Author Name: rajatpradhan

The article deals with the autonomy enjoyed by the private institutions in fixing their fee structure, and the amount of state interference.

The Law Operating In This Field

The specific question that: “How far is it permissible under the Constitution for the State to control and regulate admission and fee in private unaided educational institutions?” has bothered the Supreme Court on a plethora of occasions. The apex court in its wisdom has answered the above-mentioned question although meticulously but has left it open-ended. The primary and the contemporaneous issue that whether the constitution of India guarantees a fundamental right to education to its citizens, was answered in affirmative by the Supreme court in the case of Unnikrishnan, J.P. v. State of Andhra Pradesh. [1] An eleven judge bench of the Supreme Court for the first time, inter alia addressed the issue of fee structure in detail in the case of T.M.A. Pai Foundation &Ors. v. State of Karnataka &Ors.[2] (hereinafter referred to as the Pai Foundation case). A bench of eleven judges was constituted so that it would not be bound by any of their earlier decisions. The fact that merits consideration is that the apex court was divided in its opinion in this case, which gave rise to subsequent questions, arising from the different interpretations by the different High courts.

The apex court was vigilant enough to take into cognisance the ambiguities which had arisen from the aforesaid judgment, hence it constituted a constitution bench comprising of five judges to clarify the doubts which had arisen in the Pai foundation case. The Pai foundation case was elaborated and simplified in the case of Islamic Academy of Education and Anr. v. State of Karnataka and Ors.[3] Despite the sincere efforts made by the Supreme Court to clarify the doubts and to answer the questions which had arose subsequent to the Pai Foundation case, the Islamic Academy case had its own lacuna and failed to serve the said purpose.

Finally, in 2007 another bench of the Supreme Court comprising of seven judges in P.A. Inamdar and Ors. v. State of Maharashtra and Ors.[4] assembled to clarify the Pai Foundation case and to address the issues which had cropped up pursuant to the Islamic Academy case. The apex court for the first time delivered a unanimous opinion. The decision in the Inamdar case illuminated several vital aspects which were conducive towards the answering of several questions posed after the Pai foundation and the Islamic Academy cases.

However, even after the decision in the Inamdar case there are still some doubts or grey areas in relation to the question of extent of State control over the private unaided institutions imparting education. The same conclusion can be derived on perusal of Para 153 of the Inamdar judgement which is being mentioned herein:

"153. There are several questions which have remained unanswered and there are certain questions which have cropped up post Pai Foundation and Islamic Academy. To the extent the area is left open, the Benches hearing individual cases after this judgment would find the answers. Issues referable to those areas which are already covered by Pai Foundation and yet open to question shall have to be answered by a Bench of a larger coram than Pai Foundation. We leave those issues to be taken care of by posterity."

The same view has been expressed by the Supreme Court in some of the very recent judgments. The apex court after carefully marshalling its three aforesaid judgements was of the following opinion:

In Modern Dental College & Research Centre v. State of M.P[5] the apex court opined:
".....Thus, it is evident that even in Inamdar case, it has been observed that there are still some doubts or grey areas in relation to the question of extent of State control over the private unaided institutions imparting professional education."

The Supreme Court reiterated the above notion vis-à-vis fee structure, in Action Committee, Unaided Private Schools of Delhi v. Director of Education [6] in the following words.

"24. In this context it may be noted that in T.M.A. Pai Foundation Case and in Islamic Academy of Education the principles for fixing fee structure have been illustrated. However, they were not exhaustive. They did not deal with determination of surplus and appropriation of savings."

The open ended question post Inamdar case is 'to what degree the State can interfere with respect to private unaided institutions.'

The Mandate of the Constitution and the reality
In a democratic and welfare country like India, the state has the primary responsibility to impart education among all ages of students. The constitution has through Ar. 21-A specifically mandated that it shall be the duty of the Government to impart free and compulsory education among students of six to fourteen years of age. Education and matters incidental to it have been incorporated in Entry 25[7] of the Concurrent list or List III (mentioned in schedule VII) of the Constitution of India. But the same is subject to entries 63, 64, 65 and 66 of List I. The intention of the legislature by the said entries is that education is both a State and Union subject, i.e. matters pertaining to education are to be dealt both by the state and the union. Both, the centre and the state governments are within their legislative competence to enact laws pertaining to education. But, it is well settled that in case of conflict between the State and Union laws, the latter prevails.

Ar. 41 of the Constitution which is a directive principle of State policy, inter alia, contemplates that the State within the limits of its economic capacity and development,

make effective provision for securing the right to education. The article does not prescribe any particular age group of students for which this right is to be secured as contrasted from Ar. 21-A of the Constitution. The article being only a directive is unenforceable in a court of law as different from Ar. 21-A which is enshrined in the form of a Fundamental right of children. But the fact that merits attention in Ar. 41 is that the right can only be secured within the limits of economic capacity of the State. A state has to cater to the multiple needs of its citizens, which no doubt requires a large amount of capital, which it indirectly receives either from the Union or from the taxes or revenues collected by it. The state due to financial constraints is often unable to secure effectively all the rights which have been mandated by the Constitution. The right to education is not an exception to this notion and it has clearly been expressed by the Supreme Court in the following judgment. The same notion has been acknowledged by the apex court in the Islamic case[8] as follows:

“Imparting of education is a State function. The State, however, having regard to its financial and other constraints is not always in a position to perform its duties. The function of imparting education has been, to a large extent, taken over by the citizens themselves. Some do it as pure charity; some do it for protection of their minority rights whether based on religion or language and some do it by way of their "occupation". Some such institutions are aided by the State and some are unaided.”

The necessity of Private Unaided Educational Institutions

Specifically Article 38 harmoniously read with Articles 41, 45 and 46 of the Constitution proclaims about education of the people, naturally subject to availability of the funds, is the duty of the States. But if state is not in a position of provide equal opportunities of the education to all sections of the human being it may liberate the opportunities through private educational institutions. The words "within the economic capacity" in Article 41 empowers the states to permit the private educational institutions to be established and administered on its own. And for this they should have their funds which will naturally and reasonably be incurred from the students in the form of fees collected from them by the institutions.[9]

Hence, the need of private institutions crops up. Private unaided institutions are the bulwark of Right to education and the reality is that in the present scenario they are a necessity. The same principle has been acknowledged by the apex court:

InUnniKrishnan’s[10] case, it has been observed by Jeevan Reddy, J., at page 749, para 194, as follows:
"The hard reality that emerges is that private educational institutions are a necessity in the present day context. It is not possible to do without them because the Governments are in no position to meet the demand - particularly in the sector of medical and technical education which call for substantial outlays. While education is one of the most important functions of the Indian State it has no monopoly therein. Private educational institutions - including minority educational institutions - too have a role to play."

Justice Kirpal,C.J (as the lordship was at that time) in the Pai Foundation case recognised the importance of private unaided educational institutions by citing dismal figures that while the number of Government colleges in certain states had remained stagnant, private institutions had constantly mushroomed:

39. “That private educational institution are a necessity becomes evident from the fact that the number of government-maintained professional colleges has more or less remained stationary, while more private institutions have been established. For example, in the State of Karnataka there are 19 medical colleges out of which there are only 4 government-maintained medical colleges. Similarly, out of 14 Dental Colleges in Karnataka, only one has been established by the government, while in the same State, out of 51 Engineering Colleges, only 12 have been established by the government. The aforesaid figures clearly indicate the important role played by private unaided educational institutions, both minority and non-minority, which cater to the needs of students seeking professional education.[11]

Education as a business: lucrative and recession proof

Education no doubt is big business which in the contemporary scenario is regarded as lucrative and recession proof. The notion that education has been a business from times immemorial has been acknowledged by the apex court in the case of Modern School v. union of India[12] in the following words: (Paras 3, 4 and 5 of the judgement)

“3. In modern times, all over the world, education is big business. On 18th June, 1996, Professor G. Roberts - Chairman of the Committee of Vice-Chancellors and Principals commented:"The annual turnover of the higher education sector has now passed the $10 billion mark. The massive increase in participation that has led to this figure, and the need to prepare for further increases, now demands that we make revolutionary advances, in the way we structure, manage and fund higher education."

4. In the book titled 'Higher Education Law' (Second Edition) by David Palfreyman and David Warner, it is stated that in modern times, all over the world, education is big business…”

It is for the same reason that for the past few decades India has experienced the mushrooming of private unaided educational institutions. The education sector has lately caught the attention of large MNC’s and the Corporate, experiencing large amount of investments, as the education sector is not only lucrative but recession proof. With thinning demand for real estate and growing cash constraints, many developers are now looking at thriving sectors. They are divesting in non-core businesses such as education with a conviction that it’s a recession-proof sector. High rate of return on investment coupled with huge demand-supply gap is attracting realtors to this sector, who will be comfortable setting up the required infrastructure.[13] The AEZ group has recently announced a tie-up with Mother’s Pride, a chain of schools, by investing Rs 500 crore in the company. This unprecedented investment in the education sector, although termed as a philanthropic measure by the investors, needs careful scrutiny.

In all of these cases, the central issue is that when the private party invests money in education, the question of control comes in. The experience has been that wherever private control is high, educators feel stifled and education ultimately suffers.

The Tatas and Birlas have many educational interests for a long time. In a different way, so do the Manipal Group, the Apeejay group or the Amity group. While in the former case, values and philanthropy has been the riding motive, the latter have dedicated themselves largely to education alone. Education is perhaps seen more as a commercial venture for making money. The primary question which concerns us is that whether and to what to extent the State can impose restrictions and regulations vis-à-vis the fee structure of such institutions. The primary objective of the state is to ensure that quality education is imparted by such institutions and to ensure excellence in it. However, the issue of commercialisation of education and illegal profiteering by such institutions is of paramount importance and it is in this light that the apex court has laid down the guidelines in the Pai foundation case and subsequently clarified it in the Islamic and the Inamdar case vis-à-vis fee structure.

Guidelines Laid Down By The Pai Foundation Case And Its Clarifications In The Subsequent Cases

Although the Pai foundation case overruled Unnikrishnan's case, the notion that there should be no charging of capitation fee or commercialisation of education laid down in the latter was upheld. The Pai foundation case was in consonance with the Unnikrishnan's case in this aspect. In Pai foundation case, the court was of the opinion that there has to be a distinction between the aided and non-aided educational institutions and it would be unfair to apply the same set of restrictions and regulations to the two set of institutions. The right of the private unaided educational institutions to regulate their fee structure for their respective courses derives its competence from the right to administer with sufficient autonomy. Now, the contemporaneous question which crops up is that what degree of autonomy should be permissible to these institutions and where and in which areas should the state restrictions come into play? The question has been left open by the Pai foundation and the subsequent cases. However, the answer to this question cannot be encompassed within a straight jacket formula to enable the state to interfere in the administrative matters of private unaided educational institutions in specific areas and at fixed points. Private Unaided Educational Institutions enjoy greater autonomy in matters of administration, including the fixation of fee structure

Noticing in extenso paras 68, 69 and 70 of the Pai foundation case, it was held in P.A. Inamdar's case:

"129. In T.M.A. Pai it has been very clearly held at several places that unaided professional institutions should be given greater autonomy in determination of admission procedure and fee structure. State regulation should be minimal and only with a view to maintain fairness and transparency in admission procedure and to check exploitation of the students by charging exorbitant money or capitation fees."[14]

The above notion that allows greater autonomy to private educational institutions was incorporated by the apex Court in the case of Modern School v. Union of India. The court pointed out vis-à-vis fee structure specifically, that the said institutions were allowed to generate reasonable surplus out of the fees levied, but what was prohibited was commercialisation of education. (Para 14 of the judgement is being mentioned herein)

"14. …..it is now well settled by catena of decisions of this court that in the matter of determination of the fee structure the unaided educational institutions exercises a greater autonomy as, they, like any other citizen carrying on an occupation are entitled to a reasonable surplus for development of education and expansion of the institution. Such institutions, it has been held, have to plan their investment and expenditure so as to generate profit. What is however, prohibited is commercialisation of education. Hence, we have to strike a balance between autonomy of such institutions and measures to be taken to prevent commercialization of education. However, in none of the earlier cases, this court has defined the concept of reasonable surplus, profit, income and yield…."[15]

The above notion has been reiterated by the apex court in a very recent judgement in the following words in the case of Modern Dental College & Research Centre v. State of M.P.:

"10. It was also observed, following the decision in T.M.A. Pai Foundation that greater autonomy must be granted to private unaided institutions as compared to private aided institutions the reason for this is obvious. The unaided institutions have to generate their own funds and hence they must be given more autonomy as compared to aided institutions, so that they can generate these funds. However, this does not mean that the private unaided professional institutions have absolute autonomy in the matter. There can validly be a certain degree of State control over the private unaided professional institutions for the reason that recognition has to be granted by the State authorities and it is also the duty of the State to see that high standards of education are maintained in all professional institutions. However, to what degree the State can interfere with respect to private unaided institutions is a matter deserving careful consideration."[16]

General findings of the Supreme Court vis-à-vis Fee Structure in the Pai Foundation Case

As regards fee structure of private unaided professional institutions the Supreme Court was of the opinion (Pai Foundation case):
"69… … A rational fee structure should be adopted by the Management, which would not be entitled to charge a capitation fee. Appropriate machinery can be devised by the state or university to ensure that no capitation fee is charged and that there is no profiteering, though a reasonable surplus for the furtherance of education is permissible."[17]

In the Pai foundation case, the court drew a reasonable nexus between the fixation of fees by the private unaided educational institutions and the standards maintained by them. The court accepted the harsh reality that the standards maintained in private unaided educational institutions was far better than Government institutions and curtailing their fee structure or manipulating it would give rise to unwarranted consequences affecting the excellence of such institutions. The court inter alia was of the opinion that it was in fact the standards maintained by such institutions that encouraged the students to enrol in private institutions rather in the Government institutions. The abovementioned notion was envisaged by the apex court in the Pai foundation case in the following words:

"In the case of unaided private schools, maximum autonomy has to be with the management with regard to administration, including the right of appointment, disciplinary powers, admission of students and the fees to be charged. At the school level, it is not possible to grant admission on the basis of merit. It is no secret that the examination results at all levels of unaided private schools, notwithstanding the stringent regulations of the governmental authorities, are far superior to the results of the government-maintained schools. There is no compulsion on students to attend private schools. The rush for admission is occasioned by the standards maintained in such schools, and recognition of the fact that state-run schools do not provide the same standards of education. The State says that it has no funds to establish institutions at the same level of excellence as private schools. But by curtailing the income of such private schools, it disables those schools from affording the best facilities because of a lack of funds. If this lowering of standards from excellence to a level of mediocrity is to be avoided, the state has to provide the difference which, therefore, brings us back in a vicious circle to the original problem, viz., the lack of state funds. The solution would appear to lie in the States not using their scanty resources to prop up institutions that are able to otherwise maintain themselves out of the fees charged, but in improving the facilities and infrastructure of state-run schools and in subsidizing the fees payable by the students there. The fear that if a private school is allowed to charge fees commensurate with the fees affordable, the degrees would be "purchasable" is an unfounded one since the standards of education can be and are controllable through the regulations relating to recognition, affiliation and common final examinations."[18]

Summary of Findings of the Supreme Court vis-à-vis Fee structure in the Islamic Case

The first question which came before the apex court in Islamic academy of Education v. State of Karnataka[19], which we are concerned herein, was whether the private unaided educational institutions are entitled to fix their own fee structure. Clarifying stand of reasonable fee structure as mentioned in the Pai foundation case and harmonising the interests of the educational institutions to earn reasonable surplus and to prevent the commercialisation of education, the findings of the apex court can be summarised as follows:

It was held per Khare, CJ. (for himself and for Variava, Balkrishnan and Pasayat, JJ) that so far as fee structure is concerned the majority Judgement in the Pai Foundation

case is very clear. There can be no fixing of a rigid fee structure by the Government. Each institute must have the freedom to fix its own fee structure taking into consideration the need to generate funds to run the institute and to provide facilities necessary for the students. They must also be able to generate surplus which must be used for the betterment and growth of that educational institution. Again, it was re-iterated that "the decision on the fees to be charged must necessarily be left to the private educational institutions that do not seek and which are not dependent upon any funds from the government. Each institute will be entitled to have its own fee structure. The fee structure for each institution must be fixed keeping in mind the infrastructure and facilities available, the investments made, salaries paid to the teachers and staff, future plan for expansion and/or betterment of the institution etc.[20] Of course, there can be no profiteering and capitation fee cannot be charged. It thus needs to be emphasised that as per majority Judgment in the Pai foundation case imparting the education is essentially charitable in nature. Thus, the surplus/profit that can be generated must be only for the benefit/use of that educational institution. Surplus/profits cannot be diverted for any other use or purpose and cannot be used for personal gain or for any other business or enterprise.[21]

The Court noticed that there were various statutes/regulations which governed the fixation of fee and, therefore, this Court directed the respective State Governments to set up committee headed by a retired High Court Judge to be nominated by the Chief Justice of that State to approve the fee structure or to propose some other fee which could be charged by the institute.

The position as clarified by Inamdar's case vis-à-vis Fee structure
In Inamdar's case the court classified the aggrieved persons into two classes, i.e. unaided minority and non-minority institutions imparting professional education. The third issue which came up before the bench for consideration, concerns us herein, i.e. the fee structure of such institutions.[22] As regards regulation of fee, in Inamdar's case, it was opined:

"139. To set up a reasonable fee structure is also a component of "the right to establish and administer an institution" within the meaning of Article 30(1) of the Constitution, as per the law declared in Pai Foundation. Every institution is free to devise its own fee structure subject to the limitation that there can be no profiteering and no capitation fee can be charged directly or indirectly, or in any form (Paras 56 to 58 and 161 [Answer to Q.5(c)] of Pai Foundation are relevant in this regard)."[23]

Right to Administer includes the right to fix a reasonable fee structure
Regulation of fee structure stems from the broader right to administration of educational institutions. However, this right is not absolute in nature, i.e. blanket powers to frame its rules and regulations and to set a fee structure of their own choice cannot be given to the private unaided educational institutions. The state can interfere in matters of fee regulation where it deems fit that the institution is exploiting the students by providing inadequate facilities which is not commensurate to the fee charged. However, it is not to say that these restrictions or regulations imposed by the state are always to be

regarded pristine in nature or undisputable. If the private unaided educational institutions can fairly prove that the fee structure framed by them is conducive to the welfare of the students who are being provided commensurate facilities which is to achieve the greater goal of excellence in education, then the state would be obliged to withdraw the charges or the restrictions imposed by it earlier. But the contentions of the educational institutions that the fee charged by them is reasonable and not in excess shall be supported by sufficient material to prove beyond reasonable doubt that institution is in no manner indulging in the commercialization of education.

The correct position as to the extent of state regulation on private educational institutions and the autonomy to fix the fee structure was envisaged by the apex court in the Pai foundation case in the following words: (Paras 54, 56 and 57 of the Pai foundation case are herein being produced)

“54. The right to establish an educational institution can be regulated; but such regulatory measures must, in general, be to ensure the maintenance of proper academic standards, atmosphere and infrastructure (including qualified staff) and the prevention of maladministration by those in charge of management. The fixing of a rigid fee structure, dictating the formation and composition of a governing body, compulsory nomination of teachers and staff for appointment or nominating for admissions would be unacceptable restrictions.”

“56. ….The decision on the fee to be charged must necessarily be left to the private educational institution that does not seek or is not dependent upon any funds from the Government.”

“57……There can, however, be a reasonable revenue surplus, which may be generated by the educational institution for the purpose of development of education and expansion of the institution.”

The Burning issue of Capitation Fee

The expression capitation fee does not have a fixed meaning; it neither has been defined by any central statute nor by the Supreme Court. However, different state legislatures in have defined the term differently. The Tamil Nadu Educational Institutions (Prohibition of Collection of Capitalisation Fee) Act, 1982, defines Capitation fee as:

"capitation fee means any amount by whatever name called, paid or collected directly or indirectly in excess of the fee prescribed, under Section 4;"

The expression ‘capitation fee’ as defined in S. 2(a) of the Maharashtra Educational Institutions (Prohibition of Capitation Fee) Act, (6 of 1988) is:

“ Capitation fee means ‘any amount, by whatever name called, whether in cash or kind, in excess of the prescribed or as the case may be approved, rate of fees….”

The wide prevalent notion that capitation fee is only in cash is erroneous. As the above definition suggests, capitation fee can be in kind also. The term 'kind' is of wide import and can be construed to include any property, favour, a commodity or anything which is given not being commensurate to the fee charged.

The Right of Children to free and Compulsory Education Act, 2009 defines capitation fee in S. 2(b) as follows:
"Capitation fee means any kind of donation or contribution or payment other than the fee notified by the school."

On perusal of the above two definitions it is evident that the term capitation fee may have different characteristics at different levels of education. At the primary or elementary level, the term is confined to donation or contribution, whereas at the higher education level the term in addition to the meaning attributed to it at the primary level also envisages the qualities of favours.

The prohibition against the charging of capitation fee has been laid down by the Supreme Court in a catena of judgments. However, the reality is that the unscrupulous activity of charging capitation fee is still being marshalled by some of the institutions. The need of the hour is to pierce the veil and to expose the activity of charging capitation fee, which is not in consonance with the constitutional fabric. Charging capitation fee is the patent denial of the fundamental right to education of citizens of India.

The question arose for the first time before a two Judge bench of the Supreme Court in Mohini Jain v. State of Karnataka[24], in the following context:
With a view to eliminating the practice of collecting capitation fee for admitting students in educational institutions, the Karnataka Legislature passed an Act purporting to regulate tuition fee in private medical colleges in the State. By issuing a notification under the act, the Government fixed Rs. 2000/- per year as tuition fee payable by candidates admitted against 'government seats', but other students from the State were to pay Rs. 25,000/- per annum. The Indian students from outside the State were to pay Rs. 60,000/- per annum. On a writ petition filed by an out of the State student, the Supreme Court quashed the notification under Ar. 14.In justification of the notification, the private medical colleges had argued that they did not receive any financial aid from the Government and so they must charge much higher fees from private students to make good the loss incurred o government students.

"The bench characterised capitation fee as "nothing but a price for selling education" which amounts to commercialisation of education adversely affecting educational standards, characterising such institutions charging capitation fee as "teaching shops". "The concept of teaching shops is contrary to the constitutional scheme and is wholly abhorrent to the Indian culture and heritage."

Thus, the notion which was first observed in Mohini Jain's case[25], was upheld in the Unikrishnan's case[26], in Father Thomas Shingare and others v. State of Maharashtra

and others[27], the Pai foundation case[28], Islamic Academy of Education[29], Modern School v. Union of India[30], P.A. Inamdar and finally in Modern Dental College & Research Centre v. State of M.P[31] in the following words:

"17……Capitation fee is prohibited, both to the State Government as well as the private institutions, vide Para 140 of Inamdar case…."[32]

The States of Tamil Nadu, Maharashtra, Karnataka and Andhra Pradesh enacted statutes prohibiting collection of capitation fee and regulating admission in professional colleges. In terms of the provisions of the said Acts, the management of the professional colleges is prohibited from charging any fee other than fee determined under the said Acts.

The Reasonable Surplus Doctrine

Private Unaided Educational Institutions are allowed to make Profits but not Profiteering.

The unanimous opinion of the Supreme Court in all the above mentioned cases was that while the private unaided institutions were allowed to make some profits, in the course of their occupation, charging of capitation fee and illegal profiteering was and is strictly prohibited. Therefore what is prohibited is illegal profiteering and not profits. The term 'profiteering' was defined by Sinha, J. in the Islamic case taking the aid of Black's law dictionary in the following manner:

"137. Profiteering has been defined in Black's Law Dictionary, Fifth edition as: "Taking- advantage of unusual or exceptional circumstances to make excessive profits."[33]

The notion that private unaided educational institutions are entitled to earn profits and not to profiteer has been affirmed by the Supreme Court in a very recent case, namely Unaided Private Schools of Delhi v. Director of Education in the following words:

"68. On a perusal of T.M.A Pai Foundation and P.A. Inamdar, it can be inferred that private unaided institutions are permitted to have a profit but not permitted to profiteer…."[34]

Reasonable Surplus

The apex court was also of the opinion that such institutions were justified in earning reasonable surplus in the course of their occupation. The apex court was of the following opinion vis-à-vis reasonable surplus in the Pai foundation case:

"69…Appropriate machinery can be devised by the state or university to ensure that no capitation fee is charged and that there is no profiteering, though a reasonable surplus for the furtherance of education is permissible….."[35]

The fact that merits attention is that the apex court has constantly reiterated that the reasonable surplus earned by such institutions can only be utilised for the purpose of education, i.e. for the expansion and augmentation of education and not for any other purpose. Further the reasonable surplus doctrine is only available to those institutions making profits out of their own investments. In the Pai foundation case it has been clearly mentioned that reasonable surplus would not come in the ambit of profiteering:

"….Reasonable surplus to meet the cost of expansion and augmentation of facilities does not, however, amount to profiteering."[36]

The above position was affirmed and further elaborated. The apex court was of the opinion that earning reasonable surplus was an integral part of an occupation, hence it was valid. Para 128 of the Islamic case is worthy of perusal in this regard:

"128…..They, (unaided educational institutions) like any other citizens carrying on an occupation, must be held to be entitled to a reasonable surplus for development of education and expansion of the institution. Reasonable surplus doctrine can be given effect to only if the institutions make profits out of their investments. As stated in paragraph 56(of the Pai foundation case), economic forces have a role to play. They, thus, indisputably have to plan their investment and expenditure in such a manner that they may generate some amount of profit. What is forbidden is (a) capitation fee and (b) profiteering."[37]

The notion of reasonable surplus was further crystallized by the apex court in the Inamdar case. In this case the court tried to explain the gist of the answers which had been formulated by the Supreme Court in the Pai foundation case as follows:

"16……A provision for reasonable surplus can be made to enable future expansion. The relevant factors which would go into determining the reasonability of a fee structure, in the opinion of majority, are: (i) the infrastructure and facilities available, (ii) the investments made, (iii) salaries paid to the teachers and staff, (iv) future plans for expansion and betterment of the institution etc."[38]

The Supreme Court for the first time in the Inamdar case after the Modern school case (2004) discussed the concepts of revenue expenditure vis-à-vis reasonable surplus, reiterating its earlier stand, but this time backing it with a cogent reason for the institutions to earn reasonable surplus in the following words:

"Equally, a reasonable surplus should be permitted so that the fees charged cover the entire revenue expenditure and in addition leaves a reasonable surplus for future expansion. This alone would prevent the clandestine collection of capitation fees and would result in entrepreneurs investing in new medical colleges."

Expense as distinct from Expenditure

Right from the Modern School v. U.O.I case to the Inamdar case, the Supreme Court has termed education as a charitable occupation. This implies that educational

institutions are run on philanthropic purposes and the accounting principles to be applied to them are that of not-for –profit or non-business organisations. In the recent years, it has been a usual phenomenon that such institutions have tried to cash in excessive profits by manipulating their books of account, showing frivolous entries which will entitle them to recover money on the annual or recurring basis, although with depreciating interest. In this regard it is imperative to get cognisant with the concepts of 'expense' and 'expenditure'. These concepts were defined by the Supreme Court in the case of Modern School v. Union of India:

"20. Under the Generally Accepted Accounting Principles, expense is different from expenditure. All operational expenses for the current accounting year like salary and allowances payable to employees, rent for the premises, payment of property taxes are current revenue expenses. These expenses entail benefits during the current accounting period. Expenditure, on the other hand, is for acquisition of an asset of an enduring nature which gives benefits spread over many accounting periods, like purchase of plant and machinery, building etc. Therefore, there is a difference between revenue expenses and capital expenditure. Lastly, we must keep in mind that accounting has a linkage with law. Accounting operates within legal framework. Therefore, banking, insurance and electricity companies have their own form of balance-sheets unlike balance-sheets prescribed for companies under the Companies Act 1956." Therefore, we have to look at the accounts of non-business organizations like schools, hospitals etc. in the light of the statute in question."[39]

Thus the fine thread which differentiates 'expense' from 'expenditure' is that while the former is on annual basis, the latter is of enduring nature and is not accounted during the financial year. The unjustified practise observed by some of the institutions is to show frivolous entries in their expense accounts so that they can incur profits on the same.

Ex. It is a usual feature that the private institutions advertise their colleges in the newspapers throughout the year. The monies incurred for the same is shown in the expense accounts. However, this practise is erroneous in nature as advertising is only a measure to popularise the brand name of such institutions and cannot be termed as a proper expense. Hence, the institutions are not entitled to earn profits on the same.

The scheme formed by the Islamic case that the books of account are to be scrutinised by a Charted Accountant acts as a safety valve against such unwarranted practices. Another feature that distinguishes expense from expenditure and which is relevant in regard to the fee charged by the institutions is that while expenses are to come out of the fee charged, whereas the expenditure has to come out of the savings of the institutions. This concept was pointed out by the apex court in the Modern school case (2004) in the following words:"21…..

Therefore, rule 177 (of the Delhi school Education act, 1973) shows that salaries and allowances shall come out from the fees whereas capital expenditure will be a charge on the savings. Therefore, capital expenditure cannot constitute a component of the

financial fees structure as is submitted on behalf of the schools. It also shows that salaries and allowances are revenue expenses incurred during the current year and, therefore, they have to come out of the fees for the current year whereas capital expenditure/capital investments have to come from the savings……."[40]

What amount of Reasonable Surplus is Reasonable?

Now, the terms 'reasonable' and 'surplus' are somewhat repugnant to each other. Although the apex court did not elaborate on the issue of reasonable surplus, abstaining from fixing a certain amount which could be called as reasonable surplus, Sinha, J. in the Islamic Academy case was of the following opinion:

"135. While this Court has not laid down any fixed guidelines as regard fee structure, in my opinion, reasonable surplus should ordinarily vary from 6% to 15%, as such surplus would be utilized for expansion of the system and development of education."[41]

However, it is submitted that in order to fix the reasonable surplus care has to be taken in respective cases. An institution charging exorbitant fees and not providing commensurate facilities to its pupils cannot be allowed to earn a reasonable surplus of 15%. The notion of reasonable surplus cannot be cabined within doctrinaire limits or generalized, hence special care has to be taken while examining the issue of reasonable surplus.

Conclusion

Although the Supreme Court has dealt the issue of fee structure in detail, it is evident as has been pointed out by the apex court itself, that the findings are not exhaustive in nature. It is my sincere opinion that the instant issue cannot be cabined within a straight jacket formula. The basic notion that has to borne in mind while forming any statute or while imposing any regulation on such institutions is that education is a charitable occupation, in which the private players are allowed to earn profits but not to profiteer, i.e. to make unreasonable or excessive profits. A harmonious balance has to be struck between the conflicting interests of the autonomy of private unaided educational institutions in fixing a reasonable fee structure on one side, ensuring that they earn a reasonable surplus, while the students are not compelled to pay exorbitant or unjustified fees, on the other hand. The golden thread which runs through this issue is that private unaided educational institutions enjoy a greater autonomy in matters of administration which encompasses the fixation of fee structure also. A workable formula, which is not rigid in nature needs to be formulated so that the institutions can be allowed to earn reasonable surplus, taking into consideration the nature of the course i.e. super speciality courses or other courses etc. The objective is not only to fix a reasonable fee structure vis-à-vis educational institutions, but that the students get commensurate facilities and quality education in exchange of the fee paid by them.

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[1] (1993) 1 SCC 645. Although this case was overruled by the Pai Foundation case subsequently, the notion that the citizens have a fundamental right to education, which

inherently flows from Ar. 21 and the practice of charging capitation fee was abhorrent to the constitutional scheme, hence prohibited, were upheld by the later. The Pai foundation case was in consonance with this case in these 2 aspects.
[2] (2002) 8 SCC 481. The majority judgment was delivered by Kirpal, CJ with Ruma Pal, S. N. Variava and Ashok Bhan, JJ concurring with him. Khare, J. delivered a separate but concurring opinion. The judgment was delivered on 31st October, 2002.
[3] (2003) 6 SCC 697. The majority judgement was delivered by Khare, CJ on behalf of Variava, Balakrishnan and Pasayat, JJ. While Sinha, J delivered a separate opinion. The judgement was delivered on 14th August, 2003.
[4] (2005) 6 SCC 537. The decision which was delivered by Lahoti, CJ.
[5] (2009) 7 SCC 751. Para 4.
[6] (2009) 10 SCC 1. Para 24, per Kapadia, J.
[7] Entry 25 of List III (VIIth schedule) of the Constitution of India: Education, including technical education, medical education and universities and universities, subject to the provisions of entries 63, 64, 65 and 66 of List I; vocational and technical training of labour.
[8] Islamic Academy of Education and Anr. v. State of Karnataka and Ors. (2003) 6 SCC 697; Para 1, per Sinha, J.
[9] ChaturbhujNathTewari, Capitation Fee Vis-à-vis Surplus Fund In Higher Education
[10] J.P. Unnikrishnan v. State of Andhra Pradesh (1993) 1 SCC 645
[11] T.M.A. Pai Foundation v. State of Karnataka (2002) 8 SCC 481, para 39.
[12] (2004) 5 SCC 583, Para 3, 4 and 5, per Kapadia, J (Khare, C.J concurring with Sinha,J. dissenting)
[13] Praveen K. Singh, - Education is recession proof.
[14] P.A. Inamdar v. State of Maharashtra (2005) 6 SCC 537, Para 129
[15] Modern School v. Union of India (2004) 5 SCC 583, Para 14
[16] Modern Dental College & Research Centre v. State of M.P. (2009) 7 SCC 751, Para 10.
[17] T.M.A. Pai Foundation v. State of Karnataka (2002) 8 SCC 481, Para 69, per Kirpal, C.J.
[18] T.M.A. Pai Foundation v. State of Karnataka (2002) 8 SCC 481, Para 61, per Kirpal, C.J.
[19] Islamic Academy of Education and Anr. v. State of Karnataka and Ors. (2003) 6 SCC 697
[20] Islamic Academy of Education v. State of Karnataka (2003) 6 SCC 697, Para 56
[21] Ibid. Paras 5 and 6
[22] P.A. Inamdar v. State of Maharashtra (2005) 6 SCC 537, Para 26
[23] Ibid. para 139
[24] (1992) 3 SCC 666
[25] (1992) 3 SCC 666
[26] (1993) 1 SCC 645
[27] AIR 2002 SC 463
[28] (2002) 8 SCC 481
[29] (2003) 6 SCC 697
[30] (2004) 5 SCCLE 583
[31] (2009) 7 SCC 751

[32] Ibid. Para 17
[33] Per Sinha,J. in the Islamic academy case, Para 137
[34] Unaided Private Schools of Delhi v. Director of Education (2009) 10 SCC 1. Per Sinha,J. Para 68. This case came before the apex court in the form of a review petition under Ar. 137 of the Constitution of India. The court reviewed its earlier decision in the case of Modern School v. Union of India (2004) 6 SCC 537. Sinha,J. dissented in this case on the same lines as he did in the Modern School case.
[35] Per Kirpal, C.J. in the Pai Foundation case, Para 69 (as per Manupatra citation)
[36] Per Kirpal, C.J. in the Pai foundation case. (answer to Q. 9)The court at this point overruled the Unnikrishnan case, but upheld it to the extent that right to education is a fundamental right and charging capitation fee is prohibited.
[37]Per Sinha, J. in the Islamic Academy Education case, Para 128 (as per Manu citation)
[38] Para 16(1) of the Inamdar case (as per Manu citation)
[39] Modern School v. Union of India AIR 2004 SC 2236, per Kapadia, J. Para 20.
[40] Ibid. Para 21
[41] Ibid. Para 135