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HIGHER EDUCATION AND DEMOCRATIC POLITICS IN POST-REFORM INDIA

by

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and approved by

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## **ABSTRACT OF THE DISSERTATION**

Higher Education and Democratic Politics in Post-Reform India

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Dr. Leela Fernandes

A puzzle of economic liberalization in democratic and democratizing countries is how reforms were implemented in rent-seeking economies where diverse interests competed with one another for monopoly over state-owned resources. In answering this question, scholars of comparative politics have drawn attention to how policymakers have tried to manage the costs for social groups that stand to lose from reform. For instance, the persistence of rent-seeking in liberalizing states has resulted from the state's attempts to placate powerful constituencies faced with adequate incentives to organize against reform. In this dissertation I use the case of post-liberalization India to contribute to this scholarship.

I argue that the Indian state has sought to manage the costs of reform by using the policy arena of education reform as a site of patronage and social management. However, such policies have had unintended consequences, as reforms have produced new elite groups that have influenced policy outcome via mobilization in non-electoral

spaces such as the judiciary. In investigating the politics of opposition by such elite groups, my dissertation shows how the Supreme Court became the site for consolidation of a post-reform entrepreneurial identity that arose at the intersection of discourses on caste, community and religion. Thereby, it also looks at the ways in which the judicial institution has traditionally served as the institutional counter-mechanism to policy-making by legislatures in democracies.

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## **CHAPTER 1**

### **Introduction**

A puzzle of economic liberalization in democratic and democratizing countries is how reforms were implemented in rent-seeking economies where diverse interests competed with one another for monopoly over state-owned resources. In answering this question, scholars of comparative politics have drawn attention to how policymakers have tried to manage the costs for social groups that stand to lose from reform (Krueger 1974, Tollison 1982, Haggard and Kaufman 1992, Varshney 1999). For instance, the persistence of rent-seeking in liberalizing states has resulted from the state's attempts to placate powerful constituencies faced with adequate incentives to organize against reform (Schamis 1999, Jenkins 1997).

In this dissertation I use the case of post-liberalization India to contribute to this scholarship. I argue that the Indian state has sought to manage the costs of reform by using the policy arena of education reform as a site of patronage and social management. However, such policies have had unintended consequences, as reforms have produced new elite groups that have influenced policy outcome via mobilization in non-electoral spaces such as the judiciary. In investigating the politics of opposition by such elite groups, my dissertation shows how the Supreme Court became the site for consolidation of a post-reform entrepreneurial identity – one that arose at the intersection of discourses on caste, community and religion. Thereby, it also looks at the

ways in which the judicial institution has traditionally served as the institutional counter-mechanism to policy-making by legislatures in democracies.

I use an extended qualitative case study that draws together two relatively understudied realms: education policy, and elite legal contestation through the Indian Supreme court. The analysis of education policy builds on and contributes to a body of literature on how the Indian state orchestrated reform via a clever rearrangement of patronage networks and creation of new sources of patronage to replace existing ones (Harriss-White 1996, Jenkins 1999, Pasha 2000). The argument is that the Indian state obtained the support of powerful groups to implement economic liberalization in key sectors, by bestowing on them the ownership of resources in other spheres of influence. The higher education sector played a very important role in accommodating these interests, preventing their imminent opposition to the reform process (Kapur and Mehta 2004, Thachil 2009).

However, the focus on higher education policy in relation to elite legal contestation and judicial decision-making produces a contrast to this literature. My dissertation demonstrates how expansion of the centralized license regime in higher education not only gave rise to a burgeoning private sector, but also led to a conflict-ridden relationship between the private sector and the liberalizing Indian state. Represented by a caucus of engineering and medical colleges from the southern and western states of the country, the private sector in higher education frequently approached the Supreme Court to challenge the state's regulatory authority. The state's policies thus

inadvertently produced opposition to its regulatory regime in higher education. Thus, the logic of post-reform licensing could not be sustained as recipients of patronage came together frequently to end the Indian state's stranglehold over higher education.

The coming together of these institutes was a significant post-reform political development, telling the story of a conflict-ridden relationship between the Indian state and a newly consolidated private sector in higher education. The alliance of private-sector colleges against the Indian state meant that disparate entities owing allegiance to a range of castes, communities and regions joined forces, regardless of prior affiliations. Viewed in context of increasing regionalization of Indian politics and greater levels of fragmentation in the electoral arena (Yadav 1999)<sup>1</sup> this was a distinctive phenomenon

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<sup>1</sup> Regionalization of Indian politics in the 1990s was a distinctive phenomenon primarily due to a transformation in the social bases of power. Yogendra Yadav's account of the new phase, which he calls the 'third electoral system' (1999) captures this process of change, 'The last decade stands out for the sudden outburst of some of the maladies inherent in our system: the endemic multiplication in the number of parties and the fractionalization of the political space; the rise of regional parties and caste-community based parties that threaten to unleash fissiparous tendencies and a clash of primordial loyalties; the end of ideology-based politics and decline of political morality; and of course excessive political corruption, non-governance, disorder and instability' (1999, 2393).

Yadav goes on to argue that these symptoms, far from signaling the rapid decline and impending collapse of Indian democracy, reflect a transformation of politics anchored in some fundamental social changes. The upsurge of people from lower rungs of the social order has meant not only that there are many more participants in India's electoral process, but also that these participants are defined by their identification with specific group traits, which determine their electoral choices. While their self-identification and choices may be limited by pre-existing categories such as caste, class, community, religion or language, it is important to recognize that the emergence of such group identities have led to variance in voting patterns resulting in frequent shifts and upheavals in electoral outcomes. These observations tie in with the argument that regionalization of Indian politics is increasingly characterized by the 'ideological depolarization' of political parties and a transformation of parties into 'pragmatic associations, basically meant to win elections and acquire political power' (Sarangi 2005: 80).

Instead of the traditional political continuum stretching from the left parties on one end to the right wing BJP on the other, political space in the 1990s reflected various kinds of fragmentations and discontinuities. The political salience of categories based on ethnic, religious, casteist, regional and linguistic agendas shrunk ideological distances on the Left-Right continuum resulting in a mindboggling number of possibilities in terms of coalitions and alliances. 'Consequently, not only are there no longer

with important implications for politics and policy. At the same time, the group of education entrepreneurs did not do away with the traditional politics of caste, religion and language. Though these entrepreneurs came together in the Supreme Court with the aim of challenging the Indian state's regulatory framework, individuals within the group adopted strategies in accordance with their communitarian affiliations. Therefore, the entrepreneurial identity came to be constructed when the discourses on caste, community, language and religion intersected with the politics of liberalization in a democratic state.

Based on evidence from litigations and historical analysis of the higher education sector, this study makes the case that liberalization transformed the higher education sector into a site for conflict management by the Indian state. Secondly, it shows how the judiciary has traditionally served as the site for interest aggregation by elite groups that influence policy outcome by circumventing electoral politics. The private sector colleges that benefitted from post-reform licensing, lay aside their caste and communitarian affiliations, and came together in the Supreme Court to fight the Indian state's regulatory framework. Thereby, they converted a sphere of intense competition among

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permanent positions, there are also no permanent friends and enemies. Support can no longer be taken for granted' (Ibid).

The upsurge of lower-caste jati clusters in states such as Uttar Pradesh, Gujarat, Maharashtra, Bihar, West Bengal and Goa during the third electoral system was consistent with this trend. At one level it appeared to be a continuation of the process kicked off in course of the previous decade; however, by the 1990s it was clear that variations in social demography and nature of cleavages meant that the trend towards homogenization translated into very different positioning of political parties in different regions.<sup>1</sup> For instance, the BJP's alliance with the OBCs in Uttar Pradesh was at variance with its representation of upper caste interests in Gujarat. Similarly, the Congress Party represented affluence and privilege in states such as West Bengal, Kerala, Delhi and Uttar Pradesh but sought votes among the lower social strata in Maharashtra and Gujarat (See Yadav 1999, 2398).

traditional social groups into an arena for cooperation and collective action by the elites within these groups. At the same time, this study demonstrates the relevance of caste community and religion to the politics of education entrepreneurs. By drawing attention to the legal debates that were rife with conflicting and contradictory interpretations of the constitution, this project furthers our understanding of political conflict and consent produced by liberalization in democratic states.

### **The Political Economy of the Private Sector in Higher Education**

This project takes off by underlining the transforming political economy of higher education in the post-reform years. Prior to the 1990s, the Indian private sector in higher education did not exist as a single entity with a definite set of interests.<sup>2</sup> The system of patronage that emerged at the level of provincial government involved

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<sup>2</sup> Historically, the public-private partnership in higher education reflected harmonious coexistence of influential societal interests with the state. In the early years of Indian independence, powerful castes and communities in control of the private sector acquiesced to a policy of active state intervention in structuring higher education.<sup>2</sup> Such acquiescence was partly in view of a newly independent country faced with the daunting task of nation building. The Nehruvian state assigned a great deal of importance to higher education, which came to be recognized as a means of economic development as well as a mortar for integration of the nation's elite<sup>2</sup>. Within this developmental framework, the private sector was roped in to supplement state effort in ensuring both equity and access in higher education. The concerns of equity and access were directly tied to the broader issues of socio-economic advancement and social justice for large segments of the population. In the backdrop of this grand narrative of development, the private sector was envisaged not as a separate entity, but as an instrument of the state for implementing its developmental agenda. The private sector's acquiescence to state-led structuring of higher education was also due to the rational considerations of its power holders. Lloyd and Susanne Rudolph's comprehensive analysis of education and politics in India established this point at the very outset. The Rudolphs (1972) argued that higher education emerged as a highly politicized terrain as it offered high stakes in the mainstream of democratic politics. Since higher education ensured rapid socio-economic mobility via entry into the expanding middle class, ruling elites and societal interest groups vied with one another to gain control over the state's higher education apparatus. In fact, the state's dominant presence in matters of admission and curriculum was a direct consequence of a vested 'public interest' in the running of private institutions. As a result the post independent higher education system in India always remained embedded in the political configurations of dominant societal interests (Rudolph and Rudolph 1972).

vertical mobilization of various castes and communities by political elites holding power in the states. Since ownership of institutions of higher education symbolized power and prestige, local caste and community organizations competed with one another for permits to establish colleges. It is also widely recognized that in some of the states such as Karnataka, private colleges were used by caste-leaders to mobilize electoral support for caste-leaders as well as raise funds for their electoral campaigns.<sup>3</sup>

The implementation of economic liberalization altered the politics of patronage in the higher education sector. Since the impetus for liberalization came from a group of technocratic leaders supported by business groups and sections of urban middle class (Weiner 1986, Kohli 1989), it was geared towards selective implementation in specific sectors such as industry and services. These measures were opposed not only by the Left parties and organized labor in the public sector, but also by various quarters within the ruling Congress Party (*ibid*). In order to pacify these groups, which were the beneficiaries of centralized licensing in liberalizing sectors, the Indian state introduced licensing in other sectors such as higher education.

During this period, the licenses to establish private colleges did not serve the purpose for mobilizing voters or generating campaign funds. Instead, patronage in the higher education sector served the purpose of compensating and placating powerful

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<sup>3</sup> Rekha Kaul's study (1993) of the capitation fee system in the southern state of Karnataka establishes the nexus of caste education and politics in facilitating private enterprise in higher education.

constituencies, which could potentially thwart the passage of liberalization.<sup>4</sup> This dovetails with the argument that expansion of the private sector in higher education was not reflective of a new set of free market policies pursued by the Indian state (Thachil 2009, Kapur and Mehta 2004). Instead, as the state retreated from key industrial sectors, it expanded the licensing regime in the higher education sector in order to co-opt these groups and push through economic liberalization.<sup>5</sup> In addition, continued patronage flows to dominant castes and communities across the country buffered decreasing public expenditure in higher education. Since the state

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<sup>4</sup>'Governing elites at many levels of the Indian polity were attracted by the potential of liberalization to provide new sources of patronage to substitute some of those forfeited by the shrinkage of the state's regulatory role' (Jenkins 1999, 06). As economic reform presented to India's ruling elites the opportunity to capture the benefits of liberalization, they resorted to a wide array of manipulative tactics to garner support of powerful lobbies and co-opt political dissidents.

Pluralist accounts of the reform process have drawn attention to the idea that economic reform in India was hardly driven by considerations such as ideology or class interest. In sharp contrast to neo-liberal and structuralist accounts, which attributed the reform process to global markets and structure of the Indian state respectively, pluralists made the case that reform would not be imminent but for machinations of India's political elites (Jenkins 1999, Varshney 1998). Arguing that reform in India was introduced by 'stealth', Rob Jenkins contended that reform was introduced via appeasement of powerful lobbies at different times under different sets of political circumstances. Similarly, Ashutosh Varshney's argument pointed to how the Congress government exploited the fear of the BJP in several constituencies to garner support for reform (Varshney 1998).

Jenkins and Varshney offer useful insights on some of the mechanisms leading to economic reform. At one level, their work accounts for the Indian state's ability maintain a distance from powerful constituencies seeking to influence policy outcomes (See Corbridge and Harriss 2000, 160). At the same time, their accounts of the reform process does not preclude the view that the Indian state was inclined to act in accordance with the interests of certain groups such as the urban and industrial elite. Corbridge and Harriss' analysis of reform states this point more clearly. Contending that the reform process was a 'partial' one, they make the claim that reforms were geared towards addressing the concerns of India's urban, industrial, agricultural and political elite without regard for impact on the poor (Corbridge and Harriss 2000, 160).

In underlining the significance of India's ruling elites in formulating and implementing specific policy measures, the works of Jenkins and Varshney must be seen as an important link between the simultaneous processes of liberalization of the economy and regionalization of Indian politics.

<sup>5</sup> Rob Jenkins (1999) characterizes this mechanism as 'reform by stealth'.



progressively withdrew from the higher education sector (chapter 2), the licenses became the de facto mechanism to pacify the groups that were invested in the enterprise of higher education.

Centralized regulation became the most enduring aspect of the post-reform system of higher education. However, the centralization of higher education policy in an era of increased financial openness, transnational corporations and information technology boom led to an interesting phenomenon. The castes and communities that hitherto existed as separate entities bearing vertical ties with provincial governments rapidly developed horizontal ties with one another. This new alliance of caste and community owned private colleges extended not only beyond traditional caste alliances in the electoral arena, but also across the states of southern and western India. The new alliance was manifest in a series of Supreme Court litigations where the private sector colleges evolved a shared entrepreneurial identity and challenged the Indian state's regulatory framework.

This project underlines how economic liberalization presented private sector colleges with new incentives and a new matrix of preferences, leading to their unique alliance against the Indian state. This phenomenon intervenes in the comparative politics literature on economic liberalization, which predicts greater levels of competition among sub-national entities in a post-reform environment (Parekh and Weingast 1997, Weingast 2000, Sinha 2004). In India, the rise of regional disparities translated into very different positioning of the states vis a vis opportunities for investment and enterprise.

As the principle of entitlement was gradually replaced by one of competition, richer and better-managed states of southern and western India surged ahead of their northern counterparts in attracting foreign investments, particularly in the sectors related to information technology and outsourcing. However, this did not preclude intense competition within the richer states. For instance Karnataka competed intensely with states such as Tamil Nadu, Gujarat and Maharashtra in order to divert foreign investment away from these established destinations. Andhra Pradesh was involved in a similar struggle with Karnataka to attract a greater share of IT companies.

At the same time, economic liberalization triggered off the alliance featuring private colleges specifically from southern and western India. It was no coincidence that the states of Karnataka, Tamil Nadu, Maharashtra and Andhra Pradesh pioneered the assault of education entrepreneurs against the Indian state. In the 1990s, rapid growth of information technology (IT) and outsourcing industries in these regional clusters<sup>6</sup> led to increased demand for technically skilled manpower suited to the restructured labor market. In fact, it was for this reason that the private sector in these four states accounted for over 50 percent of the total number of private colleges in liberalizing India.<sup>7</sup> Not surprisingly, the coalition in the Supreme Court featured colleges from Karnataka, Tamil Nadu, Maharashtra and Andhra Pradesh.

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<sup>6</sup>See Basant (2006), Bell and Albu (1999), Mytelka and Farinelli (2000), Mytelka and Pellegrin (2001)

<sup>7</sup>See chapter 2. It is also important to keep in mind that the private sector undergoing expansion comprised primarily of engineering colleges offering degrees in computer science, engineering, information sciences, telecommunications and related fields catering to the growing information technology industry

The alliance of private colleges from the four states of southern and western India demonstrates the unfolding of two contradictory trends. On the one hand, the coalition reflected the logic of the market whereby regions poised for growth demanded the end of a regulatory regime. However, the alliance also displayed a curious commonality of interest among players that were engaged in competition in other sectors of the economy. The inter-caste, inter-state alliance of private colleges, which battled the Indian state, problematizes the correlation between liberalization and competition, and questions uncritical acceptance of the argument that liberalization intensified political competition among regional groups in Indian politics (Sarangi 2000, Hasan 2004). Rather, by drawing attention to how democratic states adopt strategies to manage the costs of liberalization, this study offers a more nuanced analysis of the relationship between economic liberalization and democratic politics.

### **Litigations and Elite Contestation**

I show that the legal battles on higher education policy represented a crystallization of the conflict arising out of larger socio-economic transformations in the post-reform scenario. Analysis of Supreme Court cases captures the evolving conflictual relationship between the Indian state and the expanding private sector in higher education. The private sector's long-drawn battle for autonomy allows us to observe the gradual shifts in strategies of litigants and the corresponding constitutional interpretations by the Supreme Court. Thus the legal policy process enables us to grasp the interaction of structural factors (lack of public funding, rise of demand for professional education and

therefore the feasibility of investing in engineering colleges) with discursive shifts reflective of a changing post-reform politics.

*Table 1: List of Supreme Court litigations concerning regulation of the private sector*<sup>8</sup>

Case	Year
D.P. Joshi v. State of Madhya Bharat	1955
Mohini Jain (Miss) v. State of Karnataka	1992
Unnikrishnan J.P. and Ors v. State of Andhra Pradesh and Ors.	1993
TMA Pai and Ors. v. State of Karnataka and Ors.	1995
TMA Pai and Ors.v. State of Karnataka and Ors.	1996
TMA Pai and Ors. v. State of Karnataka and Ors.	2002
Islamic Academy of Education and Ors. v. State of Karnataka and Ors.	2003
P.A. Inamdar and Ors. v. State of Maharashtra and Ors.	2005

The first of the 8 Supreme Court litigations concerning regulation of higher education was the only such case prior to liberalization. *D.P. Joshi v. the State of Madhya Bharat* in 1955 was followed by a long hiatus of thirty seven years, until *Mohini Jain v. the State of Karnataka* (1992) triggered off a series of seven cases spanning thirteen years. While

<sup>8</sup> The complete list of Supreme Court litigations concerning regulation and autonomy of private professional colleges was ascertained in course of the pilot study conducted in 2008. I used a tool called the 'Supreme Court Key', which generated exhaustive lists of Supreme Court litigations based on specific keywords. I obtained the list of eight litigations by using the following keywords simultaneously: capitation fees, autonomy, regulation, private colleges.

individual petitioners approached the Supreme Court in 1955 and 1992, it was the caucus of private colleges from southern and western India that figured in the remaining six litigations spanning the years between 1993 and 2005. These observations point to the emergence and intensification of the cross-regional, cross-caste alliance in the 1990s. While there is no empirical evidence of such horizontal mobilization in the pre-reform period, it is possible to argue that the weak nature of mobilization prevented its manifestation in the Supreme Court. In addition, limited centralized regulation prevented the appearance of such interest groups at the national level.

The study of litigations and education entrepreneurs assumes importance in light of the argument that the Indian judiciary has been a popular institutional means for elite groups to stake their claims in Indian democracy and articulate a 'politics of opposition' against the Indian state (Baxi 199, Galanter 1981). This phenomenon acquired greater significance since the 1970s with the upsurge of backward castes and various regional groups in the mainstream of electoral politics. This regionalization of Indian politics (Bardhan 1998, Yadav 1999, Corbridge and Harriss 2000, Hasan 2004) was accompanied by the gradual withdrawal of upper castes, upper classes and the urban middle classes from the rough and tumble of electoral politics. As these numerically insignificant groups retreated from the electoral arena, they relied on alternative spheres of influence to reclaim political power from the masses and influence policy outcomes (Corbridge and Harriss 2000, Jaffrelot 1996, Fernandes 2006).

This dissertation shows how economic reform reconfigured the very definition of 'elite' in Indian politics. As beneficiaries of the new licensing regime in higher education were faced with incentives to challenge the Indian state's regulatory framework, they were able to forge a brand new elite identity, which was manifest in the Supreme Court. The new elite identity was forged in the wake of a new matrix of preferences, which prompted the elites within various social groups to find common ground for interest aggregation. This demonstrates that Indian politics has moved beyond the phase when only traditional upper-castes and upper-classes sought non-electoral means of influencing policy outcome. Rather, the traditional bases of identity have been reconfigured and existing group boundaries have been redrawn, leading to the emergence of new groups in the policy arena.

The rise of education entrepreneurs on the higher education policy terrain demonstrates the fluidity with which the category 'elite' may be redefined and reconstituted. For instance, 'elite' in Karnataka originally connoted landowning castes in the countryside, which went on to establish institutions of higher education. However, the conception underwent incremental change as a wide array of castes and communities were gradually inducted into the business of higher education (Chapter 3). In the post-reform years, the definition of 'elite' was drastically reconfigured to assume an entrepreneurial character in course of the Supreme Court litigations. Such coherence of the private sector's entrepreneurial identity - regardless of proven allegiance of litigating colleges to caste, communitarian and linguistic organizations – underlines the need to pay attention to definitions of concepts and categories. The following segment

builds on this idea and explains why such fluidity of categories reflects the politics of transition in the liberalizing Indian state.

### **Education Entrepreneurs and the Politics of Post-reform Transition**

The unfolding of the post-reform politics of higher education gave rise to the entrepreneurial solidarity of private sector colleges. My analysis of this new entrepreneurial identity brings to focus the politics of transition in the liberalizing Indian state. With liberalization as the backdrop for a new politics of higher education, the debates in the Supreme Court reflected emergence of the new entrepreneurial solidarity; at the same time they demonstrated the resilience and relevance of existing categories such as caste, community and religion. Interestingly, TMA Pai's victory in 2002 was based on the constitutional right of minority communities to establish and administer educational institutions. This was a clear departure from the debates in *J.P. Unnikrishnan v. the State of Andhra Pradesh* (1993) where petitioners challenged state regulation by invoking the fundamental right to conduct trade business and enterprise.

Similarly, the Supreme Court's checkered response to demands raised by private college managements reflected the paradoxical nature of a democracy caught in the process of transition. Unable to transcend the legacy of the Nehruvian developmental state, the sanction for entrepreneurial activity in higher education followed a rather circuitous route. Not only did it require a decade long tussle between private managements and the state in the country's highest court of law, but also was a result of some

unprecedented constitutional interpretations by the Supreme Court.<sup>9</sup> In particular the TMA Pai verdict of 2002 was manifestation of contradictions as it invoked the rights of religious and linguistic minorities to grant entrepreneurial autonomy to private colleges. Thus, the upholding of entrepreneurial rights had to find justification in the socio-economic and cultural guarantees of minority communities.

The TMA Pai verdict did not lead to caste and community based conglomerations in the sphere of higher education. In Karnataka, establishment of the Consortium of Medical, Engineering and Dental Colleges (COMEDK) in 2004 was a clear manifestation of the entrepreneurial identity of the private sector colleges. Private institutes, *regardless of caste and community affiliations* broke away from the state administered Common Entrance Test (CET) and came together under the umbrella of the COMEDK. The caucus was founded in immediate aftermath of the TMA Pai verdict (2002), and since then, it has been a powerful lobby influencing policy outcomes at the local and national levels.

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<sup>9</sup> Since the landmark Unnikrishnan judgment (1993) where the Supreme Court rejected the appeal to include educational institutions within the scope of the fundamental right to conduct trade or business, education entrepreneurs battled the state on several other grounds. For instance, the TMA Pai case had no reference to article 19 of the constitution. Instead, it was battled and won on the basis of Articles 29 and 30, which guarantee protection of minority interests. Significantly, the Supreme Court interpreted Articles 29 and 30 to include *all linguistic and religious denominations including the majority communities*, translating the TMA Pai verdict into an instance of conflict between fundamental rights of citizens and socio-economic rights guaranteed to groups. The victory of the former, but riding on the provisions relating to the latter tells the story of India's post-reform transition – one fraught with a tension between the high ideal of liberal democracy enshrined in the constitution and changing values and beliefs of a people in a changing socio-economic milieu. It is this contradiction that informs the politics being played out in the sphere of higher education policy – one we must unravel in order to make sense of democratic politics in contemporary India.

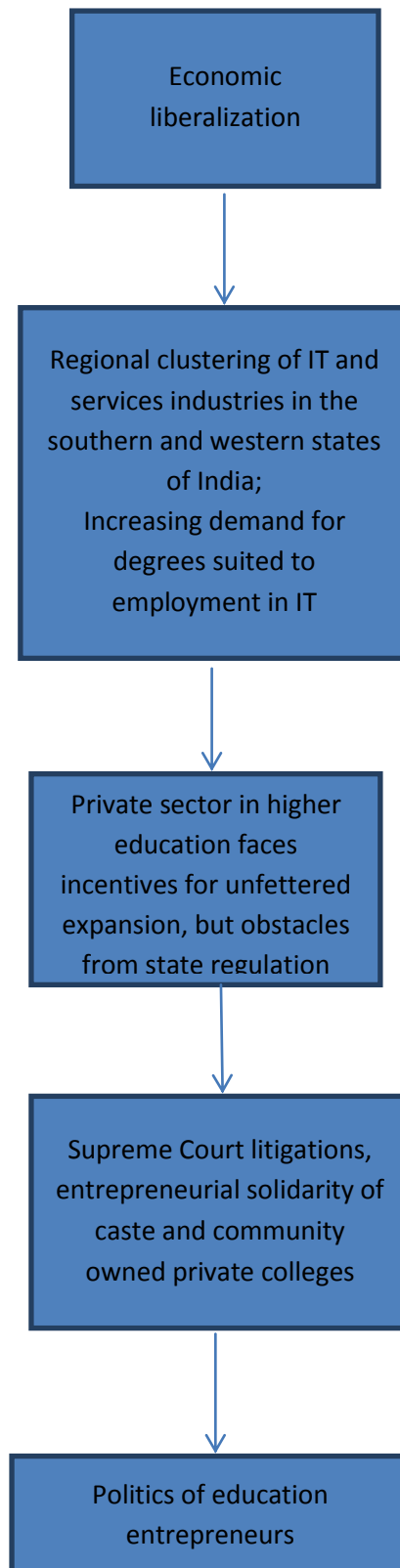


In light of evidence from the Supreme Court cases, the coalition of education entrepreneurs cannot be understood merely in relation to rational choice or political economic approaches to collective action. According to these approaches, the 'logic of collective action' is discernable, as group-formation represents the crystallization of a clearly defined set of 'selective incentives'.<sup>10</sup> However, the politics of education entrepreneurs only partially fits the classical definition of collective action. Given the new incentives for entrepreneurship in 1990s, the formation of the category of education entrepreneurs was partly an automatic outcome of the common sense profit motive. However, it was not a result of aggregating discrete expressions of class interest by individual entrepreneurs. In fact, the shifting strategies of individual colleges confounded not only the logic of the coalition, but also the stakes of individual players. It is for this reason that this study supplements the political economy approach to politics with a discursive framework suited to unraveling the politics of education entrepreneurs. It shows that the entrepreneurial identity was consolidated at the end of a *process* set in motion by economic liberalization; its boundaries were shaped by the interaction of changing strategies of entrepreneurs and inconsistent constitutional interpretations by the Supreme Court.

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<sup>10</sup> Mancur Olson (1965) Theory of Collective Action

*Figure 1: Liberalization and the Politics of Higher Education*



## **Literature Review**

### Higher Education and Politics in Comparative Perspective

Scholars and policy makers have frequently drawn attention to areas such as public spending on higher education and the rapidly changing structure, ownership and content of higher education (Chitnis 1975, Tilak 1991, 1992, Altbach 1993, 2005, Salmi 1992, Rani 2002, 2004). They have interrogated economic and political factors responsible for convergent trends as well as divergent policy trajectories in different parts of the world (Altbach et al 1982, Bums 1971, Ignas and Raymond 1981, Kogan et al 2006). Thus, existing scholarship in this area offers important perspectives on how policy at the national and local levels mediates the linkages between global economic processes and the structuring of higher education (Marginson and Van der Wende 2006).

However, studies on higher education policy have rarely been integrated into comparative analyses of democratic politics. Since higher education policy stems from the larger social, economic and political environment of a country, it is integral to and indicative of larger political shifts in a post-reform polity. This project treats higher education policy as the primary unit of analysis, but in doing so, departs from conventional studies of policy by incorporating it within a framework of comparative political analysis. The significance of this approach lies in its ability to distil the policy-specific implementation of economic liberalization, and yet map its larger implications for democratic politics.

Comparative studies of globalization and higher education show that a neo liberal economic regime does not automatically translate into reduced public spending on higher education. In fact, data from most countries under liberal economic regimes point to a relatively higher role of the state in supporting higher education. Compared to India, developed capitalist countries of North America and Western Europe spend a larger portion of the nation's GDP on higher education.<sup>11</sup> Among developing nations that implemented economic reform in the 1990s, Malaysia increased higher education spending in an era of economic openness (Thachil 2009). Among welfare states in Europe, exposure to markets had little or no consequence on existing levels of public expenditure in higher education (Tilak 2006). In light of such evidence, the retreat of the Indian state from higher education cannot be treated as natural consequence of economic liberalization. As Thachil argues, it is India's domestic level political structures that are responsible for this trend. In this study, I posit at the center of analysis, the political institutional structure that evolved over several decades, and demonstrate its role in mediating the impact of reform on policy outcomes.

Comparative studies on globalization and higher education have also highlighted the institutional and ideological constraints on policy. The expanding role of new technologies and the increasing recognition that knowledge is key to fostering economic growth and global competitiveness have erected a new contradiction – on the one hand, trade liberalization and competition are seen in terms of new opportunities for higher

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<sup>11</sup> UNDP (2011), 'International Human Development Indicators', <http://hdrstats.undp.org/en/indicators/38006.html> (accessed on 15 January, 2011).

education, but on the other hand, they raise questions about government policy commitment to higher education as a public good (See Marginson and Van der Wende 2006). This contradiction is not manifest in a uniform manner, but assumes different dimensions in accordance with local governance and policy in different contexts. Viewed in the Indian context, the influx of unaided private institutes in India's higher education landscape has raised thorny questions regarding the trade-off between the need for expansion in this sector and the imperatives of social justice. Successive policies have addressed this trade-off, demonstrating the crucial significance of policy intervention in shaping outcomes at the level of individuals and society. Viewed in this manner, the litigations offer an important perspective on how policy at the national and local levels mediates the impact of global economic processes on the structuring of higher education.

My study builds on existing scholarship on the determinants and consequences of India's higher education policy. However, in addressing the macro-economic, institutional and ideological factors shaping higher education policy, it seeks to uncover broader trends in India's post-reform politics. A basic premise informing this study is the clear linkage of politics with India's higher education system. It follows that the politics of higher education is integral to and symptomatic of the larger political processes in India's democratic politics. This is tied to the idea that the appearance of education entrepreneurs in policy and discourse is a *political* manifestation of some of the processes set in motion by economic reform. Therefore, this dissertation addresses

the ways in which the study of India's higher education sector can contribute to studying the relationship of economic reform to democratic politics.<sup>12</sup>

### The Political Economy of Higher Education in India

Scholarship on higher education in India has frequently addressed the socio-political determinants of the higher education system. The 1972 study by Lloyd and Susanne Rudolph titled 'Education and Politics in India' was the pioneering piece of scholarship, which elucidated the relationship between higher education and politics in independent India. According to the Rudolphs, the historical relationship of Indian universities with the government created a strong official interest in university affairs, curtailing the ability of universities to define their autonomy. Since higher education in independent India came to be regarded as a social right, it became integral to political demands of various societal groups, further limiting the meaning of autonomy. Though private entrepreneurship<sup>13</sup> co-existed with state patronage in this sphere, its dependence on grant-in-aids rendered it as beholden to the state in matters of curriculum, faculties and

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<sup>12</sup>The preponderance of legal cases since the early 1990s also reflects the increasing significance of higher education policy in contemporary Indian politics. Why did higher education policy emerge as a space where tensions between the existing political order and emerging interests were played out in the 1990s? The onset of economic liberalization is crucial to answering this question. Propelled by the information technology boom, the changing face of labor and employment in urban India had a large impact on higher education. The increasing demand for skills suited to the needs of IT not only transformed the topography of higher education institutes in the country, but also reproduced and reinforced the ideal of technical education (See Upadhyaya and Vasavi 2006). In such a scenario, state regulation curbing profiteering in education came directly into conflict with increasing private entrepreneurship in this sphere, leading to the series of legal battles in the Supreme Court.

<sup>13</sup> As the Rudolphs point out, three types of private entrepreneurship played a role in shaping Indian Higher education: nationalist, sectarian movement and caste community. In addition, individual philanthropists and local notables maintained private institutions (19).

admission. Consequently, not only were private colleges within reach of public authority and its definition of public interest, but also came to represent partisan and sectarian interests that could capture public resources for private ends. Private colleges, which were often institutionalized means of channeling funds for partisan interests became a convenient means of expressing political preferences as well as mobilizing resources for party politics.

The politics behind the public support of private education is further illuminated in Rekha Kaul's 1993 study of the capitation fee phenomenon in Karnataka's private professional colleges. Her finding that private educational institutions have often been used by societal groups as a means of channelizing resources for strengthening their political bases, further established the linkages between higher education and India's mainstream democratic politics. Thus, along with the Rudolphs, Rekha Kaul drew attention to the role of interest groups, patronage networks and party politics in underlining the need to view the higher education system in terms of larger processes shaping Indian democracy.

More recently, scholars of Indian politics have drawn attention to the role of existing patronage networks in facilitating privatization of higher education. As Tariq Thachil (2009) argues, the rhetoric of privatization adopted by Indian politicians had much to do with a clientilistic political system that 'created incentives for policymakers to be more concerned with ensuring continued patronage flows to their elite supporters during reform' (473). As a result, the implementation of neo-liberal economic policies by the

Indian government translated into a justification for retreat of the state in the higher education sector.<sup>14</sup> Nevertheless, the Indian state did not cease to regulate the higher education sector. To the contrary, discretionary privatization of higher education coincided with centralized regulation of this sector, which only served to create new bases of patronage. It is this logic of privatization that points to the need to focus on domestic political structures and their role in shaping the form and content of reform policies.

Devesh Kapur and Pratap Bhanu Mehta's study of Indian higher education reform squares with Thachil's arguments. According to Kapur and Mehta (2004), the ongoing de facto privatization of higher education – particularly tertiary education – is not a result of comprehensive reform or systemic overhaul following economic liberalization. Driven by a combination of ideology and vested interest, privatization resulted from 'a breakdown of the state system and an exit of Indian elites from public institutions, to both private sector institutions within the country as well as abroad' (2004, 2). They go on to argue that the pressure for expansion of higher education in the 1990s coexisted with the pressure to spend proportionately less on it. Not only did public expenditure in higher education decline in the 1990s<sup>15</sup>, but it was accompanied by the influx of private institutions claiming tax exemptions from the government. Most of these institutions derived funds not from philanthropic contributions of donors, but from hefty sums of money charged to students. In addition, several of these institutions belonged to the

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<sup>14</sup> Such a policy outcome diverged from trends in other liberalizing economies such as Malaysia, where deregulation spurred greater levels of public spending on education (Thachil 2009).

<sup>15</sup> The Punnayya Committee Report (1992-93), Dr. Swaminathan Committee on technical education (See Tilak 2004).



category of capitation fee colleges, which have been instrumental in mobilizing funds for electoral campaigns of political parties. Thus, privatization of higher education in the post-reform period was propelled by a regime of dirigisme resulting in discretionary privatization coexisting with over-regulation by the state.<sup>16</sup>

My dissertation draws from this scholarship to argue that the Indian state used the site of higher education policy as a site of social management in the post-reform scenario. However, it also pushes the boundaries of this idea and goes on to show how liberalization created incentives for beneficiaries of licensing to mobilize against the state and effect long term policy-changes in higher education. The following segment describes how an understanding of the rules of judicial decision-making further shapes this argument.

#### Law and Politics:

Comparative politics scholarship on the judiciary has spanned a wide range of issues. In context of developing societies of the non-western world, research has been directed at understanding the strengths and weaknesses of courts, their independence (or lack thereof) from pressures of democratic politics, and their role in interpreting the constitution. In response to studies on judicialization of politics (Tate and Vallinder 1997, Mehta 2007) and judicial activism (Wright 1968, Bhagawati 1984, Sathe 2001), Daniel Brinks and Varun Gauri (2008) have argued that Indian judges rarely penalized the government; rather they resorted to ‘weak remedies’ (Tushnet 2004 cited in Brinks

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<sup>16</sup> See Kapur and Mehta 2004.

and Gauri 2008) such as setting up committees and negotiation channels. In interrogating the reasons for such behavior within theories of institutionalism and civil society activism, Brinks and Gauri conclude that the judicial arena is rarely conducive to realization the social rights to health and education. But on the other hand, repeated judicial intervention in this area has served to perpetuate the rhetoric of rights instead of enumerating the means and remedies for their realization. Their conclusion that courts have at best 'played an indirect role in influencing policy' then extends to assessing the effectiveness of the judiciary in delivery of socio-economic rights.

The study of courts within the framework of institutional theories in comparative politics typically focuses on institutional rules that may be responsible for active policy-making by courts. It looks at the role of courts in vetoing policy innovations by other institutions of government. However, Brinks and Gauri suggest that institutional rules by themselves do not explain the reasons for the large volume of litigations in specific spheres of policy. The litigants' ability to generate lawsuits depends not only on the mobilization thresholds established by institutional rules, but by the responsiveness of courts and their reputation as an effective mechanism for delivery of social justice. For instance, the relatively higher volume of social rights litigation in Brazil derives from 'fairly low threshold of civil society organizational development, which is easily met whenever groups decide to pursue legal strategies' (10). But similar groups in Nigeria pursuing rights-based claims choose forums offered by local level politics and activism over the institutional forum of courts. Similarly, variations in the volume of litigation across spheres of policy have rarely to do with 'demand-side mechanisms' i.e. the ability

or resources of potential litigants. 'Given a basic level of resources, potential litigants simply create the structures they need to pursue the goals and strategies they identify. The more important constraint, then, may be the supply of judicial services appropriate to the task at hand' (14). While this may be due to the non-responsiveness of other institutional mechanisms, the strategic calculations of litigants cannot be fully appreciated without taking into account their assessment of the judiciary vis-a-vis other available forums.

Brinks and Gauri offer a foray into the mechanisms of courts, and the various factors that determine their relationship to the policy making process. Their argument that effectiveness of courts derives from a robust judicial tradition in a specific sphere of policy relates well to the idea that the Indian judiciary has traditionally served as a forum for articulating a 'politics of opposition' (Baxi 1972). In particular, the judiciary served as a forum for articulation of group interests, which failed to find expression in the electoral arena (Galanter 1971). The diversity of castes, communities and other interest groups constituting the fabric of Indian democracy meant that there were frequent conflicts over interpretations of group-based guarantees, especially when they traded off with individual rights. In such instances, the courts became the institutional mechanism for redressal of demands. They played a central role in consolidating group identities, and articulating a 'politics of opposition' against the mainstream forces in India's democratic politics.

My study of higher education litigations draws on the idea that the threshold for mobilizing litigants depends upon the court's reputation as an effective forum for achievement of desired goals. The litigating parties were political elites whose interests were reconfigured in the post-reform drive towards privatization. My study shows that the alliance of education entrepreneurs emerged from reconfiguration of elite interest, demonstrating characteristics of oppositional groups that traditionally articulated their demands in courts. As legislations on higher education sought to bring private professional colleges under the purview of regulations and caste-based reservations, owners of these institutions collectively articulated a politics of opposition against the legislative branches of government. Thus my conception of 'mobilizing thresholds' endorses the argument of Brinks and Gauri, but in doing so, proposes the idea that the dynamics of group formation and identification with specific group-traits is also central to studies of judicialization of political processes.

### Theories in Comparative Politics

This study engages with the relationship between courts and public policy, but my agenda must be distinguished from the issue of *institutional choice* (Garrett 1992, Frye 1997) in comparative politics. Mainstream analyses of institutional choice typically assign value to a societal goal and employ institutional theories to determine the efficacy of alternative institutions in attaining that goal. This tradition goes back to Ronald Coase's economic analysis of transaction costs (1960), but the framework has been employed by scholars of constitutional law and public policy seeking to further a

range of social goals or public policy choices such as resource allocation efficiency, Rawlsian justice, Lockean property rights, and equality of opportunity<sup>17</sup>. Incorporating both positive and normative components, the framework of institutional choice is geared towards studying the incentives of actors in alternative institutional settings, and predicting how their behavior will lead to specific outcomes.

My study draws on neo-institutional studies of politics, but engages with *institutional change* rather than institutional choice. It is geared towards understanding the relationship between actor preference and institutional rules in charting out a country's political trajectory. By situating litigations at the center of analysis, I seek to understand the behavior of actors who influence political processes via participation in non-electoral spaces such as the judiciary. This approach to the study of politics also throws light on the process of institutional change brought about by its interaction with society and the environment.

The idea that institutions change in response to extra institutional stimuli has been developed to a great extent by practitioners of historical institutionalism (Pierson 2004, Thelen 1999, 2003, Thelen and Steinmo 1992) as well as rational choice institutionalism (North 1990, North and Weingast 1989, Geddes 1994). In order to apply these theoretical insights to the judiciary, it is useful to reflect on the 'participation centered approach' developed by Neil Komesar in the book *Imperfect Alternatives* (1994). Komesar argues that institutional performance is shaped by a range of 'complex

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<sup>17</sup> See Neil Komesar (1994), *Imperfect Alternatives*, University of Chicago Press.

processes such as the political process, the market process, and the adjudicative process, in which the interaction of many participants shapes performance' (3). Therefore, the question of 'who decides' needs to be analyzed with respect to institutional rules, but in conjunction with the processes that impact actor preferences, and thereby, institutional performance.

Theoretically, my study engages with the question of conceptualizing the state in comparative research. Recent scholarship in comparative politics has raised questions as to its continued viability as a form of political organization (Strange 1996). The basic idea is that increased financial openness, higher volumes of trade and increased economic interdependence are sounding the death knell of the state – which after all is a national institution. In a global economy, the argument goes, states can no longer ignore the global forces of mobile capital, lack the resources to make sense of the growing complexity of industrial technologies and so on. Applying this argument to the higher education sector, it is often contended that privatization is a direct consequence of state withdrawal in an environment of fiscal deregulation and sectoral redistribution of employment.

This study contends against the above line of argument. The litigations offer adequate evidence to demonstrate the centralized regulation and licensing of higher education by the Indian state. In fact, the litigations are a manifestation of the conflict between the state and the private sector over issues of regulation and control. In light of such evidence, I draw from a different methodological orientation to studying the state. An

alternative to analyzing the strengths and capacities of territorial states is analyzing its domestic political institutions - legislative, bureaucratic, judicial and financial. Neo-institutional perspectives<sup>18</sup> are particularly prominent in this regard. By arguing that political institutions shape and aggregate societal preferences and delegate decision making authority to particular societal actors, rational choice institutionalists claim that 'electoral, legislative and bureaucratic institutions serve to mediate the pressures brought to bear by organized interests and the general public and to transform them in ways that directly affect policymaking' (Frieden and Martin 2002, 133).<sup>19</sup> By focusing on the ongoing tussle between the legislature and the judiciary for jurisdiction over higher education policy, this dissertation captures the pressures brought to bear on alternative institutions of the Indian state.

A neo-institutional approach to studying the state does not preclude a process-oriented understanding of the concept. The basic idea is that political institutions share a symbiotic relationship with the larger environment in which they are situated. This relates to the contention that isolating the state as a focus of study, or focusing exclusively on its structure, often leads to a mystification of the state and its capabilities.<sup>20</sup> It constructs a false opposition between positions that view the state as a primary actor, and those that point to its diminished relevance in a globalized world. Instead, a more useful approach is one that rejects a monolithic view of territoriality

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<sup>18</sup> Hall and Taylor (1998)

<sup>19</sup> Historical institutionalist perspectives supplement the rational-choice variant of new institutionalism by drawing attention to the role of extra-institutional factors in influencing actor preferences and shaping the trajectory of institutional development (Thelen 2000, Pierson 2004).

<sup>20</sup> See Timothy Mitchell (1991).

based solely on a modern conception of sovereign territorial space in favour of a more contingent and mutable formulation based on unit variation (See Kahler 2002). It calls for treating institutions as the unit of analysis, and considering the different relationships between the national, local and global.

Resting on some of the basic premises of neo-institutional analysis, my study of higher education policy summons different and often disparate approaches in comparative politics. Recent strides in the new-institutionalism have given an impetus to this integrationist agenda<sup>21</sup>. The shift in focus from explaining the causal primacy of political institutions to concentrating on the hitherto neglected question of institutional reproduction over a period of time<sup>22</sup> - a development tied to the new-found focus on timing, sequencing and mechanisms in studying temporal phenomena – has demonstrated the scope for synthesizing elements of rationality, structure and culture in the study of political processes. It is this integrationist approach that informs this study, and I apply it to developing a framework where litigations form the launch pad for investigating causal sequences and mechanisms.

### **A Case Study of Private Entrepreneurship in Karnataka**

If a case study may be defined as ‘an intensive study of a single unit for the purpose of understanding a larger class of (similar) units’ (Gerring 2004, 342), private entrepreneurship in higher education in Karnataka is a prototype case for privatization

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<sup>21</sup> See Lichbach and Zuckerman (1997)

<sup>22</sup> Thelen 2003, Pierson 2004



of higher education in India. This is because private ownership of engineering colleges in Karnataka dates back to the 1950s.<sup>23</sup> In the late 1980s, there were 35 private engineering colleges in Karnataka, which comprised approximately 70 % of the total number of engineering colleges in the state (Kaul 1993). When compared with one private college in Andhra Pradesh, one in Maharashtra, none in Tamil Nadu, two in Haryana and one in Uttar Pradesh, Karnataka clearly stood apart as a unique case.<sup>24</sup>

A hub of privately owned engineering colleges long before the trend caught up in the rest of India, Karnataka is currently home to 172 private engineering colleges. However, the consolidation of Karnataka's education entrepreneurs came about only in 2003. The establishment of the COMEDK in 2004 on heels of the TMA Pai verdict was perhaps the clearest manifestation of a common identity derived from entrepreneurial interest.<sup>25</sup> Freed of the obligation to abide by state regulation pertaining to fee structure as well as admission policy, member institutions of the COMEDK instituted an alternative to the state-run Common Entrance Test (CET) to oversee admissions to private professional colleges in the state.

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<sup>23</sup>The term 'private' excludes institutions that received grant-in-aid from the state. It refers exclusively to unaided institutions owned by individuals or caste and community based organizations.

<sup>24</sup> See Asha Gupta (2004).

<sup>25</sup>The pilot survey I undertook in early 2009 helped me seal Karnataka as the field for this study. Since Karnataka was a hub of privately owned professional colleges long before the trend caught up in the rest of India (Gupta), it is ideal ground to understand why consolidation of the entrepreneurial class came about only in the years following economic reform. Secondly, Karnataka's colleges figured prominently in recent Supreme Court cases including landmark ones such as *Mohini Jain vs. State of Karnataka* (1992), *T.M.A. Pai Foundation vs. State of Karnataka* (1994, 1996, 2002) and *Islamic Academy vs. State of Karnataka* (2003). In fact, the survey revealed that colleges in Karnataka figured in almost half of the Supreme Court cases involving education entrepreneurs, and had important bearings on proceedings and outcomes of the remaining cases.

Herein lay the puzzle. The COMEDK is primarily an aggregate of private professional colleges owing allegiance to a range of religious, caste and community organizations. In the 1960s and 70s the proliferation of private colleges had much to do with mobilization of electoral support for caste and community leaders, who in turn espoused the educational advancement of caste members (Kaul 1993, Rudolph and Rudolph 1972). The vertical networks of patronage were reproduced through the decade of the 80s with the result that castes and communities ranging from traditional elites such as Vokkaligas and Lingayats to backward communities and constitutional scheduled castes entered the business of higher education. In the presence of such deeply entrenched ties between community owned professional institutes and local politics, why did Karnataka's private institutes unite around a common entrepreneurial identity defined by opposition to the state?

In answering this question, I draw attention to reform driven socio-economic transformations in Karnataka. The policies of economic liberalization introduced by the Congress government in 1991 ushered in an era of structural transformations impacting the nature of productive activity and employment patterns in the economy. The growth of the information technology sector in India since the 1990s was integral to these transformations. Rise of transnational corporations and diffusion of production activity across the globe gave an impetus to the IT industry, which increasingly contributed to India's annual GDP<sup>26</sup>. Concomitantly, jobs involving computer programming, processing

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<sup>26</sup> Chapter 3

of financial services and telemarketing opened new avenues for social and economic mobility of the educated workforce.

In this new environment, two processes came into play simultaneously. On the one hand, specialized degrees in computer science and information technology held out the promise of well-paying jobs, creating new perceptions of how a certain kind of higher education can facilitate upward economic and social mobility. As a result, degrees in telecommunications, computer science and related areas represented new avenues for higher incomes, greater social mobility and assimilation into the culture of consumerism that enveloped urban India since the 1990s (See Fernandes 2006). Thus managements of private colleges saw new opportunities to harness the demand and expand their enterprise.

These post-reform developments clearly altered the matrix of preferences of powerful societal groups in control of Karnataka's private professional colleges. The simultaneous tightening of controls by centralized regulatory bodies such as the AICTE was an important development in the new scenario, as it interfered with unfettered expansion of the private sector. Centralization of regulation was no doubt responsible for ushering in privatization via patronage on a national scale, but it also set up the state and the private sector as separate entities with contradictory interests. Thus, while in the 1960s, 70s and 80s, higher education had been an instrument to establish patronage links between the provincial governments and local elites, the 1990s saw the transformation of this space into an arena of conflict between these elites and the Indian state. A

manifestation of such conflict, the Supreme Court litigations offer a foray into the nature of interest aggregation, and the core issues shaping political competition among groups.

### Defense of the Case-Study Approach

My case study of private entrepreneurship in Karnataka is in tune with contemporary approaches to the study of Indian politics, which situate state-level analyses within comparative frameworks aimed at theorization of Indian politics. The study of state-politics within such a comparative frame entails focus on a single state, but in a way that can enable larger inferences about Indian politics.<sup>27</sup> This is useful particularly in the current context of Indian politics characterized increasingly by variance in regional patterns of electoral politics. At the same time, emerging trends at the national level are tied intricately to developments in individual states and regional political formations, which have gradually moved the center of gravity in Indian politics away from New Delhi and the Indian National Congress.<sup>28</sup>

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<sup>27</sup> Similar approaches have been employed in the works of Zoya Hasan (on UP), Christophe Jaffrelot (on MP), Narendra Subramaniam (Tamil Nadu), D.L. Sheth and Ghanshyam Shah (Gujarat), Peter D'Souza (Goa). According to Yogendra Yadav and Suhas Palshikar (2003), comparative studies of state level politics are carried out in 2 other ways: direct comparison of politics in more than one state (Atul Kohli, Aseema Sinha), and overviews of trends and patterns of party politics across a number of states (Pradeep Kumar, E Shreedharan, Atul Kohli, Yogendra Yadav 1996, 1999, Christophe Jaffrelot). See [From Hegemony to Convergence: Party System and Electoral Politics in the Indian States, 1952-2002, \(Yogendra Yadav and Suhas Palshikar\) in Journal of Indian School of Political Economy, Vol. 15, Nos. 1 & 2, 2003.](#)

<sup>28</sup> Focus on the Congress Party - India's central integrating institution (Manor 1990) - also established the tradition of studying the 'Indian political system as a whole' (Kothari 1970) rather than as the aggregation of political developments in its constituent units.<sup>28</sup> Even though studies of state level politics were carried out during this period (Weiner 1968, Narain 1976), it was not until the 1980s that the states became central to understanding larger processes in Indian politics. The new trend in scholarship ostensibly had to do with challenges to the 'Congress system', which could no longer account for political developments in the country. The new disaggregated approach to the study of Indian politics involved studying the

The singular focus on the experience of Karnataka does not detract from the agenda of comparative research. A major critique of this approach is that it is incapable of generating generalizations based on comparison across a large number of cases. While this is a serious handicap, the strength of the case-study approach lies in its ability to address causal complexes - to examine the conjunctures in time and space that produce important social changes (Ragin 1987). By treating the case as a whole, it becomes possible to investigate the combination of conditions, and thereby uncover patterns of invariance and constant association.

Recent theoretical strides in the discipline of comparative politics have demonstrated the ways in which single case analyses can contribute to the comparative agenda. The idea that social phenomena result from the conjuncture of a multiplicity of causal conditions lends itself to 'specifying small and medium-sized mechanisms for human action and interaction' (Pierson 2000, quoting Jon Elster: 73)<sup>29</sup>. Traditional large-N studies in comparative politics often generated abstract generalizations without

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politics of individual states. At the same time, the study of state-level politics had to be geared towards making inferences about larger trends in politics at the national level. Therefore, while it became imperative for scholars of Indian politics to understand the impact of events such as economic reform, they had to situate their analyses in context of the logic of political processes in individual states. In other words, Indian politics now had to be understood as an aggregation of state level outcomes, which often followed divergent trajectories. Thus, the third electoral system was one that necessitated theoretical frameworks enabling comparison of state level outcomes to understand the important processes in Indian politics.

<sup>29</sup> One insight offered by Pierson is that political scientists need to look at self-reinforcing mechanisms or 'positive feedback' loops after a given critical historical juncture passes. Taking history seriously and uncovering reproductive mechanisms characterize Pierson's call: yet this is not the same as a 'path dependent' characterization, for path-dependent scholarship can simultaneously be 'too contingent as well as too deterministic' (Thelen) – too open at the front end *before* the critical juncture occurs and then too closed, after it occurs. See Pierson (2000): "Not just what but when: timing and sequence in political processes" *Studies in American Political Development* Volume 14, No. 1: p 72-92.

addressing the unique conjuncture of causes in specific cases. The focus on mechanisms can be a way out of this impasse, as it is capable of distilling patterns of generality without looking for uniformity of outcomes.

An important implication of this idea is that within-country studies in comparative politics can provide valuable insights about other countries.<sup>30</sup> Kanchan Chandra<sup>31</sup> explicates this in some detail. Single country case studies employing a multitude of variables often resort to controlled comparisons. Control variables include any number of things, including the economy, the ethnic demography, the duration of colonial rule, climate, ecology, history, patterns of past violence, political leadership, and institutional structure, only some of which can be explicitly identified. These controls make it possible to isolate the impact of the independent variable in the given context. But when exporting the model to other contexts, the explanatory power of the independent variable is often lost, since the same control variables may not be available. Therefore a better way to uncover general patterns via comparison is to look for recurrence not of the same dependent variable (outcome), but for mechanisms. It suggests that that the same variables need not be at work in each country – the same

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<sup>30</sup>This may be illustrated by reference to some of the works in comparative politics that employ small-n or case study methods, yet seek to answer broad and general questions about all societies. For instance *Making Democracy Work: Civic Traditions in Modern Italy* (Putnam 1993) posits a bivariate correlation between civic traditions and the performance of democratic institutions, while *Ethnic Conflict and Civic Life: Hindus and Muslims in India* (Varshney 2002) advertises a bivariate correlation between civic life and ethnic conflict. Certainly, the correlations are contextualized, but both authors aim in these within-country studies to produce hypotheses that explain outcomes in other contexts, and are evaluated on the basis of this ambition.

<sup>31</sup>See Kanchan Chandra: 'Mechanisms v/s Outcomes', *Essay for symposium on David Laitin's work Newsletter of the APSA Section on Qualitative Methods* <http://www.nyu.edu/gsas/dept/politics/faculty/chandra/qualmeth2006.pdf> (accessed on 3 Feb 2011).

mechanism might be produced by a different variable. By forcing the researcher to identify variables repeatedly in the course of building an explanation, a mechanism-approach is designed to uncover the importance of other variables.

Chandra further argues that generalizations based on mechanisms must be evaluated not by testing to see if the entire chain of mechanisms linking the cause and the outcome in one country are the same in others, but by seeing how far the chain of mechanisms in a new country coincides with that of the first before it diverges. According to Chandra, the difference between an outcome-based analysis and a mechanism based analysis lies in differentiating their *degree of the fineness* of the analysis rather than seeking a difference in *what* is being explained. An outcome based analysis makes a statement about a “macro-correlation” between two variables. Mechanism-based analyses are statements about the series of ‘micro-correlations’ that constitute the logical chain linking the macro-correlation.<sup>32</sup>

### **Conceptual Framework and Methodology**

Conceptually, this study is based on a framework that shows how policy mediates the linkages between economic reform and democratic politics. Policy is a useful conceptual

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<sup>32</sup>She uses a number series to illustrate this point. The idea is that there is no limit to the fineness of analysis that can be used in a mechanism-based approach. Just as there is infinity of points between two numbers on a continuous scale, there is infinity of micro-correlations that constitute the larger correlation. But there is no difference in the essential nature of the dependent variable that either an outcome oriented or a mechanism-oriented approach attempts to explain. The difference lies only in the distance of the explanatory variable from the dependent variable. In an outcome-based approach, the independent variable is distant from the dependent variable. The correlation between the two, therefore, is not obvious. In a mechanism-based approach, each micro-correlation links two proximate points. Thus, each micro-correlation may well be obvious. But a sequence of micro correlations taken together travels a great distance from the initial variable that triggered them, and produces a non-obvious outcome.

category because studying the policy terrain can contribute substantially to understanding temporality of political processes. It can aid observation of shifting boundaries, alignments and configurations over a period of time, and therefore lend itself to uncovering mechanisms underlying group formation in competitive politics. My treatment of policy as an analytic category also serves the purpose of breaking down the rather abstract, theoretical notion of institutional reproduction. To begin with, it allows the researcher to observe the actual contestations among groups in institutional settings, and thereby trace the persistence, transformation or evolution of specific categories of identity over a period of time. For instance, the increasing visibility of education entrepreneurs in the Supreme Court needs to be understood in relation to a liberalizing economy where new preferences not only shaped categories of identity, but also led to a greater role of the judiciary in policy making.

A review of the literature on institutional reproduction and change reveals that practitioners of new institutionalism have begun to pay greater attention to the processes by which different actors are incorporated into political institutions. There is increasing recognition that concepts such as institutional layering and institutional conversion must take into account how identities of relevant institutional actors are constituted over a period of time. Therefore, an analysis of institutional reproduction is to a very great extent an analysis of the processes involving one or a combination of the following: 1) persistence of group identity within political institutions, 2) incorporation of previously excluded groups into the institutional framework 3) renegotiation of existing group boundaries and creation of new groups. Such analysis would take into



account the role of increasing returns and critical junctures in explaining institutional trajectories; however, by squarely focusing on contestations underlying group formation, it would help disaggregate these concepts and enable an incremental understanding of institutional reproduction in a post-reform developing economy.

I launch my analysis from a theoretical ground that fits broadly into the framework of new institutionalism. The policy process being circumscribed by rules of political institutions is amenable to such a framework.<sup>33</sup> However, beginning with some of the basic premises of new institutionalism, this study summons conceptual tools from outside the repertoire of neo-institutional analysis. The focus on contestations on the policy terrain requires a deeper understanding of group formation in competitive politics, which I believe is at the heart of questions pertaining to institutional reproduction and change. While rational choice institutionalism's assumption of fixed actor preferences precludes an inductive analysis of interest aggregation in institutional settings, historical institutionalism's focus on preference formation often falls short of capturing the dynamics of groups within political institutions. By bringing the policy terrain to the center of analysis, I highlight these contestations, and draw attention to the fluidity of group boundaries and the related politics of categories.

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<sup>33</sup>Situating the Indian judiciary at the center of analysis, this study is primarily a neo-institutional account of the politics flowing from a large scale shift in India's macro-economic environment. By using the institution of the judiciary to understand the Indian state's relationship with the emerging private sector in higher education, it incorporates analysis of institutional rules, actor preferences as well as macro level socio-economic factors in tracing post-reform political processes.

My theory of identity formation is based on the idea that group boundaries change in response to institutional rules as well as extra-institutional stimuli. Thus it calls for a shift away from the determinism inherent in assumptions of fixity. By suggesting that formation of groups on the policy terrain is a process open to empirical investigation, it draws attention to causal mechanisms, rather than to linear causal relationships between institutions and the environment. This methodological orientation to the politics of groups is consistent with genealogical approaches<sup>34</sup> to the study of politics. At one level, this is a methodological approach geared towards paying attention to the micro-level causal mechanisms and mapping the gradual progression from cause to effect. But more importantly, the merit of a genealogical approach lies in its questioning of the conventional cause-effect reasoning employed in positivistic approaches to the study of politics. In interrogating the politics of categories, such an approach is amenable to reconstructing available evidence towards the search for alternative explanations for specific outcomes.<sup>35</sup>

The genealogical method furthers my argument for moving beyond the 'elite' – 'mass' dichotomy characterizing much of the scholarship in new institutionalism<sup>36</sup>. The case of education entrepreneurs illustrates that the elite – mass dichotomy fails to survive strict empirical scrutiny. It reveals that group boundaries are in a state of flux, and different

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<sup>35</sup> Drawing from the Weberian connection between the realms of understanding and explanation, this approach underscores the relevance of discursive realms in shaping political outcomes. At the same time, it may be employed to more conventional studies of political economy so that it becomes possible to capture the representation and discursive elements of group formation without diluting the force of arguments based on parameters such as income or consumption (See Leela Fernandes 2006, xxxv)

<sup>36</sup> North, Mahoney (Spain),

groups assume prominence at different junctures in the policy-making process. New categories of identity are also forged in wake of new imperatives in a rapidly changing socio-economic milieu. For instance, Karnataka's education entrepreneurs did not exist as a coherent group prior to the 1990s. In order to understand why individual colleges rallied around such an entrepreneurial identity despite their affiliations to caste, community and political outfits, it is important pay close attention to the construction of the entrepreneurial identity in the 1990s.

The focus on policy juxtaposed with neo-institutional analysis and a genealogical approach to the politics of categories paves the way for a deeper understanding of substantive politics in a post-reform scenario. The mechanisms linking economic reform with new forms of contestation become apparent via study of the evolving higher education policy terrain. The rapidly changing grounds of interest aggregation and accompanying discourses emanating from successive legislative enactments and legal outcomes are ample indicators of the post-reform shifts in India's substantive democracy. As I demonstrate via this study, the rise of education entrepreneurs has clear linkages with the steady erosion of long-standing discourses on development and social justice in Indian politics. Rise of rights-oriented discourses has origins in the sphere of higher education policy – an important linkage reiterating that higher education policy is central to interrogating the relationship between reform and democratic politics.

My methodological approach underscores the interplay of structural and discursive realms in delineating group boundaries and shaping political rhetoric. In order to capture this interplay, I undertake a chronological study of policy enactments on regulation of private professional colleges. To begin with, I use manuscripts of a series of Supreme Court litigations to grasp the boundaries of groups relevant to policy making. Thereby, I make inferences regarding the limits of India's political institutions and the extent to which they reflect the distribution of power in society. More importantly, I trace the changing nature of interest aggregation in this terrain reflected in the emergence of new identities and new configuration of interests over a period of time. Finally, I use the manuscripts to trace important debates shaping policy outcomes and their significance for the substantive issues informing dominant political discourse in the country. In explicating the role of education entrepreneurs in shaping policy over the last two decades, I demonstrate how they have been instrumental in initiating rights based discourses in a space hitherto dominated by discourses on social justice and development.

My research also uses published quantitative data on growth of private professional colleges in Karnataka, enrollment patterns in these colleges and expansion of the information technology sector. Research on the information technology boom has yielded a wealth of information on the changing face of labor in urban India. There also exists published data on the steady growth of private colleges offering degrees in computer science and information technology. I consider these alongside legal manuscripts and secondary literature, in order to yield data on the following: 1) the

origin, ownership and affiliation of private professional colleges, which are important for ascertaining the identities that formed the basis of individual colleges, and those which figured in legislative and legal proceedings respectively 2) the rationale for the COMEDK banner, which does not take into account the caste and community affiliations of individual colleges 3) the important discourses and ideological positions informing the demand for a greater measure of autonomy from state regulation and control. By juxtaposing the published quantitative data with data obtained from the legal manuscripts, I will examine how the terrain of policy pertaining to regulation of private professional colleges has emerged as a space for elites to stake their claim in India's democracy.

This study is empirically grounded in the experience of Karnataka; however the class of education entrepreneurs is not exclusive to the southern Indian state. A category with national representativeness, it has risen to prominence in several other states, as reflected in the series of Supreme Court cases over the last twenty years. In fact, though I draw my data primarily from the legislative enactments and legal cases that had bearings on the establishment, regulation and survival of private professional colleges in Karnataka, my research does not preclude taking into account the cases involving private colleges in other states. Since the Supreme Court rulings must be considered chronologically in order to analyze shifting group boundaries and shifting terms of debate, I refer to the entire series of Supreme Court cases on the issue, as well as federal policy enactments setting the guidelines for policy making by states. Therefore,

despite empirical focus on Karnataka's education entrepreneurs, this study incorporates an analytic framework suited to understanding the trends in India's democratic politics.

## **Chapters**

Chapter 2 introduces the broad framework for the articulation and implementation of higher education policy in independent India. It discusses the historical antecedents of the structuring of higher education and investigates the role of caste and community in furthering enterprise in this sector. The latter half of the chapter describes the transformations wrought by economic liberalization in conjunction with increasing centralization of higher education policy. The parallel and simultaneous processes of privatization, centralization and regionalization capture this process of transformation and provide the backdrop to understand the post-reform politics of higher education.

Chapter 3 traces the origins of Karnataka's private sector in higher education during the pre-reform era. In doing so, it explicates the nexus of caste, education and politics in Karnataka, and its role in aiding private entrepreneurship in tertiary education. This chapter underlines the synergistic relationship between the private sector and state through the decades of the 60s, 70s and 80s. Thus it provides a foil to understanding the emergence of conflict in subsequent years.

Chapter 4 investigates strategies adopted by private colleges in the Supreme Court. This chapter traces the legal discourses, which were reflective of the shifting politics of caste,

community and region in liberalizing India. In doing so, it captures the distinctiveness of an emerging post-reform politics of higher education in the country.

Chapter 5 delineates the boundaries of the entrepreneurial identity that emerged in course of the litigations. Thus it underscores the point that group boundaries are rarely fixed and the process of group formation must remain open to empirical investigation. It makes the argument that education entrepreneurs evolved in course of the discourses that informed the contradictions inherent in the transitory Indian state. The last section of chapter 5 discusses the character and role of the COMEDK – an umbrella organization representing education entrepreneurs in Karnataka. The group of entrepreneurs represented by the COMEDK may be numerically insignificant in the mainstream of politics, but its political significance remains independent of its numerical strength. Cutting across caste, communitarian and linguistic, it crystallized in context of the privatization debate in the Supreme Court and strengthened itself in the face of legislative dictates on the quota question. A symbol of entrepreneurial autonomy in the face of increasing centralized regulation of the private sector in higher education, it is a visible entity in public debates on privatization of higher education and continues to influence policy outcome and implementation.

Chapter 6 underscores the twin politics of economic liberalization in India. On the one hand, it explicates the logic of competition that distinguished the alliance of southern and western states from education entrepreneurs in other states of India. On the other hand, it explains the curious logic of cooperation among players that competed

intensely in other sectors of the economy. This chapter makes the central argument of this dissertation – policy-specific implementation of economic reform must inform the study of reform and politics.

Chapter 7 situates the Indian judiciary at the center of analysis. The purpose of this chapter is to understand the judiciary as a site for interest aggregation by elites in a democracy. It highlights the judiciary's role as an instrument of opposition politics in Indian democracy and underlines its negligible role in furthering socio-economic rights including the right to education for the constitutionally mandated beneficiaries of affirmative action. This chapter also captures reproduction and change of the judicial institution in response to new pressures in the wake of economic reform. Susceptible to the demands of interest groups in democratic politics, the Supreme Court's vacillating responses tell the story of an Indian state attempting to reconcile new political imperatives with the legacies of developmentalism. Thus this chapter is a telling account of the judiciary and its role in shaping democratic politics.



## **Chapter 2**

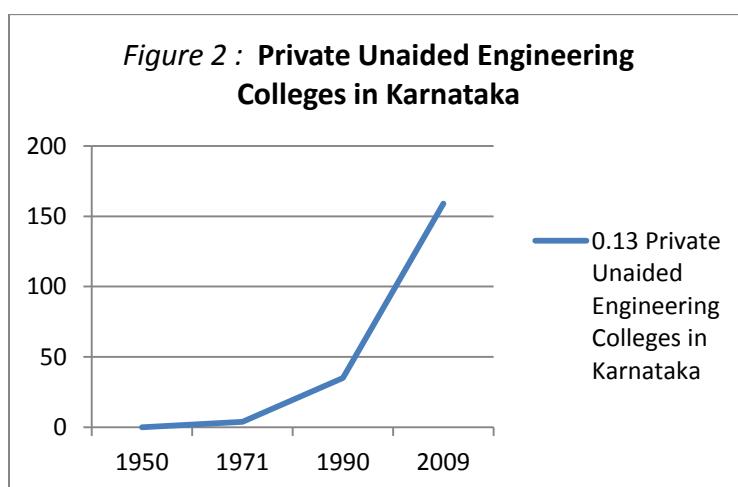
### **The Structuring of Higher Education in Independent India**

This chapter begins by situating higher education within the grand narrative of the developmental state under Prime Minister Nehru. However, as the state participated actively in its growth and development, the higher education sector could not remain external to the politics of caste, community and religion that defined the electoral arena. As higher education was an important resource representative of the power and prestige of local caste and community organizations, it came to represent an arena for competition among groups in the mainstream of electoral politics. Subsequently, it emerged as the site for a highly differentiated system of patronage. The capitation-fee colleges in Karnataka were a clear manifestation of this phenomenon, underscoring the linkages between caste-owned private colleges and the electoral fortunes of caste leaders in the provincial government.

In the 1990s, the political economy of higher education began to undergo discernable shifts. Growing fiscal deficits in the aftermath of economic liberalization meant that there were massive cut backs in government support to key sectors, including higher education. While this created an environment for the influx of private providers, privatization of higher education took place under a stringent regulatory regime. It did not arise out of policy geared towards a comprehensive program of reform; rather, it came about as a result of discretionary actions by the state aimed at accommodating elite interests in the post-reform political system. The private institutions which

sprouted in the new environment did not fit into the framework of public-private partnership of the previous decades. In absence of grant-in-aids from the state or philanthropic contributions from individuals, the new breed of private colleges was sustained by high fees charged to students.<sup>37</sup> The situation was a unique one, where the state was not an active participant in expansion of the private sector, but continued to play a commanding role in matters of curriculum, affiliation and admission policy.

These changes affected the dynamics of the capitation fee system in Karnataka, which reflected the massive drive towards privatization of tertiary education in India. In Karnataka, this was reflected in the sudden upswing in the number of private engineering colleges. From 35 private engineering colleges in the late 80s, the number rose to 65 in 1997 and by the end of the first decade of the new millennium, there were 159 private engineering colleges in Karnataka.<sup>38</sup>



Source: Based on data from Rekha Kaul (1993) and the COMEDK Prospectus of 2009

<sup>37</sup> For an overview of the higher education system in India, see Appendix I

<sup>38</sup> Compiled from the 2009 prospectus issued by the COMEDK to engineering applicants in Karnataka.

The privatization of professional education was accompanied by a greater degree of centralization in policy making. The National Policy on Education (1986) laid out new guidelines for structuring higher education in the country, and following its recommendations, the All India Council for Technical Education (AICTE) was established as the central regulatory authority in technical education. This was an important development because it introduced a new centralizing authority to the politics of the capitation fee system.<sup>39</sup> In particular, the new statutory powers of the AICTE – particularly the powers of ‘accreditation’ and ‘recognition’ – indicated the genesis of a centralized licensing mechanism in the higher education sector.

The proliferation of private engineering colleges in Karnataka also reflected the regional character of privatization. Even though private engineering colleges sprouted across the country, they were mostly concentrated in the southern and western regions (Table 6). Karnataka constituted one of the prominent regional clusters in this regard. In the second half of the chapter, I discuss privatization of higher education, centralization of higher education policy and concentrated growth of private engineering colleges as parallel, yet related phenomena, which were integral to the politics of higher education in the 1990s.

### **Origins of the Private Sector in Higher Education**

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<sup>39</sup>AICTE Act (1987), <http://www.aicte-india.org/act.htm> (accessed on 15 October, 2009).

In the Nehruvian developmental state, the public-private alliance was a core aspect of government policy. Founded on the principle of grant-in –aid pursued by Britain since the middle of the nineteenth century, such alliance was characterized by the blurring of public and private initiatives in setting up institutions of higher education. This system led to a large private sector, but one that was regarded as an integral component of the Indian state’s higher education apparatus. On the one hand, it was based on the private expectations that the government will aid them; on the other hand, the state facilitated private entrepreneurship as it would have a say in the running of such institutions. As a result, unlike in countries where the public and private sectors have been separated by ‘historical experience, interest and ideology’, India’s private sector in higher education did not develop in isolation from government initiative (Rudolph and Rudolph 1972, 16).

This model of structuring higher education assumed significance in context of a newly independent nation faced with the difficult task of nation building. The importance of higher education lay not only in its role in generating manpower to promote economic development, but also as a means of national integration of the elite and the industrial classes. As Devesh Kapur and Pratap Bhanu Mehta (2004) point out, the strength and resilience of institutions of higher education stem from the participation of the nation’s elite. Since higher education is one of the most important factors contributing to the growth of a middle class - which in turn is both a cause and a symptom of capitalist development<sup>40</sup> – the stakes of this class in the system must be the driving force of higher education policy. The system of public-private partnership in higher education

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<sup>40</sup>Adelman and Morriss (1967), Engerman and Sokoloff (1997, 2000), Easterly (2001).

adopted by rulers of independent India was a significant mechanism for the integration of the nation's elite and the growing middle classes into the project of nation building. Thus, by the second half of the twentieth century, well known public institutions such as the Indian Institutes of Technology, as well as a number of privately owned institutions of learning emerged as powerful symbols of India's modernization, self-reliance and progress.

The historical association of public interest with affairs of private educational institutions inevitably gave rise to politicization of the system. In a country where higher education was perhaps one of the 'swiftest elevators to the pinnacles of modern Indian power and opportunity' (Kapur and Mehta 2004), politicization of higher education was part of the larger process of politicization whereby political and societal actors with varied or competing interests attempted to gain control over resources that promised political as well as socio-economic advancement. Organized societal interests demarcated along lines of caste, community and religion often appropriated educational structures for furthering their own ambitions and interests.<sup>41</sup> Thus, on the one hand the meaning of public interest was often appropriated by ruling groups to exercise control over valuable and limited resources; on the other hand, private entrepreneurship became a means of receiving patronage and benefaction of those in power. Usually at the cost of educational goals, the enmeshing of educational structures in a nexus of power and interest group politics became a defining feature of independent India's higher education system.

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<sup>41</sup> See Rudolph and Rudolph (eds); *Education and Politics in India*, Harvard University Press, 1972.

## Technical Education

Technical education comprised an Steered by recommendations of the Radhakrishnan Commission (1948), the newly independent Indian state's emphasis on education for 'development' made a de facto distinction between skill-based learning and general education, with the result that institutions such as the Indian Institutes of Technology (IIT) became central to realizing the idea of India envisaged by early Indian planners. This model of disciplinary compartmentalization, reinforced by successive policy recommendations delineated the terms of debate on higher education policy in the country. Geared towards breaking away from the liberal arts emphasis in colonial education – one which aimed at producing civil servants and white collar workers – the Indian state's patronage of vocational education was consistent with the agenda of rapid modernization via industrialization and achievement of self-sufficiency<sup>42</sup>.

The significance accorded to development of technical education in independent India was reflected as early as 1946 when the Sarkar Committee recommendations envisaged the Indian Institutes of Technology along the lines of the Massachusetts Institute of Technology. In addition to their role in furthering science, technology, economic development and self-reliance, the idea of these institutions embodied the nationalist spirit of the post-independent years. In fact, the connection between nationalism and scientific education was clearly demonstrated when the first of the IITs at Kharagpur was inaugurated at the site of the Hijli Detention Camp, where the British had

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<sup>42</sup>The 2<sup>nd</sup> Five Year Plan.

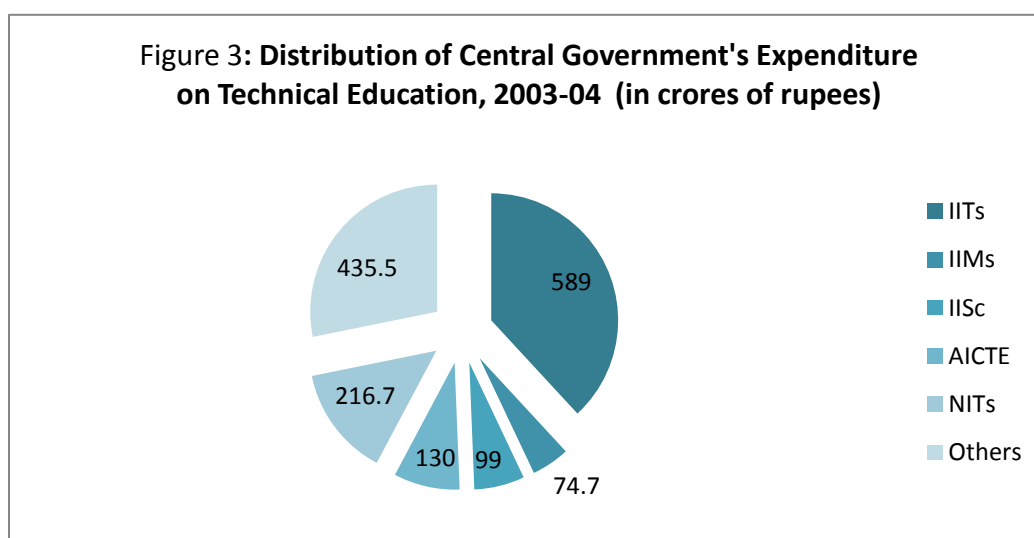
incarcerated political prisoners. Nehru's address at the first convocation of IIT Kharagpur in 1956 reiterated this: 'Here in the place of that Hijli Detention Camp stands this fine monument of India, representing India's urges, India's future in the making. This picture seems to be symbolic of changes that are coming to India.'

Apart from public institutions such as the IITs, the sizeable private sector in technical education was constituted by institutions supported and sustained by state funds. These colleges were owned and managed by private individuals, trusts or organizations, but were treated as government institutions on account of the funds they received from the state. This category of institutions was distinct from the unaided private sector, which made an appearance in the 70s and 80s, and expanded rapidly in the years after economic liberalization. The term 'privatization' applied primarily to the latter category of institutions, which proliferated on account of policy that sanctioned large numbers of private colleges, privatized existing public sector universities or resorted to a greater proportion of private funds (cost recovery) for the running of state-supported colleges (Tilak 1999, 120).

The regulatory framework of technical education reflected the ideology of state-led development for higher education in general and scientific education in particular. It was a two-pronged framework, whereby the state shouldered the burden of financing institutions of higher education, but also put in place strict regulatory mechanisms for their functioning and expansion. Thus, All India Council for Technical Education (AICTE)

was established in 1945 as an advisory body in matters relating to development and expansion of technical education.<sup>43</sup>

As far as funding of technical education was concerned, the central government's plan and non-plan budgetary expenditure supported public institutions such as the IISc, the IITs, the IIMs, the NITs, and the IISERs. Only 22 percent of the total allocation was assigned to other institutions including the colleges and universities run by various state governments (CABE 2004). As percentage of Gross National Product (GNP), the central government's allocation for higher education fluctuated between 0.35 to 0.47 percent, of which technical education received 0.13 to 0.15 percent of GNP. The central government's allocation did not contribute substantially to the grant-in-aid colleges in the various states, which were largely sustained by funds from respective state governments.



Source: Based on data from CABE Committee Report of 2004.

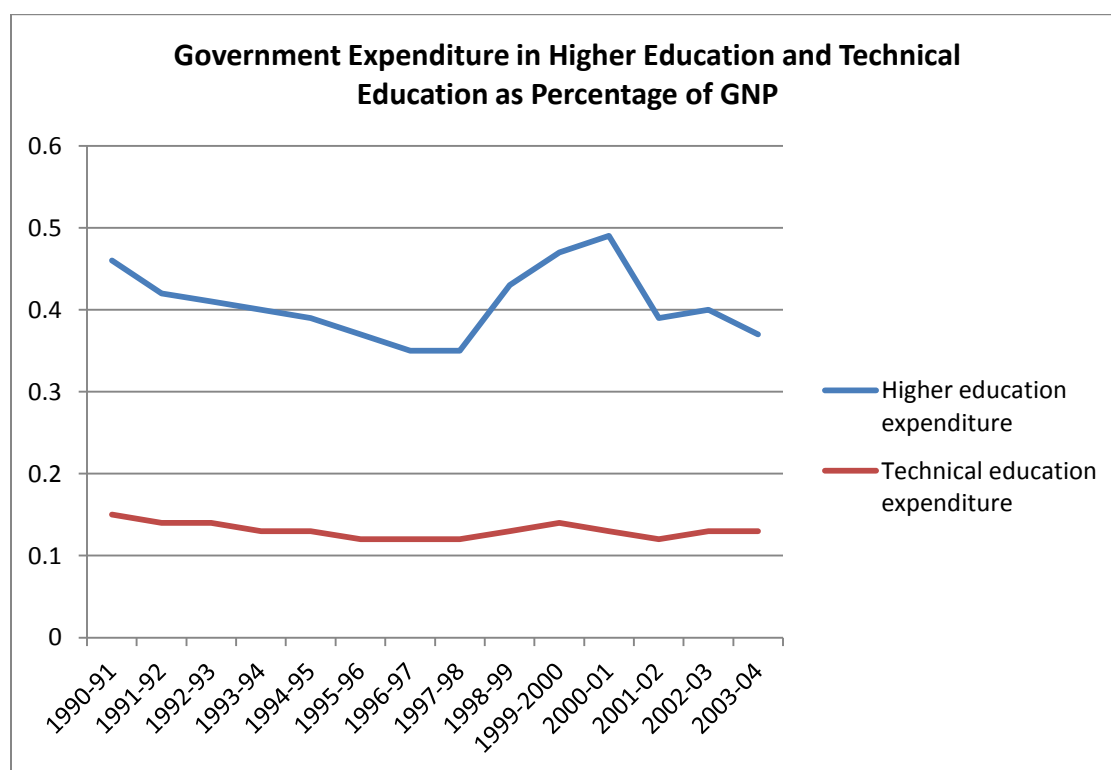
<sup>43</sup> Other centralized regulatory bodies in higher education include University Grants Commission, Medical Council of India, Council for Scientific and Industrial Research, etc.



In 2004, the Central Advisory Board of Education (CABE) Report on the Financing of Higher and Technical Education reiterated the role of higher education in furthering socio-economic development and concerns of equity. In doing so, the report drew attention to the scarcity of public funds for expanding the system and providing access to students from various sections of society.

‘In a sense, higher education in India is in a deep financial crisis, with escalating costs and increasing needs of the system on the one hand, and shrinking provisions of the public budgetary resources on the other. As a result, several universities and institutions of higher education are in continuous deficit. The unveiling of economic reform policies in early 1990s also contributed to the accentuation of financial hardships of institutions of higher education’ (CABE 2004, 6)

Figure 4:



Source: Based on data from CABE Committee Report of 2004.

The report clearly documented the declining public expenditure on higher education in the aftermath of economic reform. According to this report the budgetary allocation for higher education per student declined by 28 percentage points between 1990-91 and 2002-03. In 1993-94 prices, the decline was from Rs 7676 in 1990-91 to Rs 5500 in 2002-03. As percentage of GNP, the decline was from 0.46 to 0.37 over the twelve year period. As far as technical education is concerned, the decline from 0.15 to 0.13 percent was less drastic. However, this did not preclude an increase in the fee structures, which became a means of 'cost recovery' by the government. While the income from fees accounted for a mere 2-3 percent of the total cost of providing higher education in the 1980s, the revised fee structures in the late 1990s led to fee incomes ranging from 5 percent to 50 percent of the total cost of providing education.

The declining public expenditure in higher education also gave impetus to the rapidly expanding private sector in technical education. In addition, this trend reflected the Indian government's conscious resolve to encourage private entrepreneurship in order to promote 'universalization' and 'vocationalization' of education. The National Policy on Education (1986) laid out these policy prescriptions and provided the framework for proliferation of private colleges unaided by the state. At the same time, it marked the beginning of a stringent regulatory regime, whereby establishment of private engineering colleges would be closely monitored by the AICTE. Alternately, it was the National Policy of Education (1986), which established the AICTE as a statutory body invested not merely with an advisory role, but with the power to sanction as well as revoke licenses of private unaided colleges.

### **Caste and Community in the Enterprise of Technical Education**

Even though private enterprise was recognized for supplementing state effort towards modernization, caste and community affiliated educational institutions remained relevant within independent India's modernist discourse. While the ideas of planned development, industrialization, secularism and democracy were key constituents of such a discourse, traditional structures such as caste and community did not remain external to it. In fact, the history of higher education policy in India clearly tells us that these categories have been central to the policies of development pursued by the Indian state since independence in 1947.

The history of caste and community enterprise in higher education dates back to the years of British rule in India. The system of grant in aid for private enterprise introduced by the British in the middle of the 19<sup>th</sup> century, was motivated 'partly by financial stringency and partly by the policy of patronizing missionary enterprise' (Madan and Halbar 1972). Consistent also with the British government's policy of exercising control over affairs of universities and institutions of higher education, the system of grant in aid ensured the existence of a powerful official voice in affairs of institutions imparting higher education. The public financial support of institutions created a system where

the idea of *public interest* came to be deeply imprinted even in the running of institutions that were privately founded and managed.<sup>44</sup>

The idea of public interest in higher education survived within the framework of the independent Indian state. As higher education was recognized as a vehicle of modernization, the developmental state played an active role in regulating and monitoring institutions of higher education. On the other hand, the definition of public interest had to be realized within the parameters presented by the ground realities in Indian society and politics. Political competition among groups demarcated along caste and community lines meant that public policy became an instrument of converting material, human and symbolic resources into political resources that could be used in political competition for power. Since higher education constituted a valuable resource for socio economic advancement and entry into the coveted public services, the idea of public interest in higher education became an instrument of political mobilization and political patronage.

This phenomenon was clearly manifest in the expanding system of private enterprise in tertiary education in Karnataka. In addition to this contradiction inherent in the process of modernization, the proliferation of private professional colleges in Karnataka demonstrated the resilience as well as relevance of caste and community within the policy framework of higher education. Since the Indian state recognized the role of

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<sup>44</sup> The British wished to encourage education, but did not play any significant entrepreneurial role. The separation of private and public educational institutions, which had been central to policy debates in the United States of America did not surface in India (Madan and Halbar, 1972)

communities in furthering its developmental goals, the process of modernization through education involved a unique interaction of ideas inspired by western modernity and traditional structures specific to the Indian case. The case of professional colleges in Karnataka demonstrates that caste and community owned institutes became vehicles for political mobilization in the electoral arena, giving rise to a set of institutions sustained by patron-client relationships. An illustration also of the resilience of traditional structures such as caste, this empirical phenomenon serves to underline that these categories did not wither away in the modernizing Indian state; rather, they adapted remarkably well to the new environment and emerged as potent forces shaping the character of growth and development.

### **The Capitation Fee Phenomenon in Karnataka**

In her 1993 study titled 'Caste, Class and Education: Rise of the Capitation Fee Phenomenon in Karnataka', Rekha Kaul drew attention to the nexus of caste, class and politics in sustaining privately owned institutes of professional education in Karnataka. Her claim underlined the general point made by Llyod and Susanne Rudolph in their 1972 book *Education and Politics in India*. According to the arguments of Madan and Halbar, 'the goals of the educational system, and the policies and decisions regarding their implementation, emanate at least partly from the social and political systems' (122). Their case study of educational institutions in the erstwhile Mysore state demonstrated that the rise of private educational institutions affiliated to narrow sectarian interests had much to do with the position of local caste and community

groups in the societal matrix. Thus numerically small communities such as Brahmans and Christians dominated private educational enterprise while the majority community of Vokkaligas often lagged behind. On the other hand, the numerically strong Lingayat community had a strong presence in the management of private institutes even though they did not share with Brahmans and Christians the long tradition of literacy and learning.<sup>45</sup>

The relationship between local caste-class configurations and private enterprise in higher education is reflected more clearly in case of professional colleges in the region. Since the beginning of the twentieth century, the government of the old Mysore state promoted scientific and industrial growth. Government-sponsored industrial development in the region started way back in 1902, when the first hydro-power station in Asia was set up at Shivanasamudram. Under Sir M. Visvesvaraya's tenure (1912-1918) as the Dewan of Mysore, a great deal of technological and industrial initiative led to the establishment of several public sector units such as the Bhadravati Iron and Steel Works. It was also under his tenure that Karnataka's first engineering college was set up in Bangalore in 1917. Alongside, the demand for medical education also picked up considerably. As developmental projects enhanced the need for well-developed health services in the state, the Mysore Medical College was established in 1924 by Sri Krishnarajendra Wodeyar.

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<sup>45</sup> The study by Madan and Halbar is based on a study of primary, secondary as well as collegiate educational institutions in Mysore state.

After independence, the policies of industrialization led to a rapid increase in the demand for skilled manpower, and established technical education as a means of acquiring coveted jobs in the expanding public sector. In Karnataka, this led to an interesting phenomenon. The landed upper castes in the countryside began to invest agricultural surplus in the establishment of engineering and medical colleges for socio-economic advancement of their caste members. In this context, professional education became an important resource for challenging the hegemony of the Brahmins who dominated bureaucracy and politics in the province.

In the post-independence period, the expanding private enterprise in professional education in Karnataka was closely linked with the rise of Vokkaligas and Lingayats in formal politics. As these landed groups gradually took over the legislatures and bureaucracy, there emerged a two-way patron client relationship between the politicians and powerful caste organizations in the state. Representative of the rich peasantry, village level caste-organizations were dependent on their ministers for a variety of favors and privileges. In return, the village-level caste organizations played a crucial role in mobilizing vote-banks for political-leaders during elections. Moreover, as caste leaders often doubled up as political representatives, linkages between caste organizations and politicians became further entrenched (Kaul 1993).

Institutions of higher education catalysed the patronage links between politicians and their caste-members. Keen to strengthen caste solidarity in the political arena, Vokkaliga and Lingayat politicians used these institutions to cater to educational aspirations of

caste-members and facilitate their entry into public sector jobs. At the same time, these institutions augmented the power, privilege and social-standing of village-level caste leaders, who were recruited by politicians to set up educational institutions in mofussil areas. In addition to caste-support and vote banks, the revenue from such institutions of higher education also became a primary source of mobilizing funds for electoral campaigns of caste leaders (Ibid).

However, the expanding network of private professional colleges presented a paradox. On the one hand, they promised socioeconomic advancement of caste members; but, on the other hand, these colleges were sustained by the huge sums of money charged for admission.

‘Although most colleges were managed by single caste trusts, caste factors were generally set aside by colleges in granting admissions, and bidders paying the highest capitation fee were preferred. This paradox needs to be explained. It is true that caste leaders in the management catered to their caste clientele for personal gains, social recognition and political power. In setting up a caste based college they were able to get the support of majority of those belonging to their caste on the pretext that the educational interest of their caste would be adequately served and the community further strengthened. But even amongst the boys and girls of their own caste, preferences for admission were on the basis of the student’s capacity to purchase a seat. Moreover, on an average, 20 to 30 percent of the seats went to students belonging to the caste managing the college. The bulk of admissions were from amongst the non-caste students who could afford to give large donations. So the benefits of this kind of system have not really percolated to the vast majority of the poor caste members who may have initially supported the idea of a college run for their own community’ (Kaul 1993, 90).

Popularly known as ‘capitation fees’, this system of admission to caste owned private professional colleges in Karnataka played a very important role in funding electoral campaigns of caste leaders. As the nexus of landowning caste leaders, legislators and education entrepreneurs became entrenched over the years, lower castes and backward communities were also inducted into the system hitherto dominated by



Vokkaligas and Lingayats. Over twenty years spanning the decade of the 1970s and the 1980s, there was an upsurge of Backward Castes, Muslims and regional interest groups in the politics of Karnataka. Since they set up engineering and medical colleges using the modus operandi of existing institutions, the system of private professional education did not wither away; rather, it adopted itself to changing political configurations, and persisted as a manifestation of patronage politics in the region.

### **Liberalization and Higher Education**

In the post-reform Indian state of the 1990s, the role of provincial governments in distributing permits was diminished considerably. This is because, the regime of dirigisme now flowed from the central government in New Delhi, whereby centralized regulatory bodies monitored the establishment and functioning of private sector colleges. This resulted in an unprecedented expansion of private colleges across the country, and particularly in the southern and western states.<sup>46</sup> The parallel process of privatization, centralization and regionalization, which characterized the higher education sector in the 1990s, became the key ingredients of the new political economy of higher education.

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<sup>46</sup>The private colleges that went to court in the 1990s invariably belonged to the burgeoning tertiary sector undergoing rapid expansion in the southern and western states (Chapter 2). This trend cannot be delinked from growth of the information technology (IT) industry in these regional clusters (Ilavarasan 2007, Basant 2006, Kapur 2002, Madon 1997). The region-specific clustering of the IT sector led to restructuring of the labor market in these regions, and an increase in demand for technically skilled manpower suited to its needs. This was an important development directly linked with the spurt in the growth of engineering colleges in the states of Karnataka, Tamil Nadu, Andhra Pradesh and Maharashtra. Configuration of the entrepreneurial identity was an outcome of new preferences of elites in the wake of these changes. Alternately, the coalition of private colleges from these states reflected solidarity of regional interests against the Indian state.

## Privatization

As India embarked on the path of structural readjustment, the higher education sector was marked by a massive drive towards privatization. The withdrawal of the state from education (Thachil 2009 Tilak 2006, 2004, Kapur and Mehta 2004) is illustrated in Table 5, which shows a considerable decline in allocation of GDP post 1991. The expenditure on education peaked temporarily between 1999 and 2001, only to decline steadily thereafter. This decline is more significant when we take into consideration India's rapid GDP growth since economic liberalization in 1991 (Figure 1). As far as higher education is concerned, the Punnayya Committee (1992-93)<sup>47</sup> recommendations led to the slashing of government spending on universities directly under purview of the federal government. In addition, the Dr. Swaminathan Committee (1992) on technical education recommended that institutions of higher education generate at least 20 percent of required funds via fees charged to students (Tilak 2004).

*Table 3: Share of Government Expenditure in Education as percentage of GDP*

1951-52	0.67
1965-66	1.82
1985-86	3.71
1988-89	4.21
1991-92	3.9
1997-98	3.6
1999-2000	4.3

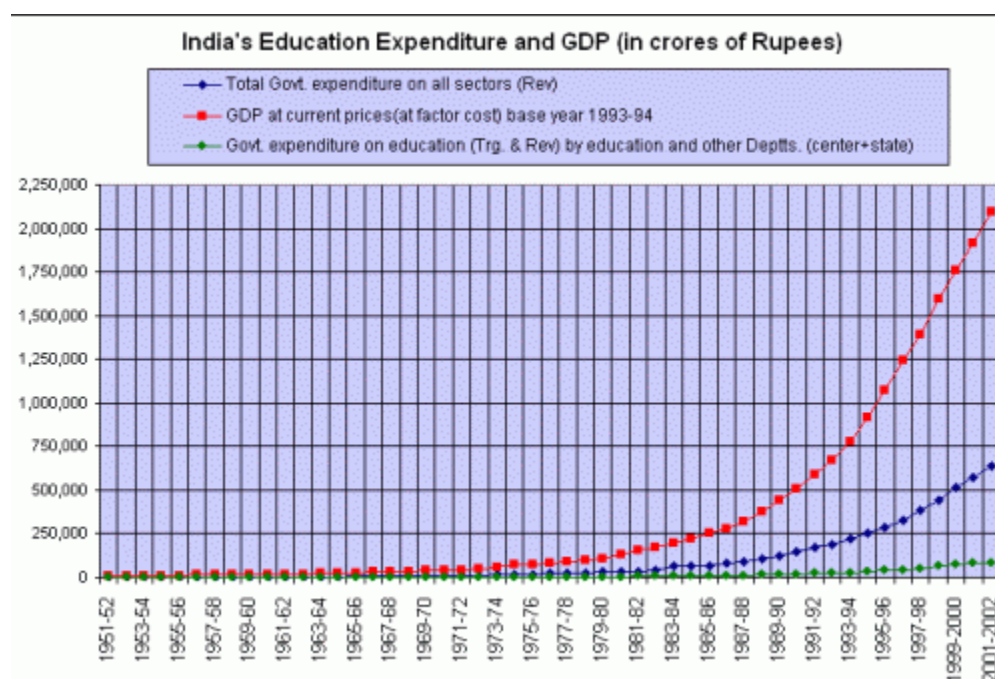
<sup>47</sup> Justice Dr. K. Punnayya Committee (1992-93), 'UGC Funding of Institutions of Higher Education' <http://www.ugc.ac.in/pub/report/9.pdf> (accessed on 5th July 2010).

2000-01	4.4
2001-02	3.9
2002-03	3.83
2003-04	3.81
2004-05	3.54

Source: Tilak (2006)

Reduced levels of state expenditure in higher education created a vacuum that was rapidly filled by a slew of private institutions of various kinds. Apart from franchisees of foreign universities and vocational training institutes such as NIIT and APTECH<sup>48</sup>, these

*Figure 4: India's Education Expenditure and GDP*

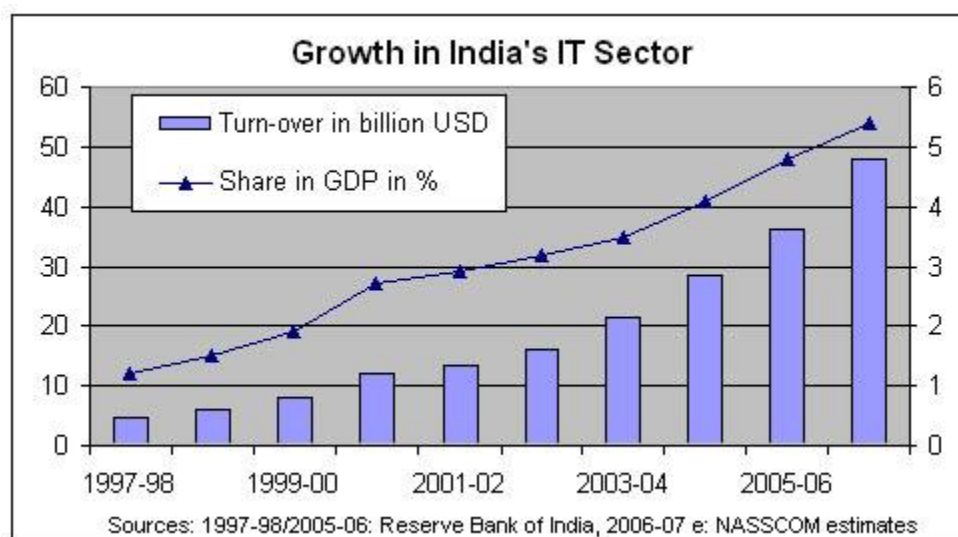


Source: Education in India (2004), [http://prayatna.typepad.com/education/2004/05/expenditure\\_on\\_.html](http://prayatna.typepad.com/education/2004/05/expenditure_on_.html) (accessed on 15 February, 2010)

<sup>48</sup> These institutes catered primarily to the increasing demand for upgrading skills in order to be employable in the services industry. See Fernandes 2006.

Included indigenous private colleges funded not by state grants or philanthropic contributions, but by the high fees charged to students<sup>49</sup>. In an environment dominated by influx of transnational corporations and rise of the IT industry (Figures 2, 3), these institutes catered to the growing demand for skill-based professional degrees, paving the way for many more similar colleges. This phenomenon was pronounced in the case of Karnataka, which emerged as a prominent cluster of the IT industry in India (p. 13-14).

*Figure 5: Growth of India's IT Sector and contribution to GDP*



<sup>49</sup>As Pratap Bhanu Mehta and Devesh Kapur (2004) argue, the drive towards privatization did not arise out of entrepreneurial initiatives in a market driven economy. 'Privatization is not a result of changing ideological commitments of the key actors—the state, the judiciary or India's propertied classes'. Rather, it resulted from a 'breakdown of the state system and an exit of Indian elites from public institutions, to both private sector institutions within the country as well as abroad' (2004, 2). This means that privatization of higher education in India is driven neither by a policy commitment to reform, nor by needs of the middle class, whose interests it was supposed to serve in the first place. Flowing from imperatives of clientilistic politics in the post-reform years, higher education is subject to a 'discretionary privatization' that does not permit mobilization of capital in productive ways, leading to sub optimal structuring of higher education.

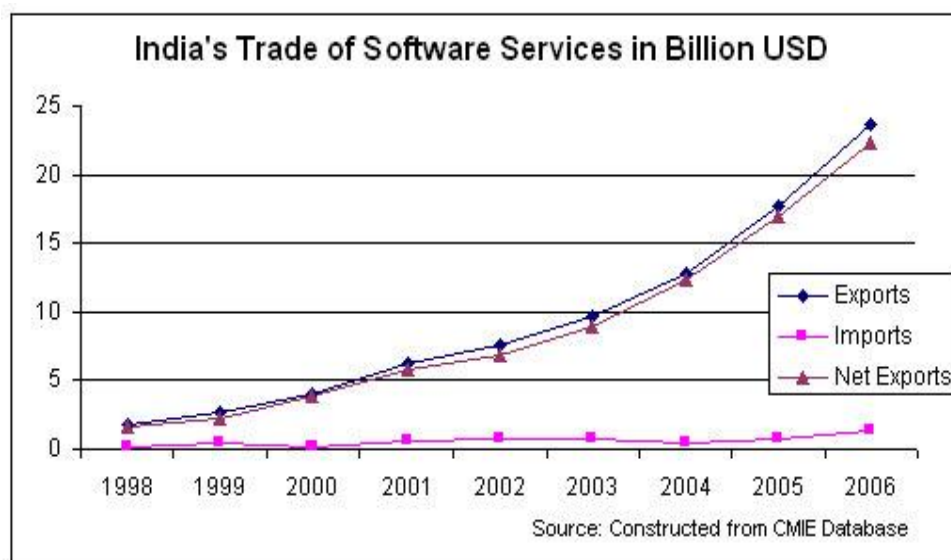
Source: Rajesh Tiwari (2007), 'Innovation Ideas in India's IT Industry: Status Quo and Emerging Trends', <http://www.global-innovation.net/projects/grd/india/ict/soft/index.html> (accessed on 10 February 2010).

The rise of private engineering colleges in an environment of sectoral shifts and labor market transformations presented a paradox. As scholars have documented, enrolments in such colleges reflected the collective aspiration for socio economic mobility via lucrative jobs in the IT sector. In her study of middle class identity in post-reform India, Leela Fernandes (2006) describes a trend whereby aspiring entrants to the new Indian middle class engage in the practice of 'strategic credentializing' in order to find employment in the restructured labor market. Such a practice includes not only the attainment of specific skill sets (such as computer literacy), but investment in various forms of symbolic capital (English classes, managerial diplomas, public speaking training) consistent with images of the new middle class (p.96).

In an IT hub such as Karnataka, the new breed of private engineering colleges caters to the increasing demand for strategic credentializing. The paradox arises from the fact that these colleges do not contribute directly to the expanding IT workforce in the region. Recruitment patterns in Indian IT firms demonstrate that employers' preferences are heavily skewed in favor of graduates from the Indian Institutes of Technology, the National Institutes of Technology and some highly ranked private colleges such as BITS Pilani (Upadhyaya and Vasavi 2006) As far as Karnataka's private colleges are concerned, only a few top notch colleges such as the R.V. College of Engineering, M.S. Ramaiah Institute of Technology, PESIT, Manipal Institute of Technology and BMS College of Engineering contribute significantly to the rapidly

expanding IT workforce. While the new breed of private colleges produce a large fraction of engineering graduates in the state, they are often deemed as unemployable by IT recruiters, and consequently, do not get absorbed by the IT industry without additional training.<sup>50</sup>

*Figure 6: India's Trade of Software Services*



Source: Rajesh Tiwari (2007), 'Innovation Ideas in India's IT Industry: Status Quo and Emerging Trends', <http://www.global-innovation.net/projects/grd/india/ict/soft/index.html> (accessed on 10 February 2010)

In that case, what accounts for the constant flow of aspiring IT employees to these colleges year after year, paving the way for many more new colleges in the state? The answer to this question lies in the new symbolism attached to technical education in an era of structural readjustments and new avenues for economic mobility. The rise of the

<sup>50</sup>There is a broad consensus on this point in the Indian media and among the IT employers. Recent efforts to bridge the gap between the graduates and employable graduates include tie ups between IT giant Wipro and NASSCOM to train engineering graduates for employability. In Chennai, corporate trainers from Australia, Malaysia, Japan and India have set up an institution called Professional Quality Management Development Center (PQMDC) to train fresh engineering graduates for employment.

IT industry was accompanied by societal-level ideological and cultural shifts. Changing perceptions of how technical education facilitates social mobility was an important attitudinal outcome of the macro level transformations. Thus, along with material and structural shifts, economic reform lent a symbolism to tertiary education, which became closely associated with the newly emerging urban middle class identity and its aspirants.

A sociological study of the IT industry by Carol Upadhy and A.R. Vasavi indicates the emergence of these trends. According to Upadhy and Vasavi (2006), software companies look for a combination of skill and 'cultural capital', which means that graduates from the best engineering colleges join the IT workforce. By default, this ensures that the quintessential IT employee is urban, educated, middle class, and belongs to an intermediate or upper caste. Candidates from other socio-economic backgrounds get filtered by the exclusionary processes operating within the education system and do not usually cross the threshold barriers of the IT industry. Yet, it is the very processes of inclusion and exclusion that contribute to the symbolism of professional education, reinforcing its perceived ties with employment in the IT industry and membership of the new Indian middle class.

However, reform driven economic and cultural transformations do not tell the entire story. Proliferation of private engineering colleges was a distinctively political phenomenon, albeit one triggered by economic reform. As far as Karnataka was concerned, the new breed of private professional colleges was not entirely new to the post-reform landscape. Characterized by high fees and donations charged to students,

such colleges had predecessors in the capitation fee system. They appeared in Karnataka as early as the 1960s, when politicians sanctioned caste and community owned institutes with the aim of mobilizing campaign funds and electoral support. The reproduction of the capitation fee system continued through the next two decades, and by the end of the 1980s, a range of castes and communities had set up professional colleges, sustained not by grant-in-aids or private philanthropy, but by the exorbitant fees charged to students. In that case, what was distinctive about the post reform scenario in Karnataka's higher education landscape? Alternately, what were the political mechanisms driving the sudden proliferation of private engineering colleges in the state?

The implementation of economic reform altered the politics of the capitation fee system. The rise of the Indian state as a regulatory authority in the post-reform period meant that patronage now flowed from the political imperatives of ruling elites at the center. A clientilistic higher education system controlled by powerful societal groups required the Indian state to ensure continued patronage flows to these groups during economic reform (Kapur and Mehta 2004, Thachil, 2009). In the face of the Indian state's retreat from sectors such as higher education, the politics of patronage performed the function of co-opting groups, which could potentially thwart the move towards reform. The capitation fee system was an arena where the new politics of reform was played out. An arena defined by the nexus of caste, education and politics, pre-existing patronage networks made it ideal ground for unfolding of this new politics. As powerful castes, communities and politicians in control of Karnataka's capitation fee



system became the de facto recipients of patronage, they invested in the profitable business of professional education. Consequently, the number of private engineering colleges in Karnataka went up from 35 in 1989 to 159 in 2009 (p. 85).<sup>51</sup>

The case of Karnataka illustrates a larger point about the relationship between reform and privatization. Often justified by the rhetoric of retreat of the state, privatization of higher education cannot be understood as a direct consequence of economic liberalization. In fact, much of the existing scholarship attributes privatization of higher education in post-reform developing countries to convergent trajectories in the wake of financial openness and globalization (Verger 2009, Belfield and Levin 2002). However, quite contrary to this line of analysis, there is evidence that exposure to markets actually led to increased social spending by many welfare states in Europe (OECD 2010)<sup>52</sup>. The apparent conflict between these two strands of scholarship is resolved once we factor in the *political mechanisms* triggered off by economic reform. As the case of Karnataka demonstrates, politics mediates the impact of reform on policy, which then accounts for divergent policy trajectories in separate political contexts.

### Centralization

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<sup>51</sup> The new logic of privatization also led to genesis and expansion of patronage networks in other states of India. This was pronounced particularly in the southern and western regions, which were the prime beneficiaries of liberalization in the services sector (p.71).

<sup>52</sup> <http://www.oecd.org/dataoecd/45/48/37864432.pdf>. Also See Thachil (2009).

The discretionary privatization of higher education flowed from centralization of policy and tightening of controls by the central government. The stringent regulatory regime of the 1990s introduced a new set of controls for the establishment and administration of private engineering colleges across the country. In 1986, the Indian government's National Policy on Education set new guidelines for structuring education in the country. With regard to professional education, it stated thus; '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.' In line with this, the AICTE was established in 1988 as a central regulatory authority in technical education in the country.

The AICTE had existed as a central apex advisory body since the pre-independence years. Established in 1945 for the development of technical education in the country, The All India Council for Technical Education played an important role in promoting technical education in the country. But it was the National Policy of Education (1986) that defined the powers of the AICTE more clearly. The body was vested with statutory authority for planning, formulation and maintenance of norms and standards, quality assurance through accreditation, funding in priority areas, monitoring and evaluation, maintaining parity of certification and awards and ensuring coordinated and integrated development and management of technical education in the country.<sup>53</sup>

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<sup>53</sup><http://www.aicte.ernet.in/AICTEAct.htm>

Since 1988, the AICTE regime in technical education implemented strict procedural norms for the establishment of private institutes. The processes of recognition and accreditation which were strictly enforced by the AICTE ensured that an institution could be registered only on meeting a set of conditions laid down by the central regulatory agency.<sup>54</sup> The institutionalization of these norms and procedures also ended state government monopoly in sanctioning new colleges. Since the AICTE was invested with power to override decisions of the state government in this sphere<sup>55</sup>, it played an important role in altering the politics of higher education at the provincial level.

### Regionalization

The proliferation of private professional colleges was also a region-specific phenomenon. The new breed of private engineering colleges sprouted in specific regional clusters concentrated in southern and western parts of the country (Table 6)

*Table 4: State-wise distribution of private engineering colleges in India*

Region	State/Union Territory	ENGINEERING	
		NOI	Intake
<b>Central</b>	1. <a href="#">Madhya Pradesh</a>	61	20210
	2. <a href="#">Chhattisgarh</a>	14	4020
	3. <a href="#">Gujarat</a>	37	12965
	<b>Total -----&gt;</b>	<b>112</b>	<b>37195</b>
<b>Eastern</b>	1. <a href="#">Mizoram</a>	1	120
	2. <a href="#">Sikkim</a>	1	525

<sup>54</sup> *Guidelines Laid Down by the AICTE for Technical Education for Fulfillment by Private Technical Institutions*, Ministry of Human Resource Development, New Delhi, July, 1989.

<sup>55</sup> AICTE Act (1987), <http://www.aicte-india.org/act.htm> (accessed on 15 October 2009).

	3. <a href="#">West Bengal</a>	54	15477
	4. <a href="#">Tripura</a>	1	180
	5. <a href="#">Meghalaya</a>	1	240
	6. <a href="#">Arunachal Pradesh</a>	1	210
	7. Andaman&Nicobar	-	-
	8. <a href="#">Assam</a>	3	750
	9. <a href="#">Manipur</a>	1	115
	10. Nagaland	-	-
	11. <a href="#">Orissa</a>	41	13014
	12. <a href="#">Jharkhand</a>	10	3385
	<b>Total -----&gt;</b>	<b>114</b>	<b>34016</b>
<b>North</b>	1. <a href="#">Bihar</a>	8	1905
	2. <a href="#">Uttar Pradesh</a>	89	28953
	3. <a href="#">Uttaranchal</a>	9	1440
	<b>Total -----&gt;</b>	<b>106</b>	<b>32298</b>
<b>North-West</b>	1. <a href="#">Chandigarh</a>	5	800
	2. <a href="#">Haryana</a>	38	12785
	3. <a href="#">Himachal Pradesh</a>	5	1260
	4. <a href="#">Jammu&amp;Kashmir</a>	5	1545
	5. <a href="#">New Delhi</a>	14	4330
	6. <a href="#">Punjab</a>	45	14880
	7. <a href="#">Rajasthan</a>	41	15045
	<b>Total -----&gt;</b>	<b>153</b>	<b>50645</b>
<b>South</b>	1. <a href="#">AndhraPradesh</a>	236	82970
	2. <a href="#">Pondicherry</a>	6	2370
	3. <a href="#">Tamil Nadu</a>	254	80417
	<b>Total -----&gt;</b>	<b>496</b>	165757
<b>South-West</b>	1. <a href="#">Karnataka</a>	118	46375
	2. <a href="#">Kerala</a>	89	24413
	<b>Total -----&gt;</b>	<b>207</b>	<b>70788</b>
<b>West</b>	1. <a href="#">Maharashtra</a>	155	48250

Source: <http://www.aicte.ernet.in/ApprovedInstitute.htm>

Scholars studying the boom in India's tertiary education have underlined the linkages between region-specific proliferation and concentrated growth of the IT industry. The clustering of India's software technology parks in 5 centers – Bangalore, Hyderabad, Chennai, Pune and Noida – despite the presence of such parks in 21 other locations across the country - must be attributed to system level factors facilitating a range of related activities in these nodes. While local governments and availability of skilled labor play a crucial role in creating conditions conducive to clustering (Schmitz and Musyck, 1995 in Basant 2006), recent studies have highlighted some of the positive externalities endogenous to clustering. These include knowledge flows between firms and social capital generated by clustering of IT firms, which in turn lead to infrastructure building and production of skilled labor. The two way flow between geographically bounded clusters and infrastructure building in such clusters is then responsible for converting the cluster based 'production systems' into self sustaining 'knowledge systems' (See Bell and Albu 1999, Mytelka and Farinelli 2000, Mytelka and Pellegrin 2001). Knowledge systems also include linkages with 'external knowledge sources such as universities, R&D institutions, certification agencies, external firms, customers and so on' (Basant 2006).

The above brand of analysis addresses the linkages between clustering of IT firms and simultaneous proliferation of educational institutions catering to their needs and requirements. It follows that there is a reasonable degree of overlap between clusters that sprouted the information technology industry and regions where private engineering colleges became concentrated in the 1990s. The case of Karnataka validates

as well as problematizes any obvious correlation between the two, as it demonstrates the role of domestic level political factors in mediating the impact of macro-level changes on policy outcomes.

Regional growth of private engineering colleges must be seen as a distinctly post-reform phenomenon bearing clear linkage with liberalization of the services sector and the rise of information technology in southern and western India. At the same time, it was the mediation of the regulatory state that led to the specific outcome of rapid expansion via patronage. Partly a byproduct of the historical linkages between higher education and local politics, the pre-existing networks established Karnataka as a frontrunner among states in receipt of the Indian state's patronage in the sphere of higher education. Thus the case of Karnataka yields useful perspectives on the relationship between reform and higher education policy in the rest of the country and elsewhere in the developing world.

### Chapter 3

#### **Education Entrepreneurship and Emergence of Political Elites in Karnataka**

In this chapter, I investigate the role of higher education in furthering the political ambitions of Karnataka's landed upper castes. I trace the linkages between rise of dominant castes in politics of Karnataka and their increasing presence in the business of technical education. By studying the politics of private professional education in the state, I further an understanding of higher education as a significant resource for socio-economic as well as political advancement of caste groups in Karnataka. In doing so, I also underline the steady growth of patronage networks that sustained the system of private enterprise in higher education.

I trace the origin, persistence and reproduction of the system of private entrepreneurship in tertiary education in Karnataka. Embedded in the social-political conditions prevalent in the state over the last five decades, this system was shaped in response to changing caste configurations in the formal electoral arena. In order to trace these shifting configurations and their role in steering the trajectory of institutional reproduction, I undertake an analysis of the policies that constituted the backdrop for expansion of private enterprise in higher education.

I also address an important theoretical point relating to institutional reproduction and change.<sup>56</sup> The steady proliferation of private professional colleges through the 1950s, 60s, 70s and 80s clearly demonstrated that entry of new groups into corridors of power did not cause significant upheavals in the system. Instead, the system survived by incorporating these previously excluded groups into the preexisting framework of rules. Since the goals of these new set of institutional actors did not differ from the former ruling groups, the institutional set-up for private professional education survived via the process of *institutional conversion*<sup>57</sup> whereby powerful new actors adapted the system to new social and political imperatives. Another mechanism that sustained the system for four decades had to do with institutional innovations that reworked the existing system to respond to new challenges. Such a process is one of *institutional layering*<sup>58</sup>, where institutional innovators adapt to the logic of the preexisting system, but their actions cause a significant departure from the established path. In Karnataka, implementation of land reforms as well as recommendations of the Backward Classes

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<sup>56</sup>This account of institutional reproduction in Karnataka is based on studying timing and sequencing of temporal phenomena, rather than a rational choice theory of actor preferences. In the framework of rational choice institutionalism, preferences of institutional actors are fixed, which reflect in the rules of institutions. However, recent strides in the discipline have questioned this theoretical premise of rational choice institutionalism. As the case of education entrepreneurship in Karnataka demonstrates, institutions often reflect the distribution of power in society. The changing political environment and new configurations of power are instrumental in shaping actor preferences, leading to institutional change via layering and conversion. In fact, this is an important theoretical point that was often neglected in studies interrogating institutional origin. Since scholars tried to ascertain a clear causal relationship between institutions and their environment, they often fell short of interrogating the mechanisms at the heart of institutional persistence and change. With the new found focus on timing and sequence, there is increasing agreement that the important question is not whether institutions or their environment is the primary causal factor. Instead the call is for 'specifying small and medium sized mechanisms for human action and interaction' and paying attention to 'temporal dimensions of social phenomena' (Pierson 2004).

<sup>57</sup>See Thelen 2003, 208-240

<sup>58</sup>Ibid



Commission were instrumental in affecting interests of key political actors, with implications for ownership patterns of private colleges. Together, the processes of layering and conversion led to reproduction of Karnataka's capitation fee system. New actors were incorporated into it and new relationships were forged between institutional and societal actors, yet the institutional arrangement set in motion in the 1950s persisted despite changing societal matrices and political configurations.

### **Caste Configurations in Karnataka**

Since higher education facilitated economic and political advancement of societal groups, the ownership of private professional institutes was an important indicator of their power and status. Conversely, groups in search of economic advancement and political power often asserted their caste and communal identities in order to advance their cause through higher education (Kaul 1993, Madan and Halbar 1972). As a result, the system of private professional colleges in Karnataka shared a symbiotic relationship with various processes operating at the interface of Karnataka's state and society. Keeping this in mind, it is imperative to understand the configuration of castes and communities in the state that shaped its political trajectory over the last five decades.

The two dominant<sup>59</sup> castes at the helm of politics in Karnataka were the Lingayats and Vokkaligas. Deriving their wealth and status primarily from ownership of land in rural Karnataka, Vokkaligas and Lingayats were forerunners in the business of higher education. As their investment in professional colleges yielded rich political dividends in

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<sup>59</sup> Frankel and Rao:

terms of economic gains, caste support and political power, other caste groups followed suit. In the 1970s, Vokkaligas and Lingayats continued to remain at the forefront of tertiary education; but the political upsurge of lower castes in the electoral arena ended their monopoly in the sphere. What were the linkages between politics and the system of private professional or tertiary education in the state? How did the relationships of domination and subordination among castes shape politics in Karnataka? In the remaining chapter, I trace the processes linking mainstream politics in Karnataka with private entrepreneurship in higher education.

#### Dominance of Vokkaligas and Lingayats

The pre-eminence of Lingayats and Vokkaligas in politics of Karnataka had much to do with the organization of Karnataka's society and polity since the early years of independence. Unlike the Brahmins who controlled the administrative apparatus of the province for many years before independence, Vokkaligas and Lingayats were numerically preponderant caste groups ranking well below the Brahmins in the caste hierarchy. However, despite lower ritual status, Vokkaligas and Lingayats were powerful landowning castes exercising considerable influence in rural Karnataka. Their superior position in the societal matrix, which derived primarily from their economic well-being, gradually became entrenched via their dominating presence in the traditional village councils since the early years of the nineteenth century.

The dominance of Vokkaligas and Lingayats in rural Karnataka was not characteristic of the caste –class overlap found in most other states of India. Rather it had to do with the

cross-cutting nature of caste and class in Karnataka's social order. While the relatively lower ritual status of landowning groups was partly responsible for the dilution of oppression typical of caste relations in North Indian villages, several other material factors ensured that dominance persisted via 'co-optation and paternalism' rather than via 'brutishness and mistreatment of the dominated' (Manor 1989, 334).

The superior position of Lingayats in Karnataka's societal matrix was largely independent of their ritual status in the caste hierarchy. This unusual aspect of dominance is attributed by scholars to the Virasaiva movement, which took place in Karnataka in the twelfth century.<sup>60</sup> A socio religious reform movement noted for its anticlericism, antiritualism and egalitarianism, the Virasaiva movement was a sharp sectarian protest to the established Brahminical tradition in the region. 'The Virasaiva movement was a social upheaval by and for the poor, the low-caste, and the outcaste against the rich and the privileged; it was a rise of the unlettered against the literate pundit, flesh and blood against stone' (Ramanujan 1973:21) The Lingayat community was born out of the Virasaiva movement. Thus, in the northern and western areas of the province where Virasaivism triumphed, Lingayats came to pre-dominate culturally, economically and politically.

The Vokkaliga community has been known less for its anti-Brahmanical ideology, and its relationship with the Brahmins had much to do with class hierarchies in urban and rural Karnataka. While land-owning Vokkaligas dominated the largely poor Brahmin

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<sup>60</sup> See Blake Michael 1983, Danesh Chekki 1997,

community in the southern and eastern countryside, the urban educated Vokkaligas did not enjoy a similar position vis-s-vis Brahmins, who were pre-dominant in the bureaucracy and state services. Therefore, when the non-Brahman movement swept the erstwhile Mysore state in the first decade of the twentieth century, the Vokkaliga community assumed a prominent role in lobbying for a greater share of the state's pie for the increasing number of educated non Brahmins in the region.

Though the non-Brahmin movement was restricted to urban areas of the old Mysore state, it played a considerable role in inducting the Vokkaligas and Lingayats into the mainstream of politics. The disconnect between politics at the state and local levels had meant that despite dominance in the countryside, Vokkaligas and Lingayats did not exercise much influence in the Mysore state's administrative apparatus. With the rise of the non-Brahmin movement, the new generation of educated Vokkaligas, Lingayats and other non-Brahmin castes attempted to generate widespread support for their demands. Since the Lingayats and Vokkaligas were powerful landowning castes in rural Karnataka, the non-Brahman movement sought to channel its political resources into politics at the state level. However, the hiatus between politics of the two levels was too wide to be bridged by the movement. As it became increasingly clear that the movement by itself could not transform politics in the Mysore state, the Vokkaligas and Lingayats took refuge under the banner of the Congress Party in 1937. As the Brahmin-dominated Mysore State Congress also joined the banner of the Gandhi-led Indian National Congress, the relationship between Brahmins and non-Brahmins in the princely state of Mysore gradually evolved into one of harmony.

‘Mysore was the only princely state in which a Congress movement of real substance developed. Brahmans and non Brahmans worked very harmoniously alongside one another in this effort. Roughly two third of the thirty or so leading figures in the Mysore State Congress – including the leading Lingayats and Vokkaligas – were lawyers. As the movement developed, key posts went increasingly to Vokkaligas and Lingayats with links to powerful groups on the land. By the time the Maharaja was compelled by a massive Satyagraha in September 1947 to concede the principle of popular sovereignty, the Congress that was on hand to take power was substantially controlled by Vokkaligas (who outweighed lingayats in number and importance in old Mysore) and Lingayats. It was by this rather circuitous route that the non Brahman movement gained such success as it had in the state (Manor, 1977).

The inclusion of Lingayats and Vokkaligas in the Congress party greatly influenced the trajectory of post-independence politics in the region. For the three and a half decades that the Congress Party held power in Karnataka, Vokkaligas and Lingayats dominated politics at the state level. Two factors ensured the unassailed dominance of these two communities at the helm of Karnataka’s politics. First, the overwhelming reach of the Congress Party ensured that it filtered the state’s political machinery at all tiers of government. A perfect instance of what Rajni Kothari termed as the ‘Congress system’ (Kothari 1964), politics in Karnataka reflected how the Congress Party occupied not only the political center, but also most of the left and the right of the political spectrum. Juxtaposed with the established social economic and political dominance of the two communities at the grassroots, it translated into electoral majorities for the Vokkaliga and Lingayat-dominated Congress in Karnataka.

In the 1950s and 60s almost every government in Karnataka was headed by a Vokkaliga chief minister, and Lingayats took over in 1972. Under leadership of these two communities, the Congress government in Karnataka gradually entrenched itself in a position of power. As Lingayats and Vokkaligas together comprised only about one third of the state’s population, how did they sustain their power and privilege for over three

decades? While James Manor's point about the relatively benign nature of caste oppression in Karnataka (p 43) assumes relevance here, a general point regarding the trajectory of lower caste politics in India also requires attention. Caste has been a constant marker of ritual status in the social order; however, the organization of lower castes into a potent force in mainstream electoral politics is relatively recent. The southern Indian states of Tamil Nadu and Kerala were precursors in this regard. While the Dravida Munnetra Kazhagam, an anti-Brahmin Party came to power in Tamil Nadu following a peaceful lower caste revolution in Tamil Nadu, the Communist Party of India, comprising primarily of the low caste Ezhava community came to power in Kerala in 1957. In the northern Indian states, caste politics remained subservient to the politics of religion until the 1980s and 90s when lower caste parties in Bihar and Uttar Pradesh followed in the footsteps of Tamil Nadu and Kerala. According to Ashutosh Varshney, the distinction between caste politics in the two regions lies in the distinctive nature of political mobilization. In the south, lower castes formed their own political parties by the 1950s and 60, whereas in North India, the mobilization of lower castes followed a top-down mechanism as the Congress Party built a 'pyramid of caste coalitions under the existing social elite' (Weiner 1967 in Varshney 2000; 6).

The case of Karnataka does not fit very well into either of the two categories offered by Varshney. As a southern Indian state, its political trajectory did not resemble that of Tamil Nadu or Kerala. On the other hand, the configuration of castes in its political landscape did not match the classification based on horizontal and vertical mobilization. To begin with, Brahmins did not head the pyramid of caste coalitions. But more

importantly, the Congress Party strategically adopted policies aimed at co-opting the lower castes into the mainstream of politics. Its policies of reform and representation for these groups were not generous compared with favors bestowed on Vokkaligas and Lingayats; nevertheless, they played an important role in maintaining a considerable degree of stability in Karnataka's socio-political order (See Manor 1989, 343). In addition, the relatively non-violent history of caste relations in the region played a role in keeping major political upheavals at bay.<sup>61</sup>

### The Devraj Urs phase

When Devraj Urs took over as Chief Minister of Karnataka in 1972, it marked the beginning of a new phase of politics in the state. His coalition with lower castes and preferential policies for disadvantaged groups<sup>62</sup> broke the Vokkaliga- Lingayat stranglehold over politics, paving the way for rise of new players in the corridors of power. Such a strategy was one of 'enlightened conservatism – a tendency to pursue incremental changes, which anticipate future problems in order to diffuse them before they become acute' (Manor 2008). By avoiding social and political alienation of the numerically preponderant lower castes, Devraj Urs' government facilitated Karnataka's relatively smooth transition to the post-Mandal phase of Indian politics.

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<sup>61</sup>Even when Congress governments in New Delhi, Uttar Pradesh, Rajasthan, Maharashtra, Gujarat, Madhya Pradesh, West Bengal and Orissa were pulled down following the Emergency imposed by Indira Gandhi's government, the Congress establishment in Karnataka escaped a similar fate.

<sup>62</sup> The backward Muslim community was also treated as a disadvantaged group (Manor 1980, 1989).

Devraj Urs' policies of accommodation touched several areas of administration. First, the politically expedient chief minister ensured that members of numerically strong castes and communities received key cabinet posts in his government. However, most importantly, it was the land reform of 1974 that played a significant role in breaking the self-perpetuating political machinery in the state. On the heels of land reform, the Karnataka Backward Classes Commission recommended the inclusion of 41.67% of the state's population for the purposes of affirmative action<sup>63</sup>. Though this report created a furore in Lingayat circles, Devraj Urs had by then consolidated his position among the numerically preponderant lower castes.<sup>64</sup> Consequently, he implemented the recommendations of the commission in 1977. The Congress government under Urs also initiated schemes in the areas of primary education, healthcare and rural employment. On the other hand, Devraj Urs ensured that Lingayats and Vokkaligas did not become completely alienated from the system. For instance, the Vokkaliga community was included in the list of Backward Classes and Lingayat cultivators in northern Karnataka received considerable benefits from his policies (Manor 1989). Finally, since all the policies were implemented gradually, change was incremental and did not threaten breakdown of the existing socio-political order in Karnataka.

The following Congress government under Gundu Rao centralized power in the hands of the Chief Minister. Not surprisingly, the political networks developed by Devraj Urs collapsed, leading to a de facto bureaucratic regime in the state. By this time, as James

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<sup>63</sup>The Karnataka State Commission for Backward Classes, Special Report – 2000.

<sup>64</sup> As a means of consolidating support of these societal groups, Devraj Urs established and promoted caste associations (Manor 2008).



Manor points out, it was no longer possible for a single societal force to dominate state level politics in Karnataka. Lingayats and Vokkaligas continued to remain influential, but the institutionalization of broad coalitions meant that in order to win elections, a political party could not but accommodate interests of a wide array of societal groups. The massive defeat of Gundu Rao's Congress government in 1983 bore testimony to this. As the alienated groups turned to the Janata Party headed by Ramakrishna Hegde, the 'Congress system'<sup>65</sup> in Karnataka came to an abrupt end.

### Politics in the 1980s

The entry of hitherto marginalized groups into legislatures, bureaucracy and educational institutions had a lasting impact on Karnataka's politics. Though, as Atul Kohli (1982)<sup>66</sup> pointed out, the Devraj Urs government neither intended nor achieved institutionalization of lower caste rule, it played a significant role in altering the configurations of power in the state. The pragmatism of Devraj Urs led him to follow a policy of accommodation whereby a clever balancing of diverse interests kept political turmoil at bay. In other words, his regime was a reasonably inclusive one that did not alienate any of the populous or powerful societal interests. Thus the loose and amorphous coalition built on the edifice of patronage came to represent a happy political equilibrium for some years.

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<sup>65</sup> See Rajni Kothari (1964).

<sup>66</sup> "Karnataka's Land Reforms: A Model for India?," *Journal of Commonwealth and Comparative Politics*, November 1982, pp. 309–328.

However, a political system sustained by patronage is inherently unstable. As politicians compete with one another to offer the electorate a greater share of spoils, new players enter the fray in a bid to displace the old ones. In the absence of a strong leadership, this leads to infighting within the party, ultimately leading to its collapse.<sup>67</sup> Simultaneously, it creates the space for new political alliances and new configurations of power.

This was largely the picture in the post-Devraj Urs phase of Karnataka politics. A follower of Indira Gandhi, Devraj Urs had built his administrative apparatus in the form of a command system dependent on centralized leadership rather than on party organization. Therefore, when he broke away from the Congress(I) in 1978, the electorate was faced with a confusing situation. The coalition of the previous regime could no longer be the basis of voting behavior because merger of Congress (Urs) with the Lingayat dominated Janata Party had obliterated the distinction between parties and their social bases (Manor 1984).

This meant that electoral fortunes now hinged on personal loyalties inculcated over the preceding years. Not surprisingly, the Congress (Urs) -Janata combine managed to secure a majority in the 1978 assembly elections. However, over the next few years, it became evident that the scheduled castes and backward communities did not figure prominently in the Gundu Rao government. In addition, the factionalism within the Janata Party led the Chief Minister Gundu Rao to centralize power in his own hands to

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<sup>67</sup> See Geddes (1994)

an unprecedented degree, with the consequence that legislators were deprived of power and influence. As a vast array of societal forces grew alienated from the system, the Gundu Rao government suffered a resounding defeat in the 1983 assembly polls.

However, despite collapse of the Urs coalition, an important trend emerged very clearly in the 1980s. The rejection of the Gundu Rao government proved that lower caste and backward communities were integral to mainstream politics in Karnataka, and political parties could ignore them only at their own peril.

‘Mainly as a result of what happened during the Urs years (1972-80), and partly as a result of events under the two subsequent Chief Ministers – R. Gundu Rao (1980-83) and Ramakrishna Hegde (1983-88) – it is no longer possible for any single set of social forces to exercise ‘dominance’ in state-level and supra-local level politics in Karnataka. Most Karnataka politicians – whatever their caste background – now presume that members of disadvantaged social groups possess the sophistication to anticipate tangible benefits from the genuine (not token) representation within political parties seeking power in the state. They also presume that a party which does not deliver these things will not gain many votes from such groups. As a result, both main parties now seek to construct coalitions in which traditionally dominant Vokkaligas and lingayats play an important role, but in which sufficient power is shared with other groups to prevent any social force from exercising dominance.’ (Manor 1989, 356).

This institutionalization of broad coalitions was a significant aspect of post-Urs politics in Karnataka. The Janata government, which took charge in 1983 was representative of all the social forces that had turned away from Gundu Rao’s Congress(I), and thereafter, no single set of forces has succeeded in dominating politics in the state.

### **Significant Legislations**

The Vokkaliga and Lingayat dominance in society and politics gradually mapped on to the sphere of private higher education. The non-Brahmin movement in the erstwhile Mysore state saw the Vokkaligas and Lingayats seeking greater representation in the

bureaucracy and other state services. Propelled by the realization that education was going to be a crucial factor in their fight against Brahmin dominance in the administrative apparatus, the land owning castes began to channel agricultural surplus towards the establishment of educational institutions. As Vokkaligas and Lingayats filled the ranks of the Congress Party, and thereby, the state legislatures, they used their power and influence to sanction private colleges owned by their caste members. Conversely, the powerful caste organizations also exerted pressure on the government to obtain sanctions for colleges. Since these colleges came to play an important role in mobilizing electoral support for caste members and funds for electoral campaigns, there emerged a system of patron client linkages in the system of private professional education.

In order to trace the linkages between caste configurations in politics and caste-based ownership of professional colleges, it is necessary to take a look at the important legislations that impacted relations of domination and subordination in the region. On the one hand, these legislations reflect the wielding of political power by Karnataka's social and political elites; but on the other hand, a chronological study of these legislations reflects the incremental changes leading to the realignment of political forces in the 1970s. Viewed in light of these emerging social and political configurations, the expanding system of caste based private enterprise in professional education begins to fit into the larger political picture of the state.

### Land Reforms

The Indian constitution delegates responsibility of implementing land reforms to governments of the states. In Karnataka, the dominant landed interest groups who dominated the political and administrative apparatus in the state, for long resisted any meaningful redistribution of land. In 1955, the government of Karnataka passed the *Inam Abolition Act* banning absentee landlordism in the state. However, since most absentee landlords were Brahmins<sup>68</sup>, the Act faced much resistance from the Brahmin dominated bureaucracy at that time. Consequently, the Act was implemented not through formal administrative channels, but through court decisions on the claims of tenants on *Inam* land (Thimmaiah and Aziz, 1983).

The next phase of reforms involving the land owned by the Vokkaligas and Lingayats did not come through easily. In the late 1950s, the government dominated by Vokkaligas and Lingayats undertook land reforms as an exercise in political pragmatism. Since they comprised only about 30 percent of the state's population, it was the landless lower-castes who comprised the bulk of the electorate. In addition, the Congress Party in Karnataka had to face challenges from the organized Left that was gaining steadily in the countryside. Thus, the Karnataka Land Reforms Act passed in 1961 adopted several measures relating to land ceiling and tenancy laws. However, the act did not bring about vast changes in the pattern of land ownership in Karnataka. According to James Manor, the 1961 reforms had only a mild impact in the countryside. Though the proportion of land under control of owner-cultivators rose from 70.2 percent in 1961 to 88.8 percent

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<sup>68</sup> The Brahmins had migrated to towns and cities in the 19<sup>th</sup> century (Manor 1989, Thimmaiah and Aziz 1983).

in 1971 (Rajpurohit cited in Manor 1989), the figures 'conceal tenancies in order to circumvent the 1961 land reform which lacked the teeth of the Act of 1974' (343). Since the dominant landed castes were able to dilute the force of the land ceiling provisions by wresting for themselves, a series of concessions, the Act of 1961 did not play a significant role in altering the relations of production in the countryside.

In the late 1960s, the political picture in Karnataka changed significantly. The split in the Congress Party and the rout of the old Congress establishment by Indira Gandhi's faction of the party led to important changes in the party's political alliances. This had clear ramifications for state level politics in Karnataka. In line with Indira Gandhi's populist politics of the 1970s, the Congress government headed by Devraj Urs inducted lower castes and other landless communities in positions of power. In fact, the number of Lingayats in the legislature reduced considerably following the 1972 assembly elections (table 2, p. 24-25). In this changed scenario where traditional landed groups lost their hold on the policy making apparatus, the new political elite immediately enacted a revised land reform act. By the 1970s, the Brahmins had also lost their control over land in the countryside. As Brahmins in the state bureaucracy aligned with the new rulers of Karnataka, the passage of stiff land reform legislations did not encounter major hurdles (See Thimmaiah and Aziz 1983, 825).

The Act of 1974 effected a greater degree of redistribution in the countryside; however the reforms tended to be piecemeal and superficial instead of deep and systematic (Kohli 1982). Since the political establishment under Devraj Urs was characterized by

populism and patronage politics, where control of political spoils was used to buy political support of marginalized groups, redistributive policies did not really take root in Karnataka.<sup>69</sup>

‘The leader as a patron bestows patronage on the client followers in exchange for support. Because patronage usually involves the use of public resources for private aggrandizement, the whole arrangement is seen, both by participants and outsiders, as representing the sordid side of politics. The participants clearly recognize the rival factions and the respective leaders and followers. It is, however, difficult for an outsider to penetrate this arrangement; it is in the interest of the participants to preserve the secrecy of the arrangement deemed to represent political corruption’ (Kohli 1982, 147).

The politics of patronage meant that lower caste rule was not institutionalized in Karnataka. Unlike in states such as West Bengal where redistributive reforms were carried out by a political party with the organization as well as the intent to orchestrate fundamental changes in relations of production, Karnataka’s redistributive policies were a product of clientelism. Unlike in Bengal, the Devraj Urs government did not implement policies that would create an alternative structure of power at the level of society. Instead, the rhetoric of redistribution and mass politics was a carefully crafted political strategy to undermine the legitimacy of the old regime dominated by Vokkaligas and Lingayats (*Ibid*). Thus, even though the trend of lower caste coalitions took hold of politics in Karnataka, the Vokkaligas and Lingayats continued to remain powerful entities in politics and society. This was aptly demonstrated through the 80s when political fortunes of lower castes and minority communities oscillated in response to strategies of Congress and Janata leaders in the state.

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<sup>69</sup> This contrasts with the situation in West Bengal. According to Kohli, the intent and achievement of land reforms in West Bengal had to do with the presence of a well organized political party absent in Karnataka.

*Table 4: Composition of the Karnataka Legislative Assembly by Caste: 1952-1972*

*Elections*

Election Years										
Caste/Community	1952		1957		1962		1967		1972	
	no	%	no	%	no	%	no	%	no	%
Brahmin	14	11.0	9	6.3	8	6.0	8	5.8	11	6.2
Lingayat	45	35.4	47	33.1	45	34.0	49	35.5	43	24.2
Vokkaliga	33	26.0	35	24.7	35	26.5	36	26.1	52	29.2
Other Hindus	12	9.5	22	15.5	20	15.2	17	12.3	37	20.8
Scheduled Castes	20	15.7	22	15.5	21	15.9	24	17.4	23	12.9
Scheduled Tribes	-	-	2	1.4	1	0.8	-	-	2	1.1
Christian	-	-	1	0.7	-	-	1	0.7	5	2.8
Jain	2	1.6	3	2.1	1	0.8	1	0.7	1	0.6
Muslim	1	0.8	1	0.7	1	0.8	2	1.5	4	2.2

Source: Government of Karnataka, *Karnataka Backward Classes Commission Report, Vol.IV*, page 829.

The Report of the First Backward Classes Commission

While land reforms constituted one prong of Urs' political pragmatic politics, affirmative action for disadvantaged groups constituted the other. Alongside land reforms, which sought to address the problem of poverty in the countryside, Devraj Urs adopted a different mechanism to tackle social problems such as inequality, oppression and exploitation (See M.N. Panini and M.N. Srinivas, 1984). The second prong of his populist



politics was chiefly reflected in the Report of the Backward Classes Commission (1975). Constituted by Devraj Urs to identify caste groups eligible for special concessions from the government, the commission under the chairmanship of L.G. Havanur recommended 32 percent of the state's population for award of these concessions.

Interestingly, the Havanur Report identified the Vokkaligas, but not the Lingayats as a backward community. The Christian and Muslim communities were also excluded from the Havanur recommendations. However, for the sake of political expediency, the Devraj Urs government not only extended reservations to these communities, but also offered some concessions to the socio-economically advanced Brahmins and Lingayats. The 'special group' contrived to accommodate interests of groups excluded by the Havanur Report was not based on caste or community affiliations. Instead, it consisted of cultivators, artisans, petty businessmen and class IV state employees who were not eligible for concessions under the caste quotas. Consequently, the overall quantum of reservation was increased from 32 to 40 percent of the total population.

#### The Report of the Second Backward Classes Commission

The Janata government instituted the Second Backward Classes Commission in 1983 under the Chairmanship of T. Venkataswamy. The Venkataswamy Report not only reduced the quantum of reservation for backward classes, but also excluded both Lingayats and Vokkaligas from the list of beneficiaries. In the face of vehement opposition from particularly the Vokkaliga community, Ramakrishna Hegde's Janata government rejected the report on grounds of it being arbitrary, inconsistent and

methodologically flawed<sup>70</sup>. In 1986, the government prepared an ad-hoc list of Backward Classes, which not only reiterated the findings of the Havanur Commission Report, but also included new castes and communities to the list of beneficiaries. Thus, of the 71.43 percent of the state's population that was covered by the government order in 1986, Vokkaligas and Lingayats constituted about 37 percent; i.e. more than half the total quantum of reservation for Backward Classes in Karnataka. As a slew of other communities including Christians and ritually lower caste Hindus were also provided for, the order clearly reflected the Hegde government's compulsions of placating lower castes and minority communities without antagonizing the socially and economically powerful Vokkaligas and Lingayats.

#### The Report of the Third Backward Classes Commission

The Chinappa Reddy Commission instituted in 1988 adopted not only caste as a marker of backwardness, but also identified several groups in terms of economic backwardness. These included agricultural laborers, weavers, automobile drivers, construction workers, petty shopkeepers and menial workers.<sup>71</sup> Like the Havanur Commission, the Chinappa Reddy Commission identified Lingayats as a forward community and excluded them from the benefits of reservation. As Vokkaligas were also denied the fruits of reservation, the report of the Third Backward Classes Commission (1990) encountered stiff resistance in the legislatures. By this time, the Congress government headed by Veerendra Patil had substantially reversed the policy of coalition with lower castes, and

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<sup>70</sup>The Karnataka State Commission for Backward Classes (2000), *Special Report*, page 10.

<sup>71</sup> Report of the Karnataka Third Backward Classes Commission (1990)

the attempt to woo Lingayats was clearly reflected in the state's administrative machinery, once again filled with representatives of the Lingayat community (Kaul 1993, 78). Not surprisingly, the commission's recommendation for 39 percent reservation to 32 groups in the state was not implemented by the Patil government. Instead, a series of government orders in 1994 ensured that both of the dominant communities were included as beneficiaries of the 57 percent reservation to backward classes. Along with reservation for scheduled castes and scheduled tribes, the total reservation in Karnataka stood at a staggering 75 percent.

### **Education Entrepreneurship: Reproduction and Change**

The nexus of caste, education and politics can be a useful starting point to study the mechanisms underlying institutional reproduction and change in Karnataka. Embedded in the patron client linkages between ruling elites and powerful societal groups, the growth of private professional colleges in Karnataka followed the rise of specific castes and communities in formal politics.<sup>72</sup> The steady but sporadic growth of these colleges between the 1940s and the 1980s reflected changing political configurations in the electoral arena and changing policies in response to emerging political imperatives. While the increasing Lingayat dominance in the legislatures was reflected in the establishment of Lingayat colleges in the 1960s and early 70s, the new socio-political environment of the 1970s and 80s gave rise to new trends in this sphere. The increasing presence of Backward Castes, Muslims and other agrarian groups in mainstream politics

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<sup>72</sup>The gradual entry of backward castes, Muslims and other agrarian groups in the business of higher education following their upsurge in politics in the 1970s is a clear example of this phenomenon.

was followed by the entry of these groups in the business of professional education. The following evidence demonstrates that the system of private professional education was to a large degree, reflective of changing trends in mainstream politics.

### The 1950s and 60s

The first private professional college was established by the Brahmin community. In 1953, T.M.A. Pai established the Kasturba Medical College in Manipal in order to supplement government efforts in providing medical education. In technical education, the Manipal Institute of Technology was set up in 1957. However, the chief motivation for the ventures arose from alienation of the Brahmin community in aftermath of the anti-Brahmin movement. As many Brahmin applicants were denied admission to state run colleges, individuals such as T.M.A Pai took initiatives to secure the educational aspirations of community members (See Rekha Kaul 1993, 91). The Kasturba Medical College was the first college in the state to grant admissions on payment of capitation fees (Kaul 1993, 4); however, over the next few years, the capitation fee phenomenon was nurtured by a different set of socio-economic conditions in Karnataka. The rise of the rich peasantry as a powerful force in state-level politics led them to exercise influence in a sphere that promised socio-economic advancement as well as monetary gains. As the landed classes began to channel agricultural surplus towards the establishment of private professional colleges, the expanding system of such colleges also came to serve a political purpose for the Vokkaliga and Lingayat leadership.

'A new university, a medical or an engineering college, a polytechnic, or an agricultural college in the *mofussil* areas , are all simultaneously a manifestation of, and an addition to, the regional political influence, besides bringing educational facilities nearer home to members of their constituencies' (Kaul 1993, 105).

It is important to understand that these colleges represented an institutionalized means of furthering the political ambitions of powerful groups. Since private enterprise in education is seen as an attempt by castes and communities to integrate themselves into the folds of a modern Indian state, educational institutions owned by such organized societal interests have been regarded by the state as instruments of socio-economic advancement in a developing nation. In fact, these bodies performed highly secular functions and brought about 'decompression' of traditional institutions (Madan and Halbar 1972, 132). It was this idea contained in India's constitutional framework that facilitated the expanding system of caste owned colleges in Karnataka. However, with steady rise of the capitation fee phenomenon, the system gradually came to represent a mechanism whereby powerful caste and community leaders mobilized funds for electoral campaigns as well as support of caste members.

It followed that castes and communities wielding political power exerted pressure on the state government to obtain sanctions for colleges. An example of a caste-based capitation fee institute established during the phase of Lingayat dominance is the Jawaharlal Nehru Medical College at Belgaum. Established in 1963 by the Karnataka Lingayat Education Society, it was sanctioned by the Lingayat Chief Minister S. Nijalingappa. In fact, it was also able to obtain 100 acres of land from the Belgaum Borough Municipality with help of the Lingayat dominated Congress government in

Karnataka.<sup>73</sup> The Siddaganga Institute of Technology at Tumkur was another capitation fee college established by the Lingayats in the early 1960s. Among Vokkaliga owned institutes, the Adichunchanagiri Institute of Medical Sciences at Mandya was established in 1973. By the early 1970s, there were 4 private engineering colleges and 5 private medical colleges in Karnataka<sup>74</sup>.

As far as technical education was concerned, the rise of private institutes was also facilitated by the lack of stringent AICTE regulations. In line with its advisory role during this period, the AICTE invited private participation in the sector to supplement government initiative to provide technical education. This was no different from the system of grant-in-aid that had for long been a feature of education in India. Largely dependent on state funds, the institutes were subject to regulations, which not only prohibited capitation fees, but also spelt out admission policy, curriculum and necessary infrastructure. However, the capitation fee system in Karnataka developed outside the framework of the AICTE. As the state government came under pressure from interest groups to sanction colleges, AICTE regulations were often set aside. In absence of statutory powers, the AICTE was easily circumvented, paving the way for establishment of many capitation-fee colleges.

### The Decade of the 70s

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<sup>73</sup> See Rekha Kaul 1993, 167-68.

<sup>74</sup> Some institutes such as those run by the Gokula Educational Foundation were not affiliated to specific castes or communities. See Kaul 1993.

By the early 1970s, the field had been set for more entrants to the business of professional education. But the new political trajectory set in motion by the Devraj Urs regime altered the caste and community profile of Karnataka's education entrepreneurs. The Devraj Urs government sanctioned 9 engineering colleges and 3 medical colleges, all of which were additions to the existing capitation fee system. However, the management profiles of these colleges made it clear that the field had been thrown open to lower castes and minority communities. The Lingayats and Vokkaliga continued to establish new colleges, but their monopoly in the field had clearly come to an end.

Following the implementation of the Havanur Committee Report, the Vokkaligas entered the business of professional education with renewed vigour, and opened several new colleges in the state. In 1979, the Dayanand Sagar College of Engineering was set up by an affluent Vokkaliga barrister. The Bangalore Institute of Technology (1979) and the Kempegowda Institute of Medical Sciences (1980) in Bangalore were started by the Vokkaligara Sangha – an organization founded in 1906 to 'promote social, cultural and educational aspirations of the agricultural community of the erstwhile Mysore state'<sup>75</sup>. Another Vokkaliga organization, the Adichunchanagiri Shikshana Trust was instrumental in setting up the Adichunchanagiri Institute of Technology in Chikmagalur in 1980. Simultaneously, a number of colleges run by lower castes and backward communities also came into existence. The Ambedkar Institute of Technology and the Ambedkar Medical College, run by scheduled caste managements were

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<sup>75</sup> <http://www.kimsbangalore.edu.in/vsabout.html> (accessed on 4th June, 2009).

established in 1979. The Muslim community set up the Islamaiah Institute of Technology in Bangalore, while another scheduled caste institute called the Sri Siddhartha Institute of Technology came into existence in Tumkur during the same year. Finally, the Lingayats did not lag far behind as the Lingayat Education Society (1916) continued to set up educational institutions in the state. As a result of its activities, the KLE Engineering College was set up in Belgaum in 1979.

Rekha Kaul's extensive study of these colleges and their managements clearly established their linkages with state-level politics. Her study showed that managements of private professional colleges comprised of businessmen, landholders, politicians and high ranking government officials. 'While influential government officials were a help in getting files to move faster, political contacts ensured the smooth functioning of the college' (172). However, the caste composition of the managements was mostly uniform. Managements of the KLE institutions as well as the Siddaganga Institute of Technology comprised exclusively of Lingayats, managements of the Adichunchanagiri institutes, Bangalore Institute of Technology and Kempegowda Institute of Medical Sciences comprised exclusively of Vokkaligas, while managements of the Ambedkar institutes and SSIT did not consist of any non-scheduled caste member. While this established the caste-based ownership of private professional colleges in Karnataka, it also demonstrated the nexus of caste, politics and education in sustaining capitation fee colleges in the state.



The decade of the 70s contained the key political processes responsible for future trajectory of the capitation fee system. First it is important to note that lower caste representation in Karnataka's politics followed the patronage route. Consequently, their rule did not become institutionalized in the state. But the political upsurge of new groups was not inconsequential as it played an important role in breaking the elite stranglehold over Karnataka's society and politics. Viewed together, these two phenomena represented the twin aspects of institutional reproduction in the system of private professional education.

A product of patronage links between new ruling elites and their constituencies, the new ownership pattern was no departure from the institutional trajectory of the previous decades. The system of patron client linkages that sustained the proliferation of Lingayat colleges in the 60s not only remained intact but was further entrenched under the new regime. Yet, following Urs' policies, as new groups entered the political field, the *layering* of a new set of colleges onto an existing network of dominant caste colleges had a substantial impact on the overall trajectory of Karnataka's capitation fee system. Secondly, the new political environment created by land reform and extensive backward caste reservation meant that the existing arrangement had to address the needs and goals of new interest groups. Therefore, Karnataka's capitation fee system was reproduced also via the process of *conversion* whereby the old patron client arrangement turned to the service of lower castes and minorities.

### The 1980s

In the 1980s, the number of private professional colleges saw a steady rise, and by the end of Gundu Rao's term in 1983, there were 27 private engineering colleges and 8 private medical colleges in Karnataka.<sup>76</sup> It was also at this time that the government was caught in crossfire between public outcry against a system that compromised 'public interest', and its own ruling elites whose interests were at stake in the capitation fee system. Anticipating electoral consequences in the 1983 state assembly elections, the Gundu Rao government issued an order in 1981 for the phased abolition of capitation fees in private engineering colleges. In response, the managements of private engineering colleges challenged the government order in the High Court and obtained a stay, which allowed the system to continue on its course. As the Gundu Rao government sanctioned a progressive increase in the fees charged by capitation fee colleges,<sup>77</sup> it became clear that the Gundu Rao government was a captive of its caste and entrepreneurial interest groups.

The tussle between public interest and institutional elites continued through the 80s. In tune with its campaign pledge, the Janata Party government under Ramakrishna Hegde passed the Karnataka Educational Institutions (Prohibition of Capitation Fee) Act in 1984. Apart from ordering a phased termination of the capitation fee system, it specified a seat sharing ratio between the government and private managements whereby 60 percent of seats were to be filled by government nominated students from

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<sup>76</sup> Government of Karnataka, *White Paper on Professional Colleges and Institutions*, March 1983.

<sup>77</sup> Rekha Kaul (1993), Chapter 4.

Karnataka.<sup>78</sup> The Act also mandated that private institutes subsidize the fees to be paid by this category of students. However, before the Act of 1984 could be implemented, private institutes once again won a legal victory against the state government. In response to a writ petition filed by private managements in the state, the High Court struck down the Karnataka Educational Institutions (Prohibition of Capitation Fee) Act, and rejected the seat sharing ratio as well as the fee limits mandated by the government.

Over its next few years in office, the Janata government steered a course no different from its predecessors. Under pressure from caste groups and the growing class of entrepreneurs in the state, it sanctioned several new capitation fee colleges so that their number reached a staggering 50 (35 engineering and 15 medical colleges) by the end of the decade. Thus, despite occasional placatory measures to curb the practice, the Hegde government's surrender to interest groups paved the way for institutional license to the system. The 1989 agreement between the government and private managements for a considerably higher fee structure was in fact an 'official sanction for the commercialization of professional education' (Kaul 1993, 137). In complete contradistinction to the Act of 1984, the state administration under President's rule drew up a scheme that succeeded in merely staggering the payment of capitation fee over the entire course in the form of tuition fees' (*ibid*)

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<sup>78</sup> The other categories for the purpose of allocating fees included non-Karnataka students, NRIs and students admitted through the management quota.

The capitation fee colleges registered considerable growth in the 1970s and 1980s. Despite new groups and new governments coming to power over these years, the clear trend was one of increasing fees and a rapidly expanding system of professional education based on capitation fees. This reveals important linkages among society, politics and the capitation fee phenomenon in Karnataka. A review of the social composition of successive governments makes this clearer. The Devraj Urs government incorporated a diverse array of castes and communities in his administration which mapped on to the ownership patterns of capitation fee colleges. The assumption of power by Gundu Rao's Congress followed by reshuffling of political elites did not bring about a significant shift in these patterns. In fact the sharp rise in the number of capitation fee colleges in the 1980s reflected a clear continuity of the system set in motion several years ago, albeit in a vastly different socio political environment. Moreover, since the new governments under Gundu Rao and Ramakrishna Hegde were comprised of the same set of societal interests as under Devraj Urs, there was no significant change in the ownership pattern kicked off during Urs' regime. Thus, once the system was in place, successive governments failed to curb its expansion leading to its continuity and reproduction, rather than change.

It was economic liberalization in the early 1990s and rise of the Indian state's regulatory authority that triggered off an alternative politics of the capitation fee system. A conjuncture of new material conditions such as withdrawal of public resources from education and a spurt of economic development in southern and western India led to a

realignment of political forces in these regions leading to a brand new line of conflict – one between the local elites and the Indian state. As the new coalition of local groups from Karnataka and its neighbouring states identified the Indian state as a common enemy, they approached the Supreme Court with pleas for autonomy. The following chapter describes the unfolding of this conflict and demonstrates the alliance of local elites in the face of increasing regulation.

## Chapter 4

### Litigations and the Politics of Higher Education

This chapter is concerned with explaining two of the central observations made in this study. The first is the appearance of the curious alliance of local elites bearing ties with a range of caste, communitarian, linguistic and regional groups. The unfolding of debates in course of the litigations demonstrates the manner in which the alliance persisted despite the strategies of individual colleges, which were often based on communitarian affiliations. This furthers the argument that the entrepreneurial identity of local elites cannot be understood without taking into account the changing politics of caste, community and religion in liberalizing India. Secondly, the Supreme Court litigations provide the basis to observe and understand how the meaning of 'elite' is being reconfigured in context of higher education. It relates to the larger argument regarding elite groups approaching the judiciary to effect favorable policy changes (chapter 5).

The Supreme Court cases may be regarded as a chronology of litigations constituting a discursive trajectory of debates on the autonomy of private professional colleges in the country. Beginning with *D.P. Joshi v. the State of Madhya Bharat* in 1955, the 8 cases represent a continuum, reflective of the evolving nature of debates and discourses on the issue. It is important to note that 7 of the 8 cases were fought in the apex court between 1992 and 2005. The frequency of cases in the 1990s, following the hiatus of four decades since D.P Joshi (1955) indicates that conflicts over autonomy emerged as

central policy concern in the post- liberalization years.<sup>79</sup> These cases on autonomy of private professional colleges focused on two core issues: 1) fee structure 2) admission policy with respect to distribution of seats based on the state of domicile, and quotas implemented under the Indian government's affirmative action scheme.

This chapter is divided thematically to reflect the main discourses informing the debates in the litigations. Each new theme reflects the shift in discourse, and unfolding of fresh concerns of litigants. The shifts also reflect new strategies adopted by litigants in accordance with the judicial discourses in liberalizing India. It is these shifts that hold the key to tracing the character of education entrepreneurs and their route to victory against the regulatory regime of the Indian state.

### **'Capitation Fees': What it has meant over the Years**

The meaning and interpretation of 'capitation fees' by the Supreme Court has played a key role in delineating the relationship between the public and private sectors in higher education. In the 1950s, the Supreme Court's endorsement of capitation fees drew attention to the rules governing the partnership between the state and the private sector. Its verdict in *D.P. Joshi v. The State of Madhya Bharat* upheld the legitimacy of capitation fees on grounds that it did not violate the fundamental rights in the constitution. However, subsequent litigations in the 1990s established new parameters

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<sup>79</sup> In addition to the 8 cases discussed in this chapter, 8 other Supreme Court cases between 1991 and 2006 touched on the capitation fee question. However, since these did not address the twin issues of fees and admission policy, they did not contribute to the discursive trajectory on the question of autonomy of private professional colleges in India.

for evaluating the legitimacy of capitation fees. Successive verdicts in *Mohini Jain v. The State of Karnataka* and *J.P. Unnikrishnan v. The State of Andhra Pradesh* struck down the constitutional sanction for capitation fees. While the former was a categorical rejection of such fees charged by private colleges, the latter fixed a ‘ceiling’ for the fee structure in private engineering and medical colleges.

#### D.P. Joshi v. The State of Madhya Bharat

When the government of Madhya Bharat took over administration of the Mahatma Gandhi Memorial Medical College in Indore, it laid down a new rule of admission. According to this, the existing capitation fee amount of Rs 1500 would no longer apply to ‘bona fide residents’ of Madhya Bharat; however, payment of capitation fee would be mandatory for all non-Madhya Bharat entrants to the medical college. In response to this rule, the petition in the Supreme Court challenged the order on grounds that it violated the fundamental rights of equality before law and non-discrimination by law on grounds of religion, race, caste, sex or place of birth. The petition by D.P. Joshi – a third year student at the medical college - invoked Articles 14 and 15<sup>80</sup> of the Indian constitution in asking the court to issue a prohibitory order against the government.

The history of the Mahatma Gandhi Medical College figured prominently in Madhya Bharat’s defense. In an affidavit in response to the petition, the defense counsel invoked the private origins of the college. The capitation fee phenomenon was part of a larger funding structure evolved by the private management, and the state had taken over on

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<sup>80</sup> See Appendix II



the condition that donors would continue to hold stakes in its affairs. The acknowledgement of this point by the Supreme Court was a clear endorsement of the legitimacy of the fee as long as it operated within the rules of public-private partnership. According to the court's verdict, the requirement of a capitation fee from non-residents did not violate the provisions of equality in the constitution. The dismissal of the petition was also on grounds that discrimination on basis of 'domicile' did not tantamount to contravention of the equality principle.

#### Mohini Jain v. The State of Karnataka

The discourse on capitation fees took a new turn with the verdict in *Mohini Jain vs. The State of Karnataka*. In 1992, Mohini Jain, a resident of Meerut (Uttar Pradesh), challenged the constitutional validity of capitation fees charged by unaided professional colleges in Karnataka. On June 5 1989, the government of Karnataka had issued a notification under the Karnataka Educational Institutions (Prohibition of Capitation Fee) Act, 1984 fixing the tuition fee, other fees and deposits to be charged from the students by the private Medical Colleges in the State. The tuition fee per year for the candidates admitted against "Government seats"<sup>81</sup> was Rs. 2,000. Karnataka students who did not make the cut for the subsidized government seats would pay a tuition of Rs.25,000, whereas students belonging to the category of "Indian students from outside Karnataka" were to pay a tuition fee not exceeding Rs.60,000 per annum.

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<sup>81</sup> Appendix I

The Sri Siddhartha Medical College – one of the respondents in the case - argued that the fee categories were based on the distinction between ‘merit’ and ‘non-merit’, and that cross subsidy of the merit category by non-meritorious students was a legitimate practice not prohibited by any constitutional provision. In fact, the defense counsel invoked the judgment in *D.P. Joshi v. the State of Madhya Bharat* to prove the legality of capitation fees. Secondly, the Karnataka Private Medical Colleges Association – the intervener in the case - argued that private medical colleges in Karnataka did not receive any financial aid from either the Central or the State Government. In absence of state support, the subsidy offered to students of the government-mandated merit category automatically placed the additional burden on remaining students. In such a situation, the question of profiteering by private colleges did not arise.

The Supreme Court’s deliberation on the capitation fee question involved interpretation of the ‘right to education’.<sup>82</sup> In its interpretation of this right, the Supreme Court invoked both the Fundamental Rights and the Directive Principles of State Policy contained in Parts III and IV of the constitution respectively.<sup>83</sup> The fundamental right to protection of life and personal liberty under Article 21 appeared prominently in the judgment, which

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<sup>82</sup> The Supreme Court frame the following questions:

- 1) Is there a ‘right to education’ guaranteed under the Constitution? If so, are capitation fees violative of this right?
- 2) Is the charging of capitation fees by educational institutions unfair, arbitrary, unjust and a violation of the equality clause under Article 14 of the constitution?
- 3) Does the impugned notification permit private medical colleges to charge capitation fee in the guise of regulating fees under the Act? In that case, is the notification a violation of the Karnataka Educational Institutions (Prohibition of Capitation Fee) Act, 1984?

<sup>83</sup> Appendix I

situated education within the ambit of basic rights guaranteed the constitution. In addition, the discussion of Articles 38, 39, 41 and 45 situated education in the larger framework of the welfare state defined by its pursuit of 'a social order in which justice, social, economic and political, shall inform all the institutions of the national life' (Article 39, Constitution of India). Underwriting the complementary nature of fundamental rights and directive principles in promoting education, the Supreme Court stated thus,

'The State is under a constitutional mandate to create conditions in which the fundamental rights guaranteed to the individuals under Part III could be enjoyed by all. Without making "right to education" under Article 41 of the Constitution a reality, the fundamental rights under Chapter III shall remain beyond the reach of large majority which is illiterate.'

The verdict in *Mohini Jain v. The State of Karnataka* was an important moment in the trajectory of autonomy debates. It was for the first time that the apex court's interpretation of Article 21 set up a dichotomy between privatization and the Indian state's welfarist foundations. The idea that capitation fees constituted a breach of both fundamental rights and directive principles was a clear departure from the verdict in *D.P. Joshi*, which endorsed capitation fees as an acceptable practice within the rules of private entrepreneurship in higher education. Viewed in context of the new economic environment of the 1990s, this was a significant shift in the Supreme Court's political rhetoric. As the meaning and import of privatization became clothed in the rhetoric of retreat of the state, the Supreme Court's stand on capitation fees marked a point of departure for the politics of higher education. Even though caste, communal, regional and linguistic interests complicated the picture in subsequent litigations, the dichotomy

between privatization and welfare set the parameters for debate in subsequent litigations.

J.P. Unnikrishnan & Ors Etc v. State of Andhra Pradesh & Ors.

The relationship between public and private sectors in providing higher education came under scrutiny once again in *J.P. Unnikrishnan & Ors Etc v. State of Andhra Pradesh & Ors.* In response to the judgment in *Mohini Jain*, private engineering and medical colleges in the states of Karnataka, Andhra Pradesh, Maharashtra and Tamil Nadu filed writ petitions in the Supreme Court challenging the correctness of the decision. Contending that the state had no monopoly over imparting education and that every citizen had the fundamental right to establish educational institutions under Article 19(1) (g) of the constitution, the litigants argued that private entrepreneurship in education was no different from a business venture, and therefore amenable to the fundamental right to conduct trade, business and enterprise. The litigants further claimed that ‘unnecessary state control’ hampered the exercise of this right by individuals and organizations, which in fact subsidized a large number of seats for nominees of the government. Finally in claiming that the government could have no say in determining the quantum of fees to be charged by private institutions, the petitioners from the four states challenged their respective state government legislations prohibiting the charging of capitation fees by private engineering and medical colleges.

Explicating the relationship between the state and private agencies in providing higher education, the litigants invoked a wide array of constitutional provisions. Apart from

seeking entrepreneurial rights under Article 19(1) (g), the petition rested on two other principal arguments. First, the litigants invoked Articles 29 and 30 of the constitution to argue that the right to establish and administer educational institutions could not be limited to minority communities; i.e. majority communities could not be deprived of a similar right. This represented a tricky ideological position. Since the litigants now claimed entrepreneurial rights on grounds of affiliation to religious, caste and linguistic denominations, subsequent interpretations of Article 19 became inseparable from debates on the relationship between the state and its constituent groups.

Secondly, J.P. Unnikrishnan and others sought a clarification of the meaning of 'government' under Article 12 of the constitution. They argued that by virtue of mere recognition and/or affiliation, private educational institutions (including aided institutions) did not become instrument of the state within the meaning of Article 12 of the constitution. Finally, the litigants challenged the positive interpretation of Article 21 in *Mohini Jain v. the State of Karnataka*. According to their petition, 'Article 21 was negative in character and it merely declared that no person should be deprived of his life or personal liberty except according to the procedure established by law, and since the State was not depriving the respondents-students of their right to education, Article 21 was not attracted.'

The defense presented by the Indian Medical Council and the All India Council for Technical Education attempted to uphold the long-standing argument for a private

sector invested in the larger project of state building.<sup>84</sup> Their stand against 'commercialization of education' invoked the argument that the very concept of cost-based or self-financing educational institutions was opposed to public policy.<sup>85</sup> This was because the concept of capitation fees suffered from a 'class-bias' and would lead to the creation of two separate classes. They called for abolition of capitation fees and urged private institutions to raise funds via philanthropy, or with the help of religious or charitable organizations.

Later, another response submitted on behalf of the government of India qualified the argument on financing of private professional colleges. In view of its declaration that the government was not in a position to undertake additional financial responsibility for medical and technical education, the respondent acknowledged the need for a different fee structure with respect to private institutions. In doing so, the government also qualified some of the assertions made by the Indian Medical Council and the AICTE. Interestingly, this included the claim that the unconditional right of education at all

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<sup>84</sup> This involved the following arguments:

- 1) Imparting education was an important function of the state. Private institutions were an instrument towards performance of this function, and therefore it was binding on such institutions to ensure that 'economic power' of one candidate did not work to the 'detriment of a more meritorious candidate'.
- 2) The right to establish educational institutions did not imply the right to recognition and/or affiliation. The state or a university had the right to grant recognition or affiliation to private institutions based on meeting of criteria such as 'fairness', 'merit', 'standards of education', etc. These are binding on both minority and majority institutions.
- 3) Since private institutions performed an important 'public function', the activity of a private educational institution was liable to be termed as state action. Therefore, it would be required to act 'fairly' in matters such as admission of students, recruitment of faculty and treatment of employees.

<sup>85</sup> The defense cited legislations by the central and state governments including the UGC Act of 1956 never sanctioned commercialization of education

levels to every citizen did not imply a constitutional obligation on part of the state to establish educational institutions either directly or through state agencies. At the same time, it reiterated its regulatory role with the argument that while the private sector should be encouraged to supplement and augment state effort in providing education, regulatory controls were necessary to guard against commercialization of education as well as ensure maintenance of standards and facilities. In addition, regulation would serve to enforce reservation for special categories in accordance with state policy.

The Supreme Court of India took an ambiguous stand in *J.P. Unnikrishnan v. the State of Andhra Pradesh*. To begin with, it upheld the sanctity of the fundamental right to education under article 21. The court also upheld the equality clause under article 14, when it struck down as unconstitutional, the provision for ‘payment seats’ under the various state government legislations on regulation of capitation fees. However, the apex court’s invocation of articles 41 and 45 in relation to article 21 did not broaden the scope of educational rights under the latter. Contrary to its stand in *Mohini Jain v. the State of Karnataka*, the court interpreted the non-justiciable social and economic rights as limitations to the realization of fundamental rights:

‘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 14 years. Thereafter his right to education is subject to the limits of economic capacity and development of the state’. 1 SCC 645 (04/02/1993).

The court was non-committal also in its explication of the relationship between the state and private agencies. On the one hand, the court ruled that the state may fulfill its obligations under Articles 41 and 45 via establishing educational institutions either

directly, or via granting of affiliation and/or recognition to private institutions. On the other hand, in a major departure from the stand in *Mohini Jain*, the Unnikrishnan judgment sanctioned a fee differential for admission to private engineering and medical colleges. However, such a sanction did not settle the debate on fees in favor of privatization of higher education. The ambiguous and vacillating nature of the Unnikrishnan judgment was exacerbated when the court announced a ceiling for fees to be charged by private unaided colleges. By mandating that recognition and grant-in-aid from the state would be subject to adherence to the ceiling, the court not only complicated the meaning of privatization within the Indian state, but also set a precedent for active judicial intervention in matters relating to higher education policy.

### **The Invocation of Minority Rights**

The constitutional debates on capitation fees took an unprecedented turn when a cluster of private managements from the southern and western states invoked minority rights in order to break away from the regulatory structure in higher education. First invoked in 1995, a series of five Supreme Court litigations spanning ten years (1995-2005) debated the constitutional validity of capitation fees within the framework of rights guaranteed to minority communities. It was in course of these debates that the relationship between the public and private sectors in higher education was redefined. In its landmark verdict in 2002, the apex court recognized the right of minority institutions, and by extension, the right of all community-owned institutions to abdicate any obligation to implement the state's reservation policy.



TMA Pai and Ors etc v. State of Karnataka and Ors etc (1995)

Following the ruling in *J.P. Unnikrishnan and Ors v. the State of Andhra Pradesh* and Ors, the government of Karnataka extended the newly developed scheme for admission and fees to private educational institutions run by minority communities. Since the court made no mention of minority institutions within the framework of the Unnikrishnan judgment, several writ petitions challenged the inclusion of minority institutions within the definition of private professional colleges. In 1993, the Islamic Academy of Education claimed its status as a religious minority institution, while the Venkatesha Education Society sought a review of the judgment for linguistic minorities. In response to these petitions, the Supreme Court issued an interim order within three months of the Unnikrishnan ruling. However, the order, which sanctioned a greater degree of administrative autonomy to minority run private colleges, had the effect of inviting a series of petitions from private institutions, each claiming minority status under articles 29 and 30 of the constitution.

These developments initiated fresh debates, which now focused on the meaning and significance attached to the expression 'minority' in the Indian constitution.<sup>86</sup> As the

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<sup>86</sup> According to the court, the problem arose in view of ambiguities surrounding the territorial definition of a minority community. Does the status as a religious or linguistic minority in one state allow members of the community in another state to claim minority status under Article 30 of the constitution? For instance, the Venkatesha Education Society in Bangalore represented the Tamil speaking minority in the state of Karnataka. However, what did that mean for the Tamil speaking community elsewhere in the country? Could they claim minority status for the purpose of admission to colleges run by the Venkatesha Education Society? Similarly, did the TMA Pai Foundation's status as representative of the Konkani speaking community in Karnataka implies that the minority quota (50 percent of the total number of seats) could be availed by Konkani speakers from a state where they were not in minority? With respect to the latter, the status of the Konkani language in the Indian constitution was also a subject of debate.

debate on definitions occupied center stage<sup>87</sup>, the Supreme Court restricted itself to issuing directions, which stopped short of providing a comprehensive judgment on the main issues. Setting these aside for consideration by a larger Bench, the court reiterated the Unnikrishnan framework of admission and fees. With respect to minority institutions, it held that the interim order of 1993 would remain valid for the following academic year.

However, despite the absence of a comprehensive ruling, *TMA Pai and Ors v. the State of Karnataka and Ors* (1995) was a landmark moment in the trajectory of higher education policy debates. In a clear departure from the debates in *Mohini Jain and Unnikrishnan*, it brought to focus the question of minority rights within the framework of the fundamental right to entrepreneurial autonomy. Alternately, the question of privatization, which had earlier been debated in terms of a binary between the state and the market now became clothed in the discussion on minority rights. Thus the complex relationship between the state and private agencies acquired a new layer, which played a significant role in shaping the policy trajectory in subsequent years.

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Since Konkani was not one of the official Indian languages under the Eighth Schedule of the constitution, could the TMA Pai Foundation invoke article 30 to claim minority status?

<sup>87</sup>What the 'right' of a minority community really entails: Does the minority's 'right to establish and administer educational institutions of their choice'(article 30) include the procedure and method of admission? In other words, to what extent could the state government regulate admission to aided and unaided minority institutions? In view of this question, the court reconsidered the ruling in *St. Stephen's v. University of Delhi* (1992), where the apex court held that 'Article 30 clothes a minority educational institution with the power to admit students by adopting its own method of selection and that the State or the affiliated University has the power to regulate admission of students to such minority educational institution even while permitting the minority educational institution to admit students belonging to the relevant minority to the extent of 50% of intake capacity'.

TMA Pai and Ors etc v. State of Karnataka and Ors etc (1996)

In the following year, the Supreme Court issued some new directives to state governments and their agencies for the fixing of fees in private professional colleges. Based on the guidelines issued by the Unnikrishnan judgment, the court directed state governments across the country to fix the ceiling on fees chargeable by private professional colleges. It also enjoined bodies such as the University Grants Commission, the All India Council for Technical Education and the Indian Medical Council to formulate a set of rules for granting of recognition and affiliation to new engineering and medical colleges.

In the directives of 1996, the Supreme Court for the first time engaged with the issue of its legitimate sphere of authority. Justifying its active role in partaking in the process of formulating rules, the court stated thus:

‘Though a period of more than three years have passed by since the decision in Unnikrishnan, the authorities mentioned in the said paragraph have not come forward with a workable, realistic and just fee structure, with the result that year after years this Court is practically being forced to fix the fee on a tentative basis. Fixing the fees is not the function of this Court. It is the function of the Government, the affiliating Universities and the statutory professional bodies like University Grants Commission, Indian Medical Council and All-India Council for Technical Education. Atleast now, we expect the concerned authorities to move in the matter with promptitude and evolve an appropriate fee structure. While doing so, it is made clear, they shall not feel shackled by the Orders made by this Court from time to time relating to fee structure. It shall be open to them to evolve such fee structure as they think appropriate, in such terms, and subject to such conditions as they feel are in the interests of the student community, the private professional colleges as also in public and national interest.’ (SCI 1996)

The above statement of the court also underlined the prominent role of legislative bodies in regulating higher education in the country. In affirming its stand in the Unnikrishnan judgment, the court reiterated the need for legislative control over fee

structures and admission policy, while allowing for different schemes according to location, region and the type of education imparted.

TMA Pai and Ors etc v. State of Karnataka and Ors etc (2002)

The debate on minority rights resurfaced in a big way in 2002 when the Supreme Court delivered its verdict in TMA Pai v. the State of Karnataka. As the court addressed the larger question regarding the relationship between public and private agencies in higher education, it clarified its stand on several issues of great political import: minority rights, the secular underpinnings of the constitution, the role of education within the framework of development and social justice, and finally, the scope for entrepreneurship in higher education. Thus, it was after ten years of deliberation that the Supreme Court offered answers to questions, which had arisen via numerous writ petitions filed by private institutes since the Unnikrishnan judgment in 1993.

The meaning and content of the expression 'minorities' in Article 30 of the Constitution of India:

To begin with, the court ruled that definition of minority under Article 30 must follow the logic of linguistic reorganization of states. In other words, a linguistic or religious community could claim minority status only with respect to a specific state, and not the whole of India. For instance, a college run by the Telugu speaking community in the state of Andhra Pradesh could not claim protection under Article 30 based on its minority status in India. However, responding to another question articulated by the

court in 1995, an eleven-judge Bench offered an interesting interpretation of Article 30. The Bench invoked the 42<sup>nd</sup> constitutional amendment to argue that inclusion of education in the concurrent list of the constitution meant that the regional definition of 'minority' required reconsideration.

Prior to the 42<sup>nd</sup> constitutional amendment in 1976, education was the sole prerogative of state governments. The court's reconsideration of Article 30 in light of a new center-state dynamic not only set new parameters for the debate on minority rights, but also identified a crucial factor shaping policy outcomes in higher education. As legislative statutes defined the powers of centralized agencies such as the AICTE more clearly, regional elites in control of higher education adopted new strategies to retain control over a system in which they were greatly invested. The invocation of minority rights in context of the debate on privatization was a manifestation of this new center-state dynamic.

#### Rights of Minority and Non-Minority Private Institutes

On behalf of the all the private institutions, the argument for autonomy invoked several constitutional provisions. The petitioners argued that linguistic and religious minorities had the right to establish and administer educational institutions of their choice under Article 30. They further argued that this entailed full autonomy in administration, and the word 'choice' connoted the right to admit students who might not belong to their religious or linguistic denomination. With regard to non-minority institutions, it was argued that the fundamental right to establish and administer educational institutions

was enshrined in Articles 19 (g) (1) and 26. It was contended that since secularism and equality were part of the basic structure of the Constitution, the provisions of the Constitution should be interpreted so that the rights of the private non-minority unaided institutions were the same as that of the minority institutions. Finally, the Solicitor General endorsed the need for greater autonomy to private unaided institutions and therefore the need to reconsider the Unnikrishnan judgment. He, however, contended that Article 29(2) was applicable to minority institutions, and the claim of the minority institutions that they could preferably admit students of their own religion or language to the exclusion of the other communities was impermissible.

The court ruled that a joint reading of Articles 19 (1) (g) and 26 implied that all communities had the right to establish and maintain educational institutions. In a reversal of its stand in *Mohini Jain*, the court ruled that education could be understood as an occupation within the ambit of Article 19.

‘There is nothing ambiguous about the word "occupation" as it is used in the sense of employing one's time. It is a relative term, in common use with a well-understood meaning, and very broad in its scope and significance. It is described as a generic and very comprehensive term, which includes every species of the genus, and compasses the incidental, as well as the main, requirements of one's vocation, calling, or business. The word "occupation" is variously defined as meaning the principal business of one's life; the principal or usual business in which a man engages; that which principally takes up one's time, thought, and energies; that which occupies or engages the time and attention; that particular business, profession, trade, or calling which engages the time and efforts of an individual; the employment in which one engages, or the vocation of one's life; the state of being occupied or employed in any way; that activity in which a person, natural or artificial, is engaged with the element of a degree of permanency attached’ (SCI 2002).

Elaborating on the extent of state control permissible in private unaided colleges, the court maintained that autonomy did not entail the right to affiliation or recognition from the state. However, it held that the state had a lesser role to play in the affairs of

unaided colleges when compared with its authority in regulating the affairs of government aided institutions.

‘It would be unfair to apply the same rules and regulations regulating admission to both aided and unaided professional institutions. It must be borne in mind that unaided professional institutions are entitled to autonomy in their administration while, at the same time, they do not forgo or discard the principle of merit. It would, therefore, be permissible for the university or the government, at the time of granting recognition, to require a private unaided institution to provide for merit-based selection while, at the same time, giving the Management sufficient discretion in admitting students. This can be done through various methods. For instance, a certain percentage of the seats can be reserved for admission by the Management out of those students who have passed the common entrance test held by itself or by the State/University and have applied to the college concerned for admission, while the rest of the seats may be filled up on the basis of counselling by the state agency. This will incidentally take care of poorer and backward sections of the society. The prescription of percentage for this purpose has to be done by the government according to the local needs and different percentages can be fixed for minority unaided and non-minority unaided and professional colleges. The same principles may be applied to other non-professional but unaided educational institutions viz., graduation and post-graduation non-professional colleges or institutes.’ (Paragraph 68, *TMA Pai v. the State of Karnataka*, 2002).

The ruling in *TMA Pai v. the State of Karnataka* marked a clear shift from the court’s position in *Unnikrishnan*. Striking down the *Unnikrishnan* scheme for admission and fees in private institutions, the Supreme Court recognized the right of not only minority colleges, but also unaided non-minority colleges to devise independent fee structures and admission policy. The court’s rationale for this shift clearly reflected a new interpretation of the principle of public-private partnership in higher education. The following statements underline this shift more clearly:

‘Private education is one of the most dynamic and fastest growing segments of post-secondary education at the turn of the twenty-first century. A combination of unprecedented demand for access to higher education and the inability or unwillingness of government to provide the necessary support has brought private higher education to the forefront. Private institutions, with a long history in many countries, are expanding in scope and number, and are becoming increasingly important in parts of the world that relied almost entirely on the public sector.’

‘Not only has demand overwhelmed the ability of the governments to provide education, there has also been a significant change in the way that higher education is perceived. The idea of an academic degree as a "private good" that benefits the individual rather than a "public good" for society is now widely accepted. The logic of today's economics and an ideology of privatization have contributed to the

resurgence of private higher education, and the establishing of private institutions where none or very few existed before.'

As minority rights and secularism became the grounds for redefining the meaning and scope of privatization, the politics of higher education became central to the unfolding of a much broader politics. The subsequent litigations highlighted the principal discursive trajectories triggered by the TMA Pai judgment of 2002.

### Islamic Academy v. the State of Karnataka (2003)

Islamic Academy v. the State of Karnataka was the first of the two cases that came up in the Supreme Court in response to *TMA Pai vs. the State of Karnataka* (2002). In the TMA Pai verdict, the court stated that it would be unfair to apply the same rules and regulations for admission to both aided and unaided professional institutions. However, this was qualified by the observation that though unaided professional institutions are entitled to autonomy in administration, they cannot discard the principle of merit.

'It would, therefore, be permissible for the university or the Government, at the time of granting recognition, to require a private unaided institution to provide for merit-based selection while, at the same time, giving the management sufficient discretion in admitting students. This can be done through various methods.'

The clause of 'sufficient discretion' led to several discrepancies in implementation of the TMA Pai directives. According to the 2002 judgment, private professional institutions could fix their own fee structure, which could include reasonable revenue for purposes of development and expansion of the institutions. As long as they did not charge capitation fees, and adhered to the principle of 'merit', the state could not interfere in their administration. However, following discrepancies in the fee structures established



by different State governments, the petitioner sought clarification on the rights of private unaided colleges to fix their own fees and admit students by evolving their own method of admission.

The court reiterated the stand in TMA Pai and ruled that unaided minority as well as non-minority institutions could fix independent fee structures and evolve their own admission policies for up to 50% of the seats. However their functioning would be overseen by a committee, till the government enacted further legislation in this regard. In a clarification of paragraph 68 in TMA Pai v. the State of Karnataka, the Bench suggested that unaided professional colleges should also make provisions for students from the poorer and backward sections of society. It said the government could prescribe the percentage of seats according to local needs, and different percentages could be fixed for minority and non-minority institutions.

### **The Reservation Conundrum**

#### P.A. Inamdar v. the State of Maharashtra (2005)

*P.A. Inamdar v. the State of Maharashtra* added a new layer to the evolving relationship between public and private sectors in higher education. In this judgment, the Supreme Court took a stand on the state's reservation policy vis-à-vis private educational institutions. In what was a follow through to the TMA Pai and the Islamic Academy judgments, the court addressed the issue of implementing caste based reservations in private educational institutions. An issue that never came up for consideration in the

prior judgments, caste-based affirmative action in context of the ongoing debate on minority rights further complicated the relationship between the state and private institutions. Did autonomy under Article 30 free minority institutions of the obligation to implement reservations for backward castes? Since the TMA Pai judgment permitted non-minority institutions to exercise a similar principle of autonomy, could such private institutes also circumvent the policy of reservation?

The Bench of the P.A. Inamdar judgment held that the state could not foist its reservation policy on unaided private educational institutions. Interpreting paragraph 68 of the TMA Pai judgment once again, the Bench did not endorse the quota principle upheld in the Islamic Academy judgment. It held that there was absolutely no ground to infer that the state could impose either a seat sharing formula or its reservation policy on unaided private professional colleges. In a significant departure from the Islamic Academy judgment, the new ruling freed private colleges of the obligation to implement caste quotas prescribed by the state, and permitted them adopt affirmative action policies on basis of voluntary or consensual arrangements with the state.

In reiterating that the jurisdiction of the state was limited to enforcing certain basic minimum standards of education, it upheld the right of both minority and non-minority educational institutions to formulate independent fee structures and admission policy. State regulation would have to be minimal and only with a view to maintaining fairness and transparency in the admission procedure, and checking the exploitation of students by charging exorbitant fees or capitation fees. According to the ruling, the right of the

state to encroach on admission policy of private institutions was tied to the receipt of government aid by the latter. Thus, the P.A. Inamdar judgment clearly distinguished private unaided colleges from aided institutions in demarcating the state's regulatory authority in higher education.

The judgment also clarified the meaning of minority under Article 30. The definition of minority was with respect to Minority institutions are free to admit students of their choice, including students from non-minority communities and also members from other States of the community of those who run the institution, both to a limited extent and not in a manner and to such an extent that their minority status is lost. Otherwise, they would lose the protection of Article 30(1), it ruled.

### 93<sup>rd</sup> Amendment and Beyond

A response of organized interests in the electoral arena to increasing influence of societal elites in policy-making, the 93<sup>rd</sup> amendment was clearly intended to bring all private institutions, whether aided or unaided, under the purview of the government's policies on reservation and fee structure. Termination of quotas in private institutions was an untenable proposition for political parties as their electoral fortunes hinged on predictable patterns of voting by caste groups. Therefore, the 93<sup>rd</sup> amendment was presumably geared towards reclaiming the status quo as far as the electoral calculus was concerned.

However, its passage, preceded by the Inamdar verdict raised several questions concerning interpretation of key constitutional provisions. Opponents of the 27 percent quota for OBCs (other backward classes) approached the Supreme Court with public interest litigations calling for a stay on the 93<sup>rd</sup> amendment. A PIL filed by educator and business consultant Shiv Khera challenged the constitutionality of the amendment on the ground that it violated the fundamental right to equality, and therefore the basic structure of the constitution. Another petition by Supreme Court counsel Ashok Kumar Thakur sought the apex court's intervention in securing from the government, all relevant reports and data, based on which the government sought to implement the quotas.

*Table 5: Chronology of events following the 93<sup>rd</sup> amendment*

<b>April 10, 2008</b>	The Supreme Court upholds the validity of the Central Educational Institutions (Reservation in Admission) Act, 2006 providing 27 per cent quota to OBCs in the educational institutions but excludes the "Creamy Layer"
<b>Nov 11, 2007</b>	After 25 days of hearing, judgment is reserved.
<b>Aug 7, 2007</b>	The five-judge Constitution Bench commences hearing to decide the validity of the Act.
<b>Mar 29, 2007</b>	The Supreme Court gives an interim order staying the implementation of the Act.

<b>January 1, 2007</b>	Another petition challenging the implementation of the Act is filed in the Supreme Court.
<b>Dec 1, 2006</b>	A Parliamentary Standing Committee on human resource and development submits its 186th report in both houses of Parliament saying no caste-based census has been carried out after 1931. The Committee, in its report, cautions the government that the implementation of the Act would compromise academic excellence and lead to "demographic disaster."
<b>May 31, 2006</b>	The Supreme Court permits all concerned citizens to be impleaded as parties in the on-going petition and allows them to file a fresh petition.
<b>May 29, 2006</b>	The Supreme Court issues notice to the Centre on the petition.
<b>May 27, 2006</b>	Prime Minister constitutes an Oversight Committee to look into the implementation of 27 per cent reservation for the OBCs in higher educational institutes.
<b>May 22, 2006</b>	Ashok Kumar Thakur files a petition in the

	Supreme Court challenging the Central Educational Institutions (Reservation in Admission) Act, 2006, when anti-quota agitation at AIIMS was at its peak.
<b>May 16, 2006</b>	The Standing Committee on social justice and empowerment submits its 15th report stating that there was no census in the case of backward classes. It mentions that a report of Registrar General of India that no information has been collected on OBCs in 2001 census.
<b>Jan 20, 2006</b>	. The Constitution (93rd amendment) Act, 2005 comes into effect empowering the state to make special provisions for socially and educationally backward classes and SC/STs in admission to educational institutions.

10 April, 2008, *Outlook*<sup>88</sup>

The aftermath of the 93<sup>rd</sup> amendment was also marked by intensification of the anti-reservationist movement. Accusing the government of perpetuating caste-based 'discrimination' to the detriment of the merit principle, , students of the premier IITs and All India Institute of Medical Sciences rallied against the provision of 27 percent OBC quota in educational institutions across the country. The claims of Youth for Equality

<sup>88</sup>'Chronology of Events' in Outlook <http://www.outlookindia.com/article.aspx?237164> (accessed on 6 March 2010).

(YFE) – an organization born out of these protests in 2006, illustrate some of the main discursive trends unleashed by passage of the 93<sup>rd</sup> amendment:

‘The Constitution guarantees equality to all citizens and thus establishes a rule of Non-discrimination by the state in any manner. It ensures and inures the state to treat all citizens equally and allow equality of status and opportunity to all and specifically provides that discrimination on the basis of religion, sex, color, caste, race or the place of birth etc are impermissible. The pious objectives with which our fore-fathers decided and embarked upon the framing of the Constitution - Secularism was one of the guiding principles. Secularism entails not just religious but also casteless egalitarian society. The high objective and the final goal was to convert a society fragmented on the lines of religion, caste, economic status etc into a homogenous society where identification of a person was not on the basis of the religion he professes or caste he belongs to but was on the basis of what he is or what he has made himself into.’ (Youth for Equality, 2011)<sup>89</sup>

The above excerpt from the YFE manifesto conveys not only the idea that quotas violate the principle of secularism but also that homogeneity is a professed constitutional objective, which the state must strive to achieve. A corollary flowing from this argument is that affirmative action based on group traits only serves to deepen existing cleavages, which is in fact discriminatory in nature. An inevitable outcome of such discrimination is violation of equality of opportunity as well as compromise with merit, which can be measured only in individuals, and not in terms of group membership.

‘The most important reform that is required in the present situation is a departure from the present "Group Centric" affirmative action to "Individual Centric" benefits. At present benefits are being extended to a "class" (correctly described as "caste") which has resulted in formation of unholy "caste based" lobbies which is not in the interest of one Nation State. At the outset this groupism has to be disbanded and therefore emphasis on extension of benefits has to shift from "the conditions that a group satisfies" to the conditions that "an individual satisfies" for claiming benefits of state protection. Thus the state thereafter has to lay down secular conditions which apply to all individual irrespective of their caste, religion, sex, place of birth etc. The individuals satisfying these conditions would thereafter be collectively called the "Backward Classes" to muster the Constitutional mandate’ (ibid).

The points raised by the YFE manifesto were in fact debated in the Supreme Court.

Despite the victory of the 93<sup>rd</sup> amendment against its dissenters, the court deliberated

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<sup>89</sup>YFE: Why we are Against Caste Based Reservation, <http://www.youthforequality.com/our-agenda/why-against-caste-based-reservation.aspx> (accessed on 5 Dec 2010)

at length on the feasibility of caste-based affirmative action. Dalveer Bhandari, a dissenting member of the Bench in *Ashok Kumar Thakur v. the Union of India* argued that preferential treatment based on a single immutable characteristic such as caste is discriminatory towards the non-beneficiaries, and only serves to deepen existing cleavages. Citing a number of cases from the United States of America where preferential treatment based solely on race were struck down by the court as unconstitutional, he made the case for individualized evaluation of students seeking affirmative action. The reference to the US Supreme Court's ruling in *Grutter v. Bollinger* sought to underscore the importance of identifying multiple criteria for granting preferential treatment – a move that would break the covert installation of quotas in the name of social justice. According to Bhandari, income was one such criterion, which could be used to evaluate educational achievement.

Dalveer Bhandari also argued that the 93<sup>rd</sup> amendment violated the principle of secularism, and thereby the basic structure of the constitution. According to this view, reservation was devised as a temporary mechanism and the Indian constitution did not provide for timeless perpetuation of caste. Quoting Constituent Assembly member K. Santhanam, he made the point that India's constitution makers were 'social reformers' who sought to 'remove the blight created by caste'. "The social revolution meant to get (India) out of the medievalism based on birth, religion, custom, and community and reconstruct her social structure on modern foundations of law, individual merit, and secular education'. Thereby he contended that the 93<sup>rd</sup> amendment was violative of the



basic structure of constitution as it was a compromise with the principles of a 'secular democracy'.

Even though the majority Bench of the Supreme Court upheld the 93<sup>rd</sup> amendment as constitutional, the debates highlighted important discursive trends in Indian politics. The rejection of group based claims to citizenship by several constituencies reflected a trend towards redefining the concepts of equality and egalitarianism in the contemporary context. The principles adopted by the framers of the Indian constitution were frequently challenged in the litigations, leading to deliberation on the basis of citizenship in a democratic state. The next chapter expounds on these discursive tendencies, delineates the emerging politics of education entrepreneurs and explains the implications for Indian politics.

## Chapter 5

### The Politics of Education Entrepreneurs

The chapter provides an analysis of the politics of autonomy that informed the strategies of education entrepreneurs and consolidated the entrepreneurial identity. The chapter situates the entrepreneurial identity at the confluence of old and new discourses of the liberalizing Indian state. Drawing evidence from the Supreme Court litigations, it makes the argument that education entrepreneurs represented a crystallization of the contradictions in the transitory state. By underlining the overlapping and intersecting nature of old and new debates in higher education policy, the Supreme Court cases effectively tell the story of India's post-reform transition in the 1990s.

The entrepreneurial identity was gradually shaped by the intersection of traditional identity politics with a politics of liberalization. Arising out of multiple phenomena such as withdrawal of state from higher education, redefinition of labor market, and market pressures in restructuring higher education, the politics of liberalization impacted the trajectory of identity politics in the policy space, giving rise to a distinctive post-reform category of identity. Thus, the entrepreneurial category was the dominant identity that arose when narratives of the developmental state intersected with the politics of caste, community and religion in a rapidly changing socio-economic environment. It was also representative of a politics of exclusion by an elite identity configured in the aftermath of liberalization.

In the last section, I undertake an analysis of the character and composition the COMEDK – the umbrella organization of caste and community owned private colleges - that was established in Karnataka following the TMA Pai verdict in 2002.

### **The Politics of Autonomy**

Over the last two decades, the debate on autonomy has been a defining aspect of higher education litigations in the Supreme Court. A debate initiated by the verdict in *Mohini Jain v. the State of Karnataka*, it informed subsequent litigations and significantly impacted the politics in this sphere. As discussed in the preceding section, the debate on autonomy hinged on two core issues 1) fee structure 2) admission policy to be pursued by private professional colleges. Supreme Court debates on these two issues not only reflected the increasing divergence of the state and the market in higher education, but also contributed to, and reinforced the dichotomous conception of the Indian state and the private sector in higher education. On the other hand, the interaction and interplay of processes set in motion by the reworking of caste, communal and regional configurations lay at the heart of this new politics of higher education. The Supreme Court debates are central to tracing the unfolding of these processes, and therefore to the crystallization of a hegemonic politics in India's higher education.

The privatization of higher education emerged as a contentious issue in *Mohini Jain v. the State of Karnataka* (1992). In a subtle shift from *D.P Joshi v. the state of Madhya Bharat* (1952) the discourses in Mohini Jain reflected a new set of issues informing the debate on public private partnership in higher education. In the 1950s, private

entrepreneurship in higher education was interpreted as an integral aspect of the developmentalist state. Since the private sector supplemented state effort towards modernization and advancement of socio-economic goals, it was part of a larger narrative shaping conceptions of the modern Indian state. The Supreme Court's interpretation of Articles 14 and 15 in *D.P. Joshi* must be understood within this political narrative, which informed India's higher education policy in the 1950s. While this narrative of a modernizing juggernaut was not without chinks and imperfections, it was glue that held together disparate interests and identities in India of the pre-reform period.

In *Mohini Jain v. the State of Karnataka*, the relevance of the private sector in the grand narrative was challenged once again. However, the court's stand in *Mohini Jain* marked a clear departure from its unequivocal defense of the private sector in *D.P. Joshi*. Interpreting education to be a fundamental right integral to a life of dignity and freedom, the court rejected the constitutionality of capitation fees. This reversal, after three and a half decades of the *D.P. Joshi* judgment was crucial for two reasons. First, the *Mohini Jain* judgment was a moment, which upheld a clear conflict of interest between the private sector and the state. Unlike in *D.P. Joshi*, the discourse in *Mohini Jain* posited the private sector, not within the rubric of the developmentalist state, but as an external entity with a separate set of interests. On the other hand, the *Mohini Jain* judgment marked the continuity of the developmentalist discourse. The court's impassioned defense of the fundamental right to education as well as its invocation of the directive principles of state policy reflected the overwhelming force of this discourse

in the sphere of education. Thus, even as the public-private partnership in higher education came under the scanner for the first time in 1992, the court remained firm in its interpretation of higher education as integral to the developmental goals of the Indian state.

The Supreme Court arrived at the landmark verdict in *TMA Pai Vs the State of Karnataka* (2002) following a series of legal battles spanning ten years. Beginning with *Mohini Jain Vs the State of Karnataka* in 1992, the cases involving private professional colleges and the state gave rise to constitutional debates addressing some of the basic tenets of the developmental state. To begin with, the scope for interpreting education as a fundamental right came under scrutiny. How could this be reconciled with the fundamental right to conduct trade, business and enterprise? In a developmental state like India, could higher education be amenable to Article 19 (1) of the constitution? In *Mohini Jain*, the court held education to be a fundamental right necessary for the 'fulfillment of all enabling rights, which create a life of dignity'. It followed that a private educational institution is not exempt from ensuring access to all people, rich or poor. However, the Unnikrishnan judgment that followed a year later, qualified the verdict in *Mohini Jain*. The court ruled thus:

'The Citizens of the country have a fundamental right to education. The said right flows from Article 21 of the Constitution. This right is, however, not an absolute right. Its contents 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 14 years. Thereafter his right to education is subject to the limits of economic capacity and development of the State' (SCI 1993).

The Unnikrishnan judgment did not take a very clear stand on higher education vis-à-vis Articles 21, 41 and 45. Instead, it erected a trade-off between higher education as a

desired good and the fundamental right of every citizen to conduct trade, business and enterprise. On the one hand it struck down the litigant's claim that Article 19(1) could be enforced in the sphere of higher education; but on the other hand, it did not clarify the role of the state in providing higher education.

In *J.P Unnikrishnan*, the court removed higher education from the ambit of fundamental rights, but ruled that it could not be appropriated by entrepreneurs for the purpose of profiteering. Accordingly, it laid down a scheme regulating admission and levy of fee in private unaided educational institutions particularly those imparting professional education. Almost a decade later, the court reversed the stand it took in *Unnikrishnan*. In *TMA Pai versus the State of Karnataka*, the apex court ruled in favor of administrative autonomy to all private unaided institutions of higher education.

However, a close look at the at the TMA Pai judgment cautions against interpreting it as a victory of private capital against state-led development. Rather, the 2002 Supreme Court ruling is a clearer illustration of India's post reform political dilemma. Since the case was fought primarily on the premise of constitutional guarantees to minority communities, the earlier conflict between social justice and private entrepreneurship was largely subsumed by the debate on minority rights. As the litigant invoked Article 30 of the Indian constitution to claim autonomy from government regulation, the case was not constructed as a tussle between the old establishment and the emerging socio-economic order. As the issue of socio economic advancement of minority communities occupied center stage of debate, the TMA Pai case in fact challenged the

developmentalist credentials of the Indian state. Unable to transcend the ideas at the heart of Indian democracy, the TMA Pai case was a clear manifestation of the paradox characterizing post-reform Indian politics.<sup>90</sup>

In *P.A. Inamdar v. the State of Maharashtra* (2005), the Supreme Court circumscribed the debate by the concerns of ‘Liberalization, Privatisation and Globalization’ (SCI 2004). According to the apex court, education could no longer be regarded a matter of charity or philanthropy. Even though it continued to be a ‘mission in life’ for ‘some altruists’, education had become an ‘occupation’, and also a ‘means of livelihood for some professionals’. The justification for autonomy of private educational institutions followed from these premises.

### **Education Entrepreneurs and the Indian State**

The legal battles and ensuing debates contributed to delineating the category of ‘education entrepreneurs’ – an interest group unified in its opposition to regulation and control of higher education by the state. Unlike in the 1980s, when sporadic cases in the provincial High Courts indicated the existence of this entrepreneurial identity, the Supreme Court cases of the 1990s reflected a coherent entity with national representativeness. As education entrepreneurs from the states of Karnataka, Andhra Pradesh, Tamil Nadu and Maharashtra came together on a national stage, this new category figured prominently in public discourse on higher education policy, and contributed to shaping the policy trajectory in India’s post-reform political milieu.

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<sup>90</sup> See Chapter 4.

The new category of education entrepreneurs came to be identified by a set of characteristics. Marked primarily by their desire to maximize profit, they opposed government strictures on fees and admission policy. The profit motive meant that they operated primarily in the sphere of tertiary education, which was amenable to demands in the post reform labor market of the 90s.<sup>91</sup> Gradually, the entrepreneurial identity emerged as a category with national representativeness. This was because it came to be directly linked with the constitutional debates relevant to the idea of the contemporary Indian state. The legitimacy of the independent Indian state, which was rooted in its promise to deliver social and economic justice to deprived and disadvantaged groups, came under scrutiny in course of these debates, raising difficult questions about some of its basic premises.

The Supreme Court viewed the private colleges more as embodiments of the private sector in a liberalizing economy and not so much as components of the Indian state's higher education apparatus. For instance, when the private colleges invoked the fundamental right to conduct trade and business (Article 19), the Supreme Court responded by constructing the debate on right to education in terms of the opposition between a class of entrepreneurs seeking to conduct business and a state committed to guaranteeing access and equity in education. Thus, in sharp relief to the idea of the developmental state, the Supreme Court played a central role in reifying the entrepreneurial character of private professional colleges.

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<sup>91</sup> See chapter 2.



The conflict in higher education policy initially came to be constructed around the binary of the state and the market. To this extent, economic liberalization did bring about a significant shift in the relationship between the state and private entrepreneurs. However, this relationship was also shaped by continuities and past associations. For instance, the role of caste, community and religion remained central to this relationship. As private colleges claimed autonomy on grounds of their status as minority institutions, constitutional guarantees for the welfare of marginal groups figured prominently in post-reform higher education policy debates. The subtle shift, however, was contained in the appropriation for minority rights for claiming autonomy from state interference and regulation. Thus, even though education entrepreneurs emerged as the antithesis of the developmental state, the binary rested on the shifting politics of caste, community and religion in liberalizing India.

This was representative of a distinctive post-reform politics and it defined the transitory character of the Indian state, which could not be dissociated from questions of development and social justice. Since the landmark Unnikrishnan judgment (1993) where the Supreme Court rejected the appeal to include educational institutions within the scope of the fundamental right to conduct trade or business, education entrepreneurs battled the state on several other grounds. For instance, the TMA Pai case had no reference to article 19 of the constitution. Instead, it was battled and won on the basis of Articles 29 and 30, guaranteeing protection of minority interests. Significantly, the Supreme Court interpreted Articles 29 and 30 to include *all linguistic and religious denominations including the majority communities*, translating the TMA

Pai verdict into an instance of conflict between fundamental rights of citizens and socio-economic rights guaranteed to groups. The victory of the former, but riding on the provisions relating to the latter tells the story of India's post-reform transition – one fraught with a tension between the high ideal of liberal democracy enshrined in the constitution and changing values and beliefs of a people in a changing socio-economic milieu. It is this contradiction that informs the politics being played out in the sphere of higher education policy – one we must unravel in order to make sense of democratic politics in contemporary India.

While the assertion of discrete group interests in higher education policy always underlined its significance for democratic politics in India, the post-reform years added new dimensions to identity politics in this space. Debates on the relationship of the state with caste, community and religious identities were complicated by new concerns regarding the role of the state in a developing country undergoing structural readjustment.

In understanding and delineating the post-reform entrepreneurial category, it is useful to consider the theoretical framework developed by Leela Fernandes in her discussion of the new Indian middle class. According to Fernandes, 'The creation of the new middle class unfolds through a process of enframing in which the boundaries of this social group are delineated through a set of public discourses, cultural narratives and economic shifts' (2006, 31). This draws attention to an important theoretical intervention in the scholarship on group formation. The argument that creation of the

new middle class identity is contingent on history as well as temporality of everyday practices underlines the need to regard group formation as a political process open to empirical investigation. Applying this intervention to the category of education entrepreneurs, I emphasize the need to address the politics underlying the creation of this new category. Arising out of the contradictions between the developmental state and a liberalizing economy, such a politics crystallized in the form of legal battles between education entrepreneurs and the state. An ongoing process, it unfolded through the interaction of material factors and discursive trends, and played an important role reshaping the substance of democratic politics in the post-reform period.

The idea of 'elite revolt' articulated by Stuart Corbridge and John Harriss (2000) lends analytical insights to the ways in which power is generated by small minorities in democratic politics. In their formulation, the parallel and complementary processes of economic liberalization and Hindu nationalism became the vehicles for 'reinvention of India' via 'elite revolts'. Since both were representative of the interests and aspirations of middle classes and upper castes, they facilitated the assertion of these groups against the upsurge of lower castes in electoral politics. Therefore, despite the numerical minority of upper castes and middle classes in formal politics, their capture of the public sphere by non-electoral means was largely responsible for shaping India's post-reform political trajectory. This idea is further developed by Fernandes in her study of middle class politics in post-reform India:

'Although formal democratic processes have enabled marginalized groups to gain access to political power, the political power of the middle class has rested on its growing condemnation of such democratic

processes and its successful attempts at claiming access to citizenship and the state through non-electoral means. In other words, as the expansion of democracy has enabled subordinated groups to gain access to political power, groups such as the new middle class have been able to find ways to circumvent such formal processes and reconstitute the political mechanisms that provide access to the state. The new middle class can indirectly shape policy agendas in ways that do not rest on the results of electoral politics – a process that may partly explain relatively low elite voter participation rates’ (Fernandes 2006, 175).

The exclusionary processes underlying construction of the hegemonic middle class identity were not uncontested. As Fernandes goes on to explain, middle class politics has been continuously challenged by various forms of political mobilization by marginalized caste and class groups in contemporary India. The significance of such contestations rests on two points central to understanding the politics of group formation in Indian democracy. First, the protests by marginalized groups are representative of the politics of caste, community and religion, which have dominated the narratives of Indian politics over the past decades. Since the politics of the middle classes have rested on politicization of these narratives, it is imperative to situate the post-reform class identity of the middle classes in relation to these contestations.

Secondly, as Fernandes argues, the emerging politics of class is characterized by intra-class conflict whereby ‘new entrants into the middle class attempt to gain benefits that upper-caste Hindus have traditionally enjoyed’ (182). Such heterogeneity within the liberalizing middle classes ensures that it is difficult to understand this new politics of class in terms of electoral verdicts or party politics. In other words, treatment of ‘elite revolt’ in context of her study cautions against assuming a natural correlation between economic liberalization and rise of the BJP or any other singular force in Indian politics.

The politics of education entrepreneurs bore an uncanny resemblance to the politics of the liberalizing middle class. Even though the entrepreneurial identity was *prima facie* a rejection of communal affiliations, it was not entirely disengaged from such politics. In fact, it not only involved politicization of caste, communal and linguistic identities, but also was poised against the assertion of lower castes and OBCs in the policy arena. The exclusionary character of its politics was clearly reflected in the aftermath of the TMA Pai ruling of 2002, when the apex court was approached twice in succession with regard to interpretation of paragraph 68<sup>92</sup> of the Pai verdict.

In seeking clarification on paragraph 68 of the Pai verdict, petitioners in the Islamic Academy case sought to circumvent the criteria for securing affirmative action in private unaided minority colleges. Following an unfavourable ruling in the Islamic Academy case, petitioners led by P.A. Inamdar moved the court one more time in 2005. This time, they succeeded in securing a verdict, which not only absolved unaided and minority institutions from implementing the centralized caste-quotas, but also reinterpreted the principle of 'merit'. In proclaiming that caste-based quotas were tantamount to a compromise with the principle of 'merit', the court added huge momentum to a very prominent discursive trend in Indian politics.<sup>93</sup>

In TMA Pai, the Supreme Court entitled all unaided institutions to autonomy in administration, but at the same time, directed all such institutions to assign 50 percent

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<sup>92</sup>Chapter 3.

<sup>93</sup> The upper-caste anti-reservation movement that gained momentum since implementation of the Mandal recommendations in 1990, often cites this merit principle as an argument against caste-based quotas.

of seats to the state government. The idea was that these seats would ensure access to poorer and weaker sections of society who were not in a position to pay higher fees demanded by private institutions. The ruling was perhaps in spirit of the first amendment to the Indian constitution, which added a fourth clause to Article 15: 'Nothing in this Article or in Clause 2 of Article 29 shall prevent the state from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes'<sup>94</sup> (See Venkatesan 2005). According to the Pai ruling, this provision would ensure preservation of 'merit' as meritorious students from weaker socio-economic strata would find access to institutions of higher education. It was this interpretation of merit that was upheld in the Islamic Academy judgment. Thus despite repeated intervention by entrepreneurs in the Supreme Court, as well as the growing strength of the anti-reservationists in India's public spaces, the official discourse on affirmative action remained constant through this period.

It was in 2005 that an institutional arm of the central government endorsed the line of the anti-reservation movement. As education entrepreneurs sought reversal of the Islamic Academy ruling, the debate on reservation in unaided and minority institutions took a new turn. The petitioners led by Harish Salve argued that the merit criterion would be best served if unaided institutions devised independent fee structures enabling them to impart quality education as well as ensure access to students from

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<sup>94</sup> The first amendment was enacted on heels of the Supreme Court verdict in *The State of Madras v. Champakam Dorairajan* (1951).

various social and economic strata. According to this argument it was necessary to strike a balance between the issues of quality and access. The petitioners also argued that the TMA Pai ruling did not offer a license to state governments to foist the quota principle on unaided institutions as this principle did not bear a clear connection with 'merit'. Endorsing this claim of petitioners, the Supreme Court ruled thus:

'the State cannot insist on private educational institutions which receive no aid from the State to implement State's policy on reservation for granting admission on lesser percentage of marks, i.e. on any criterion except merit' (SCI 2005).<sup>95</sup>

Further, the court argued as follows:

'Merely because the resources of the State in providing professional education are limited, private educational institutions, which intend to provide better professional education, cannot be forced by the State to make admissions available on the basis of reservation policy to less meritorious candidate. Unaided institutions, as they are not deriving any aid from State funds, can have their own admissions if fair, transparent, non-exploitative and based on merit' (ibid).

The argument in P.A. Inamdar ran counter to India's long-standing institutional discourse on reservation and contradicted the constitutional justifications for affirmative action in India. In fact, the judgment had far reaching effects in Indian society, as it lent a considerable degree of legitimacy to the anti-reservation movement – a movement that dissociated the merit principle from the concepts of discrimination, deprivation or diversity.<sup>96</sup> In forging this new conflictual relationship between merit and reservation, the judgment also raised questions regarding the need for affirmative

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<sup>95</sup> P.A. Inamdar v. The State of Maharashtra (2005)

<sup>96</sup> See Satish Deshpande(2008): [http://www.india-seminar.com/2008/587/587\\_satish\\_deshpande.htm](http://www.india-seminar.com/2008/587/587_satish_deshpande.htm) (accessed on 5 Nov, 2010)

action in state-owned educational institutions and public-sector establishments (Mehta 2006)<sup>97</sup>.

The exclusionary politics emanating from the series of verdicts, and culminating in the Inamdar judgment was not uncontested. If education entrepreneurs asserted their interests and achieved their objectives by non-electoral means, organized interests in mainstream politics countered them in the legislatures. The demand for deregulation of higher education was fiercely contested by political parties of all hues including the communist parties at the left, and the BJP at the right of India's political spectrum. Following the P.A. Inamdar verdict in 2005, India's political class as a whole adopted a united stance against the ruling and proposed a draft bill mandating the surrender of 50 percent seats to the government in order to accommodate students belonging to the 'scheduled castes, scheduled tribes, and, wherever applicable, to the socially and educationally backward classes and other economically weaker sections'.<sup>98</sup> Introduced in Parliament in 2005 as the 104<sup>th</sup> Constitutional Amendment Bill, the provision was sealed via the 93<sup>rd</sup> amendment<sup>99</sup> to the Indian Constitution<sup>100</sup>. A Supreme Court judgment in 2008 upheld the validity of the 93<sup>rd</sup> constitutional amendment.

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<sup>97</sup> <http://www.india-seminar.com/2006/557/557%20pratap%20bhanu%20mehta.htm> (accessed on 4 Nov 2010)

<sup>98</sup> Draft Bill of 2005

<sup>99</sup> The 93<sup>rd</sup> amendment inserted a fifth clause in article 15 of the Constitution: "(5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their **admission to educational institutions** including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30."



Education entrepreneurs were not rendered irrelevant by passage of the 93<sup>rd</sup> amendment. In Karnataka, the COMEDK has continued to function as a powerful lobbying higher education and an alternative to the state government in providing higher education. The character, composition and role of the COMEDK is discussed in the following chapter.

### **Karnataka's Education Entrepreneurs: the Consortium of Medical, Engineering and Dental Colleges of Karnataka (COMEDK)**

'ADMISSIONS to the private professional colleges in Karnataka have come to a halt with the government and the managements deadlocked on the issues of sharing of seats in the colleges and the fees to be charged. The government has also postponed by 10 days, to July 8, the selection of candidates to all the professional colleges, including those run by it. And with both parties approaching the court, over 120,000 candidates face an uncertain future, as the impasse is unlikely to end soon. Many of them have even joined undergraduate courses in science or commerce, in many cases by paying the entire course fee, knowing that they will have to forfeit it if and when they secure admission in a professional college. Their parents, unwittingly dragged into the tug of war over the money-spinner that professional education has become, are left to shoulder the additional burden' (Sharma 2004).

Following the TMA Pai judgment in 2002, the tussle between the state government and private managements attained new proportions. The multifarious interpretations of the ruling created a situation where there was no consensus on the colleges to be included under the purview of the Supreme Court verdict. For instance, in July 2003, the Karnataka High Court ordered 75 percent of seats in private unaided colleges to be allocated via the government run Common Entrance Test, leaving only the remaining 25 percent to be filled by college managements. In doing so, it held that only minority

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<sup>100</sup> The Draft Bill of 2005 had initially been conceptualized as a Right to Education Bill aimed at providing free and compulsory elementary education to all children in the age group 6-14. Instead of incorporating proposals such as 25 percent reservation in private schools for poor neighborhood children, the bill became the instrument to legislate the politically significant proposal to legislate an additional 27 percent quota for OBCs (other backward castes) in institutions of higher education.

colleges were eligible to implement the 50:50 seat sharing ratio ratified by the Supreme Court's ruling in TMA Pai. Since a counter-plea by college managements to the Supreme Court failed to invoke a stay on the order, the impasse remained a feature of government - private management relations in Karnataka for several years thereafter.

Karnataka's private colleges were represented by an umbrella organization formed on heels of the TMA Pai verdict. In 2003, the managements of 41 private medical, dental and engineering colleges formed the Consortium of Medical, Engineering and Dental Colleges of Karnataka (COMEDK). By 2004, the number of COMEDK colleges rose to 62, which comprised of over 50 percent of the total number of private colleges in the state.<sup>101</sup> In subsequent years membership of the COMEDK steadily increased, reaching 172 in 2009. This reflected two phenomena: 1) the unprecedented rise of private engineering colleges in the state between 2002 and 2009; 2) a widespread acceptance of the COMEDK as a legitimate representative of private college managements irrespective of their caste, community or political affiliations. The upswing in the number of engineering colleges in Karnataka has already been discussed at length in chapter 2. This chapter has drawn attention to the second phenomenon, and provided a framework to understand how Karnataka's education entrepreneurs evolved a shared entrepreneurial identity that crystallized with establishment of the COMEDK in 2003.

The Supreme Court directives in TMA Pai formed the launch pad for the COMEDK's assault on the existing matrix of fees and seat sharing among varied student

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<sup>101</sup> Table 3 pg

constituencies (table). In June 2003, a statement by B.G. Jawali, member of COMEDK cited the TMA Pai judgment in refuting the government directives on admission to private professional colleges. Dr. Jawali said professional colleges had framed their own rules for admissions and for evolving a fee structure based on the guidelines issued by the Supreme Court.<sup>102</sup> According to this statement in 2003, the fee for the medical course would be between Rs. 2.25 lakh and Rs. 2.75 lakh a year and that for the dental course about Rs. 1.5 lakh. The fee for engineering courses would be between Rs. 50,000 and Rs. 1 lakh a year. In December 2003, the COMEDK submitted to the government a draft admission scheme based on Supreme Court directives. The new scheme did away with the previous seat matrix where the government determined admission to 75 percent of available seats in private colleges. Instead, the new COMEDK formula provided for a 60:40 seat sharing ratio by which the government would determine admissions to only 40 percent of the total number of seats.

In the subsequent years, the COMEDK emerged as a powerful lobby in the policy arena and became the voice of Karnataka's private colleges against the state's regulatory framework. Interestingly, the very colleges born out of the nexus of caste, education and politics came together as a single entity defined by its opposition to the state government. Thus, formation of the COMEDK was a moment that captured a new form of interest aggregation in the politics of higher education in Karnataka. On the other hand, establishment of the COMEDK did not signal an end to the politics of caste and community in higher education. While the new entrepreneurial identity emerged as a

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<sup>102</sup> *The Hindu*, June 8, 2003

ground for solidarity among private professional colleges, the politics of higher education witnessed unprecedented intensification of conflict between castes and communities on a national scale. The passage of the 93<sup>rd</sup> amendment in Parliament signaled this development and became the new point of reference for the politics of reservation. A move intended to annul the Inamdar verdict, the Indian parliament passed a Bill extending the reach of caste quotas to unaided private institutions of higher education. Subsequent litigations challenging the 93<sup>rd</sup> amendment did not survive in the court of law; however, these developments firmly entrenched the politics of higher education in a public-private divide - one that became analogous to the increasing rift between the legislature and the judiciary in Indian politics.

#### The COMEDK: Civic Activism or Elite Revolt?

Education entrepreneurs from the southern and western states evolved common ground to contest state regulation in the Supreme Court underscoring the relevance of higher education policy to the politics emanating from these regions. In Karnataka, the COMEDK emerged as an influential lobby in shaping policy outcomes in subsequent years. To the extent that the COMEDK countered the centralized regulatory framework of the state, it may be regarded as a case of associational activity aimed at curbing the tendencies of centralization and unmitigated legislative supremacy in policy-making. However, do the politics of the COMEDK lend to accepted definitions of civic or associational activity in democracies? How can we evaluate its role in shaping the

discursive trajectories on questions such as relevance of the state in a liberalizing economy and the role of non-state entities in articulating public policy?

A sizeable section of scholarship on civil society is geared towards expounding the concept in context of societies where institutions of an authoritarian state had prevented the growth of associational activity outside the jurisdictions of the state. In such contexts, civil society is often hailed as a prerequisite for transition of authoritarian states to democratic ones. Often a policy prescription for states developing countries, recent versions of the civil society prescription stem from neo-liberal critiques of state-led development<sup>103</sup>, which posit institutions of civil society as anathema to the ills of authoritarian states.<sup>104</sup> In this formulation, civil society is what ensures higher rates of economic growth as well as greater levels democratization. Viewed from this perspective, India's education entrepreneurs played the role of a societal counterweight to increasing centralization and over-regulation of higher education by the national government. As an entity that mediated between society and the state in asserting the rights of minority and nonminority private unaided colleges in India, education entrepreneurs played an important role in asserting the rights guaranteed under Articles 19 and 26 of the constitution. The argument that institutions run by minority communities cannot be brought under the purview of centralized regulation<sup>105</sup> was arguably a step forward in this direction. Thus education entrepreneurs temporarily

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<sup>103</sup> Christiaan Grootaert (1998) *Social Capital: The Missing Link? Social Capital Initiative, Working Paper No. 3*, World Bank.

<sup>104</sup> See Kuldeep Mathur (2001)

<sup>105</sup> TMA Pai v. The State of Karnataka (2002)

thwarted the foisting of a uniform quota principle on educational institutions across the country.

Democratizing potential of civic organizations must also be measured in terms of their role in propagating greater degrees of inclusiveness in the existing social order<sup>106</sup>. The primary caveat in the neo-liberal view of civil society is its failure to recognize the heterogeneity of associations falling under the broad umbrella offered by the concept. In India, for instance, associations based on caste or religious identities are not only hierarchical and undemocratic in their organization, but also propagate a non-inclusive ordering of society<sup>107</sup>. Non-inclusiveness is also characteristic of associations formed by economic elites, which function as pressure groups or lobbies with particularistic interests. Recent developments in the field have noted the gradual rise of this phenomenon in a globalizing world where civil society is reduced to 'reflexive life planning' by societal elites via 'reconstruction of defensive identities around communal principles' (Castells 1997, 11). Castell's critique is one of exclusive elite identities operating in information societies of the globalizing world. The larger point to be drawn from his critique is that a society comprising of a network of exclusive categories leads to space for 'new social inequalities'. Since the elites have access to more information and opportunities, they engage in 'reflexive life-planning' while a majority of people remain

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<sup>106</sup> Andre Beteille (1999)

<sup>107</sup> Andre Beteille (1999)

“irrelevant from the perspective of dominant interests”, and outside ‘the networks of power and wealth’ (Castells, 1998)<sup>108</sup>

The objections to such exclusivist societal formations tie with concerns regarding the representative nature of groups operating in civil society. Despite incorporating horizontal networks<sup>109</sup> based on the principles of trust and reciprocity<sup>110</sup>, civil society organizations mediating between the state and citizens are often partisan bodies representing the interests of a small section of society. In that case, their role in expanding the public domain or in deepening the culture of democracy must be limited by the concern of accountability to a wider public (Jayal 2007). Non-state entities influencing and effecting policy changes at the level of political institutions are rarely invested with the political agency of citizens. In other words, an inherent danger in entrusting non-state entities with the policy making process has to do with alienating popular will from the policy making process.<sup>111</sup>

The COMEDK’s success in influencing higher education policy is fraught with some of these concerns. Demarcated from proponents of state participation in higher education, crystallization of COMEDK’s entrepreneurial identity was identified with the rhetoric of withdrawal of state from higher education. As the internal differentiations based on historical linkages with caste and community organizations became blurred within the

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<sup>108</sup> Also see <http://www.dannybutt.net/infoclass/Chapter3.pdf>

<sup>109</sup> This is distinct from vertical patron-client networks characteristic of hierarchical organizations such as the Catholic Church. See Foley and Edwards (1996).

<sup>110</sup> Robert Putnam (1993): Civic organizations based on horizontal ties promoted trust and reciprocity among citizens. According to Putnam, associational activities based on these values are a cause as well as barometer of economic development and political modernization.

<sup>111</sup> See Neerja Jayal (2007)

organization, it acquired the character of a distinctive category of entrepreneurs interested in influencing the direction and content of policy. An exclusivist social formation representative of specific interests, the politics of the COMEDK has furthered the demands of an emergent elite in liberalizing India; however its visibility in the policy sphere and considerable success in opposing centralized policy dictates must be regarded in light of a politics instrumental in hijacking popular will away from the policy making institution.



## Chapter 6

### The Twin Politics of Economic Liberalization

India's economic liberalization was not synonymous with a one-point agenda for opening up the economy to global markets. Instead, it was a partial and piecemeal process aimed at loosening controls in specific spheres such as industry and services (Kohli 1989). Alternately, the reform process in India needs to be understood, not as grand vision for a new economic regime (Bardhan), but as smaller policy prescriptions implemented over several phases to address the concerns of specific urban and industrial classes (Kohli 1989, Corbridge and Harriss 2000). Since this eliminated bases of patronage for prominent castes, communities, peasantry and other rural constituencies, economic reform was greeted with opposition from these quarters (Kohli 1989). In order to manage this cost of liberalization, the governing elites in the Congress government frequently resorted to new sources of patronage, which substituted some of those forfeited by shrinkage of the state's regulatory role (Jenkins 1997, 06).

The emergence of the higher education sector as a new source of patronage led to two contradictory processes, particularly in the states at the forefront of the information technology and services boom of the 1990s. The first of these had to do with the rise of competition between regions poised for growth, and those that did not enjoy the fruits of deregulation. In being a region-specific coalition, the solidarity of education entrepreneurs from southern and western India demonstrates this competitive logic of post-reform politics. The logic of competition was reflected since the 1970s when

marginalized castes and various regional groups entered the mainstream of politics for the first time. The competition was intensified with the implementation of economic liberalization in the 1990s. The rise of regional disparities meant that regional groups vied with one another for a larger share of resources, and therefore a greater role in politics at the national level. The first segment of this chapter explains the relationship between economic reform and regionalization of Indian politics. The region-specific nature of this alliance is conducive to the argument that regional disparities in the wake of liberalization led to a revolt of regional elites against the Indian state.

At the same time, the collective show of strength by education entrepreneurs of diverse affiliations, belonging to four separate federal units, was counter-intuitive to the ideas of sub-national autonomy and intensification of competition. This solidarity was based on a distinctive commonality of interest in the new regulatory environment. By juxtaposing this with the politics of post-reform transition, as evidenced in the Supreme Court litigations, the latter half of the chapter explains the logic of solidarity among competing units in the economy.

### **Liberalization and Sub-National Competition**

Even though the reform process in India has been concentrated at the level of central government, several states have been involved in competition with another. The variation in state-level responses to economic liberalization has furthered the argument of the Indian state as a 'divided leviathan' (Sinha 2005). In particular, it was observed that the variation in regional patterns of industrialization and growth, which existed

even prior to economic liberalization, was substantially accentuated in the post-reform period. While the states of southern and western India emerged as competitive units in the new phase, the states of northern and eastern India lagged behind substantially.

During this period, sub-national governments in India's federal structure played an important role attracting capital from foreign investors in rapidly growing sectors of the economy. For example, Karnataka in 1997 was the first Indian state to formulate and implement a comprehensive policy for promotion of IT based growth. Prior to this, the government of Karnataka had facilitated the Software Technology Parks of India (STPI) scheme for production of software for export. In 1999, the federal government permitted 100% FDI in the IT sector, which followed tax incentives to IT exporters in the country. These policy measures benefitted states such as Karnataka where the sub-national government laid down simplified procedures for establishment of software units and provided other support especially during the early years of the IT industry (Balasubramanyam and Balasubramanyam 2010, Madon 1997). Other factors such as political stability, absence of violent conflict and a history of industry and enterprise worked to the advantage of states such as Karnataka.<sup>112</sup>

As the level of sub-national competition intensified in this sector, governments of other states announced with their respective IT policies in order to woo domestic as well as foreign investors. Tamil Nadu followed closely on the heel of Karnataka and announced its IT policy in 1997, which expanded rapidly over the next decade. Ever since Andhra

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<sup>112</sup> See Basant (1996)

Pradesh announced an IT policy in 2000, it emerged as a highly competitive destination for IT companies in India. The government of Andhra Pradesh not only promised a hospitable environment for provision of factors of production and basic infrastructural requirements, but also declared a regulatory regime requiring 'minimum interface with the government' (Govt of AP 2000, 7). As a relatively late entrant in the field Andhra Pradesh picked up quickly, and by 2004, the software exports of Andhra Pradesh reached a staggering one billion dollars.

According to the classification developed by Nirupam Bajpai and Jeffery Sachs (1999), the southern and western states of Karnataka, Andhra Pradesh, Tamil Nadu, Maharashtra and Gujarat belong to the category of states which have been involved in healthy competition with one another. While most states of northern and eastern India are lagging behind in this respect, few states such West Bengal, Orissa and Haryana fall into an intermediate category.

The study by Bajpai and Sachs demonstrates that the reform-driven states have tended to attract greater levels of investment from foreign as well as domestic players. According to the data cited in the study, the southern states accounted for more than 34 percent of the proposals that have been approved by the Ministry of Industry in 1998. In the period January-December 1998, a total of 428 approvals were given for investments in the states of Karnataka, Tamil Nadu, Andhra and Kerala. The west, accounting for around 21 percent of the total approvals throughout the country follows the Southern region. This investment is in the states of Gujarat, Maharashtra and Goa.

On the other hand, the states in the North and the East are far behind, except for investments in Delhi (3).

The classification provided by Bajpai and Sachs captures the regional differences in the impact of economic liberalization; however, it does not account for the impact based on sector-specific implementation of reform. When sub-national governments or regional groups exercise authority within a limited sphere of the economy, they are not able to control the externalities generated by their policies. This is clearly demonstrated in case of the southern and western states, which acted independently to attract investment in the services sector, but could not implement similar policies in higher education. The expansion of the latter under a centralized licensing regime meant that the regional interest groups were in no position to exploit the increasing demand for technical education – a phenomenon directly tied to the rapid expansion of IT and outsourcing industries in these regions. The solidarity of private colleges from these states reflected the logic of competition against other regions of India – however, it needs to be understood externality generated by implementation of reform and increasing sub-national autonomy in a different sector of the economy.

The trajectories of individual states were also shaped by the intersection of two simultaneous political processes in the 1990s. The first of these was intensification of caste-based alliances in the aftermath of the Mandal Commission recommendations.<sup>113</sup> The intermediate, middle and lower castes had for long been the

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<sup>113</sup> Appendix I

beneficiaries of affirmative action provided by provincial governments; however, with implementation of the Mandal recommendations and expansion of caste quotas in the central government, they became a powerful force in national politics. With liberalization following closely on heels of Mandal, the regional character of these alliances became pronounced. Contrary to the rationale of the V.P. Singh government, expansion of caste quotas did not ensure an alliance of disparate regional formations constituted by various backward groups. On the one hand, the Congress Party's vacillation over the quota question alienated it from upper castes, which turned to the BJP's brand of Hindu nationalism to protect their interests. On the other hand, the quotas did not ensure a clear divide between the OBCs and the BJP. Despite historical animosity of backward and intermediate groups with the Hindu upper castes, they often allied across ideological spectrums to protect specific regional agendas.

Thus economic liberalization upset the political calculus of the V.P. Singh government as 'vigorous articulation of state interests by regional parties provided the rationalization for coalition-building between ideologically incompatible partners' (ibid). It follows that economic reform was a critical juncture that shaped the path and content of India's democratic politics. The downward spread of democracy, and subsequently, the Mandal legislations had been instrumental in elevating the lower strata of India's social hierarchy to the center-stage of national politics; however, it was economic reform that was responsible for the region-specific trajectories that emerged from deepening of democracy across the country.

Thus political realignments of the 1990s had much to do with the changed preferences of regional elites in context of the ongoing process of economic reform. Alternately, the emergence of regional clusters as the focal points of the Indian economy was propelled by the rise of regional parties with distinct social and political agendas. While the increasing representation of the vernacular elite in government was an important trend during this time, such politics was also marked by the 'strategic shift from protests against Brahmin domination to the appropriation and consolidation of political power through an acquisition of economic clout, control over the educational system and jobs in the government sector' (Hasan 2004b).<sup>114</sup>

It is the logic of competition in liberalizing India that is problematized by the alliance of education entrepreneurs in the Supreme Court. The inter-caste, inter-state coalition of private sector colleges defied the logic of regional competition and coalition in Indian politics. It is for this reason that the impact of reform on higher-education policy assumes importance, particularly in the understanding of reform-driven shifts in the mainstream of democratic politics. The following section explains the logic of coalition in the higher education sector and expounds its significance for post-reform Indian politics.

### **The Logic of Alliance**

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<sup>114</sup> As Zoya Hasan explains, the social constellations giving rise to these shifts vary from state to state, but the unmistakable upshot of regionalisation has been the rise to power of intermediate classes and castes in Tamil Nadu, Andhra Pradesh, Karnataka, Gujarat, Maharashtra. This process is under way in Bihar, Uttar Pradesh, Madhya Pradesh and Rajasthan. See Zoya Hasan; 'The New Power Centres', *Frontline*, Vol 21 Issue 8 April 10-23, 2004.

Coalition building by education entrepreneurs from the southern and western states reflected a unique commonality based on opposition to the Indian state. On the one hand, the regional character of this group reflected the demand for self-regulation in a sector poised for sharp growth in these states. Alternately, it was the players with highest stakes in India's tertiary education sector that came together to launch the region-specific offensive against centralized regulation. This was not detached from the increasing influence of regional elites at India's political center. A trend marked by a shift from domination of upper castes to control over economic resources (Hasan 2004), it assumed the form of entrepreneurial solidarity in the case of tertiary education. Thus interest aggregation around the entrepreneurial category was a distinctive political process bearing linkages with the larger trends in Indian politics.

As the case of Karnataka demonstrates, private colleges had begun to take root as early as the 1970s. The need to mobilize campaign funds was one of the prime factors propelling the proliferation of engineering colleges in the state. However, though the motivations for profiteering lay in a political system sustained by two way flows between the provincial government and local elites, the practice of collecting large sums of money paved the way for a thriving business of higher education. Alternately, while reproduction of the capitation fee system certainly perpetuated the existing nexus of caste, education and politics, it did not preclude the rise of entrepreneurship in higher education.



By the early 1990s, entrepreneurship in higher education had emerged as a reasonably well-defined sphere of economic activity. This inevitably gave rise to contradictions within the clientilistic political system as education entrepreneurship developed largely at odds with the parent system of patronage. The conflict was demonstrated as early as the 1980s when growing numbers of education entrepreneurs frequently conflicted with government dictates over fee structures, admission policy and curriculum. Consequently, sporadic legal battles for entrepreneurial autonomy were to be found even in the early 1980s, when private colleges challenged state government regulations in the High Court.<sup>115</sup>

By this time ownership of private colleges had also ceased to symbolize power differentials between dominant and non-dominant castes in the region. The policies of cooptation and accommodation pursued by Chief Minister Devraj Urs ensured that politically significant groups such as the Backward Castes and Muslims were integrated seamlessly into the system of entrepreneurship built on patronage. As education entrepreneurship became a widespread phenomenon outside of the castes that were traditionally dominant in society and in politics, the salience of caste for education entrepreneurs also underwent subtle transformations. Thus caste continued to remain the basis of patronage and a means of generating campaign funds; however, the system also gave rise to entrepreneurs who appeared not to have a direct stake in electoral politics. A clear example of this was the empire of educational institutions established in

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<sup>115</sup> See Rekha Kaul 1993.

Bangalore by M.S. Ramaiah – an education entrepreneur with no proven affiliation to specific political outfits (Kaul 1993).

In the years following economic liberalization, there was rapid expansion of private professional colleges across India, but particularly in the states of southern and western India<sup>116</sup> However, given the strict regulatory regime under which it operated, the rapidly expanding private sector in higher education was a classic example of the rentier state in the post liberalization period (Kapur and Mehta 2004). Unlike in other industrial sectors where the license raj was dismantled following reforms in the 1990s, privatization of higher education remained inextricably linked with discretionary actions of the state for several reasons. Due to fiscal conservatism and exhaustion of former sources of patronage, the post-reform Indian state used the rhetoric of privatization as a means of channeling patronage to dominant societal groups (Thachil 2009). In addition to this, the era of privatization coincided with the Mandalisation<sup>117</sup> of Indian politics. Following the massive expansion of caste quotas for backward classes, the state roped in the private sector to diffuse the sudden intensification of conflict and competition for access to institutions of higher education (Kapur and Mehta 2004, 7).

The entrepreneurial solidarity of private colleges from the four states was poised against the increasing regulatory tendencies of the Indian state. It also had to do with new incentives and a new matrix of preferences in the post-reform economic environment of the 1990s. This was tied to liberalization of the services sector and

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<sup>116</sup> Chapter 2

<sup>117</sup> Appendix I

disproportionate growth of the IT sector in the states of Karnataka, Andhra Pradesh, Tamil Nadu and Maharashtra.<sup>118</sup>

This relates well with the argument that economic reform played a central role in this ongoing reconfiguration of political space in the 1990s. The region specific growth trajectories in the post-reform years lend perspective to the new coalitions of the 90s. This phase witnessed coalitions that defied the logic of traditional caste configurations. Instead, political formations were dominated by distinctive regional agendas, which led to coalition building across ideological spectrums.<sup>119</sup> For example, high levels of growth in the southern states, particularly with respect to the information technology industry, led to broad-based regional coalitions that made claims on the central government to augment development opportunities and public investment (Hasan 2004). Secondly, the regional forces from different parts of the country did not share the same characteristics. For instance, not all regional forces represented demands for cultural autonomy or grievances against the centre (Hasan 2004). In such cases, the rise of regional elites had to do with the desire to play a greater role in national politics, and to exercise a greater degree of influence in policy making at the national level.

The polarization of interests based on private ownership of medical and engineering colleges began in the early 1990s and it was in *J.P. Unnikrishnan v. the State of Andhra*

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<sup>118</sup>The information technology (IT) industry has increased its contribution to the country's GDP from 1.2 per cent in 1997-98 to 5.2 per cent in 2006-07, according to a Nasscom-Deloitte study.

<sup>119</sup>When V.P. Singh's government enacted the Mandal Commission recommendations in 1989, it was with the hope that regional parties comprising of backward classes and middle peasantry would align together against the BJP driven by communal ideology and upper caste interests. However, reconfiguration of political forces did not follow this route. See Zoya Hasan (2004).

*Pradesh* (1993) that such polarization acquired an unambiguous regional dimension. The coalition formed by private colleges from the four states arose in context of the region specific proliferation of private colleges in the aftermath of economic reform (chapter 2). The concentration of information technology firms in these regional clusters constituted the backdrop against which the politics of privatization was played out in these states. Taken together, the clustering of IT firms and doling of patronage in the tertiary education sector created conditions for a regional solidarity that transcended barriers of caste, religion or linguistic communities.

The region-specific solidarity of private college managements persisted through the subsequent litigations and did not wither away in face of the ongoing debate on minority rights. In 1995, the discursive trajectory of the Supreme Court litigations turned away from the conflict between the fundamental right to conduct trade business and enterprise (article 19) and the interpretation of right to education within the scope of Article 21. Instead, the debate came to be constructed around the right of minority communities to establish educational institutions without interference of the state (Articles 29, 30). The contention that minority institutions cannot be brought under the purview of state imposed ceiling on fees or its affirmative action policies did not lead to friction between minority and non-minority private institutions in the coalition. Instead, the demand for autonomy by minority institutions gradually evolved as the grounds for entrepreneurial autonomy of non-minority private colleges in the region.

The petitions by private colleges in *TMA Pai v. the State of Karnataka (2002)* reflected the solidarity regardless of minority or non-minority affiliation of private colleges. The legal counsel on behalf of all private institutions in the states of Karnataka, Maharashtra, Tamil Nadu and Andhra Pradesh submitted that the Indian constitution provides a fundamental right to establish and administer educational institutions, and such a right extends to both minority and non-minority institutions. The following excerpts from the proceedings in *TMA Pai v. the State of Karnataka* make this clear.

‘On behalf of the private minority institutions, it was submitted that on the correct interpretation of the various provisions of the Constitution, and Articles 29 and 30 in particular, the minority institutions have a right to establish and administer educational institutions of their choice. The use of the phrase "of their choice" in Article 30(1) clearly postulated that the religious and linguistic minorities could establish and administer any type of educational institution, whether it was a school, a degree college or a professional college; it was argued that such an educational institution is invariably established primarily for the benefit of the religious and linguistic minority, and it should be open to such institutions to admit students of their choice.’ (Paragraph 7, SCI 2002).

‘On behalf of the private non-minority unaided educational institutions, it was contended that since secularism and equality were part of the basic structure of the Constitution, the provisions of the Constitution should be interpreted so that the rights of the private non-minority unaided institutions were the same as that of the minority institutions. It was submitted that while reasonable restrictions could be imposed under Article 19(6), such private institutions should have the same freedom of administration of an unaided institution as was sought by the minority unaided institutions.’ (Paragraph 8, SCI 2002).

As the verdict in *TMA Pai* upheld the petitioners’ claim, minority and non-minority private colleges from the four states remained united in their fight against their respective state governments. The solidarity was reflected once again in *P.A. Inamdar v. the State of Maharashtra (2005)* when private colleges rallied together against imposition of the quota principle. The petition submitted by the counsel for private colleges did not distinguish between minority and non-minority institutions:

‘establishing and running an educational institution is a guaranteed fundamental right of 'occupation' under Article 19(1)(g) of the Constitution. Article 19(6) permits State to make regulations and place reasonable restrictions in public interest upon the rights enjoyed by citizens under Article 19(1)(g) of the

Constitution. Any imposition of a system of selection of students for admission would be unreasonable if it deprives the private unaided institutions of the right of rational selection which it has devised for itself.' (SCI 2004, section IV).

The petition further claimed that the state could not interfere in the admission procedures of private colleges, especially those set up by scheduled castes, scheduled tribes, regional associations, caste organizations, class-based welfare groups, cooperatives or communitarian associations.<sup>120</sup>

The private colleges of the four states remained united for over a decade in their campaign against the state in seeking relief from imposition of quotas and ceiling on fees. The caste, linguistic and communal affiliations of individual colleges remained intact; however none of these came to constitute an axis of mobilization or interest aggregation in the Supreme Court. The region specific coalition of private colleges won the first round of battle against the state when the apex court ruled against appropriation of quotas by the state for providing them to reserved categories. The verdict also underlined the irrelevance of minority affiliations as far as the foisting of quotas on private institutions was concerned.

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<sup>120</sup> 'On behalf of unaided private professional colleges, learned counsel further submitted that there are many private educational institutes which have been set up by people belonging to a region or a community or a class in order to promote their own groups. As long as these groups form an unaided minority institution, they are entitled to have transparent criteria to admit students belonging to their group. For instance, scheduled castes and scheduled tribes have started Ambedkar Medical College; Lingayaths have started KLE Medical College in Belgaun and people belonging to Vokalliga community have started Kempegowda Medical College. Similarly, Edava community in Kerala has started its own colleges. Sugar cooperatives in Maharashtra have started their own colleges. Learned counsel also highlighted an instance of a college opened in Tamil Nadu by State Transport Workers for the education of their children on the engineering side. He submitted that if the State is allowed to interfere in the admission procedure in these private institutions set up with the object of providing educational facilities to their own group, community or poorer sections, the very purpose and object of setting up a private medical college by a group or community for their own people would be defeated' (SCI 2004, Part IV).

It was in course of these litigations that the widening split between the public and private sectors in higher education became clearly visible. As the politics of higher education came to be defined by this conflict, it witnessed the emergence of a coherent entrepreneurial identity. An interest group undivided by considerations of caste, community or religion, it emerged as a counterweight to the centralized regulation of higher education in the country. A visible force in public debates and an influential lobby at the state and the national levels, it has played an important role in shaping India's post-reform policy trajectory in higher education.

## CHAPTER 7

### The Judiciary and Elite Contestation

In light of the Supreme Court's interventions in higher education litigations, how do we understand the judiciary's role as an institution that articulates public policy? In absence of a consistent stand in interpreting the constitution, to what extent has the Supreme Court justified its repeated interventions in the policy making process? Alternately, does this strengthen the contention that the Supreme Court is a centre of political power, captive to particularistic interests and identities in the democratic political process? In order to answer these questions, it is important to understand the structure and functioning of the Supreme Court in India. To what extent is it a normative institution driven by the rules of proceduralism in a democracy? On the other hand, is it possible to understand its modus operandi in terms of a different set of rules derived not from constitutional norms, but from the socio-political context within which it operates?

My argument in this chapter validates the need to understand the Supreme Court as a political institution responding to strategies and pressures of societal actors. Despite its moorings in legal statutes<sup>121</sup>, the Indian judiciary as a whole and the Supreme Court in

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<sup>121</sup> The role of the Supreme Court in India's parliamentary democracy is that of a federal court with appellate and advisory powers. One of the three branches of a powerful central government (the other two being the legislative and executive branches), the Supreme Court lies at the apex of a unified judicial system comprising of 21 high courts and a large number of lower courts dispersed across the 28 states and 7 union territories. Built on the US model of separation of powers, the judiciary is designed so as to enjoy a considerable degree of independence from the legislative and executive branches of government. Thereby it is widely regarded as the most important check to unmitigated legislative autonomy. This view of the judiciary became firmly established in the post-emergency years when the Supreme Court resisted



particular is a site of *politics*, amenable to the strategies and interests of organized societal groups. It is this idea, which informs my analysis of higher education litigations, and constitutes the basis for tracing larger political processes in contemporary India.

The remaining chapter addresses three issues. First, I explain how the higher education litigations translate into a struggle between the institutions of the legislature and the judiciary. In doing so, I underline the stickiness of institutions and the propensity of the judiciary to articulate elite interests against legislative mandates. The history of judicial intervention in higher education policy demonstrates this clearly. Second, I examine the mechanisms by which societal groups use the forum offered by courts to articulate their interests. Do such groups shape policy decisions and institutional outcomes? Alternately, by what mechanisms do such outcomes precipitate new forms of interest aggregation in institutional settings? Finally, this chapter discusses the judiciary's role as a site of opposition politics in Indian democracy, tying it back to the argument that

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several legislations aimed at a greater degree of centralization and legislative supremacy (Upendra Baxi 1980, Mehta and Shankar 2008). In fact, the Indian Supreme Court has a long history of protecting judicial autonomy via interpreting the constitution through a basic structure doctrine in face of threats from an increasingly powerful legislature in the 1970s (Mehta and Shankar, 2008).

Corresponding with the sections on fundamental rights and directive principles of state policy<sup>121</sup>, the judiciary takes on two important roles. The first of these has to do with the notion of basic law in the liberal tradition, which protects individual rights and liberties from incursions by the state. Secondly, the Indian state was invested with the capacity to undertake modernization of a society ridden with structural injustices.<sup>121</sup> Viewed within this framework of a state committed to social justice and economic development, the courts became a legitimate means of enforcing the ideals enlisted in section IV of the constitution (See Mehta 2007). It is from the latter of the two roles that the Indian Supreme Court draws its powers of activism and review, and as Mehta points out, judges have made use of this constitutional practice to widen the definition of rights held to be constitutionally 'justiciable' (110).

courts become the de facto institutional mechanism for elite actors to influence policy outcome.

### **Limits of Judicial Sovereignty**

The story of post-reform higher education litigations and crystallization of the entrepreneurial category is one of the ongoing struggles between alternative institutions in India's democratic set-up. The litigations have typically been followed by legislative responses to the judgment, which in turn have been subject to judicial scrutiny. Even after the P.A. Inamdar judgment – hailed as a decisive victory of the private sector over the state – the passing of the 104<sup>th</sup> legislative amendment sought to empower the legislative branch of policy-making over judicial pronouncements on the subject. Passed in December 2005, the 104<sup>th</sup> Constitutional Amendment Bill became the 93<sup>rd</sup> amendment to the Indian constitution:

‘Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30’.

Termed as an ‘enabling legislation’ by the Minister of Human Resources Development,<sup>122</sup> it required the states to draft laws towards implementation of this amendment. Riding on the momentum generated by reversal of the Inamdar judgment, the central government in 2006 also announced quotas for the backward castes in all educational institutions including central universities and the premier IITS and IIMs. In

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<sup>122</sup>[http://prayatna.typepad.com/education/2006/04/implications\\_of.html](http://prayatna.typepad.com/education/2006/04/implications_of.html)

accordance with the new directive, reservations went up from the existing 22.5 percent to 49.5 percent of the total number of seats in these institutions.

The judicial-legislative divide became an enduring feature of higher education policy in the post-reform years. Analogous to the public-private split, this was largely due to new forms of elite identification whereby those in control of the private sector in higher education approached the courts for annulment of centralized regulation. Arising out of a fundamental reconfiguration of bases of power in the aftermath of economic liberalization, the divide between the two branches of government spoke of a political process, which gradually transformed the nature of political contestation as well as institutional decision-making. As an instrument of oppositional politics by education entrepreneurs, the Supreme Court evolved into the institutional counter-mechanism to centralization and legislative supremacy in the domain of higher education policy.

‘In India, the supremacy of any branch of government is not simply a result of a one-time-only act of constitutional design, but must be secured through an ongoing struggle .... Most judgments, in fact, are the result of a delicate and *political* process of balancing competing values and political aspirations; they seek to provide a workable *modus vivendi* rather than to articulate high values’ (Mehta 2007, 75).

The tussle between the judicial and legislative branches of government was not very different from the one that ensued in the aftermath of the Emergency years. However, as Pratap Bhanu Mehta (2007) points out, the lack of a full scale parliamentary assault on the courts’ interpretation of the constitution in the 1990s was largely due to a fragmented political system where no political party could achieve dominance in Parliament. But when the legislative branch did come to a consensus on the question of OBC reservation, little time was lost in striking down Supreme Court rulings. Analogous

to the split between the legislature and the judiciary, did the public-private fault-line in the post liberalization years reflect a fundamental shift in the nature of India's political institutions? In particular, the court's interpretation of the private sector's role as provider of higher education underwent progressive shifts following the Mohini Jain verdict in 1992. Based on the subsequent litigations, is it possible to posit economic reform as a critical juncture significantly altering the nature and substance of judicial policy-making in India?

### **A Neo Institutional Account of Judicial Action**

A neo-institutional lens offers a means of addressing this question. A paradox of institutional reproduction is the resilience of institutions over long stretches while constantly undergoing incremental change. The long term durability of institutions derives from reinforcement of past choices in a path dependent manner. At the same time incremental change takes place in response to stimuli in a rapidly changing external environment. It is contingent on the beliefs held by institutional actors and the rate at which these beliefs are updated in accordance with environmental stimuli. Finally, institutional breakdown or overhaul occurs at times of crisis when external shocks bring about a drastic shift in the path of institutional reproduction.

Recent literature on institutions has underscored the need to consider these phenomena in relation to one another rather than as exclusive processes (Thelen 1999 2003, Pierson 2004). In particular, the recognition that institutions may not represent efficient solutions to real world problems, calls for understanding institutional

reproduction not merely in terms of choices of rational actors, but as a constant process of 'learning' (Pierson 2004). This occurs when major environmental change is effected gradually by slow moving social processes, altering the functioning of political institutions, and thereby, the concerns of powerful actors. 'Powerful actors are able to identify any gaps that might develop between the functioning of institutions and their own preferences. They will then take the necessary corrective steps to redesign institutions so that they operate more effectively' (124-26)

The case of India's higher education policy demonstrates that institutional reproduction is a multi-layered process where reinforcement, change and overhaul kick in at different junctures and display considerable interaction effects. The post-reform centralization was a critical juncture altering the preferences of regional elites in control of the capitation fee system.<sup>123</sup> Even as they frequently approached the courts to resolve the gap between their preferences and the new environment, this did not immediately translate into perceivable shifts in the nature of judicial pronouncements. The Supreme Court verdicts underwent gradual shifts, and it was not until the TMA Pai verdict of 2002 that it adopted a radically different stand on the nature and role of the private sector in higher education. The essence of the 2002 verdict was cemented in the Inamdar judgment of 2005.<sup>124</sup>

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<sup>123</sup> See Chapter 2.

<sup>124</sup> This allows us to endorse Pratap Bhanu Mehta's argument that the judiciary functions not as a 'forum of principles', but as a means of achieving a 'modus vivendi' between competing groups in Indian democracy. My study underscores the argument that Indian courts have failed to interpret the constitution in a consistent manner or issue new policy directives to the government. The verdicts that facilitated administrative autonomy for private professional colleges often lacked clear interpretations of

The stickiness of institutional design is also demonstrated in the appropriation of courts by elite actors to influence policy. The distinctive entrepreneurial identity evolved in the post liberalization period, shaping a clear discursive trajectory on privatization of higher education. While the specific identity had no precedence, its appearance on the policy terrain did not depart from the established trend of elite actors approaching courts to overhaul policy. In other words, liberalization was a certainly critical juncture altering the nature of cleavages on the terrain of higher education policy; yet the judiciary continued to be the institutional mechanism for articulating elite interests against legislative mandates.

A neo-institutional framework also accounts for the empirical constraints to judicial independence. In other words, it throws light on factors that determine the variation in independence of courts across countries. A neo-institutional account of judicial action offers a useful theory to bridge the gap between normative theories and empirical reality. The theoretical framework proffered by new institutionalism moves beyond an exogenous theory of institutions, which posits political institutions as the causal force behind policy processes and outcomes. Rather, by treating institutions as *endogenous* to political processes, new institutionalism allows us to study the genesis and endurance of

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constitutional provisions and attempted to reconcile conflicting statutes. A clear example of this is the TMA Pai verdict where minority rights were conflated with entrepreneurial autonomy to strike down the ideas of equity and access in higher education.

institutions in terms of decision making by elites, conflict and cooperation among interest groups as well as long drawn historical processes.<sup>125</sup>

Applying the endogenous theory of institutions to courts, Barry Weingast argues that the power of the judiciary derives from the relationship between the judiciary and other branches of government (2002, 675). Despite constitutional separation of powers, judicial independence is often compromised in the absence of a powerful executive branch of government. This is because a powerful executive controlled by opposition groups offers a significant check to unmitigated power of the legislatures. However, when opposition groups cannot influence policy outcomes via control of the executive, they attempt to control policy via capture of the judiciary. Thus, the removal of policy making authority from legislatures and their investiture in courts through procedures such as judicial review is a manifestation of opposition politics that runs counter to the interests of power holders in legislatures and executives (Hirschl 2003, 232).<sup>126</sup> It follows that parliamentary democracies with weak executives are prone to a greater degree of 'judicialization of politics' than presidential systems where decisions of the congress can be vetoed by the executive.

The idea that the judiciary is susceptible to environmental influences or capture by societal pressure groups disturbs the notion of separation of powers in India's

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<sup>125</sup> Barry Weingast makes the distinction between exogenous and endogenous theories of institutions. See Weingast (2002); 'Rational Choice Institutionalism' in Helen Milner and Ira Katznelson (eds), *Political Science: State of the Discipline*, Norton.

<sup>126</sup> See Ran Hirschl (2003), 'The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions' in Robert Dahl, Alan Shapiro and Antonio Cheibub (eds) *The Democracy Sourcebook*, MIT Press.

parliamentary democracy. Theoretically, a strong and independent judiciary is indispensable to the functioning of a federal polity where diverse interests seek representation and accommodation at the national level. But in practice, the separation-of-powers doctrine is not mere formal allocation of powers to political institutions. Rather it is inextricably linked with an 'evolving constitutional jurisprudence' (Mehta 2007), which determines the extent of power and authority of courts. As Mehta puts it, 'in democratic societies especially, it seems that the degree of independence, which a judiciary asserts is itself a creation of judicial power' (78). In other words, it would be not only simplistic, but also erroneous to attribute the strengths and weaknesses of courts to the constitution. Instead, these derive from the political context within which courts function as well the history of judicial action on a specific subject.<sup>127</sup>

### **The Judiciary and Higher Education Policy**

The Supreme Court played a significant role in shaping the trajectory of higher education policy in independent India. An institution deriving its formal powers from the constitution, the Indian Supreme Court has remained at the center-stage of policy decisions in this sphere. Its frequent interventions on a range of issues such as compensatory discrimination for historically disadvantaged groups and privatization of higher education reflected the core ideals defining the need and purpose of higher

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<sup>127</sup> See Brinks and Gauri 2008.



education in India, and also inscribed them along a trajectory that shaped subsequent policy decisions.

The Supreme Court has all along been an arbiter of disputes over the state's reservation policy in higher education (Galanter 1991). But over the last twenty years, the focus of Supreme Court interventions in higher education shifted to the rift between the state and education entrepreneurs. The new conflict-ridden relationship between the state and the private sector situated the Supreme Court at the helm of decision-making in this policy sphere. Wielding a large degree of executive power, the apex court did not merely play the part of an arbiter between the state and private sector in higher education; rather its interventions took the shape of policy pronouncements, which often struck down legislative policy, and greatly influenced the politics of higher education in subsequent years.

To illustrate, while the ruling against capitation fees in *Mohini Jain v. the State of Karnataka* (1992) triggered reactions from the private sector invested in a system sustained by capitation fees<sup>128</sup>, the reversal of its stand in *TMA Pai vs. the State of Karnataka* (2002) and the subsequent ruling in *P.A. Inamdar vs The State of Maharashtra* precipitated strong reactions from legislative quarters<sup>129</sup>. In *Unnikrishnan v. the State of Andhra Pradesh* (1993), the court's endorsement of a regulatory framework paved the way for alternative brands of identity politics in the following

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<sup>128</sup> See Chapter 2. Also see Rekha Kaul (1993); *Caste, Class and Education: Rise of the Capitation Fee Phenomenon in Karnataka*. Sage.

<sup>129</sup> The 93<sup>rd</sup> Constitutional amendment was passed by parliament to strike down the Inamdar judgement. See Chapters 3 and 4.

litigations. As private colleges invoked rights of minority communities to circumvent the regulatory framework and claim autonomy from the state, they evolved a shared entrepreneurial identity regardless of communitarian affiliations.<sup>130</sup> Finally, verdicts in *Islamic Academy v. the State of Karnataka* (2003) and *P.A Inamdar v. the State of Maharashtra* (2005) added more dimensions to the politics of higher education, as caste-based constituencies launched offensives against a policy that absolved the private sector of implementing the state's reservation policy.

### **Rights, Social justice and Higher Education Policy**

The history of judicial intervention in higher education policy has to do with the Indian state's attempts to reconcile and resolve the dilemma between fundamental rights and directive principles.<sup>131</sup> Since education is formally listed as a socio-economic right, its

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<sup>130</sup> See Chapter 3.

<sup>131</sup> Through the 1950s, 60s and 70s, the conflict between fundamental rights and directive principles was a defining aspect of constitutional debates in the Supreme Court. After independence, the ruling Congress government enacted several laws with the aim of reforming land ownership and tenancy structures. In response, land owners from across the country petitioned in the Supreme Court claiming curtailment of the fundamental right to property. Thus as early as 1951<sup>131</sup>, the Supreme Court adjudicated between sections III and IV of the constitution, when it struck down land reforms as unconstitutional. However, the parliament used its amendatory powers to remove land reforms from the scope of judicial review. As the first and fourth constitutional amendments (1951 and 1955) removed the private property clause from the section on fundamental rights, the dispute was settled temporarily in favour of redistribution and socio-economic justice.

The tussle resumed once again in 1967. In the landmark *Golak Nath v. the State of Punjab* (1967), the court held fundamental rights to be sacrosanct, and not subject to amendment under Article 368 of the constitution, even on ground of conflict with directive principles. In other words, the apex court held that some features of the constitution were integral to its *basic structure*, and were not subject to the usual procedure for amendment. In subsequent years, the basic structure doctrine was summoned by the Supreme Court several times to resolve the conflict between fundamental rights and directive principles. In *Kesavananda Bharati v. the Union of India* (1973, the court struck down the verdict in *Golak Nath*. According to the majority verdict in *Kesavananda Bharati*, the Parliament could amend any part of the constitution, but so long as such amendment did not destroy its *basic structure*. While there was no clear

interpretation in context of the Indian state's developmentalist agenda has been a subject of much debate and discussion. In the early years after independence, judicial debates pertaining to higher education policy revolved around disputes arising out of

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consensus on what constituted basic structure, only a minority of the Bench in Kesavananda agreed that fundamental rights were beyond the amendatory powers of Parliament. Apart from endorsing the primacy of welfare objectives of the Indian state, the Kesavananda verdict also enhanced the scope of judicial review by the Supreme Court.<sup>131</sup>

The basic structure doctrine was summoned again two years later when the Parliament passed the 39<sup>th</sup> amendment to curb judicial review. In dismissing parts of the 39<sup>th</sup> amendment as invalid, the apex court argued that separation of powers and independence of the judiciary were integral to the constitution's basic structure, and could not be subject to Article 368 of the constitution. Following the declaration of Emergency by Indira Gandhi in 1976, there was suspension of fundamental freedoms including the right to move courts. However, the Congress Party constituted a committee to review the question of constitutional amendment by Parliament and the merits of the basic structure doctrine argued by the Supreme Court. Based on its recommendations, the government passed the 42<sup>nd</sup> constitutional amendment, which wrought some significant changes in the Indian constitution. It not only removed all limits to the Parliament's power to amend the constitution, but also removed all amendments to fundamental rights from the scope of judicial review. Finally, by prohibiting any challenge to a law premised on the directive principles of state policy, the 42<sup>nd</sup> amendment clearly established the supremacy of the directive principles over fundamental rights.

The tussle between fundamental rights and directive principles was not laid to rest by the 42<sup>nd</sup> amendment. In the 1980s, two other litigations challenged the constitutionality of amendments to fundamental rights. The court reiterated its position on the need for judicial review and held that unlimited power of Parliament to amend the constitution was antithetical to its basic structure. By this time, the court also interpreted basic structure in terms of a more harmonious relationship between fundamental rights and directive principles of state policy.<sup>131</sup> The majority verdict of a Bench in 1980 held that the harmony between fundamental rights and directive principles was a basic feature of the Indian constitution, and therefore litigations arising out of conflict between the two were subject to judicial scrutiny on terms prevalent prior to the 42<sup>nd</sup> amendment.

The Supreme Court verdicts in the early 1980s offered no clear resolution to the conflict between fundamental rights and directive principles. However, the debates on basic structure raised many important questions regarding the scope for interpreting the relationship of fundamental rights with the non-justiciable rights contained under directive principles of state policy. Secondly, such debates underlined the role of the judiciary in offering an important check to the power of electoral majorities. Finally, they offered significant insights to the Supreme Court as 'a center of political power, seeking to discharge its rightful obligations of national governance' (Baxi 1980, xi).

Alternately, the nature of judicial intervention in the late 1970s and 80s has been explained by legal experts in context of the political atmosphere prevailing at that time. Legal scholar Upendra Baxi interprets the social justice leanings of the court as an imperative of the post emergency period. 'Judicial populism was partly an aspect of post emergency catharsis. Partly, it was an attempt to refurbish the image of the court tarnished by a few emergency decisions and also an attempt to seek new, historical bases of legitimation of judicial power.'<sup>131</sup> Thus, the court's liberal interpretation of the constitution was an attempt to reinstate the image of the Court, and to increase its political power vis-a-vis other organs of government (294).

the Indian state's reservation policy. According to Marc Galanter's study titled '*Law and Backward Classes in India*', caste quotas were the main bone of contention in higher education litigations through the 50s, 60s and 70s. This was reflected in various High Court litigations across the country whereby 41 of the 42 cases relating to higher education were fought on the issue of reservation.<sup>132</sup> Significantly, a bulk of these concerned reservation in engineering and medical colleges in 11 states, where non-beneficiaries as well as putative beneficiaries challenged their exclusion from quotas in these institutions.<sup>133</sup> Between 1955 and 1980, higher education related litigations comprised 10 of the 38 Supreme Court cases on compensatory discrimination. Alternately, of the 12 cases concerning higher education, 10 were regarding quotas for backward classes. Fought over the compensatory discrimination policies pursued by individual provincial governments, all of these litigations dealt with conflicts over access to professional colleges in the south Indian states (See Galanter 1984).

It is possible to make two observations based on Galanter's findings. First, they establish the centrality of higher education to political mobilization in the southern states and indicate that caste was the prime axis of such mobilization during these years. However, even as upper castes challenged compensatory discrimination policies for the category designated as 'Other Backward Classes', they did not question the validity of compensatory discrimination policies per se; rather they moved courts on the ground that such policies were extended to groups, which did not warrant compensatory

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<sup>132</sup> See Marc Galanter (1984): *Competing Equalities: Law and the Backward Classes in India*, OUP.

<sup>133</sup> Marc Galanter (1984, 502) points out that petitions often came in large batches where all members of the affected class stood to gain from a revision of the government order. The large batches featured in such litigations even though interim relief was available only to the individual litigant.

discrimination. In other words, the politics of higher education in the 1950s, 60s and 70s remained circumscribed by the politics of caste, and did not transcend the framework of development and social justice contained in the Indian constitution.

Secondly, Galanter's findings underline the negligible role of the judiciary in expanding the scope and reach of caste-based reservation in higher education. In an interesting departure from the court's track record in arbitrating disputes over land reform, Galanter's study underlined the judiciary's role in curbing the impact of social justice legislation. While non-beneficiaries of the state's reservation policy enjoyed 50 percent success rate in curbing and confining the impact of quotas, putative beneficiaries enjoyed success in merely 20 percent of the cases. Moreover, in case of the latter, 'successes were of a limited and correctional nature, holding the government to its announced policy rather than to broadening its policy' (511).

By the early 1990s, litigations relating to higher education became characterized by a new fault line: that between the state and the private sector. Along with a sudden intensification in the frequency of cases, litigations on higher education policy became complicated by the presence of a new category that coalesced around the private sector's opposition to government policy. This new category derived from common identification of private educational institutions with opposition to state regulation and control of higher education. In the 1990s, as the state progressively withdrew from the rapidly expanding higher education sector, private colleges frequently challenged the government's stranglehold over matters relating to fee structures and admission policy.

However, the emergence of this new ground for interest aggregation did not do away with the old politics of caste and community. Rather, the new category that emerged and intensified around an entrepreneurial identity was a dominant one arising from intersection of the existing politics of caste and community with new forms in the wake of privatization.

The trade-off of group-oriented social justice with fundamental rights became visible in the early 1990s. This trade-off was a persisting feature of litigation concerning property rights and land reform<sup>134</sup>, but it appeared in higher education litigations for the first time in 1992. Accompanied by the widening fault line between the public and private sectors in higher education, the complex relationship between fundamental rights and socio-economic rights panned out over successive litigations. In *Mohini Jain v. the State of Karnataka* (1992), the Supreme Court ruled against the practice of charging capitation fees by private professional colleges. This ruling was significant for several reasons. First of all, it pointed to cracks in the notion of a harmonious public-private partnership in higher education. Secondly, it invoked the non-justiciable socio-economic 'right to education' to strike down the practice of charging capitation fees by private professional colleges. Most importantly, it was the Supreme Court's interpretation of this right that makes *Mohini Jain* a landmark case in the history of higher education litigations. It not only interpreted a non-justiciable socio economic right within the scope of the fundamental right to life and liberty but also used it to trump the fundamental right to

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<sup>134</sup> Most significantly, litigations against land reform legislations were characterized by the trade-off between the fundamental right to property and the constitutional guarantee for equitable development by eradication of structural injustices.

conduct business, trade and enterprise. Thus, the Mohini Jain judgment sparked off a conflict unprecedented in the history of higher education litigations in the Supreme Court.

The conflict between fundamental rights and socio economic rights acquired new dimensions in subsequent litigations. In particular, the politics of caste and community appeared with renewed vigor, albeit in a new avatar. On the heels of the Mohini Jain verdict, private entrepreneurs summoned the fundamental right to entrepreneurship to circumvent implementation of affirmative action policies. The petition in Unnikrishnan was reflective of this new brand of politics. However, in the immediate aftermath of the Unnikrishnan judgment, the petitioners invoked the cultural rights of minorities to claim autonomy from the state. While the former perpetuated the conflict between fundamental rights and social justice guarantees, the latter erected a curious tradeoff between the two prongs of social justice in the Indian constitution.

#### Judicial Activism and Higher Education

During the drafting of the Indian constitution, the constituent assembly succeeded in achieving a consensus on the feasibility of using the courts as a means of 'social revolution' (Austin 1996). Consequently, sections III and IV (incorporating the fundamental rights and directive principles of state policy respectively)<sup>135</sup> were incorporated into the constitution to facilitate social transformation via courts. However, the ensuing conflict between fundamental rights and directive principles

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<sup>135</sup> See Appendix 1

raised some important concerns. In particular, the judicial enforcement of social rights emerged as a primary concern among judges, law makers as well as scholars. If indeed, the Indian constitution envisaged achievement of the ideal of citizenship via enforcing socio-economic rights, did they create provisions for adjudicating between political and socio-economic rights in instances of conflict? As the tussle between the two unfolded in the Supreme Court over a period of almost three decades, it underlined the innovative ways in which the apex court interpreted its role as an agent of social transformation. In fact, the Indian legal system was a forerunner among non-western democracies<sup>136</sup> in developing procedural mechanisms and legal remedies aimed at harnessing the transformative potential of social and economic rights.<sup>137</sup>

‘As we know, the case of India is undoubtedly exemplary in this respect. When judges encountered difficulty in assuming jurisdiction over – what they believed were - socially relevant cases, they invented the *epistolary jurisdiction* which allowed virtually everyone to have access to court. When they encountered problems in finding the evidence they needed, they created *special commissions of inquiry*. When they did not find adequate remedies in traditional legal repertoire, they created new ones. And when they feared that their orders would not be properly enforced over time, they created monitoring agencies in charge of enforcing their orders. (Gargarella, Domingo and Roux 2006, 268).

The Indian judiciary made a conscious effort to reach out to constituencies that were traditionally excluded from access to judicial remedy due to the high threshold barriers. It was especially in the aftermath of the Emergency that the courts were involved in a concerted effort to not only reclaiming their independence from the executive, but also

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<sup>136</sup> Judicial activism in non-western democracies has invited the argument that the activist role assumed by courts contributed to promoting democracy and development via realization of social and economic rights (Gargarella, Domingo and Roux 2006, 255-275). Tied to theoretical arguments on redefining democracy and citizenship in terms of a qualitative understanding of democracy, it highlighted the judiciary's contribution to operationalizing these ideals and extending their reach.

<sup>137</sup> Public Interest Litigations constituted one of the most important legal innovations aimed at such transformation. See Bhagawati (1984).



enabling constituencies such as public individuals and NGOs to seek judicial remedy on issues pertaining to environment, women's empowerment poverty and civic issues<sup>138</sup>.

However, the history of judicial activism in India, which is closely linked with the birth of Public Interest Litigations, does not overlap with the history of higher-education litigations. Even if we were to consider litigations concerning elementary, primary and secondary education, the volume of PILs was negligible.<sup>139</sup> Rather, it was mostly individuals and private educational institutions that approached the courts for interpretation and implementation of the 'right to education' listed in Section IV of the constitution. The Supreme Court adjudicated mainly university level cases pertaining mainly to procedural issues concerning examinations, admissions, recruitment of teachers and their remuneration. A bulk of the case load also came from private petitioners who moved the apex court against government regulation relating to autonomy and affirmative action. While private educational institutions figured prominently among the petitioners in this category, individuals too challenged the law, particularly against implementation of quotas for designated groups.

Given the history of education related litigations in Indian courts, Pratap Bhanu Mehta and Shylashri Shankar (2008) argue that the judiciary is an ineffective institutional mechanism for pursuing the implementation of socio-economic rights. Their argument rests on the evidence that Indian courts have rarely held government action regarding

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<sup>138</sup> The lowering of threshold barriers for seeking judicial remedy enabled litigations which came to be known as 'Public Interest Litigations' (PIL). See Mehta and Shankar (2008)

<sup>139</sup> See Galanter 1984.

health and education rights to be unconstitutional. Judges have been reluctant to penalize the government even when it failed to fulfill its statutory obligations. Instead, courts resorted to ‘weak remedies’ (Tushnet 2004, cited in Mehta and Shankar 2008) or measures such as setting up committees and negotiation channels. In the sphere of university education, court rulings in favor of private providers were reflective of legal resources available to litigants who could approach the courts to contest state policy concerning accreditation and regulation.

This dovetails with Marc Galanter’s (1984) observation that the judiciary’s record vis-a-vis university education belies its supposed benevolence in interpreting socio-economic rights for deprived groups. Litigations in this sphere have rarely been concerned with widening the scope of social justice legislations by Parliament. Rather, the court has been more frequently approached by petitioners challenging the existing scope of existing legislation. This point was established by Marc Galanter’s study, which proved that the bulk of court rulings concerning affirmative action in higher education favored non-beneficiaries rather than putative beneficiaries in challenging the implementation of quotas. This observation was found to be valid for primary and secondary education as well. Taken together, the bulk of litigations on education (at primary, secondary as well as the university level) have been concerned with the issue of access to educational institutions rather than issues of infrastructure, quality or academic output by students (Mehta and Shankar 2008). In particular, higher education litigations on affirmative action as well as those concerning autonomy of private and minority institutions have

tended to focus on the access of well-off students to educational institutions rather than the access or quality of education available to poorer students.

My analysis of court interventions on the issue of privatization endorses the claim that the court has in fact consistently catered to the interests of affluent members of society and elite stake-holders in the policy-making process, who use the courts to articulate a politics of opposition against legislative mandates. These observations make a strong case against an unqualified argument for activist courts. Instead, they draw attention to the *conditions* under which the judiciary takes decisions in specific policy arenas. In light of evidence that the courts in new democracies assumed an activist role on behalf of weaker groups<sup>140</sup>, these litigations offer a point of departure to understand the conditions under which the judiciary is influenced by organized societal interests, especially in countries where political institutions are weak.

### **Judicialization of Politics**

Increased judicial intervention in matters of governance led to blurring of the constitutionally mandated separation of powers between the legislative and the judiciary. The frequent exercise of the powers of judicial activism and judicial review gradually widened the judiciary's legitimate spheres of action to the extent that the courts became instruments of administration and policy-making (See Mehta 2007, 10). As this resulted in 'judicialization of the political process', the courts performed much more than its function of interpreting the constitution; in fact litigations reflected

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<sup>140</sup> See Brinks and Gauri 2008.

competing interests, and judgments were about providing a 'workable modus vivendi' (Mehta 2007) for their accommodation. In other words, the Indian judiciary never functioned exclusively as a 'forum of principles' meant to uphold the rule of law against authoritarian tendencies of the legislatures; rather it has often proved to be a space for accommodation of diverse interests in mainstream democratic politics.

Judicial activism has also raised the concern that interpreters of the law have repeatedly encroached legislative and executive space (Mehta 2007, Brinks and Gauri 2008, Sathe 2002). While the tricky issue of resolving the dilemma between constitutionalism and democracy<sup>141</sup> underlies such a concern, it also extends to questioning the real impact of court rulings on public policy outcomes. Daniel Brinks and Varun Gauri have argued that legalization of a policy sphere does not automatically translate into perceivable shifts in policy. Their comparative study on the impact of health and education litigations reveals that the judiciary rarely vetoes legislative policy or comes in the way of policy innovation. In fact, since the judiciary responds more effectively to individual, rather than collective demands, its interventions are typically limited to facilitating debate on the nature and content of policy. Alternately, it is not possible to establish direct linkages between court rulings and policy innovation.

The gradual widening of its legitimate sphere of authority has meant that the Indian judiciary has frequently been approached by groups with stakes in the policy making process. In fact the judiciary has frequently served as an 'instrument of oppositional

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<sup>141</sup> Pratap Bhanu Mehta (2006).

politics' (Baxi 1980) whereby a range of political players use the courts as an institutional mechanism to circumvent legislative decision-making. In the sphere of higher education policy, it was the issue of caste-based affirmative action that attracted most instances of judicial policy making in the pre-liberalization era (p.5). But with intensification of the public-private fault-line in the post liberalization years, the courts became central to articulating policy regarding the restructuring of higher education in a rapidly liberalizing, developing nation.

The idea of the judiciary as an institutional mechanism for articulation of group interests assumed considerable importance in a country as heterogeneous and diverse as India (Galanter 1971). Since the Indian constitution recognized caste, community, religious and linguistic groups as legitimate entities for conferment of social, economic and cultural rights, India's political institutions became the means for such groups to seek public recognition and redressal of demands. This often led to the trade-off between social, economic and cultural rights of groups and individual freedoms guaranteed by the constitution. A trade-off intrinsic to the basic structure of multi-ethnic, multicultural liberal democracies across the world, the conflict of group rights and individual freedoms was a defining aspect of judicial discourse in independent India, and it played a central role in delineating the boundaries and defining the legitimate spheres of judicial intervention.

### **The Politics of Groups and Public Policy**

The policy-making role of the judiciary assumes importance in context of the common perception that courts offer an institutional forum for articulation of group interests in democratic politics. As Marc Galanter has pointed out, India's modern legal system has transformed the ways in which diverse group interests are expressed and accommodated (1971). Unlike in traditional society where caste, community and religious authorities exercised power within their individual spheres of influence, exercise of power in the modern Indian state takes place via representation and influence in policy making institutions at various levels of government. Thus, India's legal system represents a forum where societal interest groups articulate their ambitions, especially when these fail to find expression in electoral politics governed by numbers, majorities and coalitions.

The relationship of the judiciary with group identities is a dialectical one. As Galanter argues,

'group identities are not natural facts, like geological formations or rainfall, impervious to fiat, and uninfluenced by understanding. But neither are they artificial products of policy, like courts, legislatures, or corporations, that can be dismantled or altered by human design. Like language usages, they have an intermediate character, combining natural givenness with some malleability' (1984, 353).

Galanter goes on to explain that official categories never reflect pre-existing categories that were observed and recorded in an objective manner; rather they are greatly influenced by individual and collective strategies of self representation. But once such categories are in place, they not only become instruments of official policy, but also hold symbolic currency. Thus, while construction of identities involves a large amount of

ambiguity, indeterminacy and fluidity, political institutions preside over the process and contribute importantly to it.

Galanter's relativistic approach offers an interesting point of departure to theorize group politics within the bounds of specific political institutions. Such an approach to group identities is one that enables disaggregation of group traits, which often extend across categories and coexist with other traits within categories. Thereby, it reveals a very important mechanism by which political institutions such as courts respond to specific situations, as it affords them with a flexibility that would be unavailable if group identities had been rigid and unchanging:

'Visualizing identity as composite and relative enables courts to readily distinguish those aspects of it relevant to compensatory discrimination policy, undistracted by the notion that it is unitary and inseparable. Similarly, it liberates the courts from the notion that backwardness is a single trait or one that is either present or absent. It enables the court to examine government action with a critical eye to ensure that government has focused on aspects of identity that are relevant to compensatory discrimination policy' (355).

In addition to the multiple, ambiguous and shifting meanings of group identities<sup>142</sup> associated with official discourse, the fluidity of group boundaries also arises from the perception of judicial (and other) pronouncements by various actors and audiences. Since judicial discourse is marked by a continuity whereby courts reappraise, rework and clarify former pronouncements, the boundaries of groups can shift over a period of time depending on how actors within groups wish to blur boundaries, erase traditional

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<sup>142</sup> Galanter refers to this as a 'cognitive disarray' in the discourse about policies that takes place in government, among political elites, in the media and among wider public. It is also a discourse in which courts are accorded a leading role.

symbols of domination and hierarchy, or create new markers of identity.<sup>143</sup> This suggests that interest group politics is played out within the limits imposed by the judiciary; however, the judiciary itself is amenable to the perceptions, strategies and political imperatives of societal actors.<sup>144</sup>

The politics of groups constitutes the bridge between normative underpinnings of the judiciary and empirical constraints to its functioning. The judiciary as a political institution did not operate in vacuum. Its intervention at different junctures was informed by interaction with the very groups that comprised Indian democracy. Therefore, analysis of higher education policy needs to not only incorporate an understanding of judicial intervention, but it must do so within a theoretical framework that situates the judiciary in a political context defined by the shifting politics of caste, class, religion and language. The following section charts out such a theoretical framework. I make the case for a neo-institutional account of judicial action, for two reasons. First, the dynamism of institutional analysis allows us to understand group formation as a political process taking places in relation to institutional rules as well as macro level changes in economy and society. In fact, it is this dynamism that also offers a foray into the normative-political duality characterizing higher education policy debates. While the judiciary was straddled with the task of infusing normative content to higher education policy debates, it was also amenable to range of societal interests.

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<sup>143</sup> See Galanter (1984), chapter 10.

<sup>144</sup> While Galanter's theory of group formation departs from the basic assumptions of new institutionalism (particularly rational choice institutionalism), the two theoretical frameworks converge on the singularly important point that institutions and their environment are situated in a dialectical, diachronic relationship with one another. Therefore, instead of trying to determine causality in one realm or the other, it is important to focus on the mechanisms at the heart of institutional reproduction and change.



As a result, judicial interventions were not discrete moments when constitutional norms trumped political machinations of powerful groups. Rather, judicial pronouncements were outcomes of an ongoing political process in course of which the judiciary itself underwent significant changes.

### **The Indian Supreme Court as an Instrument of Opposition Politics**

The functioning of the judicial organ of government is as much about oppositional politics as it is about the politics of establishment (Baxi 1980). As an institution of national government, the Supreme Court often becomes a platform for opposition groups to voice their concerns and seek relief from majoritarian politics. Since legislative policy usually reflects the political imperatives of groups in power, courts by default take on the role of an institutional counterweight to the hegemonic politics of establishment. When viewed in this manner, the tussle between the Supreme Court and the Parliament in the 1970s translates into a tussle for power between different groups in Indian democracy.

Viewed within the theoretical framework of new institutionalism, the vacillating and inconsistent nature of Supreme Court interventions must be attributed to the political struggles at the heart of Indian democracy. However, this understanding is qualified to a limited extent by the argument of accountability. As a center for political power, the court is vulnerable to the onslaught of organized interest group politics. But unlike the legislative branch of government, the court lacks a clearly defined constituency to which it is accountable, and which would provide support in an instance of crisis. According to

Upendra Baxi (1978, 80), the Indian Supreme Court has 'multiple communication constituencies in the sense that it tries to reach out to different groups through its decisions and to generate consensus and acceptance of its authority'. Thus whenever possible, the court must accommodate rival claims of power. As a result, the court is often engaged in managing the distribution of power so that 'where it can get away with hegemony it does; where it has to reach accommodation with other organs of government, it does; where it desires to alter the rules, it does so by serving notice' (Baxi 1980, 12-13).

Therefore, the politics of opposition articulated by the Supreme Court is subject to exogenous factors such as the larger political climate prevailing in the country. To illustrate, the court's stand in the *Golak Nath* case was largely an outcome of the environment of fear generated by factors such as the sudden death of Jawaharlal Nehru (Baxi 1980). Similarly the shift towards a more liberal interpretation of fundamental rights and orientation towards socio-economic rights had to do with the attempt by judges to recoup the legitimacy of the judiciary following acquiescence to an authoritarian executive during the emergency (Baxi 1985, Sathe 2002, Mehta and Shankar 2008).

To what extent did the Supreme Court articulate a politics of opposition in case of higher education policy? What were the political exigencies shaping Supreme Court interventions in this sphere? If we take a look at the petitions filed through the 50s, 60s and 70s, it becomes clear that they were concerned mostly with the implementation of

caste based quotas in institutions of higher education. According to Marc Galanter (1984), the court's responses to such petitions could be classified into three categories. In situations where student petitioners sought to overturn or curtail schemes of reservation, the judiciary pronounced favorable judgments in 50 percent of the cases. Interestingly, most of such litigants were prospective students seeking admission to engineering and medical colleges, and moved the court on grounds of exclusion due to unwarranted quotas assigned to the 'Other Backward Classes'<sup>145</sup>. In fact, Galanter points out that the success rate of this category of litigants was second only to the class of employees and unions. Thus, the benevolence of courts in interpreting provisions for socio-economic rights did not manifest in the realm of higher education.

The nature of judicial intervention during these years is consistent with the idea of courts as instruments of oppositional politics. At a time when mainstream electoral politics was marked by the entry of backward classes into the corridors of power, upper castes and traditional societal elites sought to retain their influence in a sphere that facilitated not only economic mobility, but also a means of controlling the vast bureaucracy. Since increasing influence of backward classes in the electoral arena eroded their traditional bastion of power, elite groups found ways of circumventing mass politics to retain control over important policy areas. In fact, litigations in higher education represented what John Harriss and Stuart Corbridge (2000) have called 'elite revolts' in Indian democracy – a phenomenon by which traditional elites circumvent

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<sup>145</sup> The category of OBCs was coined by the Mandal Commission recommendations of 1989. OBCs are distinct from Scheduled Castes and Scheduled Tribes.

electoral politics and exert themselves in alternative spaces in order to reclaim democracy from the masses.

The politics of opposition acquired new characteristics in the 1990s. To begin with, economic liberalization wrought significant changes in the political economy of higher education. The withdrawal of government spending in a social sector such as higher education belied the trends in many welfare states of the west; however it served to sustain the patron-client linkages in India's higher education system. The rhetoric of 'withdrawal of state' was one that facilitated continued patronage flows to powerful societal groups in control of the private sector in higher education.<sup>146</sup> However, though the large scale privatization benefitted existing elite actors in Indian politics, the rapidly changing socio-economic and political milieu of the 1990s introduced additional considerations to the politics of higher education. With the erosion of Congress dominance and simultaneous influx of backward and intermediate groups in the policy making institutions of government, there was a blurring of the traditional divide between powerful and marginalized groups.

On the one hand, elites in control of the private sector felt the pressure of increasing regulation in an era of political realignments and fiscal conservatism; therefore, they used the institution of courts to articulate a politics of opposition against the Indian state characterized by crumbling of the Congress system and rise of marginalized groups. But on the other hand, as intermediate and backward groups became a part of

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<sup>146</sup> See Chapter 2.

the clientilistic system in higher education, they did not remain external to the politics articulated by traditional elites; rather their alignment with upper castes in the higher education litigations demonstrated solidarity based on a common opposition to the stringent regulatory regime in higher education. Alternately, the traditional fissure between societal power-holders and marginalized groups was replaced by a new fissure between the private sector and the state. In other words, the politics of opposition in the sphere of higher education became characterized by the battle waged by an estranged private sector against the Indian state.

The widening fault line between the public and the private sectors in higher education became manifest via the series of Supreme Court litigations in the 1990s. This new fault line was an important one, for it became the basis of a new found solidarity of private entrepreneurs in the higher education sector. This solidarity became visible as early as 1993, when private institutes from the states of Karnataka, Tamil Nadu, Andhra Pradesh and Maharashtra came together in the Unnikrishnan case to wage a common battle against their respective state governments. This trend continued through the 90s, and until the TMA Pai verdict of 2002, which granted a large degree of autonomy to private professional colleges across the country. An interesting development in this regard was a more permanent manifestation of the new found entrepreneurial solidarity. In the aftermath of the TMA Pai ruling, private colleges in Karnataka constituted the Consortium of Medical, Engineering and Dental Colleges (COMEDK)<sup>147</sup>, which not only

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<sup>147</sup> For a more detailed discussion of the COMEDK see chapter 2.

became a forum for private colleges to articulate their interests, but also played an important role in influencing Karnataka's higher education policy in subsequent years.

The politics of opposition articulated by regional elites in the Supreme Court was significant in many ways. First, it affirmed the increasing presence of regional interests in policy making at the national level. Secondly, it indicated the new significance of higher education policy to political contestation among groups in Indian democracy. Finally, it demonstrated the shifting nature of identity politics in the 1990s. The widening gap along the public-private fault line regardless of the petitioners' affiliations to caste, religious and linguistic identities spoke of a politics that lay at the heart of policy shifts in higher education. However, on the other hand, their appropriation of discourses based on group-oriented socio-economic rights reflected the conflicts and contradictions underlying the politics of opposition in higher education. Based on a unified entrepreneurial identity derived in opposition to the regulatory regime, the litigations by private professional colleges demonstrated the unfolding of a hegemonic politics, when traditional identity politics intersected with the politics of reform in a rapidly changing socio-economic environment.

The Supreme Court was an important entity in consolidating the new politics of opposition. By endorsing the public-private divide in the higher education sector, its verdicts in successive cases played an important role in carving out the private sector's new relationship with the Indian state. The series of higher education litigations also demonstrate the vulnerability of the judiciary to organized politics by societal interests.

In doing so, they also reflect the reconfiguration of interests and identities in Indian politics of the 1990s. The alliance of diverse castes and communities, and the regional character of the new entrepreneurial category were in tune with the ongoing shifts in Indian democracy. Thus, on the one hand, the Supreme Court was instrumental in giving voice to the new oppositional interest in higher education, but on the other hand, its endogeneity to larger political processes meant that the court itself was greatly influenced by the paradigm shifts in Indian politics.

Thus, my study of higher education litigations addresses the politics of opposition articulated by regional elites in the post-reform period. While I explained how regional elites realigned their preferences and identities in the 1990s, I also underscored the role of judicial intervention in delineating the boundaries of this hegemonic politics. From suspicion of private enterprise in higher education to endorsement of its demands, the Supreme Court's articulation of higher education policy was often tantamount to what Mehta and Kapur have termed 'non-consequential analysis', i.e. its interventions do not enable the education system to respond to the need for expansion or quality. Instead, its attempts to reconcile the demands of private entrepreneurs with formal equality have only reinforced the 'peculiar public-private split' characteristic of India's contemporary higher education scenario.

## **CHAPTER 8**

### **Conclusion**

This concluding chapter is aimed at underscoring some of the important points raised by this study, which may serve as possible points of departure for future research. In particular, the significance of non-electoral spaces for democratic competition deserves greater attention in comparative studies of political processes. In the context of Indian politics in the post-reform period, this may be fruitfully employed in studying phenomena such as the rise of vernacular elites, judicialization of politics and emerging forms of identity politics. Secondly, the focus on specific policy arenas can yield important insights on the trends in the mainstream of democratic politics. By incorporating policy as the theoretical as well as empirical basis of comparative research, future studies may find more effective means of tracing important linkages between developments in non-electoral and electoral spheres of democratic competition.

This study has addressed the following questions: 1) why is higher education policy significant to the politics of post-reform transition? 2) Who are the new players in the policy making process? 3) How did the politics of higher education map on to the important trends in post-reform Indian politics? Drawing evidence from a series of Supreme Court litigations I have argued that higher education policy has emerged as a space for political contestation in India's post reform democratic politics. Propelled by the transformation of higher education as a resource in context of the post reform



information technology boom, the rise of education entrepreneurs in this space has led to the unfolding of overlapping as well as contradictory processes culminating in the distinctive divide between the state and the expanding private sector in higher education.

The regional basis of entrepreneurial solidarity constitutes the primary link between the terrain of higher education policy and the mainstream of democratic politics in India. Alternately, higher education litigations in the Supreme Court may be treated as a veritable barometer of broader trends in India's democratic experience in the post-reform years. A telling account of the rise of regional elites and accompanying politics, Supreme Court litigations tell the story of their changing stakes in the post-reform socio-economic environment of the 1990s. The salience of regional elites in the terrain of higher education policy is important for several reasons. As seen in the previous chapters, regional elites from the states of Karnataka, Tamil Nadu, Andhra Pradesh and Maharashtra were instrumental in altering the trajectory of policy outcomes in this sphere. Since institutions of higher education in these states constituted an important resource for political elites, the new policy trajectory was crucial to their sustenance and survival. Thus the politics emanating from their intervention in higher education policy was integral to the unfolding of larger political processes in the 1990s.

The focus on non-electoral spaces captures the alternative political trajectories charted by vernacular groups in pursuing political goals. Their ascent in electoral and non-electoral spheres of democratic expression reflects the new bases of identity evolved by

vernacular elites in India. The new entrepreneurial identity of regional elites entailed a different politics, which increasingly took on the elite forms of discourse discussed by Corbridge and Harriss (2000) and by Leela Fernandes (2006). In fact, the politics of Karnataka's education entrepreneurs bears a distinctive resemblance to the middle class politics discussed by Fernandes. For instance, her argument that middle class politics is a story of political alienation and resurgence is not very different from the politics of education entrepreneurs who have sought to assert themselves through support of liberalization and opposition to caste-based quotas in higher education.

However, as far as higher education policy was concerned, the urban middle classes did not align with the politics of education entrepreneurs. The outcomes of Supreme Court litigations meant that the historical beneficiaries of the state-run higher education apparatus now bore the burden of additional fees. Legislative opposition to judicial policy pronouncements, which sought to retain the force of caste-quotas in education policy, also alienated the middle classes. In fact, the tussle between the legislative and judicial branches of government upheld the paradoxical suspension of higher education between over regulation and discretionary privatization, which systematically excluded the sections of the middle class from a stake in the system. Based on these observations, I have argue that the concept of 'elite revolt' needs to be reworked to accommodate the fluidity with which the category 'elite' can be reconstituted by groups with different agendas. .

A relativistic approach to group formation is a useful launch pad to analyze the concept of elite revolt in context of higher education litigations. The expression of entrepreneurial interest in the Supreme Court needs to be understood in terms of the ongoing relationship between the judiciary and societal actors. Given the history of judicial interventions in higher education policy, the propensity of disgruntled groups to make their claims via litigations is clearly linked with their high rate of success in courts. In the earlier decades, as well as in the 1990s, such groups went to the judiciary to counter the policies of those in power. Therefore, the crystallization of categories through which resistance was articulated had much to do with the nature of democratic politics at specific junctures. As Marc Galanter has explained, litigations around the issue of reservation in educational institutions sprang from the need to challenge the denial of a scarce opportunity. At a time when national politics was revamped by the entry of backward and intermediate castes in positions of power, upper castes and traditional elites rallied around caste identities to challenge quotas in higher education.

However, the politics of higher education acquired new dimensions in the 1990s. Following the Mandal legislation, the blurring of traditional caste cleavages set the tone for the rise of inter-caste alliances in national politics. Economic liberalization accentuated this trend as regional elites cut across caste cleavages to lobby for demands shaped by distinctively regional political agendas. The new form of interest aggregation in higher education litigations was tied to these larger developments in Indian politics. As privatization of higher education became a means of channeling patronage benefits to regional groups in control of the private sector, the interests of these groups were

increasingly shaped by the regional patterns of development. The revolt of elites from the southern states was a manifestation of this shift in the political economy of higher education. It was in response to this shift that interest aggregation around the entrepreneurial class identity emerged as an enduring feature of higher education litigations in the 1990s. The contradiction, however, lay in the coalition of players from the four states when regional groups in these states competed with one another to attract a larger share of investment and resources.

The shifting politics of higher education also underlines the relationship of the judiciary with societal groups. Reflective of larger socio-economic and political trends, the nature of interest aggregation bears important consequences for subsequent interventions by the judiciary. As the litigants blurred their caste cleavages and accentuated the solidarity based on entrepreneurial interest, the Supreme Court became complicit in perpetuating the perceived public-private divide in higher education.

The relativistic approach to group identity also recognizes the presence of alternative group traits; the point is to understand the dominance of specific categories in accordance with changing political imperatives in particular institutional contexts. In case of higher education litigations, identities based on caste and community did not melt away in the aftermath of Mandal legislations and economic reform. In fact, the hegemonic discourse on the public-private divide came to be constructed at the intersection of the traditional politics of caste, religion and language. The Supreme Court played an important role in construction of the hegemonic discourse. As earlier, it

resurrected the old tension between group benefits and individual rights; however, its interpretation of existing discourses in the new political context contributed to etching a new fault line, and delineating a new category of identity in the politics of higher education.

My study of the higher education litigations unravels the mechanisms at the heart of this politics. Crucial to it is the regionalization of national politics in the wake of India's economic liberalization. Economic liberalization was a critical juncture that altered the trajectory of politics in higher education. The reshuffling of identities and reconfiguration of political alliances were central to such a politics. The Supreme Court litigations not only reflect the unfolding of these processes through the decade of the 90s, but also allow us to observe the interaction of political institutions with ongoing socio-economic and political processes. Thus they provide a comprehensive account of political and policy shifts in India after economic liberalization. However, in order to understand the shifting politics of identity in the Supreme Court, it is necessary to take a look at the genesis and evolution of important categories in the politics of higher education. Therefore, I use the case of Karnataka to trace the shifting identities in the politics of higher education, and the subsequent emergence of Karnataka's elites as a powerful lobby in policy-making at the national level.

The focus on the regional basis of entrepreneurial solidarity also addresses an important point regarding the politics of groups. Contemporary scholarship on Indian politics has erected and reinforced the dichotomy between categories that operate in electoral and

non-electoral political spaces. For instance, Stuart Corbridge and John Harriss' account of 'elite revolt' describes the mechanisms by which upper castes and middle classes have sought to claim democratic spaces by circumventing electoral means. In this formulation it is usually assumed that the lower castes and other intermediate groups operate primarily in the electoral arena, with little or no impact on the politics unfolding in the alternative spaces. In a review of this dichotomy, I suggest that the democratic upsurge by intermediate and lower castes mapped on to non-electoral arenas and took on specific characteristics in accordance with the differential impact of reform in regions.<sup>148</sup> The region-specific delineation of vernacular politics was played out in key policy spheres, which in turn contributed to reshaping the scope and substance of Indian democracy.

Documenting the consolidation and expansion of the COMEDK in Karnataka lends to capturing the diversity of political trajectories charted by vernacular elites within states, especially in the aftermath of reform. Consider the case of Karnataka. The prominent role of its vernacular elites in national level coalition politics of the 1990s<sup>149</sup>, was accompanied by their visibility and influence in non-electoral spaces such as the litigations on higher education policy. A post-reform phenomenon, the divergent institutional trajectories charted by Karnataka's elite groups was constitutive as well as demonstrative of the widening gap between the public and private sectors in higher education. The story was one of reconfiguration of elite interests in accordance with the

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<sup>148</sup> My argument that the politics of reform were played out in specific policy arenas, which in turn shaped the scope and content of Indian democracy, then diverges from accounts of democratic upsurge based on pre-existing categories of identity.

<sup>149</sup> Deve Gowda of the Janata Dal headed the non Congress government in 1996.

differential impact of reform in a specific sphere of political and economic activity. Therefore, using the case of education entrepreneurs in Karnataka I reiterate my argument that specific policy arenas mediate the emergence of these groups in national politics. The differential impact of economic reform can be understood only when it is considered in the context of policy outcomes integral to shaping the interests of dominant entities in the region.

This study situates the judiciary at the center of analysis. Using a neo-institutional theoretical framework, it scrutinizes the apex court's role in articulating a consistent policy position vis-a vis the issues of privatization and caste quotas in educational institution. The inference is that the judiciary functions as a center of political power that often articulates a politics of opposition against legislative mandates. The vacillating nature of judicial pronouncements bears testimony to this claim. This study also underlines the absence of judicial activism in the sphere of higher education policy. Previous studies (Galanter 1981 Brinks and Gauri 2008) established the court's negligible role in furthering the impact of social justice legislation. In particular, Marc Galanter pointed to the court's tendency to uphold the claims of non-beneficiaries and putative beneficiaries whenever these groups lobbied against implementation of reservation. As far as the debate around privatization is concerned, this study endorses the idea that courts are susceptible to capture by powerful interest groups which might be numerically significant, but capable of sustained lobbying in the highest court of law.

These findings would necessitate a qualified review of the idea that the Indian judiciary functions as a 'last resort for the oppressed and the bewildered' (Baxi 1971). In context of the Emergency years in the 70s, the Indian Supreme Court's role as an activist court has rarely gone unnoticed. Through the charged political atmosphere of the 70s and 80s, the court not only withstood attacks on its autonomy and independence, but also offered a counterforce to the central government's attempt at curbing democratic rights of citizens. Nevertheless, it is important to exercise caution in celebrating its role as a guardian of the constitution. Has the role of the Supreme Court translated into delivery of its primary function, i.e. upholding the rule of law? As Pratap Bhanu Mehta points out, despite the Indian Supreme Court's undeniable contribution to democracy and rule of law, its exercise of power in service of these goals was not without caveats. For instance, while the court made available a forum for public appeals, it failed to articulate a consistent and coherent public philosophy for protecting the rule of law. In that case, it is important to ask questions regarding Supreme Court's legitimate role in resolving public policy problems<sup>150</sup>

The debate on rights that unfolded in the Supreme Court also encapsulated the shifting notions of equality and social justice in post-reform India's political milieu. If we hark back to the constituent assembly debates on the model of affirmative action, it is possible to identify the main theoretical and ideological strands that shaped its form and content during the early years of Indian independence. In the backdrop of mass

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<sup>150</sup> See Pratap Bhanu Mehta (2007); 'The Rise of Judicial Sovereignty' in Sumit Ganguly, Larr Diamond Marc Plattner (eds), *The State of India's Democracy*, JHU Press. Pg. 108.



migration and unprecedented communal violence following the partition of India in 1947, the framers of the constitution adopted the bold stance of creating a secular state, but one that recognized the cultural rights of religious and linguistic minorities. In rejecting the proposal for a Hindu nation, Sardar Vallabhai Patel rejected the idea of India as a Hindu state. 'We must not forget that there are other minorities whose protection is our primary responsibility. The state must *exist for all irrespective of caste and creed*' (Patel to B.M. Birla 10 June 1947, quoted in Mahajan 2001:5, 2005: 289, emphasis added). Thus the model of cultural rights for minority communities was designed to coexist with uniform political rights regardless of affiliation to the community.

The Indian state also adopted the policy of caste based quotas with the aim of extenuating social disadvantages of backward castes. The two prongs of independent India's affirmative action program were integral to the idea of the Indian-state as a 'community of communities' (Mahajan 2006, 167).<sup>151</sup> The idea that citizens of the independent Indian state were looked upon not merely as individuals, but as members of various communities was central to the conception of citizenship that lay at the heart of the Nehruvian state. This idea of citizenship was one that conferred on all individuals equal rights in the political sphere; however, in recognizing that cultural minorities and historically disadvantaged communities required affirmative state action to exist as equals, the Indian constitution interpreted the provision of 'equal protection by law' in a

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<sup>151</sup> Mahajan, Gurpreet (2006): 'From Community to Nation: The Making of the Majority-Minority Framework' in Mehta and Pantham (eds), *Political Ideas in Modern India*, Sage.

bold and innovative manner. As Gurpreet Mahajan argues, such a constitutional provision clearly stood apart at a time when most liberal democracies in the west defined citizenship in terms of the political right to vote so that equality translated into equal treatment by law of all individuals regardless of communal affiliation or position in the social hierarchy. In other words, the co-existence of territorial sovereignty with cultural diversity in the public sphere was a unique feature of the Indian constitution, which was incorporated into constitutions of other democracies only several years later.

The two prongs of India's affirmative action program were integral to the Nehruvian model of development which emphasized the responsibility of the state to respond effectively to pluralistic pressures as well as actively intervene in society for promoting a just and inclusive social order. The idea was that the doctrine of political equality before law must be supplemented by the state's affirmative duty to remedy existing inequalities via policies of protective discrimination.<sup>152</sup> Alternately, citizenship in the Indian state rested on the philosophical and ideological justification for preserving diversity while ameliorating debilitating social conditions.

Simultaneously, there was the realization that this ideal of citizenship in a democratic state could not be realized merely by adoption of a constitution, or by assigning the category with moral and juridical significance. Rather, its realization had to be rooted in a historical development marked by transformation of individuals and groups into

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<sup>152</sup> This idea is integral to the Directive Principles of State Policy in Section IV of the constitution. According to Article 46, 'the state shall promote with special care the educational and economic interests of the people, and in particular SC and STs and shall protect them from social injustice'.

modern entities capable of constituting the 'public' or the realm of civil society in a democratic state. The primary agent of this transformation would have to be the Indian state and it would have to perform the indispensable function of legally recognizing and protecting the rights of individuals in a manner that would lead to the genesis and growth of a vibrant civil society.<sup>153</sup> Consistent with this notion of citizenship was the idea that a range of political institutions would mediate the interaction of state and society with the aim of realizing the political, social and economic rights of the new citizenry.

Viewed in the backdrop of this constitutional framework, the recurring argument for upholding individual merit as the fundamental principle for ordering society constitutes an important shift in the meaning and practice of citizenship. A classic liberal argument for distributive justice, the merit principle is predicated on the idea that scarce highly rewarded positions are allocated via a 'natural hierarchy of intellect and skill' (Young 1990, 200). Alternately, it entails a division of labour based on equality of opportunity where no group receives advantage due to race, ethnicity or sex. The assumption is that social hierarchies stem from competition among individuals situated on a level playing field. In other words, it does not recognize that particular groups and individuals are positioned differently in relation to others, and this requires creation of a level playing field via state intervention, before consideration of merit can be articulated. While merit

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<sup>153</sup> See Gurpreet Mahajan (1999), Andre Beteille (1999).

is the determinant of social justice in the former, the latter position holds social justice as a pre-requisite for merit.<sup>154</sup>

At a theoretical level, the conflict is not one between egalitarianism and its detractors. Both positions express the concern for equality, though in different ways. As Amartya Sen points out, the idea of equality is a powerful one commanding a moral force, which is difficult to dispense with,

‘A common characteristic of virtually all the approaches to the ethics of social arrangements that have stood the test of time is to want equality of something – something that has an important place in the particular theory. Not only do income egalitarians demand equal incomes, and welfare egalitarians ask for equal welfare levels, but also classical utilitarians insist on equal weights on the utilities of all, and pure libertarians demand equality with respect to an entire class of rights and liberties. To see the battle as one between those ‘in favour’ of and those ‘against’ equality (as the problem is often posed in the literature) is to miss something central to the subject’ (Sen 1992).

The problem then, has to do with the choice of ‘evaluative space’ within which equality must be enforced for the practice of citizenship and achievement of social justice. Since equality in one space inevitably trades off equality in others<sup>155</sup>, a framework for social justice ought to address the specific nature of inequalities in a given context. Sen’s argument is that such a framework cannot preclude demarcation of groups, and ought to pay attention to intra-group inequality based on the manifestation of disadvantage in a specific context.

The Supreme Court litigations have upheld the principle of equality, but the apex court’s choice of evaluative space has not been consistent. As the litigations demonstrated,

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<sup>154</sup> See Amartya Sen 1992

<sup>155</sup> The history of conflict between fundamental rights and directive principles illustrates this point (See Chapter 1). The higher education litigations also illustrate this point.

equality in one space inevitably traded off with equality in another. The conflict between fundamental rights (Article 19) and social justice imperatives (directive principles of state policy) was not new. However, the trade-off between minority rights and caste-based quotas was certainly unprecedented, and constitutes a landmark in the evolution of India's jurisprudence. Therein lay one of the most significant developments in the contemporary discourses on equality, citizenship and democracy in India.

In this study, my attempt has been to capture the dynamic nature of institutional reproduction and identity formation in a rapidly changing socio-economic environment. Concomitantly, I have drawn attention to the role of discursive trends in shaping the form and content of India's democratic politics. Higher education litigations in the Supreme Court have offered a window to observe these developments, and also make causal inferences based on the chain of causal mechanisms. They also constitute the point of departure to investigate linkages between disparate areas of scholarship such as the capitation fee phenomenon, rise of IT clusters, regionalization of Indian politics, judicialization of politics and elite revolts. By providing the interface to understand these phenomena in relation to one another, they offer a means of preserving the complexity of political processes, but without compromising the intent of establishing a cause-effect relationship between economic liberalization and the revolt of regional elites in Indian politics.

## **APPENDIX I**

### **Organization of Higher Education in India**

The system of higher education in India dates back to the nineteenth century when the colonial government set up the universities of Calcutta, Bombay and Madras to oversee functioning of the existing 27 colleges. Today, the higher education apparatus in India consists of approximately 350 university level institutions and 17,000 affiliated colleges. The University Grants Commission (UGC) – India's central regulatory body in higher education – classifies these universities into 5 categories, namely central universities, state universities, deemed universities, private universities and autonomous institutes of national importance:

- Central universities – Established by an Act of Parliament, a central university falls under the purview of the Department of Higher Education in the Ministry of Human Resource and Development. There are 42 such universities operating in India, as of 2011.
- State Universities – These universities are established by an act passed by the state legislative assemblies. Several of these universities are in receipt of funds from the UGC and the central government. In 2011, the UGC listed 275 state universities. State government funded institutions also include selected private colleges affiliated to the state universities. These are referred to as private-aided colleges.

- **Deemed University** – According to the UGC Act of 1956 ‘deemed’ status or autonomy is granted to institutions or university departments with a track-record of excellence. According to the most recent list published by the UGC on 23 June, 2008, there are 130 deemed institutions in the country.
- **Private Universities** – Private universities are recognized by the UGC, but they cannot grant affiliation to colleges. This category of institutions is relatively new to the higher education landscape, as they came into existence following the UGC (Establishment of and Maintenance of Standards in Private Universities) Regulations, 2003. Private universities are distinct from private colleges, which have operated for many years in affiliation with central or state universities. As of 2011, there were 85 private universities in India.
- **Autonomous Institutes and Institutes of National Importance** – These are established by acts of parliament, and are financed to a large extent by the Department of Higher Education and the Ministry of Human Resource and Development of the central government. These include the Indian Institutes of Technology, the National Institutes of Technology, the Indian Institute of Science, the Indian Institutes of Management and the Indian Institutes of Science Education and Research. In 2011, the UGC listed 33 such institutions in India.

### **Admission Policy**

While admission to the IITs and NITs is monitored by centralized examinations such as the Joint Entrance Examination (JEE) and the All India Engineering Entrance Examination

(AIEEE) respectively, admission to private engineering colleges affiliated to the state government universities is monitored by bodies established at the state level. One of the earliest state-level bodies to be established for this purpose was the West Bengal Joint Entrance Examinations Board (WBJEE) in 1962. In Karnataka, admissions to engineering colleges came to be monitored by a state-level agency for the first time in 1984.<sup>156</sup> This was following a legislation passed by the state assembly, which sought to curb the rampant practice of charging huge sums of money by private unaided colleges. Since the passing of the Karnataka Educational Institution (Prohibition of Capitation Fee) Act in 1984, the Common Entrance Test (CET) Cell was established by the state government for conducting an annual examination for entry into not only engineering colleges in the state, but also to colleges offering degrees in medicine.

In order to accommodate the interests of private engineering colleges under purview of the CET, the government of Karnataka evolved a unique formula, which categorized applicants into three categories. While higher ranked applicants qualified for the heavily subsidized 'merit seats' in government colleges or private aided institutions, the remaining 'payment seats' were allotted to lower ranked applicants for higher fees in private aided and unaided institutions. A third category of applicants were admitted via the 'management quota' of private unaided colleges for varying denominations of fees charged by individual colleges. Students were also classified into 'Karnataka' and 'non-Karnataka', whereby the latter was not eligible for admission via the merit category.

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<sup>156</sup> The Karnataka model was replicated in the 1990s by the state governments of Tamil Nadu, Andhra Pradesh and Kerala.



The ratio for merit, payment and management quotas became a contentious issue in the Supreme Court litigations of the 1990s<sup>157</sup>. As private college managements emerged victorious in *TMA Pai v. the State Karnataka* (2002), they lobbied aggressively for jurisdiction over a larger share of seats. After private colleges constituted the COMEDK in 2004 and began to conduct a separate entrance examination, the state government continued to admit 'merit category' students into these colleges via the CET. At this time, the ratio of seats for merit and payment categories steadily declined from 85: 15 in 1993-94 to 75:25. In subsequent years, the ratio in favor of the government further declined to 60:40 in 2006-07 and 55:45 in 2008-09.

In the CET system of the 1990s, 50 percent of the government seats were reserved for mandated beneficiaries of affirmative action (the remaining 50 percent was allocated via 'merit'). These included scheduled castes, scheduled tribes, OBCs and students of rural background. Following Supreme Court judgments in 2002 and 2005, private colleges were relieved of the obligation to provide for caste-based quotas during admission. It was also at this juncture that private colleges revised their fee structures and incorporated a hike of almost 100 percent between the academic years of 2002-03 and 2003-04.

- *Table 2: Seat-sharing ration between government and private college managements*

Academic Year	Government	Private Managements
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<sup>157</sup> Chapter 4

1994-95	85	15
2003-04	75	25
2005-06	65	35
2006-07	60	40
2007-08	55	45

Source: Based on data from the Government of Karnataka Education Department

### **Higher Education and Affirmative Action**

India's history of affirmative action policies dates back to the early 20<sup>th</sup> century when the colonial government headed by Vice - Roy Curzon created special provisions for employment of Muslims in the government services. According to official discourse, the move was aimed at creating a level playing field for the Muslim community of Bengal, which was seen as backward in comparison with the Hindu Bengalis. Subsequently, this logic of preferential treatment was extended to the Sikhs for employment in the military. In 1918, the colonial administration introduced reservation for various backward groups including the Untouchables at state level bureaucracies in three states of southern and western India. Caste-based affirmative action was institutionalized via the Government of India Act of 1935 as the British administration introduced an extensive policy of reservation for backward castes as well as for Muslim, Sikh, Christian and Anglo-Indian communities.

Reservation in higher education was introduced for the first time by the First constitutional amendment in 1951, which provided for 22.5 percent quotas for Scheduled Castes (SCs) and Scheduled Tribes (STs) in college admissions.<sup>158</sup> Earlier, the Drafting Committee of the Indian constitution adopted caste based reservation as the basis of independent India's affirmative action program. While Article 366 contained the definition of SCs and STs – the prime beneficiaries of affirmative action – Article 46 contained the directive for special treatment of these constitutionally mandated groups. Following the First amendment, the central as well as state governments adopted a wide array of reservation policies in higher education.

Reservation for other caste groups was gradually instituted at the state level. Since the Kalekar Commission (1953) recommendations in favor of reservation for 'Other Backward Classes' (OBCs) was rejected by the central government, the expansion of quotas did not occur at the level of central government. However, commissions constituted by various state governments mandated a range of castes and communities as beneficiaries of quotas at the state level. It was not until 1979 that the central government instituted another commission to assess the condition of the socially and educationally backward castes of India. The Mandal Commission report identified 1257 communities as backward, which constituted 52 percent of the population. Its report submitted in 1980, recommended that the quantum of reservation in institutions of the central government be increased from 22.5 percent to 49.5 percent.

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<sup>158</sup> Reservations also applied to parliamentary seats, jobs in the bureaucracy and other public institutions in receipt of government funds.

In 1990, the VP Singh government implemented the Mandal Commission recommendations in government jobs. However, their implementation in educational institutions of the central government did not take place until 2006. In the previous year, the 93<sup>rd</sup> constitutional amendment introduced reservations for mandated groups in private educational institutions. This was the legislative response to the Supreme Court judgment in *PA Inamdar v. the State of Maharashtra* (2005), which ruled that the state cannot impose its reservation policy on unaided private colleges (both minority and non-minority) including professional colleges. In 2007, the Supreme Court stayed the implementation of quotas in educational institutions of the central government, but in 2008, it upheld the decision to introduce 27 percent quotas for OBCs in such institutions.

## APPENDIX II

### Constitution of India – Summary of Part I – IV

#### PREAMBLE

#### PART I – The Union and Its Territory

##### Article

1 – Name and Territory of the Union

2 – Admission or establishment of new states

2A – (Repealed)

3 – Formation of new states and alteration of areas, boundaries or names of existing states

4 – Laws made under 2 and 3 to provide for the amendment of the first and fourth schedules and supplemental, incidental, consequential matters

#### PART II – CITIZENSHIP

5 – Citizenship at the Commencement of the constitution

6 – Rights of citizenship of certain persons who have migrated from Pakistan to India

7 – Rights of citizenship of certain migrants to Pakistan

8 – Rights of citizenship of certain persons of Indian origin residing outside India

9 – Persons voluntarily acquiring citizenship of another State.

10 – Continuance of the rights of citizenship

11 – Parliament to regulate the right of citizenship by law

### PART III – FUNDAMENTAL RIGHTS

12 – Definition

13 – Laws inconsistent with or in derogation of fundamental rights

#### *Right to equality*

14 – Equality before Law

15 – Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

16 – Equality of opportunity in matters of public employment

17 – Abolition of untouchability

18 – Abolition of titles

#### *Right to Freedom*

19a – Freedom of speech and expression

19b – freedom to assemble peacefully without arms

19c – freedom to form associations or unions

19d – freedom to move freely throughout the territory of India

19e –freedom to reside and settle in any a part of India

19f – omitted

19g – freedom to practice any profession, or carry on any occupation, trade or business

20 – Protection in respect of conviction for offences

21 – Protection of personal life and liberty

22 – Protection against arrest and detention in certain cases

*Right against Exploitation*

23 – Prohibition of trafficking of human beings and forced labour

24 – Prohibition of children in factories, etc.

*Right to freedom of Religion*

25 – Freedom of conscience and free profession, practice and propagation of religion

26 – Freedom to manage religious affairs

27 – Freedom regarding payment of taxes for promotion of any religion

28 – Freedom regarding attendance at religious instruction or religious worship in certain educational institutions

#### Cultural and Educational Rights

29 – Protection of Interests of Minorities

30 – Right of minorities to establish and administer educational institutions

31 – Repealed

#### *Saving of Laws*

31A – Saving of laws regarding acquisition of estates, etc.

31B – Validation of certain acts and regulations

31C – Saving of laws giving effect to certain directive principles

31D – Repealed

#### *Right to Constitutional Remedies*

32 – Remedies for enforcement of rights conferred by this part



32A – Repealed

33 – Power of parliament to modify rights conferred by this part in their application to the Forces, etc.

34 – Restriction on Rights conferred by this part while martial law is in enforcement

35 – Legislations to give effect to the provisions contained in this Part

#### PART IV – DIRECTIVE PRINCIPLES OF STATE POLICY

36 – Definition

37 – Applications of the principles contained in this Part

38 – State to secure a social order for the promotion of welfare of the people

39 – Certain principles of policy to be followed by the State

40 – Organization of village panchayats

41 – Right to work, to education, and to public assistance in certain cases

42 – Provisions for just and humane conditions for work, and maternity relief

43 – Living wage, etc., for workers

43A – Participation of workers in management of industries

44 – Uniform civil code for citizens

45 – Provision for free and compulsory education for children

46 – Promotion of educational and economic interests of Schedules Castes, Scheduled Tribes and other weaker sections

47 – Duty of the State to raise the level of nutrition and the standard of living and to improve public health

48 – Organization of agriculture and animal husbandry

49 – Protection and improvement of environment and safeguarding of forests and wildlife

50 – Separation of judiciary from executive

51 – Promotion of Internal Peace and Security

#### PART IVA – FUNDAMENTAL DUTIES

51A – Fundamental Duties

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