CAPITATION FEES IN MEDICAL AND ENGINEERING COLLEGES

THE PROBLEM of capitation fees in medical and engineering colleges has been the subject of two erroneous decisions by the Supreme Court of India, *viz.*, *Mohini Jain*[1] and *Unni Krishnan.*[2]

Mohini Jain related to capitation fees in medical colleges. A bench of two judges in that case held, (*i*) that the right to education in medical colleges is a fundamental right of the citizen, enforceable against the state as well as private medical colleges (*ii*) the charging of tuition fee of Rs. 25,000 in private medical colleges as against tuition fee of Rs. 2,000 only in government medical colleges is unconstitutional. Apart from error on the merits of the decision, the judgment in *Mohini Jain* is really a non judgment, *i.e.*, *non est.*, being a flagrant violation of the imperative mandate of the Indian Constitution, article 145 (3), that the minimum number of judges who are to sit for deciding a case involving substantial question of law as to the interpretation of the Constitution *shall be five*. It is surprising that the advocates who appeared in the case submitted to a hearing of the case by a truncated bench of two judges, and failed to insist on a hearing by a Constitution Bench of five judges. Of course there is an earlier Supreme Court decision[3] that a question already decided by a Constitution Bench of five judges, will thereafter not be a substantial question of constitutional law, requiring to be decided by a bench of five judges. But the question raised in *Mohini Jain*, *viz.*, whether the right to education in a medical college is a fundamental right was not the subject of any previous decision by a Constitution Bench of five judges of the Supreme Court. Hence the case should have been decided by a bench of five judges and not a truncated bench of two judges. Apart from the constitutional infirmity, the decision itself involved the error of failing to notice that education in a government medical college is subsidised education, *i.e.*, at less than the cost of providing it, and there was no principle of constitutional law or justice of wisdom which would require private medical colleges to provide medical education at less than the cost. The other proposition of the truncated bench that the right to education in medical colleges is a fundamental right has been rightly rejected as erroneous by the subsequent Constitution Bench of five judges in *Unni Krishnan*.

In *Unni Krishnan*, the Constitution Bench of five judges was concerned with medical education as well as engineering education. And in this case the Supreme Court rightly held, (*a*) that there is no fundamental right to subsidised education *i.e.*, education at less than the cost of providing it; and (*b*) that private educational

1. *Mohini Jain* v. *State of Karnataka*, (1992) 3 S.C.C. 666.
2. *Unni Krishnan* v. *State of Andhra Pradesh*, (1993) 1 S.C.C. 645.
3. See, *Abdul Rahim* v. *State of Bombay*, A.I.R. 1959 S.C. 1315.

institutions providing medical or engineering education on cost basis are legal; and (*c*) that when private educational institutions charge permitted fees which will necessarily be higher than the subsidised fee in government colleges, that cannot be characterised as capitation fee. This was sufficient to decide the question whether the decision in *Mohini Jain* was correct. What remained was the question of price control, which is a legislative function of the legislature and not a judicial function. Of the five judges who formed the Constitution Bench in *Unni Krishnan*, Sharma C.J. (for himself and Bharucha J.) partly dissented from the other three judges, and in a single page judgment of extreme brevity observed:

> [W]e 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.... 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.[4]

But the wise caution of Sharma C.J. was not heeded by the other judges in the Constitution Bench. And Jeevan Reddy J. (for himself and Pandian J.) did not stop at deciding the question which was necessary to be decided, but proceeded to prescribe a "scheme" which the appropriate government, recognising and affiliating authorities *shall impose and implement*. According to this scheme, 50 per cent of the seats in a medical college or engineering college will be "free seats" to be given to students on the basis of merit to be determined by a common entrance examination (subject to communal reservation). The remaining 50 per cent of the seats will be "payment seats" to be given to the students of next lower merit determined by the same common entrance examination (subject again to communal reservation).

The Supreme Court after having decided that there is no fundamental right to free or subsidised education in medical and engineering colleges, has in its scheme in the same judgment provided for free education in medical and engineering colleges for 50 per cent of the students, and the cost of providing medical or engineering education has to be recovered from the parents of the remaining 50 per cent of the students. In other words the parents of 50 per cent of the students not only pay the cost of medical or engineering education of their children, but also subsidise the free education of the other 50 per cent of the students.

The Indian Constitution has adopted the principle of separation of powers between the three organs of the state, *viz*., the legislature, the executive and the judiciary. If any of these oversteps the limits of its power, it will be *ultra vires*. The doctrine of *ultra vires*, which means acting beyond one's power is applicable to the judiciary also when it usurps a legislative function.

What is the result of the Supreme Court's scheme in *Unni Krishnan*? Before its scheme in *Unni Krishnan* the tuition fee in private medical colleges in Karnataka was Rs. 25,000 for Karnataka students and Rs. 60,000 per year for

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4. *Supra* note 2 at 663-4.

students from outside Karnataka.[5] After the scheme in *Unni Krishnan* the fee structure approved by the court for medical colleges pursuant to the scheme is Rs. 1,40,000 per annum for medical colleges which have their own hospital facilities, and Rs. 1,20,000 for medical colleges partly depending on the facilities of government hospitals.[6] This is capitation fee with a vengeance and not its abolition. This is because the parents of "payment seat" students have to pay the cost of educating not only to their own children, but also the cost of providing subsidised education to the "free seat students".

There is no basis for presuming that the parents of "payment seat" students who do not have sufficient merit to qualify for admission to "free seats" are relatively more affluent. There is also no basis for presuming that the parents of "free seat" students of higher merit are relatively poor or less affluent. The classification is arbitrary and in violation of the principles of equality before the law and equal protection of the law enshrined in article 14 of the Constitution. This violation of article 14 is not by the legislature, but by the Supreme Court which is expected to be the guardian of fundamental rights declared by the Constitution. If such a scheme had been devised by the legislature the court would have struck it down.

Several petitions filed in the Supreme Court after *Unni Krishnan* were heard by the same judges who decided *Unni Krishnan*. This was because these subsequent petitions did not assail legality of the Supreme Court's scheme in *Unni Krishnan*. However, if the scheme in *Unni Krishnan* is assailed as *ultra vires*, the writ petitions will necessarily have to be heard by a different and larger bench. A writ petition may not ordinarily lie against the Supreme Court's decision. However, article 32 of the Constitution confers the right to move the court for enforcement of rights conferred by the Constitution.[7] Since the court's scheme violates article 14 which is in the Constitution,[8] article 32 should be available even against an *ultra vires* act of the Supreme Court.

It could even be argued that the Supreme Court's scheme is an advice to the legislature and does not have the effect of a decision, as the case before the court stood disposed off by the decision that there is no fundamental right to free education in medical and engineering colleges, and that when private medical and engineering colleges charge fee on cost basis that cannot be characterised as capitation fee. The scheme in *Unni Krishnan* is to be found in the judgment of Jeevan Reddy J. (for himself and Pandian J.). After referring to the University Grants Commission Act, Indian Medical Council Act, All India Council for Technical Education Act and enactments of Andhra Pradesh, Karnataka, Maharashtra and Tamil Nadu, Jeevan Reddy J. observed "it would be highly desirable if the scheme is given statutory shape by incorporating it in the rules that may be framed under the said enactments." The scheme itself is preceded by the

5. See, *supra* note 1 at 675.
6. See, *T.M.A. Pai Foundaion* v. *State of Karnataka*, (1993) IV SVLR (C) 1 at 8.
7. Pt III.
8. *Ibid.*

words "the scheme evolved herein is in the nature of guidelines which the appropriate governments and recognising and affiliating authorities shall impose and implement." The state governments failing to appreciate the *ultra vires* character of the scheme in *Unni Krishnan* have felt that they were bound to obey the scheme most religiously.

A parent whose child has been admitted to a "payment seat" can file a writ on the ground that in consequence of the Supreme Court's scheme in *Unni Krishnan*, he is made to pay the cost of not only his own child's education but also to subsidise the education of another parent's child, and this is the result of it usurping legislative power which is not vested in it under the Constitution.

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