

Tackling Unfair Practices in Higher Education: Analysis of the Indian Prohibition of Unfair Practices Bill

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Abstract

The growing demand for higher education in India, along with limited supply of good quality institutions of higher education, has seen a rise in unfair practices by many universities. These include a variety of practices, ranging from charging of donation amount or capitation fee for admission of students to awarding fake degrees to students graduating from the universities. In this context, the Prohibition of Unfair Practices in Technical Educational Institutions, Medical Educational Institutions and Universities Bill was introduced in India in the year 2010. The Bill aims to protect the interests of students admitted or seeking admission in institutions of higher education by prohibiting certain unfair practices in technical educational institutions, medical educational institutions and universities. This article analyses the provisions of the Prohibition of Unfair Practices Bill. While this Bill is a good attempt towards putting a check on such practices, there are a number of concerns regarding its effectiveness and adequacy. An analysis of the Bill shows that it follows a paradigm requiring transparency by universities so as to provide for informed decision making, while recognizing the autonomy of the universities to manage their own affairs. While the Bill thus avoids over-regulation, it has also been criticized as following a minimalistic approach towards keeping a check on unfair practices by universities. The approach that India should adopt towards tackling unfair practices in higher education will depend upon the broader paradigm that India chooses to adopt towards regulation of education. Thus, Indian policy makers first need to define whether they want to treat education as another business practice or service, or single it out for specialized treatment requiring greater regulation. In addition to broader concerns regarding the overarching paradigm adopted by the Bill, other concerns regarding the scope and applicability of the Bill are also examined in the article.

Keywords: Unfair practices, higher education, privatization, capitation fee, autonomy

I . Introduction

With India's rising population, especially among the youth, there is a growing demand in higher education in recent years. This demand for higher education has seen a proliferation of private universities in the country. While India's national policy is against commercialization of higher education, it supports not-for-profit private participation in the higher education sector.¹

The growing demand for higher education is met with limited supply of higher education institutions, especially of institutions providing a high quality of education. This has raised concerns regarding the use of unfair practices by many institutions. These include a variety of practices, ranging from charging of donation amount or capitation fee for admission of students to awarding fake degrees to students graduating from the universities.

In this context, the Prohibition of Unfair Practices in Technical Educational Institutions, Medical Educational Institutions and Universities Bill (hereinafter Prohibition of Unfair Practices Bill) was introduced in India in the year 2010. The Bill aims to protect the interests of students admitted or seeking admission in institutions of higher education by prohibiting certain unfair practices in technical educational institutions, medical educational institutions and universities. It provides a list of prohibited unfair practices for universities and higher educational institutions and provides the penalties for carrying out such unfair practices. The Bill was introduced in 2010 but has now lapsed.

This article analyses the provisions of the Prohibition of Unfair Practices Bill. While this Bill is a good attempt towards putting a check on such practices, many commentators have pointed out several concerns regarding the effectiveness and the adequacy of the Bill. An analysis of the Bill shows that it is based on a paradigm of institutional autonomy, with transparency requirements, to ensure informed decision-making. While this model has its merits, it has also been criticized as being minimalist and inadequate to check unfair practices followed by universities in India. To determine the extent of regulation and broader paradigm behind the law, Indian policy makers would first need to define how to treat the field of education. If education can be equated to any other business practice, albeit a socially important one, then mere transparency requirements

1. Press Info. Bureau of the Gov't of India, Amendments to the Prohibition of Unfair Practices in Technical Educational Institutions, Medical Educational Institutions and Universities Bill, 2010, Press Info. Bureau (Nov. 16, 2011), <http://pib.nic.in/newsite/erelease.aspx?relid=77229>.

may suffice. However, if education should be treated as a specialized area requiring greater government intervention, then the provisions of the Bill are inadequate in tackling the problem of unfair practices in higher education. In addition to these concerns, a number of other concerns regarding the scope and applicability of the Bill also bring into doubt its effectiveness.

This article is divided into six chapters. The next chapter gives an overview of the regulatory structure for higher education in India. The third chapter gives a background on unfair practices in higher education in India. The fourth chapter then describes the main provisions of the Prohibition of Unfair Practices Bill, especially looking at the kind of practices prohibited as unfair under the Bill. The fifth chapter provides a detailed analysis of the provisions of the Bill, looking at its limitations and the critique of the transparency paradigm that it adopts. The last chapter concludes this article.

II. Regulatory Structure of Higher Education in India

Before examining the legal mechanisms to deal with unfair practices in higher education, it will be useful to look at the regulatory structure of higher education in India. At present, the higher education sector is largely regulated by the University Grants Commission (UGC), which is responsible for giving grants to various educational institutions as well for coordination, determination and maintenance of standards in institutions of higher education.² The UGC was established under the University Grants Commission (UGC) Act of 1956.³ A “university” under the UGC Act includes three kinds of universities: (i) “a university established or incorporated by or under a Central Act”; (ii) a university established or incorporated under a Provincial Act or a State Act; and (iii) any institution recognized by the Commission in accordance with its regulations.⁴ In addition, the Central Government may declare an institution for higher education as a “deemed university” on advice of the UGC in accordance with Section 3 of the UGC Act.⁵ Some prominent institutions can be declared as institutions

2. Univ. Grants Comm'n, *Mandate*, UGC, <http://www.ugc.ac.in/page/Mandate.aspx> (last visited June 2, 2014).

3. University Grants Commission Act, No. 3 of 1956 (India).

4. *Id.* § 2(f).

5. *Id.* § 3.

of national importance.⁶ The mandate of the UGC includes promotion and coordination of university education; determination and maintenance of standards of teaching, examination and research in universities; advising the Central and State governments on the measures necessary for improvement of university education; and disbursement of grants to universities and colleges.⁷

In addition to the UGC, other bodies regulate education in professional institutions. For example, the All India Council for Technical Education (AICTE) acts as the national level body to regulate technical education in India, including formulation and maintenance of norms and standards, quality assurance through accreditation, funding, monitoring and evaluation and ensuring coordinated and integrated development and management of technical education in the country.⁸ Similarly, the Medical Council of India (MCI)⁹ and the Bar Council of India (BCI)¹⁰ are statutory bodies for establishing and maintaining high standards of medical education and legal education respectively.

III. Unfair Practices in Higher Education

The prevalence of unfair practices in the Indian higher education sector is widely known. Such unfair practices may concern the establishment and recognition of the institution, admission of students, conducting examinations, awarding degrees, recruiting faculty, paying salaries to employees, and so on.¹¹ Many universities, especially private universities, in the country are known to engage in such unfair practices. A number of private universities and colleges are established without proper permissions, and students are awarded degrees

6. Univ. Grants Comm'n, Institutes of National Importance, UGC, <http://www.ugc.ac.in/institutes-national-importance.aspx> (last visited June 2, 2014).

7. Univ. Grants Comm'n, *supra* note 2.

8. All India Council for Technical Educ., *About Us*, AICTE, <http://www.aicte-india.org/aboutus.php> (last visited June 5, 2014).

9. MED. COUNCIL OF INDIA, <http://www.mciindia.org/> (last visited June 5, 2014).

10. Bar Council of India, *About the Council*, BAR COUNCIL OF INDIA, <http://www.barcouncilofindia.org/about/about-the-bar-council-of-india/> (last visited June 5, 2014).

11. Jandhyala B G Tilak, *A Weak Attempt to Curb Unfair Practices in Higher Education*, 45(38) ECON. & POLITICAL WEEKLY 19, 19 (2010).

or diplomas that are not recognized by the government.¹² Such practices affect a range of stakeholders, including prospective students, enrolled students, teachers and parents.

The Prohibition of Unfair Practices Bill does not define what an “unfair practice” is. Instead, it enumerates practices and conducts that are deemed as unfair under the Act. Defining “unfair” is a challenging task. In the context of corruption in higher education, Ararat L. Osipian argues that it “remains a definitional problem.”¹³ He divides higher education corruption into three broad categories: (1) corruption of academic integrity, including research fraud and plagiarism; (2) corruption in higher education per se, including bribery; and (3) corruption in the higher education sector, which is a broader category and includes, for example, professional misconduct in university hospitals, even though it may not constitute academic misconduct.¹⁴ A legislation seeking to address unfair practice in higher education in India may choose to address all or any of these categories. However, the Bill does not provide a framework behind the enumeration of various unfair practices. The understanding of “unfair” itself depends upon the broader policy on education. For example, the treatment of privatization of higher education and the autonomy given to private institutions in the country may determine whether charging of exorbitant fee, or admitting students on non-merit based criteria, such as through management quotas, is “fair” or “unfair.” The lack of a coherent policy on education in India affects the Prohibition of Unfair Practices Bill. Even where the lawmakers choose to enumerate unfair practices instead of broadly defining an “unfair practice,” clarity in the underlying policy is essential in order to construct the broader framework within which the unfair practices fall.

At present, no law exists in the country to directly deal with the problem of unfair practices by universities and institutions of higher education.¹⁵ However, the UGC has taken a few measures to check unfair practices. The UGC has, through various regulations, addressed some of the issues that form part of the Prohibition of Unfair Practices Bill. For example, the UGC (Grievance Redressal) Regulations, 2012 provides a list of “grievances” (similar to “unfair practices”

12. *Id.*

13. Ararat L. Osipian, *Grey Areas in the Higher Education Sector: Legality Versus Corruptibility*, 2012 BYU EDUC. & L.J. 141, 143 (2012).

14. *Id.* at 149-50.

15. See K. N. PANIKKAR & M. BHASKARAN NAIR, *GLOBALIZATION AND HIGHER EDUCATION IN INDIA* 46 (1st ed. 2012).

under the Bill) or complaints of aggrieved students, including making admission contrary to merit declared in the admission policy; irregular admission process; non-publication of prospectus; publishing false or misleading information in the prospectus; withholding or refusing to return any document deposited for seeking admission; demanding money in excess of specified fee; breach of the policy for reservation; complaints of discrimination from the Scheduled Castes, the Scheduled Tribes, Other Backward Classes, Women, Minorities or Disabled categories; non-payment or delay in payment of scholarships to any student; delay in conduct of examinations or declaration of results; non-provision of specified amenities; denial of quality education; non transparent or unfair evaluation practices; and harassment and victimization of students, including sexual harassment.¹⁶ The Regulations also require universities to form a Grievance Redressal Committee¹⁷ and appoint an Ombudsman¹⁸ for grievance redressal under the Regulations. Further, the UGC (Admission to Specified Professional Programmes) Interim Regulations, 2003 provide for conduct of entrance examinations for admission to institutions and provide that if any student is admitted de hors merit, penalty shall be imposed on that institution as per the provisions contained in the UGC Act and its recognition or affiliation may also be withdrawn.¹⁹ In addition, the UGC periodically publishes a list of “fake universities” on its website.²⁰ The government has also occasionally issued advisories to students and parents regarding the dubious claims of many institutions.²¹ Some states have also framed their rules and regulations to check malpractices by universities.²²

Prior to the introduction of the Prohibition of Unfair Practices Bill, there have been attempts to enact Central laws on regulation of private universities in India. In 2005, the Ministry of Human Resource Development prepared the Private Professional Educational Institutions (Regulation of Admission and Fixation of Fee) Bill, 2005. While the Bill was not complete in aspects of checking unfair

16. UGC (Grievance Redressal) Regulations, 2012, § 2(f) (India).

17. *Id.* § 5.

18. *Id.* § 4.

19. UGC (Admission to Specified Professional Programmes) Interim Regulations, 2003, § 7 (India).

20. Univ. Grants Comm'n, *Fake Universities*, UGC, <http://www.ugc.ac.in/page/Fake-Universities.aspx> (last visited Jan. 15, 2015).

21. Tilak, *supra* note 11.

22. Tilak, *supra* note 11.

practices, it incorporated the principles of Common Entrance Test (CET) for admission of students, centralized counseling, allotment of seats among various categories including weaker sections and differential fees for different categories of students.²³ Later in the year 2007, the UGC brought out a draft legislation—Admission and Fee Structure in Private Aided and Unaided Professional Educational institutions, 2007. This draft provided for allotment of seats under various quotas, such as the government general quota, government reserved quota, and institutional quota and management quota. The draft also contained provisions for Common Entrance Test, centralized counseling, and variable fee structure to be determined by fee regulatory committees appointed by a state. These provisions regulating the functioning of universities were in addition to provisions requiring transparency in their functioning.²⁴ However, both these Bills lapsed.²⁵

IV. The Prohibition of Unfair Practices Bill: An Overview

In an effort towards improving the higher education sector in India, the Union Human Resources Development Ministry had introduced four Bills in the year 2010. These include the Educational Tribunals Bill, 2010 (that aims to set up national and state level Education Tribunals to adjudicate on disputes related to higher educational institutions and students or the faculty and institutions and statutory authorities); the Foreign Educational Institutions (Regulation of Entry and Operations) Bill, 2010 (to allow foreign institutions to set up campuses in India without an Indian partner subject to specific conditions such as maintenance of a corpus fund);²⁶ the Prohibition of Unfair Practices in Technical, Medical Educational Institutions and University Bill, 2010 (to penalize certain unfair practices of private educational institutions); and the National Accreditation Regulatory Authority for Higher Educational Institutions Bill, 2010 (to set up a

23. M.A. Baby, *The Bill on Prohibition of Unfair Practices and Inclusive Higher Education*, THE HINDU (Apr. 2, 2010), <http://www.thehindu.com/opinion/op-ed/the-bill-on-prohibition-of-unfair-practices-and-inclusive-higher-education/article381696.ece>.

24. *Id.*

25. *Id.*

26. See Bhawana Rawat & Shakeel Ahmad, *Foreign Direct Investment in India's Service Sector: A Case of Education Sector*, 13 J. WORLD INV. & TRADE 294 (2012), for the merits of FDI in education sector in India, and a discussion of the Foreign Educational Institutions (Regulation of Entry and Operations) Bill, 2010.

mechanism to accredit higher educational institutions). In addition, the Higher Education and Research Bill was moved in 2011. It seeks to establish a National Commission for Higher Education and Research as an overarching body for regulation of higher education, replacing the existing regulatory bodies including the UGC and the All India Council for Technical Education (AICTE). While the Higher Education and Research Bill was withdrawn,²⁷ all other Bills have now lapsed.²⁸ All these Bills form a part of a package for reforms in higher education in India and it will be useful to examine them together while also looking at each Bill closely to analyze how effectively it deals with its subject matter. This article examines the Prohibition of Unfair Practices Bill.

The Prohibition of Unfair Practices Bill aims to protect the interest of students admitted or seeking admission in universities and institutions by providing for the prohibition of certain unfair practices in technical educational institutions, medical educational institutions and universities. It provides a list of prohibited unfair practices for universities and higher educational institutions and provides the penalties for carrying out such unfair practices. The Bill was introduced in the Lok Sabha (House of the People) of the Indian Parliament on 3 May 2010. It has now lapsed.²⁹ It was referred to the Department-Related Parliamentary Standing Committee on Human Resource Development on 13 May 2010 for examination and report.³⁰ The Committee presented to Chairman, Rajya Sabha (Council of States in the Indian Parliament), and forwarded to Speaker, Lok Sabha, the *Two Hundred Thirty-Sixth Report on the Prohibition of Unfair Practices in Technical*

27. PRS Legislative Research, *The Higher Education and Research Bill, 2011*, PRS, <http://www.prsindia.org/billtrack/the-higher-education-and-research-bill-2011-2153/> (last visited Jan. 15, 2015).

28. PRS Legislative Research, *HRD/Labour/Health Lapsed Bills*, PRS, <http://www.prsindia.org/billtrack/hrd-labour-health/lapsed/> (last visited Jan. 15, 2015).

29. PRS Legislative Research, *The Prohibition of Unfair Practices in Technical Educational Institutions, Medical Educational Institutions and University Bill, 2010*, PRS, <http://www.prsindia.org/billtrack/the-prohibition-of-unfair-practices-in-technical-educational-institutions-medical-educational-institutions-and-university-bill-2010-1137/> (last visited Jan. 15, 2015).

30. DEP'T-RELATED PARLIAMENTARY STANDING COMM. ON HUMAN RES. DEV., PARLIAMENT OF INDIA RAJYA SABHA, TWO HUNDRED THIRTY-SIXTH REPORT ON THE PROHIBITION OF UNFAIR PRACTICES IN TECHNICAL EDUCATIONAL INSTITUTIONS, MEDICAL EDUCATIONAL INSTITUTIONS AND UNIVERSITIES BILL, 2010 (2011), *available at* <http://www.prsindia.org/uploads/media/unfair%20practices/SC%20unfair%20practices.pdf> [hereinafter STANDING COMMITTEE REPORT].

Educational Institutions, Medical Educational Institutions and Universities Bill, 2010 on 30 May 2011³¹ (hereinafter Standing Committee Report). The Report was presented to the Rajya Sabha on 1 August 2011 and laid on the table of Lok Sabha on 2 August 2011.³²

The Prohibition of Unfair Practices Bill extends to the whole of India, except to the state of Jammu and Kashmir.³³ Chapter II of the Bill deals with a number of unfair practices related to the process of admission in universities and higher educational institutions. Chapter III deals with the imposition of monetary penalties, while Chapter IV deals with offences. Chapter V contains miscellaneous provisions.

The Bill defines an “institution” as a “technical educational institution or medical educational institution or any such institution registered under the Societies Registration Act, 1860 and recognized as such by the appropriate statutory authority or a university as defined in section 2 of the UGC Act, 1956 and includes an institution deemed to be a university under section 3 of that Act or under any other law for the time being in force.”³⁴ Section 2(f) of the UGC Act defines “university” as a “University established or incorporated by or under a Central Act, a Provincial Act or a State Act, and includes any such institution as may, in consultation with the University concerned, be recognized” by the UGC in accordance with its regulations.³⁵ Further Section 3 of the UGC Act empowers the Central Government, on the advice of the UGC, to declare that any institution for higher education, other than a University, shall be deemed to be a University.³⁶ The Prohibition of Unfair Practices Bill does not apply to minority institutions and does not affect the right of the minorities to establish and administer educational institutions of their choice.³⁷

The following unfair practices, along with the relevant penalties, are covered under the Bill:

(a) Acceptance of admission or other fees and charges without receipt: The Bill

31. *Id.*

32. *Id.*

33. Prohibition of Unfair Practices in Technical Educational Institutions, Medical Educational Institutions and Universities Bill, 2010, No. 56 of 2010, cl. 1(2) (India) [hereinafter Prohibition of Unfair Practices Bill].

34. *Id.* cl. 2(1)(e).

35. University Grants Commission Act, *supra* note 3, § 2(f).

36. University Grants Commission Act, *supra* note 3, § 3.

37. Prohibition of Unfair Practices Bill, *supra* note 33, cl. 26.

prohibits accepting any payment towards admission or any other fees and charges for admission in any course or program without a proper receipt issued in writing to the student.³⁸ Further, the institution can charge only the fees or charges for admission declared by it in its prospectus for admission.³⁹ Further, no institution can charge any fee for admission test other than an amount representing the reasonable cost incurred by it in conducting such test.⁴⁰

(b) Prohibition of admission without specified admission tests or inter se merit for selection of students: According to the Bill, there are two ways to conduct the process of admission to universities and institutions of higher education:

(i) Specified admission test

If the university aims to conduct admission through a specified competitive test, then no person can be admitted to the institution except through such test. The test must be conducted by either a body as may be notified under the Act by the appropriate authority for conducting such admission tests, or such institution(s) if such they have been so authorized by the Central Government or a State Government or any appropriate authority or by any other authority so authorized and notified to conduct such test.⁴¹

(ii) Inter se merit

If there is no specified competitive admission test, then the admission must be conducted through inter se merit to be specified in the prospectus of the institution.⁴²

In both of these cases, each institution must maintain records of the entire process of selecting students, including answer sheets of the competitive test, if any. Institutions are liable to produce such records when called upon to do so by the appropriate statutory authority⁴³ under the Act or any other law. They must also exhibit such records on their websites. Institutions must maintain the records for a period of one year from the date of completion of the admission test, which might be longer in case the admission has been questioned in any court of law or

38. Prohibition of Unfair Practices Bill, *supra* note 33, cl. 3(1)(b).

39. Prohibition of Unfair Practices Bill, *supra* note 33, cl. 3(1)(a).

40. Prohibition of Unfair Practices Bill, *supra* note 33, cl. 3(2).

41. Prohibition of Unfair Practices Bill, *supra* note 33, cl. 4(1).

42. Prohibition of Unfair Practices Bill, *supra* note 33, cl. 4(2).

43. As per Clause 2(1)(c) of the Prohibition of Unfair Practices Bill, “appropriate statutory authority” means any authority established under any law in force for coordinating or determining or maintaining the standards of higher education for technical education, medical education and education in universities.

tribunal.⁴⁴

(c) Offences relating to publication of prospectus: The Bill makes it mandatory for an institution to publish its prospectus. Before the expiry of sixty days prior to the date of commencement of admission, every institution must publish a prospectus for the purpose of giving information to persons seeking admission and to general public. The prospectus must contain:⁴⁵

(i) Each component of the fee, deposits and other charges payable by the students admitted to the institution and the terms and conditions of such payment;

(ii) Percentage of tuition fee and other charges refundable to a student in case the student withdraws from the institution before or after completion of course or program of study, and the time within and the manner in which such refund shall be made;

(iii) Number of seats approved by the appropriate statutory authority in respect of each course or program of study for the academic year for which admission is proposed to be made;

(iv) Conditions of eligibility including the minimum and maximum age limit, if any specified by the institution;

(v) Educational qualifications specified by the relevant appropriate statutory authority, or by the institution, where no such qualifying standards have been specified by any statutory authority;

(vi) Process of admission and selection of eligible candidates, including all relevant information regarding details of admission test and the amount of fee to be paid for the admission test;

(vii) Details of each teaching faculty, including their educational qualifications and teaching experience, and indicating whether such members are on regular basis or as visiting member;

(viii) Minimum pay and other emoluments payable for each category of teachers and other employees;

(ix) Information regarding physical and academic infrastructure and other facilities including hostel accommodation, library and hospital or industry wherein the practical training to be imparted to the students and in particular the facilities accessible by students;

(x) Broad outlines of the syllabus specified by the appropriate statutory authority or by the institution, as the case may be, including the teaching hours, practical sessions and other assignments;

44. Prohibition of Unfair Practices Bill, *supra* note 33, cl. 4(3).

45. Prohibition of Unfair Practices Bill, *supra* note 33, cl. 5(1).

(xi) All relevant instructions regarding maintaining the discipline by students within or outside the campus of the institution, and, in particular such discipline relating to the prohibition and consequences of ragging and for violating the provisions of any regulation in this behalf made under the UGC Act, 1956 or any other law;

(xii) Any such other information which may be prescribed by Central Government rules.

The institution must publish the above information on its website and draw attention of prospective students and general public to the website through advertisements displayed prominently in different newspapers and through other media.⁴⁶ The institution must fix the price of “printed copy of the prospectus, being not more than the reasonable cost of its publication and distribution and no profit be made out of the publication, distribution or sale of prospectus.”⁴⁷

Any institution, which knowingly does anything contrary to the information published by it in its prospectus in violation of the above provisions, shall be liable to a penalty, which may extend to fifty lakh rupees.⁴⁸

(d) Prohibition of misleading or false advertisements: The Bill prohibits institutions from issuing or publishing:

(i) Any advertisement falsely claiming to be recognized by the appropriate authority for inducing students for taking admission, or

(ii) Any false or misleading information in respect of the institution’s infrastructure, academic facilities, faculty, standard of instruction, or academic or research performance.⁴⁹

Any institution which violates this provision by publishing any false or misleading advertisement shall be liable to a penalty which may extend to fifty lakh rupees.⁵⁰ Further, every person who authorized the issue of a false or misleading advertisement shall be liable to a penalty, which may extend to fifty lakh rupees.⁵¹

Where an institution has been alleged to have committed an offence under this provision, the burden of proving that it has not committed the offence shall be on

46. Prohibition of Unfair Practices Bill, *supra* note 33, cl. 5(1).

47. Prohibition of Unfair Practices Bill, *supra* note 33, cl. 5(2).

48. Prohibition of Unfair Practices Bill, *supra* note 33, cl. 9.

49. Prohibition of Unfair Practices Bill, *supra* note 33, cl. 8.

50. Prohibition of Unfair Practices Bill, *supra* note 33, cl. 12.

51. Prohibition of Unfair Practices Bill, *supra* note 33, cl. 13.

the institution.⁵²

(e) Prohibition of Capitation Fee: Prohibition of capitation fee is a significant feature of the Bill. The Bill defines “capitation fee” as any amount, by whatever name called:

(i) “demanded or charged or collected, directly or indirectly, for, or, on behalf of any institution, or paid by any person in consideration for admitting any person as student”; and “which is in excess of the fee payable towards tuition fee and other fees and other charges declared by any institution in its prospectus”; or

(ii) “paid or demanded or charged or collected, by way of donation, for, or, on behalf of any institution, or paid by any person in consideration for admitting any person as a student in such institution.”⁵³

The Bill prohibits any institution from, directly or indirectly, demanding, charging or accepting, capitation fee or demanding any donation, by way of consideration for admission in a course or program of study.⁵⁴ The Bill also prohibits any person to, directly or indirectly, offer or pay capitation fee or give any donation, by way of consideration either in cash or kind or otherwise, for obtaining admission.⁵⁵

Any institution, which demands or accepts capitation fee or donation in violation of this provision shall be liable to a penalty which may extend to fifty lakh rupees.⁵⁶

(f) Prohibition on withholding or refusal to return documents or fee: Where an institution has possession or custody of any document, including certificates of degree, diploma or any other award, deposited with it by an admission applicant, the institution shall not withhold or refuse to return such document to induce the person to pay any fee in respect of any course or program of study that the person does not intend to pursue or avail any facility in such institution.⁵⁷

Where an admitted student withdraws from an institution, the institution shall refund the percentage of the deposited fee as has been mentioned in the prospectus within the specified time period.⁵⁸

Any institution that violates the above-mentioned provision shall be liable to a

52. Prohibition of Unfair Practices Bill, *supra* note 33, cl. 23.

53. Prohibition of Unfair Practices Bill, *supra* note 33, cl. 2(d).

54. Prohibition of Unfair Practices Bill, *supra* note 33, cl. 6(1).

55. Prohibition of Unfair Practices Bill, *supra* note 33, cl. 6(2).

56. Prohibition of Unfair Practices Bill, *supra* note 33, cl. 10.

57. Prohibition of Unfair Practices Bill, *supra* note 33, cl. 7(1).

58. Prohibition of Unfair Practices Bill, *supra* note 33, cl. 7(2).

penalty which may extend to one lakh rupees.⁵⁹

All penalties imposed under the Bill are without prejudice to proceedings for prosecution or imposition of penalty under this Act or any other law in force. Further, all the matters (including imposition of penalties) shall be adjudicated by the concerned State or National Educational Tribunal, that have been proposed to be established under the Educational Tribunals Bill.⁶⁰

For commission of any other offence under the Act for which no penalty has been specified, the offender shall be liable to a penalty which may extend to five lakh rupees and in the case of a society or trust, which may extend to ten lakhs rupees.⁶¹ Any capitation fee or donation or any other charges collected in contravention of the Act, shall be liable to be confiscated.⁶²

Besides the above-mentioned penalties, the Bill further provides that any person who contravenes (or attempts or abets contravention) the provisions of the Act or any rules made under the Act, shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both.⁶³ Any person who fails to pay penalty imposed by Educational Tribunal or fails to comply with any of its directions or orders, shall be punishable with imprisonment minimum one month and maximum three years or with fine ranging from fifty thousand rupees to five lakh rupees, or with both.⁶⁴ Except for offence under Clause 6 (prohibition of capitation fee), which is deemed cognizable, all other offences under the Act are deemed non-cognizable.⁶⁵

No court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class can try any offence punishable under the Act.⁶⁶ To take cognizance of any offence alleged to have been committed by any institution or director, manager, secretary or other officer, a written complaint of such person authorized by the Central or the State Government or by such person authorized by the concerned appropriate statutory authority must be filed.⁶⁷ If an offence has been committed by a society or trust or institution, every person who at the time

59. Prohibition of Unfair Practices Bill, *supra* note 33, cl. 11.

60. Prohibition of Unfair Practices Bill, *supra* note 33, cl. 16.

61. Prohibition of Unfair Practices Bill, *supra* note 33, cl. 14.

62. Prohibition of Unfair Practices Bill, *supra* note 33, cl. 15(1).

63. Prohibition of Unfair Practices Bill, *supra* note 33, cl. 17(1).

64. Prohibition of Unfair Practices Bill, *supra* note 33, cl. 17(2).

65. Prohibition of Unfair Practices Bill, *supra* note 33, cl. 19.

66. Prohibition of Unfair Practices Bill, *supra* note 33, cl. 18(2).

67. Prohibition of Unfair Practices Bill, *supra* note 33, cl. 18(1).

the offence was committed was in charge of, and was responsible to, the society or trust or institution for the conduct of its business, as well as the society or trust or institution, shall be deemed guilty, except where the person proves that the offence was committed without her or his knowledge or she or he exercised due diligence to prevent it.⁶⁸ However, where it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of any director, manager, secretary, trustee or other officer of the society or trust or institution, such person shall also be deemed guilty.⁶⁹

The Bill also empowers the Central or State Government, and the appropriate statutory authority to call upon any technical educational institution or medical educational institution or university to furnish any information concerning the activities carried on by it, to carry out the purposes of this Act.⁷⁰

V. A Legislative Analysis of the Bill: Examining its Limitations and Questioning the Paradigm

The Prohibition of Unfair Practices Bill forms a part of the packet of legislations sought to be enacted to regulate higher education sector in India. The Bill recognizes the recent expansion of higher education in India, which involves private participation in the growth of higher professional education, especially technical and medical education. While the current national policy supports private non-for-profit participation in higher education, it is against the commercialization of higher education.⁷¹ Jandhyala Tilak argues that privatization and commercialization are principally and practically the same, with the basic consideration being profit maximization.⁷² With the increasing involvement of private sector in higher education, there is a growing public concern against unfair practices in educational institutions and universities, such as charging donations or capitation fees for admitting students, false and misleading advertisements,

68. Prohibition of Unfair Practices Bill, *supra* note 33, cls. 20(1), 21(1).

69. Prohibition of Unfair Practices Bill, *supra* note 33, cls. 20(2), 21(2).

70. Prohibition of Unfair Practices Bill, *supra* note 33, cl. 24.

71. DEP'T OF EDUC., MINISTRY OF HUMAN RES. DEV. OF INDIA, NATIONAL POLICY ON EDUCATION, 1986 (1998), *available at* http://www.ncert.nic.in/oth_anoun/npe86.pdf.

72. Jandhyala B G Tilak, *Absence of Policy and Perspective in Higher Education*, 39(21) ECON. & POLITICAL WEEKLY 2159, 2163 (2004).

poor quality of education services and so on.⁷³ The Prohibition of Unfair Practices Bill is undoubtedly a major step towards reforms in higher education. It addresses a number of problems that students and parents commonly face while seeking admission in institutions of higher education in India. This Bill seeks to address the problem of unfair practices by prohibiting certain practices and prescribing the appropriate penalty or punishment for committing such unfair practices.

The Bill also addresses the issue of autonomy of higher educational institutions. It recognizes the need to balance autonomy of higher education institutions with measures to protect the interests of students and others accessing higher education by prohibiting unfair practices.⁷⁴ Regulation of fee is an important element of autonomy of a higher educational institution. The National Knowledge Commission has recommended that, in general, universities should have the autonomy to fix their own fees.⁷⁵

The issue of regulation of fee of private institutions has been addressed by the Supreme Court of India as well. In general, while the courts are in favor of allowing a reasonable level of autonomy to educational institutions, they also recognize the need for state regulation to ensure that unfair practices like demanding capitation fee are checked. For example, in *Unni Krishnan v. State of Andhra Pradesh*,⁷⁶ the Supreme Court recognized that while private institutions should have some discretion in fixing their fee, and it is understandable that their fee is generally higher than that in government institutions, such discretion should not lead to the commercialization of education where evil practices like charging capitation fee take place. In *T.M.A. Pai Foundation v. State of Karnataka*,⁷⁷ while the Supreme Court was against regulation of fees charged by unaided institutions, the Court asserted that no institution should charge capitation fee. However, in order to check practices like profiteering and charging capitation fee, in *Islamic Academy of Education v. State of Karnataka*,⁷⁸ the Supreme Court ruled in favor of establishing state committees to approve fee structures of universities

73. Prohibition of Unfair Practices Bill, *supra* note 33, Statement of Objects and Reasons.

74. Prohibition of Unfair Practices Bill, *supra* note 33, Statement of Objects and Reasons.

75. NAT'L KNOWLEDGE COMM'N, GOV'T OF INDIA, REPORT TO THE NATION 2006 – 2009, at 63 (2009), available at <http://www.aicte-india.org/downloads/nkc.pdf>.

76. A.I.R. 1993 S.C. 2178.

77. (2002) 8 S.C.C. 481.

78. (2003) 6 S.C.C. 697.

or to propose alternative fee structures. Considering the need to curb unfair practices like charging capitation fees, and the need to allow a reasonable surplus to institutions, the Supreme Court in *P.A. Inamdar v. State of Maharashtra*⁷⁹ approved of the Committee suggested in the *Islamic Academy of Education* case. More recently, in *Rohilkhand Medical College & Hospital v. MCI*,⁸⁰ the Supreme Court expressed concern over unfair practices, especially payment of capitation fee, in medical admissions in India. Taking note of the Prohibition of Unfair Practices Bill, the Court recommended the enactment of a Parliamentary legislation to address unethical and unfair practices in higher education.

The judicial approach towards private participation in higher education has been incoherent. These judgments reflect that the judiciary seems to have uncomfortably accepted the fact of existence of privatization in higher education, and are making unstructured attempts to regulate the private sector. According to Devesh Kapur and Pratap Bhanu Mehta, “there has been a distinct shift in the Supreme Court’s stance in the past decade, from an undisguised suspicion of the private sector, to a grudging acceptance of the emerging reality.”⁸¹ Without declaring it illegal, the Court in *Unni Krishnan* suggested that commercialization of higher education is “unholy.”⁸² This grudging acceptance has caused confusion whether education can be treated as a “service,” generally understood by courts to cover only commercial transactions, such that consumers may seek redressal against unfair practices in consumer courts.⁸³ There is a lack of clarity on the state’s stand on the fundamental aspect of whether higher education, especially by private players, can be treated as just another service.

As seen above, while concerns with unfair practices adopted by universities, especially the practice of charging capitation fee, has time and again surfaced in India, this Bill makes a consolidated attempt to prohibit such practices and prescribe penal consequences of indulging in such practices.

Overall, it can be seen that the Bill follows an approach of autonomy of the institution coupled with transparency. By mandating publishing of prospectus

79. (2005) 6 S.C.C. 537.

80. (2013) 12 S.C. 199.

81. DEVESH KAPUR & PRATAP BHANU MEHTA, CTR. FOR INT’L DEV. AT HARVARD UNIVERSITY, INDIAN HIGHER EDUCATION REFORM: FROM HALF-BAKED SOCIALISM TO HALF-BAKED CAPITALISM 18 (2004), available at <http://www.hks.harvard.edu/content/download/69173/1249502/version/1/file/108.pdf>.

82. A.I.R. 1993 S.C. 2178.

83. KAPUR & MEHTA, *supra* note 81, at 18-19.

and punishing the publication of false or misleading information, the Bill tries to enforce transparency in the functioning of educational institutions. At the same time, it largely allows universities to make their own decisions, as long as these decisions are transparent. Similarly, it allows students and parents to form their own judgments based on the information they receive in the prospectus. This model of autonomy, transparency and informed decision-making is then buttressed by other laws in the five-Bill legislative package. For example, the National Accreditation Regulatory Authority for Higher Educational Institutions Bill, 2010, that provides for accreditation of universities, uses accreditation and publication of this information as a mechanism for quality check. In addition, the Educational Tribunals Bill, 2010 allows aggrieved persons to file complaints against malpractice committed by institutions of higher education.

While this model of autonomy, transparency and informed decision-making has its merits, the Bill can also be criticized for being a minimal Bill that does not do much. It is alleged that the Bill has a very narrow ambit, thus allowing a number of unfair practices to go unchecked. This part of the article explores some of the concerns about the effectiveness of the Bill to curb unfair practices in higher education in India.

A. Scope of the Bill

1. Coverage of Institutions and Universities

The Standing Committee Report⁸⁴ observed that the scope of the Bill is limited because of the narrow definition of “institution.” The Committee noted that while the Bill covers technical and medical institutions and universities including deemed universities, it “excludes other universities, colleges for general and professional education and other institutions of higher general education, including, notably, colleges for teacher education,”⁸⁵ such as the National Council for Teacher Education.⁸⁶ Since unfair practices defined in the Bill need to be curbed in all kinds of educational institutions, such exclusion unnecessarily protects certain institutions. The Committee recommended a detailed definition of “institution” such as provided for in the Educational Tribunals Bill, 2010.⁸⁷

84. STANDING COMMITTEE REPORT, *supra* note 30.

85. STANDING COMMITTEE REPORT, *supra* note 30, ¶¶ 3.2, 3.3.

86. STANDING COMMITTEE REPORT, *supra* note 30, ¶ 3.3.

87. STANDING COMMITTEE REPORT, *supra* note 30, ¶ 3.4.

Section 3(1)(o) of the Educational Tribunals Bill, 2010 defines a “higher educational institution” as “an institution of learning including an university, an institution deemed to be university, a college, an institute, an institution of national importance declared as such by an Act of Parliament or a constituent unit of such institution, which is imparting (whether through conduct of regular classes or distance education system) higher education beyond twelve years of schooling leading to the award of a degree or diploma.”⁸⁸ Further, the authorities responsible for adjudicating under the Prohibition of Unfair Practices Bill are State Educational Tribunal or the National Educational Tribunal, established under the Educational Tribunals Act, 2010.⁸⁹ This further demands greater congruence between the two Bills and it is not clear why the two Bills have a different coverage in terms of universities and institutions falling within their purview.

2. Coverage of Unfair Practices

The Bill deals with a number of problems that students, their parents as well as the general public faces because of unfair practices resorted to by institutions of higher education. However, it fails to include unfair practices like hiring unqualified teachers,⁹⁰ malpractices in evaluation, and favoritism or victimization of students by teachers or administration,⁹¹ which also affects the interests of students, parents and the general public. Certain malpractices in evaluation, including passing undeserving students and allowing students with low attendance to sit in the exams,⁹² are also against the interests of potential employers as well as the general public. Many private universities are known to temporarily hire faculty and arrange for equipment only for the purpose of inspection visits by regulatory bodies like the UGC.⁹³ The Bill also fails to cover grievances of employees and teachers against the institution.⁹⁴ These may include non-payment or delayed payment of salaries to teachers and other employees, recruiting faculty with low salary, forcing teachers to pass undeserving students,

88. Educational Tribunals Bill, 2010, No. 55 of 2010, § 3(1)(o) (India).

89. Prohibition of Unfair Practices Bill, *supra* note 33, cl. 16.

90. STANDING COMMITTEE REPORT, *supra* note 30, ¶ 3.6.

91. *See* STANDING COMMITTEE REPORT, *supra* note 30, ¶¶ 3.6, 3.8.

92. *See* STANDING COMMITTEE REPORT, *supra* note 30, ¶¶ 3.6, 3.8.

93. PANIKKAR & BHASKARAN NAIR, *supra* note 15, at 47.

94. STANDING COMMITTEE REPORT, *supra* note 30, ¶¶ 3.5, 3.6.

exploitation of teachers or employees, and so on.⁹⁵

Further, the Educational Tribunals Bill aims to provide for adjudication of disputes involving teachers and other employees of higher educational institutions and other stakeholders (including students, universities, institutions and statutory regulatory authorities).⁹⁶ It is not clear why the Prohibition of Unfair Practices Bill failed to broaden its ambit and include other unfair practices that may adversely affect the interests of other stakeholders besides students and parents.

In fact, the UGC (Grievance Redressal) Regulations, 2012 of the UGC provides a list of “grievances” which go beyond the practices covered in the Bill. Some of the grievances covered in these Regulations include breach of the policy for reservation, complaints of discrimination from the Scheduled Castes, the Scheduled Tribes, Other Backward Classes, Women, Minorities or Disabled categories; non-payment or delay in payment of scholarships to any student; delay in conduct of examinations or declaration of results; denial of quality education; non transparent or unfair evaluation practices; and harassment and victimization of students, including sexual harassment.⁹⁷

3. Persons accountable under the Bill

The Standing Committee observed that often capitation fee is charged not through advertisements, but through various agents and intermediaries. The Standing Committee noted that the present Bill does not include such agents and intermediaries, and should be amended.⁹⁸

B. Institutional Autonomy in Deciding Fee

The increasing role of private institutions in the country has led to the problem of unregulated fee structure, to the extent that in the name of autonomy, many private universities and deemed universities are charging exorbitant fees.⁹⁹ While the Bill prohibits capitation fee,¹⁰⁰ it does not prohibit charging of exorbitant fees by universities and institutions. Further, while the Bill prohibits accepting any

95. STANDING COMMITTEE REPORT, *supra* note 30, ¶¶ 3.6, 3.8.

96. Educational Tribunals Bill, 2010, *supra* note 88, Preamble.

97. UGC (Grievance Redressal) Regulations, 2012, *supra* note 16.

98. STANDING COMMITTEE REPORT, *supra* note 30, ¶¶ 10.2-10.5.

99. STANDING COMMITTEE REPORT, *supra* note 30, ¶ 6.7.

100. Prohibition of Unfair Practices Bill, *supra* note 33, cl. 6.

payment towards admission or any “other fees and charges” for admission in any course or program without a proper receipt issued in writing to the student,¹⁰¹ it does not define “other fees and charges.” It also does not give any guidance or mechanism for fixing fees by private institutions or prescribe any upper limit for fees for different courses.¹⁰² The problem of charging exorbitant fees by private and deemed universities was also noted by the *Yashpal Committee Report* and the *Report of the Committee for Review of Existing Institutions Deemed-to-be-Universities*.¹⁰³ In the absence of any central legislation regulating or fixing fee¹⁰⁴ and with the Supreme Court directive on regulation of fee in private institutions,¹⁰⁵ this legislation could have been an appropriate place to make charging of exorbitant fees without any rational basis an offence. The Standing Committee recommended that this Bill should either provide “a workable mechanism for deciding the fee structure for various professional courses” or lay down “minimum and maximum limit for fees for different categories of courses based on the ground realities.”¹⁰⁶ The Standing Committee also recommended referring to Kerala Self Financing Professional Colleges (Prohibition of Capitation Fees and Procedure for Admission and Fixation of Fees) Act, 2004 and the Maharashtra Educational Institutions (Prohibition of Capitation Fee) Act, 1987 which provide for regulation of fee structures.¹⁰⁷ If such measures are not adopted, despite the prohibition of capitation fee, victimization of parents and students might continue.¹⁰⁸

The level of autonomy that should be given to private institutions in matters of education remains debatable. While recent trends have pointed towards granting of autonomy, the problem of charging exorbitant fees needs to be addressed. It is unclear if the Bill, if enacted, would really serve the interests of students and parents despite provisions on capitation fee¹⁰⁹ and disclosure of fee structure,¹¹⁰ if charging of exorbitant fees is not addressed. At present, there are certain

101. Prohibition of Unfair Practices Bill, *supra* note 33, cl. 3(1)(b).

102. STANDING COMMITTEE REPORT, *supra* note 30, ¶ 6.7.

103. STANDING COMMITTEE REPORT, *supra* note 30, ¶ 6.7.

104. STANDING COMMITTEE REPORT, *supra* note 30, ¶ 6.8.

105. STANDING COMMITTEE REPORT, *supra* note 30, ¶ 6.9.

106. STANDING COMMITTEE REPORT, *supra* note 30, ¶ 6.11.

107. STANDING COMMITTEE REPORT, *supra* note 30, ¶ 6.13.

108. STANDING COMMITTEE REPORT, *supra* note 30, ¶ 6.11.

109. Prohibition of Unfair Practices Bill, *supra* note 33, cl. 6.

110. Prohibition of Unfair Practices Bill, *supra* note 33, cl. 5.

government and UGC norms that contain provisions regulating the fee structure of certain universities.¹¹¹ For example, the UGC (Institutions Deemed to be Universities) Regulation, 2010, requires the fee structure in deemed universities to be fixed in accordance with the Fee Regulations framed by the Government or the UGC from time to time.¹¹² Further, UGC (Establishment of and Maintenance of Standards in Private Universities) Regulations, 2003 provide that fees must be fixed in accordance with the norms or guidelines prescribed by the UGC and other statutory bodies.¹¹³

C. Penalty for Failure to Comply with Tribunal's Orders

Under Clause 17 of the Bill, any person who fails to pay penalty imposed by Educational Tribunal or fails to comply with any of its directions or orders, shall be punishable with imprisonment for a term not less than one month but which may extend to three years or with fine not less than fifty thousand rupees but which may extend to five lakh rupees, or with both.¹¹⁴ This penalty, especially the provision of imprisonment, seems excessively harsh.¹¹⁵

D. Prior Complaint before Cognizance of Offences

The Bill provides that no court shall take cognizance of any offence except on the written complaint of the person authorized by the Central Government or by the State Government in that behalf or of a person authorized by the concerned appropriate statutory authority.¹¹⁶ While this provision may have been incorporated with a view to prevent harassment of people, it might unnecessarily

111. Amlanjyoti Goswami, *Higher Education Law and Privately-Funded University Education in India: Towards a Vision?*, in INDIA INFRASTRUCTURE REPORT 2012: PRIVATE SECTOR IN EDUCATION 185 (2013), available at http://www.idfc.com/pdf/report/2012/Chapter_17.pdf.

112. UGC (Institutions Deemed to be Universities) Regulation, 2010 (as amended in 2014), § 6 (India).

113. UGC (Establishment of and Maintenance of Standards in Private Universities) Regulations, 2003, § 3.9 (India).

114. Prohibition of Unfair Practices Bill, *supra* note 33, cl. 17(2).

115. STANDING COMMITTEE REPORT, *supra* note 30, ¶¶ 14.3, 14.4.

116. Prohibition of Unfair Practices Bill, *supra* note 33, cl. 18(1).

delay the process for grievance redressal for aggrieved persons.¹¹⁷

E. Offences by Institutions

The Bill provides for penalty to be imposed against various officers of institutions, including Chancellors, trustees, etc.¹¹⁸ The Governor of a state is the Chancellor of universities in many states,¹¹⁹ and the Chief Justice of High Court is the Chancellor of many law universities.¹²⁰ Indian laws, including the Constitution of India itself, provide special protection to Governors of State and President of India with respect to civil and criminal proceedings against them.¹²¹ The Bill totally ignores such protections and puts such officers of the country at the same level as other officers of a university.

F. Non-Applicability to Minority Institutions

Clause 26 of Prohibition of Unfair Practices Bill titled “Non-applicability of this Act to minority institutions in certain cases” provides that the Act will not affect the right of minorities to establish and administer educational institutions of their choice.¹²² While the legislature must respect the constitutional rights of minorities to establish and administer educational institutions,¹²³ it is not clear

117. STANDING COMMITTEE REPORT, *supra* note 30, ¶¶ 15.2 - 15.6.

118. Prohibition of Unfair Practices Bill, *supra* note 33, cl. 21.

119. *See, e.g.*, Punjab University Act, No. 35 of 1961, § 9 (India), which provides that the Governor of Punjab shall be the Chancellor of the Punjab University; Andhra Pradesh Universities Act, No. 4 of 1991, § 10 (India), which provides that the Governor of Andhra Pradesh shall be the Chancellor of universities established under the Act; Gujarat Technological University Act, No. 20 of 2007, § 9 (India), which provides that the Governor of the state shall be the Chancellor of the university.

120. *See, e.g.*, National Academy of Legal Studies and Research University Act, No. 34 of 1998, § 7 (India), which provides that the Chief Justice of Andhra Pradesh shall be the Chancellor of the university; National Law University Statutes, 2010, cl. 3 (India), which provide that the Chief Justice of the Delhi High Court shall be the Chancellor of the National Law University Delhi.

121. STANDING COMMITTEE REPORT, *supra* note 30, ¶ 16.2.

122. Prohibition of Unfair Practices Bill, *supra* note 33, cl. 26.

123. INDIA CONST. art. 29.

under what cases the minorities will be or should be exempt from application under the Act.¹²⁴ Irrespective of minority rights, it is arguable that some provisions, like prohibition of publication of false and misleading information or withholding documents of students, should be equally applicable to all institutions.

G. The Overall Picture

The above description and analysis of the Prohibition of Unfair Practices Bill makes it clear that the Bill largely follows an approach of transparency and autonomy. It is commendable that the Bill tries to establish a culture of transparency in the functioning of institutions of higher education in India. But the Bill has also been criticized as being an inadequate step towards addressing the widespread problem of unfair practices in the Indian higher education sector.

One of the problems regarding the inadequacy of the Bill is its limited scope and application. Even within the framework of transparency and autonomy, the Bill could have covered a much wider ambit. This coverage could be in terms of the kinds of universities and institutions covered, the number of unfair practices covered as well as the people accountable under the law. These shortcomings in the law have already been explained above.

The other problem with the law is in its framework itself. Some commentators have suggested that transparency is not enough to tackle the problem of unfair practices in universities in India. For example, it is suggested that the Bill should do more in terms of regulating admission, fees and content of courses, and expand the social and academic accountability of institutions beyond just ensuring transparency on these matters. Thus, the Bill must address the larger issues of social justice and excellence in academics.¹²⁵

It is also argued that the limited approach of the Bill concentrated merely on transparency allows profiteering and commercialization of higher education. It is argued that since education is not the same as business, transparency cannot be the only mandatory good practice required on part of the universities.¹²⁶ This is also accompanied by the fear that prohibition of capitation fee without regulating the fee structure may lead universities to find newer ways to charge more money, making it difficult to differentiate what amounts to capitation fee and what is a

124. PRS Legislative Research, *supra* note 29.

125. Baby, *supra* note 23.

126. Baby, *supra* note 23.

legitimate fee.¹²⁷

These arguments represent alternative ways of approaching the legal regulation of higher education. While the current framework respects autonomy and decision making by the concerned stakeholders, it mandates transparency to ensure that the decision making is an informed one. The other approach assumes that the law needs to regulate much more than merely ensuring transparency. Thus, further protections in other areas, such as regulation of fee or of course content, is required as per this approach. To decide what approach should be followed, India needs to first decide how it aims to treat the field of education. Can education be equated to any other business,¹²⁸ ensuring transparency in its functioning being sufficient to ensure a check on unfair practices? Or, should education be treated as separate from other businesses requiring a greater level of legal intervention it is affairs? Some of the regulation concerns may be addressed through UGC norms, functioning as an independent regulator. Education may be a socially relevant area, but so are many other businesses.

The problems with the framework behind the Act reflect the absence of a broader policy on higher education itself, especially with relation to the treatment of private universities. The Indian higher education sector has developed largely in an ad hoc manner, without an underlying coherent policy guiding the developments in the sector.¹²⁹ The confusion is especially evident in the area of treatment of privatization of higher education. Jandhyala Tilak claims the beginning of the 1990s in India marked a period of widespread laissez faireism in higher education, involving governmental non-intervention and absence of policy, which led to the growth of private higher education institutions.¹³⁰ The later period also reflects confusion in the higher education policy, with the government not being able to take a clear stand on private higher education. This is evident, for example, by the policy of allowing privatization but not commercialization,

127. Santosh K. Joy, *Cabinet Clears Bills to Penalize Unfair Practices at Institutions*, LIVEMINT (Mar. 20, 2010), <http://www.livemint.com/Home-Page/R59QCFIsIn5e24h1URRFIJ/Cabinet-clears-Bills-to-penalize-unfair-practices-at-institu.html>.

128. See Osamudia R. James, *Predatory Ed: The Conflict Between Public Good and For-Profit Higher Education*, 38 J.C. & U.L. 45 (2011).

129. Tilak, *supra* note 72, at 2164; Jandhyala B G Tilak, *Higher Education Policy in India in Transition*, 47(13) ECON. & POLITICAL WEEKLY 36, 36 (2012).

130. Jandhyala B G Tilak, *Private Higher Education in India*, 49(40) ECON. & POLITICAL WEEKLY 32, 32 (2014).

both of which essentially involve profit maximization.¹³¹ The present phase seems to be the one where the state considers privatization desirable.¹³² However, this phase marks a de facto privatization of higher education, flowing largely from the failure of the state machinery. Kapur and Mehta argue that private participation in higher education in India has not been a part of a broader higher education reform policy and the sector involves “half-baked socialism and half-baked capitalism, with the benefits of neither.”¹³³ As seen above, the judiciary has also played a role in this incoherence, besides the executive.

The proposed Bills seem to be in recognition of the existence of massive privatization in higher education. The Prohibition of Unfair Practices Bill is a step towards checking corrupt and unfair practices in higher education, while acknowledging that private institutions are here to stay. However, the lack of deliberation and the ad hocism through which the higher education sector has developed has also affected this Bill, and there is need for a more deliberative policy approach in higher education.

The autonomy with accountability approach also requires reflection on the extent of governmental control and regulation of educational institutions. Tilak argues that while institutional autonomy is important, it is possible to separate academic autonomy, administrative autonomy and financial autonomy. It is possible to have a greater governmental involvement and interference in financial matters, while according autonomy in other aspects, especially on academic matters.¹³⁴ In the guise of allowing private sector participation, the state should not abdicate its responsibility towards planning and policy making for higher education.¹³⁵ Clarity on the understanding of institutional autonomy and unfair practices will also determine the extent to which whether minority institutions can be exempt from a law on checking unfair practices. While this article does not argue in favor of one or the other approach, it argues that it is important for Indian policy makers to take a call on their broader approach towards education. This call needs to be made in light of the growing demand for higher education institutions in India, the capacity of the state to cater to this demand and the growing concerns regarding quality of higher education in India.

131. *Id.* at 32-33.

132. *Id.* at 33.

133. KAPUR & MEHTA, *supra* note 81, at 13.

134. Jandhyala B G Tilak, *Fees, Autonomy and Equity*, 39(9) ECON. & POLITICAL WEEKLY 870, 873 (2004).

135. Tilak, *supra* note 130, at 37.

Irrespective of the approach that India takes toward education, it is no doubt important the transparency paradigm itself should be broadened so as to cover a wider range of unfair practices as well as apply to all kinds of universities and institutions of higher education. There is no reason to exclude any particular kinds of universities, including minority institutions, from the purview of the Act.

VI. Conclusion

The growing demand for education and proliferation of private universities has led to a rise in unfair practices in higher education. There is an urgent requirement for legal intervention to tackle this problem. The Prohibition of Unfair Practices Bill shows that it is a good step towards tackling the problem of unfair practices in higher education in India. However, an analysis of the provisions of the Bill reveals that there are certain inadequacies and shortcomings that need to be addressed. Since the Bill aims to protect the interests of students and prohibit certain unfair practices, the scope of the Bill needs to be expanded to cover a wide range of institutions of higher education. It also needs to include a wider set of unfair practices currently being practiced by universities in India. Along with these limitations, the Bill also raises broader policy questions about the legal treatment of education in India and the extent to which education should be regulated. It is hoped that these concerns will be taken into account before another law is introduced to address the issue of unfair practices in higher education.

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