

PROFITEERING IN THE HIGHER EDUCATION SECTOR IN INDIA

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With India's fruitful demographic dividend, the burden has fallen on the State to use all measures and procure all means to reap the advantages that flow from it. Promoting and ensuring that every citizen receives higher and technical education, thus becomes the State's obligation. However, there exists a prominent disparity between the burgeoning demand for and the limited supply of facilities for higher education. Faced with the challenge of increasing the supply of higher education with its limited financial resources, the State has decided to encourage further private participation in the sector, and to incentivize the same has promulgated a plan for allowing entrepreneurs to profiteer from higher education, a model new to the Indian sensibilities. This paper explores the contours of this suggestion as proposed in the Draft 12th Five Year Plan in order to understand the needs and the possible benefits that could follow if the for-profit model was to be implemented in India. The author has tried to balance the criticisms against the merits of the model and concluded by presenting certain safeguards using which the model can be implemented to ensure that India is not left behind in the global race of enrollments and employable graduates, especially when all other considerations favour her.

I. INTRODUCTION

Higher education has a crucial role to play in the economic and social progress of any society. With India treading the path of becoming a knowledge based economy¹, or one that relies extensively

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¹ Government of India, Ministry of Human Resource Development, Department of Higher Education, *Report of the Working Group on Higher Education For the XII Five Year Plan* (Sept., 2011), http://planningcommission.gov.in/aboutus/committee/wrkgrp12/hrd/wg_hiedu.pdf.

on codified and tacit knowledge “as a basis for the organization and conduct of economic activities”², the importance of higher education increases manifold. Therefore, the development of the sector finds for itself a prominent place in the developmental plans of the country.

One of the most important themes underlying the formulated policies for higher education is an avowed orientation towards quality expansion of the sector, with due emphasis on relevant and quality teaching. Financial investments from the public and private sector thus become imperative tools for achieving the desired level of expansion³, thus necessitating the introduction of incentives for the private players to invest heavily.

While the former eleven Five Year Plans of the country prohibited profiteering by viewing higher education as a noble profession, meant for social good, to be provided by the State or promoted and provided by charitable trusts, societies or not-for profit companies⁴, the 12th Five Year Plan, to be effected from 2012-2017, departed from the view by allowing higher education to be commoditized for business. Emphasizing the need for greater enrollment in private education and consequent expansion of the sector, the 12th Plan proposed to re-evaluate the ‘not for-profit’ status in private higher education to meet the persisting shortages, primarily in the field of vocational and professional education⁵. The presumption that financial returns through profit generation incentivize and prompt further participation and investment from private players belies the decision of the Planning Commission, which hopes to improve the access to and the supply of higher education to its eligible youth.⁶

² Loet Leydesdorff, *The Knowledge-Based Economy and the Triple Helix Model*, <http://www.leydesdorff.net/arist09/arist09.pdf> (last visited Feb. 12, 2014).

³ Dr. Bruce Johnstone, *The Financing and Management of Higher Education: A Status Report on Worldwide Reforms* (Oct., 1998), <http://www2.uca.es/HEURESIS/documentos/BMinforme.pdf>.

⁴ Department of Higher Education, Ministry of Human Resource Development, Government of India, *State Private Universities*, http://mhrd.gov.in/state_private_univ (last visited Mar. 5, 2013).

⁵ See generally *Report on Higher Education*, *supra* note 1.

⁶ See *Report on Higher Education*, *supra* note 1, at 19.

This paper seeks to comprehensively analyze and understand the reasons for such a paradigm change in the policies revolving higher education. The first part of the paper deliberates on the classification of higher education as a public, private or merit good to determine whether the State or the market structures should, at all, be allowed to provide the same. It seeks to justify private provisioning of higher education, without which for-profit models of education are neither plausible nor possible, by tracing the global shift in the understanding of higher education from a public to a private good. The second part of the paper discusses the reasons for allowing the private sector to be associated with higher education and the nature and realities of such intervention. The third part of the paper deals with the limitations faced by the private players in investing in higher education that warrants introduction of a profit motive in higher education. It also deliberates upon the possible benefits that such a model could provide for the country's knowledge based upliftment. The paper concludes with certain suggestions that need to be kept in mind for the new model to succeed in fulfilling the goals of expansion and excellence of higher education as focused in the 12th Plan.

II. PRIVATE PROVISION OF HIGHER EDUCATION

A. ARGUMENTS IN FAVOUR OF CONCEPTUALIZING HIGHER EDUCATION AS A PUBLIC GOOD

Traditionally, higher education has been considered a pure public good, one that is to be provided and funded by the State without any reliance on user charges and market fees.⁷ Higher education fulfilled the definitional requirements of a public good being "non-excludable" and "non-rivalrous".⁸ It was considered non-excludable as it was difficult to limit or restrict the access of higher education and its benefits to any one class of the population⁹ while it was considered non-rivalrous as

⁷ Jurgen Enders & Ben Jongbloed, *The Public, the Private and the Good in Higher Education and Research: An Introduction*, http://www.transcript-verlag.de/ts752/ts752_1.pdf (last visited Jan. 20, 2014).

⁸ *Id.* at 12.

⁹ J.E. Stiglitz, *Knowledge as A Global Public Good*, 1(9) GLOBAL PUBLIC GOODS 308, (1999).

the obtainment of its benefits by one did not reduce the ability of others to enjoy the same quantum and quality of benefits¹⁰. The two aforementioned features prevented the private provisioning of the good as markets were believed to sell for the “exclusive use of consumers”¹¹ and were unable to find a solution to the free-rider problem.¹² Moreover, higher education, like most public goods, produced significant social and economic externalities¹³ by enabling people who acquired it to “augment the productivity”¹⁴ of those individuals who could not partake in the experience of attaining it, through means like improvements in health, reduction in poverty, rapid adoption of new technologies and strengthening of democracy and discussion.¹⁵ The social returns and benefits of public goods like higher education form the foundations of the belief that markets are incapable of producing and supplying optimum levels of the good for all citizens in an equitable manner¹⁶ due to the market’s inherent interests in profit maximization instead of social welfare and the existence of imperfect market structures due to the asymmetric information between the suppliers of higher education and the students who demand for it.¹⁷

¹⁰ P.A. Samuelson, *The Pure Theory of Public Expenditure*, 11 REVIEW OF ECO.&STAT. 387, 387 (1954), <http://www.jstor.org/stable/1925895?seq=1>.

¹¹ Enders& Jongbloed, *supra* note 7, at 27.

¹² James Cemmel, *Public v Private Higher Education: Public Good, Equity, Access: Is Higher Education a Public Good*, <http://www.aic.lv/bolona/Bologna/contrib/ESIB/Publicvsargh.pdf> (last visited Jan. 20, 2014).

¹³ Martin Carnoy, Isak Froumin, Prashanth Loyalka& Jandhyala B.G.Tilak, *The Concept of Public Goods, the State and Higher Education Finance: A View from the BRICs* (Jun. 1, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2289126&download=yes.

¹⁴ Simon Marginson, *The Public/Private Divide in Higher Education: A Global Revision*, 53 HIGHER EDU. 307, 307 (2007), available at <http://www.ses.unam.mx/curso2008/pdf/Marginson2007.pdf>.

¹⁵ Jandhyala BG Tilak, *Higher education: A Public Good or a Commodity for Trade? Commitment To Higher Education Or Commitment Of Higher Education To Trade* (Apr. 2, 2009), <http://www.kritischedeuten.nl/wp-content/uploads/2011/09/higher-education-a-public-good-or-a-commodity1.pdf>.

¹⁶ Blaug, Mark & Maureen Woodhall, *Patterns of Subsidies to Higher Education in Europe*, 7 HIGHER EDU. 331, 331 (1979), available at <http://www.jstor.org/stable/3445649>.

¹⁷ Tilak, *supra* note 15.

Furthermore, higher education is given the status of a merit good¹⁸ deserving government support till a level of supply “beyond that which consumer sovereignty would allow”¹⁹. Merit goods, being termed as ‘experience’ goods, are under-consumed and under-valued²⁰ by citizens who lack the necessary knowledge and foresight to be able to see the future advantages that can be reaped by the present consumption of such goods.²¹ Moreover, consumers have limited and imperfect information about higher education and thus consumer choice in the sector is constrained.²² Such paucity of information obliges public responsibility for provisioning of higher education in tandem with the society’s long term interests, especially since markets are not considered competent to spontaneously produce solutions to such problems.²³ The government thus lowers the price of consuming such goods by introducing subsidies²⁴ in the sector in an attempt to increase the level of demand of such goods and subsequently improve the level of social welfare by increasing the attainment of beneficial dividends of higher education. Such benefits manifest in the availability of an array of economic and social opportunities becoming accessible to the people.²⁵

¹⁸ In India, higher education is considered a Merit II good having lesser priority and standing in terms of desirability of subsidization. See D.K. Srivastava & C. Bhujanga Rao, *Government Subsidies in India: Issues and Approach* (2002), http://www.nipfp.org.in/newweb/sites/default/files/dp_2002_06.pdf.

¹⁹ MARKETIZING EDUCATION AND HEALTH IN DEVELOPING COUNTRIES: MIRACLE OR MIRAGE 98 (Christopher Colclough ed., 1997).

²⁰ Jandhyala B G Tilak, *Higher Education between the State and the Market* (Dec., 2004), http://portal.unesco.org/education/es/files/36529/11006126893Colloquium_-_December_04_-_Tilak.doc/Colloquium+-+December+04+-+Tilak.doc.

²¹ Jandhyala BG Tilak, *Financing of Higher Education: Traditional Versus Modern Approaches* (Mar. 12, 2012), http://www.yuksekogretim.org/Port_Doc/YOD_2012001/YOD_2012001005.pdf.

²² Joseph Stiglitz, *The Contributions of the Economics of Information to the Twentieth Century Economics*, 115(4) QUARTERLY J. OF ECO. 1441, 1449 (Nov., 2000), available at <http://ricardo.ecn.wfu.edu/~cottrell/papers/stiglitz.pdf>.

²³ Enders & Jongbloed, *supra* note 7.

²⁴ Jandhyala B G Tilak, *Public Subsidies in Education in India*, 39(4) ECON. & POL. WKLY. 343, 344 (2004).

²⁵ Srivastava & Rao, *supra* note 18.

Traditionally, thus higher education was considered to be a public good and private provisioning of the same was by definition of the term 'public', discouraged.

B. ARGUMENTS IN FAVOUR OF CONCEPTUALIZING HIGHER EDUCATION AS A PRIVATE GOOD

Opposing conventional wisdom, various economists and policy makers have refuted the public nature²⁶ of higher education and promoted it as a private good²⁷ especially in terms of social mobility.²⁸ Neo liberal economic policies²⁹ that question the role of the State and generally propagate its withdrawal³⁰ in sync with the World Bank approaches,³¹ in the name of stabilization, structural adjustment and globalization³² further the above cause by treating

²⁶ Robert Zemsky, *Have We Lost the Public in Higher Education*, THE CHRONICLE OF HIGHER EDU. (May 30, 2003), <http://chronicle.com/article/Have-We-Lost-the-Public-in/21529>.

²⁷ Paula Marantz Cohen, *Social v Private Good in Education*, <http://theamericanscholar.org/social-vs-private-good-in-education/> (last visited Feb. 24, 2013).

²⁸ Social mobility goals assert that higher education institutions should provide students with educational credentials in order to succeed in the socio-economic conditions. As opposed to the goal of social efficiency that notes higher education as needed to enhance the social system as a whole, the goal of social mobility focuses on the needs of individual educational consumers thus highlighting the private nature of higher education. See generally David F. Labaree, *Public Goods, Private Goods: The American Struggle over Educational Goals*, 34(1) AMERICAN EDU. RESEARCH J. (1997), available at https://www.stanford.edu/~dlabaree/publications/Public_Goods_Private_Goods.pdf.

²⁹ The neo-liberalists supported their Keynesian arguments by pointing to the difficulty in computing the social collective benefits of higher education, and thus stressing only on the private benefits which weakened the rationale for public funding. See T. Cutler, *Venturous Australia: Building Strength in Innovation: Report* (Aug., 2008), http://www.business.nsw.gov.au/__data/assets/pdf_file/0016/5407/NIS_review_Web3.pdf.

³⁰ Tilak, *supra* note 15.

³¹ World Bank Publications, *Higher Education: The Lessons of Experience* (1994), http://siteresources.worldbank.org/EDUCATION/Resources/278200-1099079877269/547664-1099079956815/HigherEd_lessons_En.pdf.

³² Abhinav Singh & Bharathi Purohit, *Reconsidering privatization for Corruption Free*

higher education as a marketable commodity and promoting its liberalization and privatization.³³ The same has been exacerbated by the international perception of the law on trade and services as is embodied in the GATS which promotes higher education to be exported as a major and profitable service of any economy.³⁴

The above transition in classification of higher education can be further supported by shedding light on the practical aspects and the intrinsic character of the good in itself. Firstly, it is argued that higher education is both excludable and rivalrous in its nature and hence its treatment as a public good rests on a faulty premise.³⁵ Access to higher education is restricted only to those who are able to get admitted to the limited colleges or universities of higher learning, be it on the basis of merit or eligibility³⁶ or the ability to pay a particular level of tuition fees.³⁷ Similarly, the admission of one person is always at the expense of another due to the limited number of seats, thereby reducing consumption possibilities for one by the admission of another, and making it a rivalrous commodity.³⁸

Secondly, it is contended that the private 'individualized status'³⁹ benefits conferred by higher education on individual students, such as post-graduation employment opportunities, higher wages, increased income over lifetime, greater job satisfaction, better health,

Administration in Indian Higher Education, 1(7) EDU. RESEARCH J. (2011), <http://resjournals.com/ERJ/Pdf/Dec/Singh%20and%20Purohit.pdf>.

³³ Tilak, *supra* note 15.

³⁴ Susan L. Robertson, *Globalization, GATS and Trading in Education Services*, Centre for Globalization, <http://www.bris.ac.uk/education/research/centres/ges/publications/04slr.pdf> (last visited Feb. 26, 2013).

³⁵ NICHOLAS BARR, THE ECONOMICS OF THE WELFARE STATE 106,345 (2d ed.1993).

³⁶ Singh & Purohit, *supra* note 32.

³⁷ Margison, *supra* note 14.

³⁸ Trade Policy Division, Department of Commerce, Government of India, *Higher Education in India and GATS: An Opportunity*, http://commerce.nic.in/trade/Consultation_paper_on_Education_GATS.pdf (last visited Feb. 24, 2013).

³⁹ Margison, *supra* note 14.

- and the organizations they work for are considered to outweigh the public social benefits,⁴⁰ making higher education tilt towards being a private good.^{41,42} In saying so, benefits of higher education are seen as selective and the aim of pursuing such education is seen as one that would enable a student to “*gain an advantage in the competition for social position*”.⁴³ Therefore, despite the collective benefits that higher education produces, economists have argued that higher education should be treated as a good providing an exchange value as opposed to a use value, with the primary aim of exchanging one’s education for a job that provides the aforementioned comforts and benefits.⁴⁴

Third, it was found by the World Bank⁴⁵ that higher educational institutions were facing financial strains even in economically well off countries due to the chronic shortage of public funds and the inability of the governments to provide higher education on a scale that matches demand.⁴⁶ Treating higher education as a private good capable of being delivered by private entities was thus seen an attractive alternative to defray fiscal costs⁴⁷ while widening access and improving the quality of education by using resources for research and development.⁴⁸

⁴⁰ Trade Policy Division, Department of Commerce, Government of India, *supra* note 38.

⁴¹ Margison, *supra* note 14.

⁴² See generally Jose Joaquin Brunner, *The Rationale for Higher Education Investment in Ibero-America*, WORKING PAPER NUMBER 319, OECD Development Centre, <http://www.oecd.org/development/WP319%20AE.pdf> (last visited Jan. 23, 2014).

⁴³ Labaree, *supra* note 28.

⁴⁴ Labaree, *supra* note 28.

⁴⁵ *Higher Education: The Lessons of Experience*, *supra* note 31.

⁴⁶ Meher Engineer, G. Haragopal, Madhu Prasad, Sunil, Kedar Nath Pandey, Prabhakar Arade & Anil Sadgopal, *Higher Education*, 45(37) ECON. & POL. Wkly. (Sept. 11, 2010), available at http://www.epw.in/letters/higher-education.html-1?ip_login_no_cache=e32af172ec0d6c5dce7ed2f72dbdf0e7.

⁴⁷ Sanat Kaul, *Higher Education in India: Seizing the Opportunity* (2006), http://www.icrier.org/pdf/wp_180.pdf.

⁴⁸ *World Bank (1999) Education Sector Strategy*, WASHINGTON, DC: WORLD BANK HUMAN DEVELOPMENT

Fourth, various critics of the public good theory state that college students are more astute and better informed about the quality of education they seek, in comparison to students in the primary sector, and hence markets for higher education need not necessarily suffer from asymmetric information problems. Without any information asymmetry problems, consumers are able to adequately determine their market behavior and on the basis of their demand, markets are able to deliver satisfactorily.⁴⁹

Furthermore, promoters of the above view state that even though higher education represents a merit good, public subsidies for the same must be contained and competitive private provision allowed ensuring quality and equity. They argue so in the name of efficiency stating that empirically the social rates of return to higher education have been lower⁵⁰ than the private rates of return⁵¹ especially in comparison to the statistics found for primary education.⁵² They thus opine that while primary education may continue to be subsidized for its social benefits, higher education must involve the implementation

GROUP, cited in Tristan McCowan, *The Growth of Private Higher Education in Brazil: Implications for Equity and Quality*, 19(4) J.Edu. Policy (2004), available at <http://eprints.ioe.ac.uk/2524/1/McCowan2004Thegrowth453.pdf>.

⁴⁹ See generally Tilak, *supra* note 15.

⁵⁰ KULANDAI SWAMY V C, RECONSTRUCTION OF HIGHER EDUCATION IN INDIA (2006), available at http://books.google.co.in/books?id=PnMGTUDlyRUC&pg=PA25&lpg=PA25&dq=higher+education+non+merit+good+india+subsidy&source=bl&ots=ATmNEvp0BD&sig=49xTDvprF4_MvfIDCm6Cuf6P750&hl=en&sa=X&ei=Y4M8UbjWBY3SrQfxuIHICg&redir_esc=y#v=onepage&q=higher%20education%20non%20merit%20good%20india%20subsidy&f=false.

⁵¹ Social returns are private returns net of public costs which include the costs incurred by the society for a person's education. Hence, private rate of returns in higher education exceed social rates of returns. See *Measurement Economic Benefits of Education Investment - An Illustration, Private Versus Social Costs, Empirical Findings, Estimation Issues*, <http://education.stateuniversity.com/pages/1930/Economic-Benefits-Education-Investment-Measurement.html#ixzz2N8znD5mn> (last visited Jan. 22, 2014).

⁵² Philip LeBel, *Economic Criteria for Higher Education Finance* (Jul., 1999), <http://msuweb.montclair.edu/~lebelp/HigherEdReformCriteria.pdf>.

of user costs and private provisioning,⁵³ specially seeing the low price elasticity of higher education.⁵⁴ Further, subsidization in higher education was felt to be regressive as it would maintain *low levels of fees for the better off students*.⁵⁵ Moreover, it was felt that public subsidization by the state would lead to higher education institutions becoming vulnerable to government control which would impede the growth of the sector by reducing its flexibility towards change.⁵⁶

Thus, there exists a strong understanding that promotes higher education as a private good to be supplied in the markets.

It is essential to harmoniously collate these two divergent view points on the nature of higher education, with the political and cultural ethos of the economy as the background theme, in order to properly categorize the good. Following the same ideology, regardless of ownership,⁵⁷ higher education institutions can be seen to display a degree of both 'publicness' and 'privateness'.⁵⁸ Hence, one can conclude that higher education must be legitimately provided by both the public and the private sector to improve both its access and availability.⁵⁹

⁵³ See generally Tilak, *supra* note 21.

⁵⁴ Jandhyala B.G Tilak, *Higher Education in Trishanku*, 40(37) ECO. & POL. WKLY. (Sept. 10, 2005), available at <http://www.epw.in/perspectives/higher-education-trishanku.html>.

⁵⁵ Vijendra Sharma, *Higher Education in the 12th Five Year Plan: For-Profit Private Investment with High Fees and Contract Facility* (Mar. 31, 2013), <http://vijendersharma.wordpress.com/2013/02/22/higher-education-in-twelfth-five-year-plan/>.

⁵⁶ Tilak, *supra* note 54.

⁵⁷ Simon Margison, *The Problem of Public Goods in Higher Education* (Jul., 2012), http://www.cshe.unimelb.edu.au/people/margison_docs/ACE2012_8-12%20July2012.pdf.

⁵⁸ Margison, *supra* note 14.

⁵⁹ Saumen Chattopadhyay, *The Emerging Market for Higher Education: Rationalizing Regulation to Address Equity and Quality Concern*, http://www.idfc.com/pdf/report/2012/Chapter_14.pdf (last visited Feb. 24, 2013).

III. PRIVATE HIGHER EDUCATION IN INDIA: HISTORY, JUDICIAL LIMITATIONS AND PRACTICE

Though, in terms of pure economic analysis, higher education can be seen as either a public or private good, it is the social and political characterization of the good against the cultural milieu of the country that determines the actual mode of provisioning of the good. Through this section, the trajectory of the growth and development of the sector in India is mapped to enable one to understand the status of higher education in the country and the way its provisioning has been interpreted by the highest judicial authorities of the country in contrast with the practical realities that are seen to engulf its contours.

A. HISTORY

Private initiative in higher education is not considered a new phenomenon in India⁶⁰ with various ancient prestigious universities being funded by philanthropists.⁶¹ During the British Rule itself through the directives of the East India Company, the policy of grants-in-aid was introduced to encourage private institutions- organized either on nationalistic, sectarian or casteist lines.⁶² Formal private participation in the field of higher education was prompted by the inadequate attention paid to the sector by the Indian Government due to high rates of inflation and the shrinking public budget before the first phase of liberalization in 1991 that translated into declining per student expenditures and inadequate investment in the quality of higher education in the country.⁶³

⁶⁰ MATHIEU CANTEGREIL, DWEEP CHANANA & RUTH KATTUMURI, REVEALING INDIAN PHILANTHROPY 33 (2013).

⁶¹ J.S.Cotton, *Private Educational Institutions in India* in ENCYCLOPEDIA OF EDUCATIONAL SYSTEM IN INDIA (B.M Sandhdher ed., 1999).

⁶² Suresh Babu G.S., Privatization of Higher Education in India: Challenges of Social Equity (2011), http://www.academia.edu/427014/PRIVATISATION_OF_HIGHER_EDUCATION_IN_INDIA_CHALLENGES_OF_SOCIAL_EQUALITY.

⁶³ Rumki Basu, *Is Higher Education a Public Good: Policy Dilemmas in a Democratic State*, http://www.napsipag.org/pdf/rumki_basu.pdf (last visited Feb. 24, 2013).

The neglect received by the higher education sector dates back to the 1990 Education for All Conference held in Jomtien, Thailand. The Conference was premised on the growing importance of providing basic education to all, not only to reduce the high levels of illiteracy that impeded growth but also “*to bring into being forms of sustainable national development that reconcile cultural and technological change within social and economic development*”.⁶⁴ Terming basic education as a fundamental human right, the Conference pushed the participating countries to finance the provision of the same, even if funds had to be diverted from the higher education sector to the primary sector.⁶⁵ The Indian Government, in conformance with the principles and decisions made therein and the objectives enunciated in the Indian Constitution, thus diverted all its attention to elementary and primary education.⁶⁶ This had an adverse effect on higher education—in terms of its reduced importance in public planning exercises and reduction in the intensity of public efforts for its promotion, as it was popular perception that the goals related to elementary education could only be achieved if a cap was placed on the expansion and funding of secondary and higher education.⁶⁷ The same was evident from the coherent declaration of the Report of the Ministry of Human Resource Development, 1994 which stated that “*the higher education system in the country is now sufficiently developed to meet the nation's requirements. The unmet demand for higher education is not considered economically viable*” for the Government, therefore calling for private sector participation.⁶⁸ Over time, the Government continued to follow in the footsteps of the

⁶⁴ World Conference on Education for All, Thailand, *Meeting Basic Learning Needs: A Vision for the 1990's* (Mar., 1990), <http://unesdoc.unesco.org/images/0009/000975/097552e.pdf>.

⁶⁵ *Id.*

⁶⁶ See generally Jandhyala B. G Tilak, *Higher Education Policy in India in Transition*, 47(13) ECON. & POL. Wkly. 36 (Mar. 31, 2012), available at http://www.epw.in/perspectives/higher-education-policy-india-transition.html?ip_login_no_cache=b79337e943b72842676fed2361d5e553.

⁶⁷ Basu, *supra* note 63.

⁶⁸ Ministry of Human Resource and Development, Government of India, 75 *Development of Education in India* (1994), in Tilak, *supra* note 66.

World Bank which advocated macroeconomic policies of structural adjustment and promoted privatization and minimal public spending on higher education stating the inefficiency of devoting resources to it especially when the same scarce resources could be used in primary education that provided for a larger scope of social return in comparison to private returns.⁶⁹ In 1997, the Finance Ministry went a step forward in confirming the withdrawal of state funding and state subsidization by stating that higher education fell outside the ambit of the merit goods requiring little or no subsidization from the Government.⁷⁰ It was subsequently termed a 'merit 2' good requiring limited subsidization because of the limited recovery rates of the subsidies in the stream of higher education.⁷¹ It was thus not surprising when allocations towards higher education in the Eighth and Ninth Five Year plans reduced drastically to about 7-8 % of the total Plan expenditures on education,⁷² a four times cut as compared to the Fourth Five Year Plan.⁷³ Thereafter, in the approach paper to the Tenth Five Year it was declared that "*Since budget resources are limited, and such resources as are available, need to be allocated to expanding primary education, it is important to recognize that the universities must make greater efforts to supplement resources from the government.*"⁷⁴ This furthered evidenced the

⁶⁹ See generally *Higher Education: The Lessons of Experience*, *supra* note 31.

⁷⁰ D.K. Srivastava & A.K. Amarnath, *Central Budgetary Subsidies in India* in D. K. Srivastava & C. Bhujanga Rao, *Government Subsidies in India: Issues and Approach* (Jan., 2002), available at http://www.nipfp.org.in/newweb/sites/default/files/dp_2002_06.pdf.

⁷¹ K. B. POWAR, *INDIAN HIGHER EDUCATION: A CONGLOMERATE OF CONCEPTS, FACTS AND PRACTICES* 89 (2002).

⁷² See Jandhyala Tilak, *Absence of Policy and Perspectives in Higher Education*, 39(21) ECON. & POL. WKLY. (May 22, 2004), available at http://www.eledu.net/rrcusr_n_data/Absence%20of%20Policy%20and%20Perspective%20in%20Higher%20Education.pdf.

⁷³ Jandhyala Tilak, *A Decade of Turmoil in Higher Education in India: Faulty Assumptions, Questionable Approaches and Undesirable Outcomes* (Jan., 2003), <http://www.norrag.org/fileadmin/Full%20Versions/NN31.pdf>.

⁷⁴ Planning Commission, Government of India, *Approach Paper to the Tenth Five Year Plan* (Sept. 1, 2001), <http://planningcommission.nic.in/plans/planrel/appdraft.pdf>.

unwillingness of the Government to support the development of higher education, especially in light of the fiscal austerity being followed due to the liberalization process and the increasing investments required for developing higher education institutions with proper infrastructure facilities and employment of qualified teachers.⁷⁵

Concurrently, the period in which the above changes took place also evidenced massification and democratization of higher education in India with both the elite and non-elite sections of the society demanding access to the institutions of higher learning.⁷⁶ This burgeoning demand increased the pressure for larger number seats for higher learning.⁷⁷ The existing pressure mounted further with the demands of a rapidly growing economy, both domestically and globally, which created an array of new sophisticated and high skill sectors, like Information Technology and Outsourcing, and led to the further growth of existing ones.⁷⁸ However, employment in such productive sectors was available only to those who possessed a high degree of technical and vocational skill,⁷⁹ in other words who acquired quality higher education and improved their capital productivity and employability.⁸⁰ As a result, it became crucially important to look for measures to meet such extensive demand,⁸¹ keeping in mind the paucity

⁷⁵ Johnstone, *supra* note 3.

⁷⁶ Veerman Committee Report, *Higher Education Issues and Trends From an International Perspective* (Nov., 2009), available at <http://www.highereducation.si/wp-content/uploads/2012/08/Masifikacija-to%C4%8Dka-2.pdf>.

⁷⁷ Philip G. Altbach, *The Private Higher Education revolution: An Introduction* in PRIVATE HIGHER EDUCATION: A REVOLUTION (Philip G. Altbach ed., 2005), available at <https://www.sensepublishers.com/media/787-private-higher-education.pdf>.

⁷⁸ *The Brains Principle*, THE ECONOMIST (Sept. 8, 2005), <http://www.economist.com/node/4339960>.

⁷⁹ Bibek Debroy, *Higher Education in India: Ducking the Answers*, 31 ISAS INSIGHTS (May 16, 2008), available at <http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=55916>.

⁸⁰ Hemali Vhappia, *Every Second Student in India Enrolls in a Private College*, TIMES OF INDIA (Jun. 21, 2009), http://articles.timesofindia.indiatimes.com/2009-06-21/india/28167201_1_higher-education-private-institutes-private-sector.

⁸¹ *Education in India: Securing the Demographic Dividend* (Mar., 2001), www.grantthornton.in/assets/Education_Report_2010.pdf.

of Government funds⁸² and the neoliberal perception of higher education as a private good to be exposed to market forces in consonance with the laissez-faire approach.⁸³

Realizing the potency of the situation, the Government appointed the Punnaya, the Swaminathan⁸⁴ and the Birla-Ambani Committee⁸⁵ to find ways of mobilizing resources for higher education.⁸⁶ The reports of these Committees paved the way for private sector participation in the stream of post-secondary higher and technical education and recommended varied methods of privatization including self-financing, student loans, encouragement of privately funded institutions, relaxation of norms for granting 'deemed to be university' status⁸⁷ and implementation of user charges by means of increased tuition fees.⁸⁸ The Birla-Ambani Report in particular pointed out that "*private financing should be encouraged to fund private institutions*".⁸⁹ The recommendations not only aimed at solving the problem of decreased public funding⁹⁰ and easing the burden on the government exchequer⁹¹ but also attempted to take steps to make India a competitive knowledge

⁸² Basu, *supra* note 63.

⁸³ Tilak, *supra* note 20.

⁸⁴ Tilak, *supra* note 73.

⁸⁵ See generally Mukesh Ambani & Kumarmangalam Birla, *Report on A Policy Framework for Reforms in Education* (Apr., 2000), available at <http://www.ispepune.org.in/PDF%20ISSUE/2003/JISPE403/2038DOCU-3.PDF>

⁸⁶ Jandhyala B G Tilak, *Fees, Autonomy and Equity*, 39(9) ECON. & POL. WKLY. (Feb. 28, 2004), available at <http://www.jstor.org/stable/4414690>.

⁸⁷ *Thoughts on Higher Education* (Mar. 29, 2009), <http://www.knowledgecommission.gov.in/downloads/news/news358.pdf>; see also *Private Public Partnerships: Critical for Higher Education* (Feb., 2009), <http://digitallearning.eletsonline.com/2012/01/public-private-partnerships-critical-for-higher-education/>.

⁸⁸ C. Premsai, *Higher Education in India: From Socialism to Capitalism*, <http://www.goforthelaw.com/articles/fromlawstu/article47.htm> (last visited Jan. 27, 2014).

⁸⁹ See generally Ambani & Birla, *supra* note 85.

⁹⁰ Tilak, *supra* note 20.

⁹¹ Premsai, *supra* note 88.

economy as opposed to a non-competitive labour economy, where individuals having the capability to utilize knowledge based resources can secure employment in upcoming sectors and lead the path for research and development.⁹² Private sector participation was seen as the tool to bridge the demand-supply mismatch of higher education and effect further engagement in the globalized market mechanisms⁹³ while maintaining low costs per students.⁹⁴

Various private universities were granted the status of “deemed universities” thereafter, thus acting as a welcome harbinger of private provisioning of higher education in India. By April 2000, foreign direct investment through the ‘automatic route’⁹⁵ for higher educational institutions was also allowed in India.⁹⁶ Thus, India had reached a stage where privatization of higher education was accepted and relied on to ensure that the society’s demand for higher education was not left unfulfilled.⁹⁷

B. JUDICIAL LIMITATIONS

Even though the State and the society accepted private players in the field of higher education, judicial precedents curbed the freedoms that could be exercised by them. The Supreme Court, begrudgingly accepting the de-facto reality of the presence of private institutions, agreed to consider private provisioning of higher education

⁹² Ambani & Birla, *supra* note 85.

⁹³ Ann I Morey, *Globalization and the Emergence of For-Profit Higher Education*, 48(1) HIGHER EDU. (Jul. 1, 2004), available at <http://www.jstor.org/stable/4151533?origin=JSTOR-pdf>.

⁹⁴ Vijendra Sharma, *World Bank Dictated Policies on Higher Education* (2001), <http://indiaeducrisis.wordpress.com/2009/05/06/chapter-1/#more-112>.

⁹⁵ Ministry of Commerce and Industry, Department of Industrial Policy and Promotion, *Press Note 2 of 2000 Series*, http://dipp.nic.in/English/policy/changes/press2_00.htm (last visited Feb. 24, 2013).

⁹⁶ Tilak, *supra* note 73.

⁹⁷ P. Geetha Rani, *Economic Reforms and Financing Higher Education in India*, 3(1) INDIAN J. OF ECO.& BUSINESS (2004), available at <http://www.ibbc.lt/economicreforms/highereducation.pdf>.

as a valid profession but refrained from equating it to a trade or business capable of generating profits.⁹⁸ This view was in tandem with the perceptions of prominent Indian leaders like Raja Rammohan Roy and Lala Lajpat Rai who had upheld the universal, secular and democratic nature of education and demanded to curb profiteering in any way in the sector of higher education. The reason for such austerity in prohibiting profiteering was to preserve the sanctity of the act of providing a good like education, which served the overall welfare of the society.⁹⁹

Private institutions were indulging in the practice of charging very high capitation fees, i.e., fees charged over and above the revenue and capital expenditure of an institution of higher learning and inclusive of a reasonable surplus,¹⁰⁰ the validity of which was tested by the Supreme Court in various cases. The judges attempted to reconcile the disparate principles of profit, charity, equity and access and finally reached the conclusion to only allow private philanthropists and altruists to contribute to the sphere.¹⁰¹

In *St. Stephen's College v. University of Delhi*¹⁰² and *Mohini Jain v. State of Karnataka*¹⁰³ the Court endorsed public intervention and regulation in private institutes, especially in terms of their policy decisions on admissions and determination of fee structure to ensure that no profiteering was possible. The stance of the Court was manifested in the following observation made by it: the '*concept of teaching shops is contrary to the constitutional scheme and wholly abhorrent to the Indian culture and heritage*'. The Court pointed out that private institutions had been allowed to function in the country only as agents

⁹⁸ Premshai, *supra* note 88.

⁹⁹ Pratap Samal, *Supreme Court Judgment on Education: Paves the path for Profiteering by Education Merchants*, <http://groups.yahoo.com/group/mukto-mona/message/12686?source=1&var=1> (last visited Jan. 28, 2014).

¹⁰⁰ See P.A.Inamdar & Ors. v. State of Maharashtra & Ors., (2005) 6 S.C.C 537.

¹⁰¹ Basu, *supra* note 63.

¹⁰² See *St. Stephen's College v. University of Delhi*, (1992) 1 S.C.C 558.

¹⁰³ See *Mohini Jain v. State of Karnataka*, (1992) 3 S.C.C 666.

of the Government and thus were required to uphold the ideals of the Constitution as inscribed in Article 21 and 38 and provide affordable quality education.

A year later, in 1993, the *Unnikrishnan* case¹⁰⁴ confirmed the right and necessity of establishing private self-financing institutions of higher education. The Court allowed the private colleges to have complete autonomy in determination of their fee structure and admission criterion and charge as high a capitation fee as they desired, till it remained within the contours of the ceiling fixed by the State. The Court restated that 'education was never commerce' in the country and thus, could not be carried on like a trade working for profit maximization.

The verdict in the 1994 case of *TMA Pai Foundation v. State of Karnataka*¹⁰⁵ reversed the findings of private sector autonomy as laid down in the above cases to hold that private unaided institutions could be regulated by the government in an attempt to ensure excellence in education. Even so, the Court upheld the position on the prohibition of profit motive in higher education which was essentially charitable and socialistic in nature.¹⁰⁶ In *Islamic Academy of Education v. State of Karnataka*,¹⁰⁷ the Court stated that a 'reasonable surplus'¹⁰⁸ made by charging slightly higher fees than Governmental institutions was not profiteering as it was made to be pumped back into the development of the institution and the augmentation of facilities.¹⁰⁹

The issue was again addressed in 2005 by the Supreme Court in the case of *P.A. Inamdar v State of Maharashtra*.¹¹⁰ The Court granted

¹⁰⁴ See *J.P. Unnikrishnan v. State Government of Andhra Pradesh*, (1993) 1 S.C.C 645.

¹⁰⁵ See *TMA Pai Foundation v. State of Karnataka*, A.I.R 1994 S.C.C. 13.

¹⁰⁶ *Islamic Academy of Education v. State of Karnataka*, (2003) 6 S.C.C 697, 773.

¹⁰⁷ *Islamic Academy of Education*, *Id.*

¹⁰⁸ *Islamic Academy of Education*, *Id.*

¹⁰⁹ KD Raju, *Private Initiatives in Higher Education: Enabling Legislations, Regulations and Judicial Interpretations in India* (2004), <http://ssrn.com/abstract=813246>.

¹¹⁰ *Inamdar*, *supra* note 100.

complete autonomy to private unaided colleges to decide fee structures and to make “*legitimate surpluses*” with the caveat that such fees and surpluses could be regulated to prevent ‘unreasonable’ profits.¹¹¹

The precedents so laid had sought to establish education as tool for social improvement which could not be treated as a mere commodity used for the generation of surpluses. Private higher education institutions were to be run in the form of “not for-profit” companies, charitable trusts or societies under Section 25 of the Companies Act, 1956, Indian Trusts Act, 1882 and Societies Registration Act, 1860, respectively.¹¹² The Government showed support for the same by granting hundred percent tax exemptions in respect of donations made to universities or colleges by tax payers.¹¹³

C. REALITY OF PRIVATE HIGHER EDUCATION IN INDIA

However, despite the judicial mandates and the legislative fiscal incentives promoting the *de-jure* establishment of not for-profit institutions,¹¹⁴ the regulatory and definitional ambiguity over the terms ‘*legitimate reasonable surplus not amounting to profiteering*’ as used in the *Inamdar* case¹¹⁵ was misused over and over again to make large profits under the table leading to large scale commercialization of higher education and the *de-facto* running of for-profit models¹¹⁶ which, unlike non-commercial and non-profit models that retain the surplus generated for the self-preservation or expansion of the organization, distribute the surplus generated to the stakeholders as dividends.¹¹⁷

¹¹¹ Inamdar, *supra* note 100.

¹¹² Kiritika Suneja, *Not For Profit Tag For Higher Education Should Go: PlanCom*, FINANCIAL EXP. (Oct. 3, 2012), <http://www.financialexpress.com/news/notforprofit-tag-for-higher-education-should-go-plancom/1011135/0>.

¹¹³ Debroy, *supra* note 79.

¹¹⁴ Sharma, *supra* note 94.

¹¹⁵ Inamdar, *supra* note 100.

¹¹⁶ Tilak, *supra* note 66.

¹¹⁷ *Section 25 Companies*, http://www.srr-foundation.org/workshop/presentation_03-12-11/section_25_companies_act.pdf (last visited Feb. 24, 2013).

Most private institutions register themselves in law as 'not for-profit' societies or trusts but function as businesses that siphon off the profits generated from the fees charged in the institutes of higher learning to associated foundations¹¹⁸ thus ploughing little back for improvements.¹¹⁹ Private players thus launder the money and make profits, while gaining access to the free land that the Government provides to philanthropic private participants to incentivize investments in the higher education sector.¹²⁰ Profits are made by various universities through illegal charges in the name of 'reasonable surpluses' for allocation of seats from the management quota in the form of exorbitant capitation fees, recovering much more than the recurring costs of investment.¹²¹ Furthermore, certain private institutes have been accused of arbitrary fixation of fees, determined by the economic status and affordability levels of the student's parents¹²² and for making unreasonable and unaccounted profits that run into thousands of millions of rupees.¹²³ Tax evasions for pocketing profits have been seen in a wide array of public and private higher educational institutions. The Maharashtra Mahila Udyam Trust paid donations amounting to Rs. 17 Lakhs to another public charitable trust called Shram Sadhana Trust for the construction of a college building. It

¹¹⁸ Tristan McCowan, *Tooley's Seven Virtues and the Profit Incentive in Higher Education*, 2(2) J. FOR CRITICAL EDU. POLICY STUDIES (Sept., 2004), www.jceps.com/index.php?pageID=article&articleID=29.

¹¹⁹ Hema Ramanathan & Paravathy PB, *Where Motive is Profit, Education Takes a Back Seat*, THE HINDU (Dec. 25, 2011), <http://www.thehindu.com/opinion/open-page/where-motive-is-profit-education-takes-a-back-seat/article2745141.ece>.

¹²⁰ Devesh Kapur & Bhanu Pratap Mehta, *Mortgaging the Future: Indian Higher Education* (Dec. 26, 2007), <http://www.slideshare.net/tblogger/mortgaging-the-future-indias-higher-education>.

¹²¹ Johnstone, *supra* note 3.

¹²² Kaushiki Sanyal, *Legislative Brief: The Prohibition of Unfair Practice in Technical Educational Institutions, Medical Educational Institutions and University Bill, 2010*, PRS INDIA (Oct. 29, 2010), <http://www.prsindia.org/uploads/media/Prohibition%20of%20Unfair%20Practices%20/Legislative%20Brief%20-%20Prohibition%20of%20unfair%20practices%20Bill%202010.pdf>.

¹²³ Sanat Kaul, *Higher Education in India: Seizing the Opportunity* (May, 2006), http://www.icrier.org/pdf/wp_180.pdf.

was later unearthed that the donation, to which no taxes apply, was in the nature of capitation fees which would be siphoned off as pure profits.¹²⁴ Similarly, Karnataka's YGen Management Consulting Private Limited made unaccounted profits in association with Gulbarga State University by duping students into paying hefty fees for enrollment in courses that had no regulatory certification and hence were not regulated by the government.¹²⁵

Thus, though the status of private higher education in India remains that of a charitable service, it is in essence functioning as an informal business, evading the strictures of law.

IV. FOR PROFIT EDUCATION: A BENEFICIAL NECESSITY?

A. NEEDS

The Indian higher education sector has grown many-folds from merely boasting of 28 universities and 578 colleges in 1950-51 to having over 500 universities and more than 25,000 colleges at present.¹²⁶ Though the statistics showcase bolstered participation and investment from both the public and the private sector, there still exist deficiencies in the supply of higher education as compared to its demand due to the burgeoning population of India and escalating demands for graduates and technical skilled workers.¹²⁷ This has forced the government to look over its strategies and come up with better models to incentivize more investment and participation in this sector. In light of the same, the Draft 12th Five year Plan suggested that “*the 'not-for-profit' status in higher*

¹²⁴ M. Padmakshan, *Educational Donations Will Not Be Taxed*, THE ECO. TIMES (Sept. 3, 2002), http://articles.economictimes.indiatimes.com/2002-09-03/news/27338109_1_capitation-fee-donations-tax-exemption.

¹²⁵ Urmila Rao, *Students Beware: Degrees for Sale* (Aug. 1, 2012), <http://www.careers360.com/news/9243-investigation-degrees-for-sale>.

¹²⁶ Sharma, *supra* note 55.

¹²⁷ Planning Commission, Government of India, *Twelfth Five Year Plan (2012-2017) Social Sectors*, http://planningcommission.gov.in/plans/planrel/12thplan/pdf/vol_3.pdf (last visited Jan. 28, 2014).

education should, perhaps, be re-examined for pragmatic considerations so as to allow the entry of for-profit institutions in select areas where acute shortages persist.”¹²⁸ The reason for pondering over the grant of legitimacy to private for-profit higher education institutions is because philanthropic practices not only failed to yield the desired result but have also led to the practice of tax evasion and money laundering as explained above.¹²⁹

Presently, even with the multitude of public and private institutions in the country, India sees a very low gross enrolment ratio (GER) in institutes of higher education. The GER is a mere 13% and is significantly lower than that of India’s contemporaries¹³⁰ and the country requires an additional 35,000 colleges and 800 universities to increase the GER to a comparable number of a minimum 21% and a maximum of 30% through the course of the Twelfth Five Year Plan.¹³¹ Improving the GER would mean providing higher education to a major proportion of the population in an attempt to reap the fruits of India’s favorable demographic dividend, expected to last for the next thirty to forty years.¹³² The demographic dividend, which is expected to see more than 546 million people under the age of 25 at a time when the developed world would be facing an ageing population of 37,¹³³ implies that India would see a higher proportion of workers in comparison to dependents, thereby providing an opportunity to

¹²⁸ *Twelfth Five Year Plan, Id.*

¹²⁹ Ritika Chopra, *Planning Commission Fights HRD Ministry on Profit in Higher Education*, INDIA TODAY (Sept. 24, 2012), <http://indiatoday.intoday.in/story/profit-in-higher-education-planning-commission-hrd-ministry/1/221889.html>.

¹³⁰ *India- Higher Education Sector: Opportunities for Private Participation*(Jan., 2012), http://www.pwc.in/en_IN/in/assets/pdfs/industries/education-services.pdf.

¹³¹ Prashant K Nanda & Sangeeta Singh, *Plan panel backs for-profit institutes of higher learning*, LIVEMINT (Aug. 28, 2011), <http://www.livemint.com/Home-Page/R7KKuk4tSgtZzkkiDe62vI/Plan-panel-backs-for-profit-institutes-of-higher-learning.html?facet=print>.

¹³² *Wasting Time*, THE ECONOMIST (May 11, 2013), <http://www.economist.com/news/briefing/21577373-india-will-soon-have-fifth-worlds-working-age-population-it-urgently-needs-provide>.

¹³³ *Education*, INVEST INDIA, <http://www.investindia.gov.in/?q=education-sector> (last visited Feb. 24, 2013).

increase the annual growth of per capita income.¹³⁴ Unless capitalized upon, this demographic dividend would turn into a demographic liability¹³⁵ and India would lose out on the chance to become a globally dominating economy¹³⁶ that is capable of exporting knowledge based goods and services with surplus graduates and skilled workers.¹³⁷ Even with the Government allocating more than the current 1.5 percent of the Gross Domestic Product on higher education,¹³⁸ the sector needs additional investments worth 10 Lakh crores in the next 10 years in order to meet the above goal.¹³⁹ The private sector is thus looked upon to make investments over and above the estimated 50,000 crores per year¹⁴⁰ in order to ensure the desired expansion of the sector.

Though charitable ventures and philanthropy in higher education have accounted for about 58.5¹⁴¹ percent of the total enrolments, they cannot be relied upon¹⁴² for future expansion of the sector because of the declining philanthropic sensibility¹⁴³ in the country. Moreover, the

¹³⁴ S. A. Aiyar, *Demographic Dividend: Delayed, But Getting Better*, TIMES OF INDIA (Jun. 30, 2013), <http://blogs.timesofindia.indiatimes.com/Swaminomics/entry/demographic-dividend-delayed-but-getting-better>.

¹³⁵ Shaaja Neelakantan, *Private Higher Education May Be Key to India's Future, leaders Say*, THE CHRONICLE OF HIGHER EDU. (Nov. 14, 2011), <http://chronicle.com/article/Private-Higher-Education-May/129782/>.

¹³⁶ Basu, *supra* note 63.

¹³⁷ *Twelfth Five Year Plan*, *supra* note 127.

¹³⁸ Abhay Anand, *General Budget 2013-14; Expectations of Higher Education Sector*, INDIA EDU. REV. (Feb. 19, 2013), available at <http://www.indiaeducationreview.com/features/general-budget-2013-14-expectations-higher-education-sector>.

¹³⁹ *Education*, *supra* note 133.

¹⁴⁰ Suneja, *supra* note 112.

¹⁴¹ Ritika Chopra, *Plan Panel Versus Sibal on Profit in Varsities: Twelfth Plan Report says Higher Education can be Run For Profit* (Sept. 23, 2012), <http://www.dailymail.co.uk/indiahome/indianews/article-2207565/Plan-Panel-versus-Sibal-Profit-Varsities-Twelfth-plan-report-says-higher-education-run-profit.html>.

¹⁴² Sharma, *supra* note 55.

¹⁴³ Akshay Mukul, *HRD Says No To Move For Limited For-Profit Higher Education Institutions*, THE TIMES OF INDIA (Jul. 3, 2011), http://articles.timesofindia.indiatimes.com/2011-07-03/india/29732932_1_higher-education-education-policy-hrd-ministry.

not-for profit model is looked upon as an entry-barrier to the higher education sector due to an increasing belief in the concept of investing for the sole purpose of obtaining high returns.¹⁴⁴ Faced with such a predicament, the only pragmatic solution to attract serious private investors to the higher education sector¹⁴⁵ is to attract them with pecuniary motives¹⁴⁶ and allow them the legitimate right to earn dividends¹⁴⁷ and make profits from higher education.¹⁴⁸ In the absence of such incentives, there is a possibility of the probable investments being diverted to other sectors that provide higher returns and the possibility of profit maximization with the same value of investments.¹⁴⁹

It is suggested that continuing with the not for-profit model which prevents recouping of investments¹⁵⁰ and forces the pumping of the revenue that exceeds operational costs back into the institution would dissuade serious entrepreneurs¹⁵¹ from putting their capital resources in the higher education sector which requires relatively large tangible and non-tangible capital to acquire land, provision for physical and soft infrastructure and payment of competing salaries for the faculty members.¹⁵² Keeping the old model would instead attract

¹⁴⁴ Anurag Behar, *Profit and Higher Education*, LIVEMINT (Sept. 21, 2009), <http://www.livemint.com/Opinion/dJuIZqAcNVSU3cRM63xxZL/Profit-and-higher-education.html?facet=print>.

¹⁴⁵ Johnstone, *supra* note 3.

¹⁴⁶ Samal, *supra* note 99.

¹⁴⁷ *Allow Education for Profit: Plan Panel*, DECCAN HERALD (Oct. 3, 2012), <http://www.deccanherald.com/content/282926/allow-education-profit-plan-panel.html>.

¹⁴⁸ Mukul, *supra* note 143.

¹⁴⁹ P. Francois, *Not For-Profit Provision of Public Services*, 113(486) ECONOMIC JOURNAL, ROYAL ECONOMIC SOCIETY C53, C58 (March 2003).

¹⁵⁰ Amy J. Sepinwall, *Education by Corporation: The Merits and Perils of For-Profit Higher Education for a Democratic Citizenry*, (Jan., 2013), <http://works.bepress.com/cgi/viewcontent.cgi?article=1015&context=amysepinwall>.

¹⁵¹ Anand Sudarshan & Sandhya Subramanian, *Private Sector's Role in Higher Education*, http://www.idfc.com/pdf/report/2012/Chapter_16.pdf (last visited Mar. 4, 2013).

¹⁵² *Profitable Education*, BUSINESS WORLD (Oct. 28, 2011), <http://www.businessworld.in/en/storypage/-/bw/profitable-education/354773.0/page/0>.

dubious players seeking to make profits through underhand dealings at the cost of the students,¹⁵³ as has been seen in India earlier. The model of earning profits becomes all the more essential when one seeks to attract foreign investors who resist coming to India despite India's sustained and rapid economic growth and massive domestic demand because of the non-profit mandate and the regulatory obeisance to multiple bodies.¹⁵⁴

Not allowing profit generation would further reduce the chances of investment since Article 15(5) of the Indian Constitution allows the State to enforce reservations in private institutions¹⁵⁵ and restrict the fees for the reserved category to a meager amount, thus constricting the earnings of the private sector.¹⁵⁶ Further, without profit incentive, investors would shy away from opening establishments in disadvantaged areas¹⁵⁷ only increasing the inter-state disparities of GER.¹⁵⁸

In light of the same, it can be concluded that there exists a need for allowing profit-repatriation in higher education for furthering the growth and development of the economy of the nation.

B. BENEFITS

Though the for-profit model is a practical reality and necessity, it is still frowned upon by people who believe education to be a sacred sector, to be protected from the unpredictable cycles of the stock-

¹⁵³ Kaushik Basu, *Profit Can Co-exist with Quality*, BUSINESS TIMES (Sept. 20, 2009), <http://m.businesstoday.in/story/profit-can-coexist-with-quality/1/4603.html>.

¹⁵⁴ *River of Innovation: The Future of Higher Education and its Impact on Research and Innovation* (2012), http://www.nesta.org.uk/library/documents/River_of_Innovation.pdf.

¹⁵⁵ V. Venkatesan, *Lessons in Equity*, THE FRONTLINE (Jul. 16, 2011), available at <http://www.frontlineonnet.com/fl2815/stories/20110729281503700.htm>.

¹⁵⁶ *On Reservation for OBC's in Education*, http://www.pragoti.in/pragoti/archive/obc_cpim.pdf (last visited Mar. 4, 2013).

¹⁵⁷ McCowan, *supra* note 119.

¹⁵⁸ *Twelfth Five Year Plan*, *supra* note 127.

exchange.¹⁵⁹ However, the for-profit model claims to its name various merits that could be ultimately beneficial for the Indian higher education sector.

Primarily, legitimizing profits would obligate private players to show, in their accounting books, the amount of profits made by them, thus helping to stem the emerging black market of private higher education borne from the illegally siphoned off profits. Moreover, formalization and regularization of the profits by means of a credible auditing system¹⁶⁰ would ensure increased incidence of taxation¹⁶¹ by means of service tax on tuition fees and income tax on surpluses. This collected revenue could be channeled into further development of the sector by direct investment or by providing for large scale scholarship programmes that promote equity.¹⁶²

Further, the for-profit model would lead to better corporate participation in the sector by forging links between the industry and the academia and providing for corporate sponsored internships and part time academic appointments, especially for multi-disciplinary and inter-disciplinary short term courses, thus helping to improve productivity by inculcating practical skills demanded by the commercial and industrial sector.¹⁶³ Moreover, as has been seen in for-profit institutions established in the United States, Brazil and China, these institutions focus on career-oriented programs and hence offer

¹⁵⁹ *Profiteering in education by private sector will not be allowed: Sibal*, THE HINDU (Feb. 10, 2010), <http://www.thehindu.com/news/national/profiteering-in-education-by-private-sector-will-not-be-allowed-sibal/article104274.ece>.

¹⁶⁰ Urmila Rao, *Education Scam Exposed: Degrees for Sale* (Aug.1,2012), <http://in.finance.yahoo.com/news/education-scam-exposed—degrees-for-sale-.html?page=all>.

¹⁶¹ Kevin Kinser & Daniel C. Levy, *The For Profit Sector: US Patterns and International Echoes in Higher Education* (Feb., 2005), <http://www.albany.edu/dept/eaps/prophe/publication/paper.html>.

¹⁶² *Twelfth Five Year Plan*, *supra* note 127.

¹⁶³ James Coleman & Richard Vedder, *For Profit Education in the United States: A Primer* (May, 2008), http://www.centerforcollegeaffordability.org/uploads/For-Profit_corr_2.pdf.

very sequential and structured courses designed to ensure employability in the emerging market scenario, keeping the needs of students and the prospective employment industry in mind.¹⁶⁴

The intrinsic characteristics of the for-profit model itself also boasts of various comparable advantages and benefits that it can bring to the economy. For-profit institutions, structured like corporations, function as self-sufficient systems that work on the concept of 'consumer sovereignty'.¹⁶⁵ They respond to market forces, in the form of prices and bottom lines, so as to efficiently allocate resources and provide services that are valuable to their customers (students). They strive to make available the desired levels of utility at reasonable prices and thence attract a higher percentage of clientele.¹⁶⁶ They allow the entrepreneur to interpret market information and effectively determine the appropriate costs of providing the services demanded. The knowledge so gathered is then used to contain costs by minimizing bureaucratic administrations, maintaining a degree of competitiveness¹⁶⁷ and keeping wages at market clearing levels.¹⁶⁸ The high level of competition in the market combined with free-entry ensures high quality levels in higher education¹⁶⁹ as only products and services that improve the students productivity are in demand and thus profitable, while services that are of dubious quality or that hardly augment student's employability in the industrial sector are not likely to be demanded for long, and thus prove unprofitable.¹⁷⁰ Therefore,

¹⁶⁴ BEN WILDAVSKY, ANDREW P. KELLY & KEVIN CAREY, *REINVENTING HIGHER EDUCATION: THE PROMISE OF INNOVATION* (2011).

¹⁶⁵ Coleman & Vedder, *supra* note 164.

¹⁶⁶ Venkatesan, *supra* note 155.

¹⁶⁷ See generally Altbach, *supra* note 77.

¹⁶⁸ S.E. Turner, B. Pusser & D.W. Breneman, *The Contemporary Provision of For Profit Higher Education: Mapping the Competitive Market in EARNINGS FROM LEARNING: THE RISE OF FOR PROFIT UNIVERSITIES* (S.E. Turner, B. Pusser & D.W. Brenemans eds., 2006).

¹⁶⁹ Enders & Jongbloed, *supra* note 7.

¹⁷⁰ Daniel Bennett, Adam R Lucchesi & Richard K Vedder, *For Profit Higher Education: Growth Innovation and Growth* (Jul., 2010), <http://centerforcollegeaffordability.org/research/studies/for-profit-higher-education-2010>.

the mere factor that for-profit institutions function as businesses in a highly competitive market can ensure that they see the provision of quality education as their *raison d'être*,¹⁷¹ without which they would be automatically weeded out.¹⁷²

Further, the model bases itself on the assumption that entrepreneurs would take pro-active steps to increase the demand for their institutions and courses by means of structuring them distinctively.¹⁷³ Experimentation and innovation in dissemination of the course materials or the content of the course material to produce such distinctiveness would therefore be encouraged.¹⁷⁴ Successful innovation in the higher education sector could thus be replicated in other for-profit institutions which, as opposed to their not-for profit or State run counterparts, not only have the needed capital to introduce such changes but also the competition incentive.¹⁷⁵

The 'for-profit' nature of the institutions also gives them more flexibility, dynamism¹⁷⁶ and agility as entrepreneurs are quick to respond to and cater to shifts in students' demands to ensure no loss of profitability.¹⁷⁷ Moreover, a competitive business model entails

¹⁷¹ James Tooley, *Should the Private Sector Profit from Education: The Seven Virtues of Highly Effective Markets* (May. 11, 1999), <http://www.libertarian.co.uk/lapubs/educn/educn031.pdf>.

¹⁷² Planning Commission, Government of India, *Faster, Sustainable and More Inclusive Growth: An Approach to the 12th Five Year Plan* (Oct., 2011), http://planningcommission.nic.in/plans/planrel/12appdrft/approach_12plan.pdf.

¹⁷³ See generally Wildavsky, Kelly & Carey, *supra* note 164.

¹⁷⁴ See generally Wildavsky, Kelly & Carey, *supra* note 164.

¹⁷⁵ James B Stanfield, *The Profit Motive in Education: Continuing the Revolution* (2012), <http://www.iea.org.uk/sites/default/files/publications/files/The%20Profit%20Motive%20in%20Education%20-%20Continuing%20the%20Revolution.pdf>.

¹⁷⁶ The United Kingdom and China can be quoted as examples where competition and incentives have led to greater dynamism and flexibility in the higher education sector. See Pawan Agarwal, *Higher Education in India: The Need for Change* (Jun., 2006), http://www.aiiserver.com/glf/wpcontent/uploads/2011/03/ICRIER_WP180_Higher_Education_in_India_1.pdf.

¹⁷⁷ Coleman & Vedder, *supra* note 164.

autonomy in decision making capacities as opposed to the bureaucratic, time consuming procedures of public institutions¹⁷⁸ which have little or no incentive to reduce costs because of the subsidies provided to them.¹⁷⁹ For-profit ventures also have immense potential and capacity to attract and expand their labour pool with greater promise of financial awards, as opposed to traditional non-profit and public sector organizations which usually lack the excess surplus to be used in infrastructural expansion.¹⁸⁰

As an additional cue, it is suggested that since for-profit institutions have been allowed to operate in the healthcare sector, which has traditionally been placed on a similar pedestal as higher education, it should also be legalized in the higher education sector,¹⁸¹ especially in light of its advantages. Similarly, as lack of profiteering constraints foreign providers from coming to India,¹⁸² the removal of such restrictions is required for entry of globally recognized institutions in the domestic framework, especially as the middle class generation is also open to the idea of investing in good quality education.¹⁸³

Thus there are various causes and reasons that validate profiteering in higher education,¹⁸⁴ thus being supportive of the view adopted by the Planning Commission in the 12th Five Year Plan.

¹⁷⁸ Pratap Bhanu, *Critiquing the Regulatory Regime*, INDIAN EXPRESS, <http://foreigneduca.com/Pratap%20Bhanu%20Mehta.htm> (last visited Jan. 24, 2014).

¹⁷⁹ Raj Chengappa, *Higher Education: How to Clean the Mess*, INDIA TODAY (Jul. 2, 2009), <http://indiatoday.intoday.in/story/Higher+Education:+ How+to+clean+the+mess/1/49794.html>.

¹⁸⁰ J. Gregory Dees & Beth Battle Anderson, *For-Profit Social Ventures* (2003), <http://www.caseatduke.org/news/documents/DeesAndersonCASE.pdf>.

¹⁸¹ Neelakantam, *supra* note 135.

¹⁸² Rahul Choudaha, *Who's Coming and Why*, FINANCIAL EXPRESS (Jan. 24, 2011), <http://www.financialexpress.com/news/whos-coming-and-why/741218/0>.

¹⁸³ *Profitable Education*, *supra* note 152.

¹⁸⁴ Stanfield, *supra* note 175.

V. RECOMMENDATIONS AND SAFEGUARDS FOR THE FOR-PROFIT MODEL

Though the profit motive in higher education may indeed boast of many factors to its credit, it is often spoken of with apprehensions of poor quality, use of unfair practices, and exorbitant tuition costs, thereby hampering equality and accessibility in its provision.¹⁸⁵ However, if certain safeguards are kept in mind, the model can be used to balance the social objectives espoused by traditional higher education advocates along with the financial returns desired by the investors.

The massive commercialization of education paints a picture of entrepreneurs measuring success in terms of the growth of their institutions, determined on the basis of enrollments and surpluses, without any focus on prestige and quality.¹⁸⁶ It is also believed that profiteering would lead to the exploitation of the students by the entrepreneurs, giving primacy to the interests of the shareholders as opposed to the students and the society at large.¹⁸⁷ However, such apprehensions are unfounded and do not reflect the actual behavioral patterns of the model. The entrepreneurs of for-profit institutions aim to increase the demand for their product by serving and satisfying customers and also exceeding expectations.¹⁸⁸ The higher the demands for a particular institute, the more revenue it earns. If the assumption that entrepreneurs seek to increase profits continually is true, then it must follow that most businesses would seek to grow qualitatively to attract more consumers and thereby reap greater dividends.¹⁸⁹ Therefore, in the long run, enterprises providing poor quality services

¹⁸⁵ Mukul, *supra* note 143.

¹⁸⁶ Robin Wilson, *For-Profit Colleges Change Higher Education's Landscape*, THE CHRONICLE FOR HIGHER EDU. (Feb. 7, 2010), <http://chronicle.com/article/For-Profit-Colleges-Change-/64012/>.

¹⁸⁷ Sepinwall, *supra* note 150.

¹⁸⁸ Dees & Anderson, *supra* note 180.

¹⁸⁹ Basu, *supra* note 153.

would not be able to sustain themselves or cover costs¹⁹⁰ and thus would be weeded out by the competitive market itself.¹⁹¹ It can also be assumed that the value and established reputation of the 'for profit' institutions along with the fact that the members of the institutions are stakeholders in its dividends, would act as a check against any depreciation in its quality, as enrollments are usually based on the same.¹⁹²

Howsoever, practically speaking there may be a few for-profit institutions in the industry which would be guilty of misconduct and poor quality. In order to check the growth of such institutions, as well as fly-by-night institutions,¹⁹³ it is essential to put in place an efficient overall regulatory system.¹⁹⁴ A proper body must be set up by the Government for the accreditation of the for-profit institutes of higher learning before they are instituted. The accreditation process should not only look into the quality of the curricula being taught, but also the qualifications of the teachers, the nature of the courses being offered, the infrastructure, faculty as well as the importance of the courses in terms of the prevalent market demands. Accreditation mechanisms should also determine the minimum criteria for student quality and only then provide the necessary certification for the setting up of the institution.¹⁹⁵ However, such regulatory oversight must follow even after the establishment of the institution through the means of surprise on-

¹⁹⁰ Tom Vander Ark, *Private Capital, For-Profit Enterprises and Public Education*, in Stanfield, *supra* note 175.

¹⁹¹ *The Role and Measurement of Quality in Competition Analysis* (2013), <http://www.oecd.org/competition/Quality-in-competition-analysis-2013.pdf>.

¹⁹² McCowan, *supra* note 119.

¹⁹³ *India Assures Level Playing Field to Foreign Educational Institutions*, DECCAN HERALD (Oct. 14, 2012), <http://www.deccanherald.com/content/197876/content/217211/99-varieties-crispy-dosas.html>.

¹⁹⁴ Wildavsky, Kelly & Carey, *supra* note 164.

¹⁹⁵ *Exploring the Future of International For-Profit Higher Education and Quality Assurance: Where are We Now and Where Do We Go From Here?* (Mar. 21, 2011), http://www.chea.org/pdf/UNESCO_document.pdf.

¹⁹⁶ Wildavsky, Kelly & Carey, *supra* note 164.

site inspections.¹⁹⁶ Though the specifications of the accreditation mechanism are beyond the scope of this paper, it can be well deduced that a proper, well managed accreditation system, bereft of corruption, politicization and red-tapes,¹⁹⁷ would further ensure quality higher education in the sector, sustain and maintain the academic values in the country and serve and preserve the public interests.¹⁹⁸ Further, disclosure of the accreditation reports would ensure the dissemination of necessary information to prospective students about the institution, thus negating any argument of market failure due to asymmetric information.¹⁹⁹ It must also be kept in mind that the accreditation process should not hinder the autonomy²⁰⁰ of the for-profit institution thereby affecting the decision making capacity of the entrepreneurs to make decisions in tandem with the demands of the industry and the students.²⁰¹ Lastly, the institutions must be obligated to publish all their annual reports and financial assets and details, including profits and losses, the profiles of the board of directors, staff, and the management, the details of the infrastructural holdings, etc. to the public to ensure further transparency and consequent faith in the sectorial working.²⁰²

The dual issue of cost and accessibility further erode the credibility of the for-profit model. It is believed that for-profit institutions charge exorbitant tuition fees and hence are not financially viable for a vast majority of India's population.²⁰³ This

¹⁹⁷ Jon F. Wergin, *Resource Review: Higher Education: Waking up to the Importance of Accreditation*, 37(3) CHANGE 35-41 (2005).

¹⁹⁸ *The Value of Accreditation: Four Pivotal Roles* (May, 2003), http://www.chea.org/pdf/pres_ltr_value_accred_5-03.pdf.

¹⁹⁹ McCowan, *supra* note 119.

²⁰⁰ *Higher Education in India: Twelfth Five Year Plan and Beyond* (2012), [http://www.ey.com/Publication/vwLUAssets/Higher_Education_in_India/\\$File/EY-FICC_Higher_Education_Report_Nov12.pdf](http://www.ey.com/Publication/vwLUAssets/Higher_Education_in_India/$File/EY-FICC_Higher_Education_Report_Nov12.pdf).

²⁰¹ See generally Agarwal, *supra* note 176.

²⁰² C.R Suthar C.R & R.C Joshi, *Challenged Before Indian Higher Education: An Administrative Vision*, 5(12) PACIFIC BUSINESS R. INT. (Jun., 2013), <http://www.pbr.co.in/Vol%205%20Iss%2012/12.pdf>.

²⁰³ Chopra, *supra* note 129.

doubt in the affordability of such institutions is also bornout of the mischaracterization of the nature of a profit-making venture.²⁰⁴ Though raising tuition prices is necessary for “*long term sustainability*”²⁰⁵ of the institution, price setting for tuition accounts for the elasticity of demand, the nature of clientele and the cost of production.²⁰⁶ As profiteering can be achieved by both increasing revenue and decreasing costs, there exists an inherent incentive for the firms to reduce their cost of operation²⁰⁷ to a bare minimum and thus charge tuition fees in correspondence with the same.²⁰⁸ Moreover, it is usually the prestigious universities that are able to command high tuition prices, which most middle class people would be willing to pay for with the help of loans.²⁰⁹ It is believed that by misrepresenting their quality, the for-profit institutions can dupe their customers into believing in the prestige of their established enterprise and extract exorbitant values in the name of fees.²¹⁰ However, an open and transparent accreditation system, as expounded above, along with a mandatory obligation to disclose the ratings of the university, calibrated on a national level by an independent Government body, can go a long way in curbing such exploitation. Such an announcement of the ratings would also encourage greater competition, thereby incentivizing lower user-costs.²¹¹ Moreover, as a safeguard the Government may establish certain ceilings of fees, in terms of the percentage of the cost of production and make available a readily available scheme of grants,

²⁰⁴ See generally, James B. Stanfield, *The Fortune at the Bottom of the Education Pyramid*, 100-109 (2012), <http://www.iea.org.uk/sites/default/files/publications/files/The%20Profit%20Motive%20in%20Education%20-20Continuing%20the%20Revolution.pdf>.

²⁰⁵ Wildavsky, Kelly & Carey, *supra* note 164.

²⁰⁶ Wildavsky, Kelly & Carey, *supra* note 164.

²⁰⁷ Stanfield, *supra* note 175, at 38-39, 132-133.

²⁰⁸ Wildavsky, Kelly & Carey, *supra* note 164.

²⁰⁹ Agarwal, *supra* note 176.

²¹⁰ Agarwal, *supra* note 176.

²¹¹ Suthar & Joshi, *supra* note 202.

loans²¹² and scholarships to ensure affordability, equity and access to these institutions.²¹³

Therefore, if the Government regulates and steers the direction of private investment to ensure quality and egalitarianism, the for-profit model would not only help to meet the domestic gap between the demand for and the supply of higher education, but also ensure an extremely robust industry capable of producing graduates capable of being productively employed, thus strengthening the economy as a whole.²¹⁴

VI. CONCLUSION

The Indian higher education sector suffers from a two pronged problem of limited access and poor quality in terms of shortages of faculty, insufficient infrastructure and outdated curricula.²¹⁵ The for-profit model that encourages the higher education sector to be looked at like a profiteering business, is through its innate nature capable of providing a long term solution to both the problems. Not only does the profit motive attract serious investors to the competitive market, thereby ensuring that quality education in tandem with student demands is provided, but also ensures that there exists enough fungible capital to utilize in the development of the institution.²¹⁶ Through this paper, the author has attempted to bring to notice the need for the introduction of such a model, in terms of increasing institutional

²¹² Reference could be made to the Loan Plans made available in Australia, wherein the loan is repaid through temporary increases in the income tax of programme participants. Consequently, the money is continuously recycled to finance the education of future students. *See Our Universities: Backing Australia's Future* (2003), <http://www.backingaustraliasfuture.gov.au>.

²¹³ Agarwal, *supra* note 176.

²¹⁴ Philip G. Altbach & Pawan Agarwal, Scoring Higher on Education, THE HINDU (Feb. 12, 2013), <http://www.thehindu.com/opinion/op-ed/scoring-higher-on-education/article4404687.ece>.

²¹⁵ Suthar & Joshi, *supra* note 202.

²¹⁶ Suthar & Joshi, *supra* note 202.

capacity to further uplift the gross enrollment ratio of the country and therefore the employable youth to serve the economic interests of the nation. The paper has also aimed at highlighting the benefits that such a model may bring to the education sector in India, provided safeguards like mandatory and stringent accreditation of institutions, with a special focus on the length and the substance of the course material and the admission procedures, are employed. Moreover, an effort has been made to bring to limelight how private institutions subvert the contours of law to make under-hand profits which if legalized would prove advantageous to the exchequer of the country and could be utilized for varied welfare activities.

As there exists a strong pragmatic case for the introduction of such a model, with an established theoretical economic backing that promotes private provisioning of the good, it is time for the policy-makers to re-examine and allay the customary abhorrence towards the profit-motive in higher education.

To conclude, the author opines that the private and the public sector must work together, realizing the deep and conclusive impact that higher education has on the country's development and thus deliver the expectations that the 12th Five Year Plan holds from this policy change-expansion, equity and excellence.²¹⁷

²¹⁷ See generally *Report on Higher Education*, *supra* note 1.