*R.N.R.*

*Before Adarsh Kumar Goel, Ajay Kumar Mittal and Mehinder Singh Sullar, JJ.*

**NAVDEEP KAUR GILL AND OTHERS,**—*Petitioners*

*versus*

**STATE OF PUNJAB AND OTHERS,**—*Respondents*

**C.W.P. No. 17752 of 2005 and other connected writ petitions**

*29th March, 2011*

***Constitution of India, 1950–Arts.19(1)(g) & 226—Punjab Private Health Sciences Educational Institutions (Regulation of Admission, Fixation of Fee and Making of Reservation) Act, 2006—Ss. 3, 4, 6 & 7—Admission to medical colleges–State Government***

***constituting Fee Fixation Committee—FFC prescribing fee structure after taking into account cost of Colleges and data furnished by them—Colleges demanding fee in excess of that fixed by FFC—Challenge thereto—No material to show that FFC fixed unreasonably low fee structure—Colleges held not entitled to charge fee in excess of fee approved by FFC—S.7 of 2006 Act limiting fee to minimum infrastructure requirements does not violate fundamental right of Colleges under Article 19(1)(g) of the Constitution.***

*Held,* that report of the Fee Fixation Committee which operated upto the Session 2005-06 does not call for any interference by this Court. Fee notified in the prospectus for the session 2003-2004 was Rs. 1.10 lacs which was later increased to 1.5 lacs as per notification dated 25th July, 2003. The committee determined the fee of MBBS students at Rs. 1 lac after due consideration of the report of the Chartered Accountants and the fee structures proposed by the Colleges. The students have accordingly paid the fee so fixed under interim orders of this Court and have completed their studies. Contention that fee structure should not have been uniform but should be college specific and on the ground the report was vitiated is without any merit. The fee structure does make a distinction for some of the colleges. The same was to be operative for three years which period has come to an end. There is no doubt that colleges have a fundamental right to run their administration which includes fixation of fee subject only to checking of profiteering. There is no material to show that the FFC has fixed unreasonably low fee structure without taking into account the cost of the colleges and data furnished by them. Principles of natural justice have been duly complied with. As mentioned in the report of the FFC, the colleges have been given due hearing. The proposed fee structures furnished by the colleges were duly considered and reasons have been mentioned for not accepting the fee structures, as proposed. Accordingly, the writ petitions filed by the Colleges are liable to be dismissed and writ petitions filed by the students deserve to be allowed to the extent that the colleges are not entitled to charge fee in excess of the fee approved by the FFC.

(Para 26)

*Further held,* that the provision limiting the fee to the minimum infrastructure requirements cannot be held to be violative of fundamental right under Article 19(1)(g) of the Constitution. The restriction does not,

in any manner, interfere with the right of educational institutions to establish and administer the same. Their cost in providing minimum infrastructure is taken care of. They are not debarred from providing better infrstructure if they could afford to. There is no absolute right to establish institutions involving higher cost and limiting the same only to the students who can pay higher fee. A student paying high fee is likely to aim at earning more rather then serving which can be bane to the society. Education after all is not business. Primarily, it is service to the society where earning is secondary or incidental. High fee will be inconsistent with such aim and will force a student to adopt a commercial approach. If the Act intends to encourage social values, where service oriented approach can be adopted and access to higher education can be provided to poorer sections, such aim will be consistent with the directive principles. In judging the validity of a legislation, the Court has to strike a balance between the need of the society and right of the individual. Right of the Individual cannot be held to be sacrosanct so as to make the need of the society subordinate to its right.

(Para 57)

Rajiv Atma Ram, Sr. Advocate with Arjun Partap Atma Ram, Advocate in C.W.P. No. 12668, 11790 of 2006.

S.C. Sibal, Sr. Advocate with V.S. Rana, Advocate in C.W.P. Nos. 17905 & 17752 of 2005.

A.K. Chopra, Sr. Advocate with Gagandeep Singh, Advocate in C.W.P. No. 18394 of 2005.

Deepak Sibal, Advocate with Arun Arya, Advocate in C.W.P. Nos. 18675 of 2003, 19339 of 2005, 294, 3671 of 2008, 12044 of 2010.

Sukhbir Singh, Advocate C.W.P. Nos. 19929 & 19895 of 2005.

Puneet Gupta, Advocate in C.W.P. No. 16153 of 2005.

Vivek Sethi, Advocate in C.W.P. No. 18349 of 2005.

Surinder Garg, Advocate in C.W.P. Nos. 18478 and 1792 of 2005.

Dr. Surya Parkash, Advocate in C.W.P. No. 9447 of 2007.

Ashish Rawal, Advocate for Anupam Gupta, Advocate in C.W.P. No. 6808 of 2008.

Padam Jain, Advocate in C.W.P. No. 13259 of 2004.

Kamal Sehgal, Advocate in C.W.P. No. 18593 of 2007.

P.K. Mutneja, Advocate in C.W.P. No. 2720 of 2008.

H.S. Sirohi, Advocate in C.W.P. No. 19364 of 2005, C.W.P. No. 3037 of 2008.

Rajesh Gupta, Advocate in C.W.P. No. 2946 of 2008.

B.B.S. Sobti, Advocate with S.S. Saini, Advocate in C.W.P. Nos. 12013 of 2003, 19667 of 2005 and 7556 of 2006.

Animesh Sharma, Advocate for Akshay Bhan, Advocate in C.W.P. No. 3600 of 2007.

None in C.W.P. No. 7146 of 2004: *for the petitioners.*

Amol Rattan Singh, Addl. A.G. Punjab for the State.

Gurminder Singh, Advocate with Param Preet Singh, Advocate for DCI.

IPS Doabia, Advocate for MCI.

B.B.S. Sobti, Advocate with S.S. Saini, Advocate for respondent No. 2 in C.W.P. No. 12044 of 2010, for respondent No. 3 in C.W.P. Nos. 7146 of 2004, 16153 and 19339 of 2005 and for respondent No. 4 in C.W.P. Nos. 1792, 13259 of 2004, 8349, 18349, 18394, 18478 and 19364 of 2005, 2946, 3037, 6808 of 2008.

**ADARSH KUMAR GOEL, J.**

(1) This order will dispose of 29 writ petitions mentioned above involving questions relating to validity of regulation of fee fixation and admissions in medical colleges as follows :—

(I) C.W.P. Nos. 18675 of 2003, 1792, 7146, 13259 of 2004, 16153, 17752, 17905, 18349, 18394, 18478, 19339 and 19364 of 2005 have been filed by students challenging demand of fee higher than the fee approved for the Academic Sessions 2003-04, 2004-05 and 2005-06 by the Fee Fixation Committee (FFC) constituted by the State of Punjab as per directions in the judgment of the Hon'ble Supreme Court in

**Islamic Academy of Education and another** *versus* **State of Karnataka and others, (1)** as reiterated in **P.A. Inamdar and others** *versus* **State of Maharashtra and others, (2).** C.W.P. No. 6808 of 2008 has been filed by 20 students of Dayanand Medical College, Ludhiana of the PGET 2000 batch seeking direction for release of MD/MS degree and detail marks certificates which has been contested on the ground that the petitioners have not paid the due fee.

(II) C.W.P Nos. 12013 of 2003, 19667, 19895 and 19929 of 2005 have been filed by medical colleges challenging rate of fee fixed as per interim report dated 17th July, 2004 and final report dated 8th July, 2005 by the said FFC as being violative of their fundamental right under Article 19(1)(g) of the Constitution.

(III) C.W.P. Nos. 294, 2720, 2946, 3037, 3671 of 2008 and 12044 of 2010 have been filed by the students challenging fixation of fee by the State of Punjab as per provisions of the Punjab Private Health Sciences Educational Institutions (Regulation of Admission, fixation of fee and making of reservation) Act, 2006 ('2006 Act') while

(IV) C.W.P. Nos. 7556, 11790 of 2006, 3600, 9447, 12668 and 18593 of 2007 have been filed by private Ayurvedic Dental and Medical colleges challenging the provisions of the 2006 Act as violative of autonomy of the said colleges in the matter of fixation of fee and conduct of admissions.

(2) The matter has been placed before this Bench in view of order of the Division Bench dated 8th November, 2010 as under :—

> ".....Taking into account the facts in the present cases and the various judgments of Hon'ble Supreme Court as well as Division Bench of this Court in **Educate India Society** *versus* **State of Haryana and others, (3)** and also taking into account that this issue arises every year, **we are of the view that matter ought to be heard and decided authoritatively by a Full Bench.**

(1) (2003) 6 S.C.C. 697
(2) (2005) 6 S.C.C.537
(3) 2005 (5) S.L.R. 549

**The issue of vires and other allied issues raised in the colleges' petitions would be considered alongwith the aforesaid writ petition on the next date of hearing before the Full Bench...."**

**Pleadings**

(3) We may give facts in the representative petitions in each of the four categories.

**Category I**

(4) We are referring to C.W.P. No. 17752 of 2005 as a representative petition in this category. Averments therein are that the students were admitted to MBBS course in the session 2003–04 after passing entrance test on the basis of prospectus issued by the Baba Farid University of Health Sciences (BFU). They were allocated to Sri Guru Ram Das Institute of Medical Sciences and Research, Amritsar. They passed their first professional examination and were studying in second professional for which examinations were scheduled to be held with effect from 22nd November, 2005. As per prospectus, fee required to be paid was Rs. 1.10 lacs per annum which was increased to Rs. 1.5 lacs *vide* notification dated 25th July, 2003, Annexure P.1. The said fee was deposited by the petitioners apart from hostel fee and security advance. However, after the admissions were given, the State of Punjab constituted Justice Majithia Committee as per direction of the Hon'ble Supreme Court in **Islamic Academy of Education.** The Committee made its interim recommendation dated 17th July, 2004, Annexure P.3, taking into account the grievance of the students that increase of fee *vide* notification dated 25th July, 2003 to Rs. 1.50 lacs was not called for as it was on account of abolition of NRI quota which was later restored resulting in higher income to Medical College. The recommendation is as under :—

"14. To summarize the Committee orders that the private unaided medical institutions in the State of Punjab–

(i) will change from the students admitted in the year 2003–04, fee for the second year of their study i.e. year 2004–05 equivalent to the provisional fee as indicated in the government notification dated 17th June, 2004 for the year 2004–05 i.e. the student admitted in the year

2003–04 will pay fee for the second year of their study @ Rs. 75,000 for MBBS, Rs. 55,000 for BDS and Rs. 35,000 for BAMS/BHMS course. Institutions can take a fresh undertaking from the students that they would pay the difference as and when the final fee structure is approved by the committee ;

(ii) will not charge as security; hostel charges etc., in excess of what has been provided in government notification dated 25th July, 2003. The excess amount if charged by them as explained above would be refunded forthwith.

| | | |
|---|---|---|
| Sd/– | Sd/– | Sd/– |
| Dr. K.K. Talwar,<br>Director, PGI | Dr. R.P. Bambah,<br>Ex. Vice Chancellor,<br>Punjab University | G .R. Majithia,<br>Chairman |
| Amarjit Chopra,<br>Chartered Accountant | | Sd/–<br>Satish Chandra,<br>Member Secretary |

*Note :*—Before asking the students admitted in the year 2003–04 for deposit of fee for the second year of their study i.e. year 2004–05 as indicated in para 14(i), the institution shall first adjust the amount received by them in the year 2003–04 in excess of the fee indicated in para 14(i) above. If after adjustment anything is due against the student then only he will be required to make the payment for the second year 2004–05. It is again made clear that the students admitted in the year 2003–04 are liable to pay only Rs. 75,000, Rs. 55,000 and Rs. 35,000 for the year 2003–04 as well as for the year 2004–05 and if they have paid in excess of this amount in the year 2004–05 and if any difference is left to be paid then only the students will be asked to make the payment. Decision in regard to fee structure for the year 2003–04 was taken and this para is added with the approval of the chairman for removal of all kinds of doubts.

Staish Chandra
Member Secretary."

(5) The FFC gave its final report dated 8th July, 2005 extracts from which are as under :—

"Having considered all the factors, the Committee has finally concluded the fee structure. Keeping in view the Cost Data and financial information submitted to Chartered Accountants, their comments there upon and also the analysis carried out subsequently in view of the various factors, the Committee is of the opinion that the fee fixed for various institutions is just, fair and equitable. The Committee has adhered to guidelines laid down by the Apex Court.

The Committee while determining the fee structure, strictly followed the following criteria as indicated by the Apex Court in "T.M.A. Pai Foundations v. State of Karnataka (2002) 8 SCC 481 :—

A. That the object of setting up an Educational Institution is by definition 'Charitable', it is clear that an Educational Institution cannot claim a Fee as is not required for the purpose of fulfilling the object.

B. That in the establishment of an Educational Institution, the object should not be to make a profit inasmuch as educational function is charitable in nature.

C. That a reasonable regular surplus may be generated by the Educational Institution for the development of Education and expansion of the institution.

D. That profiteering/capitation fee in any form directly or indirectly is forbidden for the management of the institution;

E. That the fee structure shall be fixed keeping in mind the infrastructure and the facilities, the investment made, salary for teaching and non teaching staff, future plans of expansion and for betterment of the institution.

F. That merit alone shall be the basis for selecting the students.

The State Government has allowed admission of NRI students against the management quota.

The Apex Court in its interim order in Islamic Academy of Education *versus* State of Karnataka, reported as 2004(6) SCC 573, allowed the admission of NRI students against the management quota. Various matters regarding the clarification of decision of the Apex Court in Islamic Academy of Education's (supra) have been referred to a larger Bench.

**FINAL FEE STRUCTURE AT A GLANCE FOR THE YEARS 2003-04, 2004-05 AND 2005-06 for MBBS, BDS and BHMS Courses only**

**(Fee per annum per student)**

**MBBS**

| | | |
|---|---|---|
| 1. | Dayanand Medical College & Hospital, Ludhiana (DMCH) (MBBS) | Rs. 1.00 lac |
| 2. | Shri Guru Ram Dass Institute of Medical Sciences and Research (SGRD) (MBBS) | Rs. 1.00 lac |

**BDS**

| | | |
|---|---|---|
| 1. | Shri Guru Nanak Dev Dental College and Research Institute, Sunam (BDS) | Rs. 82,000.00 |
| 2. | Dashmesh Institute of Research and Dental Sciences, Faridkot (BDS) | Rs. 92,500.00 |
| 3. | SGRD Institute of Dental Sciences | Rs. 78,000.00 |
| 4. | Laxmi Bai Dental College, Patiala (BDS) | Rs. 78,000.00 |
| 5. | Desh Bhagat Dental College, Muktsar (BDS) | Rs. 40,000.00 |
| 6. | National Dental College, Gulabgarh, Dera Bassi (BDS) | Rs. 68,500.00 |

**BHMS**

| | | |
|---|---|---|
| 1. | (i) Shri Guru Nanak Dev Homeopathic Medical College and Hospital, Canal Road, Ludhiana (BHMS) | Rs. 12,000.00 |
| | (ii) D.M. | Rs. 31,500.00 |
| 2. | Lord Mahavira Homeopathic Medical College, Ludhiana (BHMS) | Rs. 17,500.00 |
| 3. | Homeopathic Medical College, Abohar (BHMS) | Rs. 14,500.00 |
| 4. | Institute of Homeopathic Medical Education and Research, Chunni Kalan, Fatehgarh Sahib (BHMS) | Rs. 3,500.00 |
| 5. | Kalyan Homeopathic Medical College, Tarn Taran | Rs. 11,500.00 |

**Notes :–**

(i) The fee structure is subject to the decision of the Bench of Seven Judges of the Hon'ble Apex Court.

(ii) The above fee shall be applicable for the years 2003-04, 2004-05 and 2005-06 for students admitted in 2003-04 and students admitted subsequently.

(iii) The Fee Fixation Committee can also review the fee structure recommended, as and when it feels the necessity on a motion by the management of such institutes which invest in any substantial improvements in infrastructure/staff/services for the student, who are the ultimate beneficiaries.

(iv) The variation in the fee structure of colleges offering the same course is because of the wide disparity in cost structure submitted and the amenities/services being provided to the students. Wherever the services rendered are superior, the committee has permitted a higher fee.

(v) The institutions shall charge excess fees if any (i.e. difference in fee fixed now and fee already charged) in four equated installments spread over a year.

(vi) The institutions shall also extend all help and guidance to needy students to arrange education loans for themselves.

(vii) **C.M.C. (Medical & Dental) Ludhiana**

In absence of the income and expenditure account and also the segregated receipts for hospital, college and hostel, the cost per student cannot be worked out and the fee cannot be fixed for Christian Medical College Ludhiana.

In view of the above, the CMC (Medical & Dental) Ludhiana are directed to supply the required information within a period of one month to enable the committee to fix their fees.

As an interim measure they would charge Rs. 75,000 p.a. for MBBS and Rs. 55,000 per annum for BDS from each student for the session 2003-04, 2004-05 and 2005-06. Other appropriate adjustments in excess/deficit fees charged would be done accordingly.

(viii) **D.M.C. (Ludhiana) and SGRD (Amritsar)**

The Committee decided that it will be fair and proper to maintain uniformity in fee Structure of these colleges to eliminate bias and prejudice and also that it will ensure that efficiency will not go unrewarded and inefficiency in cost would not be passed to the students.

(ix) **Baba Jaswant Singh Dental College, Ludhiana (BJSDC)**

Fee in respect of Baba Jaswant Singh Dental College, Ludhiana (BJSDC) could not be fixed as per details given hereunder :

The report in respect of BJSDC was submitted by M/s Mohinder Vij and Associates, Chartered Accountants, Ludhiana dated 6th February, 2005. Subsequently in the meeting held with the Chartered Accountants on 16th February 2005, which was not attended by any representative of BJSDC, the Chartered Accountants were requested to send their report on the following issues :

Applicability of PF and from which date it became applicable.

Reconciliation of salary with PF and TDS applicability

Average salary paid to staff

Cost per student

Depreciation for the period ended 31st March 2004.

Shortage of staff.

The Chartered Accountants vide their letter dated 9th March, 2005 informed as under :–

'In the case of Baba Jaswant Singh Dental College, it is not possible for us to segregate the expenditure incurred between college, hostel and hospital due to non maintenance of the separate records. Also Accounts Head of the institution has expressed his inability to provide the relevant details in the absence of classification of expenses under separate heads. Consequently it is not possible for us to calculate the cost per student in the absence of segregation of expenses relating to college, hostel and hospital.'

The Chartered Accountants have however furnished a depreciation chart. In view of the non segregation of the expenses relating to college, hostel and hospital and also due to non availability of information with regard to area under college, hostel and hospital the depreciation chart is of little consequence.

The details furnished by the Chartered Accountants with regard to the teaching staff alongwith their report dated 6th February, 2005 showed total teaching staff of 97 persons including the principal, Dr. O.P. Nar. The list contained at serial No. 34, 35, 37, 38 to 54, 88, 91 to 94, 96, 97 the names of various faculty member (Doctors) whose monthly remuneration is shown at Rs. 5,000. Besides at serial number 85, 86 and 87 the names of faculty member (Doctors) whose monthly remuneration is shown at Rs. 6,000, Rs. 4,500 and Rs. 4,500 respectively. Except for two, all aforementioned employees were employed throughout the year. Their total salary for the year works out to more than Rs. 17 lacs. Provident Fund contribution for the management on such amount works out as more than Rs. 2 lacs approximately.

It is also observed that the total salary of the 97 employees as per list works out to Rs. 150 lacs approximately against the debit of Rs. 247 lacs in the income and expenditure account. It appears

that Rs. 97 lacs pertain to salary of non teaching staff. It can safely be assumed that almost 50% of such employees would be covered by the Provident Fund, which would mean an additional burden of Rs. 6 lacs for management contribution towards Provident Fund.

That total debit in income and expenditure account for management contribution towards Provident Fund and other funds is shown at Rs. 1.63 lacs against approximate figure of Rs. 8 lacs as stated herein above.

Further appropriate bifurcation of revenue head into receipts from college, hostel and hospital etc. has not been furnished.

In view of the Chartered Accountants report and the facts stated therein above with regard to contribution to Provident Fund and the revenue head bifurcations, it is not possible to ascertain the cost per student and fix the fee in case of this institution.

In view of the above, the institute is directed to supply the required information within a period of one month to enable the committee to fix their fees.

As an interim measure they would charge Rs. 55,000 p.a per student from each student for the sessions 2003–04, 2004–05 and 2005–06.

Other appropriate adjustments in excess/deficit fees charged would be done according to instructions at para 14.

The institute would not charge any amount under any head from students in addition to the fee.

xx xx xx xx xx

26. **FEE STRUCTURE OF AYURVEDIC COLLEGES**

The Committee reserves sanction to the final fee structure for Ayurvedic Colleges.

The Committee is of the opinion that further probe and in depth analysis is required into the proposed fee structure of these colleges. After the completion of the probe and submission of the reports of Chartered Accountants and, if need be an opportunity of hearing would be granted to the institutions and only thereafter the final fee structure would be passed.

Till then the institutions would charge the provisional fee from the students. The institutions are directed not to charge any amount under any head from the student in addition to the fees. The fee shall be applicable for the years 2003–04, 2004–05 and 2005–06 for students admitted in 2003–04 and students admitted subsequently. Requisite adjustments in fee should be made forthwith and only those amounts be realized this year (2005–06) which are arrived at by such adjustment.

No institute can charge any sum of money in addition to the fee prescribed under any garb or any other nomenclature on the pretext of enforcing discipline/or any other excuse."

(6) In the details of fixation of fee annexed to the report, the Committee has given details of working out of the fee in respect of each concerned medical/Dental college having regard to expenses of the said colleges and infrastructure available and also explained reasons for disagreement with the report of the Chartered Accountants as under :–

**"GENERAL DEFFICIECIES OBSERVED BY THE CHARTERED ACCOUNTANTS AND THE COMMITTEE**

Lack of adequate infrastructure e.g. Land and Building, Hostel facilities, Laboratories, Library, Toilets etc.

Inadequate staff strength both teaching as well as administrative.

Non segregation of expense and revenue between hospital, college, hostel and trust.

Non availability of hospital facility for on the job training purposes. Arrangements made with the other hospitals are not adequately evidenced for want of attendance records.

Non-coverage under Provident Fund Act despite the staff strength being far in excess of the stipulated limits under the Provident Fund Act.

Execessive charge in respect of hostel and mess facility contrary to the norm laid down by the Government.

Levy of other charges e.g. development charge/augmentation fee contrary to Government norms.

Non availability of student fee reconciliation.

Non availability of exact number of NRI students with various institutions.

**ASSUMPTIONS**

Interest cost has not been considered to be a part of total expenses to be considered for calculation of cost per student.

Interest income to the extent on Corpus investment has not been adjusted against the total expneses to be considered for calculation of cost per student but in case the same has been received against Investment of students Funds (Security deposit, advance tuition fee etc.), it has been reduced from the said expenses.

Infrastructure provision shall be the responsibility of the management. However, depreciation and maintenance cost thereof shall form part of the total expenses to be considered for calculation of cost per student.

In case the detail with regard to teaching and non teaching beds is available, hospital receipts I patient receipts are apportioned amongst the college and hospital in the ratio of teaching and non teaching beds.

In case hostel receipts and mess charges form part of income, an equivalent amount has been reduced from the total expenses to be considered for calculation of cost per student.

In case OPD charges and other related charges form part of income, expenditure incurred for providing these facilities form part of total expenditure and separate detail thereof is not available, an equivalent amount of such income has been reduced from the total expenses to be considered for calculation of cost per student.

In case examination fee I other charges are credited to income and expenditure account, the same has been reduced from the total expenses to be considered for calculation of cost per student.

The cost per student has been adjusted taking into consideration the surplus over the normal fee that would be generated because of fee received from NRI students. Calculations have been made treating all NRI seats as filled up.

Cost per student for the purpose of fixation of fee has been calculated with reference to the approved strength rather than the actual number of students, as infrastructure has to be created based upon the approved strength. Even otherwise there are certain repeaters the impact of whom has not been considered."

(7) During pendency of the writ petitions, interim orders were passed directing the colleges to accept fee as per report of the FFC. Case of the petitioners is that the colleges were demanding fee in excess of that fixed by the FFC, which demand was liable to be set aside. The colleges have contested the stand of the students by way of their counter writs which are being referred to in Category II.

**Category II**

(8) In this cateogry, C.W.P. Nos. 12013 of 2003 and 19667 of 2005 are taken as representative petitions. In C.W.P. No. 12013 of 2003, challenge is to the provisions contained in the prospectus Annexure P.1 issued by the Baba Farid University of Health Sciences, Faridkot (BFU) prescribing fee structure as per notification dated 25th July, 2003 issued by the State of Punjab as being violative of the autonomy of the medical colleges recognized in judgment of the Hon'ble Supreme Court in **TMA Pai Foundation and others** *versus* **State of Karnataka and others (4).** Case set out in the petition is that the petitioner was a society running a medical college. It was unaided minority institution. The State issued notification dated 14th May, 2003 notifying that entrance test for admission to MBBS for the year 2003 in Medical and Dental Colleges in the State of Punjab will be conducted by the BFU. The University accordingly issued prospectus mentioning very low level of fee i.e. Rs. 13,000 per student for free seats and Rs. 1.10 lacs for paid seats. The petitioner also issued its own prospectus prescribing its rational fee structure i.e. Rs. 4 lacs per annum per student in the general category. The said fee structure was duly accepted by the Medical Council of India, respondent No. 4. The petitioner calculated the

(4)(2002) 8 S.C.C. 481

cost of education and furnished information in a prescribed Performa. The calculation charts thereof have been annexed as Annexures P.5 and P.6 for the years 2001–02 and 2002–03 according to which the cost per student for the year 2001–02 is Rs. 3,20,838 and for the year 2002–03 is Rs. 3,32,622. If margin of 17% for inflation and further development of education including new equipments is added, average fee per student comes to Rs. 3,81,452. Even as per Regulation 7(5) of the AICTE (Norms and guidelines for fee and guidelines for admission in professional colleges) Regulations, 1994, fee chargeable in professional colleges is to be determined on the basis of estimation of the expenditure of the said colleges taking into account salaries, cost of consumables, expenditure on field trips and other visits, contingent expenditure, expenditure on maintenance of buildings, library expenditure, replacement on account of modernization and addition of equipments etc. The petitioner sent its fee structure for approval but the University arbitrarily fixed fee @ Rs. 1.50 lacs per annum per student ignoring the law laid down in **TMA Pai foundation** and policy guidelines issued by the Ministry of Health, Government of India *vide* letter dated 14th May, 2003 Annexure P.15. Para 4.13 of the said guidelines provides that private unaided educational institutions shall have the right to determine the scale of fee but no capitation fee could be charged and fee structure was to be rational without profiteering but could include reasonable revenue surplus for development of educational and expansion of the institution. The said guidelines refer to para 56 and 57 in the judgment of the Hon'ble Supreme Court in **TMA Pai Foundation.** The guidelines further provide that the State/University could frame appropriate regulations to prescribe percentage of seats for the weaker sections by giving them scholarship or free ships or other issues mentioned therein including fixing of upper limit on the fee chargeable. The States could constitute Standing Committees to monitor the fee charged to oversee reasonableness of the fee taking into account the cost of education including reasonable revenue surplus for development of education and expansion of institution. Upper ceiling of the fee was to be valid for three years. The Standing Committee could also provide for extent of concession in fee granted to students belonging to poor and economically backward classes and to direct grant of scholarship or concession to take care of meritorious but poor students. Contrary to the said guidelines, the fee fixed *vide* impugned notification dated 25th July, 2003 was less than the cost calculated by the petitioner. The petitioner made representation Annexure P.11 to which no response was received.

(9) In C.W.P. No. 19667 of 2005 filed by Dayanand Medical College, report of the FFC dated 8th July, 2005 has been challenged on the ground that the fee structure is extremely low and it is impossible for the college to function without running into loss thereby leading to its closure. The FFC has not gone into the budget of the college. Reliance has been placed on interim order dated 15th July, 2005 passed by the Hon'ble Supreme Court in the case of Karnataka Private Dental Medical Colleges based on compromise. Reliance has also been placed on FFC of State of U.P. fixing fee of more than Rs. 3 lacs *vide* notification dated 20th July, 2005, Annexure P.14 and recommendation of FFC for the State of Jammu and Kashmir fixing fee of Rs. 2.83 lacs. According to the petitioner, in other States, the rate of fee was much higher. Cost of education per student was Rs. 4 lacs per annum.

(10) Reply has been filed by the affected students who are respondents 130 to 149 in C.W.P. No. 19667 of 2005, stating that the petitioner could approach the FFC itself as observed by the Hon'ble Supreme Court vide order dated 14th November, 2005 in SLP (C) No.(s) 20377–20385 of 2004 **M/s Ramaiah Medical College** *versus* **Aparjita and 7 others** as under :—

> "The applications for impleadment are dismissed.
>
> The law relating to fixation of fee stands settled by this Court in **PA Inamdar** *versus* **State of Maharashtra** (Civil Appeal No. 5046 of 2005). It would be for the petitioners now to approach the Fee Fixation Committee in terms of the legal position settled in the said decision and place before the Committee all factual and legal aspects including the submission for fixation of interim fee, if necessary. We hope that the Committee would be able to decide the matter expeditiously.
>
> The Special Leave petitions are disposed of accordingly."

It is further stated that the students were admitted as per provisions of the prospectus and could not be required to pay any higher fee. Even according to the prospectus of the said Institution, the fee was to be charged as per notification dated 25th April, 2005 of the State Government till fee

structure was approved by the FFC. The FFC had taken into account the view point of the petitioner and all relevant circumstances in fixing the fee. As regards the report of the Chartered Accountants submitted to the Committee, it is submitted that the income of the petitioner from the NRI students had also to be taken into account and also the fact that the petitioner Institution was admitting the PG students with no extra expenses. The PG students worked in the hospital and the petitioner institution earned surplus on account of their services. The petitioner was having net surplus in its income and thus was profiteering. Depreciation on buildings had been wrongly claimed to show expenditure. The cost of land was shown to be lower by 1000 times. Thus, according to the colleges, the fee structure approved by the FFC was arbitrary and was liable to be set aside.

(11) Writ petitions of the colleges were admitted but no stay was granted and deposit of fee by students in terms of report of the FFC was to be subject to final adjudication of the writ petitions. Case of the colleges is that the fee structure approved by the FFC be set aside and they be allowed to charge fee fixed by them as per their own budget.

**Category III**

(12) The subject of fee fixation in higher, technical and professional education was regulated by FFC constituted as per directions of the Hon'ble Supreme Court in **Islamic Academy of Education and P.A. Inamdar** till a legislation was brought. The State of Punjab enacted the 2006 Act which received the assent of the Governor of Punjab on 10th October, 2006 and was notified on 11th October, 2006. Categories III and IV relate to fee fixation and allied issues under the said Act. Section 7 of the Act envisages fixation of fee by the State Government and under the said Act, notification dated 1st August, 2007 was issued fixing the fee structure which was revised vide notification dated 3rd August, 2007. In Category III, the students have challenged notification dated 3rd August, 2007 providing for charging of annual tuition fee of Rs. 3 lacs from MBBS students in management quota. Direction has been sought for reducing the fee for MBBS students to Rs. 1 lac and to Rs. 55,000 for BDS students. Further prayer is to adjust the fee already paid and to refund the balance.

(13) Case set out in C.W.P. No. 294 of 2008 which is taken as a representative petition in this category is that the wards of the members

of the petitioner association were admitted to MBBS, BDS, BAMS and BHMS courses in the State of Punjab in Medical, Dental, Ayurvedic and Homeopathic institutions in pursuance of notification dated 21st May, 2007 after passing the PMET 2007 in accordance with the provisions in prospectus Annexure P.1. According to the prospectus, 50% are State quota seats and 50% are management quota seats. In management quota, 15% are for NRI category. In the year 2005, annual fee for MBBS course was fixed as Rs. 75,000 for government and management quota which was increased to Rs. 1 lac in the year 2006. Though, *vide* notification dated 1st August, 2007, fee was enhanced to Rs. 1.15 lacs for MBBS, Rs. 63,250 for BDS and Rs. 40,250 for BAMS/BHMS but on account of pressure of the private colleges particularly boycotting of counseling by the private colleges on 2nd August, 2007, as per public notice dated 2nd August, 2007 published by Punjab Private Self Finance Medical Dental and Ayurvedic Colleges Association, the fee structure was arbitrarily increased *vide* notification dated 3rd August, 2007 to Rs. 3 lacs per annum for MBBS, Rs. 2,30,000 per annum for BDS and Rs. 1,10,000 per annum for BAMS/BHMS. The stand of the private medical colleges was that earlier fee was fixed after taking into account income from NRI seats but NRI seats could not be filled up, which called for revision thereof. The rate for NRI seats was $ 75000 for MBBS, $ 30000 for BDS and $ 15000 for BAMS/BHMS. This Court in C.W.P. No. 97 of 2007 **Sohrab Arora** *versus* **State of Punjab** found that admissions under NRI quota were being made from non NRIs in violation of directions of the Hon'ble Supreme Court and issued contempt notice to the State which led to issuance of corrigendum by the State dated 13th July, 2007. As per the said corrigendum, the colleges were debarred from admitting non NRIs against NRI seats. Colleges protested on the ground that fee had been fixed by wrongly taking into account extra income from NRI seats. However, the Hon'ble Supreme Court *vide* order dated 17th September, 2007 in CA No. 4329 of 2007, **Shikha Aggarwal** *versus* **State of Punjab** allowed the arrangement to continue for the current year. Still, the Colleges continued to charge revised fee. The NRI seats were filled up in the management quota by charging up to Rs. 35 lacs in accordance with the notification dated 3rd August, 2007 as under :—

> "But the left over seats of NRI quota will be filled up by the Management and fee of these left over seats will not exceed the fee chargeable from the NRI seats, by the respective institutions/college."

(14) The private colleges were thus profiteering and the fee was being revised contrary to the direction of the Hon'ble Supreme Court against not revising the fee for three years. The management quota was contrary to the directions of the Hon'ble Supreme Court in ***P.A. Inamdar.*** The revised fee did not take into account the fee approved by the FFC. The revised fee was also against the provisions of the 2006 Act as the view point of the students was not considered. Moreover, the FFC headed by the Secretary Medical Education as per 2006 Act had also fixed fee of Rs. 1 lac per annum for MBBS and Rs. 55,000/- per annum for BDS which was again revised after two days without any change in circumstances. The parents are finding it difficult to pay the revised fee. If a student becomes doctor from a commercialized college, he may tend to commercialize the medical profession. The State Government has acted on political consideration and the pressure of the private college ignoring that education was the main tool for achieving social justice. The petitioners made representations to put forward their view point but the same were not taken into account.

(15) Thus, case of the petitioners is that revision of fee to Rs. 3 lacs for MBBS students, Rs. 2.30 lacs for BDS and Rs. 1.10 lacs for BAMS/BHMS degrees was arbitrary and that higher fee for management quota was not permissible. Categorization of management quota and government quota was illegal.

(16) The colleges have contested the stand of the students by submitting that the fee fixed by the FFC was arbitrarily low which continued in notification dated 1st August, 2007 and thus revision of fee *vide* notification dated 3rd August, 2007 was fully justified. The Chartered Accountant appointed by the FFC had worked out the fee of Rs. 2.14 lacs per student but the FFC had arbitrarily fixed low fee which has been challenged by the colleges in writ petitions (Category II). For the government quota, lesser fee had been fixed which had also to be taken into account while fixing the fee for the management quota. Apart from contesting the writ petition of the students seeking reduction in fee, the colleges have also filed writ petitions putting forward their grievances which are covered in Category IV. The said category is dealt with separately.

**Category IV**

(17) In this category, the colleges have challenged the 2006 Act and the notifications issued thereunder. Facts in cateogry IV are being taken from C.W.P. No. 11790 of 2006 which is treated as representative petition

in this category. The 2006 Act which was notified on 27th March, 2006 and was amended by ordinance dated 24th April, 2006 which was later replaced by Act notified on 19th July, 2006. Notification dated 24th April, 2006 was issued amending the notifications dated 25th April, 2006 and 20th July, 2006. The petitioner is assoication of self financed medical colleges. They were entitled to autonomy in the matter of fee fixation subject to their not charging capitation fee or not profiteering which aspects could be regulated by a committee of the State Government. However, the FFC fixed very low fee interfering with the autonomy of the private unaided colleges against which writ petitions had already been filed. During pendency thereof, the impugned Act was notified which is applicable for the session 2006–07 onwards. *Vide* notification dated 25th April, 2006, fee was fixed for the students admitted during 2004–05 and 2005–06 for their second and third years and for new students admitted in the session 2006–07. The impugned Act could not be invoked even for the sessions after 2006–07 in respect of students already admitted. The fee fixed as per impugned notification was lower than the fee being charged by private unaided colleges in the neighbouring States of Uttaranchal, Haryana and Jammu and Kashmir and lower than the expenditure incurred by the colleges in imparting education. The impugned Act and the notifications issued for conducting admissions and fixing fee structure are violative of fundamental right of the private medical colleges under Article 19. The Colleges have right to fix fee and to make admissions. Moreover, the eligibility criteria for admission was governed by Central Act namely Indian Medicine Central Council Act, 1970. The State legislation was repugnant to the Central Act. Section 22 of the Central Act provided for minimum standards being laid down while Section 36 provided for making of regulation for courses and period of study, standard of staff, infrastructure and conduct of professional examination or any other matters. Indian Medical Council Act, 1956 which is also a Central Act, provides for fixation of standards for medical education under section 19A. Section 33 provides for making of regulation for courses of study, standards of infrastructure and conduct of professional examination. In exercise of the said power, regulations called the Post Graduate Medical Education Regulations 2000 and Regulations of Graduate Medical Education, 1997 have been framed providing for eligibility for admission and other subjects. Section 7 and 9(a) dealing with fixation of fee and admission are violative of Article 19(1)(g) of the Constitution. Though under the unamended

Section 7, the fee was to be fixed as per specified parameters, under the amended provision, the said parameters are not applicable and only factor to be taken into account is minimum standards laid down by the Council. There could be no Government quota in admissions.

(18) Even though, no reply has been filed by the State in this writ petition, reply has been filed in connected CWP No. 9447 of 2007 to the effect that the provision for admission to management quota seats through Central Admission Committee was for larger interest and welfare of student community to maintain transparency and to promote merit and to curb malpractices in view of observations of the Hon'ble Supreme Court in paras 138, 141 and 142 in **P.A. Inamdar.**

**Questions**

(19) In view of above pleadings, the questions raised can be framed as under :—

(1) Whether fee fixation by FFC for the period prior to sessions 2006-07 is excessive as stated by the students (Category I) or low as stated by the colleges (Category II) ?

(2) Whether fee fixation and admission procedure violate fundamental right of the college under Article 19(1)(g) of the Constitution (Category IV) and whether the impugned notification issued under the said Act prescribed exorbitant and arbitrary fee violating right of students (Category III) ?

**Statutory provisions**

(20) Before dealing with the above questions, it will be appropriate to reproduce the relevant orders/notifications/statutory provisions relevant for categories III and IV.

**Relevant provisions of 2006 Act**

**Section 3** : (1) The State Government shall regulate admission, fix fee and make reservation for different categories in admissions to private health sciences educational institution.

(2) For the purpose of determining the fee, the State Government may require any private health sciences educational institution to furnish such information, as it may deem appropriate.

(3) The State Government shall ensure that admission under the management category in a private health sciences educational institution is made in a fair and transparent manner on the basis of the *inter se* merit determined by the Common entrance Test through the centralized receipt of applications and centralized counselling as per procedure, notified by the State Government in the Official Gazette.

**Section 4** : (1) the eligibility criteria for admission to a private health sciences educational institution shall be such, as may be determined and notified by the State Government from time to time.

(2) The State Government or any other authority, authorized by it, shall conduct the Common Entrance Test for making admissions to all the private health sciences educational institutions in the State of Punjab.

(3) Admission to all the categories of seats in private health sciences educational institutions, except in the case of Foreign Indian students, shall be made on the basis of the inter se merit of the candidates obtained in the Common Entrance Test.

**Section 6 :** All private health science educational institutions shall reserve seats for admission in open merit category and management category, for advancement of socially and educationally backward classes of citizens or for the Scheduled Castes or Scheduled Tribes to such extent, as may be notified by the State Government in the Official Gazette from time to time.

**Section 7 :** (as originally enacted) (1) The State Government shall determine fee, to be charged by a private health sciences educational institution, located in the State, having regard to the following factors, namely :—

(a) The location of the institution ;

(b) The nature of the curriculum ;

(c) The cost of land and building ;

(d) The available infrastructure and equipment ;

(e) The expenditure incurred or being incurred on faculty, administration and maintenance ;

(f) The reasonable profit, required for the growth and development of the institution ; and

(g) Any other relevant factor, which the State Government deems just and appropriate for the determination of fee.

(2) Before determining fee under sub section (1), the State Government shall give the concerned private health sciences educational institutions and the representatives of the students already studying in such institutions and the representatives of the students, who intend to seek admission in those institutions, a reasonable opportunity to express their view points in writing with respect to the fee determination.

(3) Notwithstanding anything contained in sub-sections (1) and (2), the State Government may in public interest, determine a provisional fee."

**Amending ordinance 2006 dated 19th July, 2006 later replaced by Act amending Section 7**

"6. In the principal Act, for section 7, the following section shall be substituted, namely—

"7. (1) The State Government shall determine or cause to be determined the fee to be charged by the private health sciences educational institutions, having regard to the minimum norms of infrastructure and facilities as laid down by the concerned Council.

(2) Notwithstanding anything contained in sub-section (1), the State Government may, in public interest, determine a provisional fee :"

Provided that the State Government shall determine fee in accordance with the provisions of sub-section (1) within a period of ninety days from the date of fixation of such provisional fee."

**Notification dated 25th April, 2006**

"Provisional fee structure for the student relating to year 2004-05 to 2006-07 for in the private unaided medical institutes in the State of Punjab.

Under the powers conferred by Clause 2, sub clause (c) of the Punjab Private Health Sciences Educational Institutions (Regulation of admission, Fixation of fee and making of reservation) Act, 2006 and all other powers given therein, the Governor of Punjab is pleased to notify the following provisional fee structure to be charged from the students admitted in the year 2004-5/05/06 during the 2nd/3rd year and for the students to be admitted in 2006-07 in the Private Medical/Dental/Ayurvedic/Homeopathic colleges in the State of Punjab.

**College fee :**

| | |
|---|---|
| MBBS | 1,00,000 |
| BDS | 55,000/- |
| BAMS/BHMS | 35,000/-" |

**Notification dated 1st August, 2007**

"Under the powers conferred under section 7(1) of the Punjab Private Health Sciences Educational Institution (Regulation of admission, fixation of fee and making of Reservation) Act, 2006 and all other powers given therein, the Governor of Punjab is pleased to notify the following fee structure to be charged from the students to be admitted in 2007-08 in the Private Medical/ Dental/Ayurvedic/Homeopathic Colleges in the State of Punjab.

**UNDER GRADUATE COURSES :**

| Sr. No. | Course | Fee in Rs. (per annum) |
|---|---|---|
| 1 | MBBS | 1,15,000 |
| 2 | BDS | 63,250 |
| 3 | BAMS/BHMS | 40,250 |

**PG COURSES (MEDICAL/DENTAL) :**

| Sr. No. | Course | Fee in Rs. (per annum) |
|---|---|---|
| 1 | Clinical MD/MS | 2,99,000 |
| 2 | Basic MD/MS | 2,01,250 |
| 3 | PG diploma | 2,30,000 |
| 4 | Clinical MDS | 1,72,750 |

However, there will be no change in the fee structure, so far as the seats under NRI quota are concerned."

**Notification dated 3rd August, 2007**

"In partial modification of the Punjab Government Notification No. 5/35/07-3HBIII/4790 dated 1st August, 2007, the Governor of Punjab is pleased to modify the fee structure to be charged from students to be admitted in 2007-08 in Private Medical/ Dental/Ayurvedic/Homeopathic Colleges in the State of Punjab :—

**UNDER GRADUATE COURSES**

| Sr. No. | Course | 50% Government quota fee in Rs. (per annum) | 35% management quota in Rs. (per annum) |
|---|---|---|---|
| 1 | MBBS | 1,15,000 | 3,00,000 |
| 2 | BDS | 63,250 | 2,30,000 |
| 3 | BAMS/BHMS | 40,250 | 1,10,000 |

**PG COURSES (MEDICAL/DENTAL) :**

| Sr. No. | Course | Fee in Rs. (per annum) |
|---|---|---|
| 1 | Clinical MD/MS | 2,99,000 |
| 2 | Basic MD/MS | 2,01,250 |
| 3 | PG Diploma | 2,30,000 |
| 4 | Clinical MDS | 2,60,000 |

However, there will be no change in the fee structure, so far as the seats under NRI quota are concerned, except MDS courses in which fee has been raised to Rs. 2,60,000/- hence equivalent amount in foreign exchange in US $ shall be chargeable. But the left over seats of NRI quota will be filled up by the Management and fee of these left over seats will not exceed the fee chargeable from the NRI seats, by the respective institutions/college."

**Relevant extract from notification dated 29th March, 2006**

"Clasue 3. The Governor of Punjab is further pleased to authorize and direct Baba Farid University of Health Sciences, Faridkot to conduct the Common Entrance Test PGET 2006 for admissions to post graduate courses in all Health Sciences Educational Institutions affiliated to Baba Farid University of Health Sciences as per procedure and criteria laid down in or notified under the Punjab Private Health Sciences Educational Institutions (Regulation of Admission, Fixation of fee and Making of Reservation) Act, 2006.

Xx xx xx xxxx xxx

Clause 30. Reservations in Private Unaided Health Sciences Educational Institutions shall be made under the Punjab Private Health Sciences Educational Institution (Regulation of Admission, Fixation of fee and Making of Reservation) Act, 2006 for the following candidates :—

| | | |
|---|---|---|
| (i) | Schedule caste | 25% |
| (ii) | Backward classes | 5% |
| | *(Note* : The Backward Class Certificate must be as per the latest instructions issued by the Government of Punjab) | |
| (iii) | Physically handicapped as per MCI guidelines | 3% |
| | (Disability 50% to 70% to be determined at the time of counselling by a duly constituted board of the specialty of Orthopaedics). | |

**Relevant judgments**

(21) In **P.A. Inamdar,** a bench of seven Hon'ble Judges considered the issue of regulations of admissions and fee. The said issue had also been earlier gone into by a bench of 11 Judges in **T.M.A. Pai Foundation** and a bench of 5 Judges in **Islamic Academy.** We consider it appropriate to extract some parts of judgment in **P.A. Inamdar** for ready reference :—

> "13. Having dealt with each of the abovesaid heads, the Court through the majority opinion expressed by B. N. Kirpal, C.J., recorded answers to the 11 questions as they were framed and posed for resolution. The questions and the answers as given by the majority are set out hereunder :—
>
> xx xx xx xx xx xx
>
> Q.9. Whether the decision of this Court in Unni Krishnan, J.P. *versus* State of A.P., (1993) 1 SCC 645 (except where it holds that primary education is a fundamental right) and the scheme framed thereunder require reconsideration/modifications and if yes, what ?
>
> A. The scheme framed by this Court in Unni Krishnan case (supra) and the direction to impose the same, except where it holds that primary education is a fundamental right, is unconstitutional. However, the principle that there should not be capitation fee or profiteering is correct. Reasonable surplus to meet cost of expansion and augmentation of facilities does not, however, amount to profiteering.
>
> Q. 10. Whether the non-minorities have the right to establish and administer educational institution under Articles 21 and 29(1) read with Articles 14 and 15(1) in the same manner and to the same extent as minority institutions ?
>
> and
>
> Q. 11. What is the meaning of the expressions "education" and "educational institutions" in various provisions of the Constitution ? Is the right to establish and administer educational institutions guaranteed under the Constitution ?

A. The expression "education" in the articles of the Constitution means and includes education at all levels from the primary school level up to the postgraduate level. It includes professional education. The expression "educational institutions" means institutions that impart education, where "education" is as understood hereinabove.

The right to establish and administer educational institutions is guaranteed under the Constitution to all citizens under Articles 19(1)(g) and 26, and to minorities specifically under Article 30.

All citizens have a right to establish and administer educational institutions under Article 19(1)(g) and 26, but this right is subject to the provisions of Articles 19(6) and 26(a). However, minority institutions will have a right to admit students belonging to the minority group, in the manner as discussed in this judgment."

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***Pai Foundation explained in Islamic Academy***

15. Pai Foundation Judgment was delivered on 31st October, 2002. The Union of India, various State Governments and the Educational Institutions, each understood the majority judgment in its own way. The State Governments embarked upon enacting laws and framing the regulations, governing the educational institutions in consonance with their own understanding of Pai Foundation. This led to litigation in several Courts. Interim orders passed therein by High Courts came to be challenged before this Court. At the hearing, again the parties through their learned counsel tried to interpret the majority decision in Pai Foundation in different ways as it suited them. The parties agreed that there were certain anomalies and doubts, calling for clarification. The persons seeking such clarifications were unaided professional educational institutions, both minority and the non-minority. The Court formulated four questions as arising for consideration in view of the rival submissions made before the Court in Islamic Academy :

"(1) whether the educational institutions are entitled to fix their own fee structure ;

(2) whether minority and non-minority educational institutions stand on the same footing and have the same rights ;

(3) whether private unaided professional colleges are entitled to fill in their seats, to the extent of 100%, and if not, to what extent ; and

(4) whether private unaided professional colleges are entitled to admit students by evolving their own method of admission."

16. We could attempt at formulating the gist of the answers given by the Constitution Bench of the Court as under :

(1) Each minority institution is entitled to have its own fee structure subject to the condition that there can be no profiteering and capitation fees cannot be charged. A provision for reasonable surplus can be made to enable future expansion. The relevant factors which would go into determining the reasonability of a fee structure, in the opinion of majority, are : (i) the infrastructure and facilities available, (ii) the investments made, (iii) salaries paid to the teachers and staff, (iv) future plans for expansion and betterment of the institution etc.

S.B. Sinha, J, defined what is 'capitation' and 'profiteering' and also said that reasonable surplus should ordinarily vary from 6 per cent to 15 per cent for utilization in expansion of the system and development of education.

(2) In the opinion of the majority, minority institutions stand on a better footing than non-minority institutions. Minority educational institutions have a guarantee or assurance to establish and administer educational institutions of their choice. State Legislation, primary or delegated, cannot favour non-minority institution over minority institution. The difference arises because of Article 30, the protection whereunder is available to minority educational institutions only. The majority opinion called it a "special right" given under Article 30.

In the opinion of S.B. Sinha, J, minority educational institutions do not have a higher right in terms of Article 30(1) ; the rights of minorities and non-minorities are equal. What is conferred by Article 30(1) of the Constitution is "certain additional protection" with the object of bringing the minorities on the same platform as that of non-minorities, so that the minorities are protected by establishing and administering educational institutions for the benefit of their own community, whether based on religion or language.

It is clear that as between minority and non-minority educational institutions, the distinction made by Article 30(1) in the fundamental rights conferred by Article 19(1)(g) has been termed by the majority as "special right" while in the opinion of S.B. Sinha, J, it is not a right but an "additional protection". What difference it makes, we shall see a little later.

(3) and (4). Questions 3 and 4 have been taken up for consideration together. A reading of the opinion recorded in Islamic Academy shows that paras 58, 59 and 68 of Pai Foundation were considered and sought to be explained. It was not very clear as to what types of institutions were being dealt with in the above referred to paragraphs by the majority in Pai Foundation. Certainly, distinction was being sought to be drawn between professional colleges and other educational institutions (both minority and unaided). Reference is also found to have been made to minority and non-minority institutions. At some places, observations have been made regarding institutions divided into groups only by reference to aid, that is whether they are aided or unaided educational institutions without regard to the fact whether they were minority or non-minority institutions. It appears that there are a few passages/sentences wherein it is not clear which type of institutions the majority opinion in Pai Foundation was referring to thereat. However, the majority opinion in Islamic Academy has by explaining Pai Foundation held as under :

(1) In professional institutions, as they are unaided, there will be full autonomy in their administration,

but the principle of merit cannot be sacrificed, as excellence in professions is in national interest.

(2) Without interfering with the autonomy of unaided institutions, the object of merit based admissions can be secured by insisting on it as a condition to the grant of recognition and subject to the recognition of merit, the management can be given certain discretion in admitting students.

(3) The management can have quota for admitting students at its discretion but subject to satisfying the test of merit based admissions, which can be achieved by allowing management to pick up students of their own choice from out of those who have passed the common entrance test conducted by a centralized mechanism. Such common entrance test can be conducted by the State or by an association of similarly placed institutions in the State.

(4) The State can provide for reservation in favour of financially or socially backward sections of the society.

(5) The prescription for percentage of seats, that is allotment of different quotas such as management seats, State's quota, appropriated by the State for allotment to reserved categories etc., has to be done by the State in accordance with the "local needs" and the interests/needs of that minority community in the State, both deserving paramount consideration. The exact concept of "local needs" is not clarified. The plea that each minority unaided educational institution can hold its own admission test was expressly overruled. The principal consideration which prevailed with the majority in Islamic Academy for holding in favour of common entrance test was to avoid great hardship and incurring of huge cost by the hapless students in appearing for individual tests of various colleges.

17. The majority opinion carved out an exception in favour of those minority educational professional institutions which were established and were having their own admission procedure for at least 25 years from the requirement of joining any common entrance test, and such institutions were permitted to have their own admission procedure. The State Governments were directed to appoint a permanent Committee to ensure that the tests conducted by the association of colleges is fair and transparent.

18. S. B. Sinha, J, in his separate opinion, agreed with the majority that the merit and merit alone should be the basis of selection for the candidates. He also agreed that one single standard for all the institutions was necessary to achieve the object of selection being made on merit by maintaining uniformity of standard, which could not be left to any individual institution in the matter of professional courses of study. However, the merit criterion in the opinion of Sinha, J, was required to be associated with the level of education. To quote his words : "the merit criterion would have to be judged like a pyramid. At the kindergarten, primary, secondary levels, minorities may have 100% quota. At this level the merit may not have much relevance at all but at the level of higher education and in particular, professional education and postgraduate-level education, merit indisputably should be a relevant criterion. At the postgraduation level, where there may be a few seats, the minority institutions may not have much say in the matter. Services of doctors, engineers and other professionals coming out from the institutions of professional excellence must be made available to the entire country and not to any particular class of group of people. All citizens including the minorities have also a fundamental duty in this behalf."

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**The questions spelled out by Orders of Reference**

27. In the light of the two orders of reference, referred to hereinabove, we propose to confine our discussion to the

questions set out hereunder which, according to us, arise for decision :—

(1) To what extent the State can regulate the admissions made by unaided (minority or non-minority) educational institutions ? Can the State enforce its policy of reservation and/or appropriate to itself any quota in admissions to such institutions ?

(2) Whether unaided (minority and non-minority) educational institutions are free to devise their own admission procedure or whether direction made in Islamic Academy for compulsorily holding entrance test by the State or association of institutions and to choose therefrom the students entitled to admission in such institutions, can be sustained in light of the law laid down in Pai Foundation ?

(3) Whether Islamic Academy could have issued guildelines in the matter of regulating the fee payable by the students to the educational institutions ?

(4) Can the admission procedure and fee structure be regulated or taken over by the Committees ordered to be constituted by Islamic Academy ?

xx xx xx xx xx

124. So far as appropriation of quota by the State and enforcement of its reservation policy is concerned, we do not see much of difference between non-minority and minority unaided educational institutions. We find great force in the submission made on behalf of the petitioners that the States have no power to insist on seat sharing in the unaided private professional educational institutions by fixing a quota of seats between the management and the State. The State cannot insist on private educational institutions which receive no aid from the State to implement State's policy on reservation for granting admission on lesser percentage of marks, i.e. on any criterion except merit. As per our understanding, neither in the judgment of Pai Foundation nor in the Constitution Bench decision in Kerala

Education Bill, which was approved by Pai Foundation, there is anything which would allow the State to regulate or control admissions in the unaided professional educational institutions so as to compel them to give up a share of the available seats to the candidates chosen by the State, as if it was filling the seats available to be filled up at its discretion in such private institutions. This would amount to nationalization of seats which has been specifically disapproved in Pai Foundation. Such imposition of quota of State seats or enforcing reservation policy of the State on available seats in unaided professional institutions are acts constituting serious encroachment on the right and autonomy of private professional educational institutions. Such appropriation of seats can also not be held to be a regulatory measure in the interest of minority within the meaning of Article 30(1) or a reasonable restriction within the meaning of Article 19(6) of the Constitution. Merely because the resources of the State in providing professional education are limited, private educational institutions, which intend to provide better professional education, cannot be forced by the State to make admissions available on the basis of reservation policy to less meritorious candidate. Unaided institutions, as they are not deriving any aid from State funds, can have their own admissions if fair, transparent, non-exploitative and based on merit.

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126. The observations in paragraph 68 of the majority opinion in Pai Foundation, on which the learned counsel for the parties have been much at variance in their submissions, according to us, are not to be read disjointly from other parts of the main judgment. A few observations contained in certain paragraphs of the judgment of Pai Foundation, if read in isolation, appear conflicting or inconsistent with each other. But if the observations made and the conclusions derived are read as a whole, the judgment nowhere lays down that unaided private educational institutions of minorities and non-minorities can be forced to submit to seat sharing and reservation policy of the State. Reading relevant parts of the judgment on which learned counsel

have made comments and counter comments and reading the whole judgment (in the light of previous judgments of this Court, which have been approved in Pai Foundation) in our considered opinion, observations in paragraph 68 merely permit unaided private institutions to maintain merit as the criterion of admission by voluntarily agreeing for seat sharing with the State of adopting selection based on common entrance test of the State. There are also observations saying that they may frame their own policy to give free-ships and scholarships to the needy and poor students or adopt a policy in line with the reservation policy of the state to cater to the educational needs of weaker and poorer sections of the society.

127. Nowhere in Pai Foundation, either in the majority or in the minority opinion, have we found any justification for imposing seat sharing quota by the State on unaided private professional educational institutions and reservation policy of the State or State quota seats or management seats.

128. We make it clear that the observations in Pai Foundation in paragraph 68 and other paragraphs mentioning fixation of percentage of quota are to be read and understood as possible consensual arrangements which can be reached between unaided private professional institutions and the State.

129. In Pai Foundation, it has been very clearly held at several places that unaided professional institutions should be given greater autonomy in determination of admission procedure and fee structure. State regulation should be minimal and only with a view to maintain fairness and transparency in admission procedure and to check exploitation of the students by charging exorbitant money or capitation fees.

***130. For the aforesaid reasons, we cannot approve of the scheme evolved in Islamic Academy to the extent it allows States to fix quota for seat sharing between management and the States on the basis of local needs of each State, in the unaided private educational institutions of both minority and non-minority categories. That part of the***

***judgment in Islamic Academy, in our considered opinion, does not lay down the correct law and runs counter to Pai Foundation.***

**NRI seats**

131. Here itself we are inclined to deal with the question as to seats allocated for Non-Resident Indians ('NRI', for short) or NRI seats. It is common knowledge that some of the institutions grant admissions to certain number of students under such quota by charging a higher amount of fee. In fact, the term 'NRI' in relation to admissions is a misnomer. By and large, we have noticed in cases after cases coming to this Court, neither the students who get admissions under this category nor their parents are NRIs. In effect and reality, under this category, less meritorious students, but who can afford to bring more money, get admission. During the course of hearing, it was pointed out that a limited number of such seats should be made available as the money brought by such students admitted against NRI quota enables the educational institutions to strengthen its level of education and also to enlarge its educational activities. It was also pointed out that people of Indian origin, who have migrated to other countries, have a desire to bring back their children to their own country as they not only get education but also get reunited with Indian cultural ethos by virtue of being here. They also wish the money which they would be spending elsewhere on education of their children should rather reach their own motherland. A limited reservation of such seats, not exceeding 15% in our opinion, may be made available to NRIs depending on the discretion of the management subject to two conditions. First, such seat should be utilized *bona fide* by the NRIs only and for their children or wards. Secondly, within this quota, the merit should not be given a complete go-by. The amount of money in whatever form collected from such NRIs, should be utilized for benefiting students such as from economically weaker sections of the society, whom, on well defined criteria, the educational institution may admit on subsidized payment of their fee. To prevent misutilisation of such quota or any malpractice

referable to NRI quota seats, suitable legislation or regulation needs to be framed. So long as the State does not do it, it will be for the Committees constituted pursuant to Islamic Academy's direction to regulate.

132. Our answer to the first question is that neither the policy of reservation can be enforced by the State nor any quota or percentage of admissions can be carved out to be appropriated by the State in a minority or non-minority unaided educational institution. Minority institutions are free to admit students of their own choice including students of non-minority community as also members of their own community from other States, both to a limited extent only and not in a manner and to such an extent that their minority educational institution status is lost. If they do so, they lose the protection of Article 30(1).

Q. 2 Admission procedure of unaided educational institutions.

133. So far as the minority unaided institutions are concerned to admit students being one of the components of "right to establish and administer an institution", the State cannot interfere therewith. Upto the level of undergraduate education, the minority unaided educational institutions enjoy total freedom.

**134. However, different considerations would apply for graduate and post-graduate level of education, as also for technical and professional educational institutions. Such education cannot be imparted by any institution unless recognized by or affiliated with any competent authority created by law, such as a University, Board, Central or State Government or the like. Excellence in education and maintenance of high standards at this level are a must. To fulfill these objectives, the State can and rather must, in national interest, step in. The education, knowledge and learning at this level possessed by individuals collectively constitutes national wealth.**

135. Pai Foundation has already held that the minority status of educational institutions is to be determined by treating the States as units. Students of that community residing in other States

where they are not in minority, shall not be considered to be minority in that particular State and hence their admission would be at par with other non-minority students of that State. Such admissions will be only to a limited extent that is like a 'sprinkling' of such admissions, the term we have used earlier borrowing from Kerala Education Bill, 1957. In minority educational institutions, aided or unaided, admissions shall be at the State level. Transparency and merit shall have to be assumed.

136. Whether minority or non-minority institutions, there may be more than one similarly situated institutions imparting education in any one discipline, in any State. The same aspirant seeking admission to take education in any one discipline of education shall have to purchase admission forms from several institutions and appear at several admission tests conducted at different places on same or different dates and there may be a clash of dates. If the same candidate is required to appear in several tests, he would be subjected to unnecessary and avoidable expenditure and inconvenience. There is nothing wrong in an entrance test being held for one group of institutions imparting same or similar education. Such institutions situated in one State or in more than one State may join together and hold a common entrance test or the State may itself or through an agency arrange for holding of such test. Out of such common merit list the successful candidates can be identified and chosen for being allotted to different institutions depending on the courses of study offered, the number of seats, the kind of minority to which the institution belongs and other relevant factors. Such an agency conducting Common Entrance Test (CET, for short) must be one enjoying utmost credibility and expertise in the matter. This would better ensure the fulfillment of twin objects of transparency and merit. CET is necessary in the interest of achieving the said objectives and also for saving the student community from harassment and exploitation. Holding of such common entrance test followed by centralized counselling or, in other words, single window system regulating admissions does not cause any dent in the right of minority unaided educational institutions to admit

students of their choice. Such choice can be exercised from out of list of successful candidates prepared at the CET without altering the order of merit *inter se* of the students so chosen.

137. Pai Foundation has held that minority unaided institutions can legitimately claim unfettered fundamental right to choose the students to be allowed admissions and the procedure there for subject to its being fair, transparent and non- exploitative. The same principle applies to non-minority unaided institutions. There may be a single institution imparting a particular type of education which is not being imparted by any other institution and having its own admission procedure fulfilling the test of being fair, transparent and non-exploitative. All institutions imparting same or similar professional education can join together for holding a common entrance test satisfying the abovesaid triple tests. The State can also provide a procedure of holding a common entrance test in the interest of securing fair and merit-based admissions and preventing mal-administration. The admission procedure so adopted by private institution or group of institutions, if it fails to satisfy all or any of the triple tests, indicated hereinabove, can be taken over by the State substituting its own procedure. The second question is answered accordingly.

138. It needs to be specifically stated that having regard to the larger interest and welfare of the student community to promote merit, achieve excellence and curb mal-practices, it would be permissible to regulate admissions by providing a centralized and single window procedure. Such a procedure, to a large extent, can secure grant of merit based admissions on a transparent basis. Till regulations are framed the admission committees can oversee admissions so as to ensure that merit is not the casualty.

Q. 3 Fee, regulation of

139. To set up a reasonable fee structure is also a component of "the right to establish and administer an institution" within the meaning of Article 30(1) of the Constitution, as per the law declared in Pai Foundation. Every institution is free to devise

its own fee structure subject to the limitation that there can be no profiteering and no capitation fee can be charged directly or indirectly, or in any form (Paras 56 to 58 and 161 [Answer to Q. 5(c)] of Pai Foundation are relevant in this regard..

**Capitation Fees**

140. Capitation fee cannot be permitted to be charged and no seat can be permitted to be appropriated by payment of capitation fee. 'Profession' has to be distinguished from 'business' or a mere 'occupation'. While in business, and to a certain extent in occupation, there is a profit motive, profession is primarily a service to society wherein earning is secondary or incidental. A student who gets a professional degree by payment of capitation fee, once qualified as a professional, is likely to aim more at earning rather than serving and that becomes a bane to the society. The charging of capitation fee by unaided minority and non-minority institutions for professional courses is just not permissible. Similarly, profiteering is also not permissible. Despite the legal position, this Court cannot shut its eyes to the hard realities of commercialization of education and evil practices being adopted by many institutions to earn large amounts for their private or selfish ends. If capitation fee and profiteering is to be checked, the method of admission has to be regulated so that the admissions are based on merit and transparency and the students are not exploited. It is permissible to regulate admission and fee structure for achieving the purpose just stated.

*141. Our answer to Question-3 is that every institution is free to devise its own fee structure but the same can be regulated in the interest of preventing profiteering. No capitation fee can be charged.*

**Q. 4. Committees formed pursuant to Islamic Academy**

142. Most vehement attack was laid by all the learned counsel appearing for the petitioner-applicants on that part of Islamic Academy which has directed the constitution of two committees dealing with admissions and fee structure. Attention of the Court

was invited to paras 35, 37, 38, 45 and 161 (answer to question 9) of Pai Foundation wherein similar scheme framed in Unni Krishnan was specifically struck down. *Vide* para 45, Chief Justice Kirpal has clearly ruled that the decision in Unni Krishnan insofar as it farmed the scheme relating to the grant of admission and the fixing of the fee, was not correct and to that extent the said decision and the consequent directions given to UGC, AICTE, MCI, the Central and the State Government etc. are overruled. *Vide* para 161, Pai Foundation upheld Unni Krishnan to the extent to which it holds the right to primary education as a fundamental right, but the scheme was overruled. However, the principle that there should not be capitation fee or profiteering was upheld. Leverage was allowed to educational institutions to generate reasonable surplus to meet cost of expansion and augmentation of facilities which would not amount to profiteering. It was submitted that Islamic Academy has once again restored such Committees which were done away with by Pai Foundation.

*143. The learned senior counsel appearing for different private professional institutions, who have questioned the scheme of permanent Committees set up in the judgment of Islamic Academy, very fairly do not dispute that even unaided minority institutions can be subjected to regulatory measures with a view to curb commercialization of education profiteering in it and exploitation of students. Policing is permissible but not nationalization or total take over, submitted Shri Harish Salve, the learned senior counsel. Regulatory measures to ensure fairness and transparency in admission procedures to be based on merit have not been opposed as objectionable though a mechanism other than formation of Committees in terms of Islamic Academy was insisted on and pressed for. Similarly, it was urged that regulatory measures, to the extent permissible, may form part of conditions of recongnition and affiliation by the university concerned and/or MCI and AICTE for maintaining standards of excellence in professional*

*education. Such measures have also not been questioned as violative of the educational rights of either minorities or non-minorities.*

144. The two committees for monitoring admission procedure and determining fee structure in the judgment of Islamic Academy, are in our view, permissive as regulatory measures aimed at protecting the interest of the student community as a whole as also the minorities themselves, in maintaining required standards of professional education on non- exploitative terms in their institutions. Legal provisions made by the State Legislatures or the scheme evolved by the Court for monitoring admission procedure and fee fixation do not violate the right of minorities under Articles 30(1) on the right of minorities and non-minorities under Article 19(1)(g). They are reasonable restrictions in the interest of minority institutions permissible under Article 30(1) and in the interest of general public under Article 19(6) of the Constitution.

*145. The suggestion made on behalf of minorities and non-minorities that the same purpose for which Committees have been set up can be achieved by post-audit or checks after the institutions have adopted their own admission procedure and fee structure, is unacceptable for the reasons shown by experience of the educational authorities of various States. Unless the admission procedure and fixation of fees is regulated and controlled at the initial stage, the evil of unfair practice of granting admission on available seats guided by the paying capacity of the candidates would be impossible to curb.*

146. Non-minority unaided institutions can also be subjected to similar restrictions which are found reasonable and in the interest of student community. Professional education should be made accessible on the criterion of merit and on non-exploitative terms to all eligible students on an uniform basis. Minorities or non-minorities, in exercise of their educational rights in the field of professional education have an obligation and a duty to maintain

requisite standards of professional education by giving admissions based on merit and making education equally accessible to eligible students through a fair and transparent admission procedure and on a reasonable fee-structure.

147. In our considered view, on the basis of judgment in Pai Foundation and various previous judgments of this Court which have been taken into consideration in that case, the scheme evolved of setting up the two Committees for regulating admissions and determining fee structure by the judgment in Islamic Academy cannot be faulted either on the ground of alleged infringement of Article 19(1)(g) in case of unaided professional educational institutions of both categories and Article 19(1)(g) read with Article 30 in case of unaided professional institutions of minorities.

148. A fortiori, we do not see any impediment to the constitution of the Committees as a stopgap or *ad hoc* arrangement made in exercise of the power conferred on this Court by Article 142 of the Constitution until a suitable legislation or regulation framed by the State steps in. Such Committees cannot be equated with Unni Krishnan Committees which were supposed to be permanent in nature.

149. However, we would like to sound a note of caution to such Committees. The learned counsel appearing for the petitioners have severely criticised the functioning of some of the Committees so constituted. It was pointed out by citing concrete examples that some of the Committees have indulged in assuming such powers and performing such functions as were never given or intended to be given to them by Islamic Academy. Certain decisions of some of the Committees were subjected to serious criticism by pointing out that the fee structure approved by them was abysmally low which has rendered the functioning of the institutions almost impossible or made the institutions run into losses. In some of the institutions, the teachers have left their job and migrated to other institutions as it was not possible for the management to retain talented and highly qualified teachers

against the salary permitted by the Committees. Retired High Court Judges heading the Committees are assisted by experts in accounts and management. They also have the benefit of hearing the contending parties. We expect the Committees, so long as they remain functional, to be more sensitive and to act rationally and reasonably with regard for realities. They should refrain from generalizing fee structures and, where needed, should go into accounts, schemes, plans and budgets of an individual institution for the purpose of finding out what would be an ideal and reasonable fee structure for that institution.

150. We make it clear that in case of any individual institution, if any of the Committees is found to have exceeded its powers by unduly interfering in the administrative and financial matters of the unaided private professional institutions, the decision of the Committee being quasi-judicial in nature, would always be subject to judicial review.

151. On Question-4, our conclusion, therefore, is that the judgment in Islamic Academy, in so far as it evolves the scheme of two Committees, one each for admission and fee structure, does not go beyond the law laid down in Pai Foundation and earlier decisions of this Court, which have been approved in that case. The challenge to setting up of two Committees in accordance with the decision in Islamic Academy, therefore, fails. However, the observation by way clarification, contained in the later part of para 19 of Islamic Academy which speaks of quota and fixation of percentage by State Government is rendered redundant and must go in view of what has been already held by us in the earlier part of this judgment while dealing with Question No. 1.

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*155. It is for the Central Government, or for the State Governments, in the absence of a Central legislation, to come out with a detailed well thought out legislation on the subject. Such a legislation is long awaited. States must act towards this direction. Judicial wing of the State is called*

*upon to act when the other two wings, the Legislature and the Executive, do not act. Earlier the Union of India and the State Governments act, the better it would be. The Committees regulating admission procedure and fee structure shall continue to exist, but only as a temporary measure and an inevitable passing phase until the Central Government or the State Governments are able to devise a suitable mechanism and appoint competent authority in consonance with the observations made hereinabove. Needless to say, any decision taken by such Committees and by the Central or the State Governments shall be open to judicial review in accordance with the settled parameters for the exercise of such jurisdiction." (emphasis supplied).*

(22) We may now refer to judgment of this Court in Educate India Society, which has been mentioned in the order of reference. Therein, challenge was to order dated 24th July, 2004 of the State Fee Committee constituted by the State of Haryana, disapproving proposal of the petitioner-college for higher fee. It was submitted on behalf of the petitioner that the college was suffering financial losses and Fee Committee failed to take into consideration cost incurred by it. This Court held that the jurisdiction of the Fee Committee was limited to consider whether fee proposed by an institution is justified in view of facilities provided. The relevant observations in the said judgment are as under :—

"31. In the first instance, we shall endeavour to determine the jurisdiction and the scope of the authority vested by the "TMA Pai-Islamic Academy Scheme" in the State Fee Committee, And thereupon to decide whether the State fee Committee, while determining the fee payable by students admitted to AICTE courses at the petitioner institute, had acted in consonance with the jurisdiction and authority vested in it, while passing the impugned order dated 24th July, 2004.....

32. The jurisdiction of the State Fee committee, therefore, is to determine whether the fee proposed by an unaided private institute is justified in view of the facilities provided. if the answer to the aforesaid determination is in the affirmative, the fee

proposed by the Committee has to be approved. If not, the State Fee Committee shall determine the fee which is justified and approve the same. The State Fee Committee shall also examine if the institute is charging "capitation fee" or profiteering. If it is indulging in any of the two activities, the State Fee Committee, while approving the fee proposed by an institute, deduct there from the component(s) constituting "capitation fee" and/or "profit."

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34.... It is not understandable how and why the State Fee Committee should insist that the infrastructure of the petitioner- Institute should be utilized exclusively for running AICTE courses. The main object of the petitioner society is to provide educational facilities including AICTE and non AICTE courses to the general public. The students admitted to the AICTE courses would not gain if the non AICTE courses had not been started by the petitioner society. As a matter of fact, students admitted to the AICTE courses are being benefited by the commencement of the non AICTE courses, inasmuch as debts accumulated on account of exclusive running the AICTE courses are being off set from savings from non AICTE courses. Held it not been for the revenue surplus from the non-AICTE courses, students admitted to the AICTE courses would have had to entirely shoulder debts to the tune of Rs. 5.94 courses, irrespective of the duration during which they were to be discharged. This aspect of the determination at the hands of the State Fee Committee, therefore, deserves to be set aside without any further deliberation on the matter.

35..... If the fee proposed by an institute is not unjustified keeping in mind the facilities made available to students and developmental activities carried out at an institute for the benefit of the students, the same has to be approved by the State Fee Committee. Since the State Fee Committee wishes to impose its wisdom on issues of financial management on the petitioner

society which desires to apply its revenue surplus differently, we are constrained to conclude, that the State Fee Committee has transgressed the jurisdiction vested in it by the "TMA Pai-Islamic Academy scheme", on the instant issue.

36.....It is sought to be suggested, that the repayment of the loans should be staggered for a longer pcriod so as to lessen the financial burden on the students admitted to the AICTE courses. This basis for raising the aforesaid objection is clearly misconceived because the proposal of the petitioner-society has not placed the burden of repayment of loans at all, on the students admitted to the AICTE courses. Infact, as repeatedly highlighted by the learned counsel for the petitioner-society, the loans are proposed to be repaid from the revenue surplus earned from the non-AICTE courses. As such, it is not possible to accept as valid the instant objection of the State Fee Committee as against the fee proposal submitted by the petitioner-society,.

37. As noticed above, on the three major issues, the State Committee seems to have impinged on the freedom of the petitioner-society to manage its own financial affairs. Likewise, on the issue of employment of teaching, as well as, no teaching staff, and other allied issues canvassed, we are of the view, that the State Fee Committee could have interferred in the proposal submitted by the petitioner-society only if it transgressed the determination of the Supreme Court.....

The State Fee Committee has not recorded any finding to the effect that the fee proposed by the institute is unjustified keeping in view the facilities made available to students and development activities carried out at the institute for the benefit of the students. In our view, the State Fee Committee while deliberating on the issue of fee to be charged by the petitioner-society (from the students admitted to the AICTE courses) has transgressed its jurisdiction as well as the parameters laid down under the "TMA Pai-Islamic Academy scheme."

Finally, it was concluded as under :—

> "41. Since we are of the opinion that the State Fee Committee, has not kept in mind the parameters laid down in TMA Pai's case (supra) and Islamic Academy's case (supra), we consider it just and appropriate to set aside the impugned order dated 24th July, 2004. The State Fee Committee shall reconsider the fee proposal submitted by the petitioner-society, on 15th March, 2004 in the light of parameters laid down under the TMA Pai Islamic Academy scheme, and pass a fresh order after affording the petitioner society an opportunity of hearing. In the meantime, it will be open to the petitioner society to charge fee as was allowed by the Delhi High Court in Civil Writ No. 1993 of 2003 (which incidentally is identical to the fee proposed by the petitioner society, through its communication to the State Fee Committee dated 15th March, 2004). The fee which is collected, shall be strictly accounted for and will be subject to final order that may be passed by the State Fee Committee."

(23) We have heard learned counsel for the parties and perused the record. We proceed to deal with the questions framed in para 19 above.

**Re: (i)**

**Validity of fee fixation by the FFC for the period prior to sessions 2006-07**

(24) This question arises in categories (I) and (II) of the writ petitions for the period prior to coming into force of the 2006 Act. As already noticed, the Act came into force on 27th March, 2006. The notification thereunder was issued for the first time on 24th April, 2006. Thus, scope of consideration is fixation of fee for sessions 2003-04 to 2005-06. Stand of the students is that interim recommendation dated 17th July, 2004 and final recommendation dated 8th July, 2005 of FFC should govern the rate of fee for the said period and the students have already paid the fee accordingly under interim orders of this Court. They have completed their studies and should not be held liable to pay anything in excess of the fee so determined. Case of the colleges is that fee earlier fixed

by the State Government as per notification dated 25th July, 2003 and thereafter as per interim and final reports of the committee was violative of rights of the unaided educational institutions to determine their own fee structure subject only to their not charging capitation fee and not profiteering. The Colleges furnished relevant data to the Committee but the Committee arbitrarily ignored the same which was beyond the scope of their authority. The reports of the committee are subject to judicial review on well known principles of illegality, irrationality and procedural irregulrity. Accordingly, reports may be quashed and either the colleges be allowed to recover fee from the students as per their own proposed fee structure or the committee may be required to re-determine the fee taking into account the report of the Chartered Accountant and the proposed fee structure of the colleges, as was done earlier in the judgment of this Court in ***Educate India Society.*** It was submitted that in ***T.M.A. Pai Foundation,*** It was recognized that private educational institutions had a role to play in development. It was not possible for the State to meet the educational needs. The educational institutions had fundamental right of occupation under Article 19(1)(g) and though the said right was subject to regulation, the regulation had to keep in mind the economic force and cost of the colleges in providing education. If by regulation, the colleges were forced to charge fee less than their cost, they could not exist (reference was particularly made to paras 27, 35, 38, 56, 57 and 70). The order of setting up of the fee committees in ***Islamic Academy*** was by way of regulatory mechanism discussed in ***T.M.A. Pai Foundation.*** Reference in this regard was made to para 6. In ***P.A. Inamdar,*** again the role of Fee Committee was held to be that of a regulator as per observations in paras 94, 144 and 149.

(25) On the other hand, learned counsel for the students submitted that the FFC headed by a retired Judge of this Court of which eminent professionals including Director PGI, Ex-Vice Chancellor, Panjab University and Chartered Accountant were members had taken into account all relevant factors as well as observations of the Hon'ble Supreme Court. The report of the committee was exhaustive and took into account all legitimate costs and also requirement for reasonable surplus. This Court could not sit in over findings recorded by the FFC. There was no illegality, irrationality or procedural irregularity in the report of the FFC. The FFC duly considered

the report of the Chartered Accountant and gave reasons to the extent of disagreement. The judgment of this Court in *Educate India Society* was on its own facts. It considered and dealt with a different report of a different institution in the context of technical education. The present report did not suffer from the infirmities noticed by this Court therein.

(26) After due consideration of the rival submissions, we are of the view that report of the FFC which operated up to the session 2005-06 does not call for any interference by this Court. Operative part of the report has already been reproduced above. Fee notified in the prospectus for the session 2003-04 was Rs. 1.10 lacs which was later increased to Rs. 1.5 lacs as per notification dated 25th July, 2003. The committee determined the fee of MBBS students at Rs. 1 lac after due consideration of the report of the Chartered accountants and the fee structures proposed by the colleges. The students have accordingly paid the fee so fixed under interim orders of this Court and have completed their studies. Contention that fee structure should not have been uniform but should be college specific and on that ground the report was vitiated is without any merit. The fee structure does make a distinction for some of the colleges. The same was to be operative for three years which period has come to an end. There is no doubt that colleges have a fundamental right to run their administration which includes fixation of fee subject only to checking of profiteering. There is no material to show that the FFC has fixed unreasonably low fee structure without taking into account the cost of the colleges and data furnished by them. Principles of natural justice have been duly complied with. As mentioned in the report of the FFC, the Colleges have been given due hearing. The proposed fee structures furnished by the colleges were duly considered and reasons have been mentioned for not accepting the fee structures, as proposed. Accordingly, we are of the view that the writ petitions filed by the colleges are liable to be dismissed and writ petitions filed by the students deserve to be allowed to the extent that the colleges are not entitled to charge fee in excess of the fee approved by the FFC.

(27) As already observed, unaided educational institutions undoubtedly have right to set up their own reasonable fee structure which is a component of right to establish and administer an institution as held in ***TMA Pai Foundation.*** At the same time, right of establishing and administering an educational institution is not at par with trade or business

which is run with a profit motive. Such institution cannot charge capitation fee nor indulge in profiteering. It was in this background that in ***Islamic Academy of Education,*** it was held that in absence of any statutes/ regulations governing fixation of fee, the committees may be set up. It was observed :—

> *"7.....It thus needs to be emphasized that as per the majority judgment imparting of education is essentially charitable in nature. Thus the surplus/profit that can be generated must be only for the benefit/use of that educational institution. Profits/surplus cannot be diverted for any other use or purpose and cannot be used for personal gain or for any other business or enterprise. As, at present, there are statutes/regulations which govern the fixation of fees and as this Court has not yet considered the validity of those statutes/regulations, we direct that in order to give effect to the judgment in T.M.A. Pai case, (2002) 8SCC 481, the respective State Government/concerned authority shall set up, in each State, a committee headed by a retired High Court Judge who shall be nominated by the Chief Justice of that State.....*
>
> *xx xx xx xx xxx*
>
> *The Committee will be at liberty to approve the fee structure or to propose some other fee which can be charged by the institute. The fee fixed by the Committee shall be binding for a period of three years, at the end of which period the institute would be at liberty to apply for revision. Once fees are fixed by the Committee, the institute cannot charge either directly or indirectly any other amount over and above the amount fixed as fees. If any other amount is charged, under any other head or guise e.g. donations, the same would amount to charging of capitation fee. The Government/appropriate authorities should consider framing appropriate regulations, if not already framed, whereunder if it is found that an institution is charging capitation fees or profiteering that can be appropriately penalized and also face the prospect of losing its recognition/ affiliation."*

Again, in **P.A. Inamdar,** it was observed :—

> "140.... Despite the legal position, this Court cannot shut its eyes to the hard realities of Commercialization of education and evil practices being adopted by many institutions to earn large amounts for their private or selfish ends.....
>
> "145. The suggestion made on behalf of minorities and non-minorities that the same purpose for which Committees have been set up can be achieved by post-audit or checks after the institutions have adopted their own admission procedure and fee structure, is unacceptable for the reasons shown by experience of the educational authorities of various States. Unless the admission procedure and fixation of fees is regulated and controlled at the initial stage, the evil of unfair practice of granting admission on available seats guided by the paying capacity of the candidates would be impossible to curb." (emphasis supplied).

(28) The above observations show the acknowledged need for regulating fee structure at the initial stage to check commercialization and evil practices indulged in many institutions to earn large amounts for private or selfish ends. This objective is akin to objective of checking profiteering in scarce resources of the community to advance the mandate of Article 39 (be) of the Constitution. While the educational institutions have right to fix reasonable fee structure, this right is to be balanced with of the students to have access to higher education without being subjected to exploitation in the from of profiteering. The committee set up to achieve this objective is entitled to evolve its own procedure. No doubt, if the committee exceeds its powers, its decision is subject to judicial review. Scope of interference with the fee fixation by a committee is limited to find out whether the committee followed due procedure and acted fairly. In doing so, the Court is not expected to substitute itself for the said committee and itself the fee structure. In this regard, we may refer to the observations made, though made in the context of price fixation but also relevant in the present context, in **Union of India** *versus* **Cynamide India Limited, (5) :—**

> "4....Price fixation is neither the function nor the forte of the court". We concern ourselves neither with the policy nor with the rates. But we do not totally deny ourselves the jurisdiction to enquire

(5) (1987) 2 S.C.C. 720

into the question, in appropriate proceedings, whether relevant considerations have gone in and irrelevant considerations kept out of the determination of the price. For example, if the legislature has decreed the pricing policy and prescribed the factors which should guide the determination of the price, we will, if necessary, enquire into the question whether the policy and the factors are present to the mind of the authorities specifying the price. But our examination will stop there. We will go no further. We will not deluge ourselves with more facts and figures. The assembling of the raw materials and the mechanics of price fixation are the concern of the executive and we leave it to them. And, we will not re-evaluate the considerations even if the prices are demonstrably injurious to some manufacturers or producers. The court will, of course, examine if there is any hostile discrimination. That is a different "cup of tea" altogether.

(29) In view of above, fixation of fee by the FFC is not liable to be interfered with. Judgment in ***Educate India Society*** is distinguishable on facts.

**Re :(iii)**

**Validity of the Punjab Private Health Science Educational Institutions (Regulation of Admission, fixation of fee and making of Reservation) Act, 2006.**

(30) Challenge by the students under this issue relates to revision of annual tuition fee to Rs. 3 lacs *vide* notification dated 3rd August, 2007 under Section 7 of the Act on the ground that only two days before the fee determined was Rs. 1,15,000 *vide* notification dated 1st August, 2007 and the fee was earlier Rs. 1 lac as per notification dated 25th April, 2006 and as per report of the FFC which was in operation prior thereto. The category of management quota in which higher rate of fee was fixed had no jurisdiction. Fee fixed in the government quota was Rs. 1,15,000 for the MBBS students which continued but fee was increased for the management quota.

(31) On the other hand, stand of the colleges is that there could not be any government quota of seats in private unaided colleges. Fee earlier fixed by the FFC was very low which had been continued *vide* notification dated 25th April, 2006. The fee fixed was not comparable to the fee being taken by unaided colleges in the neighbouring states. The Act to the extent it empowered the State to fix fee and to make admissions was violative of autonomy of the colleges under Article 19(1) (g) of the Constitution. Under the unamended provision of section 7, the State was required to have regard to the cost of infrastructure of the colleges individually while under the amended provision, only basis for determining fee was norms of infrastructure facilities prescribed by the concerned council. The Act interfered with the autonomy of the unaided institutions to make admissions and to fix fee. It was also submitted that the State legislation was repugnant to Central legislation namely, Indian Medicine Central Council Act, 1970 and Indian Medical Council Act, 1956.

(32) Reliance has been placed on the judgments of the Hon'ble Supreme Court in ***T.M.A. Pai Foundation, Islamic Academy of Education*** and ***P.A. Inamdar*** to submit that right of educational institutions to establish and administer such institutions included right to make admissions and fix fee structure subject to the same being fair and non-exploitative. Reliance has also been placed on a judgment of the Kerala High Court dated 4th January, 2007 in WP(C) No. 18899 of 2006 **Pushpagiri Medical Society** *versus* **State of Kerala and others (6)** striking down Sections 3, 7, 8(b) & (c) and 10 of the Kerala Professional Colleges or Institutions (Prohibition of Capitation Fee, regulation of admission, Fixation of Non-Exploitative Fee and other Measures to Ensure Equity and Excellence in Professional Education) Act, 2006 which are as under :—

> "**Section 3. Method of admission in Professional Colleges or Institutions,**—Notwithstanding anything contained in any other law for the time being in force or in any judgment, decree or order of any Court or any other authority, admission of students in all professional colleges or institutions to all seats except Non-resident Indian seats shall be made through Common Entrance Test conducted by the State followed by centralized counseling

(6) 2007 JX (Ker) 2147

through a single window system in the order of merit by the State Commissioner for Entrance Examinations in accordance with such procedure as may be specified by the Government from time to time.

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**Section 7 : Factors for determination of fee:** The Fee Regulatory Committee shall determine and fix the fee or fees to be charged by an unaided professional college or institution taking into consideration the factors, such as—

(a) the obligation on the part of all unaided professional colleges or institutions to provide freeship to a minimum of fifty per cent of the students admitted and the additional expenses, if any required for the same over and above the excess funds generated from non-resident Indians, charity on the part of managements and contributions by the Government for providing freeship for Scheduled Caste or Scheduled Tribe students;

(b) to (f). xx xx xx

**Section 8: Determining factors for according recognition and conferring status as unaided minority professional college or institution—**

A minority unaided professional college or institution established and maintained by any linguistic or religious minority shall be accorded recognition and conferred status of an unaided minority professional college or institution only if it satisfies all the following conditions of demographic equivalence between the minority community to which the college belongs and the non minority community of the state taken as a single unit namely:

(a) xx xx xxxx xxx

(b) the number of professional colleges or institutions run by the linguistic or religious minority community in the State to whcih the college or institution belong shall be proprotionately lesser than the number of professional college or institutions run by the non minority community in the State.

(c) the number of students belonging to the linguistic or religious minority community to which the college or institution belongs undergoing professional education in all professional colleges or institutions in the State shall be proportionately lesser than the number of students belonging to the non minority community in the State."

"**Section 10 : Allotment of seats :** (1) In every professional college or institution other than a minority college—

(a) ten per cent of the total number of sanctioned seats shall be earmarked for the Scheduled Castes and Schedule Tribes.

(b) twenty five per cent of the total number of sanctioned seats to the other socially and educationally backward classes ;

(c) three percent of the total unmber of sanctioned seats shall be earmarked for physically challenged persons ; and

(d) twelve per cent of the total number of sanctioned seats shall be earmarked for the other sections of society not covered under items (a), (b) and (c) of this sub section on merit cum means basis :

Provided that in an unaided professional college or institution, the provisions in item (c) and (d) shall apply in accordance with the consensus based on mutual agreement arrived at between the unaided professional college or institution and the Government and following such principles and in such manner as may be prescribed :

Provided further that the admissions contemplated in items (b), (c) and (d) above shall be in compliance with the rules as may be prescribed.

(2) In an unaided professional college or institution belonging to both minority and non minority, up to fifteen percent of the total number of sanctioned seats may be filled by candidates under

the category of non resident Indian seats. Seats not filled up under Non resident Indian seats shall be filled up from general merit seats.

(3) In an unaided professional college or institution belonging to both minority and non minority community, up to fifteen percent of the total number of sanctioned seats may be filled by candidates under the category of privilege seats in the manner as may be prescribed. Seats not filled up under privilege seats shall be filled up from general merit seats.

(4) In an unaided non minority professional college or institution eighteen percent of the total number of sanctioned seats shall be filled up from general merit seats

(5) In an unaided non minority professional college or institution two percent of the total number of sanctioned seats shall be filled up by students who have made outstanding contribution in the field of culture or sports, on the basis of criteria as may be prescribed. Seats not filled up shall be filled up from general merit seats.

(6) When students of specified categories surrender the seats after selection, the same shall be filled by the candidates belonging to the same category from the merit list of the common Entrance test.

(7) Where the seats specified for the Scheduled castes or Scheduled Tribes and other Socially and educationally backward classes are left unfilled due to non availability of candidates from the same category, the seats shall be filled up by rotation from other categories within the specified seats as may be prescribed. Provided that any spillover thereafter arising shall be filled up from the general merit seats.

(8) A minority unaided professional college or institution shall admit not less than fifty per cent of the students from within the State from the minority community to which the college or institution belongs. Fifty percent of such seats may be filled up from among the socially and economically backward sections from within

the minority community on merit cum means basis with the consent of the minority educational college or institution as prescribed and the rest in the order of merit in accordance with *inter se* merit, both from the rank list prepared by the Commissioner for Entrance examinations, based on the common application prescribed in the appropriate prospectus published by the State Government.

(9) A minority unaided professional college or institution may surrender up to eighteen per cent of the seats to be filled up by the Commission for Entrance examinations from the specified seats and general merit seats in equal proportion. The first portion shall be filled up on the basis of merit cum means basis as prescribed. The second portion shall be filled up on from the general merit seats. Any seats not surrendered shall also be treated as minority seats and filled up as such.

(10) A minority unaided professional college or institution may surrender up to two percent of the total number of sanctioned seats to be filled up by students who have made outstanding contribution in the field of culture or sports, on the basis of criteria as may be prescribed. Seats not so filled up shall be filled up from general merit seats."

(33) The reasons given by the Division Bench of the Kerala High Court for striking down the provisions of the Kerala Act can be summed up as under :—

(i) Section 7 of the Act gave sweeping powers to Fee Regulatory Committee.

(ii) Section 8(b) interfered with the number of institutions to be set up by minority which was violative of Article 30.

(iii) Section 10 to the extent is provided for reservation beyond the reservation permitted under Article 15(5) was invalid as the same were not permissible under any law.

(34) Reliance has also been placed on judgment of the Orissa High Court in **Orissa Management College Association** *versus* **State of Orissa, (7),** striking down the Orissa Professional Educational Institutions (Regulation of examination and Fixation of Fees) Act, 2007 as being violative of Article 19(1)(g) of the Constitution and also on the ground that it encroached upon Entry 66 of List I. It was also submitted that in some of the judgments of this Court (main) judgment being **Amardeep and others** *versus* **State of Haryana and others (8),** it was held that entrance test by the State was violative of right of private educational institutions.

(35) Learned counsel for the State supported the impugned Act and the notifications and submitted that the fee was fixed earlier by the Fee committee which was continued *vide* notification dated 25th April, 2006 under section 7 of the Act and thereafter marginally revised *vide* notification dated 1st August, 2007 but having regard to the stand of the colleges, upward revision was made on 3rd August, 2007. The fee for the government quota continued to be almost at the pre-revised rate to promote the interest of meritorious students and fee for the management quota was revised having regard to overall cost of the institutions. The regulatory mechanism of fee determination was within the legislative competence of the State legislature under Entry 25 of List III of Seventh Schedule and was reasonable restriction under Article 19(6) of the Constitution. There was no repugnancy with Central legislation. Such restriction was in public interest. Reasonableness of the restriction had to be assessed having regard to the social objectives sought to be advanced. Regulatory mechanism was intended to advance social justice. The legislation was introduced in view of observations of the Hon'ble Supreme Court in ***P. A. Inamdar*** and orders of the Hon'ble Supreme Court under Article 142 were operative only till legislation was brought in. Once legislation was introduced, subject to constitutionality thereof, the rights of the parties were governed by the legislation.

(36) We may mention that at one stage, it was sought to be argued by learned counsel for the colleges that statutory provisions relating to reservation in private unaided colleges were beyond legislative competence

(7) AIR 2007 Orissa 120
(8) 2007 (1) S.C.T. 812

of the State. On being confronted with the Constitution amendment adding Article 15(5), learned counsel for the petitioners realized that constitutional validity of the amendment had not been challenged nor Central Government had been impleaded as party. They stated that if they are so instructed, they will take necessary steps for amending the petition but no such steps have been taken. The matter has been considered by the Hon'ble Supreme Court in **Ashok Kumar Thakur** *versus* **Union of India and others (9),** by a bench of five Hon'ble Judges. While one of the Hon'ble Judges held the amendment to be against basic features of the Constitution, other Hon'ble Judges had left the question open as issue of reservation in unaided private colleges had not arisen in that case. If the amendment had been challenged, we may have been required to go into the said question but in absence thereof, we do not express any opinion on the said issue.

(37) We have considered the rival submissions. The plea that the regulatory mechanism and the impugned Act were repugnant to Central Acts, namely, Indian Medicine Central Council Act, 1970 and Indian Medical Council Act, 1956, cannot be accepted. No provision of Central legislation has been shown to us with which the impugned Act may be in conflict. No provision fixing fee or eligibility conditions as provided for in the impugned Act have been brought to our notice from the Central legislations. The judgment of Orissa High Court in ***Orissa Management Colleges Association*** on the question of repugnancy of the State Regulatory mechanism in the matter of fee and admission with the Central legislation is distinguishable. In any case, in absence of any repugnancy being shown in the present case, we are unable to strike down the provision of the State law on that ground.

(38) It is well settled that repugnancy under Article 254 of the Constitution can be held to arise where the Central law and State law on a matter in concurrent list are irreconcilable. To the extent of repugnancy, Central law prevails. As already held above, there is no conflict of the State law with any provision of the Central law. On the question as to when

(9) (2008) 6 S.C.C. 1

repugnancy arises, reference may be made to judgment of the Hon'ble Supreme Court in **M. Karunanidhi** *versus* **Union of India (10),** wherein it was observed :—

> "35. On a careful consideration, therefore, of the authorities referred to above, the following propositions emerge :
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> 1. That in order to decide the question of repugnancy it must be shown that the two enactments contain inconsistent and irreconcilable provisions, so that they cannot stand together or operate in the same field.
> 2. That there can be no repeal by implication unless the inconsistency appears on the face of the two statues.
> 3. That where the two statutes occupy a particular field, but there is room or possibility of both the statutes operating in the same field without coming into collision with each other, no repugnancy results.
> 4. That where there is no inconsistency but a statute occupying the same field seeks to create distinct and separate offences, no question of repugnancy arises and both the statutes continue to operate in the same field."

Reference in the above judgment was also made to earlier judgments in **Deep Chand** *versus* **State of U.P. (11), State of Orissa** *versus* **M.A. Tulloch and Co., (12)** and **T. S. Balliah** *versus* **T. S. Rangachari (13).**

(39) The matter was also considered in **Government of A. P.** *versus* **J. B. Educational Society (14)** in the context of alleged repugnancy between All India Council for Technical Education Act, 1987 and A. P. Education Act, 1982. Rejecting the contention that the State Act was repugnant to the Central Act, it was observed : —

> "13. It is in this background that the provisions contained in the two legislative enactments have to be scrutinised. The provisions of

(10) (1979) 3 S.C.C. 431
(11) AIR 1959 S.C. 648
(12) AIR 1964 S.C. 1284
(13) AIR 1968 S.C. 701
(14) (2005) 3 S.C.C. 212

the AICTE Act are intended to improve technical education and the various authorities under the Act have been given exclusive responsibility to coordinate and determine the standards of higher education. It is a general power given to evaluate, harmonise and secure proper relationship to any project of national importance. Such a coordinate action in higher education with proper standard is of paramount importance to national progress. Section 20 of the A. P. Act does not in any way encroach upon the powers of the authorities under the Central Act. Section 20 says that the competent authority shall, from time to time, conduct a survey to identify the educational needs of the locality under its jurisdiction notified through the local newspapers calling for applications from the educational agencies. Section 20(3)(a)(i) says that before permission is granted, the authority concerned must be satisfied that there is need for providing educational facilities to the people in the locality. The State authorities alone can decide about the educational facilities and needs of the locality. If there are more colleges in a particular area, the State would not be justified in granting permission to one more college in that locality. Entry 25 of the Concurrent List gives power to the State Legislature to make laws regarding education, including technical education. Of course, this is subject to the provisions of Entries 63, 64. 65 and 66 of List I. Entry 66 of List I to which the legislative source is traced for the AICTE Act, deals with the general power of Parliament for coordination, determination of standards in institutions for higher education or research and scientific and technical educational institutions and Entry 65 deals with the union agencies and institutions for professional, vocational and technical training, including the training of police officers, etc. The State has certainly the legislative competence to pass the legislation in respect of education including technical education and Section 20 of the Act is intended for general welfare of the citizens of the State and also in discharge of the constitutional duty enumerated under Article 41 of the Constitution."

Same view was also taken in **U. P. Coop. Cane Unions Federations** *versus* **West U.P. Sugar Mills Assn. (15),** wherein it was observed :—

"34. Learned Senior Counsel for the respondents has strenuously urged that the Central Government having made the 1966 Order which contains a specific provision for fixation of price of sugarcane, under clause 3(1) thereof, the regulatory power under the 1953 Act cannot embrace within its fold the same power of fixation of price as this will be clearly repugnant to a law made by Parliament and would be void in view of Article 254(1) of the Constitution. In *Tika Ramji, AIR 1956 SC 676* it has been held that the EC Act under which the Central Government made the 1966 Order and the 1953 Act made by the U.P. Legislative have been enacted with reference to Entry 33 of List III of the Seventh Schedule. The constitutional validity of the 1953 Act was upheld by the Constitution Bench in the said decision. On p. 437 of the Report (SCR) the Court quoted with approval the following passage from the judgment of Sulaiman, J, in **Shyamakant Lal** *versus* **Rambhajan Singh,** AIR 1939 FC 74 (FCR at p. 212 : AIR at p. 83) for the principle of construction in regard to repugnancy : (AIR p. 700, para 32).

"When the question is whether a Provincial legislation is repugnant to an existing Indian Law, the onus of showing its repugnancy and the extent to which it is repugnant should be on the party attacking its validity. There ought to be a presumption in favour of its validity, and every effort should be made to reconcile them and construe both so as to avoid their being repugnant to each other ; and care should be taken to see whether the two do not really operate in different fields without encroachment. *Further, repugnancy must exist in fact, and not depend merely on a possibility.*" (emphasis supplied)

And then went on to hold : (AIR p. 700, para 33)

(15) (2004) 5 S.C.C. 430

"33. In the instant case, there is no question of any inconsistency in the actual terms of the Acts enacted by Parliament and the impugned Act. The only questions that arise are whether Parliament and the State Legislature sought to exercise their powers over the same subject-matter or whether the laws enacted by Parliament were intended to be a complete exhaustive code or, in other words, expressly or impliedly evinced an intention to cover the whole field."

35. In **M. Karunanidhi** *versus* **Union of India,** (1979) 3SCC 421 the principles to be applied for determining repugnancy between a law made by Parliament and law made by the State Legislature were considered by a Constitution Bench. In pursuance of an FIR lodged against Shri M. Karunanidhi, CBI after investigation had submitted charge-sheet against him under Sections 161, 468 and 471 IPC and Section 5(2) read with Section 5(1)(d) of the Prevention of Corruption Act. The Madras Legislature had passed an Act known as the Tamil Nadu Public Men (Criminal Misconduct) Act, 1973 which had received the assent of the President. It was contended that by virtue of Article 254(2) of the Constitution, the provisions of the Indian Penal Code, Prevention of Corruption Act and Criminal Law Amendment Act stood repealed. After review of all the earlier authorities the Court laid down the following tests : (SCC pp. 448-49, para 35).

"*35.1.* That in order to decide the question of repugnancy it must be shown that the two enactments contain inconsistent and irreconcilable provisions, so that they cannot stand together or operate in the same field.

2. That there can be no repeal by implication unless the inconsistency appears on the face of the two statutes.

3. That where the two statutes occupy a particular field, but there is room or possibility of both the statutes operating in the same field without coming into collision with each other, no repugnancy results.

4. That where there is no inconsistency but a statute occupying the same field seeks to create distinct and separate offences, no question of repugnancy arises and both the statutes continue to operate in the same field."

35.1 The same question was examined in considerable detail in **Hoechst Pharmaceuticals Ltd.** *versus* **State of Bihar,** (1983) 4 SCC 45 and it was held that one of the occasions where inconsistency or repugnancy arose was when on the same subject-matter one would be repugnant to the other and, therefore, in order to raise a question of repugnancy, two conditions must be fulfilled. The State law and the Union law must operate on the same field and one must be repugnant or inconsistent with the other and these are cumulative conditions. In **National Engg. Industries Ltd. versus Shri Kishan Bhageria,** 1988 Supp SCC 82, Sabyasachi Mukharji, J. opined that the best test of repugnancy is that if one prevails, the other cannot prevail.

36. In **S. Satyapal Reddy versus Government of A. P.** (1994) 4 SCC 391 the question was examined in the context of prescription of a higher qualification by the State Government. The service rule made by the Central Government prescribed a diploma in Mechanical Engineering as the minimum qualification for appointment on the post of Assistant Motor Vehicles Inspector while the rule made by the State Government required a degree in Mechanical Engineering or certain other alternative qualifications. The challenge made by the diploma-holders was negative and it was held that prescribing a higher qualification did not give rise to any inconsistency or repugnancy as both the rules could operate harmoniously and effect could be given to both of them. Similarly, in **Preeti Srivastava (Dr.) versus State of M. P.** (1999) 7SCC 120, it was held that laying down higher eligibility qualification by the State Government for admission to postgraduate medical courses did not lead to any kind of repugnancy.

37. Under sub-clause (1) of clause 3 of the 1966 Order, the Central Government can only fix a minimum price of sugarcane. This clause should be read along with sub-clause (2) which creates an embargo or prohibition that no person shall sell or agree to sell sugarcane to a producer of sugar and no such producer shall purchase or agree to purchase sugarcane at a price lower than that fixed under sub-clause (1). The inconsistency or repugnancy will arise if the State Government fixed a price which is lower than that fixed by the Central Government. But, if the price fixed by the State Government is higher than that fixed by the Central Government, there will be no occasion for any inconsistency or repugnancy as it is possible for both the orders to operate simultaneously and to comply with both of them. A higher price fixed by the State Government would automatically comply with the provisions of sub-clause (2) of clause 3 of the 1966 Order. Therefore, any price fixed by the State Government which is higher than fixed by the Central Government cannot lead to any kind of repugnancy."

(40) As regards objection of the students or colleges against quantum of revision of fee, the same cannot be accepted for the same reasons for which we have not found any ground to interfere with the fee fixed by the FFC. No doubt, fee was revised within two days to more than double, it cannot be held that the basis for revision was events only of two days. As explained on behalf of the State, the basis for revision was continuing demand of colleges for upward revision. Fee fixed *vide* notification dated 1st August, 2007 was almost at par with the rate of fee fixed more than three years back i.e. *vide* notification dated 25th July, 2003 and interim recommendation of the FFC, dated 17th July, 2004 and, thus revision was called for. As already observed, this Court cannot substitute itself for the fee fixation authority in absence of perversity or patent error. Overall cost of the institutions could not be ignored in determining the fee. Object was to check exploitation and commercialization and at the same time, allowing the institutions to meet the cost incurred and also to have some surplus.

(41) As regards the contention that the classification of students in management quota and government quota was not rational, we find merit therein. In **Unni Krishnan,** the Hon'ble Supreme Court framed a scheme

permitting higher fee for the management quota and regulated fee for the government quota of students. The said scheme was disapproved in **TMA Pai Foundation** as follows :—

> "**37.** ***Unni Krishnan***, (1993) 1 SCC 645, judgment has created certain problems, and raised thorny issues. In its anxiety to check the commercialization of education, a scheme of "free" and "payment" seats was evolved on the assumption that the economic capacity of the first 50% of admitted students would be greater than the remaining 50%, whereas the converse has proved to be the reality. In this scheme, the "payment seat" student would not only pay for his own seat, but also finance the cost of a "free seat" classmate. *When one considers the Consitution Bench's earlier statement that higher education is not a fundamental right, it seems unreasonable to compel a citizen to pay for the education of another, more so in the unrealistic world of competitive examinations which assess the merit for the purpose of admission solely on the basis of the marks obtained, where the urban students always have an edge over the rural students. In practice, it has been the case of the marginally less merited rural or poor student bearing the burden of a rich and well-exposed urban student.*
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> 38. The scheme in ***Unni Krishnan case***, (1993) 1 SCC 645 has the effect of nationalizing education in respect of important features viz. the right of a private unaided institution to give admission and to fix the fee. By framing this scheme, which has led to the State Governments legislating in conformity with the scheme, the private institutions are indistinguishable from the government institutions; curtailing all the essential features of the right of administration of a private unaided education institution can neither be called fair nor reasonable. Even in the decision in ***Unni Krishnan case***, (1993) 1 SCC 645, it has been observed by Jeevan Reddy, J., at p. 749, para 194, as follows :
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> > "194. The hard reality that emerges is that private educational institutions are a necessity in the present-day context. It is not possible to do without them because the

governments are in no position to meet the demand—particularly in the sector of medical and technical education which call for substantial outlays. While education is one of the most important functions of the Indian State it has no monopoly therein. Private educational institutions—including minority education institutions—too have a role to play."

(42) Again, in P.A. Inamdar in para 130, it was observed that fixing of quota for seat sharing between management and States could not be approved.

(43) No doubt, observations about management quota seats or free seats were made in absence of legislation and a legislation has brought a qualitative change in situation, the fact remains that the legislation or any action thereunder has to be consistent with Article 14 of the Constitution. Though, under the Act, there is no provision for separate fee for management quota seats and government seats, such classification has been made,—*vide* notification dated 3rd August, 2007. Classification of management quota seats and government seats for fee fixation does not appear to be rational. There is nothing to show that any economic or social criteria has been followed. It was orally explained that meritorious students have been admitted to the government quota and beyond particular cut off marks, the students have been admitted in the management quota. The fee fixation has to be on uniform basis except for valid classification. However, since the impugned notification may have run its life and at this stage, we do not consider it appropriate to disturb the past events.

(44) We may now consider the contention raised on behalf of the Colleges that the Act was violative of Article 19(1)(g) of the Constitution in authorizing fee to be fixed and admissions to be made. Section 7 is enabling provision for determining the fee. It provides for fixing the fee having regard to the minimum norms of infrastructure and facilities prescribed by the concerned council. Criticism against the provision is that the institutions are denied right to fix fee as per their own infrastructure and such fee could be interfered with only on the ground that the same was exploitative and did not have nexus to the cost incurred. Conduct of Common Entrance Test and making of admissions by the State under Sections 3 to 6 is challenged as being interference with the autonomy of unaided institutions.

(45) We are unable to accept the submissions. The Act is a regulatory measure. Section 3 provides for regulation of admissions, fixation of fee and making of reservation. The fixation of fee by the State is by way of regulation. We have already left the question of reservation open in absence of challenge to Article 15 (5) or any other statutory provisions. The admissions are regulated on the basis of Common Entrance Test and are made on *inter se* merit and cannot be held to be invalid being permissible regulatory measure.

(46) Fee is to be determined having regard to norms of infrastructure and facilities provided by the concerned councils set up under the Central laws. There can be no objection to regulatory measures in the matter of making of admissions or fixing of fee. Objection that the fee should be fixed by the College and not by the State cannot be accepted. The observations in judgements referred to above have been made in absence of legislation.Once a legislation is enacted, its validity is to be tested on the touchstone of the Constitution. Though, establishment of educational institutions is a fundamental right under Article 19 (1) (g) as held in **T.M.A. Pai Foundation,** the said right is not an absolute right. The same is subject to regulation. In absence of any law, under the judicial direction, the committees were constituted to oversee admission and fee fixation. The said judicial directions have now been substituted by the statutory mechanism. In the matter of fee fixation, the basis for fee is the norms of infrastructure and facilities prescribed by a council and an institution providing higher facilities is not allowed to charge higher fee. To this extent, there is departure from the observations made in above judgements to the effect that an unaided educational institution could fix its own fee structure subject to the same being not exploitative.

(47) Question for consideration is whether a legislation which restricts right to charge higher fee by providing higher infrastructure is within the legislative competence and can be justified as reasonable restriction in public interest. It has been submitted on behalf of the State that having regard to practical needs of the society as a whole, the legislation checks the fee being taken to unreasonable level merely on the plea that higher infrastructure was provided. Larger consideration of access to higher

education even to economically lower sections of society is sought to be achieved by limiting the level of the fee to the minimum prescribed requirements of infrastructure and facilities. There is no bar for higher facilities being provided subject to no extra fee being charged. Limiting the fee to a minimum level is intended to keep in mind the angle of the common man. It is a matter of legislative choice of policy.

(48) Fixing fee equal to minimum needs of infrastructure cannot be held to be beyond the legislative power under Article 19 (6) of the Constitution. In judging reasonableness of restriction, the Court has also to bear in mind the directive principles of State policy. Restriction can be held to be reasonable if the same is to advance directive principles and is not otherwise arbitrary or excessive. A balance has to be struck between freedom under Article 19 (1) (g) and social control permitted by way of restrictions. The approach of the Court has to have regard to prevailing conditions, values of life and social philosophy of the Constitution.

(49) The judgement of the Kerala High Court in **Pushpagiri Medical Society** is distinguishable. Even otherwise, we are unable to follow all the observations made therein.

(50) It is well settled that right under Article 19 (1) (g) of the Constitution is subject to reasonable restrictions in public interest under Article 19 (6) of the Constitution. We may refer to some of the judgments dealing with the scope of regulatory power of legislature under Article 19 (6) of the Constitution.

(51) In **Papnasam Labour Union** *versus* **Madura Coats Limited., (16)** it was observed :—

> "15. After considering the respective submissions of the learned counsel for the parties and considering various decisions of this Court in deciding the question of reasonablenss of the restriction imposed by a statute on the fundamental rights guaranteed by Article 19 of the Constitution of India (reference to which would be made hereinafter), it appeares to us that the following

(16) (1995) 1 S.C.C. 501

principles and guidelines should be kept in mind for considering the constitutionality of a statutory provision upon a challenge on the alleged vice of unreasonablness of the restriction imposed by it :

(a) The restriction sought to be imposed on the fundamental rights guaranteed by Article 19 of the Constitution must not be arbitrary or of an excessive nature so as to go beyond the requirement of felt need of the society and object sought to be achieved. [1950 SCR 759 : (AIR 1951 SC 118); 1954 SCR 803: (AIR 1954 SC 224); 1979 (1) SCR 1009: (AIR 1979 SC 25)].

(b) There must be a direct and proximate nexus on a reasonable connection between the restriction imposed and the object sought to be achieved. [AIR1963 SC 812 :AIR 1978 SC 771(777); 1992 (3) SCC 336 : (1992 AIR SCW 1378)].

(c) No abstract or fixed principle can be laid down which may have universal application in all cases. Such consideration on the question of quality of reasonableness, therefore, is expected to vary from case to case. (AIR 1960 SC 1080 ; AIR1961 SC 1602; AIR 1978 SC 771).

(d) In interpreting constitutional provisions court should be alive to the felt need of the society and complex issues facing the people which the legislature intends to solve through effective legislation. (AIR 1961 SC 1602; AIR 1978 SC 771).

(e) In appreciating such problems and felt need of the society the judicial approach must necessarily be dynamic, pragmatic and elastic. (AIR 1961 SC 1602; AIR 1977 SC 1825; AIR 1978 SC 771).

(f) It is imperative that for consideration of reasonableness of restriction imposed by a statute, the Court should examine whether the social control as envisaged in Article 19 is being effectuated by the restriction imposed on fundamental right. (AIR 1952 SC 196; AIR 1964 SC 416; AIR 1978 SC 771).

(g) Although Article 19 guarantees all the seven freedoms to the citizen, such guarantee does not confer any absolute or unconditional right but is subject to reasonable restriction which the legislature may impose in public interest. It is therefore necessary to examine whether such restriction is meant to protect social welfare satisfying the need of prevailing social values. (AIR 1952 SC 196; AIR 1964 SC 416; AIR 1971 SC 2164; AIR 1978 SC 771).

(h) The reasonableness has got to be tested both from the procedural and substantive aspects. It should not be bound by processual perniciousness or jurisprudence of remedies. [AIR 1977 SC 1825; 1979 (1) SCR 1009; (AIR 1979 SC 25)].

(i) Restriction imposed on the fundamental right guaranteed under Ariticle 19 of the Constitution must not be arbitrary, unbridled, uncanalised and excessive and also not unreasonable discriminatory. Exhypothesi, therefore a restriction to be reasonable must also be consistent with Article 14 of the Constitution.

(j) In judging the reasonableness of the restriction imposed by Clause (6) of Article 19, the Court has to bear in mind directive principles of State policy. (AIR 1973 SC 1461; AIR 1976 SC 490; AIR 1978 SC 771).

(k) Ordinarily, any restriction so imposed which has the effect of promoting or effectuating a directive principle can be presumed to be a reasonable restriction in public interest. [1992 (3) SCC 336 :(1992 AIR SC 1378)]."

(52) In **M.R.F. Limited** *versus* **Inspector, Kerala Government and others (17)** it was observed :—

"6. As pointed out earlier, the Right under Article 19 (1) (g) is not absolute in terms but in subject to reasonable restrictions contemplated by clause (6) thereof. The test of reasonableness

(17) (1998) 8 S.C.C. 227

of restriction was considered by this Court on several occasions but all the decisions are not being referred to and only a few are mentioned to make out the focal point on the basis of which we intend to dispose of this case.

7. We begin with an extract from, what is known as, the locus classicus, written down by Patanjali Sastri, C. J., in the State of Madras *versus* V.G. Row, 1952 SCR 597 : AIR 1952 SC 196 (at p. 200) :—

> "It is important in this context to bear in mind that the test of reasonableness, whether prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern, of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby , the disproportion of the imposition, the prevailing conditions at the time should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable."

8. This decision was followed in **Mineral Development Ltd.** *versus* **State of Bihar,** (1960) 2 SCR 609 : AIR 1960 SC 468, and it was laid down that the principles set out by Patanjali Sastri, C. J., have to be considered and kept in view by the Courts in deciding whether a particular Statute satisfies the objective test of reasonableness.

9. The observations of Patanjali Sastri, C.J., were again approved in **Collector of Customs, Madras** *versus* **Nathella Sampathu Chetty, (1962) 3 SCR 786 : AIR 1962 SC 316.** Ayyangar, J. who write the judgment observed that though there were several decisions of this Court in which the relative criteria were laid down to test the reasonableness of the restrictions imposed under clause (6) of Article 19, the passage from the judgment of Patanjali Sastri, C.J. in **State of Madras** *versus* **V.G. Row (AIR 1592 SC 196)** (Supra), which we have already extracted above, was held sufficient for the purpose of reference.

10. These decisions were considered, discussed and followed in **M/s. Laxmi Khandsari** *versus* **State of U.P.,** AIR 1891 SC 873 : 1981 (2) SCC 600.

11. In examining the reasonableness of a statutory provision, whether it is violative of the fundamental Rights guaranteed under Article 19, one cannot lose sight of the Directive Principles of State Policy contained in Chapter IV of the Constitution as was laid down by this Court in Saghir Ahmed *versus* State of U.P., AIR 1954 SC 728 : (1955) 1 SCR 707 as also in **Mohd. Hanif Qureshi** *versus* **State of Bihar,** 1959 SCR 629 : AIR 1958 SC 731.

12. This principle was also followed in Laxmi Khandsari's case (AIR 1981 SC 873) *(supra)* in which the reasonableness of restrictions imposed upon the Fundamental Rights available under Article 19 was examined on the grounds, amongst others, that they were not violative of the Directive Principles of State Policy.

13. On a conspectus of verious decisions of this Court, the following principles are clearly discernible :—

    (1) While considering the reasonableness of the restrictions, the Court has to keep in mind the Directive Principles of State Policy.

(2) Restrictions must not be arbitrary or of an excessive nature so as to go beyond the requirement of the interest of the general public.

(3) In order to judge the reasonableness of the restrictions, no abstract or general pattern or a fixed principle can be laid down so as to be of universal application and the same will vary from case to case as also with regard to changing conditions, values of human life, social philosophy of the Constitution, prevailing conditions and the surrounding circumstances.

(4) A just balance has to be struck between the restrictions imposed and the social control envisaged by clause (6) of Article 19.

(5) Prevailing social values as also social needs which are intended to be satisfied by restrictions have to be borne in mind. (See : **State of U.P.** *versus* **Kaushailiya,** (1964) 4 SCR 1002 :AIR 1964 SC 416 ).

(6) There must be a direct and proximate nexus or a reasonable connection between the restrictions imposed and the object sought to be achieved. If there is a direct nexus between the restrictions, and the object of the Act, then a strong presumption in favour of the constitutionality of the Act will naturally arise. (See : Kavalappara Kottarathi Kochuni alias Moopil Nayar *versus* **State of Madras and Kerala,** (1960) 3 SCR 887 : AIR 1960 SC 1080; **O.K. Ghosh** *versus* **E.X. Joseph,** (1963) Supp (1) SCR 789 : AIR 1963 SC 812).

14. Having regard to what has been set out above, we may now proceed to consider the reasonableness of the restrictions imposed in the instant case on the right of the appellants to carry on their trade or business."

(53) In **State of Gujarat** *versus* **Mirzapur Moti Kureshi Kassab Jamat and others (18),** it was observed :—

> **"36.** It was the Sapru Committee (1945) which initially suggested two categories of rights : one justiciable and the other in the form of directives to the State which should be regarded as fundamental in the governance of the country. Those directives are not merely pious declarations. It was the intention of the framers of the Constitution that in future both the legislature and the executive should not merely pay lip-service to these principles but they should be made the basis of all legislative and executive actions that the future Government may be taking in the matter of governance of the country. *(Constituent Assembly Debates,* Vol. 7, at p. 41)"
>
> *(See The Constitution of India*, D.J. De, 2nd Edn. 2005, p. 1367.) If we were to trace the history of conflict and irreconciliability between fundamental rights and directive principles, we will find that the development of law has passed through three distinct stages.
>
> 37. To begin with, Article 37 was given a literal meaning holding the provisions contained in Part IV of the Constitution to be unenforceable by any court. In **State of Madras** *versus* **Champakam Dorairajan, AIR 1951 SC 226,** it was held that the directive principles of State policy have to conform to and run as subsidiary to the chapter of fundamental rights. The view was reiterated in **Deep Chand** *versus* **State of U.P.** AIR 1959 SC 648. The Court went on to hold that disobedience to directive principles cannot affect the legislative power of the State. So was the view taken in **Kerala Education Bill, 1957,** In re, AIR 1958 SC 926.
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> 38. With **Golak Nath** *versus* **State of Punjab,** AIR 1967 SC 1643 the Supreme Court departed from the rigid rule of subordinating directive principles and entered the era of harmonious construction. The need for avoiding a conflict between fundamental rights and directive principles was emphasised, appealing to the legislature and the courts to strike a belance

(18) (2005) 8 S.C.C. 534

between the two as far as possible. Having noticed **Champakam**, AIR 1951 SC 226 even the Constitution Bench in **Quareshi-I,** AIR 1958 AIR SC 731 chose to make a headway and held that the directive principles nevertheless are fundamental in the governance of the country and it is the duty of the State to give effect to them :—

> "A harmonious interpretation has to be placed upon the Constitution and so interpreted it means that the State should certainly implement the directive principles but it must do so in such a way that its laws do not take away or abridge the fundamental rights, for otherwise the protecting provisions of Part III will be a 'mere rope of sand'." **(Quareshi-I,** 1959 SCR 629 : AIR 1958 SC 731, SCR p. 648)
>
> The Quareshi-I AIR 1958 SC 731 did take note of the status of direvtive principles having been elevated from " subordinate" or "subservient" to "partner" of fundamental rights in guiding the nation.

39. **Kesavananda Bharati** *versus* **State of Kerala,** (1973) 4 SCC 225 a thirteen-Judge Bench decision of this Court is a turning point in the history of directive principles' jurisprudence. This decision clearly mandated the need for bearing in mind the directive principles of State policy while judging the reasonableness of the restriction imposed on fundamental rights. Several opinions were recorded in **Kesavananda Bharati,** (1973) 4 SCC 225 and quoting from them would significantly increase the length of this judgment. For our purpose, it would suffice to refer to the seven-Judge Bench decision in **Pathumma** *versus* **State of Kerala,** (1978) 2 SCC 1 wherein the learned Judges neatly summed up the ratio of Kesavananda Bharati, (1973) 4 SCC 225 and other decisions which are relevant for our purpose. **Pathumma,** (1978) 2 SCC 1 holds : (SCC PP. 2-3)

> "(1) The courts interpret the constitutional provisions against the social setting of the country so as to show a complete consciousness and deep awareness of the growing

requirements of society, the increasing needs of the nation, the burning problems of the day and the complex issues facing the people, which the legislature, in its wisdom, through beneficial legislation, seeks to solve. The judicial approach should be dynamic rather than static, pragmatic and not pedantic and elastic rather than rigid. This Court while acting as a sentinel on the *Qui vive* to protect fundamental rights guaranteed to the citizens of the country *must try to strike a just balance between the fundamental rights and the larger and broadar interests of society* so that when such a right clashes with a larger interest of the country it must yield to the latter. *(Para 5)*

(2) *The legislature is in the best position to understand and appreciate the needs of the people as enjoined in the Constitution.* The Court will interfere in this process only when the statute is clearly violative of the right conferred on a citizen under Part III of when the Act is beyond the legislative competence of the legislature. The courts have recognised that *there is always a presumption in favour of the constitutionality of the statutes and the onus to prove its invalidity lies on the party which assails it. (Para 6)*

(3) The right conferred by Article 19(1)(f) is conditioned by the various factors mentioned in clause (5) *(Para 8)*

(4) The following tests have been laid down as guidelines to indicate in what particular circumstances a restriction can be regarded as reasonable :—

*(a) In judging the reasonableness fo the restriction the court has to bear in mind the directive principles of State pllicy (Para 8)*

(b) The restrictions must not be arbitrary or of an excessive nature so as to go beyond the requirements of the interests of the general public. The legislature must take intelligent care and deliberation in choosing the course which is dictated

by reason and good conscience so as to strike a just balance between the freedom in the article and the social control permitted by the restrictions under the article .. *(Para 14)*

(c) No abstract or general pattern or fixed principle can be laid down so as to be of universal application. It will have to vary from case to case and *having regard to the changing conditions, values of human life, social philosophy of the Constitution, prevailing conditions and the surrounding circumstances all of which must enter into the judicial verdict .. (Para 15)*

(d) The Court is to examine the nature and extent, the purport and content of the right, the nature of the evil sought to be remedied by the statute the ratio of harm caused to the citizen and the benefit conferred on the person or the community for whose benefit the legislation is passed .. *(Para 18)*

(e) There must be a direct and proximate nexus or a reasonable connection between the restriction imposed and the object which is sought to be achiveved .. *(Para 20)*

(f) The needs of the prevailing social values must be satisfied by the restrictions meant to protect social welfare .. *(Para 22)*

(g) The restriction has to be viewed not only from the point of view of the citizen but the problem before the legislature and the object which is sought to be achieved by the statute. In other words, the Court must see whether the social control envisaged by Article 19(1) is being effectuated by the restrictions imposed on the fundamental right. *However important the right of a citizen or an individual*

*may be it has to yield to the larger interests of the country or the community*
*.. (Para 24)*

(h) The Court is entitled to take into consideration matters of common report, history of the times and matters of common knowledge and the circumstances existing at the time of the legislation for this purpose *(Para 25)" (underlining by us)*

40. In **State of Kerala** *versus* **N.M. Thomas,** (1976) 2 SCC 310 also a seven-Judge Bench of this Court culled out and summarised the ratio of this Court in **Kesavananda Bharati,** (1973) 4 SCC 225. Fazal Ali, J. extracted and set out the relevant extract from the opinion of several Judges in **Kesavananda Bharati,** (1973) 4 SCC 225 and then opined : (SCC p. 379, para 164) :—

"164. In view of the principles adumbrated by this Court it is clear that the directive principles form the fundamental feature and the social conscience of the Constitution and the Constitution enjoins upon the State to implement these directive principles. The directives thus provide the policy, the guidelines and the end of socio-economic freedom and Articles 14 and 16 are the means to implement the policy to achieve the ends sought to be promoted by the directive principles. So far as the courts are concerned where there in no apparent inconsistency between the directive principles contained in Part IV and the fundamental rights mentioned in Part III, which in fact supplement each other, there is no difficulty in putting a harmonious construction which advances the object of the Constitution. Once this basic fact is kept in mind, the interpretation of Articles 14 and 16 and their scope and ambit become as clear as day."

**41.** The message of Kesavananda Bharati, (1973) 4 SCC 225 is clear. The interest of a citizen or section of a community, howsoever important, is secondary to the interest of the country

or community as a whole. For judging the reasonability of restrictions imposed on fundamental rights the relevant considerations are not only those as stated in Article 19 itself or in Part III of the Constitution : the directive principles stated in Part IV are also relevant. Changing factual conditions and State policy, including the one reflected in the impugned enactment, have to be considered and given weightage to by the courts while deciding the constitutional validity of legislative enactments. A restriction placed on any fundamental right, aimed at securing directive principles will be held as reasonable and hence *intra vires* subject to two limitations : first, that it does not run in clear conflict with the fundamental right, and secondly, that it has been enacted within the legislative cometence of the enacting legislature under Part XI Chapter I of the Constitution."

(54) In **M. Nagaraj** *versus* **Union of India (19),** it was observed :—

"**50.** Social justice is one of the sub-divisions of the concept of justice. It is concerned with the distribution of benefits and burdens throughout a society as it results from social institutions—property systems, public organisations, etc.

**51.** The problem is—what should be the basis of distribution? Writers like Raphael, Mill and Hume define "social justice" in terms of rights. Other writers like Hayek and Spencer define "social justice" in terms of deserts. Socialist writers define "social justice" in terms of need. Therefore, there are three criteria to judge the basis of distribution, namely, rights, deserts or need. These three criteria can be put under two concepts of equality—"formal equality" AND "proportional equality". "Formal equality" means that law treats everyone equal and does not favour anyone either because he belongs to the advantaged section of the society or to the disadvantaged section of the society. Concept of "proportional equality" expects the States to take affirmative action in favour of di...dvantaged sections of the society within the framework of liberal democracy.

(19) (2006) 8 S.C.C. 212

**52.** Under the Indian Constitution, while basic liberties are guaranteed and individual initiative is encouraged, the State has got the role of ensuring that no class prospers at the cost of other class and no person suffers because of drawbacks which is not his but social."

(55) In T.M.A. Pai Foundation, It was observed :—

"1. India is a land of diversity—of different castes, peoples, communities, languages, religions and culture. Although these people enjoy complete political freedom, a vast part of the multitude is illiterate and lives below the poverty line. The single-most powerful tool for the upliftment and progress of such diverse communities is education. The State, with its limited resources and slow-moving machinery, is unable to fully develop the genius of the Indian people. Very often the impersonal education that is imparted by the State, devoid of adequate material content that will make the students self-reliant, only succeeds in producing potential pen-pushers, as a result of which sufficient jobs are not available."

(56) In **Harjinder Singh** *versus* **Punjab State Warehousing Corpn. (20),** it was observed :—

**"37.** As early as in 1956, in a Constitution Bench judgment dealing with Article 32 petition, Vivian Bose, J. while interpreting Article 14 of the Constitution, posed the following question :

"23. After all, for whose benefit was the Constitution enacted?"

(Bidi Supply Co. versus Union of India, AIR 1956 SC 479, AIR at p. 487, para 23)

**38.** Having posed the question, the learned Judge answered the same in his inimitable words and which I may quote : (Bidi Supply case, AIR 1956 SC 479, AIR P. 487, para 23)

"23. ...I am clear that the Constitution is not for the exclusive benefit of Governments and States; it is not only for lawyers and politicians and officials and those highly placed. *It also exists*

(20) (2010) 3 S.C.C. 192

*for the common man, for the poor and the humble, for those who have businesses at stake, for the 'butcher, the baker and the candlestick-maker'*. It lays down for this land 'a rule of law' as understood in the free democracies of the world. It constitutes India into a Sovereign Democratic Republic and guarantees in every page rights and freedom to the individual side by side and consistent with the overriding power of the State to act for the common good of all." (emphasis supplied)

**39.** The essence of our Constitution was also explained by the eminent jurist Palkhivala in the following words :—

"Our Constitution is primarily shaped and moulded for the common man. It takes no account of 'the portly presence of the potentates, goodly in girth'. It is a Constitution not meant for the ruler

'but the ranker, the tramp of the road,
The slave with the sack on his shoulders
pricked on with the goad,
The man with too weighty a burden,
too weary a load.' "

(N.A. Palkhivala, our Constitution Defaced and Defiled, Mac Millan, 1974, p. 29)

I am in entire agreement with the aforesaid interpretation of the Constitution given by this Court and also by the eminent jurist.

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**49.** I am of the view that any attempt to dilute the constitutional imperatives in order to promote the so-called trends of "globalisation", may result in precarious consequences. Reports of suicidal deaths of farmers in thousands from all over the country along with escalation of terrorism throw dangerous signal. Here if we may remember Tagore who several decades ago, in a slightly different context, spoke of eventualities which

may visit us in our mad rush to ape western ways of life. Here if I may quote the immortal words of Tagore :

> "We have for over a century been dragged by the prosperous West behind its chariot, choked by the dust, deafened by the noise, humbled by our own helplessness and overwhelmed by the speed. We agreed to acknowledge that this chariot-drive was progress, and the progress was civilisation. If we ever ventured to ask 'progress towards what and progress for whom', it was considered to be peculiarly and ridiculously oriental to entertain such ideas about the absoluteness of progress. Of late, a voice has come to us to take count not only of the scientific perfection of the chariot but of the depth of the ditches lying in its path."

(57) We are, thus, of the view that the provision limiting the fee to the minimum infrastructure requirements cannot be held to be violative of fundamental right under Aricle 19(1)(g) of the Constitution. The restriction does not, in any manner, interfere with the right of educational institutions to establish and administer the same. Their cost in providing minimum infrastructure is taken care of. They are not debarred from providing better infastructure if they could afford to. There is no absolute right to establish institutions involving higher cost and limiting the same only to the students who can pay higher fee. As observed in P.A. Inamdar, a student paying high fee is likely to aim at earning more rather than serving which can be bane to the society. Education after all is not business. Primarily, it is service to the society where earning is secondary or incidental. High fee will be inconsistent with such aim and will force a student to adopt a commercial approach. If the Act intends to encourage social values, where service oriented approach can be adopted and access to higher education can be provided to poorer sections, such aim will be consistent with the directive principles. In judging the validity of a legislation, the Court has to strike a balance between the need of the society and right of the individual. Right of the individual cannot be sacrosanct so as to make the need of the society subordinate to its right.

(59) In view of above, all the writ petitions are disposed of accordingly

***R.N.R.***