ARTICLES 14, 21 OF CONSTITUTION : WHETHER TRIVIALISED BY HURRIED JUDICIAL ACTIVISM OF APEX COURT?

I Introduction

THE LANDMARK decision of the Supreme Court in *Unni Krishnan*,[1] dealing with the scope of the "right to education" partly overruled its earlier decision in *Mohini Jain*.[2] In *Mohini Jain*, private educational institutions were ordered by the court to stop "capitation fee" forthwith. The "right to education" in medical colleges was part of the fundamental right to life and personal liberty guaranteed by article 21. The view expressed in *Mohini Jain* was followed by the Full Bench of the Andhra Pradesh High Court in *Kranth Sangram Parished* v. *N.J. Reddy*.[3] This sudden elevation of the "right to education" to the high constitutional pedestal triggered a controversy and the matter came up before a larger Bench of five judges consisting of L.M. Sharma, C.J.,Jeevan Reddy, Ratnavel Pandian, Mohan, and Bharucha JJ. in *Unni Krishnan*. In this case some private professional colleges filed writ petitions before the Apex Court challenging correctness of the ruling in *Mohini Jain*. The Constitution Bench was concerned with both medical and engineering education.

The main questions which came up for consideration before the court were: (*i*) Whether the Constitution of India guaranteed a fundamental right to education to its citizens? (*ii*) whether a citizen of India had the fundamental right to establish and run an educational institution under article 19(1)(*g*) of the Constitution? (*iii*) whether the grant of permission to establish and the grant of affiliation by a university imposed an obligation upon an educational institution to act fairly in the matter of admission of students?

II Is "right to education" a fundamental right?

The majority agreed with the *dicta* of *Mohini Jain* that the right to education flowed directly from the right to life guaranteed by article 21 of the Constitution. However, on the content and sweep of that right, the majority in *Unni Krishnan* differed with the view adopted by Kuldip Singh J. in *Mohini Jain* and overruled the earlier decision to that extent. The court observed:[5]

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1. *Unni Krishnan* v. *State of A.P.*, (1993) 1 S.C.C. 645.
2. *Mohini Jain* v. *State of Karnataka*, A.I.R. 1992 S.C. 767.
3. (1992) 3 A.L.T. 99.
4. *Mohini Jain* "seemed to suggest that the citizens could demand that the state must provide adequate number of medical colleges, engineering colleges and other educational institutions to satisfy all their educational demands". See, S.P. Sathe, "Constitutional Law-I", XXIX *A.S.I.L.* (1993).
5. *Supra* note 1 at 732-33.

> 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....

The court declared that "a child (citizen) has a fundamental right to free education upto the age of 14 years".[6] Beyond this, the right to education, the court opined, was subject to the limits of economic capacity of the state. It conceded that "the limits of economic capacity are,... matters within the subjective satisfaction of the State".[7] In regard to the second question the court held that the activities of establishing an educational institution were kept outside the purview of article 19(1) (*g*).[8]

So far as the third and last question is concerned the court declared that since the state was the recognising affiliating authority it was under an obligation to impose such conditions as were part of its duty enjoined by article 14 of the Constitution. The court struck down section 3*A* of the Andhra Pradesh Educational Institution (Regulation of Admission and Prohibition of Capitation Fee) Act 1983, which allowed unaided private professional colleges to admit students without rank and charge the amount as they liked. It was held unconstitutional and *ultra vires* of article 14 as it gave a free hand for exploitation and commercialisation of education. The court evolved a detailed scheme for the grant of permission to recognise and affiliate educational institutions.

III Salient features of the scheme

The court divided the total seats into two categories. The first category, *viz.*, "free seats", from 50 per cent of the total seats which could be filled by the nominees of the government or university as the case may be. The students for such free seats were to be selected on merit determined on the basis of a common entrance test where such a test is held, or in its absence, by criteria as may be determined by the competent or appropriate authority, as the case may be. The remaining 50 per cent of the seats called "payment seats", could be filled by those candidates who would be prepared to pay the prescribed fees for the said seats. The allotment of student against payment seats was also be done on the basis of *inter se* merit determined on the same basis as in the case of free seats. There was no quota reserved for the management or for any family, caste, or community which might have established such a college.However, the state is competent to provide reservation of seats for constitutionally permissible categories (SCs, STs and OBCs) with the approval of the affiliating university. The number of seats available in the professional colleges could be fixed by the appropriate authority. No professional college was to be permitted to increase its strength. This scheme according to the court would apply from 1993-94.

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6. *Id.* at 735.
7. *Id.* at 737.
8. Art. 19(1)(g) guarantees to every citizen the right to carry on any trade or business or profession.

IV Conclusion

The scheme evolved by the Supreme Court in *Unni Krishnan* is in violation of the principle of equality before the law and equal protection of the law enshrined in article 14 of the Constitution. By its hurried judicial activism the apex court has sacrificed the principle of equality in favour of educational opportunities. As a result of this decision there would be two types of students, those paying less fees and known as "free seats" students, and those paying higher fees known as "payment seats" students. The latter would be able to compete for the "free seats" as well as "payments seats". The merited but less well to do students would be excluded from competing for the "payment seats". The decision has legitimised economic inequality. *Unni Krishnan* has attracted subsequent writ petitions. In the second *Unni Krishnan* case[9] the court allowed five per cent of the payment seats to be earmarked for NRIs. The quota of NRIs was raised from 5 per cent to 15 per cent for a particular year in *G.M.A. Pai Foundation (I)* v. *State of Karnataka*.[10]

It is respectfully submitted that instead of setting at rest the controversy triggered by *Mohini Jain* and *Sangram Parishad*, the decision in *Unni Krishnan* has enhanced it. The law on the subject needs a thorough reconsideration by the Legislature.

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9. (1993) 4 S.C.C. 111.
10. (1993) 4 S.C.C. 276.

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