Modern Dental College & Res.Cen. & Ors vs State Of Madhya Pradesh & Ors on 2 May, 2016

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Bench: Anil R. Dave, A.K. Sikri, R.K. Agrawal, Adarsh Kumar Goel, R. Banumathi

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4060 OF 2009

MODERN DENTAL COLLEGE AND RESEARCH CENTRE & ORS. VERSUS STATE OF MADHYA PRADESH & ORS.	.....APPELLANT(S) .....RESPONDENT(S)	

W I T H

CIVIL APPEAL NO. 4061 OF 2009

CIVIL APPEAL NO 4062 OF 2009

CIVIL APPEAL NO 4063 OF 2009

CIVIL APPEAL NO 4064 OF 2009

A N D

CIVIL APPEAL NO 4065 OF 2009

J U D G M E N T

A.K. SIKRI, J.

In all these appeals, validity and correctness of the common judgment dated May 15, 2009 passed by the High Court of Madhya Pradesh, Principal Bench at Jabalpur, has been questioned. The appellants in these appeals had filed writ petitions challenging the validity/vires of the provisions of the statute passed by the State Legislature, which is known as 'Niji Vyavasayik Shikshan Sanstha (Pravesh Ka Viniyaman Avam Shulk Ka Nirdharan) Adhiniyam, 2007' (hereinafter referred to as the 'Act, 2007'). The appellants also challenged vires of Admissions Rules, 2008 (for short, 'Rules, 2008') and the Madhya Pradesh Private Medical and Dental Post Graduate Courses Entrance Examination Rules, 2009 (for short, 'Rules, 2009') which have been framed by the State

Government in exercise of the power conferred upon it vide Section 12 of the Act, 2007. The aforesaid Act and Rules regulate primarily the admission of students in post graduate courses in private professional educational institutions and the provisions are also made for fixation of fee. In addition, the said Act and Rules also contain provisions for reservation of seats. All the appellants are private medical and dental colleges which are unaided, i.e. they are not receiving any Government aid and are self financing institutions running from their own funds.

It is evident from the reading of the impugned judgment that challenge was laid by the appellants to those provisions of the Act and Rules on four grounds. The same are as under:

(i) the challenge to the provisions relating to admission;

(ii) the challenge to the provisions relating to fixation of fee;

(iii) the challenge to the provisions for reservation; and

(iv) the challenge to the provisions relating to eligibility for admission.

Insofar as provisions relating to admission, eligibility for admission and fixation of fee are concerned, the main contention of the appellants was that these medical and dental colleges being private unaided colleges, it is their fundamental right under Article 19(1)(g) of the Constitution of India to lay down the eligibility criteria for admission and admit the students as well as fix their fee. Relying upon the eleven Judge Bench decision of this Court in T.M.A. Pai Foundation & Ors. v. State of Karnataka & Ors.[1], it was argued that right to administer educational institution is recognised as an 'occupation' and is, thus, a fundamental right to carry on such an occupation as stipulated in Article 19(1)(g). According to the appellants, the provisions in the aforesaid Act and Rules impinge upon the fundamental right guaranteed to these institutions under the Constitution and, therefore, the said provisions are violative of Article 19(1)(g) of the Constitution. Insofar as provision relating to reservation of seats to Scheduled Castes, Scheduled Tribes, etc. is concerned, the emphasis of the appellants was two fold: First, it was argued that private educational institutions cannot be foisted with the obligation to admit students of reserved class, which was the obligation of the State. Secondly, the provisions of the Act, 2007 made excessive reservations thereby leaving hardly any seats for unreserved categories, which is not permissible in view of the judgment of this Court in T. Devadasan v. Union of India & Anr.[2] and subsequent decisions reiterating the dicta in T. Devadasan.

As would be noticed hereinafter, the basis of attack to the constitutional validity of the provisions of the Act and Rules remains the same. Additionally, however, the challenge to the said Act and Rules is laid before us also on the ground of the competence of the State Legislature as, according to the appellants, the subject matter falls in the domain that is exclusively reserved for the Parliament.

The High Court has repelled the challenge on first three counts holding that the judgment in T.M.A. Pai Foundation, as explained in P.A. Inamdar & Ors. v. State of Maharashtra & Ors.[3], permits the Government to regulate the admissions as well as fee, even of the private unaided educational

institutions and that the impugned provisions are saved by Article 19(6) of the Constitution as they amount to 'reasonable restrictions' imposed on the right of admission and fixation of fee, which otherwise vests with the appellants.

Before we advert to the arguments of the appellants advanced before us in detail, it would be apposite to give the gist of the provisions of the Act, 2007 as well as Rules, 2008 and Rules, 2009 and also the manner in which the High Court has dealt with the issues at hand.

The Act, 2007:

> The Preamble of the Act mentions that it is to provide for regulation of admission and fixation of fee in private professional educational institutions in the State of Madhya Pradesh and to provide for reservation of seats to persons belonging to the Scheduled Castes, Scheduled Tribes and Other Backward Classes in professional educational institutions. Thus, insofar as the Preamble is concerned, it stipulates that the provisions are made to provide for the 'regulation' of admission and fixation of fee. Further, the Act encompasses private professional educational institutions of all disciplines and is not confined to medical and dental professions. However, writ petitions were filed raising the grievance against the aforesaid enactment only by medical and dental educational institutions. Institutions imparting other kind of professional education have not felt aggrieved.
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> Be that as it may, for regulating the admission and fixation of fee under Section 4 of the Act, a committee known as 'Admission and Fee Regulatory Committee' (hereinafter referred to as the 'Committee') is constituted for the supervision and guidance of the admission process and for the fixation of fee to be charged from candidates seeking admission in a private professional educational institution. This Section further provides for composition, disqualification and functions of the Committee.
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> Chapter III which comprises of Sections 5 to 8 deals with 'Admission'. As per Section 5, the eligibility for admission to such institutions shall be such as may be notified by the appropriate authority. These eligibility conditions are provided in Rules, 2008. Section 6 prescribes 'Common Entrance Test' (for short, 'CET') on the basis of which admissions would be made and the same reads as under:
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> "6. Common Entrance Test – In private unaided professional educational institution, admission to sanctioned intake shall be on the basis of the common entrance test in such manner as may be prescribed by the State Government." CET is defined in Section 3(d) of the Act, 2007 and reads as follows:
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> "(d) "Common entrance test" means an entrance test, conducted for determination of merit of the candidates followed by centralized counseling for the purpose of merit based admission to professional colleges or institutions through a single window

procedure by the State Government or by any agency authorized by it;" As per Section 7, any admission made contrary to the provisions of the Act or Rules is to be treated as void. Section 8 deals with 'reservation of seats'.

Insofar as fixation of fee is concerned, the facts which have to be taken into consideration while fixing the fee are provided in Section 9, which is under Chapter IV of the Act, and reads as follows:

"9. Factors – (1) Having regard to -

(i) the location of the private unaided professional educational institution;

(ii) the nature of the professional course;

(iii) the cost of land and building;

(iv) the available infrastructure, teaching, non-teaching staff and equipments;

(v) the expenditure on administration and maintenance;

(vi) a reasonable surplus required for growth and development of the professional institution; and

(vii) any other relevant fact, the committee shall determine, in the manner prescribed, the fee to be charged by a private unaided professional educational institution.

(2) The Committee shall give the institution an opportunity of being heard before fixing any fee:

Provided that no such fee, as may be fixed by the Committee, shall amount to profiteering or commercialization of education." As pointed out above, the Government has framed Rules, 2009 creating detailed provisions for fixation of fee, to which we shall be referring to at the appropriate stage.

Another provision which needs to be mentioned at this stage is Section 10. This provision provides for appeal that can be filed by a person or a professional institution aggrieved by an order of the Committee. Such an appeal can be filed within 30 days before the Appellate Authority constituted under the said provision. Under Section 12, the State Government may, by notification, make Rules for carrying out the purpose of the Act. Section 13 empowers the State Government to make Regulations consistent with the Act and the Rules made thereunder, inter alia, relating to the eligibility of admission, manner of admission and allocation of seats in a professional educational institution, including the reservation of seats, as well as

the manner or criteria for determination of fee to be charged by professional educational institutions from the students and the fee that is to be charged by the professional educational institutions.

It may be mentioned that Circular/Notification dated February 28, 2009 and March 15, 2009 was issued by the State Government under Section 6 of the Act, 2007 appointing the Professional Examination Board, Bhopal (which is known as VYAPAM) as the agency to conduct the entrance examination for the Post-graduate Entrance Examination of Private Medical and Dental universities and under-graduate examination respectively.

The Impugned Judgment As already mentioned above, the High Court classified the challenge to the provisions of the aforesaid Act and Rules into four heads and then dealt with each head separately. Insofar as challenge to the provision relating to admission is concerned, the High Court has concluded that the provisions of Section 6 read with Section 3(d) of the Act, 2007, which provide that admissions to the sanctioned intake shall be on the basis of CET followed by centralised counselling by the State Government or by an agency authorised by the State Government, are in consonance with the judgment of this Court in T.M.A. Pai Foundation and P.A. Inamdar. The High Court reproduced paragraphs 58 and 59 of T.M.A. Pai Foundation wherein this Court emphasised that the admission is to be made on the basis of merit, which is usually determined either by marks that the student obtains at the qualifying examination or school leaving certificate stage followed by the interview or by a CET conducted by the institution or in the case of professional colleges, by Government agencies. From this, the High Court concluded that since merit has to be the prime consideration and one of the recognised mode of ascertaining the merit is through CET and insofar as professional colleges are concerned, T.M.A. Pai Foundation itself permitted such CET to be conducted by the Government agencies, there was nothing wrong with the impugned provision. The High Court also held that in paragraphs 67 and 68 of T.M.A. Pai Foundation this Court had permitted framing of Regulations for unaided private professional educational institutions for conducting such admission tests. The contention of the educational institutions/ writ petitioners to the effect that T.M.A. Pai Foundation never allowed the State to control admissions in private unaided professional educational institutions so as to compel them to give up a share of available seats to the candidates chosen by the State has been repelled by the High Court by holding that the admission procedure for unaided professional educational institutions, both minority and non- minority, was spelled out in P.A. Inamdar in paragraphs 133 to 138 clearly holding that for achieving the objective of excellence in admission and maintenance of high standards, the State can, and rather must, in the national interest step in. This judgment, thereby, recognised the power of the State to hold such CETs in respect of private educational institutions as well. The High Court, in the process, painfully remarked that the admission procedure which was adopted by the private institutions had failed to satisfy the triple test of transparency, fairness

and non- exploitativeness thereby compelling the State to substitute the same by its own procedure and sufficient material was produced by the respondents on record to show that prior to the enactment of the Act, 2007, there were number of complaints of malpractices in admissions in the private professional educational institutions which were found to be true.

In nutshell, the High Court took the opinion that having regard to the larger interest of the welfare of the students community to promote merit, achieve excellence, curb malpractices and to secure grant of merit based admission in transparent manner, the Legislature in its wisdom had passed the Act in question, also keeping in mind the prevailing conditions relating to admissions in such institutions in the State of Madhya Pradesh. It, thus, concluded on this aspect that Sections 3(d), 6 and 7 of the Act, 2007 do not impinge on the fundamental right to carry on the 'occupation' of establishing and administering professional educational institutions.

Dealing with the challenge to the provisions relating to fixation of fees, viz. Sections 4(1), 4(8) and 9 of the Act in question, the High Court recognised the right of these educational institutions, as found in T.M.A. Pai Foundation, that decision on the fee to be charged is to be left to private educational institutions. Notwithstanding, the same judgment gives power to the State to regulate the exercise of power of the educational institution to ensure that there is no 'profiteering' and Sections 4 and 9 of the Act, 2007 were aimed at achieving that purpose only. In substance, these provisions empower the Committee to satisfy itself that the fee proposed by a private professional educational institution did not amount to profiteering or commercialisation of education and was based on the factors mentioned in Section 9(1) of the Act, 2007. The Court noted that these factors which were mentioned in Section 9(1) were the relevant factors for fixation of fee as they ensured fixation of such fee which would take into consideration the nature of professional courses, the cost of land and building, the available infrastructure, teaching, non-teaching staff and equipment, the expenditure on administration and maintenance, as well as a reasonable surplus required for growth and development of the professional institutions. This was precisely the mandate of T.M.A. Pai Foundation.

While dealing with the provisions in the Act, 2007, which pertained to reservation, the High Court discussed the dictum laid down in M.R. Balaji & Ors. v. The State of Mysore & Ors.[4] wherein the Constitution Bench of this Court, while interpreting Article 15(4) of the Constitution, held that the said provision was made to subserve the interest of the society at large by promoting advancement of weaker sections of the society and, thus, it authorises the State to make special provision for such weaker sections. The only exception was that such a special provision to be made by the State should not completely exclude and ignore the rest of the society. Further, while making such a provision, the State was supposed to approach its task objectively and in a rationale manner and it has to take reasonable and even generous steps to help the advancement of weaker elements; the requirement of the

community at large must be borne in mind and a formula must be evolved which should strike a reasonable balance between the several relevant considerations. Likewise, after the insertion of clause (5) to Article 15 by the Constitution (Ninety-Third Amendment) Act, 2005, another enabling provision was introduced empowering the State to make any special provision by law for advancement of any socially and educationally backward classes of citizens or for the Scheduled Tribes or the Scheduled Castes insofar as such special provision relates to admission to the educational institutions, including the private professional educational institutions, whether aided or unaided. Thus, in terms of Article 15(5) of the Constitution, the State was empowered to provide reservation to such weaker sections even in respect of unaided institutions, including minority institutions. In that context, the High Court went into the arithmetic of the seats that have been earmarked under Rule 7 of Rules, 2009 for candidates belonging to different reserved categories in different disciplines or subjects and on that basis came to the conclusion that the distribution of seats to those categories clearly demonstrates that sufficient number of seats have been allotted also for unreserved categories in different disciplines or subjects of post graduate medical and dental courses in Medical and Dental colleges in the State of Madhya Pradesh. In the process, the High Court dispelled the fear of the writ petitioners that the unreserved category candidates scoring high marks than the reserved category candidates will not get seats in the discipline or subjects of their choice.

Rule 10 of Rules, 2009 lays down the eligibility conditions for candidates for taking the CET for admission to post graduate medical and dental courses in private unaided medical and dental colleges in the State of Madhya Pradesh. One of the eligibility conditions specified in Rule 10(2)(iii) is that an eligible candidate must permanently be registered by Madhya Pradesh Medical/ Dental Council (and/or MCI/DCI) on or before April 30, 2009. The validity of this Rule was challenged by some of the writ petitioners on the ground that this Rule bars candidates who are permanently registered with other State Medical/Dental Councils from taking the CET. This contention of the writ petitioners has been accepted declaring Rule 10(2)(iii) of the Rules, 2009 as ultra vires. The conclusion of the High Court on this aspect has become final as the State has not filed any appeal thereagainst.

In nutshell, the decision of the High Court on the three crucial aspects is on the following premise:

(i) Re.: Admissions – Reading Section 6 with Section 3(d) of the Act, 2007, which deals with the CETs, it is held that provisions prescribing a CET for the purpose of admission to private unaided institutions are constitutional and valid since the same are in consonance with the dictum of the Constitution Bench judgment of this Court in the case of T.M.A. Pai Foundation, as per the law specially laid down in paragraphs 58 and 59 of the said judgment. The High Court has pointed out the manner in which the dictum of T.M.A. Pai Foundation is explained in the Constitution Bench judgment

> of this Court in the case of P.A. Inamdar, and applying the same the High Court had held that there is no violation of the fundamental rights of the writ petitioners since the provisions constituted reasonable restriction as accepted by and, therefore, saved under Article 19(6) of the Constitution. Quoting paragraphs 136 and 137 of P.A. Inamdar, the High Court held that the CET prescribed under Section 6 of the Act, 2007 will ensure that the merit is maintained. It is also concluded by the High Court that sufficient material that was placed on record to establish that prior to the enactment of the Act, 2007 clearly exhibited that private unaided institutions were not able to ensure a fair, transparent and non-

exploitative admission procedure. As such, the High Court upheld the provisions of the Act, 2007 and the Rules, 2008 read with notifications issued thereunder to be constitutionally valid.

(ii) Re.: Fee Regulation – With regard to the challenge to Sections 4(1), 4(8) and 9 of the Act, 2007 read with Rule 10 of the Rules, 2008, it is held that the power of the Fee Regulatory Committee under the provisions was only 'regulatory' and the purpose of which was to empower the Committee to be satisfied that the fee proposed by the private professional institutions did not amount to profiteering or commercialisation of education and was based on intelligible factors mentioned in Section 9(1) of Act, 2007 providing a canalised power which was not violative of the fundamental rights of the private professional institutions to charge their own fee.

(iii) Re.: Reservation – The challenge to Section 8 of Act, 2007 and Rules 4 & 7 of Rules, 2008 relating to reservations were not seriously pressed by the appellants in view of the amendment to Article 15, whereby clause (5) was inserted, by the Constitution (Ninety-Third Amendment), 2005. In any case, the High Court has examined the said provisions and concluded that sufficient number of seats were allotted for the unreserved category in different disciplines and subjects, and that a reasonable balance had been struck between the rights of the unreserved category candidates and the reserved category candidates.

The aforesaid background, as narrated by us, would make it clear that the attack to the constitutional validity of the Act, 2007 read with Rules, 2008 and Rules, 2009 primarily touches upon the following three aspects:

> (i) The impugned provisions usurp the rights of educational institutions to conduct exam and admit the students. It is argued that this right has been specifically recognised in T.M.A. Pai Foundation, which legal position is reiterated in P.A. Inamdar. Therefore, right to admission of students in unaided recognised educational institutions is to be exercised by these institutions. Even if CET is to be held for this purpose, it is these institutions which can join together and hold such a test. The only obligation is that the selection process needs to be fair, transparent and non-exploitative. The State can step in and oversee/supervise the process of admission, which is to be essentially taken by the educational institution to ensure that the aforesaid triple test of fair, transparent and non-exploitative selection process is followed. It is argued that the power given to the State would be only

> regulatory in nature and under the garb of this power the State cannot take away the right to admit the students which vests with the educational institutions. In nutshell, the submission is that holding of CET by the State under the provisions of the Act, 2007 read with the Rules framed thereunder amounts to impinging upon the fundamental right of the appellants to establish and manage professional educational institutions, which is now brought at par with the rights of minority institutions to establish such institution given to them under Article 30 of the Constitution. It was further argued that whereas the power of supervision on the part of the State may amount to reasonable restriction and, therefore, that would satisfy the test laid down in Article 19(6) of the Constitution, but taking away the power of admission entirely by conducting CET and even counseling would fall foul of the fundamental right to carry on occupation guaranteed under Article 19(6) of the Constitution and such provisions cannot be saved under Article 19(6) of the Constitution as well as they disturb the Doctrine of Proportionality.

It was submitted that the State's intervention, if at all, can only be with consensual arrangement and not otherwise.

(ii) Likewise, it is argued by the appellants that as a facet of Article 19(1)(g) of the Constitution, right to fix the fee is conferred upon these educational institutions which are unaided and, therefore, the State cannot assume that power to itself. Here again, the power of the State was limited to that of 'policing', viz., to ensure that the fee fixed by the educational institutions does not amount to 'profiteering' and that it does not result in 'commercialisation' of the education. According to the appellants, to ensure this, the only mechanism that can be provided is the 'Complaint Mechanism' whereunder after the fee is fixed by the educational institution and if there is grievance of the students or parents or even the authorities against the same there can be a scrutiny by the appropriate committee (to be set up for this purpose) to see that the fee fixed is not excessive and meets the parameters laid down in T.M.A. Pai Foundation. It was conceded that while doing so the State can also, as a watchdog, ensure that no capitation fee is charged from the students by the educational institutions. It was submitted that contrary to the above, in the instant case, the provisions of Act, 2007, read with Rules thereunder, authorize the Committee set up by the Government to fix the fee thereby denuding the institutions of their right completely, which is anathema to the right of the educational institution to carry on their 'occupation' of running the educational institutions, as a fundamental right.

(iii) Third challenge is to the provision of Section 8 of Act, 2007 and Rules 4 and 7 of Rules, 2008 dealing with the reservations.

Mr. K.K. Venugopal, learned senior counsel appearing for some of the appellants, spearheaded the attack to the impugned judgment with his usual fervor, panache and dexterity. Dr. Rajeev Dhawan was the other senior counsel who made his own detailed submissions with a melange of legal acumen, coupled with passion, thereby exacerbating the attack. They were joined by Mr. Raval, Mr. Ajit Kumar Sinha and Mr. Rakesh Dwivedi, learned senior counsel, who supported them in great measure. Their forceful onslaught was bravely faced and defended by Ms. Vibha Dutta Makhija,

learned senior counsel who appeared for the State of Madhya Pradesh. Others, who supported her in countering the submissions of the appellants, depicting in the process the other side with terse and astute aphorisms of the stark ground realities, were Ms. Pinky Anand, learned Additional Solicitor General, Mr. Vikas Singh, learned senior advocate and Mr. C.D. Singh, learned Additional Advocate General. Whether the defence has been able to blunt the attack of the appellants and has emerged successful in its endeavor would be known at the final stages of the judgment when the arguments of both sides are suitably dealt with by this Court.

The central theme of the arguments of the learned counsel for the appellants was that by the impugned legislation the State seeks to wipe out the choice available with the appellants institutions to devise their own admission procedure and the provisions of Section 6 read with Section 3(d) necessitate that the admission be carried out only on the basis of a CET to be conducted by the State Government or any agency appointed by it. Section 7 of the Act provides that the admission in violation of the provisions of the Act (i.e. in a manner otherwise than by a CET conducted by the State Government or the agency appointed by it) would be void. In addition, Section 9 of the Act provides for the Committee defined under Section 3(c) of the Act to 'determine' and 'fix' the fees to be charged by the appellants and thereby completely trample the rights of the appellants to determine and charge the fee. The Committee is not an independent Committee but is manned by Government officials and, therefore, effectively the State Government has devised the said mechanism to fix the fees of the private colleges. Section 8 provides for reservation in private institutions, including post-graduate courses, which the appellants submit is impermissible in light of the law laid down by this Court in the case of Ashok Kumar Thakur v. Union of India & Ors.[5].

It is their submission that right available to the appellants institutions is to devise their own admission procedure, subject to the condition that the procedure so devised ought to be 'fair', 'transparent' and 'non- exploitative'. Thus, the rights available to the institutions under Article 19(1)(g) includes a right to admit students on a fair basis and as such the appellants can choose to admit students on the basis of the CET conducted by an association of institutions coming together (as has been provided in P.A. Inamdar) or one conducted by the State and the choice also includes to a right to admit students on the basis of the CET conducted by the Central Government. The right to choose is the right that is available to the individual institutions under Article 19(1)(g) and the impugned legislation which abrogates the said right falls foul of Article 12 of the Constitution of India.

The counsel for the appellants traced the history of judicial journey by referring to the judgment in in Unni Krishnan, J.P. & Ors. v. State of Andhra Pradesh & Ors.[6] In that case, this Court considered the conditions and regulations, if any, which the State could impose in the running of private unaided/aided recognized or affiliated educational institutions conducting professional courses. The extent to which the fee could be charged by such institutions and the manner in which admissions could be granted was also considered. The Court thereafter devised a scheme of 'free seats' or the state quota seats and 'payment seats' or the management quota seats, under which a higher fee could be charged from the students taking admission against the 'payment seats' and a lesser fee would be charged from students occupying the 'free seats'. This Court held that a fee higher than that charged by the Government institutions for similar courses for the 'payment seats'

can be imposed, but that such fee could not exceed the maximum limit fixed by the State. With regard to private aided recognized/affiliated educational institutions, the Court upheld the power of the Government to frame rules and regulations in matters of admission and fees, as well as in matters such a recruitment and conditions of service of teachers and staff.

The learned counsel emphasised that the aforesaid control mechanism failed and the position was remedied by this Court in T.M.A. Pai Foundation. It held that if the institutions are entirely self-financing, the State shall have minimal interference and the interference can be made only for the purposes of Maintaining Academic Standards. Besides this, it was held that the colleges enjoy the greatest autonomy and the same ought to be protected. The Court has considered the scope of the 'reasonable restrictions' that can be provided by the State under Article 19(6) of the Constitution and held that the said power does not confer upon the State to take over the control of the affairs of the institutions which have been held to be reasonable restrictions. The appellants referred to the observations made in paragraph 54 with great emphasis:

> "54. The right to establish an educational institutional can be regulated; but such regulatory measures must, in general, be to ensure the maintenance of proper academic standards, atmosphere and infrastructure (including qualified staff) and the prevention of mal-administration by those in charge of management. The fixing of a rigid fee structure, dictating the formation and composition of a governing body, compulsory nomination of teachers and staff for appointment or nominating students for admissions would be unacceptable restrictions." It was argued that this Court, by overruling Unni Krishnan, has recognised the need and importance of private educational institutions and the necessity of giving them the requisite autonomy in their functioning, management and administration.
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> The submission was that this Court in T.M.A. Pai Foundation laid down the following principles and the scope of the rights enjoyed by the private institutions imparting professional education:
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> (a) that the institutions have a fundamental right to establish, run and maintain professional institutions and the rights flow from Article 30(1) in respect of minority institutions and Article 19(1)(g) in respect of minority as well as non-minority private unaided institution;
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> (b) the private institutions that do not receive any aid out of State funds enjoy a greater autonomy in their day-to-day functioning and the autonomy includes:-
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> (i) a right to admit students;
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> (ii) a right to set up a reasonable fee structure;
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> (iii) a right to appoint staff (teaching and non-teaching);

and

(iv) a right to take action if there is dereliction of duty on the part of any employees.

and

(c) the fixing of a rigid fee structure, dictating the formation and composition of a governing body, compulsory nomination of teachers and staff for appointment or nominating students for admissions would be unacceptable restrictions which would not be protected under Article 19(6) of the Constitution.

Continuing the narration of judicial pronouncement, the appellants' counsel submitted that in spite of the said observations and the law laid down by this Court in T.M.A. Pai Foundation defining the scope of the right of the private institutions to run and manage the professional colleges, some States did not adhere to the same and issued Government Orders relying on the observations made by this Court in paragraph 68 of the said judgment. The said orders were challenged before this Court, which came to be decided in the case of Islamic Academy or Education & Anr. v. State of Karnataka & Ors.[7], which laid down certain broad modalities and creation of Committees for 'regulating' the admission procedure and the fee structure. It was submitted that certain States enacted laws which were again in violation of the fundamental rights and, therefore, the same were challenged before this Court. The matter was referred to a larger Bench, which answered the reference in the case of P.A. Inamdar, wherein it was held as under:

> "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).
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> "There is nothing wrong in an entrance test being held for one group of institution 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....." xx xx xx
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> 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.
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> 144. The two Committees for monitoring admission procedure and determining fee structure in the judgment of Islamic Academy are in our view, permissible 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 Article 30(1) or 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." Explaining their understanding of T.M.A. Pai Foundation and P.A. Inamdar in their own way, a passionate plea was made not to allow such legislations to remain on statute books which were palpably unconstitutional.

In addition to the aforesaid issues, which are founded on Article 19(1)(g) of the Constitution, additional arguments raised in this Court touch upon the power of the State to enact such a legislation inasmuch as it is argued that the matter of admission in higher educational institutional falls in Entry 66 of List I to the Seventh Schedule of the Constitution (Union List) and is not covered by Entry 25 of List III of Seventh Schedule (Concurrent List).

Learned counsel appearing for the State of Madhya Pradesh put stiff resistance to the aforesaid submissions of the learned counsel for the appellants and submitted with all vehemence at her command that the impugned judgment of the High Court was without blemish, which had given due and adequate consideration to all the aforesaid submissions of the appellants which were advanced before the High Court as well and rightly negated these submissions by correctly reading the ratio of T.M.A. Pai Foundation as explained in Islamic Academy of Education and put beyond pale of controversy by P.A. Inamdar. She referred to and relied upon the reasoning given in the impugned judgment by the High Court and submitted that no interference therein was called for. In nutshell, her submission was that Act, 2007 as well as Rules framed thereunder were unconstitutional/violative of fundamental rights of the appellants guaranteed under Article 19(1)(g) of the Constitution of India. Her submission was that undoubtedly the Court recognised the right of the citizens to establish and manage educational institutions, as fundamental right, by regarding the same as an 'occupation' under Article 19(1)(g) of the Constitution in T.M.A. Pai Foundation and also bringing them at par with the similar rights which were already conferred upon minorities to establish and manage professional/technical institutions under Article 30(1) of the Constitution. She, however, sought to highlight that analogously the Court also made it clear that these were subject to reasonable restrictions which can be imposed under Article 19(6) of the Constitution. She argued that T.M.A. Pai Foundation, in this process, expounded on the nature and extent of control on the basis of levels of education which has to be kept in mind and cannot be glossed over. This was explained in paragraph 61 of the judgment by observing that insofar as school level education is concerned, unaided private schools must have maximum autonomy since at the school level it is not possible to assess the merit of the students. Therefore, admission at this stage cannot be granted on the basis of selection based only on merit. Likewise, private unaided undergraduate colleges which are imparting non-technical education would also enjoy same kind of maximum autonomy similar to schools. However, whenever it comes to the higher education, particularly in the field of

professional education, private unaided institutions imparting professional education would not be extended the principle of maximum autonomy. Here, the Court categorically stated that maximum regulations could be framed with regard to these institutions since the principle of maintaining merit was inviolable and primary. The Court was categorical in clarifying that in the field of professional education, the Government could enforce a regulation for ensuring a merit based selection. Proceeding further in this direction, she referred to certain paragraphs of T.M.A. Pai Foundation and more focused discussion on this aspect of P.A. Inamdar and submitted that these judgments clearly empower the State to regulate the admission to ensure that the triple test ensured in T.M.A. Pai Foundation is adhered to and such regulation would encompass within its power of the State to hold CET coupled with counseling of the students to be admitted in the professional institutions. She further submitted that in P.A. Inamdar the seven Judge Bench rather exhorted the States to come out with legislations regulating admissions and fee in private unaided/aided professional or technical institutions. She pointed out that after the pronouncement of judgment in P.A. Inamdar, many States have enacted laws regulating admissions and fee in such institutions. She submitted that once such a law enacted by the Delhi State was considered by this Court in the case of Indian Medical Association v. Union of India & Ors.[8], where the challenge was to the ACMS prescribing for granting admission to only wards of army personnel in colleges managed by ACMS, while upholding the constitutional validity of the Delhi Professional Colleges/Institutions (Prohibition of Capitation Fee, Regulation of Administration, Fixation of Non-Exploitative Fee & Other Measures) Act, 2007, this Court struck down the ACMS notification holding that non-minority private unaided professional colleges do not have a right to choose their own 'source' from a general pool. It was held that 'neither the minority nor non-minority institutions could mal-administer their educational institutions, especially professional institutions, that affect the quality of education, and by choosing students arbitrarily from within the sources that they are entitled to choose from'. Insofar as provision regarding fee regulations are concerned, her submission was that the mechanism which was provided did not take away the power of the educational institutions to fix the fee. On the contrary, even as per the procedure laid down the fee which the appellants intend to charge had to be placed before the Committee constituted under the Rules and the Committee was to consider whether proposed fee is proper or not and on that basis fix the fee keeping in view the parameters laid down in the Act and Rules which were in consonance with the principles enunciated in T.M.A. Pai Foundation and P.A. Inamdar as well as Modern School v. Union of India[9]. She, thus, argued that this was only a regulatory mechanism. Ms. Makhija further submitted that principles of natural justice were duly incorporated in the procedure established by incorporation of sub-section (2) of Section 9 of the Act, 2007 and even provision of appeal process was provided under Section 10 of the said Act.

Insofar as provision relating to reservation is concerned, she submitted that the issue whether provisions of Article 15(5) of the Constitution apply or not to the private unaided institutions was no longer res integra since the same has already been upheld in the Constitution Bench judgment rendered in Pramati Educational & Cultural Trust (Registered) & Ors. v. Union of India & Ors.[10] She also pointed out that challenge to the said provision relating to reservation had not been forcefully pressed by appellants before the High Court.

Other counsel made their submissions on same lines.

The discussion of the case upto now fairly demonstrates that the two cases on which strong reliance is placed by the appellants are T.M.A. Pai Foundation and P.A. Inamdar. In the process, judgment in the case of Islamic Academy of Education is also referred to. Interestingly, even the respondents have taken sustenance from the law laid down in the aforesaid judgments. Thus, interestingly, the stichomythia which went on resulting into intense arguments, coupled with emotional exchange between the two sides, had its foundation on the bedrock of same case law. Therefore, in carrying out our analysis, while dealing with the arguments of the counsel on both sides, we would be adverting to the aforesaid judgments, as well as some other judgments which have a bearing on the issue, to arrive at the desirable and just conclusions based upon the foundation laid down therein. We may also observe that in pondering over these arguments and submissions, we have endeavoured to undertake the task sagaciously and with keen penetrative analysis using the periscope of sound legal principles and doing a diagnostic of sorts.

ANALYSIS, REASONING & CONCLUSIONS:

The history of the dispute regarding Government control over the functioning of private medical colleges is quite old now but the tug of war continues. There seems to be some conflict of interest between the State Government and the bodies that establish institutions and impart professional medical education to the youth of this country. While on the one hand the State Governments want to control the institutions for socio- political considerations and on the other the people who invest, set up and establish the institutions have a genuine desire to run and exercise functional control over the institution in the best interests of the students, it cannot be disputed that the State does not enjoy monopoly in the field of imparting medical education and the private medical colleges play a very significant role in this regard. The State lacks funds that is imperative to provide best infrastructure and latest facilities to the students so that they emerge as the best in their respective fields.

In the modern age, therefore, particularly after the policy of liberalization adopted by the State, educational institutions by private bodies are allowed to be established. There is a paradigm shift over from the era of complete Government control over education (like other economic and commercial activities) to a situation where private players are allowed to mushroom. But at the same time, regulatory mechanism is provided thereby ensuring that such private institutions work within such regulatory regime. When it comes to education, it is expected that unaided private institutions provide quality education and at the same time they are given 'freedom in joints' with minimal Government interference, except what comes under regulatory regime. Though education is now treated as an 'occupation' and, thus, has become a fundamental right guaranteed under Article 19(1)(g) of the Constitution, at the same time shackles are put insofar as this particular occupation is concerned which is termed as 'noble'. Therefore, profiteering and commercialisation are not permitted and no capitation fee can be charged. The admission of students has to be on merit and not at the whims and fancies of the educational institutions. Merit can be tested by adopting some methodology and few such methods are suggested in

> T.M.A. Pai Foundation, which includes holding of CET. It is to be ensured that this admission process meets the triple test of transparency, fairness and non-exploitativeness.
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> With these introductory remarks, we advert to issue-wise discussion I. Re.: Provisions relating to CET to be conducted by the State machinery under Act, 2007 as well as Rules.
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> The issue involved, which is of seminal nature, requires three tires of judicial review. In the first instance, it is to be examined – whether the right claimed by the appellants is a fundamental right guaranteed under Article 19(1)(g) of the Constitution, and if so, what are the features it encompasses? The second stage would be to find out – whether the statute, which is impugned, imposes any restrictions on the right given to the appellants? If there are restrictions, the third poser would be – whether such restrictions are 'reasonable' and, therefore, protected under clause (6) of Article 19 of the Constitution?

Insofar as the first part of the question is concerned, it does not pose any problem and the answer goes in favour of the appellants. We may recapitulate here that Article 26 of the Constitution gives freedom to every religious denomination or any section thereof by conferring certain rights which include right to establish and maintain institutions for religious and charitable purposes. Thus, insofar as religious denominations or any section thereof are concerned, they were given right to establish and maintain institutions for religious and charitable purposes making it a fundamental right. Likewise, Article 30 confers upon minorities fundamental right to establish and administer educational institutions. Insofar as Article 26 is concerned, it comes under the caption 'Right to Freedom of Religion'. As far as Article 30 is concerned, it is under the heading 'Cultural and Educational Rights'. Thus, rights of the minorities to establish and administer educational institutions was always recognised as fundamental rights. Further, the right of private unaided professional institutions to establish and manage educational institutions was not clearly recognised as a fundamental right covered under Article 19(1)(g) and categorically rejected by the Constitution Bench of this Court comprising of five Judges in the case of Unni Krishnan. It was held in paragraph 198 of the judgment that “(w)e are, therefore, of the opinion adopting the line of reasoning in State of Bombay v. RMD Chamarbaugwala & Anr.[11] that imparting education cannot be treated as trade or business. Education cannot be allowed to be converted into commerce nor can petitioners seek to obtain the said result by relying on the wider meaning of 'occupation'”. In that case, this Court also rejected the argument that the said activity could be classified as a 'profession'. However, the right of professional institutions to establish and manage educational institutions was finally regarded as an 'occupation' befitting the recognition of this right as a fundamental right under Article 19(1)(g) in T.M.A. Pai Foundation in the following words:

> “25. The establishment and running of an educational institution where a large number of persons are employed as teachers or administrative staff, and an activity is carried on that results in the imparting of knowledge to the students, must necessarily be regarded as an occupation, even if there is no element of profit

generation. It is difficult to comprehend that education, per se, will not fall under any of the four expressions in Article 19(1)(g). "Occupation" would be an activity of a person undertaken as a means of livelihood or a mission in life. The above-quoted observations in Sodan Singh case, (1989) 4 SCC 155, correctly interpret the expression "occupation" in Article 19(1)(g)." Having recognised it as an 'occupation' and giving the status of a fundamental right, the Court delineated four specific rights which encompass right to occupation, namely, (i) a right to admit students; (ii) a right to set up a reasonable fee structure; (iii) a right to appoint staff (teaching and non-teaching); and (iv) a right to take action if there is dereliction of duty on the part of any employees. In view of the aforesaid recognition of the right to admit the students and a right to set up a reasonable fee structure treating as part of occupation which is recognised as fundamental right under Article 19(1)(g) of the Constitution, the appellants have easily crossed the initial hurdle. Here comes the second facet of this issue, viz. – what is the scope of this right of occupation?

It becomes necessary to point out that while treating the managing of educational institution as an 'occupation', the Court was categorical that this activity could not be treated as 'business' or 'profession'. This right to carry on the occupation that the education is, the same is not put at par with other occupations or business activities or even other professions. It is a category apart which was carved out by this Court in T.M.A. Pai Foundation. There was a specific purpose for not doing so. Education is treated as a noble 'occupation' on 'no profit no loss' basis. Thus, those who establish and are managing the educational institutions are not expected to indulge in profiteering or commercialise this noble activity. Keeping this objective in mind, the Court did not give complete freedom to the educational institutions in respect of right to admit the students and also with regard to fixation of fee. As far as admission of students is concerned, the Court was categorical that such admissions have to be on the basis of merit when it comes to higher education, particularly in professional institutions.

Ms. Vibha Datta Makhija is right in her submission that the significant feature of T.M.A. Pai Foundation is that it expounded on the nature and extent of its control on the basis of level of education. When it comes to higher education, that too in professional institutions, merit has to be the sole criteria. This is so explained in paragraph 58 of the judgment which reads as under:

"58. For admission into any professional institution, merit must play an important role. While it may not be normally possible to judge the merit of the applicant who seeks admission into a school, while seeking admission to a professional institution and to become a competent professional, it is necessary that meritorious candidates are not unfairly treated or put at a disadvantage by preferences shown to less meritorious but more influential applicants. Excellence in professional education would require that greater emphasis be laid on the merit of a student seeking admission. Appropriate regulations for this purpose may be made keeping in view the

other observations made in this judgment in the context of admissions to unaided institutions." In order to see that merit is adjudged suitably and appropriately, the Court candidly laid down that procedure for admission should be so devised which satisfies the triple test of being fair, transparent and non- exploitative. The next question was as to how the aforesaid objective could be achieved? For determining such merit, the Court showed the path in paragraph 59 by observing that such merit should be determined either by the marks that students obtained at qualifying examination or at the CET conducted by the institutions or in the case of professional colleges, by Government agencies. Paragraph 59 suggesting these modes reads as under:

"59. Merit is usually determined, for admission to professional and higher education colleges, by either the marks that the student obtains at the qualifying examination or school-leaving certificate stage followed by the interview, or by a common entrance test conducted by the institution, or in the case of professional colleges, by government agencies." This paragraph very specifically authorises CET to be conducted by Government agencies in the case of professional colleges.

In order to ensure that the said CET is fair, transparent and merit based, T.M.A. Pai Foundation also permitted the Government to frame Regulations for unaided private professional educational institutions. Paragraphs 67 and 68 which permit framing of such regulations are reproduced below:

"67. We now come to the regulations that can be framed relating to private unaided professional institutions.

68. It would be unfair to apply the same rules and regulations regulating admission to both aided and unaided professional institutions. It must be borne in mind that unaided professional institutions are entitled to autonomy in their administration while, at the same time, they do not forego or discard the principle of merit. It would, therefore, be permissible for the university or the Government, at the time of granting recognition, to require a private unaided institution to provide for merit-

based selection while, at the same time, giving the management sufficient discretion in admitting students. This can be done through various methods. For instance, a certain percentage of the seats can be reserved for admission by the management out of those students who have passed the common entrance test held by itself or by the State/university and have applied to the college concerned for admission, while the rest of the seats may be filled up on the basis of counselling by the State agency. This will incidentally take care of poorer and backward sections of the society. The prescription of percentage for this purpose has to be done by the Government according to the local needs and different percentages can be fixed for minority unaided and non-minority unaided and professional colleges. The same principles may be applied to other non-professional but unaided educational institutions viz. graduation and post-graduation non- professional colleges or institutes." A plea was raised by the appellants that by exercising the power to frame Regulations,

the State could not usurp the very function of conducting this admission test by the educational institutions. It was argued that it only meant that such a CET is to be conducted by the educational institutions themselves and the Government could only frame the Regulations to regulate such admission tests to be conducted by the educational institutions and could not take away the function of holding the CET.

This argument has to be rejected in view of the unambiguous and categorical interpretation given by the Supreme Court in P.A. Inamdar with respect to certain observations, particularly in paragraph 68 in T.M.A. Pai Foundation. In this behalf, we would like to recapitulate that in T.M.A. Pai Foundation, a Bench of eleven Judges dealt with the issues of scope of right to set up educational institutions by private aided or unaided, minority or non-minority institutions and the extent of Government regulation of the said right. It was held that the right to establish and administer an institution included the right to admit students and to set up a reasonable fee structure. But the said right could be regulated to ensure maintenance of proper academic standards, atmosphere and infrastructure. Fixing of rigid fee structure, dictating the formation and composition of a governing body, compulsory nomination of teachers and staff for appointment or nominating students for admissions would be unacceptable restrictions. However, occupation of education was not business but profession involving charitable activity. The State can forbid charging of capitation fee and profiteering. The object of setting up educational institution is not to make profit. There could, however, be a reasonable revenue surplus for development of education. For admission, merit must play an important role. The State or the University could require private unaided institution to provide for merit based selection while giving sufficient discretion in admitting students. Certain percentage of seats could be reserved for admission by management out of students who have passed CET held by the institution or by the State/University. Interpretation of certain observations in paragraph 68 of the judgment in T.M.A. Pai Foundation has been a matter of debate to which we advert to in detail hereinafter.

As pointed out above, immediately after the judgment in T.M.A. Pai Foundation, a group of writ petitions were filed in this Court, which were dealt with by a Bench of five judges in Islamic Academy of Education. Four of the Judges were the same who were party to the judgment in T.M.A. Pai Foundation. The issue considered was the extent of autonomy in fixing the fee structure and making admissions. This Court held that while there was autonomy with the institutions to fix fee structure, there could be no profiteering and no capitation fee could be charged as imparting of education was essentially charitable in nature. This required setting up of a Committee by each of the States to decide whether fee structure proposed by an institute was justified and did not amount to profiteering or charging of capitation fee. The fee so fixed shall be binding for three years at the end of which a revision could be sought.

With regard to the autonomy in admission, it was noted that the earlier judgment kept in mind the 'the sad reality that there are a large number of professional colleges which indulge in profiteering and/or charging capitation fees'. For this reason, it was provided that admission must be based on merit. It was impossible to control profiteering/charging of capitation fee unless admission was on merit. It was further observed that requiring a student to appear at more than one entrance test led to great hardship as the students had to pay application fee for each institute, arrange for and pay

for the transport to appear in the individual tests. Thus, management could select students either on the basis of CET conducted by the State or association of all colleges for a particular type, for example, medical, engineering or technical etc. Some of the institutions have their own admission procedure since long against which no finger had ever been raised and no complaint made regarding fairness and transparency – which claim was disputed. Such institutions as had been established for 25 years could apply for exemption to the Committee directed by the Court to be constituted. This Court directed the State Governments to appoint permanent Committees to ensure that the test conducted by association of colleges was fair and transparent.

The matter was then considered by a larger Bench of seven judges in P.A. Inamdar. It was held that the two Committees for monitoring admission procedure and determining fee structure as per the judgment in Islamic Academy of Education were permissible as regulatory measures aimed at protecting the students community as a whole as also the minority themselves in maintaining required standards of professional education on non-exploitative terms. This did not violate Article 30(1) or Article 19(1)(g). It was observed that 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 added). On this ground, suggestion of the institutions to achieve the purpose for which Committees had been set up by post-audit checks after the institutions adopted their own admission procedure and fee structure were rejected. The Committees were, thus, allowed to continue for regulating the admissions and the fee structure until a suitable legislation or regulations framed by the States. It was left to the Central Governments and the State Governments to come out with a detailed well thought out legislation setting up a suitable mechanism for regulating admission procedure and fee structure. Paragraph 68 in T.M.A. Pai Foundation case was explained by stating that observations permitting the management to reserve certain seats was meant for poorer and backward sections as per local needs. It did not mean to ignore the merit. It was also held that CET could be held, otherwise merit becomes casualty. There is, thus, no bar to CET being held by a State agency when law so provides.

Thus, the contention raised on behalf of the appellants that the private medical colleges had absolute right to make admissions or to fix fee is not consistent with the earlier decisions of this Court. Neither merit could be compromised in admissions to professional institutions nor capitation fee could be permitted. To achieve these objects it is open to the State to introduce regulatory measures. We are unable to accept the submissions that the State could intervene only after proving that merit was compromised or capitation fee was being charged. As observed in the earlier decisions of this Court, post-audit measures would not meet the regulatory requirements. Control was required at the initial stage itself.

Therefore, our answer to the first question is that though 'occupation' is a fundamental right, which gives right to the educational institutions to admit the students and also fix the fee, at the same time, scope of such rights has been discussed and limitations imposed thereupon by the aforesaid judgments themselves explaining the nature of limitations on these rights.

Insofar as the second question is concerned, it again can be easily answered by accepting that the impugned legislation and Rules impose certain restrictions. Question is, whether these are in consonance with the law laid down in the aforesaid judgments? This discussion relates to the third stage of judicial review where we are called upon to decide as to whether these restrictions are 'reasonable'.

We may note that while upholding the regulatory provision for admissions, the High Court has observed:

> "27. We are of the considered opinion that Section 6 read with Section 3
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> (d) of the Act, 2007, which provide that admissions to sanctioned intake shall be on the basis of common entrance test followed by centralised counselling by the State Government or by any agency authorised by the State Government are in consonance with the judgments of the Supreme Court in T.M.A. Pai Foundation v. Stale of Karnataka (2002) 8 SCC 364 and PA.

Inamdar and Ors. v. State of Maharashtra and Ors. (2005) 6 SCC 535. Section 2 of the Act, 2007 makes it clear that it only applies to private unaided educational institutions which impart professional education. Hence, we will have to examine the judgments in T.M.A. Pai Foundation and PA. Inamdar (supra), to find out whether these judgments permit admission to professional educational institutions on the basis of merit as determined in a common entrance test followed by centralised counselling by the State Government or its agencies.

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28……It is thus clear from Para 58 of the judgment that in TMA Pai Foundation (supra), quoted above that the Supreme Court has held that the applicant who seeks admission to a professional educational institution in order to become a competent professional must be a meritorious candidate and he cannot be put at a disadvantage by preferences shown to less meritorious but more influential applicants and, therefore, excellence in professional education would require that greater emphasis be laid on the merit of the students seeking admission. It will be further clear from Para 59 of the judgment in TMA Pai Foundation (supra), quoted above, that merit is usually determined for admission to a professional educational institution either by the marks that the students obtain at qualifying examination or at a common entrance test conducted by the institution or 'in the case of professional colleges, by Government agencies". In TMA Pai Foundation (supra), therefore, the Supreme Court was of the view that merit for admission to a professional institution could be determined by common entrance test conducted by the Government agencies." Referring to paragraphs 67 and 68 in T.M.A. Pai Foundation, it was observed:

> "29……It will be clear from the aforesaid portion of the judgment in TMA Pai Foundation (supra), that unaided professional educational institutions are entitled to autonomy in admissions but they cannot forego or discard the principle of merit and it would therefore be permissible for the Government to require the private unaided

> educational institutions to provide for a merit based admission while at the same time giving the management sufficient discretion in admissions. In the aforesaid portion of the judgment in TMA Pai Foundation (supra), the Supreme Court has further held that this can be ensured through various methods and one method is by providing that certain percentage of seats can be reserved for admission by the management out of those students who have passed the common entrance test held by itself or by the State and have applied to the college concerned for admission, while the rest of the seats may be filled up on the basis of counselling by the State agency. Here also, the judgment of the Supreme Court in TMA Pai Foundation (supra), is clear that in the seats reserved for admissions by the management, only those students who have passed the common entrance test held by the management or by the State can be admitted.
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> 31. We are unable to accept the aforesaid submission of Mr. Verma and Mr. Tankha. In PA. Inamdar (supra), the Supreme Court dealt with the admission procedure of unaided professional educational institutions, both minority and non-minority, in Paragraphs 133 to 138 at Pages 603,604 and 605 of the SCC. In Paragraph 134 in P.A. Inamdar (supra), the Supreme Court has held that for professional educational institutions, excellence in admission and maintenance of high standard are a must and to fulfil these objectives, the State can and rather must in the national interest step in because the education, knowledge and learning possessed by individuals collectively constitute national wealth and in Paragraph 135 of the judgment in PA.

Inamdar (supra), the Supreme Court has further held that in minority professional educational institutions also, aided or unaided, admission should be at the State Level and transparency and merit have to be assured in admissions. In Paragraphs 136 and 137 in PA. Inamdar (supra), the Supreme Court has observed that admissions in professional educational institutions can be made on the basis of a common entrance test either conducted by the institutions joined together or by the State itself or an agency for holding such test." After referring to paragraphs 136 and 137 in P.A. Inamdar, it was observed:

> "It will be thus clear from the Paragraphs 136 and 137 of the judgment in PA. Inamdar (supra), quoted above, that admissions to private unaided professional educational institutions can be made on the basis of merit of candidates determined in the common entrance test followed by centralised counseling by the institutions imparting same or similar professional education together or by the State or by an agency which must enjoy utmost credibility and expertise and that the common entrance test followed by centralised counselling must satisfy the triple test of being fair, transparent and non-exploitative. Thus, the judgments of the Supreme Court in TMA Pai Foundation and PA. Inamdar (supra), permit holding of a common entrance test for determination of merit for admission to private unaided professional educational institutions by the State as well as any agency which enjoy utmost

credibility and expertise in the matter and which should ensure transparency in merit.

34. Sections 3(d), 6 and 7 of the Act, 2007 by providing that the common entrance test for determining merit for admissions in the private unaided professional educational institutions by a common entrance test to be conducted by the State or by an agency authorised by the State do not interfere with the autonomy of private unaided professional educational institutions, as such private professional educational institutions are entitled to collect the fees from the students admitted to the institutions on the basis of merit, appoint their own staff (teaching and non-teaching), discipline and remove the staff, provide infrastructure and other facilities for students and do all such other things as are necessary to impart professional education to the students. Sections 3 (d), 6 and 7 of the Act, 2007, therefore, do not impinge on the fundamental right to carry on the occupation of establishing and administering professional educational institutions as an occupation. The only purpose of Sections 3

(d), 6 and 7 of the Act, 2007 is to ensure that students of excellence are selected on the basis of a common entrance test conducted by the State or an agency authorised by the State and that students without excellence and merit do not make entry into these professional educational institutions through malpractices and influence. As has been held both in the judgments in T.M.A. Pai Foundation and PA. .Inamdar (supra), the right of private unaided professional educational institutions to admit students of their choice is subject to selection of students on the basis of their merit through a transparent, fair and non-exploitative procedure. In our considered opinion therefore, Sections 3 (d), 6 and 7 of the Act, 2007 do not in any way violate the fundamental right of citizens guaranteed under Article 19(1)(g) of the Constitution. In view of this conclusion, it is not necessary for us to decide whether the provisions of Sections 3 (d), 6 and 7 of the Act, 2007 are saved by Article 15(5) of the Constitution or by the second limb of Article 19(6) of the Constitution relating to the power of the State to make a law for creation of monopoly in its favour in respect of any service." We are broadly in agreement with the approach adopted by the High Court having gone through the relied upon judgments which are discussed by us as well as in the earlier part.

It would be necessary to clarify the position in respect of educational institutions run by minorities. Having regard to the pronouncement in T.M.A. Pai Foundation, with lucid clarifications to the said judgment given by this Court in P.A. Inamdar, it becomes clear that insofar as such regulatory measures are concerned, the same can be adopted by the State in respect of minority run institutions as well. Reliance placed by the appellants in the case of St. Stephen's College v. University of Delhi[12] may not be of much help as that case did not concern with professional educational institutions.

At this juncture, we would like to deal with the arguments of the appellants that the provisions contained in the Act and the Rules have the effect of completely taking away the rights of these educational institutions to admit the students.

It is well settled that the right under Article 19(1)(g) is not absolute in terms but is subject to reasonable restrictions under clause (6). Reasonableness has to be determined having regard to the nature of right alleged to be infringed, purpose of the restriction, extent of restriction and other relevant factors. In applying these factors, one cannot lose sight of the Directive Principles of State Policy. The Court has to try to strike a just balance between the fundamental rights and the larger interest of the society. Court interferes with a statute if it clearly violates the fundamental rights. The Court proceeds on the footing that the Legislature understands the needs of the people. The Constitution is primarily for the common man. Larger interest and welfare of student community to promote merit, achieve excellence and curb malpractices, fee and admissions can certainly be regulated.

Let us carry out this discussion in some more detail as this is the central issue raised by the appellants.

Doctrine Of Proportionality Explained & Applied:

> Undoubtedly, the right to establish and manage the educational institutions is a fundamental right recognised under Article 19(1)(g) of the Act. It also cannot be denied that this right is not 'absolute' and is subject to limitations i.e. 'reasonable restrictions' that can be imposed by law on the exercise of the rights that are conferred under clause (1) of Article
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> 19. Those restrictions, however, have to be reasonable. Further, such restrictions should be 'in the interest of general public', which conditions are stipulated in clause (6) of Article 19, as under:
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> "(6) Nothing in sub clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub clause, and, in particular, nothing in the said sub clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,
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> (i) the professional or technical qualifications necessary for practicing any profession or carrying on any occupation, trade or business, or
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> (ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise." Another significant feature which can be noticed from the reading of the aforesaid clause is that the State is empowered to make any

law relating to the professional or technical qualifications necessary for practicing any profession or carrying on any occupation or trade or business. Thus, while examining as to whether the impugned provisions of the statute and Rules amount to reasonable restrictions and are brought out in the interest of the general public, the exercise that is required to be undertaken is the balancing of fundamental right to carry on occupation on the one hand and the restrictions imposed on the other hand. This is what is known as 'Doctrine of Proportionality'. Jurisprudentially, 'proportionality' can be defined as the set of rules determining the necessary and sufficient conditions for limitation of a constitutionally protected right by a law to be constitutionally permissible. According to Aharon Barak (former Chief Justice, Supreme Court of Israel), there are four sub-components of proportionality which need to be satisfied[13], a limitation of a constitutional right will be constitutionally permissible if: (i) it is designated for a proper purpose; (ii) the measures undertaken to effectuate such a limitation are rationally connected to the fulfillment of that purpose; (iii) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation; and finally (iv) there needs to be a proper relation ('proportionality stricto sensu' or 'balancing') between the importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right.

Modern theory of constitutional rights draws a fundamental distinction between the scope of the constitutional rights, and the extent of its protection. Insofar as the scope of constitutional rights is concerned, it marks the outer boundaries of the said rights and defines its contents. The extent of its protection prescribes the limitations on the exercises of the rights within its scope. In that sense, it defines the justification for limitations that can be imposed on such a right.

It is now almost accepted that there are no absolute constitutional rights[14] and all such rights are related. As per the analysis of Aharon Barak[15], two key elements in developing the modern constitutional theory of recognising positive constitutional rights along with its limitations are the notions of democracy and the rule of law. Thus, the requirement of proportional limitations of constitutional rights by a sub-constitutional law, i.e. the statute, is derived from an interpretation of the notion of democracy itself. Insofar as Indian Constitution is concerned, democracy is treated as the basic feature of the Constitution and is specifically accorded a constitutional status that is recognised in the Preamble of the Constitution itself. It is also unerringly accepted that this notion of democracy includes human rights which is the corner stone of Indian democracy. Once we accept the aforesaid theory (and there cannot be any denial thereof), as a fortiori, it has also to be accepted that democracy is based on a balance between constitutional rights and the public interests. In fact, such a provision in Article 19 itself on the one hand guarantees some certain freedoms in clause (1) of Article 19 and at the same time empowers the State to impose reasonable restrictions on those freedoms in public interest. This notion accepts the modern constitutional theory that the constitutional rights are related. This relativity means that a constitutional license to limit those rights is granted where such a limitation will be justified to protect public interest or the rights of other. This phenomenon – of both the right and its limitation in the Constitution – exemplifies the inherent tension between democracy's two fundamental elements. On the one hand is the right's

element, which constitutes a fundamental component of substantive democracy; on the other hand is the people element, limiting those very rights through their representatives. These two constitute a fundamental component of the notion of democracy, though this time in its formal aspect. How can this tension be resolved? The answer is that this tension is not resolved by eliminating the 'losing' facet from the Constitution. Rather, the tension is resolved by way of a proper balancing of the competing principles. This is one of the expressions of the multi-faceted nature of democracy. Indeed, the inherent tension between democracy's different facets is a 'constructive tension'. It enables each facet to develop while harmoniously co-existing with the others. The best way to achieve this peaceful co-existence is through balancing between the competing interests. Such balancing enables each facet to develop alongside the other facets, not in their place. This tension between the two fundamental aspects – rights on the one hand and its limitation on the other hand – is to be resolved by balancing the two so that they harmoniously co-exist with each other. This balancing is to be done keeping in mind the relative social values of each competitive aspects when considered in proper context.

In this direction, the next question that arises is as to what criteria is to be adopted for a proper balance between the two facets viz. the rights and limitations imposed upon it by a statute. Here comes the concept of 'proportionality', which is a proper criterion. To put it pithily, when a law limits a constitutional right, such a limitation is constitutional if it is proportional. The law imposing restrictions will be treated as proportional if it is meant to achieve a proper purpose, and if the measures taken to achieve such a purpose are rationally connected to the purpose, and such measures are necessary.

This essence of Doctrine of Proportionality is beautifully captured by Chief Justice Dickson of Canada in R. v. Oakes[16], in the following words (at page 138):

> “To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures, responsible for a limit on a Charter right or freedom are designed to serve, must be “of” sufficient importance to warrant overriding a constitutional protected right or freedom...Second ... the party invoking Section 1 must show that the means chosen are reasonable and demonstrably justified. This involves “a form of proportionality test...” Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First the measures adopted must be ...rationally connected to the objective. Second, the means ...should impair “as little as possible” the right or freedom in question...Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of “sufficient importance”. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.” The exercise which, therefore, to be taken is to find out as to whether the limitation of constitutional rights is for a purpose that

is reasonable and necessary in a democratic society and such an exercise involves the weighing up of competitive values, and ultimately an assessment based on proportionality i.e. balancing of different interests.

We may unhesitatingly remark that this Doctrine of Proportionality, explained hereinabove in brief, is enshrined in Article 19 itself when we read clause (1) along with clause (6) thereof. While defining as to what constitutes a reasonable restriction, this Court in plethora of judgments has held that the expression 'reasonable restriction' seeks to strike a balance between the freedom guaranteed by any of the sub-clauses of clause (1) of Article 19 and the social control permitted by any of the clauses (2) to (6). It is held that the expression 'reasonable' connotes that the limitation imposed on a person in the enjoyment of the right should not be arbitrary or of an excessive nature beyond what is required in the interests of public. Further, in order to be reasonable, the restriction must have a reasonable relation to the object which the legislation seeks to achieve, and must not go in excess of that object {See P.P. Enterprises & Ors. v. Union of India & Ors.[17]}. At the same time, reasonableness of a restriction has to be determined in an objective manner and from the standpoint of the interests of the general public and not from the point of view of the persons upon whom the restrictions are imposed or upon abstract considerations {See Hanif Quareshi Mohd. v. State of Bihar[18]). In M.R.F. Ltd. v. Inspector Kerala Govt.[19], this Court held that in examining the reasonableness of a statutory provision one has to keep in mind the following factors:

(1) 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 Article 19(6).

(5) Prevailing social values as also social needs which are intended to be satisfied by the restrictions.

(6) There must be a direct and proximate nexus or 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 the constitutionality of the Act will naturally arise.

Keeping in mind the aforesaid principles, we have adjudged the issue in our detailed discussion undertaken above. We may summarise the said discussion as follows:

> Undoubtedly, right to establish and administer educational institutions is treated as a fundamental right as it is termed 'occupation', which is one of the freedoms guaranteed under Article 19(1)(g). It was so recognised for the first time in T.M.A. Pai Foundation. Even while doing so, this right came with certain clutches and shackles. The Court made it clear that it is a noble occupation which would not permit commercialisation or profiteering and, therefore, such educational institutions are to be run on 'no profit no loss basis'. While explaining the scope of this right, right to admit students and right to fix fee was accepted as facets of this right, the Court again added caution thereto by mandating that admissions to the educational institutions imparting higher education, and in particular professional education, have to admit the students based on merit. For judging the merit, the Court indicated that there can be a CET. While doing so, it also specifically stated that in case of admission to professional courses such a CET can be conducted by the State. If such a power is exercised by the State assuming the function of CET, this was so recognised in T.M.A. Pai Foundation itself, as a measure of 'reasonable restriction on the said right'. Islamic Academy of Education further clarified the contour of such function of the State while interpreting T.M.A. Pai Foundation itself wherein it was held that there can be Committees constituted to supervise conducting of such CET. This process of interpretative balancing and constitutional balancing was remarkably achieved in P.A. Inamdar by not only giving its premature to deholding of CET but it went further to hold that agency conducted the CET must be the one which enjoys the utmost credibility and expertise in the matter to achieve fulfillment of twin objectives of transparency and merit and for that purpose it permitted the State to provide a procedure of holding a CET in the interest of securing fair and merit based admissions and preventing maladministration.
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> We are of the view that the larger public interest warrants such a measure. Having regard to the malpractices which are noticed in the CET conducted by such private institutions themselves, for which plethora of material is produced, it is, undoubtedly, in the larger interest and welfare of the students community to promote merit, add excellence and curb malpractices. The extent of restriction has to be viewed keeping in view all these factors and, therefore, we feel that the impugned provisions which may amount to 'restrictions' on the right of the appellants to carry on their 'occupation', are clearly 'reasonable' and satisfied the test of proportionality.
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> Apart from the material placed before the High Court, our attention has also been drawn to a recent report of the Parliamentary Committee to which we will refer in later part of this judgment. The report notes the dismal picture of exploitation in making admissions by charging huge capitation fee and compromising merit. This may not apply to all institutions but if the Legislature which represents the people has come out with a legislation to curb the menace which is generally prevalent, it

cannot be held that there is no need for any regulatory measure. “An enactment is an organism in its environment”[20]. It is rightly said that the law is not an Eden of concepts but rather an everyday life of needs, interests and the values that a given society seeks to realise in a given time. The law is a tool which is intended to provide solutions for the problems of human being in a society.

The High Court in its judgment has analysed the provisions of the Act and found that provisions for merit based admissions and procedure for fee fixation did not violate fundamental right of the private institutions to conduct admissions and to fix fee. We are in agreement with the said view and hold that provisions relating to admission as contained in the Act and the Rules are not offensive of Article 19(1)(g) of the Constitution.

II. Re.: Provisions in the Act Rules relating to fixation of fee are unconstitutional being violative of Article 19(1)(g) of the Constitution?

We may again remind ourselves that though right to establish and manage educational institution is treated as a right to carry on 'occupation', which is the fundamental right under Article 19(1)(g), the Court in T.M.A. Pai Foundation had also cautioned such educational institution not to indulge in profiteering or commercialisation. That judgment also completely bars these educational institutions from charging capitation fee. This is considered by the appellants themselves that commercialisation and exploitation is not permissible and the educational institutions are supposed to run on 'no profit, no loss basis'. No doubt, it was also recognised that cost of education may vary from institution to institution and in this respect many variable factors may have to be taken into account while fixing the fee. It is also recognized that the educational institutions may charge the fee that would take care of various expenses incurred by these educational institutions plus provision for the expansion of education for future generation. At the same time, unreasonable demand cannot be made from the present students and their parents. For this purpose, only a 'reasonable surplus' can be generated.

Thus, in T.M.A. Pai Foundation, P.A. Inamdar and Unni Krishnan, profiteering and commercialisation of education has been abhorred. The basic thread of reasoning in the above judgments is that educational activity is essentially charitable in nature and that commercialisation or profiteering through it is impermissible. The said activity subserves the looming larger public interest of ensuring that the nation develops and progresses on the strength of its highly educated citizenry. As such, this Court has been of the view that while balancing the fundamental rights of both minority and non-minority institutions, it is imperative that high standard of education is available to all meritorious candidates. It has also been felt that the only way to achieve this goal, recognising the private participation in this welfare goal, is to ensure that there is no commercialisation or profiteering by educational institutions.

In view of the said objectives, this Court had devised the means of setting up regulatory committees to oversee the process of admissions and fee regulations in the case of Islamic Academy of Education. However, while indirectly approving the concept of regulatory bodies, this Court in P.A. Inamdar was of the view that the scheme should not be directed by this Court exercising its powers under Article 142 of the Constitution, but must be statutorily regulated by the Center or the State laws.

The principles enunciated in T.M.A. Pai Foundation and P.A. Inamdar were applied in the case of Islamic Academy of Education where a challenge was mounted against the directions issued by the Director of Education to the recognised unaided schools under Section 24(3) read with Section 18(4) and 18(5) of the Delhi School Education Act, 1973 inter alia directing that no fees/funds collected from parents/students would be transferred from the Recognised Unaided School Fund to a Society or Trust or any other institution. After examining the directions and the accounting principles in detail, this Court upheld the said directions on the ground that it was open to the State to regulate the fee in such a manner so as to ensure that no profiteering or commercialisation of education takes place.

To put it in nutshell, though the fee can be fixed by the educational institutions and it may vary from institution to institution depending upon the quality of education provided by each of such institution, commercialisation is not permissible. In order to see that the educational institutions are not indulging in commercialisation and exploitation, the Government is equipped with necessary powers to take regulatory measures and to ensure that these educational institutions keep playing vital and pivotal role to spread education and not to make money. So much so, the Court was categorical in holding that when it comes to the notice of the Government that a particular institution was charging fee or other charges which are excessive, it has a right to issue directions to such an institution to reduce the same.

The next question that arises is as to how such a regulatory framework that ensures no excessive fee is charged by the educational institutions can be put in place. In the case of Modern School, this Court upheld the direction of the Delhi High Court for setting up of a committee to examine as to whether fee charged by the schools (that was a case of fixation of fee by schools in Delhi which are governed by the Delhi School Education Act, 1973) is excessive or not. The ratio of judgments in T.M.A. Pai Foundation and Islamic Academy of Education was discussed in the following manner:

“16. The judgment in T.M.A. Pai Foundation case was delivered on 31-10- 2002. The Union of India, State Governments and educational institutions understood the majority judgment in that case in different perspectives. It led to litigations in several courts. Under the circumstances, a Bench of five Judges was constituted in the case of Islamic Academy of Education v. State of Karnataka so that doubts/anomalies, if any, could be clarified. One of the issues which arose for determination concerned

determination of the fee structure in private unaided professional educational institutions. It was submitted on behalf of the managements that such institutions had been given complete autonomy not only as regards admission of students but also as regards determination of their own fee structure. It was submitted that these institutions were entitled to fix their own fee structure which could include a reasonable revenue surplus for the purpose of development of education and expansion of the institution. It was submitted that so long as there was no profiteering, there could be no interference by the Government. As against this, on behalf of the Union of India, State Governments and some of the students, it was submitted, that the right to set up and administer an educational institution is not an absolute right and it is subject to reasonable restrictions. It was submitted that such a right is subject to public and national interests. It was contended that imparting education was a State function but due to resource crunch, the States were not in a position to establish sufficient number of educational institutions and consequently the States were permitting private educational institutions to perform State functions. It was submitted that the Government had a statutory right to fix the fees to ensure that there was no profiteering. Both sides relied upon various passages from the majority judgment in T.M.A. Pai Foundation case. In view of rival submissions, four questions were formulated. We are concerned with the first question, namely, whether the educational institutions are entitled to fix their own fee structure. It was held that there could be no rigid fee structure. Each institute must have freedom to fix its own fee structure, after taking into account the need to generate funds to run the institution and to provide facilities necessary for the benefit of the students. They must be able to generate surplus which must be used for betterment and growth of that educational institution. The fee structure must be fixed keeping in mind the infrastructure and facilities available, investment made, salaries paid to teachers and staff, future plans for expansion and/or betterment of institution subject to two restrictions, namely, non-profiteering and non-charging of capitation fees. It was held that surplus/profit can be generated but they shall be used for the benefit of that educational institution. It was held that profits/surplus cannot be diverted for any other use or purposes and cannot be used for personal gains or for other business or enterprise. The Court noticed that there were various statutes/regulations which governed the fixation of fee and, therefore, this Court directed the respective State Governments to set up a committee headed by a retired High Court Judge to be nominated by the Chief Justice of that State to approve the fee structure or to propose some other fee which could be charged by the institute.

(emphasis supplied)" This Court also held that for fixing the fee structure, following considerations are to be kept in mind:

(a) the infrastructure and facilities available;

(b) investment made, salaries paid to teachers and staff;

(c) future plans for expansion and/or betterment of institution subject to two restrictions, viz. non-profiteering and non-charging of capitation fees." We may hasten to add here itself that Section 9 of the Act, 2007 takes care of the aforesaid parameter in abundance.

As can be seen in T.M.A. Pai Foundation case itself, this Court has observed that the Government can provide regulations to control the charging of capitation fee and profiteering. Question No.3 before the Court was as to whether there can be Government regulations, and if so, to what extent in case of private institutions? What the Court has observed in paragraph 57 of the judgment is instructive for our purposes and the same is reproduced below:

"57. We, however, wish to emphasize one point, and that is that inasmuch as the occupation of education is, in a sense, regarded as charitable, the Government can provide regulations that will ensure excellence in education, while forbidding the charging of capitation fee and profiteering by the institution. Since the object of setting up an educational institution is by definition "charitable", it is clear that an educational institution cannot charge such a fee as is not required for the purpose of fulfilling that object. To put it differently, in the establishment of an educational institution, the object should not be to make a profit, inasmuch as education is essentially charitable in nature. There can, however, be a reasonable revenue surplus, which may be generated by the educational institution for the purpose of development of education and expansion of the institution." In paragraph 69 of the judgment, while dealing with this issue, this Court again observed that an appropriate machinery can be devised by the State or University to ensure that no capitation fee is charged and that there is no profiteering, though a reasonable surplus for the furtherance of education is permissible. Although the Court overruled the earlier judgment in Unni Krishnan, which was to the extent of the scheme framed therein and the directions to impose the same, part of the judgment holding that primary education is a fundamental right was held to be valid. Similarly, the principle that there should not be capitation fee or profiteering was also held to be correct.

When we come to the judgment in Islamic Academy of Education, the first question framed by this Court was whether the educational institutions are entitled to fix their own fee structure. It is pertinent to note that this judgment brought in a Committee to regulate the fee structure which was to operate until the Government/appropriate authorities consider framing of appropriate Regulations. It is also material to note that in paragraph 20 the Court has held that the direction to set up Committees in the States was passed under Article 142 of the Constitution and was to remain in force till appropriate legislation was enacted by the Parliament.

The judgment in P.A. Inamdar, though sought to review the judgment in Islamic Academy of Education, left the mechanism of having the Committees undisturbed. In paragraph 129 of the judgment in P.A. Inamdar, this Court observed that the State regulation should be minimal and only to maintain fairness in admission procedure

and to check exploitation by charging exorbitant money or capitation fees. In paragraph 140, it has been held that the charge of capital fee by unaided minority and non-minority institutions for professional courses is just not permissible. Similarly, profiteering is also not permissible. This Court went on to observe that it cannot shut its eyes to the hard realities of commercialisation of education and evil practices being adopted by many institutions to earn large amounts for their private or selfish ends. In respect of Question No.3 framed thereunder, which was with respect to the Government regulation in the case of private institutions, this Court, in paragraph 141 of the judgment, answered that every institution is free to device its own fee structure, but the same can be regulated in the interest of preventing profiteering and no capitation fee can be charged. In paragraph 145, the suggestion for post-audit or checks is rejected if the institutions adopt their own admission procedure and fee structure since this Court was of the view that fixation of fees should be regulated and controlled at the initial stage itself.

It is in the aforesaid context that we have to determine the question as to whether the provisions relating to fixation of fee are violative of Article 19(1)(g) of the Constitution or they are regulatory in nature, which is permissible in view of clause (6) of Article 19 of the Constitution, keeping in mind that the Government has the power to regulate the fixation of fee in the interest of preventing profiteering and further that fixation of fee has to be regulated and controlled at the initial stage itself. When we scan through Section 9 of the Act, 2007 from the aforesaid angle, we find that the parameters which are laid down therein that has to be kept in mind while fixing the fee are in fact the one which have been enunciated in the judgments of this Court referred to above. It is also significant to note that the Committee which is set up for this purpose, namely, Admission and Fee Regulatory Committee, is discharging only regulatory function. The fee which a particular educational institution seeks to charge from its students has to be suggested by the said educational institution itself. The Committee is empowered with a purpose to satisfy itself that the fee proposed by the educational institution did not amount to profiteering or commercialisation of education and was based on intelligible factors mentioned in Section 9(1) of the Act, 2007. In our view, therefore, it is only a regulatory measure and does not take away the powers of the educational institution to fix their own fee. We, thus, find that the analysis of these provisions by the High Court in the impugned judgment, contained in paragraph 39, is perfectly in order, wherein it is observed as under:

"39. We are of the view that Sections 4 (1) and 4 (8) of the Act, 2007 have to be read with Section 9 (1) of the Act, 2007, which deals with factors which have to be taken into consideration by the Committee while determining the fee to be charged by a private unaided professional educational institution. A reading of Sub-section (1) of Section 9 of the Act, 2007 would show that the location of private unaided professional educational institution, the nature of the professional course, the cost of land and building, the available infrastructure, teaching, non-teaching staff and

equipment, the expenditure on administration and maintenance, a reasonable surplus required for growth and development of the professional institution and any other relevant factor, have to be taken into consideration by the Committee while determining the fees to be charged by a private unaided professional educational institution. Thus, all the cost components of the particular private unaided professional educational institution as well as the reasonable surplus required for growth and development of the institution and all other factors relevant for imparting professional education have to be considered by the Committee while determining the fee. Section 4 (8) of the Act, 2007 further provides that the Committee may require a private aided or unaided professional educational institution to furnish information that may be necessary for enabling the Committee to determine the fees that may be charged by the institution in respect of each professional course. Each professional educational institution, therefore, can furnish information with regard to the fees that it proposes to charge from the candidates seeking admission taking into account all the cost components, the reasonable surplus required for growth and development and other factors relevant to impart professional education as mentioned in Section 9 (1) of the Act, 2007 and the function of the Committee is only to find out, after giving due opportunity of being heard to the institution as provided in Section 9 (2) of the Act, 2007 whether the fees proposed by the institution to be charged to the student are based on the factors mentioned in Section 9 (1) of the Act, 2007 and did not amount to profiteering and commercialisation of the education. The word "determination" has been defined in Black's Law Dictionary, Eighth Edition, to mean a final decision by the Court or an administrative agency. The Committee, therefore, while determining the fee only gives the final approval to the proposed fee to be charged after being satisfied that it was based on the factors mentioned in Section 9 (1) of the Act, 2007 and there was no profiteering or commercialisation of education. The expression 'fixation of fees' in Section 4 (1) of the Act, 2007 means that the fee to be charged from candidates seeking admission in the private professional educational institution did not vary from student to student and also remained fixed for a certain period as mentioned in Section 4(8) of the Act, 2007. As has been held by the Supreme Court in Peerless General Finance v. Reserve Bank of India (supra), the Court has to examine the substance of the provisions of the law to find out whether provisions of the law impose reasonable restrictions in the interest of the general public. The provisions in Sections 4 (1), 4 (8) and 9 of the Act, 2007 in substance empower the Committee to be only satisfied that the fee proposed by a private professional educational institution did not amount to profiteering or commercialisation of education and was based on the factors mentioned in Section 9 (1) of the Act, 2007. The provisions of the Act, 2007 do not therefore, violate the right of private professional educational institution to charge its own fee." Further reasons in support of Issue Nos. 1 & 2 which are common to both Issues:

Provisions relating to admission of students through Government test to be conducted by the State and the provision relating to fixation of fee by setting up a Committee to oversee that institutions are not charging a fee which amounts to

capitation or profiteering are reasonable restrictions and do not suffer from any constitutional vice.

The provision of the Act and the Rules are, therefore, in tune with the sentiments and directions contained in P.A. Inamdar. The enactment in question does not run foul of any of the existing central laws. As far as the introduction of a CET at a national level is concerned, the same was not enforced during the period of operation of the State statute. In any event, there being no regulations regarding fixation or determination of fees of these institutions to ensure that the same does not allow commercialisation or profiteering, the State Legislature was well competent to enact provisions regarding the same.

At the time when the impugned legislations were enacted, the Association of Private Colleges was already conducting its CET from the year 2005 till 2007. The private universities, however, had failed to comply the triple test laid down in T.M.A. Pai Foundation and a large number of complaints were received by the State authorities with regard to denial of admissions to meritorious students. In paragraphs 32 to 39 of the Reply filed by the State Government in the High Court of Madhya Pradesh, it was duly mentioned that numerous complaints were being received with regard to the CET being conducted by the Association of the Private Colleges. It is worthwhile to note that even for the period after the coming in force of the State laws, under the interim order dated May 27, 2009[21] passed by this Court where the private colleges were allowed to continue holding their examinations for 50% seats, excluding the NRI seats, a large number of complaints were received by the State. If a particular law is necessitated to curb malpractices and/or ills that have prevailed in a system, Legislature is fully competent to enact such laws, provided it meets the test of constitutionality, which it does in the instant case.

No doubt, we have entered into an era of liberalization of economy, famously termed as 'globalization' as well. In such an economy, private players are undoubtedly given much more freedom in economic activities, as the recognition has drawn to the realities that the economic activities, including profession, business, occupation etc. are not normal forte of the State and the State should have minimal role therein. It is for this reason, many sectors which were hitherto State monopolies, like telecom, power, insurance, civil aviation etc. have now opened up for private enterprise. Even in the field of education State/ Government was playing a dominant role inasmuch as it was thought desirable that in a welfare State it is the fundamental duty, as a component of Directive Principles, to impart education to the masses and commoners as well as weaker sections of the society, at affordable rates. It was almost treated as solemn duty of the Government to establish adequate number of educational institutions at all levels, i.e., from primary level to higher education and in all fields including technical, scientific and professional, to cater to the varied sections of the society, particularly, when one-third of the population of the country is poverty stricken with large percentage as illiterate. With liberalization,

Government has encouraged establishments of privately managed institutions. It is done with the hope that the private sector will play vital role in the field of education with philanthropic approach/ideals in mind as this activity is not to be taken for the purpose of profiteering, but more as a societal welfare.

It is, therefore, to be borne in mind is that the occupation of education cannot be treated at par with other economic activities. In this field, State cannot remain a mute spectator and has to necessarily step in in order to prevent exploitation, privatization and commercialisation by the private sector. It would be pertinent to mention that even in respect of those economic activities which are undertaken by the private sector essentially with the objective of profit making (and there is nothing bad about it), while throwing open such kind of business activities in the hands of private sector, the State has introduced regulatory regime as well by providing Regulations under the relevant statutes.

Need For Regulatory Mechanism:

Regulatory mechanism, or what is called regulatory economics, is the order of the day. In the last 60-70 years, economic policy of this country has travelled from laissez faire to mixed economy to the present era of liberal economy with regulatory regime. With the advent of mixed economy, there was mushroom of public sector and some of the key industries like Aviation, Insurance, Railways, Electricity/Power, Telecommunication, etc. were monopolized by the State. License/permit raj prevailed during this period with strict control of the Government even in respect of those industries where private sectors were allowed to operate. However, Indian economy experienced major policy changes in early 90s on LPG Model, i.e., Liberalization, Privatization and Globalization. With the onset of reforms to liberalize the Indian economy, in July 1991, a new chapter has dawned for India. This period of economic transition has had a tremendous impact on the overall economic development of almost all major sectors of the economy.

When we have liberal economy which is regulated by the market forces (that is why it is also termed as market economy), prices of goods and services in such an economy are determined in a free price system set up by supply and demand. This is often contrasted with a planned economy in which a Central Government determines the price of goods and services using a fixed price system. Market economies are also contrasted with mixed economy where the price system is not entirely free, but under some Government control or heavily regulated, which is sometimes combined with State led economic planning that is not extensive enough to constitute a planned economy.

With the advent of globalization and liberalization, though the market economy is restored, at the same time, it is also felt that market economies should not exist in pure form. Some regulation of the various industries is required rather than allowing

self-regulation by market forces. This intervention through regulatory bodies, particularly in pricing, is considered necessary for the welfare of the society and the economists point out that such regulatory economy does not rob the character of a market economy which still remains a market economy. Justification for regulatory bodies even in such industries managed by private sector lies in the welfare of people. Regulatory measures are felt necessary to promote basic well-being for individuals in need. It is because of this reason that we find Regulatory bodies in all vital industries like, Insurance, Electricity and Power, Telecommunications, etc. Thus, it is felt that in any welfare economy, even for private industries, there is a need for regulatory body and such a regulatory framework for education sector becomes all the more necessary. It would be more so when, unlike other industries, commercialisation of education is not permitted as mandated by the Constitution of India, backed by various judgments of this Court to the effect that profiteering in the education is to be avoided.

Thus, when there can be Regulators which can fix the charges for telecom companies in respect of various services that such companies provide to the consumers; when Regulators can fix the premium and other charges which the insurance companies are supposed to receive from the persons who are insured, when Regulators can fix the rates at which the producer of electricity is to supply the electricity to the distributors, we fail to understand as to why there cannot be a regulatory mechanism when it comes to education which is not treated as purely economic activity but welfare activity aimed at achieving more egalitarian and prosperous society by empowering the people of this country by educating them. In the field of the education, therefore, this constitutional goal remains pivotal which makes it distinct and special in contradistinction with other economic activities as the purpose of education is to bring about social transformation and thereby a better society as it aims at creating better human resource which would contribute to the socie-economic and political upliftment of the nation. The concept of welfare of the society would apply more vigorously in the field of education. Even otherwise, for economist, education as an economic activity, favourably compared to those of other economic concerns like agriculture and industry, has its own inputs and outputs; and is thus analyzed in terms of the basic economic tools like the laws of return, principle of equimarginal utility and the public finance. Guided by these principles, the State is supposed to invest in education up to a point where the socio-economic returns to education equal to those from other State expenditures, whereas the individual is guided in his decision to pay for a type of education by the possibility of returns accruable to him. All these considerations make out a case for setting up of a stable Regulatory mechanism.

In this sense, when imparting of quality education to cross-section of the society, particularly, the weaker section and when such private educational institutions are to rub shoulders with the state managed educational institution to meet the challenge of the implementing ambitious constitutional promises, the matter is to be examined in

a different hue. It is this spirit which we have kept in mind while balancing the right of these educational institutions given to them under Article 19(1)(g) on the one hand and reasonableness of the restrictions which have been imposed by the impugned legislation. The right to admission or right to fix the fee guaranteed to these appellants is not taken away completely, as feared. T.M.A. Pai Foundation gives autonomy to such institutions which remain intact. Holding of CET under the control of the State does not impinge this autonomy. Admission is still in the hands of these institutions. Once it is even conceded by the appellants that in admission of students 'triple test' is to be met, the impugned legislation aims at that. After all, the sole purpose of holding CET is to adjudge merit and to ensure that admissions which are done by the educational institutions, are strictly on merit. This is again to ensure larger public interest. It is beyond comprehension that merely by assuming the power to hold CET, fundamental right of the appellants to admit the students is taken away. Likewise, when it comes to fixation of fee, as already dealt with in detail, the main purpose is that State acts as a regulator and satisfies itself that the fee which is proposed by the educational institution does not have the element of profiteering and also that no capitation fee etc. is charged. In fact, this dual function of regulatory nature is going to advance the public interest inasmuch as those students who are otherwise meritorious but are not in a position to meet unreasonable demands of capitation fee etc. are not deprived of getting admissions. The impugned provisions, therefore, are aimed at seeking laudable objectives in larger public interest. Law is not static, it has to change with changing times and changing social/societal conditions.

III. Re.: Reservation of seats for Scheduled Castes, Scheduled Tribes and Other Backward Classes The main arguments of the appellants, on this issue, is that reservation in private sector is unknown to the constitutional scheme and the same has been held to be by this Court in the case of P.A. Inamdar. It is their submissions that to overrule the ratio of the judgment of this Court in P.A. Inamdar, the Parliament amended the Constitution and introduced Article 15(5) . The said Article 15(5) reads as under:

“15(5) Nothing in this article or in sub-clause (g)of clause (1) of Article 19 shall prevent the state from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause(1) of Article30.

It is submitted that the caste based reservation policy or a social engineering policy of the State Government cannot be run on the shoulders of the private institutions which enjoy fundamental rights under Part III of the Constitution. It is submitted that the extent and the manner in which the right can be regulated has been set out

under Article 19(6) of the Constitution. It is submitted that in P.A. Inamdar, this Court has held that the provision for reservation in private institutions would be an 'unreasonable' restriction and, therefore, would fall foul of 19(1)(g) and would not be protected by 19(6) of the Constitution of India. It is, thus, submitted that the reasoning on the basis of which reservations in private institutions have been rejected is that this Court found that such restrictions would be 'unreasonable' restrictions and, therefore, effectively violate Articles 14 and 15(1) of the Constitution of India. It is submitted that the provisions of Article 15(5) are not an exception to Article 14 and, therefore, when the Court has held that the said reservations in private institutions are unreasonable, the impugned provisions would be in violation of Article 14 of the Constitution of India.

In any case, since this Court in P.A. Inamdar has held that there cannot be any fixation of Quota or appropriation of seats by the State, reservation which inheres setting aside Quotas, would not be permissible. It is, thus, argued that the provisions seek to bring back the Unni Krishnan system of setting up State Quotas which has been expressly held by this Court to be impermissible. This argument is to be noted to be rejected. In fact, as can be seen from the impugned judgment having regard to the provisions of Clause (5) of Article 15 of the Constitution, there was no serious challenge laid to Section 8 read with Rules 4(2), 7 and 15 of the Rules, 2008. In fact, counsel for the appellants conceded that they had not challenged 93rd Constitutional Amendment vide which Article 15(5) was inserted into the Constitution. In any case, there is hardly any ground to challenge the said constitutional amendment, which has already been upheld by a Constitution Bench judgment in the case of Pramati Educational and Cultural Trust. The only other argument raised was that a reading of the reservation provisions in Rule 7 of Rules, 2009 would show that it would be difficult to work out said percentage having regard to the fact that number of seats in the post-graduate dental and medical courses in different specialized disciplines are few. The High Court has successfully dealt with this argument by appropriately demonstrating, by means of charges, that not only it was possible to work out extent of reservation provided for different categories, sufficient number of seats were available for general categories as well. We, thus, do not find any merit in the challenge to the reservation of seats for SC/ST and OBC etc. which is in consonance with Article 15(5) of the Constitution.

As is evident from the facts mentioned by the State of Madhya Pradesh in its reply filed in IA No. 83 of 2015, the Association of Private Colleges has failed to hold their CETs in a fair, transparent and rational manner. The accountability and transparency in State actions is much higher than in private actions. It is needless to say that the incidents of corruption in the State machinery were brought in the public eye immediately and have been addressed expeditiously. The same could never have been done in case of private actions. Even on a keel of comparative efficiency, it is more than evident that the State process is far more transparent and fair than one that is devised by the private colleges which have no mechanism of any checks and balances.

The State agencies are subject to the Right to Information Act, Audit, State Legislature, Anti-Corruption agencies, Lokayukta, etc. The very object of setting up institutions for the State is a welfare function, for the purpose of excelling in educational standards. On the other hand, the primary motivation for private parties is profit motive or philanthropy. When the primary motivation for institutions is profit motive, it is natural that many means to achieve the same shall be adopted by the private institutions which leads to a large degree of secrecy and corruption. As such, the mechanism of regulations as envisaged under the impugned laws is legal, constitutional, fair, transparent and uphold the primary criteria of merit. The same does not infringe on the fundamental rights of either the minorities or the non-minorities to establish and administer educational institutions and must as such be upheld as valid.

IV. Whether the impugned legislation is beyond the legislative competence of the State of Madhya Pradesh?

The next issue to be considered is whether the subject matter of admissions was covered exclusively by Entry 66 of List I, thereby the States having no legislative competence whatsoever to deal with the subject of admissions or determination of fee to be charged by professional educational institutions.

Main reliance placed on behalf of the appellants is on Bharti Vidyapeeth (Deemed University) & Ors. v. State of Maharashtra & Anr.[22] Heavy reliance was also placed by the appellants on Gujarat University & Anr. v. Shri Krishna Ranganath Mudholkar & Ors.[23] and the judgment of the Constitution Bench in the case of Dr. Preeti Srivastava & Anr. v. State of M.P. & Ors.[24] The competing Entries are: List I, Entry 66 and List III, Entry 25. In the process, List II, Entry 32 also needs a glance. Thus, for proper analysis, we reproduce these Entries below:

“List I

66. Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions.

List II

32. Incorporation, regulation and winding up of corporation, other than those specified in List I, and universities; unincorporated trading, literacy, scientific, religious and other societies and associations; co- operative societies.

List III

25. Education, including technical education, medical education and universities, subject to the provisions of entries 63, 64, 65 and 66 of List I; vocational and technical training of labour.” To our

mind, Entry 66 in List I is a specific Entry having a very specific and limited scope. It deals with co-ordination and determination of standards in institution of higher education or research as well as scientific and technical institutions. The words 'co-ordination and determination of standards' would mean laying down the said standards. Thus, when it comes to prescribing the standards for such institutions of higher learning, exclusive domain is given to the Union. However, that would not include conducting of examination, etc. and admission of students to such institutions or prescribing the fee in these institutions of higher education, etc. In fact, such co-ordination and determination of standards, insofar as medical education is concerned, is achieved by Parliamentary legislation in the form of Medical Council of India Act, 1956 and by creating the statutory body like Medical Council of India (for short, 'MCI') therein. The functions that are assigned to MCI include within its sweep determination of standards in a medical institution as well as co-ordination of standards and that of educational institutions. When it comes to regulating 'education' as such, which includes even medical education as well as universities (which are imparting higher education), that is prescribed in Entry 25 of List III, thereby giving concurrent powers to both Union as well as States. It is significant to note that earlier education, including universities, was the subject matter of Entry 11 in List II[25]. Thus, power to this extent was given to the State Legislatures. However, this Entry was omitted by the Constitution (Forty-Second Amendment) Act, 1976 with effect from July 03, 1977 and at the same time Entry 25 in List II was amended[26]. Education, including university education, was thus transferred to Concurrent List and in the process technical and medical education was also added. Thus, if the argument of the appellants is accepted, it may render Entry 25 completely otiose. When two Entries relating to education, one in the Union List and the other in the Concurrent List, co-exist, they have to be read harmoniously. Reading in this manner, it would become manifest that when it comes to co-ordination and laying down of standards in the higher education or research and scientific and technical institutions, power rests with the Union/Parliament to the exclusion of the State Legislatures. However, other facets of education, including technical and medical education, as well as governance of universities is concerned, even State Legislatures are given power by virtue of Entry 25. The field covered by Entry 25 of List III is wide enough and as circumscribed to the limited extent of it being subject to Entries 63, 64, 65 and 66 of List I. Most educational activities, including admissions, have two aspects: The first deals with the adoption and setting up the minimum standards of education. The objective in prescribing minimum standards is to provide a benchmark of the caliber and quality of education being imparted by various educational institutions in the entire country. Additionally, the coordination of the standards of education determined nationwide is ancillary to the very determination of standards. Realising the vast diversity of the nation wherein levels of education fluctuated from lack of even basic primary education, to institutions of high excellence, it was though desirable to determine and prescribe basic minimum standards of education at various levels, particularly at the level of research institutions, higher education and technical education institutions. As such, while balancing the needs of States to impart education as per the needs and requirements of local and regional levels, it was essential to lay down a uniform minimum standard for the nation. Consequently, the Constitution makers provided for Entry 66 in List I with the objective of maintaining uniform standards of education in fields of research, higher education and technical education.

The second/other aspect of Education is with regard to the implementation of the standards of education determined by the Parliament, and the regulation of the complete activity of Education. This activity necessarily entails the application of the standards determined by the Parliament in all educational institutions in accordance with the local and regional needs. Thus, while Entry 66 List I dealt with determination and coordination of standards, on the other hand, the original Entry 11 of List II granted the States the exclusive power to legislate with respect to all other aspects of education, except the determination of minimum standards and coordination which was in national interest. Subsequently, vide the Constitution (Forty-second Amendment) Act, 1976, the exclusive legislative field of the State Legislature with regard to Education was removed and deleted, and the same was replaced by amending Entry 25, List III, granting concurrent powers to both Parliament and State Legislature the power to legislate with respect to all other aspects of Education, except that which was specifically covered by Entry 63 to 66 of the List I. No doubt, in Bharti Vidyapeeth it has been observed that the entire gamut of admission falls under Entry 66 of List I. The said judgment by a Bench of two Judges is, however, contrary to law laid down in earlier larger Bench decisions. In Gujarat University, a Bench of five Judges examined the scope of Entry 2 of List II (which is now Entry 25 of List III) with reference to Entry 66 of List I. It was held that the power of the State to legislate in respect of education to the extent it is entrusted to the Parliament, is deemed to be restricted. Coordination and determination of standards was in the purview of List I and power of the State was subject to power of the Union on the said subject. It was held that the two entries overlapped to some extent and to the extent of overlapping the power conferred by Entry 66 of List I must prevail over power of the State. Validity of a state legislation depends upon whether it prejudicially affects 'coordination or determination of standards', even in absence of a union legislation. In R. Chitralekha v. State of Mysore[27], the same issue was again considered. It was observed that if the impact of State law is heavy or devastating as to wipe out or abridge the central field, it may be struck down. In State of T.N. & Anr. v. Adhiyaman Educational & Research Institute & Ors.[28], it was observed that to the extent that State legislation is in conflict with the Central legislation under Entry 25, it would be void and inoperative. To the same effect is the view taken in Dr. Preeti Srivastava and State of Maharashtra v. Sant Dnyaneshwar Shikshan Shastra Mahavidalaya & Ors.[29] Though the view taken in State of Madhya Pradesh v. Kumari Nivedita Jain & Ors.[30] and Ajay Kumar Singh & Ors. v. State of Bihar & Ors.[31] to the effect that admission standards covered by Entry 66 of List I could apply only post admissions was overruled in Dr. Preeti Srivastava, it was not held that the entire gamut of admissions was covered by List I as wrongly assumed in Bharti Vidyapeeth.

We do not find any ground for holding that Dr. Preeti Srivastava excludes the role of states altogether from admissions. Thus, observations in Bharti Vidyapeeth that entire gamut of admissions was covered by Entry 66 of List I cannot be upheld and overruled to that extent. No doubt, Entry 25 of List III is subject to Entry 66 List I, it is not possible to exclude the entire gamut of admissions from Entry 25 of List III. However, exercise of any power under Entry 25 of List III has to be subject to a central law referable to Entry 25.

In view of the above, there was no violation of right of autonomy of the educational institutions in the CET being conducted by the State or an agency nominated by the State or in fixing fee. The right of a State to do so is subject to a central law. Once the notifications under the Central statutes for

conducting the CET called 'NEET' become operative, it will be a matter between the States and the Union, which will have to be sorted out on the touchstone of Article 254 artof the Constitution. We need not dilate on this aspect any further.

Epilogue:

> Before parting with the matter, we may observe that we have decided the lis between the parties, but that by itself does not cure all the ills with which the system suffers and something more needs to be done on that front as well. It would be necessary to refer to the grievance voiced on behalf of the appellants that admissions conducted even by an agency nominated by the State, under a state law or a central law may lack credibility. This concern has also been noticed by this Court in P.A. Inamdar. An astute and segacious approach is also necessary to deal with the ground realities. This Court had earlier appointed committees headed by the retired High Court Judges in all the States to regulate the admissions and fee structure. This was a stopgap arrangement till suitable legislation was framed and once the admission process under a statutory law becomes operative, the grievance of all concerned on the subject of proper functioning of the regulatory mechanism will need to be properly addressed. It was brought to our notice that the Central Government itself had appointed a group of experts headed by Dr. Ranjit Roy Chaudhury vide notification dated July 07, 2014 to study the Indian Medical Council Act, 1956 and to make recommendations. The said Committee gave its report on September 25, 2014 suggesting reforms in the regulatory oversight of the medical profession by the Medical Council. The recommendations covered the subject of overseeing under graduate and post graduate medical education as well as other related issues. It was also pointed out that even the Parliamentary Standing Committee on Health and Family Welfare in its 92nd report on 'The functioning of Medical Council of India' presented to the Rajya Sabha and the Lok Sabha on March 08, 2016 has gone into the matter. There is perhaps urgent need to review the regulatory mechanism for other service oriented professions also. We do hope this issue will receive attention of concerned authorities, including the Law Commission, in due course.
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> The Committee examined the existing architecture of the regulatory oversight of the medical profession, that is the MCI. It was observed that the MCI was repeatedly found short of fulfilling its mandated responsibilities. Qualify of medical education was at its lowest ebb, the right type of health professionals were not able to meet the basic health need of the country. Products coming out of medical colleges are ill-prepared to serve in poor resource settings like Primary Health Centre and even at the district level. The medical graduates lacked competence in performing basic health care tasks. Instances of unethical practices continued to grow. The MCI was not able to spearhead any serious reforms in medical education. The MCI neither represented the professional excellence nor its ethos. Nominees of Central Government and State Governments were also from corporate private hospitals which are highly commercialized. They were also found to be violating value

framework and indulging in unethical practices such as carrying out unnecessary diagnostics tests and surgical procedures in order to extract money from hapless patients. The electoral processes brought about a lot of compromises and tend to attract professionals who may not be best fitted for the regulatory body. Regulators of highest standards of professional integrity and excellence could be appointed through an independent selection process. The Committee concurred with recommendation of the Ranjit Roy Chaudhury Committee Report that regulatory structure should be run by persons selected through transparent mechanism rather than by election or nomination. The Central Government had no power to disagree with the MCI though the Government was the main stakeholder in shaping the health schemes. The Government should have power to give policy directives to the regulatory body. The existing system of graduate medical education was required to be re-invented. The admission process was not satisfactory as majority of seats in private medical colleges were being allotted for capitation fee. The system keeps out most meritorious and underprivileged students. The unitary CET will tackle the capitation fee and bring about transparency. The post graduate seats were being sold in absence of transparent and streamlined process of admission. It also noted deficiency in the teaching faculty and in regulation of professional conduct of doctors. Taking note of corruption in the MCI it was recommended that expeditious action should be taken to amend the statute and enact a new legislation. Current system of inspections was found to be unsatisfactory. The conclusions of the Committee are:

"The Committee observes that the Medical Council of India as the regulator of medical education in the country has repeatedly failed on all it mandates over the decades. The Committee in the earlier part of this Report has dealt with these failures in some details. In this section, the Committee before suggesting remedy to the problem, would like to briefly touch upon the following prominent failures of MCI in order to put things into proper perspective:-

(i) failure to create a curriculum that produces doctors suited to working in Indian context especially in the rural health services and poor urban areas; this has created a disconnect between medical education system and health system;

(ii) failure to maintain uniform standards of medical education, both undergraduate and post-graduate;

(iii) development of merit in admission, particularly in private medical institutions due to prevalence of capitation fees, which make medical education available only to the rich and not necessarily to the most deserving;

(iv) failure to produce a competent basic doctor;

(v) non-involvement of the MCI in any standardized summative evaluation of the medical graduates and post-graduates;

(vi) failure to put in place a robust quality assurance mechanism when a fresh graduate enters the system and starts practicing;

(vii) very little oversight to PG medical education leading to huge variations in standards;

(viii) heavy focus on nitty-gritty of infrastructure and human staff during inspections but no substantial evaluation of quality of teaching, training and imparting of skills;

(ix) abysmal doctor-population ratio;

(x) failure to create a transparent system of medical college inspections and grant of recognition or de-recognition;

(xi) failure to guide setting up of medical college in the country as per need, resulting in geographical mal-distribution of medical colleges with clustering in some states and absence in several other states and the disparity in healthcare services across states;

(xii) acute shortage of medical teachers;

(xiii) failure to oversee and guide the Continuing Medical Education in the country, leaving this important task in the hands of the commercial private industry;

(xiv) failure to instill respect for a professional code of ethics in the medical professional and take disciplinary action against doctors found violating the code of Ethics, etc. (Para 13.1) The Committee simultaneously observes that the onus of failure of medical education system cannot be laid exclusively on the Medical Council of India. The successive Governments have also their share in it.

The fact that there is imbalance in the distribution of medical college across States is not so much MCI's fault; it is the fault of the successive Governments that they have not pushed the MCI in that direction. There is also failure on the part of the State Government. (Para 13.2) The need for radical reforms in the regulatory framework of the medical profession has been on the agenda for several years now. The National Commission for Human Resources for Heal Bill, 2011 which was introduced in the Rajya Sabha on the 22nd December, 2011 was reported upon by this Committee and the 60th Report thereon presented to Parliament on the 23rd November, 2012. In its 60th Report, the Committee had recommended to the Ministry of Health and Family Welfare to re-examine the concerns expressed by it and bring forward a fresh Bill. Rather than seizing the opportunity to come up with a better Bill, the Ministry remained apathetic to the state of affairs and did not respond with vigorous corrective measures. (Para 13.3) Due to massive failures of the MCI and lack of initiatives on the part of the Government in unleashing reforms, there is total system failure due to which the medical education system is fast sliding downwards and quality has been hugely side-lined in the context of increasing commercialization of medical education and practice.

The situation has gone far beyond the point where incremental tweaking of the existing system or piecemeal approach can give the contemplated dividends. That is why the Committee is convinced that the MCI cannot be remedied according to the existing provisions of the Indian Medical Council Act, 1956 which is certainly outdated. If we try to amend or modify the existing Act, ten years down the line we will still be grappling with the same problems that we are facing today. Nowhere in the world is there an educational process oversight, especially, of medical education done by an elected body of the kind that MCI is. Managing everything of more than 400 medical colleges is too humongous a task to be done by the MCI alone because the challenges facing medical education of the 21st Century are truly gigantic and cannot be addressed with an ossified and opaque body like MCI. Transformation will happen only if we change the innards of the system. (Para 13.4) Game changer reforms of transformational nature are therefore the need of the hour and they need to be carried out urgently and immediately. Because, if revamping of the regulatory structure is delayed any further on any grounds including political expediency, it will be too late as too much momentum will have been built to offset attempts at reversing the direction later, with the result that our medical education system will fall into a bottomless pit and the country will have to suffer great social, political and financial costs. (Para 13.5) Keeping all these facts in mind, the Committee is convinced that the much needed reforms will have to be led by the Central Government. The MCI can no longer be entrusted with that responsibility in view of its massive failures. The people of India will not be well-served by letting the modus operandi of MCI continue unaltered to the detriment of medical education and decay of health system. The Government must therefore fulfill its commitment to preserve, protect and promote the health of all Indians by leading the way for a radical reform which cleanses the present ills and elevates medical education to contemporary global pedagogy and practices while retaining focus on national relevance. (Para 13.6) The expert committee led by (late) Prof. Ranit Roy Chaudhury constituted by the Government in July, 2014 to suggest reforms in the regulatory framework of medical profession has submitted its report in February, 2015, a copy of which has been supplied to this Parliamentary Committee. The expert committee has recommended major changes in the ethos of the regulatory body and major structural reconfiguration of its functions. The expert committee has suggested the formation of a National Medical Commission (NMC) through a new Act. The NMC will have four verticals (i) UG Board of Medical Education and Training, (ii) PG Board of Medical Education and Training (iii) National Assessment and Accreditation Board and (iv) National Board for Medical Registration. Besides these vertical heads, the expert committee has also recommended the formation f a National Advisory Council which will consist of members from the State Governments, Union Territories, State Medical Councils, Medical Universities and members of NMC. The Committee has been informed that the creation of National Medical Commission and the structure (at Appendix) envisaged has been endorsed by a group of eminent medical educationists, experts and pubic health persons. (Para 13.7) The Committee has done a rigorous analysis of the suggested new regulatory structure and found that several of its concerns have been addressed in the suggested new model of regulation of medical education and practice. The Committee is therefore in general agreement with the suggested regulatory structure, and recommends to the government to examine the structure proposed by the Ranjit Roy Chaudhury Committee subject to the recommendations made by this Committee in this report. (Para 13.8) To sum up, the Committee observes, even at the risk of sounding repetitive, that the need for major institutional changes in the regulatory oversight of the medical profession in the country is so urgent that it cannot be deferred any longer. The Committee

is, however, aware that any attempt at overhauling the regulatory framework will face huge challenges from the deeply entrenched vested interests who will try to stall ad derail the entire exercise. But if the medical education system has to be saved from total collapse, the Government can no longer look the other way and has to exercise its constitutional authority and take decisive and exemplary action to restructure and revamp India's regulatory system of medical education and practice. The Committee, therefore, exhorts the Ministry of Health, and Family Welfare to implement the recommendations made by it in this report immediately and bring a new comprehensive Bill in Parliament for this purpose at the earliest. (Para 13.9) " In view of the above, while the Expert Committee Report mentioned above is yet to be acted upon by the Government, we do not express any view on its contents. We direct the Central Government to consider and take further appropriate action in the matter at the earliest.

At the same time, we do feel that pending consideration at appropriate executive or legislature level, an Oversight Committee needs to be set in place in exercise of powers of this Court under Article 142 of the Constitution to oversee the functioning of the MCI and all other matters considered by the Parliamentary Committee.

In view of the above, while we do not find any error in the view taken by the High Court and dismiss these appeals, we direct the constitution of an Oversight Committee consisting of the following members:

1. Justice R.M. Lodha (former Chief Justice of India)

2. Prof. (Dr.) Shiv Sareen (Director, Institute of Liver and Biliary Sciences)

3. Shri Vinod Rai (former Comptroller & Auditor General of India) A Notification with respect to constitution of the said Committee be issued within two weeks from today. The Committee be given all facilities to function. The remuneration of the Members of the Committee may be fixed in consultation with them.

The said Committee will have the authority to oversee all statutory functions under the MCI Act. All policy decisions of the MCI will require approval of the Oversight Committee. The Committee will be free to issue appropriate remedial directions. The Committee will function till the Central Government puts in place any other appropriate mechanism after due consideration of the Expert Committee Report. Initially the Committee will function for a period of one year, unless suitable mechanism is brought in place earlier which will substitute the said Committee. We do hope that within the said period the Central Government will come out with an appropriate mechanism.

List the matter after one year for such further directions as may become necessary.

.....J. (ANIL R. DAVE) .....J. (A.K. SIKRI) .....J. (R.K. AGRAWAL) .....J. (ADARSH KUMAR GOEL) .....J. (R. BANUMATHI) NEW DELHI;

MAY 02, 2016.

REPORTABLE IN THE SUPREME COURT OF INDIA CIVIL APPELLATE JURISDICTION CIVIL APPEAL NO. 4060 OF 2009 MODERN DENTAL COLLEGE AND RESEARCH CENTRE & ORS. ..Appellants Versus STATE OF MADHYA PRADESH & ORS. ...Respondents With C.A. No.4061 of 2009, C.A. No.4062 of 2009, C.A. No.4063 of 2009, C.A. No.4064 of 2009 and C.A. No.4065 of 2009 J U D G M E N T R. BANUMATHI, J.

I have had the advantage of going through the draft judgment proposed by my esteemed brother Hon'ble Justice A.K. Sikri. I entirely agree with the conclusions which my erudite brother has drawn, based on a remarkable process of reasoning. I would all the same like to add some of my own reasonings, not because the judgment requires any further elaboration but because the substantial questions of law that arise for determination are of considerable importance.

2. In compliance with the directions of this Court in T.M.A. Pai Foundation and Ors. v. State of Karnataka and Ors. (2002) 8 SCC 481, Islamic Academy of Education and Anr. v. State of Karnataka and Ors. (2003) 6 SCC 697 and P.A. Inamdar and Ors. v. State of Maharashtra and Ors. (2005) 6 SCC 537, the State of Madhya Pradesh has enacted M.P. Niji Vyavasayik Shikshan Sanstha (Pravesh Ka Viniyaman Avam Shulk Ka Nirdharan) Adhiniyam, 2007 (M.P. Act No.21 of 2007). Association of Private Dental and Medical Colleges of State of Madhya Pradesh has filed Writ Petition No.1975 of 2008 challenging the provisions of Act 2007 as unconstitutional beyond legislative competence of the State Legislature and therefore without jurisdiction. In W.P. No.9496 of 2008, the association has also challenged the Admission Rule 2008 framed under Act 2007 as ultra vires the Constitution and M.P. Act 2007. The State Government issued orders on 28.02.2009 that the State Government shall conduct the Common Entrance Test (CET) for admission to the post-graduate medical and dental courses for the academic session 2008-2009 through Madhya Pradesh Professional Examination Board (VYAPAM). The Association has challenged the order dated 28.02.2009 authorizing VYAPAM to conduct the CET for admission to post-graduate medical and dental courses as arbitrary and contrary to the law laid down in T.M.A. Pai Foundation and P.A. Inamdar cases in W.P. No.2764 of 2009. Madhya Pradesh High Court by the common impugned judgment upheld the validity of the provisions of the Act and also the Rules and dismissed all the Writ Petitions. Rule 10(2)(iii) of 2009 Rules which prescribed that the candidate should have obtained permanent registration with the State Medical Council of Madhya Pradesh and not from State Medical Councils of other States for securing admission to post-graduate medical courses in any of the medical institution in the State of Madhya Pradesh was held to be ultra vires.

3. Contentions: Though in the pleadings and submissions, appellants have raised various contentions, in essence, substance of their contentions are:-

> Madhya Pradesh Act of 2007 is not referable to entry 25 in the concurrent list and common entrance test for admission is an important facet of the standards of higher education falling within entry 66 of Union List and State Legislature was not competent to legislate on the subject covered in the Union List.

In para (50) of T.M.A. Pai Foundation it was held that the right to establish and administer the educational institution includes interalia the rights to (a) admit students; (b) to set up a reasonable fee structure; and (c) to constitute a governing body.....; while so, Section 3(d) and Section 6 of the M.P. Act 2007 stipulating that admission shall be on the basis of common entrance test in such manner as may be prescribed by the State infringes the fundamental right of unaided private educational institutions and the rights of the institutions as laid down in T.M.A. Pai Foundation case and the same would be an unreasonable restrictions as held in T.M.A. Pai Foundation case.

Section 9 read with Section 4(1) of Act 2007 empowering the committee to determine the fee structure to be charged by the unaided private educational institutions infringes the autonomy of the institutions who have a right to determine their own fee structure in terms of Article 19(1)(g) of the Constitution of India. In terms of Section 4 and Regulation 5 Committee is given unbridled power to determine the fees that may be charged by the institution and the Committee can scrutinize the stipulated amounts in various heads which is not in accordance with the right of the unaided private educational institutions as laid down in T.M.A. Pai Foundation case.

Section 8 of the Act 2007 providing for reservation in unaided private educational institutions is unknown to the constitutional scheme and it would be an unreasonable restriction which would run afoul of Article 19(1)(g) of the Constitution of India and such unreasonable restriction in effect violates Articles 14 and 15(1) of the Constitution of India.

4. Challenge to Section 8 providing for reservation: Section 8 of Act 2007 provides for reservation of seats in admission in private unaided professional educational institutions for the persons belonging to Scheduled Castes and Scheduled Tribes and other backward classes as may be prescribed by the State Government. This reservation is pursuant to the Ninety Third Constitution Amendment inserting Article 15(5) of the Constitution. In para (41) of the impugned judgment, it is observed that Ninety Third Constitution Amendment inserting Article 15(5) of the Constitution has been challenged by some of the petitioners in separate writ petitions and therefore no arguments was advanced in the writ petitions challenging the views of Act 2007. It is, therefore, not necessary to go into the vires of Section 8 of Act 2007.

5. Re-contention: Lack of legislative competence of the State to enact Act 2007 as the field is occupied by entry 66 of Union List: It is to be pointed out that the issue of legislative competence was neither raised nor argued before the High Court as is apparent from the lack of discussion on this issue of constitutional importance in the impugned judgment. Be that as it may, to appreciate the contentions, it would be advantageous to have a glimpse into the relevant constitutional provisions on the distribution of legislative fields between the Centre and the States. The legislative powers of the Central and State Governments are governed by the relevant entries in the three Lists given in Seventh Schedule. Entry 66 in Union List provides for 'co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions'.

Prior to Constitution Forty- Second Amendment, "education including universities subject to the provisions of the entries 63, 64, 65, 66 of Union List and entry 25 of Concurrent List" was shown in entry 11 of the State List. By the Constitution (Forty-second Amendment) Act 1976 with effect from 03.01.1977, entry 11 was deleted from the State List and amalgamated with entry 25 of the Concurrent List.

Entry 66 of List I-Union List reads as under:-

> Entry 66. Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions.
>
> Entry 25 of List III-Concurrent List is as under:-
>
> Entry 25. Education, including technical education, medical education and universities, subject to the provisions of entries 63, 64, 65 and 66 of List I; vocational and technical training of labour.
>
> Under entry 66 of the Union List, Government of India is required to co- ordinate and maintain standards in institutions for higher education or research and scientific and technical institution. Union of India has the right to make policy decisions to maintain standards in higher education and these will be binding upon State Governments. Entry 25 of the Concurrent List is subject to the provisions of entries 63, 64, 65 and 66 of List 1 and the State cannot have a policy contrary to the Central Act. Under Article 257(1), the executive power of the State Government shall be so exercised as not to impede or prejudice the exercise of the executive power of the Union.

6. While 'education' is a concurrent subject under entry 25 of concurrent list as substituted by Constitution (Forty-second Amendment) Act 1976, entries 65 and 66 of Union List give Union the power to ensure that the standards of research etc. is not lowered at the hands of particular State or States to the detriment of national progress and that the power of the State Legislature must be so exercised as not to directly encroach upon the power of Union under the present entry. Though the field of legislation available to the Parliament and the States has been definite as stated above, more often, a certain amount of overlapping might become unavoidable; the legislation which thus overlaps would not however be rendered invalid, if, in 'pith and substance' the legislation is on the subject reserved in favour of that Legislature. In order to enable smooth functioning of federal structure of our Constitution, 'incidental encroachment' into or 'overlapping' of the field covered by one of the entries in the other Lists is permissible so long as it does not transgress the limit of legislation earmarked for the legislature making the law, judged by the standards fixed by the doctrine of 'pith and substance'.

7. In Dr. Preeti Srivastava and Anr. v. State of M.P. and Ors. (1999) 7 SCC 120, it was held that the word 'education' under entry 25 of Schedule VII List III is of wide import. It would include in its fold the taught, the teacher, the textbook and also training as practical training is required to be

imparted to students pursuing the course of post-graduate medical education. Curricula is also covered by the term 'education'.

8. While elaborating the concept of 'education' after referring to the dictionary meaning and 'India Vision-2020', in P.A. Inamdar case, in paras (88) to (90), it was held as under:-

> "88. Education is:
>
> "... continual growth of personality, steady development of character, and the qualitative improvement of life. A trained mind has the capacity to draw spiritual nourishment from every experience, be it defeat or victory, sorrow or joy. Education is training the mind and not stuffing the brain." (See Eternal Values for A Changing Society, Vol. III— Education for Human Excellence, published by Bharatiya Vidya Bhavan, Bombay, at p. 19.) "We want that education by which character is formed, strength of mind is increased, the intellect is expanded, and by which one can stand on one's own feet. ... The end of all education, all training, should be man-making. The end and aim of all training is to make the man grow. The training by which the current and expression of will are brought under control and become fruitful is called education." (Swami Vivekanand as quoted ibid., at p. 20.)
>
> 89. Education, accepted as a useful activity, whether for charity or for profit, is an occupation. Nevertheless, it does not cease to be a service to society. And even though an occupation, it cannot be equated to a trade or a business.
>
> 90. In short, education is national wealth essential for the nation's progress and prosperity."

9. By virtue of entry 66 of Union List "Co-ordination and determination of standards in institutions for higher education or research, scientific and technical institutions" is reserved with Union of India. Power to co-ordinate is not merely power to evaluate but to harmonise or secure relationship for concerted action. Oxford Concise Dictionary (7th Edn.) defines 'co-ordinate' as:-

> "make co-ordinate; bring (parts, movements etc.) into proper relation, cause to function together or in proper order".
>
> Black's Law Dictionary (10th Edn.) defines 'determinate' as:-
>
> "Having defined limits; fixed; definite" and 'determination' is defined as, "The act of deciding something officially; esp., a final decision by a court or administrative agency".
>
> From these definitions, it flows that 'determination' is the official characterization of an expression and 'co-ordination' means through which determined norms or standards are kept in harmony with each other.

10. In Concise Oxford English Dictionary (Tenth Edition, Revised) the meaning of the word 'standard' is given as:-

> "a level of quality or attainment, a required or agreed level of quality or attainment (in elementary schools) a grade of proficiency tested by examination, something used as a measure, norm or model in comparative evaluations." Black's Law Dictionary (10th Edn) defines 'standard' as:-
>
> "a model accepted as correct by custom, consent, or authority; a criterion for measuring acceptability, quality or accuracy." Ramanatha Aiyar's Law Lexicon 3rd Edn. also defines 'standard' as:-
>
> "something that is established by authority, customs or general consent as a model or example to be followed [s.18(4), expln, Beedi and Cigar Workers (Conditions of Employment) Act (32 of 1966)] Specifications approved and prescribed by a recognized body for repeated and continuous application. Standard usually prescribe a basic though higher than average level of quality."

11. The legislative history of entry 66, Union List might lay down a better picture in this regard. Profitably, we may refer to the history of 'education' as a subject of legislation in the Indian perspective must be ascertained. The Government of India Act, 1935 laid down the legislative lists in the Seventh Schedule. Entry 17 of List II therein i.e. the Provincial State List reads as under:-

> "Education including universities other than those specified in paragraph 13 of List I" Paragraph 13 of List I i.e. the federal legislative list reads as under:
>
> "The Benaras Hindu University and the Aligarh Muslim University" Evidently, 'education' as a field of legislation including universities was available to the Provinces except the two Universities i.e. the Benaras Hindu University and Aligarh Muslim University which lay in the domain of the federal legislative competence. Even when the constitution was being drafted, the idea of 'education' being a State subject and the role of Union to be limited only to co-ordinate educational institution was very firm in the minds of our constitution framers.
>
> 1 12. If we refer to volume IX of the Constituent Assembly Debates held on Wednesday, the 31st August 1949, it transpires that while introducing entry 66 of List I (as it stands in its present form), Dr. B.R. Ambedkar proposed nothing more than empowering the Union to set mere standards for higher education and to co-ordinate between the institutions.

Relevant excerpts from the debate is quoted below:-

> "The Honourable Dr. B.R. Ambedkar: Sir, I move:

> "That after entry 57 of List I, the following new entry be inserted:- '57(A) Co-ordination and maintenance of standards in institutions for higher education, scientific and technical institutions and institutions for research'."

This entry is merely complementary to the earlier entry No. 57. In dealing with institutions maintained by the provinces, entry 57A proposes to give power to the Centre to the limited extent of coordinating the research institutions and of maintaining the standards in those institutions to prevent their being lowered.

13. Sir, I also move:-

> "That in amendment No. 28 of List I (Sixth Week) in the proposed new entry 57A of List I, for the word 'maintenance' the word 'determination be substituted."

The said proposal of Dr. Ambedkar was opposed by Shri V.S. Sarwate (Madhya Bharat) by suggesting that only “Promotion by financial assistance or otherwise of standards in institutions for higher education, scientific and technical institutions and institutions for research" be left in the domain of the Union, so as to avoid unnecessary interference with the State’s power to legislate in relation to ‘education’. While highlighting the importance of ‘education’ being a State subject, Shri V.S. Sarwate observed as under:-

> “The modern trend in education is that education should be adapted to each individual so that the personality of each individual might be developed to its fullest extent, of course consistently with the personalities of other individuals. If this is the desideratum in education, then there must be full scope for variety. There should not be any uniformity in education as uniformity would kill the growth of the individual. Nobody can say that there should be a standard of intellectual weights and measures for human beings. Therefore I think that education should be left entirely to the provinces.” Shri V.S. Sarwate went to oppose introduction of entry 66 of List I (in the present form) by observing that the Union would not be competent enough to lay down standards for technical education such as that of medical education. His observation is quoted as under:-
>
> “One word more, Sir, I think that it will be difficult for Parliament or the Central Government to fix standards of higher education, for example in higher medical education. Would it be possible for the Parliament to find out what are the standards for medical education?” In order to answer the concern of other constitution framers, Dr. Ambedkar went on to clarify the limited scope of entry 66 of List I (as in the present form), as proposed by him in the following words:- “Entry 57A merely deals with the maintenance of certain standards in certain classes of institutions, namely, institutions imparting higher education, scientific and technical institutions, institutions for research, etc. You may ask, “why this entry?” I shall show why it is necessary. Take for instance the B.A. Degree examination which is conducted by the different universities in India. Now, most provinces and the Centre, when advertising

> for candidates, merely say that the candidate should be a graduate of a university. Now, suppose the Madras University says that a candidate at the B.A. Examination, if he obtained 15 per cent of the total marks shall be deemed to have passed that examination; and suppose the Bihar University says that a candidate who has obtained 20 per cent. of marks shall be deemed to have passed the B.A. Degree examination; and some other university fixes some other standard, then it would be quite a chaotic condition, and the expression that is usually used, that the candidate should be a graduate, I think, would be meaningless. Similarly, there are certain research institutes, on the results of which so many activities of the Central and Provincial Governments depend. Obviously you cannot permit the results of these technical and scientific institutes to deteriorate from the normal standard and yet allow them to be recognized either for the Central purposes, for all-India purposes or the purposes of the State."

14. The intent of our constitution framers while introducing entry 66 of the Union List was thus limited only to empowering the Union to lay down a uniform standard of higher education throughout the country and not to bereft the State Legislature of its entire power to legislate in relation to 'education' and organizing its own common entrance examination.

15. If we consider the ambit of the present entry 66 of the Union List; no doubt the field of legislation is of very wide import and determination of standards in institutions for higher education. In the federal structure of India, as there are many States, it is for the Union to co-ordinate between the States to cause them to work in the field of higher education in their respective States as per the standards determined by the Union. Entry 25 in the Concurrent List is available both to the Centre and the States. However, power of the State is subject to the provisions of entries 63, 64, 65, and 66 of Union List; while the State is competent to legislate on the education including technical education, medical education and universities, it should be as per the standards set by the Union.

16. The words 'co-ordination' and 'determination of the standards in higher education' are the preserve of the Parliament and are exclusively covered by entry 66 of Union List. The word 'co-ordination' means harmonisation with a view to forge a uniform pattern for concerted action. The term 'fixing of standards of institutions for higher education' is for the purpose of harmonising co-ordination of the various institutions for higher education across the country. Looking at the present distribution of legislative powers between the Union and the States with regard to the field of 'education', that State's power to legislate in relation to "education, including technical education, medical education and universities" is analogous to that of the Union. However, such power is subject to entries 63, 64, 65 and 66 of Union List, as laid down in entry 25 of Concurrent List. It is the responsibility of the Central Government to determine the standards of higher education and the same should not be lowered at the hands of any particular State.

17. Even the National Educational Policy recognised that the Union shall take the larger responsibility of setting the standards. The Policy of 1986 states:-

"3.13 ...While the role and responsibility of the States in regard to education will remain essentially unchanged, the Union Government would accept a larger responsibility to reinforce the national and integrative character of education, to maintain quality and standards (including those of the teaching profession at all levels), to study and monitor the educational requirements of the country as a whole in regard to manpower for development, to cater to the needs of research and advanced study, to look after the international aspects of education, culture and Human Resource Development and, in general, to promote excellence at all levels of the educational pyramid throughout the country. Concurrency signifies a partnership, which is at once meaningful and challenging; the National Policy will be oriented towards giving effect to it in letter and spirit.

5.30 State level planning and co-ordination of higher education will be done through Councils of Higher Education. The UGC and these Councils will develop coordinative methods to keep a watch on standards.

XXX 10.4 State Government may establish State Advisory Boards of Education on the lines of CABE. Effective measures should be taken to integrate mechanisms in the various State departments concerned with Human Resource Development.

10.5 Special attention will be paid to the training of educational planners, administrators and heads of institutions. Institutional arrangements for this purpose should be set up in stages." (mhrd.gov.in/sites/upload_files/mhrd/files/upload_document/NPE86-mod92.pdf) The policy clearly recognised that the State would continue to fulfill its responsibilities. This is also discernible from the amendment to entry 25 of Concurrent List. Had the intention been to keep higher education solely in the hands of the Union, only the omission of entry 11 from State List would have sufficed. The legislative intent was to allow the Union to set the standards through its organs, which the States would facilitate.

18. Thus, what emerges is that under List I, responsibility of the Union is with respect to formulation and co-ordination of standards for higher education institutions. "Determination of Standard in Higher Education" implies that the Parliament is empowered to prescribe such norms to maintain quality in the institutions for higher education. The expression 'co-ordination and determination of standards in higher education' means that it is for the Parliament to take concerted action towards maintaining the standards. The reason for empowering the Central Legislature with entry 66 was to ensure that the standards of higher education were not lowered at the hands of a particular State to the detriment of the national progress and that the power exercised by the State did not directly encroach upon power of the Union entry 66.

19. An elucidation of the connotation, "co-ordination" as it appears in entry 66 of list I, is contained in the discussion by Shah J., while expressing the majority view in The Gujarat University & Anr. v. Shri Krishna Ranganath Mudholkar & Ors. [1963] Supp.1 SCR 112. In this case, the Constitution

Bench of this Court considered whether the State Legislature could impose Gujarati and/or Hindi in Devnagari script as exclusive medium of instruction and examination in institutions affiliated to the university and constituent colleges. It was held that:-

> "if a legislation imposing a regional language or Hindi as the exclusive medium of instruction is likely to result in lowering of standards, it must necessarily fall within Item 66 of List I and be excluded to that extent from Item 11 of List II" Medium of instruction was held to have an important bearing on the effectiveness of instruction and resultant standards achieved thereby. It was further held as under:
>
> "If adequate textbooks are not available or competent instructors in the medium, through which instruction is directed to be imparted, are not available, or the students are not able to receive or imbibe instructions through the medium in which it is imparted, standards must of necessity fall, and legislation for coordination of standards in such matters would include legislation relating to medium of instruction.
>
> If legislation relating to imposition of an exclusive medium of instruction in a regional language or in Hindi, having regard to the absence of textbooks and journals, competent teachers and incapacity of the students to understand the subjects, is likely to result in the lowering of standards, that legislation would, in our judgment, necessarily fall within Item 66 of List I and would be deemed to be excluded to that extent from the amplitude of the power conferred by Item 11 of List II."

20. Subba Rao, J. in Gujarat University case, in his dissenting view stated that no authority had gone so far as to hold that even if the pith and substance of an Act fell squarely within the ambit of a particular entry, it should be struck down on the speculative and anticipatory ground that it might come into conflict with a law made by a co-ordinated legislature by virtue of another entry; if the impact of a State law on a Central Legislation was so heavy and devastating as to wipe out or appreciably abridge the central field, then it might be a ground for holding that the State law was a colourable exercise of power and in pith and substance it fell not under the State entry, but under the Union entry.

21. In R. Chitralekha & Anr. v. State of Mysore & Ors. (1964) 6 SCR 368, State Government informed the Director of Technical Education that it had been decided to fix 25% of the maximum marks for the examination in optional subjects as interview marks and on that basis, selections were made for admission to Engineering and Medical Colleges. Considering the impact of State law providing for such standards it was held that the State law prescribing a higher percentage of marks for extra-curricular activities in the matter of admission to colleges cannot be said to be encroaching on the field covered by entry 66 of Union List and that the State Government would be within its rights to prescribe qualifications for admission to colleges so long as its action does not contravene any other law.

22. It was observed in the case of Government of Andhra Pradesh & Anr. v. Medwin Educational Society & Ors. (2004) 1 SCC 86, that "keeping in view the practical difficulties faced by the Central Government or the statutory bodies like MCI or UGC, some power is sought to be delegated to the State so as to make the Parliamentary statute workable. Such 'play in joint' is also desirable having regard to the federal structure of our Constitution".

23. In State of T.N. and Anr. v. Adhiyaman Educational and Research Institute and Ors., (1995) 4 SCC 104, the question involved was whether after coming into force of the Central Act, All India Council Technical Education Act, 1987, the State Government had the power to grant and withdraw permission to start educational institution. It was held that to that extent after coming into operation of the Central Act under entry 66 of Union List, to co-ordinate and determine the standards of technical institutions as in entry 25 of Concurrent List, the provisions of the University Act will be deemed to have become unenforceable in case of technical colleges like engineering colleges. In para (41), this Court summarized the principles as under:-

> "41. What emerges from the above discussion is as follows:
>
> (i) The expression 'coordination' used in Entry 66 of the Union List of the Seventh Schedule to the Constitution does not merely mean evaluation. It means harmonisation with a view to forge a uniform pattern for a concerted action according to a certain design, scheme or plan of development. It, therefore, includes action not only for removal of disparities in standards but also for preventing the occurrence of such disparities. It would, therefore, also include power to do all things which are necessary to prevent what would make 'coordination' either impossible or difficult. This power is absolute and unconditional and in the absence of any valid compelling reasons, it must be given its full effect according to its plain and express intention.
>
> (ii) To the extent that the State legislation is in conflict with the Central legislation though the former is purported to have been made under Entry 25 of the Concurrent List but in effect encroaches upon legislation including subordinate legislation made by the Centre under Entry 25 of the Concurrent List or to give effect to Entry 66 of the Union List, it would be void and inoperative.
>
> (iii) If there is a conflict between the two legislations, unless the State legislation is saved by the provisions of the main part of clause (2) of Article 254, the State legislation being repugnant to the Central legislation, the same would be inoperative.
>
> (iv) Whether the State law encroaches upon Entry 66 of the Union List or is repugnant to the law made by the Centre under Entry 25 of the Concurrent List, will have to be determined by the examination of the two laws and will depend upon the facts of each case.

(v) When there are more applicants than the available situations/seats, the State authority is not prevented from laying down higher standards or qualifications than those laid down by the Centre or the Central authority to short-list the applicants. When the State authority does so, it does not encroach upon Entry 66 of the Union List or make a law which is repugnant to the Central law.

(vi) However, when the situations/seats are available and the State authorities deny an applicant the same on the ground that the applicant is not qualified according to its standards or qualifications, as the case may be, although the applicant satisfies the standards or qualifications laid down by the Central law, they act unconstitutionally. So also when the State authorities de-recognise or disaffiliate an institution for not satisfying the standards or requirement laid down by them, although it satisfied the norms and requirements laid down by the Central authority, the State authorities act illegally."

24. In Dr. Preeti Srivastava case, this Court considered the question whether it was open to the State to prescribe different admission criteria, in the sense of prescribing different minimum qualifying marks, for special category candidates seeking admission to the post-graduate medical courses under the reserved seats category as compared to the general category candidates. While considering the question whether norms for admission have any connection with the standards of education, observing that norms for admission have a nexus with standards of education or rules of admission which are covered under entry 25 of concurrent list, it was held that the minimum standards as laid down by the Central Statute have to be complied with by the States. In paras (35) and (36) it was held as under:-

"35. ....Both the Union as well as the States have the power to legislate on education including medical education, subject, inter alia, to Entry 66 of List I which deals with laying down standards in institutions for higher education or research and scientific and technical institutions as also coordination of such standards. A State has, therefore, the right to control education including medical education so long as the field is not occupied by any Union legislation. Secondly, the State cannot, while controlling education in the State, impinge on standards in institutions for higher education. Because this is exclusively within the purview of the Union Government. Therefore, while prescribing the criteria for admission to the institutions for higher education including higher medical education, the State cannot adversely affect the standards laid down by the Union of India under Entry 66 of List I. Secondly, while considering the cases on the subject it is also necessary to remember that from 1977, education, including, inter alia, medical and university education, is now in the Concurrent List so that the Union can legislate on admission criteria also. If it does so, the State will not be able to legislate in this field, except as provided in Article 254.

36. It would not be correct to say that the norms for admission have no connection with the standard of education, or that the rules for admission are covered only by Entry 25 of List III. Norms of admission can have a direct impact on the standards of

> education. Of course, there can be rules for admission which are consistent with or do not affect adversely the standards of education prescribed by the Union in exercise of powers under Entry 66 of List I. For example, a State may, for admission to the postgraduate medical courses, lay down qualifications in addition to those prescribed under Entry 66 of List I. This would be consistent with promoting higher standards for admission to the higher educational courses.

But any lowering of the norms laid down can and does have an adverse effect on the standards of education in the institutes of higher education. Standards of education in an institution or college depend on various factors. Some of these are:

> (1) the calibre of the teaching staff;
>
> (2) a proper syllabus designed to achieve a high level of education in the given span of time;
>
> (3) the student-teacher ratio;
>
> (4) the ratio between the students and the hospital beds available to each student;
>
> (5) the calibre of the students admitted to the institution; (6) equipment and laboratory facilities, or hospital facilities for training in the case of medical colleges;
>
> (7) adequate accommodation for the college and the attached hospital; and (8) the standard of examinations held including the manner in which the papers are set and examined and the clinical performance is judged."

25. As laid down in the decision in Preeti Srivastava, it is within the legislative competence of the State Legislature, in exercise of power under entry 25 of concurrent list to prescribe higher educational qualifications and higher marks for admission in addition to the one fixed by the Indian Medical Council in order to bring out the higher qualitative output from the students who pursue medical course. Following the above dictum, in paragraphs (13) and (14) of the decision of this Court in Visveswaraiah Technological University & Anr. v. Krishnendu Halder & Ors., reported in (2011) 4 SCC 606, held as under:-

> "13. The object of the State or University fixing eligibility criteria higher than those fixed by AICTE, is twofold. The first and foremost is to maintain excellence in higher education and ensure that there is no deterioration in the quality of candidates participating in professional engineering courses. The second is to enable the State to shortlist the applicants for admission in an effective manner, when there are more applicants than available seats. Once the power of the State and the examining body, to fix higher qualifications is recognised, the rules and regulations made by them prescribing qualifications higher than the minimum suggested by AICTE, will be binding and will be applicable in the respective State, unless AICTE itself

subsequently modifies its norms by increasing the eligibility criteria beyond those fixed by the University and the State. It should be noted that the eligibility criteria fixed by the State and the University increased the standards only marginally, that is, 5% over the percentage fixed by AICTE. It cannot be said that the higher standards fixed by the State or University are abnormally high or unattainable by normal students, so as to require a downward revision, when there are unfilled seats. During the hearing it was mentioned that AICTE itself has revised the eligibility criteria. Be that as it may.

14. The respondents (colleges and the students) submitted that in that particular year (2007-2008) nearly 5000 engineering seats remained unfilled. They contended that whenever a large number of seats remained unfilled, on account of non-availability of adequate candidates, paras 41(v) and (vi) of Adhiyaman (1995) 4 SCC 104 would come into play and automatically the lower minimum standards prescribed by AICTE alone would apply. This contention is liable to be rejected in view of the principles laid down in the Constitution Bench decision in Preeti Srivastava (Dr.)(1999) 7 SCC 120 and the decision of the larger Bench in S.V. Bratheep (2004) 4 SCC 513 which explains the observations in Adhiyaman (1995) 4 SCC 104 in the correct perspective. We summarise below the position, emerging from these decisions:

(i) While prescribing the eligibility criteria for admission to institutions of higher education, the State/University cannot adversely affect the standards laid down by the central body/AICTE. The term “adversely affect the standards” refers to lowering of the norms laid down by the central body/AICTE. Prescribing higher standards for admission by laying down qualifications in addition to or higher than those prescribed by AICTE, consistent with the object of promoting higher standards and excellence in higher education, will not be considered as adversely affecting the standards laid down by the central body/AICTE.

(ii) The observation in para 41(vi) of Adhiyaman (1995) 4 SCC 104 to the effect that where seats remain unfilled, the State authorities cannot deny admission to any student satisfying the minimum standards laid down by AICTE, even though he is not qualified according to its standards, is not good law.

(iii) The fact that there are unfilled seats in a particular year, does not mean that in that year, the eligibility criteria fixed by the State/University would cease to apply or that the minimum eligibility criteria suggested by AICTE alone would apply. Unless and until the State or the University chooses to modify the eligibility criteria fixed by them, they will continue to apply in spite of the fact that there are vacancies or unfilled seats in any year. The main object of prescribing eligibility criteria is not to ensure that all seats in colleges are filled, but to ensure that excellence in standards of higher education is maintained.

> (iv) The State/University (as also AICTE) should periodically (at such intervals as they deem fit) review the prescription of eligibility criteria for admissions, keeping in balance, the need to maintain excellence and high standard in higher education on the one hand, and the need to maintain a healthy ratio between the total number of seats available in the State and the number of students seeking admission, on the other. If necessary, they may revise the eligibility criteria so as to continue excellence in education and at the same time being realistic about the attainable standards of marks in the qualifying examinations." It is clear from the above decision that the State legislation fixing higher qualification than the one prescribed by the AICTE is not outside the legislative competence of the State.

26. In Ambesh Kumar (Dr) v. Principal, L.L.R.M. Medical College, Meerut and Ors., (1986) Supp SCC 543, the State prescribed 55% as minimum marks for admission to post-graduate medical courses. The Court considered the question whether the State can impose qualifications in addition to those laid down by the Medical Council of India and the regulations framed by the Central Government. This Court held that the State Government laying down eligibility qualification, namely, obtaining of certain minimum marks in the examination by candidates is neither an encroachment upon regulation made under the Medical Council Act nor any infringement of Union's power provided in entry 66 of Union List. It was held as under:-

> "...The State Government by laying down the eligibility qualification namely the obtaining of certain minimum marks in the MBBS Examination by the candidates has not in any way encroached upon the regulations made under the Indian Medical Council Act nor does it infringe the Central power provided in Entry 66 of List I of the Seventh Schedule to the Constitution. The order merely provides an additional eligibility qualification."

27. Observing that the scope of the relevant entries in the Seventh Schedule of the Constitution has to be understood in the manner as stated in Dr. Preeti Srivastava case, in State of T.N. and Anr. v. S.V. Bratheep (minor) and Ors. (2004) 4 SCC 513, this Court held as under:-

> 9. Entry 25 of List III and Entry 66 of List I have to be read together and it cannot be read in such a manner as to form an exclusivity in the matter of admission but if certain prescription of standards have been made pursuant to Entry 66 of List I, then those standards will prevail over the standards fixed by the State in exercise of powers under Entry 25 of List III insofar as they adversely affect the standards laid down by the Union of India or any other authority functioning under it. Therefore, what is to be seen in the present case is whether the prescription of the standards made by the State Government is in any way adverse to, or lower than, the standards fixed by AICTE. It is no doubt true that AICTE prescribed two modes of admission — one is merely dependent on the qualifying examination and the other, dependent upon the marks obtained at the common entrance test. The appellant in the present case prescribed the qualification of having secured certain percentage of marks in the related subjects which is higher than the minimum in the qualifying examination in

order to be eligible for admission. If higher minimum is prescribed by the State Government than what had been prescribed by AICTE, can it be said that it is in any manner adverse to the standards fixed by AICTE or reduces the standard fixed by it? In our opinion, it does not. On the other hand, if we proceed on the basis that the norms fixed by AICTE would allow admission only on the basis of the marks obtained in the qualifying examination, the additional test made applicable is the common entrance test by the State Government. If we proceed to take the standard fixed by AICTE to be the common entrance test then the prescription made by the State Government of having obtained certain marks higher than the minimum in the qualifying examination in order to be eligible to participate in the common entrance test is in addition to the common entrance test. In either event, the streams proposed by AICTE are not belittled in any manner. The manner in which the High Court has proceeded is that what has been prescribed by AICTE is inexorable and that that minimum alone should be taken into consideration and no other standard could be fixed even the higher as stated by this Court in Dr Preeti Srivastava case (1999) 7 SCC 120. It is no doubt true, as noticed by this Court in Adhiyaman case (1995) 4 SCC 104 that there may be situations when a large number of seats may fall vacant on account of the higher standards fixed. The standards fixed should always be realistic which are attainable and are within the reach of the candidates. It cannot be said that the prescriptions by the State Government in addition to those of AICTE in the present case are such which are not attainable or which are not within the reach of the candidates who seek admission for engineering colleges. It is not a very high percentage of marks that has been prescribed as minimum of 60% downwards, but definitely higher than the mere pass marks. Excellence in higher education is always insisted upon by a series of decisions of this Court including Dr Preeti Srivastava case (1999) 7 SCC 120. If higher minimum marks have been prescribed, it would certainly add to the excellence in the matter of admission of the students in higher education.

28. Another argument that has been putforth is that the power to enact laws laying down process of admission in universities etc. vests in both Central and State Governments under entry 25 of the concurrent list only. Under entry 25 of concurrent list and erstwhile entry 11 of State List, the State Government has enacted various legislations that inter alia regulate admission process in various institutions. For instance, Jawaharlal Nehru Krishi Vishwavidyalaya Adhiniyam, Rajiv Gandhi Prodyogiki Vishwavidyalaya Adhiniyam, Rashtriya Vidhi Sansathan Vishwavidyalaya Adhiniyam etc. were established by the State Government in exercise of power under entry 25 of concurrent list. Similarly, the Central Government has also enacted various legislations relating to higher education under entry 25 of concurrent list pertaining to centrally funded universities such as Babasaheb Bhimrao Ambedkar University Act 1994, Maulana Azad National Urdu University Act, 1996, Indira Gandhi National Tribal University Act, 2007 etc. Central Government may have the power to regulate the admission process for centrally funded institutions like IITs, NIT, JIPMER etc. but not in respect of other institutions running in the State.

29. In view of the above discussion, it can be clearly laid down power of Union under entry 66 of Union List is limited to prescribing standards of higher education to bring about uniformity in the

level of education imparted throughout the country. Thus, the scope of entry 66 must be construed limited to its actual sense of 'determining the standards of higher education' and not of laying down admission process. In no case is the State denuded of its power to legislate under Entry 25 of List III. More so, pertaining to the admission process in universities imparting higher education.

30. I have no hesitation in upholding the vires of the impugned legislation which empowers the state government to regulate admission process in institutions imparting higher education within the state. In fact, the State being responsible for welfare and development of the people of the State, ought to take necessary steps for welfare of its student community. The field of 'higher education' being one such field which directly affects the growth and development of the state, it becomes prerogative of the State to take such steps which further the welfare of the people and in particular pursuing higher education. In fact, the State Government should be the sole entity to lay down the procedure for admission and fee etc. governing the institutions running in that particular state except the centrally funded institutions like IIT, NIT etc. because no one can be a better judge of the requirements and inequalities-in-opportunity of the people of a particular state than that state itself. Only the State legislation can create equal level playing field for the students who are coming out from the State Board and other streams.

31. Whether the impugned legislation imposes reasonable restriction under Article 19(6) of the Constitution of India on the fundamental rights of the Unaided Private Educational Institutions in its "Right to Occupation" under Article 19(1) (g): In T.M.A. Pai case, eleven-Judge Bench in paras (20) and (25) held that running of an educational institution was an occupation within the meaning of Article 19(1)(g) and that the right to establish and administer an educational institution is guaranteed to all the citizens under Article 19(1)(g) of the Constitution of India and to minorities specifically under Articles 26 and 30 of the Constitution of India. These rights to establish an educational institution also stand affirmed in P.A. Inamdar.

32. Object of the Act 2007 is "...to provide for the regulation of admission and fixation of fee in private professional educational institutions in the State of Madhya Pradesh...". Section 6 of the Act 2007 provides that admission to sanctioned intake in private unaided professional educational institution shall be on the basis of common entrance test in such manner as may be prescribed by the State Government. In Section 3(d) 'common entrance test' has been defined to mean an entrance test conducted for determination of the merit of the candidates followed by centralized counselling based on merit to professional colleges or institutions through a single window procedure by the State Government or by any agency authorized by it.

33. Contention of the appellants is that Section 6 read with Section 3(d) of the Act, 2007 creates a monopoly in favour of the State in the matter of conducting common entrance test and that it directly encroaches upon the fundamental right of private unaided educational institutions under Article 19(1)(g) of the Constitution of India. It is further submitted that as held in para (137) of P.A. Inamdar case only if the admission procedure adopted by the private institutions or a group of institutions fails to satisfy the triple test of fairness, transparency and non-exploitativeness, can the State take over the admission procedure by substituting its own procedure; but by the impugned provision in Section 6 and Section 3(d) of the Act, 2007 even in the absence of any material to show

that the entrance test conducted by the private unaided institution failed to satisfy the triple test, the State had taken over the admission procedure. Much emphasis was also laid upon para (65) of T.M.A. Pai case to contend that private educational institutions have the right to select students and a common entrance test by the State decimates the right of autonomy of the private educational institutions which amounts to an unreasonable restriction and the same is liable to be struck down.

34. The claim of absolute 'right to occupation' which the appellants have raised on the basis of T.M.A. Pai, P.A. Inamdar cases is not sustainable. In T.M.A. Pai and P.A. Inamdar, no unfettered right was granted to private unaided educational institutions to carry on trade and business without being restricted by statutory regulations enacted by the competent legislature. A fundamental right is not without measure of control and it will always be subject to reasonable restriction which the State is duty bound to impose in the larger public interest. In Sreenivasa General Traders and Ors. v. State of Andhra Pradesh and Ors. (1983) 4 SCC 353, it was held as under:-

> "17. The fundamental right of all citizens to practise any profession or to carry on any occupation or trade or business guaranteed under Article 19(1)(g) has its own limitations. The liberty of an individual to do as he pleases is not absolute. It must yield to the common good. Absolute or unrestricted individual rights do not and cannot exist in any modern State. There is no protection of the rights themselves unless there is a measure of control and regulation of the rights of each individual in the interests of all."

35. M.P. Act 2007 was enacted for "the regulation of admission and fixation of fee in private professional educational institutions in the State of Madhya Pradesh and to provide for reservation of seats to persons belonging to the Scheduled Castes, the Scheduled Tribes and Other Backward Classes". Act 2007 is thus in furtherance of the constitutional obligation imposed upon the State to ensure equality of opportunity in admission to meritorious candidates who seek to pursue the medical education. Act 2007 enables the State to conduct common entrance test in the interest of securing higher standards of medical education so that quality doctors are trained leading to advancement in health sector of the nation. Point to be considered is whether the common entrance test to be conducted by the State Government or any agency authorized by it amounts to a reasonable restriction.

36. From time to time, it has been held that 'in the interests of the general public', the State would be justified in imposing reasonable restriction, even if it affects the interests of particular individuals, or even causes hardship to particular individuals owing to the peculiar conditions in which they are placed. Reference can be made to the decision of this Court in Narendra Kumar & Ors. v. Union of India & Ors. AIR 1960 SC 430, wherein it was held as under:-

> "15. It is clear that in the following three cases viz. Chintaman Rao (1950) 1 SCR 759, Cooverjee AIR 1954 SC 220 and Madhya Bharat Association Ltd. AIR 1954 SC 634, the Court considered the real question to be whether the interference with the fundamental right was "reasonable" or not in the interests of the general public and that if the answer to the question was in the affirmative, the law would be valid and it

> would be invalid if the test of reasonableness was not passed. Prohibition was in all these cases treated as only a kind of "restriction".

.....

18. In applying the test of reasonableness, the Court has to consider the question in the background of the facts and circumstances under which the order was made, taking into account the nature of the evil that was sought to be remedied by such law, the ratio of the harm caused to individual citizens by the proposed remedy, to the beneficial effect reasonably expected to result to the general public. It will also be necessary to consider in that connection whether the restraint caused by the law is more than was necessary in the interests of the general public."

37. While determining the reasonableness of the restrictions imposed by the State on the 'freedom of occupation' guaranteed by Article 19(1)(g), the principles which can be taken into account were summed up by this Court in M.R.F. Ltd. v. Inspector, Kerala Government and Ors., (1998) 8 SCC 227, in the following relevant extraction:-

> "On a conspectus of various decisions of this Court, the following principles are clearly discernible:
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> (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. v. Kaushailiya 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 Kottarathil Kochuni v. States of Madras and Kerala AIR 1960 SC 1080; O.K. Ghosh v. E.X. Joseph AIR 1963 SC
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> 812.)" A similar view was also expressed in State of Madras v. V.G. Row, AIR 1952 SC 196 and K.K. Kochuni v. State of Madras and Kerala, AIR 1960 SC 1080.

38. In T.M.A. Pai, while this Court acknowledged 'right to occupation' of private educational institutions as guaranteed under Article 19(1)(g) of the Constitution of India, in para (54), this Court laid down general law pertaining to the authority of State Government to impose regulatory means

in respect of private aided and unaided educational institutions, which reads as under:-

> "54. The right to establish an educational institution can be regulated; but such regulatory measures must, in general, be to ensure the maintenance of proper academic standards, atmosphere and infrastructure (including qualified staff) and the prevention of maladministration by those in charge of management. The fixing of a rigid fee structure, dictating the formation and composition of a governing body, compulsory nomination of teachers and staff for appointment or nominating students for admissions would be unacceptable restrictions."

39. In T.M.A. Pai, in paras (58) and (59), the Constitution Bench reiterated that for seeking admission into the professional educational institutions, merit plays an important role and held as under:-

> "58. For admission into any professional institution, merit must play an important role. While it may not be normally possible to judge the merit of the applicant who seeks admission into a school, while seeking admission to a professional institution and to become a competent professional, it is necessary that meritorious candidates are not unfairly treated or put at a disadvantage by preferences shown to less meritorious but more influential applicants. Excellence in professional education would require that greater emphasis be laid on the merit of a student seeking admission. Appropriate regulations for this purpose may be made keeping in view the other observations made in this judgment in the context of admissions to unaided institutions.
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> 59. Merit is usually determined, for admission to professional and higher education colleges, by either the marks that the student obtains at the qualifying examination or school-leaving certificate stage followed by the interview, or by a common entrance test conducted by the institution, or in the case of professional colleges, by government agencies."

40. In order to clarify the doubts/anomalies in T.M.A. Pai, Constitution Bench was constituted in Islamic Academy of Education wherein this Court reiterated that admission to professional colleges should be based on merit by a common entrance test conducted by government agencies. Furthermore, in exercise of power under Article 142, this Court directed setting up of two committees headed by a retired High Court Judge nominated by the Chief Justice of the State to oversee the entrance test conducted by the association and also to approve the fee structure proposed by the institute. In paras (19) and (20) of the said judgment, it was held as under:-

> "19. We now direct that the respective State Governments do appoint a permanent Committee which will ensure that the tests conducted by the association of colleges is fair and transparent. For each State a separate Committee shall be formed. The Committee would be headed by a retired Judge of the High Court. The Judge is to be nominated by the Chief Justice of that State.....The Committee shall have powers to

oversee the tests to be conducted by the association. This would include the power to call for the proposed question paper(s), to know the names of the paper-setters and examiners and to check the method adopted to ensure papers are not leaked. The Committee shall supervise and ensure that the test is conducted in a fair and transparent manner. The Committee shall have the power to permit an institution, which has been established and which has been permitted to adopt its own admission procedure for the last, at least, 25 years, to adopt its own admission procedure and if the Committee feels that the needs of such an institute are genuine, to admit, students of their community, in excess of the quota allotted to them by the State Government.....It is also clarified that no institute, which has not been established and which has not followed its own admission procedure for the last, at least, 25 years, shall be permitted to apply for or be granted exemption from admitting students in the manner set out hereinabove.

20. Our direction for setting up two sets of Committees in the States has been passed under Article 142 of the Constitution of India which shall remain in force till appropriate legislation is enacted by Parliament. The expenses incurred on the setting up of such Committees shall be borne by each State. The infrastructural needs and provision for allowance and remuneration of the Chairman and other members of the Committee shall also be borne by the respective State Government."

41. In P.A. Inamdar, this Court observed that there has to be one common entrance examination to be conducted by the State Government or by the competent authority appointed by the State Government in case more than one university exist in the State and in para (136) of the judgment held as under:-

"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 the 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 the common entrance test ("CET" for short) must be one enjoying utmost credibility and expertise in the matter. This would better ensure the fulfilment 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 centralised 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 the list of successful candidates prepared at CET without altering the order of merit inter se of the students so chosen."

42. In para (138), it was further held that having regard to the larger interest and welfare of the student community, it would be permissible to regulate the admissions by providing a centralized and single-window procedure. Para (138) reads as under:-

> "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 malpractices, it would be permissible to regulate admissions by providing a centralised 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."

43. Affirming the view taken in Islamic Academy on constitution of two committees and the responsibilities of the State Governments to come out with a well-thought out legislation on the subject, it was held in P.A. Inamdar in paras (144) and (155) as under:-

> "144. The two Committees for monitoring admission procedure and determining fee structure in the judgment of Islamic Academy (2003) 6 SCC 697, are in our view, permissible 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 Article 30(1) or 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.
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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. The States must act towards this direction. The judicial wing of the State is called upon to act when the other two wings, the legislature and the executive, do not act. The 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 a 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."

44. In para (155) of P.A. Inamdar, as quoted above, State Governments have been directed to frame a detailed well-thought out legislation on the subject with a further observation that any decision taken by the Committees and by the Central or State Governments shall be open to judicial review in accordance with the settled parameters for the exercise of such jurisdiction. The impugned legislation-Act 2007 has thus been enacted in compliance with the directions issued by this Court in T.M.A. Pai, Islamic Academy and P.A. Inamdar with a view to ensure fairness and transparency in the admissions process.

45. Common entrance test-single window system which regulates admission to unaided private professional educational institutions does not cause any dent in the fundamental rights of those institutions: In T.M.A. Pai and P.A. Inamdar, this Court categorically held that admission to professional courses must be on the basis of merit. The word 'merit' is word of Latin origin, deriving roots from meritum, meaning 'due reward' and mereri meaning 'earn, deserve'. Concise Oxford English Dictionary (11th Edn) defines 'merit' as 'excellence; worth'. P. Ramanatha Aiyar's Advanced Law Lexicon (3rd Edn.) on the topic of merit makes mention of Guman Singh v. State of Rajasthan (1971) 2 SCC 452, wherein it was observed as under:-

> "...merit is a sum total of various qualities and attributes of an employee such as his academic qualifications, his distinction in the university, his character, integrity, devotion to duty and the manner in which he discharges his official duties. Allied to this may be various other matters, or factors, such as his punctuality in work, the quality and out- turn of work done by him and the manner of his dealings with his superiors and subordinates officers and the general public, his rank in the service and annual confidential report. All these and other factors may have to be taken into account in assessing the merit." Additionally, in Dr. Pradeep Jain and Ors. v. Union of India and Ors., (1984) 3 SCC 654, it was held as under:-
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> "...Merit consists of a high degree of intelligence coupled with a keen and incisive mind, sound knowledge of the basic subjects and infinite capacity for hard work and also calls for a sense of social commitment and dedication to the cause of the poor."

46. It is well known that study of medicine is much sought after by students in India. Due to the high demand for admission in Medical Colleges and limited number of seats, selection and/or screening methods have evolved to select the crème de la crème. Given the surfeit of academically well-qualified applicants, the selection method ought to become highly competitive by placing exceptionally high academic thresholds. It is in this context that 'merit' comes into play in determining the parameters for admissions in institutions of higher education.

47. Merit is the cumulative assessment of worth of any individual based on different screening methods. Ideally, there should be one common entrance test conducted by the State both for government colleges and for private unaided educational institutions to ensure efficacy, fairness and public confidence. As rightly contended by Mr. Purushaindra Kaurav, Addl. Advocate General for the State of Madhya Pradesh appearing for AFRC, a common entrance test conducted by the State is more advantageous viz.:- (i) having adhered to the time schedule as laid down in Mridul Dhar case (2005) 2 SCC 65; (ii) multiple centres of examination and counselling throughout the State and a single window system for admission; (iii) standard question papers, preservation of question papers and answer books, prevention of leakage of question papers and fair evaluation and (iv) minimal litigation. That apart, procedure for preparation of merit list, counselling and allotments to various colleges is subject to Right to Information Act and thus ensures fairness and transparency in the entire process.

48. Having regard to the prevailing conditions relating to admissions in private professional educational institutions in the State of Madhya Pradesh, the Legislature in its wisdom has taken the view that merit based admissions can be ensured only through a common entrance test followed by centralized counselling either by the State or by an agency authorized by the State. In order to ensure rights of the applicants aspiring for medical courses under Articles 14, 15 and 16 of the Constitution of India, legislature by the impugned legislation introduced the system of Common Entrance Test (CET) to secure merit based admission on a transparent basis. If private unaided educational institutions are given unfettered right to devise their own admission procedure and fee structure, it would lead to situation where it would impinge upon the “right to equality” of the students who aspire to take admissions in such educational institutions. Common Entrance Test by State or its agency will ensure equal opportunity to all meritorious and suitable candidates and meritorious candidates can be identified for being allotted to different institutions depending on the courses of study, the number of seats and other relevant factors. This would ensure twin objects:- (i) fairness and transparency and (ii) merit apart from preventing mal-administration. Thus, having regard to the larger interest and welfare of the student community to promote merit and achieve excellence and curb mal-practices, it would be permissible for the State to regulate admissions by providing a centralized and single window procedure. Holding such CET followed by centralized counselling or single window system regulating admissions does not cause any dent on the fundamental rights of the institutions in running the institution. While private educational institutions have a ‘right of occupation’ in running the educational institutions, equally they have the responsibility of selecting meritorious and suitable candidates, in order to bring out professionals with excellence. Rights of private educational institutions have to yield to the larger interest of the community.

49. By holding common entrance test and identifying meritorious candidates, the State is merely providing the merit list of the candidates prepared on the basis of a fair common entrance test. If the screening test is conducted on merit basis, no loss will be caused to the private educational institutions. There is neither restriction on the entry of the students in the sanctioned intake of the institutions nor on their right to collect fees from the students. The freedom of private educational institutions to establish and run institution, impart education, recruit staff, take disciplinary action, admit students, participate in fixation of fees is in no way being abridged by the impugned

legislation; it remains intact.

50. While considering the reasonableness of the restriction, the court has to keep in mind the Directive Principles of State Policy: For deciding the constitutional validity of any statute or executive order or considering the reasonableness of a restriction cast by the law on the exercise of any fundamental right, the court has to keep in mind the Directive Principles of State Policy. A law or measure designed for promoting or having the effect of advancing directive principles is per se reasonable and in public interest. The State has a duty to balance the direct impact on the fundamental right of individuals as against the greater public or social interest. In State of Bombay and Anr. v. F.N. Balsara [1951] SCR 682, a Constitution Bench of this Court held that in judging the reasonableness of the restriction imposed on the fundamental right, one has to bear in mind the Directive Principles of State Policy set forth in Part IV of the Constitution, while examining the challenge to the constitutional validity of law by reference to Article 19(1)(g) of the Constitution. In State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat and Ors. (2005) 8 SCC 534, this Court held that ban on slaughter of cow progeny is not a prohibition but only a reasonable restriction. A seven-Judge Bench of this Court in para (41) held as under:-

> "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 competence of the enacting legislature under Part XI Chapter I of the Constitution."

51. It is the obligation of the State under the Constitution to ensure the creation of conditions necessary for good health including provisions for basic curative and preventive health services and assurance of healthy living and working conditions. Under Articles 39(e), 39(f) and 42 of the Constitution, obligations are cast on the State to ensure health and strength of workers, men and women; ensure children are given opportunities & facilities to develop in a healthy manner and to secure just & humane conditions of work and for maternity relief, respectively. Article 47 of the Constitution makes improvement of public health a primary duty of the State. However, right to health is no longer in the sole domain of Part IV of the Constitution. In Kirloskar Brothers Ltd. v. Employees' State Insurance Corp. (1996) 2 SCC 682, it was held that right to health is a fundamental right of workers and the maintenance of health is most imperative constitutional goal whose realization requires interaction of many social and economic factors. In Rajasthan Pradesh Vaidya Samiti, Sardarshahar and another v. Union of India and others (2010) 12 SCC 609, this Court held that the citizens of this country have a right under Article 21 of the Constitution of India which

includes the protection and safeguarding the health and life of public from mal-medical treatment. More recently in Centre for Public Interest Litigation v. Union of India (2013) 9 SCR 1103, again this Court has recognized that right to life under Article 21 includes right to health.

52. Maintenance and improvement of public health and to provide health care and medical services is the constitutional obligation of the State. To discharge this constitutional obligation, the State must have the doctors with professional excellence and commitment who are ready to give medical advice and services to the public at large. State can satisfactorily discharge its constitutional obligation only when the aspiring students enter into the profession based on merit. None of these lofty ideals can be achieved without having good and committed medical professionals.

53. Fundamental Rights of private unaided professional colleges must yield to public interest and rights of the students at large: Right to be treated fairly and to get admission through a non-arbitrary, non- discriminatory, fair and transparent procedure is a fundamental right of the students under Article 14. Any law which creates an artificial classification between private unaided institutions and other institutions and creates a disparity in the matter of admission whereby a meritorious student could be denied admission to pursue higher education in a private unaided institution solely because such institution has an unfettered right to choose its own students without following a uniform and transparent admission procedure would be violative of the rights of the aspiring students guaranteed under Article 14. Right of the students to admission in private unaided medical colleges is a right of equality in opportunity. On many occasions, this has led to a conflict between fundamental rights of private educational institutions on the one hand and the rights of students and public at large on the other. However, the law is now settled. In such cases where there is a conflict between fundamental right of two parties, this Court in para (59) in Sharda v. Dharmpal (2003) 4 SCC 493 held that only that right which would advance public morality or public interest would prevail. In para (39) in Kureshi Kassab case (supra), this Court held that when a fundamental right clashes with the larger interest of society, it must yield to the latter. The interest of citizens or section of community, howsoever important, is secondary to the interest of the nation public at large and of the right of the students to avail opportunity of merit-based admission in professional unaided educational institutions would advance the public interest and as such the rights of the students would prevail over the rights of the private unaided professional educational institutions.

54. Re-contention: No material to show that the private unaided professional educational institutions failed in triple test-fairness, transparency and non-exploitativeness: In para (137) of the judgment in P.A. Inamdar, this Court has observed that if the admission procedure adopted by private institutions fails to satisfy all or any of the triple test, then admission procedure can be taken over by the State substituting its own procedure and not otherwise. Contention of the appellants is that there is absolutely no material to show that private educational institutions were not able to ensure a fair, transparent and non- exploitative admission procedure and that the impugned legislation empowering the State or agency nominated by it to conduct common entrance test is in violation of the directions of this Court. In so far as this contention, High Court has observed thus:-

> "...Sufficient materials have been filed before us by the respondents to show that prior to the enactment of the Act 2007, this Court as well as the committee

> constituted as per the orders of the Supreme Court in Islamic Academy of Education (supra) had to enquire into complaints of mal-practice in admissions in private professional educational institutions and after finding the complaints to be true, directed the institutions to give admission to the aggrieved students in the next academic sessions and this would show that the private professional educational institutions were not able to ensure a fair, transparent and non-exploitative admission procedure before Act, 2007 was enacted...."

55. Our attention was drawn to the advertisement of DMAT 2006 for admission in MBBS/BDS course in the private colleges in Madhya Pradesh scheduled to be conducted on 16.07.2006 and number of writ petitions filed by the students pertaining to DMAT 2006. It was submitted that in W.P. (C) No. 1796 of 2006, High Court stayed DMAT 2006 and directed the State to appoint a committee as per Islamic Academy of Education and the committee managing DMAT cancelled DMAT 2006. Having regard to the number of complaints and litigations, High Court was right in observing that sufficient materials had been placed before it to show that prior to enactment of Act 2007, the High Court as well as the committee had to enquire into the complaints of mal-practice in admissions. It is not a case of no materials, where state would not be justified in taking over the admission procedure.

56. Learned Senior Counsel for the respondents submitted that the State Government had filed complaints before the AFRC against some of private colleges and criminal proceedings had also been initiated against unaided private professional institutions at the behest of the students alleging irregularities and mal-practices. Our attention is drawn to the alleged violation of the order of this Court in Priya Gupta v. State of Chhattisgarh and Ors. (2012) 7 SCC 433, as per which it was made mandatory for each college and university to inform the State and the competent authority of the seats which are lying vacant after each counselling and they shall furnish the complete details, list of seats fell vacant in the respective States immediately after each counselling. Ms. Vibha Dutta Makhija, learned Senior Counsel appearing for the State of Madhya Pradesh and Mr. Purushaindra Kaurav learned AAG appearing for AFRC have submitted that inspite of requests, the private colleges deliberately did not report vacant seats under the State quota after each round of counselling even after the admission procedure was complete and in this context have relied on a number of letters (Annexure A-14 to I.A. 83/2015) addressed to the private colleges by Director of Medical Education, Madhya Pradesh. It was submitted that in the year 2013-2014 there were about 300 irregular admissions in MBBS course by private medical colleges on the State quota and on the alleged violation, AFRC imposed a fine of Rs.13.10 crores on various private colleges. This was later affirmed by the appellate authority (Annexure A-17 to I.A. 83/2015). The order affirming the fine is the subject matter of writ petitions pending before the High Court and I do not propose to go into the merits of this aspect. Suffice it to note that there are prima facie materials to indicate that the private unaided professional educational institutions have not passed triple test as laid down in P.A. Inamdar. In this factual background, it does not seem inappropriate on the part of the State to come up with the Act 2007 which lays down a mechanism for conducting common entrance test in order to ensure merit based admission in the private institutions.

57. Whether the provisions of Act 2007 regarding determination of fees are violative of 'right to occupation' of private educational institutions: As stated earlier, the object of Madhya Pradesh Act 2007 is to "provide for the regulation of admission and fixation of fee in private professional educational institutions in the State of Madhya Pradesh and to provide for reservation of seats to persons belonging to Scheduled Castes, the Scheduled Tribes and Other Backward Classes in professional educational institutions and the matters connected therewith or incidental thereto". The Act authorizes the State to fix the fees to be charged by the private educational institutions, while taking relevant factors into consideration and also after ensuring an opportunity of being heard to the private educational institutions.

58. As per Section 3(e), 'fee' means all fees including tuition fee and development charges. Section 4 of the Act deals with constitution and functions of the Committee. As per Section 4(1), Committee is constituted for supervision and guidance of the admission process and for the fixation of the fees to be charged by private educational institutions. Section 9 deals with factors to be taken into consideration by the Committee for determination of fee that may be charged by private educational institutions. Section 9 reads as under:-

> 9. Factors:
>
> (1) Having regard to:
>
> (i) the location of the private unaided professional educational institution;
>
> (ii) the nature of the professional course;
>
> (iii) the cost of land and building;
>
> (iv) the available infrastructure, teaching, non-teaching staff and equipment;
>
> (v) the expenditure on administration and maintenance;
>
> (vi) a reasonable surplus required for growth and development of the professional institution;
>
> (vii) any other relevant factor, the committee shall determine, in the manner prescribed, the fee to be charged by a private unaided professional educational institution. (2) The Committee shall give the institution an opportunity of being heard before fixing any fee:
>
> Provided that no such fees, as may be fixed by the Committee, shall amount to profiteering or comercialisation of education."

59. Various factors indicated in Section 9 including reasonable surplus required for growth and development of the institution and other relevant factors for imparting professional education have

to be considered by the committee. Furthermore, in terms of Sections 4(8) and 9(2), before fixing the fee, the committee ought to afford an opportunity of being heard to the institutions which may furnish the necessary information. This ensures that private unaided educational institutions can putforth their legitimate claims pertaining to fees which is to be charged from the students admitted in these institutions. Though Section 9 empowers the committee to determine the fee, the High Court read down Sections 4(1), 4(8) and Section 9 of Act 2007 holding that those provisions "in substance empower the committee to be only satisfied that the fee proposed by a private professional educational institutions did not amount to profiteering or commercialization of education and was based on the factors mentioned in Section 9(1) of the Act 2007...".

60. Contention of the appellants is that Sections 4(1), 4(8) and Section 9 relating to fixation of fees in the Act 2007 are violative of their right to occupation" guaranteed under Article 19(1)(g) of the Constitution of India. It is submitted that when eleven-Judge Bench of this Court in T.M.A. Pai held that "...The decision on the fee to be charged must necessarily be left to the private educational institution that does not seek or is not dependent upon any funds from the Government.", then private institutions have an indefeasible right to fix their own fee structure and there is no occasion for the Government to enact such legislation empowering the committee to determine the fees to be charged.

61. Drawing our attention to para (39) of T.M.A. Pai, it has also been contended that T.M.A. Pai recognizes the importance of private unaided educational institutions by citing figures as to how numbers of government colleges have remained stagnant whereas numbers of private educational institutions have increased. It was submitted that as the eleven-Judge Bench recognised the right of private educational institutions to admit students and determine their own fee structure, the right of private unaided institutions to charge their own fees cannot be curtailed by the impugned legislation and therefore Sections 4(1), 4(8) and Section 9 of Act 2007 are liable to be struck down.

62. Per contra, learned counsel for the respondents submitted that relevant provisions of the Act empowering the committee to determine the fee that are only to ensure that the fees charged are not exorbitant and such regulation are not an impediment to the exercise of "right to occupation" of the private unaided educational institutions. It was submitted that the High Court has read down Sections 4(1), 4(8) and 9 of the Act 2007 by holding that the committee need only be satisfied that the fee proposed by a professional educational institution did not amount to profiteering by keeping in view the factors laid down in Section 9 of the Act. The question falling for consideration is whether and to what extent the State can impose restrictions vis-à-vis the fee structure of private unaided professional educational institutions.

63. Article 41 of the Constitution contemplates that "The State shall, within the limits of its economic capacity and development, make effective provisions for securing the right to work, to education....." Article 41 does not prescribe an age group for which this right is to be secured. Primary objective of the State as laid down in Article 41 is to ensure that quality higher education is imparted by educational institutions and to ensure excellence in it. Act 2007 is in furtherance of the constitutional obligation imposed upon the State in the form of Directive Principles of State Policy.

64. The words "the state shall within the limits of its economic capacity..." in Article 41 empowers the State to permit private educational institutions to be established and administer themselves. The hard reality is that private educational institutions are a necessity in the present day context and T.M.A. Pai, in para (39) has recognized this importance of private unaided educational institutions. Para (39) reads as under:-

> "39. That private educational institutions are a necessity becomes evident from the fact that the number of government-maintained professional colleges has more or less remained stationary, while more private institutions have been established. For example, in the State of Karnataka there are 19 medical colleges out of which there are only 4 government- maintained medical colleges. Similarly, out of 14 dental colleges in Karnataka, only one has been established by the Government, while in the same State, out of 51 engineering colleges, only 12 have been established by the Government. The aforesaid figures clearly indicate the important role played by private unaided educational institutions, both minority and non-minority, which cater to the needs of students seeking professional education."

65. Observing that education has been a business for a long time, in Modern School v. Union of India and Ors. (2004) 5 SCC 583, in paras (3) to (5), this Court has held as under:-

> "3. In modern times, all over the world, education is big business. On 18-6-1996, Professor G. Roberts, Chairman of the Committee of Vice- Chancellors and Principals commented:
>
> "The annual turnover of the higher education sector has now passed the £ 10 billion mark. The massive increase in participation that has led to this figure, and the need to prepare for further increases, now demands that we make revolutionary advances, in the way we structure, manage and fund higher education."
>
> 4. In the book titled Higher Education Law (2nd Edn.) by David Palfreyman and David Warner, it is stated that in modern times, all over the world, education is big business. On account of consumerism, students all over the world are restless. That schools in private sector which charge fees may be charitable provided they are not run as profit-making ventures. That educational charity must be established for the benefit of the public rather than for the benefit of the individuals. That while individuals may derive benefits from an educational charity, the main purpose of the charity must be for the benefit of the public.
>
> 5. At the outset, we hasten to clarify that although we are in agreement with the authors, quoted above, we do not wish to generalise and in the Indian context we may state that there are good schools which even today run keeping in mind laudable charitable objects."

66. Furthermore, in para (61) of T.M.A. Pai, this Court inter alia was of the view that the standards maintained by the private educational institutions are higher and it is in the interest of general public that more quality education institutions are established and such educational institutions shall have the right to admission of the students and fee to be charged. However, para (69) of T.M.A. Pai held private educational institutions were not entitled to charge capitation fee. Para (69) reads as under:-

> "69. In such professional unaided institutions, the management will have the right to select teachers as per the qualifications and eligibility conditions laid down by the State/university subject to adoption of a rational procedure of selection. A rational fee structure should be adopted by the management, which would not be entitled to charge a capitation fee. Appropriate machinery can be devised by the State or university to ensure that no capitation fee is charged and that there is no profiteering, though a reasonable surplus for the furtherance of education is permissible. Conditions granting recognition or affiliation can broadly cover academic and educational matters including the welfare of students and teachers."

67. In order to expound the aforesaid position, in Islamic Academy of Education, the first question that came up for consideration was whether private unaided educational institutions are entitled to fix their own fee structure. This Court in order to harmonize the plea of private educational institutions to earn a reasonable surplus and with the aim of preventing commercialization of education, directed the State to set up a committee headed by a retired High Court Judge to approve the fee structure or propose some other fee which can be charged by the institute. In para (7) of Islamic Academy of Education this Court directed as under:-

> "7. ....we direct that in order to give effect to the judgment in T.M.A. Pai case the respective State Governments/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..... The Committee shall then decide whether the fees proposed by that institute are justified and are not profiteering or charging capitation fee. 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..."

68. Referring to paras (69) and (70) of T.M.A. Pai and reiterating that fee charged by private educational institutions should not amount to profiteering, in P.A. Inamdar case, it was held as under:-

> "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.

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 Question 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 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 commercialisation 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."

69. From the above discussion, it clearly emerges that in exercise of their "right to occupation", private institutions cannot transgress the rights of the students. Discernibly, the Act does not give unbridled power to the authority to determine the fee. Determination of fee has to be based on the factors stipulated in Section 9 of the Act. Further, an opportunity of appeal is also provided for in the Act 2007 to the aggrieved. Fundamental rights of colleges to run their administration, includes fixation of fee. However, such right in turn has to be balanced with the rights of the students, so that they are not subjected to exploitation in the form of profiteering.

70. For the foregoing discussion, I hold that the State has the legislative competence to enact the impugned legislation-Act 2007 to hold common entrance test for admission to professional educational institutions and to determine the fee and the High Court has rightly upheld the validity of the impugned legislation. Regulations sought to be imposed by the impugned legislation on admission by common entrance test conducted by the State and determination of fee are in compliance of the directions and observations in T.M.A. Pai, Islamic Academy of Education and P.A. Inamdar. Regulations on admission process are necessary in the larger public interest and welfare of the student community to ensure fairness and transparency in the admission and to promote merit and excellence. Regulation on fixation of fee is to protect the rights of the students in having access to higher education without being subjected to exploitation in the form of profiteering. With the

above reasonings, I concur with the majority view in upholding the validity of the impugned legislation and affirm the well merited decision of the High Court.

.....J (R. BANUMATHI) New Delhi;

May 02, 2016

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[1] (2002) 8 SCC 481 [2] (1964) 4 SCR 680 [3] (2005) 6 SCC 537 [4] (1993) Supp. 1 SCR 439 [5] (2007) 4 SCC 361 [6] (1993) 1 SCC 645 [7] (2003) 6 SCC 697 [8] (2011) 7 SCC 179 [9] (2004) 5 SCC 583 [10] (2014) 8 SCC 1 [11] 1957 SCR 874 [12] (1992) 1 SCC 558 [13] Proportionality: Constitutional Rights and Their Limitation by Aharon Barak, Cambridge University Press 2012.

[14] Though, debate on this vexed issue still continues and some constitutional experts claim that there are certain rights, albeit very few, which can still be treated as 'absolute'. Examples given are:

(a) Right to human dignity which is inviolable,

(b) Right not to be subjected to torture or to be inhuman or degrading treatment or punishment.

Even in respect of such rights, there is a thinking that in larger public interest, the extent of their protection can be diminished. However, so far such attempts of the States have been thwarted by the judiciary.

[15] Supra, note [16] (1986) 1 SCR 103 [17] (1982) 2 SCC 33 [18] 1959 SCR 629 [19] (1998) 8 SCC 227 [20] Justice Frankfuter: 'A Symposium of Statutory Construction: Forward', 3, Vand L. Rev. 365, 367 (1950) [21] (2009) 7 SCC 751 [22] (2004) 11 SCC 755 [23] 1964 (Supp.) 1 SCR 112 [24] (1999) 7 SCC 120 [25] Entry 11: 'Education' including universities, subject to provisions of Entries 63, 64, 65 and 66 of List I and Entry 25 of List III [26] Unamended Entry 25 in List III read as: 'Occasional and Technical Training of Labour' [27] (1964) 6 SCR 368 [28] (1995) 4 SCC 104 [29] (2006) 9 SCC 1 [30] (1981) 4 SCC 296 [31] (1994) 4 SCC 401