number of writ petitions were immediately filed in the High Court challenging the said grant as well as Section 3-A.

127. There are a number of Private Engineering Colleges in the State. Until the current academic year (1992-1993), all the seats in these colleges were filled in by the convenor of the common entrance examination. The management had not direction or choice in the matter of admission of students. They were, however, permitted to charge a particular fees which was relatively higher than the fees charged in the Government Engineering Colleges. Nothing more. But when Section 3-A was introduced in the 1983 Act on April 15, 1992, these Private Engineering Colleges took the stand that they are entitled to admit students to the extent of 50% of the 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 July 26, 1992 not to make any admissions till the rules are made under Section 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% Indeed all this was facilities by the fact that convenor allotted students to these engineering colleges only to the extent of 50% of their respective capacity instead of 100% as usual- thereby sending an explicit single that the colleges were free to fill upon the rest on their own. Be that as it may, these admissions led to the filing of a batch of writ petitions in the Andhra Pradesh High Court. Following Mohini Jain ((1992) 3 scc 666) and also on certain other grounds, a Full Bench of the Andhra Pradesh High Court allowed the writ petitions. It declared Section 3-A unconstitutional. It also declared that the admissions made by the Private Engineering College to the extent of 50% 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.

128. Leave is granted in all the special leave petitions preferred against the Full Bench decision of the Andhra Pradesh High Court dated September 18, 1992 in Writ Petition No. 8248 of 1992 and batch. Besides the appeals, there are a few writ petitions from this state question the correctness of the dicta in Mohini Jain. ((1992) 3 SCC 666)

STATE OF MAHARASHTRA

129. 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 Permeable 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 educational should be curbed and that steps should be taken to prevent the establishment of institution set up to commercialise 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 for matters connected therewith; it is hereby enacted in the Thirty-eighty year of the Republic of India as follows :"

130. 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 under Section 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 money 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 thereunder, it shall be directed to refund the same 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 course of study in such institution, separate fee

shall have to be prescribed for aided institutions and unaided institutions. In the case of unaided institutions, the tuition fee shall be prescribed "having regard to the usual expenditure excluding any expenditure on lands and buildings or on any such 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 be. Section 7 provides for punishment which may extend to three years and fine in case of contravention of any provisions of Act or rules.

131. It is stated that the Government of Maharashtra had prescribed a uniform fee of Rs. 6500 per annum in the case of private unaided engineering colleges, which was raised to Rs. 8500 in 1991. In 1992, the fees was raised only in the case of outside students (students outside the Maharashtra State) to s. 17,000.

132. It is also stated that the Government of Maharashtra has issued a notification directing that 90% of the seats in any Private Engineering College shall be filed by nominees of the Government and the remaining 10% by the management at its discretion. In the case of medical colleges, the fee prescribed in the case of private unaided medical colleges for the current academic year is Rs. 30,000 for Maharashtra students and Rs. 60,000 in the case of outside students. 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.

133. Mahatma Gandhi Mission, Nanded, the appellant in C.A. o. 3573 of 1992 was permitted by 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 Trusts Act, 1950. The medical college is affiliated to Marathwada University and is also recognised by the Maharashtra Medical Council. The total in take capacity is 100 seats each year. The permission to start medical college was accorded to the appellant on no-grant-in-aid basis. 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 and have passed the qualifying examination in their first attempt. (There is no system of common entrance test in Maharashtra.) Admission were accordingly made for the current academic year. Soon after the decision of this Court in Mohini Jain ((1992) 3 SCC 666) a large number of students filed a writ petition in the High Court of Bombay (Aurangabad Bench) claiming refund of the fee collected from 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 August 27, 1992 directing the appellant institution to furnish a Bank guarantee to the extent of 50% of the excess amount collected by them from the students, i.e., in at sum of Rs. 42 lakhs pending disposal of the writ petition. It was further directed that pending disposal of the writ petition, the institution shall not collect any amount in excess of Rs. 3000 rom any of the students. The said interlocutory order is challenged by the appellant in Civil Appeal No. 3572 of 1992.

134. Writ Petition No. 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.

135. Writ Petition No. 678 of 1992 is preferred by Maharashtra Institute of Technology, Pune questioning the correctness of Mohini Jain ((1992) 3 SCC 666) 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/from any association to run an engineering college on self-financing basis.

TAMIL NADU

36. 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 Collecting of Capitation Fee) Act, 1992, being Act No. 57 of 1992. The Act is designed to prohibit the collection of capitation fee for admission to educational institutions is the State of Tamil Nadu and provide for matters relating thereto. The preamble to the Act recites :

"Whereas the practice of collecting capitation 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 :"

137. The Act has been given effect from August 20, 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 under Section 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. Regulation of fee, etc.- (1) Notwithstanding anything 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 so 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."

138. 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 calls upon the educational institutions to submit such returns or statements in such orm 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 thereunder. The minimum punishment is three years imprisonment which may extend up to seven years in addition to fine. Besides penalty, the educational institution is also made liable to refund the 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 convert 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. Shri. P. R. Seetharaman, learned counsel for the State of Tamil Nadu, however, filed a statement: "The Present Admission Formula in Respect of Self-financing Private Medical Colleges 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 proposal 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 up to 60% of the approved in take 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 or 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 up to 50% of the approved in take of the college under management quota. The remaining 50% of the 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 December 10, 1992.
Counsel for Tamil Nadu."

139. Shri 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 a committee to go into and free rules regulating the fee structure in self-financing Medical, Engineering and other Colleges. [Vide G.O.M. 1172 Education (JI) eptt., dated November 30, 1992.]

140. Writ Petition No. 701 of 1992 is filed by the namalai University and its Pro-Chancellor, Dr. M.A.M. Ramaswamy questioning the provisions of the above Act and the correctness of the principles enunciated in Mohini Jain ((1992) 3 SCC 666). A writ of mandamus is sought by this institution directed to the respondents (State of Tamil Nadu, Union of India and the University Grants Commission) "to forbear in any manner interfering with the right of the petitioner to collect capitation fees by 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 to cover a reasonable return on the capital investment and meet the recurring expenditure every year for 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 directing 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 and by way of payment of fees by whatever nomenclature it may be called.

141. 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 of Scheduled Castes, Scheduled Tribes and Backward Classes. Only a nominal fee is collected from them. rom 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 costs 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 or issued pursuant to the decision of this Court in Mohini Jain ((1992) 3 SCC 666). 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 impunged 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. 1. "Whether the Constitution of India guarantees a fundamental right to education to its citizens ?"

42. 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 (Express Newspapers v. Union of India (1959 SCR 12 : AIR 1958 SC 578 : (1961) 1 LLJ 339). More particularly, rom Article 21 has sprung up a whole lot of human rights jurisprudence viz., right to legal aid and speedy trial (Hussainara Khatoon ((1980) 1 SCC 98 : 1980 SCC (Cri) 40 : (1979) 3 SCR) to A. R. Antulay ((1992) 1 SCC 225 : 1992 SCC (CRI) 93), the right to means of livelihood (Olga Tellis (1985 3 SCC 545 : 1985 Supp 2 SCR 51), right to dignity and privacy (Kharak Singh ((1964) 1 SCR 332 : AIR 1963 SC 1295 : (19630 2 (Cri) LJ 329)), right to health (Vincent Panikurlangara v. Union of India ((1987) 2 SCC 165 :1987 SCC (Cri) 329 : (1987) 2 SCR 468)), right to pollution-free environment (M. C. Mehta v. Union of India ((1987) 4 SCC 463 : (1988) 1 SCR 279)) and so on. Let us elaborate.

143. In Express Newspapers v. Union of India (1959 SCR 12 :AIR 1958 SC 578 : (1961) 1 LLJ 339 it has been held :

"The freedom of speech comprehends the freedom of press and the freedom of speech and press are fundamental persona rights of the citizens."

144. 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 it 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 Kharak Singh v. state of U.P. ((1964) 1 SCR 332 : AIR 1963 SCC 1295 : (1963) 2 Cri LJ 329 decided on December 18, 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 dealt with in the several clauses of 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 Filed, J. (one of those dissenting opinions which have outlived the majority pronouncements) in unn v. Illinois ((1977) 94 US 133, 142 :24

L Ed 77 (1877))attributing a broader meaning to the word "life" in the fifth and fourteenth amendments to the US 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 sancity of a man's home as well as the dignity of the individual.

145. The minority Judges, however, placed a more expansive interpretation on Article 21. They said :

"No doubt the expression 'Personal liberty' is a comprehensive one and 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 have 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(1) are concerned."

146. In Maneka Gandhi v. Union of India ((1978) 1SCC 248: AIR 1978 SC 597)Bhagwati, J. held that the judgment in R. C. Cooper v. Union of India ((1970) 1 SCC 248 :AIR 1970 SC 564 :(1970) 3 SCR 530)has the effect of overruling the majority opinion and of approving the majority opinion in Kharak Singh.((1964) 1 SCR 332 :AZIR 1963 SC 1295 :2 Cri LJ 329)

147. In Bolling v. Sharpe (98 L Ed 884 : 347 US 497 (1953))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."

148. The word "life" occurring in Article 21 too has received a broad and expensive 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. Chandrachud ((1985) 3 SCC545 : 1985 Supp 2 SCR 51), C.J. speaking for a Constitution Bench of this Court observed : (SCC pp. 572-73 and 33).

"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 of 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 part of the constitutional right to 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 life. That, which alone makes it possible to live, leave aside what makes life livable, 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 under deserved 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 pedantry to exclude the right to livelihood rom the content of the right to life."

49. In Bandhua Mukti Morcha v. Union of India ((1984) 3 SCC 161 : 1984 SCC (L&S) 389 :(1984) 2 SCR 67)Bhaghwati, J. while affirming the proposition that Article 21 must be construed in the light of the Directive Principles of State Policy observed thus : (SCC p. 183, para 10)

"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 human 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...."

150. In D. S. Nakara v. Union of India ((1983) 1 SCC 305 : 1983 SCC (L&S) 145 :AIR 1983 SC 130)a Constitution Bench explained the significance of the addition of the expression "Socialist" in the preamble of our Constitution in the following words : (SCC p. para 33)

"During the formative years, socialism aims at providing all opportunities for pursuing the educational activity.... There will be equitable distribution of the national cake...."

151. In Vincent v. Union of India ((1987) 2 SCC 165 : 1987 SCC (Cri) 329 : (1987) 2 SCR 468)it was held by a Division Bench of this Court that : (SCC pp. 173-74, para 16)

"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 these several obligation of the State and called upon it to effectuate them in order that the resultant pictured by the Constitution Fathers may become a reality."

152. In A. R. Antulay v. R. S. Nayak ((1992) 1 SCC 225 : 1992 SCC (Cri) 329 : (1987) 2 SCR 468)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 :

153. 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 IV has been given up long ago. We may explain.

154. 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 non-justiciable. In this 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 justiciable but were directives."

155. This statement indicates the significance attached to directive principle by the funding Fathers. It is true that in State of Madras v. Champakam Dorairajan (1951 SCR 525 :AIR 1951 SC 226)fundamental rights were held pre-eminent vis-a-vis directive principles but since then there has been a perceptible shift in this Court's approach to the interplay of fundamental rights and directive principles.

156. As far back as in 1958, in Kerala Education Bill, 1957 (1959 SCR 995 :AIR 1958 SC 856) 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 on 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."

157. This is also the view taken in Mohd. Hanif Quareshi v. State of Bihar.(1959 SCR 629, 655 :AIR 1958 SC 731)

158. In Kesavananda Bharati v. State of Kerala ((1973) 4 SCC 225 : 1973 Supp SCR 1)more than one learned Judge adverted to this aspect. In the words of Hegde and Mukherjea, JJ. : (SCC pp. 502-03, paras 712, 713 and 716)

"The fundamental rights and the directive principles constitute the 'conscience' of our Constitution.... To ignore Part IV is to ignore the sustenance provide for in the Constitution, the hopes held out to the Nation and the very ideas on which our constitution is built.... [T]here is no anti-thesis between the fundamental rights and the directive principles. One supplements the other.

159. Shelat and Grover, JJ. in their judgment observed : (SCC pp. 27 and 459, paras 533 and 596).

"Both Part 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."

160. Mathew, J. while adopting the same approach remarked : (SCC pp. 875-76, para 1700)

"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, represents moral rights which they have recognised a inherent in every human being in this 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 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...."

161. Y. V. Chandrachud, J. (as he then was) put the same idea in the following words : (SCC pp. 999-1000, para 2110)

"As I look at the provisions of Part III and IV, I feel no doubt, that the basic object of conferring freedom on individuals is the ultimate achievement of the ideals set out in Part IV... (M)ay I say that the Directive Principles of State Policy should not be permitted to be come 'a mere rope of sand'. If the State fails to create conditions in which the fundamental freedom could

be enjoyed by all, the freedom of the few will be at the mercy of the many and then all freedom will vanish."

162. In State of Karnataka v. Ranganath Reddy ((1977) 4 SCC 471)Krishna Iyer, J. stated : (SCC p. 496, para 45)

"Our thesis is that the dialectics of social justice should not be missed if the synthesis of Part II and Part IV is to influence State action and court pronouncements."

163. In U.P. State Electricity v. Hari Shankar Jain ((1978) 4 SCC 16 : 1979 SCC (L&S) 481 : AIR 1079 SC 65)it was observed : (SCC p. 24, para 5)

"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 mind 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.

164. In Minerva Mills Ltd. v. Union of India ((1980) 3 SCC 625 : AIR 19980 SC 1789)Chandrachud, C.J. quoted with approval the simile 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 : (SCC p. 654, para 57)

"Those rights (fundamental rights) are not an end in themselves but are the means to an end. The end is specified in Part IV."

165. It is thus well established by the decisions of this Court that the provisions of Part 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 standpoint that Question No. 1 has to be approached.

Article 21 and Right to Education :

166. In Bandhua Mukti Morcha ((1984) 3 SCC 161 : 1984 SCC (L&S) 389 : (1984) 2 SCR 67)this Court held that the right to life guaranteed by Article 21 does take in "educational facilities". (The relevant portion has been quoted hereinbefore.) 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 hereinbefore, we hold, agreeing with the statement in Bandhua Mukti Morcha ((1984) 3 SCC 161 : 1984 SCC (L&S) 389 :

(1984) 2 SCR 67)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 ((1992) 3 SCC 666) the importance of education has been duly and rightly stressed. The relevant observations have already been set out in para 7 hereinbefore. 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 to 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 Bhartuhari (First Century B.C.) 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 secures honour at the hands of the State, not money.

A man without education is equal to animal."

167. The fact that right to education occurs in as many as three articles in Part IV viz., articles 41, 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.

168. In Brown v. Board of Education (98 L Ed 873 : 347 US 483 (1954))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 basis responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is the principle instrument in awakening the chile 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."

169. In Wisconsin v. Yoder (32 L Ed 2d 15 : 406 US 205 (1971) the court recognised that :

"Providing public schools ranks at the very apex of the function of a State".

The said fact has also been affirmed by eminent educationists of modern India like Dr. Radhakrishnan, J. P. Naik, Dr. Kothari and others.

170. 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 a law taking away the right to education, would Article 21 be attracted, according to them. This argument, in our opinion, is really born of confusion; at any rate, it is designed to confuse the issue. 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 to education is not in clouded 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.

171. In the above state of law, it would not be correct to contend that Mohini Jain ((1992) 3 SCC 666) was wrong insofar 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 meant 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 ((1992) 3 SCC 666)seems to say, yes. With respect, we cannot agree with such a broad proposition. The right to education which is 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 is 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, sickens 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 this constitution, for free and compulsory education for all children until they complete the age of 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 rightly observed by John Adams, "the preservation of means of knowledge among the lowest ranks is of more importance to the public than all the property of all the rich men in the country". (Dissertation on Canon and Feudal Law, 1765) It is this concerned which seems to underline 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." (Rauschning, 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, meant: (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 14 years, his right to education is circumscribed by the limits of the economic capacity of the state and its development. We may deal with both these limbs separately.

172. Rights to free education for all children until they complete the age of fourteen years (Art. 45). 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 time the period stipulated in Article 45- covert 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 indicated by the Constitution. The constitution contemplated a crash program 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 more 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 referred 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 in beyond question. This inversion of priorities has been commented upon adversely by both the educationists and economists.

173. Gunnar Myrdal, the noted economists and sociologists, 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 of planned targets of increased primary schooling not to be reached, whereas targets are

over-reached, 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 then primary schooling, and schooling at the territory 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 program 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."

174. In his other book Challenge of World Poverty (published in 1970, Chapter 6 'Education') he discusses elaborately the reasons for an the consequence of neglect of basis education in this country. He quotes J. P. Naik, (the renowned educationists, whose Report of the Education Commission, 1966 is still considered to be the most authoritative study of the education scene in India) as saying "Educational development... is benefiting 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 (sic). 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 Section Plan, to 34 per cent in the Third Plan, to 30 per cent in the Fourth Plan. It started going up gains only in the Fifth Plan, when it was at the level of 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."

175. 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 up to the age of 14 years.

176. This does not however mean that this obligation can be performed only thorough the State Schools. It can also be done by permitting, recognising and riding voluntary non-governmental organisations, who are prepared to impart free education to children. This does

not also meant that unaided private schools cannot continue. They can, indeed, they too have a role to play. They meet the demand of that segment of population who may not wish to have their children educated in State-run schools. They have necessarily to charge fees from the students. In this judgment, however, we do not wish to say anything about such schools or for that matter other private educational institutions except 'professional colleges'. This discussion is really necessitated on account of the principles enunciated in Mohini Jain ((1992) 3 SCC 666)and the challenge mounted against those principles in these writ petitions.

177. At this juncture, it would be appropriate to refer to the additional affidavit filed by the Union of India. In this affidavit, the present a 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 part 3 that "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 lakh habitations containing about 94% of the country's population. Growth in enrollment in the decade of 80s showed a acceleration that has now brought enrollment rates close of 100% at primary stage". Again in para 4, under the subheading "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 school run by local bodies and (sic education in) 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 up to elementary level in practically all schools is free. Other costs of education such as textbooks, 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 Tribe categories. The reason why the state Governments 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."

178. 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 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."

179. 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.

180. Before proceeding further, we think it right to say this: We are aware that "education is the 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 continuous 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 argument teacher productivity because in the absence of expenditure on other 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 the 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.

181. Right to education after the child/citizen completes the age of 14 years. 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 upon 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 the 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.

182. 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 education 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. There after, the obligation of there 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 Francis C. Mullin v. Administrator, Union Territory of Delhi.((1981) 1 SCC 608 : 1981 SCC (Cri) 212 : (1981) 2 SCR 516) While elaborating the scope of the right guaranteed under Article 21, this Court stated : (SCC pp. 618-19, para 8)

"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 thing 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 and 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 the 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 human-self."

183. We must hasten to add that just because we have relied upon some of the directive principles 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 included 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

Question Nos. 2 and 3 :

184. It would be convenient to deal with question Nos. 2 and 3 together. The contentions 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. 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 restriction, 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 educational 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 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 Government institutions. If the 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 of other meritorious students who are not able to obtain admission in the Government institutions and are also not in a position to pay the fees normally charged by such private institutions. Several facts and figures are furnished to us 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 students would not have had an opportunity of studying the course of their choice but for the existence of these private educational institutions.

(e) Mohini Jain case ((1992) 3 scc 666) 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 college, must be described as capitation fees. Saying so amounts to imposing 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 charged in Governmental institutions. The cost of educating an engineering or a medical graduate is very high. All that cost is borne by the State in Governmental colleges but the State does not subsides the private educational institutions. The private educational institution have to find their own finances and that can come only from the students.

(f) Even if the right to established an educational institution is not trade or business within the meaning of Article 19(1)(g), it is certainly an 'occupation' within the meaning of the said clause. Indeed, the use of the four expressions- profession, occupation, trade or business- in Article 19(1)(g) was meant to cover the entire filed of human activity. In such a situation, it is not necessary for the petitioners to pinpoint to which particular expression 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-financial/cost-based private educational institutions. This right can be restricted only by a law as contemplated 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 the 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 a 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 filed of medicine to the students belonging to Gulbarga, Raichur and Bidar districts, formerly included within the Nizam's dominions and which were included in the State of Karnataka on the recognition of States. Similarly, the Kempe Gowda Medical College in Karnataka, it is submitted, has been established by members of Vokkaliga community. Their wishes and objective 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. Is 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 meaning 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 III. It may be 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.

185. On the other hand, it is contended by the learned counsel for the respondents as also by the learned counsel for India Medical Council and All India Council for Technical Education that-

(a) imparting of education has always been recognised in this country from time immemorial as the religious duty. Both Hinduism and Islam treated it as such. It has also been recognised as 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. As a far back as in 1956, the Parliament expressed its intention by enacting the University Grants 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 Legislature since then.

(b) Imparting of education is the most important function of the State. This duty may be discharged by the State directly or though 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 determinant 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 an 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 so 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 therefrom 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 implicit 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 is closely intertwined with governmental activity, characterises their action 'State action'. 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 charged from them.

186. 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 :

187. The University Grants Commission Act was enacted by the Parliament in 1956 to provide for the coordination and determination of standards in Universities and for that purpose to establish a University Grants commission. Chapter III deals with the powers and functions of the Commission. Section 12 empowers the Commission to take, in consultation with the Universities and other concerned bodies, all such steps as it may think fit for the promotion and

coordination of 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) in sub-section (1) defines the expression 'affiliation'. It reads :

"12-A. (1)(a) 'affiliation' together with its grammatical variations, includes in relation to a college, recognition of such college by, association of such college with, and admission of such college to the privileges of, a University;"

Clause (b) defines the expression 'college' in the following words :

"12-A. (1)(b) 'college' means any institutions, 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;"

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 hat 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". It would be appropriate to set out sub-section (2) in its entirety. It reads :

"12-A. (2) Without prejudice to the generality of the provisions of Section 12 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 by regulations the matters in respect of which fees may be charged, and the scale of fees in accordance with which fees shall be charged in respect of those matters on and from such date as may be specified in the 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 of 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."

Sub-section (3) then says that where regulations of 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 with holding 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 under Section 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 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 :

188. 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 centre 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 provides 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 included in Part I of the Third Schedule shall also be recognised medical qualifications for the purposes of the Act. Section 19 provides for with-drawal of recognition in cases where the Council finds lowering of standards of proficiency, knowledge or skill. Section 21 provides for the maintenance of an Indian Medical Register. Section 27 says that a person registered in the Indian Medical Council Register shall be entitled to practice as a medical practitioner in any part 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 First 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 :

189. This Act has been made by the Parliament for the establishment of the "All India Council for Technical Education' with a view to the proper planning and coordinated development of the technical education system throughout the country, promotion of qualitative improvement of such education and other allied matters. Section 3 of the Act provides for the establishment of the 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 coordinate 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 tuition and other fees; (k) grant approval for starting new technical institutions and for introduction of new courses or programmes in consultation with the agencies concerned, and (n) take all necessary steps to prevent commercialisation of technical education". It is true, there is no express provision in the Act which says that no engineering college or any other college 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 be exercised by the Council itself if it thinks necessary to do so. We are of the opinion that the vast powers conferred upon the Council by Section 10, including those specified above, do extend to and entitle it to issue an order to the above effect. It can also say that even in the existing institutions, no new course, faculty or class shall be opened except with its approval. It can also pass appropriate directions to the existing institutions as well for achieving the purposes of the Act. Such an order may indeed be necessary for a proper discharge of the wide-ranging functions conferred upon the Council.

190. It is brought to our notice by the learned counsel appearing for the Council that the Council has evolved a pro forma of undertaking which should be executed by the person in charge of any institutions proposed to be established stating inter alia that such institution will not only observe the several orders and instructions issued by the council but it shall not charge any capitation fee from the students/guardians of the students in any form. The pro forma further stipulates that in the event of non-compliance with any of the orders and directions issued by the Council or the terms of the undertaking, it shall be open to the Council to take appropriate action including withdrawal of its approval or recognition, which automatically entails 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 Engineering Degree and Engineering Diploma programs in G.S.R. 320, dated June 15, 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 :

191. As mentioned in Part I of this judgment, the State of Andhra Pradesh, Karnataka, Maharashtra and recently the State of Tamil Nadu have all enacted legislation prohibiting the 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, 1982 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 :

192. 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 August 27, 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 matter 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 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 :

193. Notwithstanding the fact that education is the second highest sector of budgeted expenditure after 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 eighty 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 hereinbefore. 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 private educational institutions to fill the avoid, 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 more resources and also because the need in constantly growing, it is not possible to do without private educational institutions. In this context, it is appropriate- any, necessary, to notice the stand of the Government of India in this behalf. It is thus; the Central Government does not 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 higher 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 is charged in Governmental institutions; in 1986, the Central Government has evolved the 'New Educational Policy'- according to it, "in the interests of maintaining the standards and for several 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 sector 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 the condition that they do not college any capitation fee according to the guidelines issued by the A.I.C.T.E., the Technical Colleges will be permitted to recover 'only a graded percentage of the average cost of student education, depending on whether the institutions is Government-funded, Government-aided or unaided'. (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 7% in unaided' 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 the concept of agency in such a situation.

(c) The principles laid down in Mohini Jain case ((1992) 3 scc 666)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 filed of education, thereby making as 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 commercialising 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."

The stand of the State Government of Andhra Pradesh, Karnataka, Maharashtra and Tamil Nadu is no different.

194. 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 so play.

195. 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 teachers 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 collage, 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 a form of aid and the conditions aforesaid have to be imposed- may be with some relaxation in the matter of fees chargeable- as 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.

196. So far as unaided institutions are concerned, it is obvious that they cannot be compelled to charge the same free 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 very 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 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 standpoint of interest of general public, commercialisation is positively harmful; it is opposed to public policy. As we shall presently point out, this is one of the prisons for holding that imparting education cannot be trade, business or professiona. 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 :

197. Article 19(1)(g) of the Constitution declares that all citizens of this country shall have the right "to practice any profession, or to carry on any occupation, trade or business". Clause (6) of Article 19, however, says :

"Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law insofar as it 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 sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law insofar as it relates to, or prevents the State from making any law relating to,-

(i) the professional or technical qualifications necessary for practicing any profession or

carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise."

While we do not wish to express any opinion on the question whether the right to establish an educational institution can be said to be carrying on any "occupation" within the meaning of Article 19(1)(g),- perhaps, it is- we are certainly of the opinion that such activity can neither be a trade or business nor can it be a profession within the meaning of Article 19(1)(g). Trade or business normally connotes an activity carried on with a profit motive. Education has never been commerce in this country. Making it one is opposed to the ethos, tradition and sensibilities of this nation. The argument to the contrary has an unholy ring to it. Imparting of education has never been treated as a trade or business in this country since time immemorial. It has been treated as a religious duty. It has been treated as a charitable activity. But never as trade or business. We agree with Gajendragadkar, J. that "education in its true aspect is more a mission and a vocation rather than a profession or trade or business, however wide may be the denotation of the two latter words....." (See University of Delhi) The Parliament too has manifested its intention repeatedly (by enacting the U.G.C. Act, I.M.C. Act and A.I.C.T.E. Act) that commercialisation of education is not permissible and that no person shall be allowed to steal a arch 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 enactments prohibiting charging of capitation fee.

198. We are, therefore, of the opinion, adopting the line of reasoning in State of Bombay v. R.M.D. Chamarbaugwala (1957 scr 874 : air 1957 sc 699) that imparting education cannot be treated as a trade or business. Education cannot be allowed to be converted into commerce nor can the petitioners seek to obtain the said result by relying upon the wider meaning of "occupation". The content of the expression "occupation" has to be ascertained keeping in mind the fact that clause (g) employs all the four expressions viz., perfusion, 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 Sakharkherda Education Society v. State of Maharashtra (air 1968 Bom LR 690) Andhra Kesari Education Society v. Govt. of A.P. (AIR 1984 AP 251 : (1984) 1 APLJ 45)and Bapuji Educational Assn. v. State.(AIR 1986 Kant 80)

199. 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 Bharat Sevashram Sangh v. State of Gujarat ((1986 4 SCC 51, 56 : 1986 SCC (L&S) 723 : (1986) 1 ATC 348 : (1986) 3 SCR 602,609)a decision of a Bench consisting of E.S. Venkataramiah and Ranganath Misra, JJ. At page 609 (Page 56 of SCC, para 7), while dealing

with Section 33 of the Gujarat Secondary Education Act empowering the Government to take over an educational institution in certain situations for a period not exceeding five years, the learned Judges observed that "the said provision 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 a profession, occupation, trade or business.

200. Reliance is then placed upon the seven-Judge Bench decision in Bangalore Water Supply and Sewerage Board v. R. Rajappa ((1978) 2 SCC 213 : 1978 SCC (L&S) 215 : (1978) 3 SCR 207) 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.

201. So far as the other decision in State of Maharashtra v. Lok Shikshan Sanstha ((1971) 2 SCC 410 : 1971 Supp SCR 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 in here in the petitioners.

202. 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". Evidently, the reference is to such professions as may be practiced by citizens i.e., individuals. (See National Union of Commercial Employees v. M. R. Meher, Industrial Tribunal (AIR 1962 SC 1080, 1085 : 1962 Supp 3 SCR 157 : (1962) 1 LLJ 241)). Establishing educational institutions can by no stretch of imagination be treated as "practicing any profession." Teaching may be a profession but establishing an institution, employing teaching and non-teaching, staff, procuring the necessary infrastructure for running a school or college is not practicing profession. It may be anything but not practicing a profession. We must make it 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 the succeeding paragraphs. Out main concern in the entire preceding discussion is only to establish that the activity of establishing and/or running an educational institution cannot be a matter of commerce.

203. For the purpose of these cases, we shall proceed on the assumption that a person or body of persons has a right to establish an educational institution in this country. But this right, we must make it clear, is not an absolute one. It is subject to such law as may be made by the State in the interest of general public.

204. We must, however, make it clear, and which is of crucial importance herein, that the right to establish an educational institution does not carry with it the right to recognition or the right to affiliation. In Ahmedabad St. Xaviers College Society v. State of Gujarat ((1974) 1 SCC

717 : (1975) 1 SCR 137)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 administer educational institutions. Recognition may be granted either by the Government or any other authority or body empowered to accord recognition. Similarly, affiliation may be granted either by the University or any other academic or other body empowered to grant affiliation to other educational institutions. In other words, it is open to a person to establish an educational institution, admit students, impart education, conduct examination and award certificates to them. But he, or the educational institution has no right to insist that the certificates or degrees (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 recognition or affiliation from the appropriate agency. Grant of recognition and/or affiliation is not a matter of course nor is it a formality. Admission to the privileges of a University is a power to be exercised with great care, keeping in view the interest of the general public and the nation. It is a matter of substantial significance- the very life-blood of a private educational institution. 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 other Universities in the country. Unless it is recognised and/or affiliated as stated above it's 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 sent 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, 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 idle to contend that imparting of education is a business like any other business or that it is an activity skin to any other 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.) The private educational institutions cannot award their own degrees. Even if they award any certificates or other testimonials they have no practical value inasmuch as they are not good for obtaining any employment under the State or for admission into higher courses of study. The private educational institutions merely supplement the effort of the State in educating the people, as explained above. 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 itself or its power and privilege to be used unfairly. The incidents attaching to the main activity attach to 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 hereinbefore- the following scheme which every authority granting recognition/affiliation shall impose upon the institutions seeking such recognition/affiliation.

205. 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 anyone on 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 institution by itself 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 statutory shape by incorporating it in the rules that may be framed under these enactments.

S C H E M E

206. The scheme evolved herewith is in the nature of guidelines which the appropriate Government 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'.

207. 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 educational institutions.

(ii) Colleges of Engineering and colleges and institutions imparting technical education including Electronics, Computer Sciences, established and/or run by private educational institutions, and

(iii) such other colleges to which this scheme is made applicably by the Government, recognising and/or affiliating authority.

208. The expression "appropriate authority" means the Government University or other authority as is competent to grant permission to establish or to grant recognition to a professional college.

209. The expression 'competent authority' in this 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.

210. It is made clear that only those institution which seek permission 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 College. 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 any Government or other body constituted by it or under any law or to any examination held any by any University unless the concerned institution and the relevant course of study is recognised by the appropriate authority and /or is affiliated to the 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 withdrawn. [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 2 SCC 410 : 1971 Supp SCR SCR 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 of no less significance].

(2) At least, 50% of the seats in every professional college shall be filled by the nominees of the Government or University, as the case may be, hereinafter referred to as 'free seats'. These students shall be selected on the basis of merit determined on the basis of a common entrance examination where it is held or in the absence of an entrance examination, by such criteria as may be determined by the competent authority or the appropriate authority, as the case may be. It is however, desirable and appropriate to have a common entrance examination for regulating admissions to these colleges/institutions, as is done in the State of Andhra Pradesh. The remaining 50% (payment seats) shall be filled by those candidates who are prepared to pay the fee prescribed therefore 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 of merit shall be followed even in such reserved categories.

(3) The number of seats available in the professional college (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 application for admission separately or individually. All the applications for admission to all the seats available in such college 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, centers and places as it may direct). The

application form shall contain a column or a separate part wherein an applicant can indicate whether he wishes to be admitted against a payment seat and the order of preference, up to three professional colleges.

(5) Each professional college shall intimate the competent authority, the State Government and the concerned University in advance the fees chargeable for the entire course commencing from 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/semester. 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 charge able 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 any- one 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 regulation under Section 12-A(3) of the U.G.C. Act, regulating the fees which the affiliated colleges, operating on no-grant-in-aid basis, are entitled to charge. The council for Technical Education may also consider the advisability of issuing directions under Section 10 of the A.I.C.T.E. Act regulating the fees that may be charged in private unaided educational institutions imparting technical education. The India Medical Council and the Central Government may also consider the advisability of such regulation as a condition for grant of permission to new medical college under Section 10-A and impose such a condition on existing colleges under Section 10-C.

(c) The several authorities mentioned in sub-paras (a) and (b) shall decide whether a private educational institution is entitled to charge only that fee as is required to run the college or whether the capital cost involved in establishing a college can also be passed on to the students and if so, in what manner. Keeping in view the need, the interest of general public and of the nation, a policy decision may be taken. It would be more appropriate if the Central Government and these several authorities (U.G.C., I.M.C. and A.I.C.T.E.,) coordinate their efforts and evolve a broadly uniform criterion 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- nay, obligation- placed upon the Governments of Andhra Pradesh, Maharashtra Karnataka and Tamil Nadu by their respective legislatures- to wit, Section 7 of Andhra Pradesh Act 5 of 1983, Section 4 of Maharashtra Act 6 of 1988, Section 5 of Karnataka Act of 1984 and Section 4 of Tamil Nadu Act 57 of 1992. Other States too may have to have similar provisions, carrying statutory force.

(7) Any candidate who fulfills the eligibility conditions would be entitled to apply for admission. After the free seats in professional colleges are filled up, at least 10 days time will be given to the candidates (students) to opt to be admitted against payment seats. The candidates shall be entitled to indicate their choice for any three colleges (if available). In such a case, he shall comply with the deposit and cash security/Bank guarantee-taking the institution charging the highest fees as the basis- within the said period of ten days. If he is admitted in an institution, charging less fee, the difference amount shall be refunded to him. (The cash security of 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 and on the notice-boards of the respective college 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.

211. 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 may think appropriate not inconsistent with this scheme, by way of elaboration and elucidation.

212. This scheme shall apply to and govern the admissions to professional colleges commencing from the academic year 1993-94.

213. We are aware that until the commencement of the current academic years, 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 there own- a uniform fee was collected from all the student .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 per cent 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 (sic devised) by us.

214. In view of the above, we do not think it necessary to go into or answer question No. 3. In 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 Fee) Act, 1983

215. Section 3-A of the aforesaid Act, as introduced by the Andhra Pradesh Amendment Act 12 of 1992, read as follows :

"3-A. Special provision in respect of unaided private educational institution- 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, medical 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 subsection (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."

216. A Full Bench of the Andhra Pradesh High 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 (Kranth Sangram Parishad v. N. J. Reddy ((1992) 3 ALT 99)). The correctness of the said decision is assailed before us.

217. 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 entitled 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 contained in Section 5 shall apply to such admissions. The section is, thus, an exception to Sections 3 and 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 a 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 application on such considerations as it may deem fit.

(c) Section 5, which prohibit collection of capitation fee by an educational institution, is expressly made in applicable 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.

218. 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 alone (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.

219. 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 severe from the main body of the Section and, therefore the whole Section is liable to fall to the ground.

220. 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 thy 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 are orders issued thereunder provide otherwise, either expressly or by implication, they would be equally bad for the reason given above.

221. 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 fact 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 all the students allotted to them. (We are told that the fees from all the students allotted to them.(We are told that the fees permitted to be collated was Rs. 10,000 per annum for the previous year.) Of course, all the available seats were filled up by students allotted by the convenor of the common entrance examination; on one could be admitted by these colleges on their own. Now, for the current year, these colleges admitted 50% of the students at their own discretion- which necessarily means collection of capitation and/or arbitrary admissions for their own 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 by themselves. Thus they have reaped a double advantage.

222. It is submitted by Shri Shanti Bhushan the learned counsel for these students that they were innocent parties and had obtained admission in a bona fide 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. Maybe, the managements were guilty of irregularity, he says, but so far as the students are concerned they have done nothing contrary to law to deserve the punishment

awarded by the Full Bench of the High Court.

223. It is true, as pointed out by the High Court that these admissions were made in a hurry but the fact remains that they have been continuing in the said course under the orders of this Court over the last about four months. As stated hereinbefore the present situation has been brought about by a combination of circumstances namely, the enactments 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. Maybe, 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 the 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 course in the counsel University engineering college. For the remaining years of their course these college 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.

224. So far as Writ Petition No. 855 of 1992 is concerned, it complains of charging of double the tuition fee in case of students, coming from outside Maharashtra. The matter stand concluded against the petitioners by a decision of a Constitution Bench of this Court in D. P. Joshi v. State of M. P. ((1955) 1 scr 1215 : air 1955 sc 334) This writ petition is accordingly dismissed.

225. 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 to 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

226. For the above reasons the writ petitions and civil appeals except W.P. (C) No. 855 of 1992, C.A. No. 3573 of 1992 and the civil appeals arising from SLP Nos. 13913 and 13940 of 1992 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 educational 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 in accordance with the scheme contained 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 quality 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 Nos. 13913 and 13940 of 1992 (preferred by students who are were admitted by private unaided engineering colleges in Andhra Pradesh, without an allotment from the venor 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 directions given in para 223 hereinabove.