

The Role

Presently, educational system, private educational institutions, the usefulness and adequacy of present syllabi at different stages, fixation of responsibility of providing education, the need for educational reforms etc. are the leading issues discussed and debated at all levels. In view of the strategic role of education in the process of nation building this is absolutely essential that various issues, problems, controversies must be thoroughly analysed. But analysis and discussions are only the means and cannot be regarded as ultimate end. What is more significant is to evolve everlasting solutions to the burning issues so that education becomes the effective instrument of creating and developing the skills and talents among the youth with the ultimate objective of making India global superpower in couple of decades to come. Educationalist, social workers, politicians, teachers, students, parents, managements, govt. etc. all must actively participate in this process.

This, out of the way book is an humble attempt of Vidya Prasarak Mandal, Thane, an institution known for quality education from K.G. to Research in a variety of faculties, to establish dialog with the concerned parties who think of wellbeing of Indian youths. Such an interaction will initiate discussions, debate, arguments and counter arguments which, we are confident, will evolve lasting solutions to number of issues faced by all of us.

The book contains a brief summary of supreme court judgments in three leading cases in the field of education, viz. Pai Foundation Vs. State of Karnataka, (Oct. 2002) Brahma Samaj Vs. State of West Bengal (May 2004), P.K. Inamdar Vs.

State of Maharashtra (August 2005). In fact there are many other litigations such as Unnikrishnan Vs. State of Andhra Pradesh (1993), St. Stephen's College Vs. University of Delhi (1992), Kerala Education Bill (1958), Eslamic Academy (2003) etc. We have picked up above three representative and recent cases. In all these cases various aspects, such as constitutional provisions, autonomy of private educational institutions, role of state, policy framework etc. have been thoroughly debated and analysed by learned, senior, and experienced counsels on the basis of which authoritative judgments are pronounced by Hon. Chief Justice along with senior judges of supreme court. These judgments offer an elaborate and valuable explanation of various facets of education such as role and powers of state and University in framing rules and regulations on one hand and the privileges, constitutional rights etc. of private educational institutions on the other. The courts, in almost all the cases, supported the reasonable restrictions by the State in national interest, while at the same time upheld the autonomy of private educational institutions. We have presented only the broad outline of the judgment which, I hope, will create the awakening and awareness among the concerned i.e. governing bodies, teaching and non-teaching staff, students, parents, academicians etc. of their rights as well as responsibilities. The interested parties should refer to relevant reports and books and should also visit the relevant Web Sites for further details.

In addition to the three court cases the book contains an article dealing with autonomy to private educational institutions, the need for privatization of education in the objective manner based on first hand experience of the author who is in the academic field in various capacities as teacher, principal, member of various university bodies and committees during the last four decades. The author has always condemned the mal-practices in the noble field such as capitation fees, exploitation of students and parents and unacademic behaviour of the concerned parties, but believes that a large number of institutions are honest, transparent, merit

respecting and devoted to the cause of education. For some the views in the articles may appear to be one-sided. In fact our purpose is that as many as possible should come forward for debate and discussion, arguments and counter arguments. This is the only way to right the wrong in the field of education.

One more important clarification is that we are against neither the Government nor the University. What we aim at is the creation of mutual belief and understanding among various factions. Such a coming together will lead us to our destination viz. taking the society, youths and education to the peak of excellence.

Last but the most important is a word of gratitude. I must start with Dr. Vijay Bedekar Chairman, VPM whose inspiration is the foundation of this creation. Informal and formal discussions with him had really been thought provoking which paved the way for writing this book. His guidance had been very valuable. I must also make a mention of my colleagues Prin. Dr. (Mrs.) Singh, Prof. Bhide, Prof. Barse, Prof. Santosh Rane, Prof. Bhabad for their cooperation and suggestions. How can I forget the timely help from the Joshi Bedekar College non-teaching staff in general and Mrs. Thete, Mrs. Hema chitale, Mrs. Manali Ambokar, Miss. Nilakshi Kelkar, Mrs. Vaidehi Moghe for typing and re-retyping the manuscripts. Finally thanks to Shri. Vilas Sangurdekar and his staff of Perfect Prints for bringing out this book at a very short notice.

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T.M.A. Pai Foundation and Others Vs State of Karnataka & Others

BACKGROUND

In good old days education was regarded as a matter of charity or philanthropy. In fact most of the educational institutions were established by individuals or groups who were concerned with well-being of the society in general and young generation in particular. In course of time imparting education became an occupation and sometimes it was labled as an industry. Whether learning is a fundamental right or not can be a matter of argument and debate. However, establishment and administration of educational institutions is recognized as a fundamental right as per Articles 19 (1) (a) and 26 (a) of Indian constitution. If there is no objective of profit generation the constitutional protection is granted to educational institutions. In present scenario education has become a means of livelihood for some while a mission for some educationalist and philanthropists.

There is no dearth of litigations involving educational institutions, govt., parents, students, universities etc. Among various cases, that of T.M.A. Pai Foundation Vs Karnataka State, popularly known as Pai Foundation is regarded as the most important guide for a variety of reasons. Of course, prior to Pai Foundation there have been a number of litigations in which different aspects of administration were thoroughly debated. Mention, in this context, has to be made of the following cases.

- Unni Krishnan Vs State of Andhra Pradesh (1993)
- St. Stephen's college Vs. University of Delhi (1992)
- Ahmedabad St.Xaviers College Society Vs. State of Gujarat (1974)
- Kerala Education Bill (1958)

Above Cases, along with many others came up for the consideration of Court in *Pai Foundation*. Writ Petition No.350 of 1993 by Islamic Academy expressed doubts about the verdict in *St. Stephen's* case. As this case was heard by a 5-Judge Bench, the matter was directed to be placed before 7-Judge Bench. The constitutional Bench took note of constitutional amendment, 42 dealing with the field of education. The 7-Judge Bench suggested that the case should be heard by a larger Bench of 11 judges. The constitutional 11-Judge Bench clarified that ratio propounded in *Kerala Education Bill* and *St. Xavier's* was not binding on it and was free to hear that case in a wider perspective for interpreting the scope of Article 30 for offering an authoritative pronouncement.

This is the background of the formation of 11-judges Bench, a rare experience, under Shri. Kirpal CJ. The Bench got ready to hear the arguments and counter-arguments by a number of learned counsels and to pronounce its authoritative and guiding judgment.

ELEVEN QUESTIONS IN FIVE GROUPS :

The Constitutional Bench of 11 learned judges framed 11 questions to be considered which were grouped under following five heads.

- A. Is there a fundamental right to set up educational institutions and if so, under which provision?
- B. Does *Unni Krishnan* require reconsideration?
- C. In case of private institutions, can there be government regulations and, if so, to what extent?
- D. In order to determine the existence of religious or linguistic minority in relation to Article 30, what is to be the unit, the state or the country as a whole?
- E. To what extent can the rights of aided private minority institutions to administer be regulated?

In the context of above five categories of leading issues the Bench formulated the following eleven questions. The leading experienced and learned counsels submitted their views on behalf of petitioners and respondents. The Bench carefully listened to various arguments and counter arguments, which contained a detailed, thorough and intelligent interpretation of various provisions of constitutional Articles.

- Q.1 What is the meaning and content of the expression "minorities" in Article 30 of the Constitution of India?
- Q.2 What is meant by the expression 'religion' in Article 30(1)? Can the followers of a sect or denomination of a particular religion claim protection under Article 30(1) on the basis that they constitute a minority in the state, even though the followers of that religion are in majority in that state?
- Q.3 a) What are the indicia for treating an educational institution as a minority educational institution? Would an institution be regarded as minority educational institution because it was established by person(s) belonging to a religious or linguistic minority or it's being administered by a person(s) belonging to a religious or linguistic minority?
b) To what extent can professional education be treated as a matter coming under the minority rights under Article 30?
- Q.4 Whether the admission of students to minority educational institution whether aided or non-aided can be regulated by the State Government or by the University to which the Institution is affiliated?

- Q.5 a) Whether the minorities right to establish & administer educational institution of their choice will include the procedure & method of admission & selection of students?
- b) Whether minorities institution's right of admission of students & to lay down procedure & method of admission, if any, would be affected in any way by the receipt of State aid?
- c) Whether the statutory provisions which regulate facets of administration, like control over the educational agencies, control over the governing bodies, conditions of affiliation including recognition / withdrawal thereof & appointment of staff, employees, teachers & Principals including their service condition & regulation of fees etc. would interfere with the right of administration of minorities?
- Q.6 a) Where can a minority institution be operationally located? Where a religious or linguistic minority in State A establishes educational institution in the said State, can such educational institution grant preferential admission / reservations & other benefits to member of the religious / linguistic group from other States where they are non minorities?
- b) Whether it would be correct to say that only the members of that minority residing in State "A" will be treated as members of the minority vis a vis such institution?
- Q.7 Whether a member of linguistic non-minority in one State can establish a trust /society in other State & claim minority status in that State?
- Q.8 Whether the ratio laid down by this Court in St.Stephen's case is correct? If no, what orders?

- Q.9 Whether the decision of this court in Unni Krishnan (Except where it holds that primary education is fundamental right) and the scheme framed thereunder require reconsideration / modification and if yes, what?
- Q.10 Whether the non-minorities have a right to establish and administer educational institution under Article 21 & 29 (1) read with Article 14 and 15 (1) in the same manner and to the same extent as minority institutions?
- Q.11 What is the meaning of the expression 'Education' and 'Educational Institutions' in various provisions of the constitution? Is the right to establish & administer educational institutions guaranteed under the constitution?

In the light of above the Bench identified its jurisdiction. Accordingly it felt that following questions need not be answered by this Bench and suggested that the regular court should answer them. The questions omitted by the Bench were –Q.2, Q.3 (a, b), Q.6 (a, b), Q.7 The Bench considered the submissions and arguments in respect of rest of the questions and pronounced its judgment.

SUBMISSIONS

1. The learned counsels presented their viewpoints on behalf of various educational institutions, which were a party to case under consideration. They strongly argued that establishment and administration of educational institution was a fundamental right awarded by Indian Constitution. Articles 19 (1) (g) and / or Article 26 offer this right to the non-minorities while for the religious and linguistic minorities the said right is contained in Article (30). They claimed that educational institution should be granted full autonomy of administration. It was agreed by the counsels that these institutions will have to accept certain rules

and regulations which are necessary in the context of recognition / affiliation etc. Such conditions should be related to imparting of quality education, which include qualifications of teaching and non-teaching staff, eligibility of students, curriculum to be taught, minimum facilities to be provided to the students etc. It was however, emphasized that state should have no right to interfere with or to lay down conditions pertaining to administration of these institutions. The counsels vehemently objected to, nominations by the state on governing bodies of the private institutions, interfering with the procedure of admissions, method of selecting students, fixing of fee structure, recruitment of teachers through state channels etc. It was unambiguously submitted to the Bench that these practices by the state under the cover of rules and conditions nullify the autonomy of private institutions and reduce them to the status of department of government. This according to counsels was highly objectionable as it contradicted the fundamental constitutional right.

2. The Solicitor General of India, on behalf of Union Government requested the court to reconsider the judgment in the case of Unnikrishnan Vs. State of Andhra Pradesh (1993). Similar request was made by counsels of private educational institutions. In this context it was argued that due to the decision in this case and the schemes framed thereafter, educational institutions in general and the minority institutions in particular were subjected to undue restrictions. This amounted to clear encroachment on the fundamental right provided by the constitution of India. Moreover the scheme failed to achieve the objectives for which it was designed.

3. Separate arguments were tabled by the counsels of private minority educational institutions. It was pointed out that a correct interpretation of constitutional provisions, particularly Articles 29 and 30 reveals the fact that 'Minority Institutions' have right to establish and administer Educational Institutions 'of their choice'. The attention was drawn to the use of the phrase

'of their choice' in Article 30 (1) of the constitution from which it becomes very obvious that the religious and linguistic minorities are empowered to establish and administer any type of educational institution such as school, degree college or professional college. The emphasis was laid on the fact that such institutions are created and administered for the benefit of the respective religious and linguistic groups. It is then obvious that these institutions should have a right of selecting the students 'of their choice'. Article 30(2) ensures that these institutions should not be denied grant or aid simply because they were established and administered by religious or linguistic minorities. It was further argued that extending grant should not be used as a lever for contracting or eliminating the minority status of these institutions. The counsels submitted that Article 29(2) should not be applied to these institutions. It was argued that the said Article should not be misinterpreted so that it adversely affects the right of the minority institutions to admit students of religious or language for whom the institution was established. It was stipulated that secular laws relating to health, town planning etc. were no doubt, binding on these institutions. However, any rules, laws, regulations, conditions etc. obliterating or curtailing the minority nature of the institutions should not be framed, as they are unconstitutional in spirit. It was pointed out that constitutional right to establish and administer an educational institution encompasses within it, the right to constitute a governing body, appoint teaching and non-teaching staff and select students for admission. These aspects were part and parcel of right to administer and hence no bindings could be imposed on the same. The counsels stipulated that the State or university can lay down the qualifications of teachers and the eligibility conditions for students. But within the framework of these conditions for affiliation / recognition, the institutions must have absolute autonomy in respect of manner of appointment of teachers and of selection of students to be admitted.

4. Private, unaided, non-minority educational institutions argued that since equality and secularism were the foundation of the constitutional structure, there should be no discrimination between minority and non-minority educational institutions and that all the rights and privileges granted to minority institutions should be extended to non-minority institutions as well. It was pointed out that while reasonable restrictions by the state can be imposed under Article 19(6), such private institutions should enjoy the same rights and autonomy of administration like those claimed by minority unaided institutions.

5. The Solicitor General agreed with the contention that the right to establish and to administer an educational institution was granted to non-minorities by Article 19 and 26 and to minorities by Article 30. He supported the suggestion of the counsels for the appellants that Unnikrishnan decision required reconsideration and that private unaided educational institutions should have greater autonomy. Nevertheless he emphasized that Article 29(2) was applicable to minority institutions. It was further pointed out that the claim of minority institutions that they can preferably admit students of their religious or linguistic minority to the exclusion of others was not permissible. He thus opined that Article 29(2) prohibits even the minority institutions from denying admission on the ground of religion, race, caste, language etc.

6. Most of the states opposed the contention of the Solicitor General in respect of applicability of Article 30(1) and 29(2). The State of Madhya Pradesh, Chhatisgarh and Rajasthan emphasized the use of the phrase 'of their choice' in Article 30(1) and argued that this phrase empowers the minority institutions to admit the members of minority group. It was further argued that the inability of these institutions, under the impact of 'of their choice' to admit other students should not be regarded as denial as contemplated under Article 29(2).

The State of Andhra Pradesh, without explicit reference to interplay between Article 29(2) and Article 30(1), argued that, "since the minority institutions are established to benefit minorities, the condition, that at least 50% students should be, from that minority, should be stipulated as working rule".

It was further stated that following should be the criterion for granting minority status.

- All the office bearers, members of executive committee should necessarily be from the said minority group.
- The institute should admit minority students within the intake limits permissible to management. The Court should permit the States to frame the necessary regulations.

7. The State of Kerala, without specific reference to Article 29(2), argued that the constitutional right of the minorities should be extended to professional colleges also but they should also be subjected to the rule of limiting the admissions of minority to 50%.

8. According to State of Karnataka, "aid is not a matter of right but receipt of the same does not, in any way, dilute the minority character of the institution." The right of minority institutions should be protected despite the receipt of aid.

9. The State of Tamilnadu, Maharashtra, West Bengal, Bihar, Uttar Pradesh etc. underlined the impact of Article 29(2) on Article 30(1) and argued that aided minority institution loses the right to admit members of its community on the basis of need of the community.

10. The court recorded its appreciation and thanks to Solicitor General and other Counsels for their valuable assistance.

11. No submissions were made in respect of the four questions, which the Bench excluded from its consideration.

In view of the above arguments the Bench offered its judgment as follows.

JUDGMENT

After hearing the entire case along with various arguments and counter – arguments of learned counsels as also the view of Solicitor General the Bench pronounced its judgment in the context of five main issues and eleven questions framed thereunder. In all five judgments were given.

• **Majority Judgment** : - Shri. B. J. Kirpal CJ

Shri. B. G. Patnaik J.

Shri. Rajendra Babu

Shri. K. G. Balkrishnan J.

Shri. P. Reddy J. J.

Shri. Arijit Pasayat J.

• **Other Judgment** - Shri. V. J. Khare J.

Shri. S. M. Kadri J.

Smt. Ruma Pal J.

Shri. Variva J & Shri. Ashok Bhan J.

The majority judgment was presented by Shri. B. J. Kirpal on behalf of himself and other five judges mentioned above. Other four judgments were presented by individual judges as mentioned above.

Hon. B. J. Kirpal CJ

India is a land - Bharatmata - of a diversity of different castes, people, communities, languages, religions and culture. Although these people enjoy complete political freedom, a vast part of the multitude is illiterate and lives below the poverty line. The single most powerful tool for the upliftment and progress of such diverse communities is education. The state, with its limited resources

and slow moving machinery, is unable to fully develop the genius of the Indian people. Very often, the impersonal education that is imparted by the state, devoid of adequate material content that will make the students self-reliant, only succeed in producing potential pen-pushers, as a result of which sufficient jobs are not available.

It is in this scenario where there is a lack of quality education and adequate number of schools and colleges that private educational institutions have been established by educationists, philanthropists and religious and linguistic minorities. Their grievance is that the unnecessary and unproductive load on their back in the form of governmental control, by way of rules and regulations, has thwarted the progress of quality education. It is their contention that the government must get off their back, and that they should be allowed to provide quality education uninterrupted by unnecessary rules and regulations, laid down by the bureaucracy for its own self-importance. The private educational institutions, both aided and unaided, established by minorities and non-minorities, in their desire to break free of the unnecessary shackles put on their functioning as modern educational institutions and seeking to impart quality education for the benefit of the community for whom they were established, and others, have filled the present writ petitions and appeals asserting their right to establish and administer educational institutions of their choice unhampered by rules and regulations that unnecessarily impinge upon their autonomy.

This Bench has tried to resolve the grievances of the private educational institutions, through answers to the questions framed in this context.

Q. 1 What is the meaning and content of the expression "minorities" in Article 30 of the Constitution of India?

A. Linguistic and religious minorities are covered by the expression "minority" under Article 30 of the Constitution. Since reorganization of the states in India has been on linguistic lines,

therefore, for the purpose of determining the minority, the unit will be the state and not the whole of India. Thus, religious and linguistic minorities, who have been put at par in Article 30, have to be considered State-wise.

Q.2 What is meant by the expression "religion" in Article 30(1)? Can the followers of sect or denomination of a particular religion claim protection under Article 30(1) on the basis that they constitute a minority in the state, even though the followers of that religion are in majority in that state?

A. This question need not be answered by this Bench; it will be dealt with by a regular Bench.

Q.3(a) What are the indicia for treating an educational institution as a minority educational institution? Would an institution be regarded as a minority educational institution because it was established by a person(s) belonging to a religious or linguistic minority or its being administered by a person(s) belonging to a religious or linguistic minority?

A. This question need not be answered by this Bench; it will be dealt with by regular Bench.

Q.3(b) To what extent can professional education be treated as a matter coming under minorities rights under Article 30?

A. Article 30(1) gives religious and linguistic minorities the rights to establish and administer educational institutions of their choice. The use of the words "of their choice" indicates that even professional educational institutions would be covered by Article 30.

Q.4 Whether the admission of students to minority educational institution, whether aided or unaided, can be regulated by the State Government or by the University to which the institution is affiliated?

A. Admission of students to unaided minority educational institutions, viz., schools and undergraduates colleges where the scope of merit-based selection is practically nil, cannot be regulated by the concerned State or University, except for providing the qualification and minimum conditions of eligibility in the interest of academic standards. The right to admit students being an essential facet of the right to administer educational institutions of their choice, as contemplated under Article 30 of the Constitution, the State Government or the University may not be entitled to interfere with that right, so long as the admission to the unaided educational institutions is on a transparent basis and the merit is adequately taken care of. The right to administer, not being absolute, there could be regulatory measures for ensuring educational standards and maintaining excellence thereof, and it is more so in the matter of admissions to professional institutions. A minority institution does not cease to be so, the moment grant-in-aid is received by the institution. An aided minority educational institution, therefore, would be entitled to have right of admission of students belonging to the minority group and at the same time, would be required to admit a reasonable extent of non-minority students, so that the rights under Article 30(1) are not substantially impaired and further the citizens' rights under Article 29(2) are not infringed. What would be a reasonable extent, would vary from the types of institution, the courses of education for which admission is being sought and other factors like educational needs. The concerned State Government has to notify the percentage of the non-minority students to be admitted in the light of the above observation. Observance of inter se merit amongst the applicants belonging to the minority group could be ensured. In the cases of aided professional institutions, it can be stipulated that passing of the common entrance test held by the State agency is necessary to seek admission. As regards non-minority students who are eligible to seek admission for the remaining seats, admission should normally be on the basis of the common entrance test held by the State agency followed by counseling wherever it exists.

Q.5(a) Whether the minority's rights to establish and administer educational institutions of their choice will include the procedure and method of admission and selection of students?

A. A minority institution may have its own procedure and method of admission as well as selection of students, but such a procedure must be fair and transparent, and the selection of students in professional and higher education colleges should be on the basis of merit. The procedure adopted or selection made should not be tantamount to mal-administration. Even an unaided minority institution ought not to ignore the merit of the students for admission, while exercising its right to admit students to the colleges aforesaid, as in the that event, the institution will fail to achieve excellence.

Q.5(b) Whether the minority institutions' right of admission of students and to lay down procedure and method of admission, if any, would be affected in any way by the receipt of State aid?

A. While giving aid to professional institutions, it would be permissible for the authority giving aid to prescribe by-rules or regulations, the conditions on the basis of which admission will be granted to different aided colleges by virtue of merit, coupled with the reservation policy of the State qua non-minority students. The merit may be determined either through a common entrance test conducted by the concerned University or the Government followed by counseling, or on the basis of an entrance test conducted by individual institutions – the method to be followed is for the university or the government to decide. The authority may also device other means to ensure that admission is granted to an aided professional institution on the basis of merit. In the case of such institutions, it will be permissible for the government or the university to provide that consideration should be shown to the weaker sections of the society.

Q.5(c) Whether the statutory provisions which regulate the facets of administration like control over educational agencies, control over governing bodies, conditions of affiliation including recognition/withdrawal thereof, and appointment of staff, employees, teachers and Principals including their service conditions and regulation of fees, etc. would interfere with the right of administration of minorities?

A. So far as the statutory provisions regulating the facets of administration are concerned, in case of an unaided minority educational institution, the regulatory measure of control should be minimal and the conditions of recognition as well as the conditions of affiliation to an university or board have to be complied with, but in the matter of day-to-day management, like the appointment of staff, teaching and non-teaching, and administrative control over them, the management should have the freedom and there should not be any external controlling agency. However, a rational procedure for the selection of teaching staff and for taking disciplinary action has to be evolved by the management itself. For redressing the grievances of employees of aided and unaided institutions who are subjected to punishment or termination from service, a mechanism will have to be evolved, and in our opinion, appropriate tribunals could be constituted, and till then, such tribunals could be presided over by a Judicial Officer of the rank of District Judge. The State or other controlling authorities, however, can always prescribe the minimum qualification, experience and other conditions bearing on the merit of an individual for being appointed as a teacher or a principal of any educational institution. Regulations can be framed governing service conditions for teaching and other staff for whom aid is provided by the State, without interfering with the overall administrative control of the management over the staff. Fees to be charged by unaided institutions cannot be regulated but no institution should charge capitation fee.

Q.6(a) Where can a minority institution be operationally located? Where a religious or linguistic minority in State 'A' establishes an educational institution in the said State, can such educational institution grant preferential admission/reservations and other benefits to members of the religious/linguistic group from other States where they are non-minorities?

A. This question need not be answered by this Bench; it will be dealt with by a regular Bench.

Q.6(b) Whether it would be correct to say that only the members of that minority residing in State 'A' will be treated as the members of the minority vis. A vis. such institution?

A. This question need not be answered by this Bench; it will be dealt with by a regular Bench.

Q.7 Whether the member of a linguistic non-minority in one state can establish a trust/society in another state and claim minority status in that state?

A. This question need not be answered by this Bench; it will be dealt with by a regular Bench.

Q.8 Whether the ratio laid down by this court in the St. Stephen's case (St. Stephen's Colleges vs. University of Delhi (1992) 1 SCC 558 is correct? If no, what order?

A. The basic ratio laid down by this court in the St. Stephen's Colleges case is correct, as indicated in this judgment. However, rigid percentage cannot be stipulated. It has to be left to authorities to prescribe a reasonable percentage having regard to the type of institution, population and educational needs of minorities.

Q.9 Whether the decision of this court in Unni Krishnan J.P. vs. State of A. P. (1993) 1 SCC 645 (except where it holds that primary education is a fundamental right) and the schemes framed thereunder require reconsideration/modification and if yes, what?

A. The scheme framed by this court in Unni Krishnan's case and the direction to impose the same, except where it holds that primary education is fundamental right, is unconstitutional. However, the principle that there should not be capitation fee or profiteering is correct. Reasonable surplus to meet cost of expansion and augmentation of facilities does not, however, amount to profiteering.

Q.10 Whether the non-minorities have the right to establish and administer educational institution under Article 21 and 29(1) read with Article 14 and 15(1), in the same manner and to the same extent as minority institutions? And

Q.11 What is the meaning of the expressions "Educational Institutions" in various provisions of the Constitution? Is the right to establish and administer educational institutions guaranteed under the Constitution?

A. The expression "education" in the Articles of the Constitution means and includes education at all levels from the primary school level upto the post-graduate level. It includes professional education. The expression "educational institutions" means institutions that impart education, where "education" is as understood hereinabove. The right to establish and administer educational institutions is guaranteed under the Constitution to all citizens under Articles 19(1)(g) and 26, and to minorities specifically under Article 30.

All citizens have right to establish and administer educational institutions under Article 19(6) and 26(a). However, minority institutions will have a right to admit students belonging to the minority group, in the manner as discussed in this judgment.

B. N. Kirpal, C.J., G. B. Pattanaik, S. Rajendra Babu, K.G. Balkrishnan, P. Venkatarama Reddi and Arijit Pasayat, JJ.)

Other Judgments

Hon. V. N. Khare J.

Justice Khare presented a separate judgment, which broadly concurs with the majority judgment which offered a detailed explanation of certain issues.

Hon. Syed Shah Mohammed Quadri, J.

Subject to the comments made by him at paras from 237 to 247 and 251, Hon'ble Syed Shah Mohammed Quadri, J. has agreed with the answers recorded in the majority judgment on Issues No. 1,2,3(a), 3(b) and 4 except to the extent of the reasoning and interpretation of Arts. 29(2) and 30(1) on which the answer was based. The learned Judge has also agreed with the majority view in respect of answers to Question No. 5(a), 5(c), 6(a), 6(b), 7 and 9. With regard to Question No. 8, while agreeing with the majority view, the learned Judge has taken an exception not only to the extent of interplay between Arts. 29(2) and 30(1) but also to giving power to the authorities to prescribe a percentage having regard to the type of institution and educational needs of minorities. With regard to the answer to Question No. 5(b) and the common answer to Questions 10 and 11 of the majority view, the learned Judge held further as follows:

"All the citizens have a right to establish and administer educational institutions under Articles 19(1)(g) and 26. The minorities have an additional right to establish and administer educational institution 'of their choice' under Article 30(1). The extent of these rights are, therefore, different. A comparison of Articles 19,26 and 30 would show that whereas the educational institutions established and run by the citizens under Art. 19(1)(g) and Art. 26(a) are subject to the discipline of Arts. 19(6) and 26 there are no such limitations in Art. 30 of the Constitution, so in that the right conferred thereunder is absolute. However, the educational institutions established by the minorities under Art. 30(1) will be subject only to the regulatory measures which should

be consistent with Article 30(1) of the constitution. My answer to Question to 5(b) is that the right of the minority institutions to admit students of the minority, if any, would not be affected in any way by receipt of State aid. I intend to dilate on this aspect of the matter in my separate reasoned opinion later. It is sufficient to state at this stage that subject to this, I agree with the common answer to question No. 10 and 11."

The learned Judge again under paragraphs 251(10) to 251(67) of the Judgment, dt. 25-11-2002 has given further reasons in respect to question Nos. 5(b), 8, 10 and 11 for agreeing with the opinion of his learned sister RumaPal, J. and dissenting with the majority opinion as also the opinion of his learned brother Variava, J. with whom his another learned brother Bhan, J. agreed and for all those reasons the Hon'ble Judge in para 251(68) of the Judgment concluded as follows:

" to create inroads into the constitutional protection granted to minority educational institutions by forcing students of dominant group of the choice of the State or agency of the State of admission in such institutions in preference to the choice of minority educational institutions will amount to clear violation of the right specifically guaranteed under Article 30(1) of the Constitution and will turn the fundamental right into a promise of unreality which will be impermissible. Right of minorities to admit students of non-minority of their choice in their educational institutions set up under Article 30 is one thing but thrusting students of non-minority on minority educational institutions, whatever may be the percentage, irrespective of and prejudicial to the need of the minority in such institution, is entirely another. It is the former and not the latter course of action will be in conformity with the scheme of clause (2) of Article 29 and clause (1) and (2) of Article 30 of the Constitution."

Per Ruma Pal, J.

Hon'ble Ruma Pal, J. while broadly agreeing with the most of the conclusions arrived at under the majority view has recorded

her dissent with the answer to Question No. 1 and Question No. 8 in so far as it was held that Art. 29(2) is applicable to Art. 30(1). Consequently the learned Judge has also differed with the conclusions arrived at in Answers to Question Nos 4, 5(b) and 11 to the extent mentioned in her judgment.

Per S. N. Variava J.

While disagreeing with the views expressed not only by Hon'ble Syed Shah Mohammed Quadri, J. but also by Hon'ble Ruma Pal, J., and agreeing with the reasoning made and conclusions arrived at by the learned Chief Justice on the main issues No. 1 and 4 (categories 1 & 4), Hon'ble S. N. Variava, J., speaking on his own behalf and also on behalf Hon'ble Ashok Bhan, J., made an elaborate discussion and answered the said eleven questions separately.



**Brahmo Samaj v/s. State of West Bengal
Role of State in Appointment of Teachers
in Aided Educational Institutions**

(May, 5 2004)

Brahmo Samaj Educational Institution while challenging W. Bengal College Teachers Appointment Act (1975) and W. Bengal College Service Commission Act (1978), argued that appointment of college teachers through the college service commission was unconstitutional. The Samaj filed a petition praying that the govt. of W. Bengal should be prevented from implementing above acts.

The Petition was heard by Hon. Rajendra Babu (C J) and Hon. H.P. Mathur (J). The Bench announced its verdict on 5th May 2004. The broad outline of the judgment is presented hereunder.

As per article 7 of the above Acts the govt.- appointed college Service Commission was empowered with the authority and responsibility of selection and appointment of college teachers. Since 1980 the appointments of college teachers including Principal were being made by the above mentioned commission.

A writ Petition No. 9683-9684 (1983) was filed by Brahmo Samaj in the Supreme Court. The Petitioners claimed that theirs was a religious Minority Institutions as per provisions under Article 25, 26 and 30(1) of the Indian Constitutions. It therefore enjoys the sole right of appointing college teachers including Principal. Hence the appointments by above service commission are unconstitutional. The State of West Bengal should be prevented from implementation of the selection procedure implicit in the above Acts.

The respondent i.e. State of West Bengal, presented the following arguments in justification of its decision.

- Petitioner Institution does not belong to religious minority group
- The Institution receives state aid.
- It is the responsibility of the state to maintain quality and equal standard throughout the state.
- The demand of the Petitioners of permission not to follow the recommendations of a statutory commission will deprive the qualified and the best in the profession from being appointed as college teachers.

It was pleaded by the state that in the light of above arguments the Writ should not be admitted.

After a thorough and thoughtful consideration of arguments and counterarguments by the concerned parties, the Bench expressed in views as follows. The Bench felt that the case calls for a detailed analysis of the following major issues.

1. Pai Foundation has clearly stated that establishment and administration of educational institution is a fundamental right granted to all citizens by Constitution of India under Article 19(1) (g). It is true that Article 19(1) permits the State to restrict this right to a reasonable extent in the context of national interest. Similarly Article 26(2) of the constitution empowers all religions and sects to establish and administer educational institution subject to restrictions of public security, social ethics and social health etc. Reading together the two Articles above the Petitioners (Brahmo Samaj) have full right to establish educational institution. Whether or not Brahmo Samaj has Minority Status is of no significance in the present context.

2. The core issue in the present case is that of Constitutional right of Aided educational institutions to appoint the staff including teachers and principal. It means it is necessary in this

context to analyze and determine the role of the govt. Further it will have to be decided whether the appointments by College Service Commission be regarded as reasonable restriction.

The petitioners have a constitutional right to establish and administer educational institution. Receipt of Govt. Grant cannot be the ground to dishonor the autonomy of the institution. This will amount to converting the educational institutions into a Govt. run department, which cannot be justified. It is of course accepted that the State has right to impose reasonable restriction for maintaining high educational standards and for curbing mal-administration.

According to Pai Foundation,

It is permissible for the state to frame some rules and restrictions while granting aid to educational institutions. The method to be followed for admission, excellence, reservation, assistance to weaker sections etc. is to be decided by the concerned University or the State.

The State is at liberty to impose some restrictions regarding administration and management on the aided private professional institutions. The govt. can lay down certain conditions while sanctioning grant or aid. Since govt. shoulders the financial burden it has the responsibility of maintaining the high educational standard as also of safeguarding the interest of the teaching and non-teaching staff. Such provisions do exist in many states which extend financial assistance for meeting revenue expenditure on salary, allowances etc. The govt. logically has a right to determine the service conditions of such employees whose salaries are borne by the state in the form of grants. The right of the state to determine the qualifications for different posts exists in most of the states. This court has extended support to the states in many cases including Kerala education bill – 1957. The court has always upheld various provisions and measures adopted by the state in safeguarding interest of the students as well as of teaching and

non-teaching employees. It has always been regarded to be the responsibility of the govt. Naturally the rules, regulations, restrictions and conditions towards discharging this responsibility are always justifiable. What all this amounts to is that Govt. can certainly enact certain laws for ensuring and raising the efficiency of private institutions and to prevent mal – administration.

Despite the acceptance of certain reasonable restrictions it has to be unambiguously emphasized that private institutions cannot be owned by the Govt. neither can they be under total control of the state.

It is true that the aided institutions cannot enjoy the same autonomy as unaided ones. Generally grant is given to meet the salary and non-salary expenditure. In addition, the management spends sizable amount on revenue and capital expenditure. Nevertheless an aided educational institution cannot be treated as one departmentally run and hence the state has no right to interfere with the constitution of the governing body or thrust the staff without reference to management.

A large number of schools, colleges and professional colleges are established by philanthropists or public-spirited persons. Their objective may be very noble but they have to rely on State aid for providing the facilities essential for students and also for future growth and development. Since the state aid is mainly to meet the salaries of teaching and non-teaching staff, State can and should impose certain conditions related to selection and appointments of staff, their suspension, termination, disciplinary action etc. Such restrictions are bound to narrow the autonomy of aided institutions as compared to unaided ones.

But that control cannot extend to the day-to-day administration of the institution. It is categorically stated in TMA Pai that the state can regulate the method of selection and appointment of teachers after prescribing requisite qualification for the same. Independence for the selection of teachers among the qualified candidates is fundamental to maintenance of the

academic and administrative autonomy of an aided institution. The state can very well provide basic qualification for teachers. Under the University Grants Commission Acts, 1956, the University Grants Commission (UGC) has laid down qualifications to a teaching post in a University by passing Regulations. As per this Regulations UGC conducts National Eligibility Testing (NET) for determining teaching eligibility of candidates. UGC has also authorized accredited States to conduct State Level Eligibility Test (SLET). Only a person who has qualified NET or SLET will be eligible for appointment as teacher in an aided institution. This is the required basic qualification of a teacher. Petitioner's right to administer includes the right to appoint teachers of its choice among the NET / SLET qualified candidates.

The arguments by the state that appointment through college service commission is to maintain equal standard of education through out the state is not impressive. The introduction of NET / SET condition automatically ensures equal standard. There is no justification to impose such restriction on the autonomy of private educational institutions, which cannot otherwise be imposed, only because the State aid is given to them.

Since both sides rely on Pai Foundation decision while presenting their cases when a larger Bench consisting of 11 judges of this Court in TMA Pai has declared what the law on the matter is, we do not want to dilute the effect of the same by analyzing various statements made therein or indulge in any dissection of the principles underlying it. We would rather state that the State Government shall take note of the declaration of law made by this Court in this regard and make suitable amendments to their laws, rules and regulations to bring them in conformity with the principles set out therein.

In this view of the matter, it is necessary to examine whether the present rules are valid or not. Until such time as such rules are framed in terms of the order made by us now, the interim orders made by this Court in these proceedings will be operative.



P. K. Inamdar & Others
Vs
State of Maharashtra & Others
Govt. Quota in Private Engineering and
Medical Colleges

Hon. R. C. Lahoti CJ, Supreme Court created history in Educational Law on August, 12, 2005 when he pronounced the judgment in the above case of P. K. Inamdar Vs. Maharashtra State. In response to various petitions filed by many students, the chief Justice abolished the govt. quota in Private Engineering and Medical Colleges thus extending full autonomy to these colleges in admitting the students. The court clarified that until legislation by State or Union govt. is passed legislative committees for admission and fee structure will continue to exist. During the hearing of this petition reference was often made to the Supreme Court judgment Pai Foundation. Likewise reference was also made to Islamic academy, Unni Krishnan etc. This judgment is considered to be a milestone in the history of educational litigations.

BACKGROUND

Pai Foundation was a rare experience in which a Constitutional Bench of as many as 11 judges, led by Hon. B. J. Kirpal, CJ, heard the case of T. M. A. Pai Foundation Vs. State of Karnataka. It was logically presumed that the judgment of such a large Bench would offer a permanent solution to the issues related to education. The actual experience was contrary to this belief. A senior Academician observed that the decision in Pai Foundation is a partial response to some of the challenges of New Economic Policy LPG – It is open to debate whether or not it was satisfactory. It was also pointed out that Pai Foundation Judgment has created more problems than it has solved.

The Annual Survey of Indian Law 2002 observed, “ the principles laid down by the majority in Pai Foundation are so broadly formulated that they provide sufficient leeway to subsequent courts in applying those principles while the lack of clarity in the judgment allows judicial creativity”.

In the Post Pai Foundation period different High Courts as also supreme court were flooded with writ petitions, SLP against interim orders of High Courts etc. Most of the Petitions sought the settlement of various unsolved problems or the issues propping up in Post Pai Foundation Judgments. The reason for so many Writs and SLPs relates to the fact that, Union of India, various state Govts and Educational Institutions had their independent interpretation of the majority judgment in Pai Foundation. Consequent upon the formulation of rules and regulations, enactment of laws and statutes by different state Government, the aggrieved parties approached High Courts as well as Supreme Court with Writs and SLPs. All these matters were placed before a 5-Judge Bench to deal with the case known as Islamic Academy.

The constitution Bench comprising five judges in Islamic Academy pronounced its judgment on August, 14.2003. Despite the clarification issued by the Bench many a problems remained unsolved. Some of these issues came for consideration before a Bench of seven judges in the present case viz. P. K. Inamdar and others Vs. State of Maharashtra and Others.

★ INTRODUCTION

The 7 Judge Bench was formulated, under the Orders of the Chief Justice of India, to consider the grievances of the parties involved in P. A. Inamdar Vs. Maharashtra State and Pushpagini Medical Society Vs. State of Kerala. The said Bench recorded some observations before the consideration of issues before them so as to clarify the scope of the task before them.

- We are not supposed to express our own independent opinion on several issues, dealt with in Pai Foundation.
- We are bound by the decisions of the 11 – Judge Bench in Pai Foundation. We cannot express our dissent or disagreement, even if we may be inclined to do so, on any issue in Pai Foundation.
- Our chief responsibility is to examine if any explanation in Islamic Academy contradicts with the majority judgment in Pai Foundation.
- We will overrule any opinion or decision of Islamic academy if it stands in conflict with Pai Foundation, because it is against the Law laid down in Pai Foundation.
- While offering an explanation of some of the issues in Pai Foundation, the Constitutional Bench in Islamic Academy recommended the formation of two committees viz.
 - I. Fee structure Committee
 - II. Committee for observation of Entrance Test.

★ **PRESENTATION**

The Bench pointed out that the events following Islamic Academy judgment show that some of the main questions have remained unsettled. A few of these unsettled questions as also some aspects of clarifications were placed before the present Bench of 7 Judges. It is clear that the Writs are filed by the parties which are affected due to decision in Pai Foundation and Islamic Academy. Most of the petitioners can be classified in a single group as Unaided Professional Institutions both Minorities and Non-Minorities.

Accordingly the Bench opined that following three issues have to be considered by them.

1. The fixation of “Quota” of admissions / students in respect of Unaided professional institutions.

2. The holding of examinations for admissions to such colleges, that is, who will hold the entrance test.

3. The fee structure.

The Bench clarified that, within the limits of the orders of the Hon. Chief Justice, we will express our opinion in the context of above issues. We feel that the petitions placed before us expect us to deal with following four questions, arising from the three issues mentioned above.

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

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

3. Whether Islamic Academy could have issued guidelines in the matter of regulating the fee payable by the students to the educational Institutions?

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

The issues posed before us are referable to headings 3 and 5 out of ‘ five headings’ formulated by Kirpal, CJ in Pai Foundation. So also speaking by reference to the 11 questions framed in Pai

Foundation, the questions and answers relevant for us would be referable to question Nos. 3 (b), 4, 5 (a) (b) (c) and (9).

★ SUBMISSIONS

During the hearing of the petitions a number of learned and experienced counsels submitted a variety of arguments and counter arguments and presented number of view-points of law relevant with the issues under considerations.

★ PETITIONERS

Senior Counsel Shri. Harish Salve, who led the argument on behalf of the petitioners, argued that a correct interpretation of judgment in Pai Foundation unambiguously reveals that direction of Islamic Academy in respect of formation of permanent committees for regulation of admission and fixation of fee structure stands in contradiction with the decision in Pai Foundation. He pointed out that these directions clearly violate the spirit behind the judgment in many other cases heard and decided by all earlier constitution Benches, such as st. Stephen's, st. Xavier's and Kerala education Bill etc. He highlighted the major misinterpretation of Pai Foundation judgment by the 5 Judge Bench of Islamic Academy.

Para 68 in Pai Foundation is misinterpreted as it has been considered as the ratio of the judgment. In fact for a correct interpretation it is to be read and understood with reference to Articles 29 and 30 of constitution. Thus read, the directions of Islamic Academy for setting two committees is a clear denial of the autonomy to unaided, minority as well as non-minority professional institutions. Similar committees were suggested in Unnikrishnan which was rejected by Pai Foundation. Islamic Academy attempts nothing but the re-introduction of the schemes overruled by Pai Foundation. It was strongly protested by the counsel that state control of Admission and Fees is nothing short of Nationalization of education. Such nationalization is an unreasonable restriction on the fundamental right implicit in the

constitution. A balance has to be struck between the right to establish and administer educational institutions and the right of State to make rules and regulations for maintaining educational standard. There is no objection to state / University framing rules regarding qualifications of teachers / or eligibility for admissions. But misuse of this in curtailing the autonomy of educational institutions is against the letter and the spirit of the law and constitutional right.

Senior Counsel Shri. Ashok Desai appeared on behalf of Karnataka Medical Colleges Association. He raised serious doubts about Islamic Academy directives for formation of permanent committees for admission i.e. fixation of Quota and determination of fees. According to him this is nothing but encroachment over the autonomy of private educational Institutions. He pointed out that Islamic Academy has totally neglected the ratio of Pai Foundation that autonomy of unaided non-minority institutions is an important facet of their right under constitutional provisions.

Senior Counsel Shri. F. S. Nariman while supporting above argument, made it clear that Pai Foundation has not mentioned any govt. quota and that granting such quota by Islamic Academy contradicts the law laid down in Pai Foundation. The fixation of 50:50 quota in St. Stephen relates to aided institutions.

It was further argued that the autonomy of unaided private educational institutions must always be honoured and hence by right the private unaided educational institutions must have full autonomy for determining the fee structure, except of course with the controls in respect of charging capitation fee and profiteering. State, it was emphasized cannot have any say in fixation of fees. Capitation fee, in this context, refers to any excess charged by the institution over and above what it needs by way of revenue and capital expenditure plus a reasonable surplus. It is always possible for the state to scrutinize the revenue and capital expenditure incurred by the institutions.

Dr. Rajiv Dhavan, learned senior counsel, while launching an attack on Islamic Academy argued that the directives of Govt. of Maharashtra, dated February, 13.2005 is a clear encroachment upon the rights of unaided educational institutions. These directives of the state Govt. suggest that non-minority institutions should implement the reservation policy of the govt. even in case of management quota. The counsel further argued that Pai Foundation has supported maximum autonomy to unaided institutions, stating that regulation of capitation fee must be insisted upon and that there should be transparency in method of admissions.

Senior Counsel Shri. U. U. Lalit appearing for the Sole Dental College established for Muslims in Maharashtra; supported the above arguments and suggested a three – tier fee structure. He claimed that this fee structure will enable meritorious students to get admission, while enabling the institutions to collect the amount necessary for running the educational institution in the best possible manner.

It was thus the plea of Advocate shri. Lalit that the Mumbai High Court judgment of August, 23.2003, prescribing uniform fee structure should be set aside and the minority institutions should be allowed to prescribe the three – tier fee structure subject to non-profiteering and no charging of capitation fee.

★ RESPONDENTS

It must be noted that the States of Maharashtra, Kerala, Karnataka and Tamilnadu enacted the laws to control the admission and fees in all types of private professional educational institutions. Their stand was submitted by their respective counsels.

Senior Counsel Shri. K. K. Venugopal led the counter arguments while representing the State of Kerala. It was submitted that only 25% of the seats were reserved for students coming through CET. The management were allowed to fill up 75% of

the total intake. The attention was drawn to Para 67 to 70 of Pai Foundation judgment which covers unaided minority as well as non-minority institutions. The present Bench of 7 – Judges was required to resolve the controversy arising due to different interpretations of para 68 by the High Courts of Kerala and Karnataka.

In justification of the provisions for sharing of the seats between management and the govt. (fixation of Quota) and fixing a reasonable fee structure the counsel referred to the tendency and practices of the private institutions towards exploitation of the students. It was pointed out that both Pai Foundation and Islamic Academy judgments have condemned profiteering, collection of capitation fee and commercialization of education. The laws enacted by the Govt. of Kerala were for the purpose of pursuing the directives of this Court. e.g. High Court of Kerala tentatively fixed a fee of Rs. 1.50 lacs which the Govt. raised to 1.76 lacs. Pushpagiri Medical College have admitted charging Rs. 4.38 lacs and Rs. 22 lacs from different students. The explanation that the Rs. 22 lacs is the fee for the full course, cannot be relied upon as such amount was collected not from all but some students only. It was argued that committees had to be set up by the state to prevent the exploitation of students and their parents. The counsel argued that if the Islamic Academy scheme for setting up permanent committees is not allowed, the commercialized education will become inaccessible to meritorious but poor students.

Shri. Venugopal pointed out that this Bench in not considering the correctness of the Islamic Academy judgment. It cannot pass remakes on the correctness or otherwise of the larger Bench of 11 – Judges viz Pai Foundation. Its scope is limited to examine if Islamic Academy Judgment contradicts with the Pai Foundation Judgment. He further stated that the Islamic Academy Bench was constituted for a specific purpose of resolving inconsistencies with ref. To para 59 and 68. This Court should not offer another interpretation if Islamic Academic has offered

a reasonable and plausible interpretation of the apparent inconsistencies in Pai Foundation Judgment.

Pai Foundation has clearly stated that Quota should be fixed taking into consideration the local needs. Considering para 68 with 69, it becomes very clear that Pai Foundation has recommended creation of appropriate machinery to regulate admissions and to prevent mal-practices like admission to low-merit students, collection of capitation fee, profiteering and commercialization of education etc.

Learned Counsel Shri. T. R. Andhyarujuna, appearing on behalf of the State of Karnataka supported the judgment of Islamic Academy. He strongly argued in favour of setting up the committees for admission and fixation of fee structure. He clarified that the Govt. of Karnataka has not imposed its reservation policy on the management Quota.

Shri. P. P. Rao while supporting the directives in Islamic Academy submitted, on behalf of the State of Tamilnadu, that the state of Tamilnadu had not insisted on communal reservation based on State policy, in minority institutions.

He made a reference to Article 51 – A (i) providing for Fundamental Duties in the constitution. It is the individual and collective duty of the citizens to raise the nation to higher levels of endeavor and achievement. The responsibility of the State lies in ensuring that admissions are given on the basis of merit and that system is transparent devoid of any exploitation of students and parents.

Thus many senior, learned and experienced counsels justified their stand by referring to law and constitutional provisions. Both the sides interpreted Pai Foundation judgment to suit their convenience. The Petitioners launched the attack on Govt. Quota, Reservation, Admission and Fee fixation committees and insisted upon honoring the autonomy of the private educational institutions. The respondents i.e. various State Govts. Emphasized

national interest, exploitation of students, commercialization of education, profiteering etc. and argued that state has to regulate private institutions to curb the mal-practices in the field of education.

JUDGMENT

The Bench considered the judgments in Pai Foundation and Islamic Academy. Similarly the submission made by the counsels for petitioners and respondents were thoroughly analyzed. The Bench then announced its judgments in the form of answers to the four questions that were framed in the beginning.

Q.1 Unaided educational institutions; appropriation of quota by the State and enforcement of reservation policy.

The Bench first dealt with the minority unaided institutions. The classification of Minority Educational Institutions in three categories by the 7-Judge Bench in Kerala education Bill has met the approval of the 11-Judge Bench of Pai Foundation. This Bench follows the same classification to answer the question.

I. Unaided and Unrecognized Minority Institutions

Pai Foundation unanimously announced that the right to establish and administer educational institutions as visualized in Article 30(1) of the Constitution comprises of the following rights.

- To admit students
- To set up a reasonable fee structure
- To constitute a governing body
- To appoint, Teaching and Non-Teaching Staff
- To take disciplinary action against the employees if there is dereliction of duty.

In case of this category, the institutions are free to exercise their right under the privilege and protection offered by Article 30(1), “to their hearts content” without any restrictions excepting

those imposed in national interest such as public safety, national security, national integration, prevention of exploitation etc. The essential ingredients of management, including admission of students recruiting of staff, quantum of fee to be charged etc. cannot be regulated.

II. Unaided Minority Institutions asking for affiliation and recognition

These institutions cannot be denied affiliation or recognition only because of their minority status, of course they will have to comply with the rules and conditions of affiliation / recognition. These conditions consist of quality of education, high standard, proper administration, syllabus, infrastructural facilities, minimum qualification of staff etc. However govt. cannot interfere with day-to-day administration, which means these institutions will have full autonomy in respect of admissions, fee structure, appointment etc.

III. Aided Minority Institutions

The aided institutions will have to observe certain conditions relating to end utilization of aid for the purpose for which it is sanctioned, Pai Foundation did not offer any opinion beyond this as the case of aided institutions was not covered.

It was pointed out that the Bench sees not much difference between Minority and Non-Minority Institutions in case of quota for govt. and imposition of State's reservation policy.

The Bench pointed out that neither Pai Foundation nor Kerala Education Bill permits govt. quota or imposition of State's reservation policy. No court has ever consented to nationalization of education.

• *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 admission can be carved out to be appropriated by the state in a Minority or Non-Minority educational institution.*

Q.2 Admission procedures in unaided educational institutions

To admit students is a part and parcel of the constitutional right 'to establish and administer educational institutions'. Naturally the state cannot interfere with the admission in unaided educational institutions. The minority unaided educational institutions enjoy total autonomy upto the level of undergraduate education.

The admissions to post graduation, technical and professional courses will have to be viewed separately because these courses have to obtain affiliation and recognition from competent authority. In order to achieve the objective of excellence in education the state can intervene. In fact such interference by the state becomes unavoidable in national interest. Whatever be the status of educational institutions i.e. minority or non-minority, excellence and transparency remain the basic conditions. It has been clarified in Pai Foundation that a state is the unit for determining the religious or the linguistic minority. Naturally an institution enjoying minority status in one state may not necessarily do so in other. In such cases students from other states wherein they are not in minority cannot claim the right of admission in Minority quota in that state. They will have to be treated like other non-minority students. Moreover such admissions will be to a limited extent.

In a state there exist a number of institutions imparting instruction in particular branch. The students will face unnecessary expenses and inconvenience as they will be required to purchase admission forms from a large number of institutions and will have to appear for as many entrance examinations. In order to avoid undue duplication, unwarranted expenses along with inconvenience to students, it is desirable to conduct a single entrance test either by State, or its representative or an organization of educational institutions. A single window scheme, in no way, can be looked upon as something that restricts the rights of minority institutions because these institutions continue

to enjoy the choice of students from among the successful candidates at CET. They have the autonomy to select the students without disturbing the order of performance. The same principle becomes applicable to unaided non-minority educational institutions.

Q.3 Regulation of Fee etc.

Framing reasonable fee structure is also a major component of right to 'establish and administer' educational institution. Pai Foundation has unambiguously recognized this right within the condition of avoiding charging capitation fee and profiteering.

Pai Foundation in this context, in the answer to Q.5(c) has opined that 'Profession' has to be distinguished from 'Business' or mere 'Occupation'. The 'Business' and to some extent 'Occupation' is basically profit motivated. In contrast a 'Profession' is primarily a service to society in which 'earning' i.e. 'making profit' is secondary or incidental consideration. A student acquiring professional Qualifications on payment of capitation fee will aim at 'Earning' rather than 'serving' the society. He is bound to give priority to self-interest rather than to social interest. Profiteering is nothing but commercialization of education which has to be stopped at any cost.

In order to prevent or at least to effectively curb profiteering, exploitation of students and other mal-practices, the admission procedure has to be so designed that it is, transparent on one hand and merit-based on the other.

Our answer to Q.3 (reg. Fee Regulation) is that despite recognition of the right of educational institution to fix up a reasonable fee structure, it needs to be regulated to prevent profiteering.

Q.4 Committees formed after Islamic Academy

The recommendation of forming two committees (Admission and Fee) by Islamic Academy attracted severe

criticism from the learned counsel appearing for petitioners and applicants. Attention of the court was invited to the fact that Pai Foundation has totally overruled similar suggestion in Unnikrishnan. The counsel for petitioners agreed that some restrictions are necessary to prevent commercialization of education but argued that formation of committees of Islamic Academy is not the proper solution. It was pointed out that the purpose can be served by imposing strict conditions for affiliation and recognition. Such measures need not be treated as encroachment on the rights of educational institutions, neither minority nor non-minority.

In answer to Q. 4 the bench announced

“ The judgment in Islamic Academy for forming two committees for admission and fee structure does not go beyond the law laid down in Pai Foundation ”

Thus the Bench cancelled the State quota and overruled the implementation of reservation policy and upheld the Islamic Academy decision in respect of formation of two committees.



Privatization of Education - A Need of the Time

The crucial and strategic role that education plays in the process of economic development is acknowledged and accepted by advocates of different political, social and economic ideologies. The differences in views relate to the aspect of whose responsibility it is to shoulder the burden of educational expenses. Some believe that it is exclusively the responsibility of the govt. while certain others are of the opinion that it is the society, the people, who has to bear the burden. In Indian federal setup there can be disagreement as to whether it is the concerned state or the union who will be primarily responsible.

The chief architect of New Economic Policy – 1991 (LPG) Dr. Manmohan Singh, the then Finance Minister, is at present the Prime Minister of India. It is but natural that he is keen on leading the policy on Liberalization, Privatization and Globalization (LPG) on proper path to success.

In an interview to Mr. Ranjan Gupta of Mekinsey on the eve of Independence Day 2005. Dr. Manmohan Singh expressed his views of various key issues such as Foreign Investment, poverty eradication, creation of employment opportunities, provision of infrastructure and of course education for development of human resources. In this context Hon. PM opined,

" ----- But that also means that we ensure that our system of general and technical education are in line with job requirements of more modern manufacturing and more modern service sector ----- The working force must have skills which will fit the kind of jobs which will be in demand"

The PM thus emphasizes the need for overhauling our entire educational system for achieving the goal of making available the skilled labour force for service and manufacturing sectors.

The Prime Minister further stated

" It is true that the two primarily important sectors viz. education and public health have been neglected. We have therefore concentrated on primary education during the first year of our Govt. I am confident that in next four to five years all the children (6-14 age group) and especially disadvantaged children and girls will be getting primary education. This will create the demand for secondary and higher education. This is a difficult issue. Recently knowledge commission is established under the chairmanship of Dr. Sam Pitroda. I am laying great emphasis on improving the quality of education at all levels because I believe *empowering our people means empowering by investing more in their education and health.*

There appears to be a common agreement among thinkers from all walks of life that educational system at all levels from primary to professional as also research needs to be reformed and restructured. In this context Dr. Sam Pitroda, chairman knowledge Commission, expressed,

" Science, physics and Arithmetic being taught in India lacks modernization. As a result as per present standard eighty percent of college education has become meaningless. Increase in laboratories, special inducement to research and complete reorganization of educational system are the only ways to survive in the educational world. India will be deprived of many opportunities if we fail to do this."

◆ NEW ECONOMIC POLICY AND EDUCATION

It is absolutely necessary to take into account LPG while thinking of changes in educational policy and reorganization of educational system. It is commonly agreed that LPG has accelerated the economic growth. Private Sector is gaining greater importance consequent upon liberal practices and removal of 'Licence Raj'. The advent of, growing foreign investment etc. are bettering the living standard while enhancing employment. The growing foreign competition is forcing upwards the efficiency

and productivity of Indian industries. The changing scenario is conducive to economic prosperity which will take the Indian economy to the status of superpower. Despite the existence of unsolved issues of poverty, inequality, illiteracy, unemployment etc. it is within the powers of the country to evolve a satisfactory solution to the above ills in near future. Human Resource development is the key to the solution of most of the above issues. Hence the need for improvement in education and health.

In order that educational reforms become effective and successful they will have to be tied with LPG. It is but logical to argue that policy that brings rapid economic and industrial growth cannot lag behind in ensuring educational prosperity. Globalization in education is already initiated by permitting foreign educational institutions.

◆ PRIVATIZATION OF EDUCATION

The most debated educational issue at present is that of privatization of education. During over a decade almost everyday is occupied with labling Indian education as per their convenience and preference and prejudices. The most commonly used labels are marketization, commercialization, politicization, saffronization of education etc. Unfortunately none bothers to act positively by suggesting ways and means to educationalize education and thereby raise its level. It has been a fashion to criticize the private educational institutions and their management. The self appointed social workers, the blind followers of ideology etc. are at the front to defame even the devoted personalities in the field of education simply because they happen to run educational institution. They are called any names such as Mafia, Extortionist etc etc. Some doctrinaire bla blaist treat private educational institutions to be a gang which does nothing other than exploitation of the society. Unfortunately the private managements also do not appear to be making any effective attempt to expose the falsehood in these allegation. This article is thus an attempt to present an unbiased, objective and true picture and to reduce the impact of baseless allegation.

Hon. Shri. Vasantdada Patil, the ex. CM will always be gratefully remembered by the students in the State for his bold and timely decision to allow private engineering and medical colleges – Prior to this due to limited availability of seats in these professional colleges even the meritorious students had to seek admissions in other states Vasantdada, despite not traditionally educated had a strong perspective to analyze the future educational needs of the society which prompted him to announce and implement the policy whereby private engineering and medical colleges could be established in the State. A noteworthy aspect of this decision is that the present LPG has appeared after a very long period after the said policy implementation in the state.

On many occasions it is observed that the opposition to privatization is nothing but *Opposition for the sake of Opposition* rather than being based on any principles. It is surprising that individuals, groups and ideologist who opposed Bank Nationalization in 1969, are how opposing privatization of education. They themselves appear to be confused as to what it is that they want to oppose. At present what is needed is constructive and positive suggestions and policies that will right the wrong in the field of education. Let us not overlook the reality that in the present scenario privatization of education is necessary as well as inevitable. The opponents of privatization welcome the benefits of from it, such as growing competition, better quality, easy availability etc. Let us not forget that due price has to be paid for reaping the benefits hitherto beyond our reach.

At the outset it must be once for ever decided as to who will bear the responsibility of providing education. It is unreasonable to expect the govt. to shoulder the entire cost of education in a country with population much above 100 crores. The Union / State Govt. with any ideology cannot successfully shoulder this responsibility. During the last three decades the govt. at center and state levels have repeatedly clarified that higher education is not the responsibility of Govt. The different State Govt. as also Central Govt. are making all efforts to fulfill their responsibility

so far as primary and to some extent secondary education is concerned. The Govt. is making sincere efforts towards uninterrupted education to 6-14 age group (primary) and hopefully primary education will be available to all children during next five years. The HRD dept. has recently submitted a scheme for 75000 crores during 11th Five Year Plan (2005-06 to 2010-11) to Planning Commission for expanding the scope and raising the quality of secondary education.

Once it is accepted that Govt. cannot shoulder the responsibility of providing higher education it is logical that the society has to do that. It is on this background that the contribution of private educational institutions gains significance.

Administration, control and financial burden are the three major issues while considering the relationship between the private educational institution and the state. Further it becomes necessary to accommodate different types of colleges such as professional and non-professional, aided and unaided, minority and non-minority etc. Supreme Court in leading cases (Pai Foundation, Islamic Academy, Brahma Samaj etc.) has offered valuable guidance in its judgments. The gist of all these judgments is that,

Various benches of Supreme Court have unanimously upheld the freedom of all types of educational institutions and insisted upon granting full autonomy to all of them within the policy framework. It is opined that autonomy to private educational institutions is must for educational development in respect of admissions, fee structure and appointment of teaching and non-teaching staff etc.

Profiteering and exploitation of weaker sections is a common argument against privatization. It is claimed that these institutions by charging exorbitant donation deprive meritorious but poor students of higher education. Viewed in proper perspective this argument does not have much strength. Most of the educational institutions are established for welfare of the society in general

and student community in particular. Obviously these institutions are bound to attach greater weightage to excellence. It is improper to argue that they will sacrifice talents for money and admit lowly qualified students because they can make huge donations. In the light of evergrowing competition it will be suicidal for private institutions to neglect the quality. This approach will lead to their elimination and they will fail to get even low standard students.

"The argument that privatization leads to neglect of excellence is improper. In fact the empirical evidence reveals that in any field private sector attaches grater significances to excellence than the public sector."

Another common allegation against private institutions is unreasonable fee structure. The fees charged by these institutions are high but certainly not unreasonable and exploitative. One must always *remember the universal truth that good things are not cheap and cheap things are not good.* Quality education cannot be had unless one is prepared to bear its cost. It is possible to suggest a reasonable fee structure in the light of directives of the court. The requirement of infrastructure and other facilities is so rapidly growing that higher fees are inescapable. Cost of education should be the basic foundation of an ideal fee structure. Such cost should include in addition to expenditure on routine heads, the expenditure that will have to be incurred on expansion and growth. It is possible to accommodate poor but meritorious students through freeships, scholarships etc.

One must learn to distinguish between profiteering and profit. The former is illegal, immoral and exploitative while the latter i.e. 'profit is a part of justified cost' Various courts have agreed to the concept of reasonable surplus.

There is only half truth in the allegation that private institutions collect donations and exploit the society. Let none forget that these institutions are based on charity and cannot function without the financial help from society. Since the accounts of these institutions are audited by competent authorities

there is nothing illegal or immoral about donations. Of course to collect illegal and unaccounted money is not only illegal but a very serious moral and social crime and deserves strict action. But because some institutions are involved in such practices, it is not justifiable to treat all to be the social enemies. In fact extending voluntary donations is a responsibility of entire society. It is insult to entire society if the private institutions with transparency, audit, adherence to laws, in funds are treated as criminals.

At present there is undue interference by the State and University in the administration of colleges. Their tendency is to retain the controls but shift the responsibility to colleges. All the powers in respect of admissions, appointments, approval, fee structure are centralized in the hands of the State / University but the problems therein are to be faced by the institutions and colleges. The views expressed by various courts about intervention are self explanatory. It is pointed out

"Despite the fact that state has the right to frame rules and regulations in respect of appointments, admissions, fee etc. for maintaining high standard of and clean administration in, education, the govt. should not run these as one of its own departments. It should learn to respect the autonomy of private, educational institution"

Both the aided as well as unaided educational institutions are literally toughtered by the State Bureaucracy which feels that giving grants is the permission for them to exploit these institutions. A very serious issue like appointments of teachers is not properly handled. Various technical and other reasons are quoted for refusing or delaying the NOC. This leads to non-payment of the salary of the unapproved staff and the entire burden had to be borne by the concerned Management. Presently there is a large number of teaching staff appointed on contract and CHB. Their salaries are so low that they are really being exploited. The opponents of privatization have all the while neglected this type of serious inequality & exploitation. It is the students who suffer because of all this.

The Hon'ble Prime Minister of Maharashtra on the Teachers Day 2005 expressed his unhappiness that the young generation is not getting attracted to the Teaching Profession. The fact is that Govt. policy about appointment & salaries has caused the neglect of the youths of this noble profession.

On many occasions the red tapism in University / Govt. leads to unnecessary delay in starting the useful courses. Is it not the exploitation of the Society & the students not to grant necessary permission even on permanently unaided basis though the Private Educational Institutions are prepared to do so?

The gains from privatization are definitely of permanent nature than the problems associated with it. Briefly mention can be made of the following –

- Gaining the necessary competitive strength in view of the entry of foreign educational institutions under the new policy.
- Availability of courses as per the abilities of the students & needs of the society.
- High standard of education.
- Due recognition to merit and excellence.
- The structure of courses as per the needs of time & place.
- Participation of experienced, experts and talented teachers
- Provision of Modern Teaching Aids.
- Provision of excellent infrastructural facilities.
- Encouragement & scope to research activities.

If one looks to the bare facts and tries to get rid off the doctrinaire approach the need for privatization of education can be easily recognized.

Hon'ble Budhdev Bhattacharya , The Chief Minister of West Bengal who leads the leftist Govt. has rightly remarked that reality rather than principles should be given greater importance in analyzing any issue.

In order to fulfill the dream of making India a super power, privatization is the only solution.

