CASE NO.:
Appeal (civil) 5041 of 2005

PETITIONER:
P.A. Inamdar & Ors.

RESPONDENT:
State of Maharashtra & Ors.

DATE OF JUDGMENT: 12/08/2005

BENCH:
CJI R.C. LAHOTI Y.K. SABHARWAL D.M. DHARMADHIKARI ARUN KUMAR,G.P. MATHUR,TARUN CHATTERJEE & P.K. BALASUBRAMANYAN

JUDGMENT:
J U D G M E N T
JUDGMENT GIVEN BY
CJI R.C. LAHOTI,Y.K. SABHARWAL,D.M. DHARMADHIKARI,ARUN KUMAR,G.P. MATHUR,TARUN CHATTERJEE & P.K. BALASUBRAMANYAN

(Arising out of Special Leave Petition (C) No.9932 of 2004)
WITH
Civil Appeal No. 5042 of 2005 (@ SLP(C) No.9935/2004); Civil Appeal No. 5043 of 2005 (@ SLP(C) No. 9936/2004); W.P. (C) No. 276/2004; W.P. (C) No. 330/2004; W.P. (C) No. 357/2004; I.A. NOS. 26, 27, 30, 31 AND 33 IN W.P. (C) No.350/1993; Civil Appeal No. 5035 of 2005 (@ SLP(C) No.11244/2004; W.P.(C) No. 302/204; W.P. (C) No. 347/2004; W.P. (C) No. 349/2004; W.P. (C) No. 350/2004; W.P. (C) No. 387/2004; W.P. (C) No. 423/2004; W.P. (C) No. 480/2004; W.P. (C) No. 19/2005; W.P. (C) No. 261/2004; W.P. (C) No. 265/2004; W.P. (C) No. 380/2004; W.P. (C) No. 358/2004; W.P. (C) No. 359/2004; W.P. (C) No. 360/2004; W.P. (C) No.361/2004; W.P. (C) No. 362/2004; W.P. (C) No. 363/2004; C.A. No. 5257-5258/2004; C.A. No. 5259/2004; C.A. No. 5260-5261/2004; C.A. No. 5262-5263/2004; C.A. No. 5996/2004; C.A. No. 5992/2004; C.A. No. 5997-5998/2004; C.A. No. 7969-7971/2004; C.A. No. 7972/2004; C.A. No. 7973/2004; C.A. No. 7974/2004; C.A. No. 7975/2004; W.P. (C) No. 371/2004; W.P. (C) No. 368/2004; C.A. No. 7117-7119/2004; C.A. No. 7124-7126/2004; CONMT.PET. (CIVIL) No. 561-563/2004 In C.A. No. 7117-7119/2004; CONMT. PET. (Civil) No. 564-566/2004 in C.A. No. 7124-7126/2004; W.P. (C) No. 251/2004; Civil Appeal No. 5036 of 2005 (@ SLP (C) No. 17464/2004); Civil Appeal No. 5037 of 2005 (@ SLP (C) No. 17549/2004); W.P. (C) No. 318/2004; Civil Appeal No. 5038 of 2005 (@ SLP(C) No. 17930/2004; Civil Appeal No. 5039 of 2005 (@ SLP (C) No. 17931/2004); Civil Appeal No. 5040 of 2005 (@ SLP (C) No. 17326/2003); W.P. (C) No. 386/2004; W.P. (C) No. 397/2004

R.C. Lahoti, CJI

Preliminary

Leave granted in all SLPs.

A Coram of 11 Judges, not a common feature in the Supreme Court of India, sat to hear and decide T.M.A.Pai Foundation v. State of Karnataka (2002) 8 SCC 481 (hereinafter 'Pai Foundation', for short). It was expected that the authoritative pronouncement by a Bench of such strength on the issues arising before it would draw a final curtain on those

controversies. The subsequent events tell a different story. A learned academician observes that the 11-Judge Bench decision in Pai Foundation is a partial response to some of the challenges posed by the impact of Liberalisation, Privatisation and Globalisation (LPG); but the question whether that is a satisfactory response, is indeed debatable. It was further pointed out that 'the decision raises more questions than it has answered' (see : Annual Survey of Indian Law, 2002 at p.251, 254). The Survey goes on to observe "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 \005" (ibid at p.256).

The prophecy has come true and while the ink on the opinions in Pai Foundation was yet to dry, the High Courts were flooded with writ petitions, calling for settlements of several issues which were not yet resolved or which propped on floor, post Pai Foundation. A number of Special Leave Petitions against interim orders passed by High Courts and a few writ petitions came to be filed directly in this Court. A Constitution Bench sat to interpret the 11-Judge Bench decision in Pai Foundation which it did vide its judgment dated 14.8.2003 (reported as - Islamic Academy of Education & Anr. v. State of Karnataka & Ors., (2003) 6 SCC 697; "Islamic Academy" for short). The 11 learned Judges constituting the Bench in Pai Foundation delivered five opinions. The majority opinion on behalf of 6 Judges was delivered by B.N. Kirpal, CJ. Khare, J (as His Lordship then was) delivered a separate but concurring opinion, supporting the majority. Quadri, J, Ruma Pal, J and Variava, J (for himself and Bhan, J) delivered three separate opinions partly dissenting from the majority. Islamic Academy too handed over two opinions. The majority opinion for 4 learned Judges has been delivered by V.N. Khare, CJ. S.B. Sinha, J, has delivered a separate opinion.

The events following Islamic Academy judgment show that some of the main questions have remained unsettled even after the exercise undertaken by the Constitution Bench in Islamic Academy in clarification of the 11-Judge Bench decision in Pai Foundation. A few of those unsettled questions as also some aspects of clarification are before us calling for settlement by this Bench of 7 Judges which we hopefully propose to do.

Pai Foundation and Islamic Academy have set out the factual backdrop of the issues leading to the formulation of 11-Judge and 5-Judge Benches respectively. For details thereof a reference may be made to the reported decisions. A brief summary of the past events, highlighting the issues as they have travelled in search of resolution would be apposite.

II

BACKDROP

Education used to be charity or philanthropy in good old times. Gradually it became an 'occupation'. Some of the Judicial dicta go on to hold it as an 'industry'. Whether, to receive education, is a fundamental right or not has been debated for quite some time. But it is settled that establishing and administering of an educational institution for imparting knowledge to the students is an occupation, protected by Article 19(1)(g) and additionally by Article 26(a), if there is no element of profit generation. As of now, imparting education has come to be a means of livelihood for some professionals and a mission in life for some altruists.

Education has since long been a matter of litigation. Law reports are replete with rulings touching and centering around education in its several aspects. Until Pai Foundation, there were four oft quoted leading cases holding the field of education. They were Unni Krishnan v. State of Andhra Pradesh (1993) 1 SCC 645, St. Stephen's College v. University of Delhi (1992)1 SCC 558, Ahmedabad St. Xavier's College Society v. State of Gujarat (1974)1 SCC 717 and In Re: Kerala Education Bill, 1957, (1958) SCR 995. For convenience sake, these cases will be referred to as Unni Krishnan, St. Stephen's, St. Xavier's and Kerala Education Bill respectively. All these cases amongst others came up for the consideration of this Court in Pai Foundation.

Correctness of the decision in St. Stephen's was doubted during the course of hearing of Writ Petition No. 350 of 1993 filed by Islamic Academy. As St. Stephen's is a pronouncement of 5-Judge Bench, the matter was directed to be placed before 7-Judge Bench.

An event of constitutional significance which had already happened, was taken note of by the Constitution Bench. "Education" was a State Subject in view of the following Entry 11 placed in List II ___ State List:-

"11. Education including universities, subject to the provisions of entries 63, 64, 65 and 66 of List I and entry 25 of List III."

By the Constitution (42nd Amendment) Act 1976, the abovesaid Entry was directed to be deleted and instead Entry 25 in List III \026 Concurrent List, was directed to be suitably amended so as to read as under:-

"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."

The 7-Judge Bench felt that the matter called for hearing by a 11-Judge Bench. The 11-Judge Bench felt that it was not bound by the ratio propounded in Kerala Education Bill and St. Xavier's and was free to hear the case in wider perspective so as to discern the true scope and interpretation of Article 30(1) of the Constitution and make an authoritative pronouncement.

Eleven Questions and Five Heads of Issues in Pai Foundation

In Pai Foundation, 11 questions were framed for being answered. Detailed submissions were made centering around the 11 questions. The Court dealt with the questions by classifying the discussion under the following five heads:

1. Is there a fundamental right to set up educational institutions and if so, under which provision?
2. Does Unni Krishnan require reconsideration?
3. In case of private institutions, can there be government regulations and, if so, to what extent?
4. In order to determine the existence of a religious or

linguistic minority in relation to Article 30, what is to be the unit __ the State or the country as a whole?
5. To what extent can the rights of aided private minority institutions to administer be regulated?

Having dealt with each of the abovesaid heads, the Court through the majority opinion expressed by B.N. Kirpal, CJ, recorded answers to the 11 questions as they were framed and posed for resolution. The questions and the answers as given by the majority are set out hereunder:

"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 on a par in Article 30, have to be considered Statewise.

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?

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 a 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 right 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 undergraduate colleges where the scope for merit-based selection is practically nil, cannot be regulated by the State or university concerned, except for providing the qualifications and minimum conditions of eligibility in the interest of academic standards.
[emphasis by us]

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.
[emphasis by us]

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 the 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 State Government concerned has to notify the percentage of the non-minority students to be admitted in the light of the above observations. Observance of inter se merit amongst the applicants belonging to the minority group could be ensured. In the case of aided professional institutions, it can also 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 counselling wherever it exists.

Q.5(a) Whether the minorities' 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 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 bye __ 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 university or the Government concerned followed by counselling, or on the basis

of an entrance test conducted by the individual institutions \026 the method to be followed is for the university or the Government to decide. The authority may also devise 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 a 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-‘-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 St. Stephen's case (St. Stephen's College v. University of Delhi, (1992) 1 SCC 558) is correct? If no, what order?

A. The basic ratio laid down by this Court in St. Stephen's College case (supra) 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. v. State of A.P., (1993) 1 SCC 645 (except where it holds that primary education is a fundamental right) and the scheme framed thereunder require reconsideration/modification and if yes, what?

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

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

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

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

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

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

The majority led by Kirpal, CJ, in Pai Foundation did say that the expression "minorities" in Article 30 of the Constitution of India, whether linguistic or religious, has to be determined by treating the State and not the whole of India as unit. Questions such as: (i) what is religion, (ii) what is the indicia for determining if an educational institution is a minority institution, (iii) whether a minority institution can operate extra-territorially extending its activities into such states where the minority establishing and administering the institution does not enjoy minority status, (iv) the content and contour of minority by reference to territories, were not answered in Pai Foundation and were left to be determined by the regular Benches in individual cases to be heard after the decision in Pai Foundation. We also do not propose to involve ourselves by dealing with these questions except to the extent it may become necessary to do so for the purpose of answering the questions posed before us.

Pai Foundation explained in Islamic Academy
Pai Foundation Judgment was delivered on 31.10.2002. The Union of India, various State Governments and the Educational Institutions, each understood the majority judgment in its own way. The State Governments embarked upon enacting laws and framing the regulations, governing the educational institutions in consonance with their own understanding of Pai Foundation. This led to litigation in several Courts. Interim orders passed therein by High Courts came to be challenged before this Court. At the hearing, again the parties through their learned counsel tried to interpret the majority decision in Pai Foundation in different ways as it suited them. The parties agreed that there were certain anomalies and doubts, calling for clarification. The persons seeking such clarifications were unaided professional educational institutions, both minority and non-minority. The Court formulated four questions as arising for consideration in view of the rival submissions made before the Court in Islamic Academy:

"(1) whether the educational institutions are entitled to fix their own fee structure;
(2) whether minority and non-minority educational institutions stand on the same footing and have the same rights;
(3) whether private unaided professional colleges are entitled to fill in their seats, to the extent of 100% , and if not, to what extent; and
(4) whether private unaided professional colleges are entitled to admit students by evolving their own method of admission."

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

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

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

system and development of education.

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

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

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

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

(1) In professional institutions, as they are unaided, there will be full autonomy in their administration, but the principle of merit cannot be sacrificed, as excellence in profession is in national interest.

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

(3) The management can have quota for admitting students at its discretion but subject to satisfying the test of merit based admissions, which can be achieved by allowing management to pick up students of their own choice from

out of those who have passed the common entrance test conducted by a centralized mechanism. Such common entrance test can be conducted by the State or by an association of similarly placed institutions in the State.

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

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

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

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

Before we part with the task of summing up the answers given to the four questions in Islamic Academy, we would like to make a few observations of ours in this regard. First, the majority opinion spread over 30 printed pages, and the minority opinion spread over 60 printed pages, both though illuminating and instructive, have nonetheless not summed up or pointedly answered the questions. We have endeavoured to cull out and

summarize the answers, noted above, as best and as briefly as we could from the two opinions. We would, therefore, hasten to add that in order to fully appreciate the ratio of the two opinions, they have to be read in detail and our attempt at finding out and placing in a few chosen words the ratio decidendi of the two separately recorded opinions, is subject to this limitation. However, we shall make a reference to relevant passages from the two opinions as and when it becomes necessary. A point of significance which we would like to briefly note here itself, a detailed discussion being relegated to a later part of this judgment, is that the opinion of S.B. Sinha, J, has examined in detail, the scope of protection conferred on minority institutions by reference to their right to seek recognition or affiliation, an aspect of wider significance which does not seem to have received consideration with that emphasis either in Pai Foundation or in the majority opinion in Islamic Academy. We shall revert to this aspect a little later.

III

Issues herein

A Few Preliminary observations

Before we embark upon dealing with the issues posed before us for resolution, we would like to make a few preliminary observations as a preface to our judgment inasmuch as that would outline the scope of the controversy with which we are actually dealing here. At the very outset, we may state that our task is not to pronounce our own independent opinion on the several issues which arose for consideration in Pai Foundation. Even if we are inclined to disagree with any of the findings amounting to declaration of law by the majority in Pai Foundation, we cannot; that being a pronouncement by 11-Judge Bench, we are bound by it. We cannot express a dissent or disagreement howsoever we may be inclined to do so on any of the issues. The real task before us is to cull out the ratio decidendi of Pai Foundation and to examine if the explanation or clarification given in Islamic Academy runs counter to Pai Foundation and if so, to what extent. If we find anything said or held in Islamic Academy in conflict with Pai Foundation, we shall say so as being a departure from the law laid down by Pai Foundation and on the principle of binding efficacy of precedents, over-rule to that extent the opinion of the Constitution Bench in Islamic Academy.

It is pertinent to note, vide paras 2, 3 and 35 of Islamic Academy, that most of the petitioners/applicants therein were unaided professional educational institutions (both minority and non-minority). The purpose of constituting the Constitution Bench, as noted at the end of para 1, was "so that doubts/anomalies, if any, could be clarified." Having answered the questions, the Constitution Bench treated all interlocutory applications as regards interim matters as disposed of (see para 23). All the main matters (writ petitions, transfer petitions and special leave petitions) were directed to be placed before the regular Benches for disposal on merits.

Islamic Academy in addition to giving clarifications on Interlocutory Applications, directed setting up of two committees in each State: one committee "to give effect to the judgment in Pai Foundation" and to approve the fee structure or to propose some other fee which can be charged by minority institutions (vide para 7), and the other committee __ to oversee the tests to be conducted by the association of institutions (vide para 19).

Since the direction made in Islamic Academy for appointment of the Committees has been vehemently assailed

during the course of hearing before us, we would extract from the judgment in Islamic Academy the following two passages wherein, in the words of Khare, CJ, the purpose and the constitution of the Committees, the powers conferred on and the functions enjoined upon them are given:

"\005..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 other member, who shall be nominated by the Judge, should be a Chartered Accountant of repute. A representative of the Medical Council of India (in short "MCI") or the All India Council for Technical Education (in short "AICTE"), depending on the type of institution, shall also be a member. The Secretary of the State Government in charge of Medical Education or Technical Education, as the case may be, shall be a member and Secretary of the Committee. The Committee should be free to nominate/co-opt another independent person of repute, so that the total number of members of the Committee shall not exceed five. Each educational institute must place before this Committee, well in advance of the academic year, its proposed fee structure. Along with the proposed fee structure all relevant documents and books of accounts must also be produced before the Committee for their scrutiny. 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. Once fees are fixed by the Committee, the institute cannot charge either directly or indirectly any other amount over and above the amount fixed as fees. If any other amount is charged, under any other head or guise e.g. donations, the same would amount to charging of capitation fee. The Governments/appropriate authorities should consider framing appropriate regulations, if not already framed, whereunder if it is found that an institution is charging capitation fees or profiteering that institution can be appropriately penalised and also face the prospect of losing its recognition/affiliation. (para 7)

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 other member, to be nominated by the Judge, would be a doctor or an engineer of eminence (depending on whether the institution is medical or engineering/technical). The Secretary of the State in charge of Medical or Technical Education, as the case may be, shall also be a member and act as the Secretary of the Committee. The Committee will be free to nominate/co-opt an independent person of repute in the field of education as well as one of the Vice-Chancellors of the University in that State so that the total number of persons on the Committee do not exceed five. 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 powers 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. Before exempting any institute or varying in percentage of quota fixed by the State, the State Government must be heard before the Committee. It is clarified that different percentage of quota for students to be admitted by the management in each minority or non-minority unaided professional college(s) shall be separately fixed on the basis of their need by the respective State Governments and in case of any dispute as regards fixation of percentage of quota, it will be open to the management to approach the Committee. 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. (para 19)"

Sinha, J. has not specifically spoken of the Committees. Nevertheless he made a reference to these Committees in his opinion and thus impliedly recorded his concurrence with the constitution of these Committees.

Vide para 20, the Constitution Bench has made it clear that the setting up of two sets of Committees in the States has been directed in exercise of the power conferred on this Court by Article 142 of the Constitution and such Committees "shall remain in force till appropriate legislation is enacted by

Parliament". Although the term 'permanent' has been used, but it appears to us that these Committees are intended to be transitory in nature.

Reference for constituting a Bench of a coram higher than Constitution Bench

These matters have been directed to be placed for hearing before a Bench of seven Judges under Orders of the Chief Justice of India pursuant to Order dated July 15, 2004 in P.A. Inamdar and Ors. v. State of Maharashtra and Ors., (2004) 8 SCC 139 and Order dated July 29, 2004 in Pushpagiri Medical Society v. State of Kerala and Ors., (2004) 8 SCC 135. The aggrieved persons before us are again classifiable in one class, that is, unaided minority and non-minority institutions imparting professional education. The issues arising for decision before us are only three:
(i) the fixation of 'quota' of admissions/students in respect of unaided professional institutions;

(ii) the holding of examinations for admissions to such colleges, that is, who will hold the entrance tests; and

(iii) the fee structure.

The questions spelled out by Orders of Reference

In the light of the two orders of reference, referred to hereinabove, we propose to confine our discussion to the questions set out hereunder which, according to us, arise for decision:-

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

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

(3) Whether Islamic Academy could have issued 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).

IV

Submissions made

A number of learned counsel addressed the Court at the time of hearing raising very many issues and canvassing different view-points of law referable to those issues. We propose to place on record, as briefly as we can, the principal submissions made confined to the issues arising for decision before us.

The arguments on behalf of the petitioners were led by senior counsel Shri Harish Salve. Extensively reading various relevant paragraphs and observations in different opinions in Pai Foundation, learned counsel contends that the directions for setting up permanent committees for regulating admissions and fixing fee structure in unaided minority and non-minority institutions issued in the case of Islamic Academy are contrary to the ratio of judgment in Pai Foundation. According to learned counsel, the directions clearly run counter to all earlier Constitution Bench decisions of this Court in St. Stephen's, St. Xavier's and Kerala Education Bill.

It is argued that in the judgment of the eleven judges in Pai Foundation which deals with several diverse issues of considerable complexity, every observation has to be understood in its context. Paragraph 68 in Pai Foundation has wrongly been read as the ratio of the judgement by the Bench of five judges in the case of Islamic Academy. It is submitted that paragraph 68 in the majority opinion in Pai Foundation has to be read and understood in the context of the constitutional interpretation placed on Articles 29 & 30 of the Constitution. Reading thus, the directions for setting up permanent committees, for fixing quota and fee structure seriously impinge on the constitutional guarantee of autonomy to minority institutions under Article 30 and to unaided non-minority institutions under Article 19(1)(g). It is submitted that taking over the right to regulate admission and fee structure of unaided professional institutions is not a 'reasonable restriction' within the meaning of Article 19(6) of the Constitution. Such restriction is virtual negation of the constitutional protection of autonomy to minorities in running educational institutions 'of their choice' as provided in Article 30 of the Constitution.

Elaborating his legal propositions, learned senior counsel Shri Salve argued that establishing and running an educational institution is a guaranteed fundamental right of 'occupation' under Article 19(1)(g) of the Constitution. Article 19(6) permits State to make regulations and place reasonable restrictions in public interest upon the rights enjoyed by citizens under Article 19(1)(g) of the Constitution. Any imposition of a system of selection of students for admission would be unreasonable if it deprives the private unaided institutions of the right of rational selection which it has devised for itself. Subject to the minimum qualifications that may be prescribed and to some system of computing the equivalence between different kinds of qualifications like a common entrance test, it can evolve a system of selection involving both written and oral tests based on principle of fairness. Reference is made to paragraph 40 of the judgment in Pai Foundation.

It is submitted that the State can prescribe minimum qualifications and may prescribe systems of computing equivalence in ascertaining merit; however, the right of rational selection, which would necessarily involve the right to decide upon the method by which a particular institution computes such equivalence, is protected by Article 19 and infringement of this right constitutes an unreasonable encroachment upon the constitutionally guaranteed autonomy of such institutions.

It is further argued that where States take over the right of the institution to grant admission and/or to fix the fees, it constitutes nationalization of educational institutions. Such nationalization of education is an unreasonable restriction on the right conferred under Article 19. Reliance is placed on paragraph 38 of the judgment in Pai Foundation.

Learned counsel further argues that schemes framed relating to grant of admission and fixing of fees in Unni Krishnan has been held to be unconstitutional by the 11-Judge Bench in Pai Foundation. [Reference is made to paragraph 45 of the judgment in Pai Foundation] It is submitted that the directions to set up committees for regulation of admission and fee structure in Islamic Academy virtually do the same exercise as was done in Unni Krishnan and disapproved in the larger Bench decision in Pai Foundation. The submission in substance made is that Unni Krishnan was disapproved in Pai Foundation and has wrongly been re-introduced in Islamic Academy.

It is argued that State necessity cannot be a ground to curtail the right of a citizen conferred under Article 19(1)(g) of the Constitution. The Constitution casts a duty upon the States to provide educational facilities. The State is obliged to carry out this duty from revenue raised by the State. The shortfall in the efforts of the State is met by the private enterprise, that however, does not entitle the State to nationalize, whether in the whole or in part, such private enterprise. This, it is submitted, is the true ratio of the Pai Foundation in so far as Article 19 of the Constitution is concerned.

It is next argued that as held in St. Xavier's and re-affirmed in Pai Foundation the right to establish and administer educational institutions by minorities under Article 30 of the Constitution is not an absolute right meaning thereby that it is subject to such regulations that satisfy a dual test that is : the test of 'reasonableness' and 'any regulation regulating the educational character of the institutions so that it is conducive to making the institution an effective vehicle of education for the minority community and for the others who resort to it'. Any regulation which impinges upon the minority character of the institutions is constitutionally impermissible. It is submitted that between the right of minorities to establish and administer the educational institutions and the right of the State to regulate educational activities for maintaining standard of education, a balance has to be struck. The regulation in relation to recognition/affiliation operates in the area of standard of excellence and are unquestionable if they do not seriously curtail or destroy the right of minorities to administer their educational institutions. Only in maintaining standards of education, State can insist by framing regulations that they be followed but in all other areas the rights of minority must be protected. It is conceded that mal-administration is not protected by Article 30 of the Constitution. Similarly, secular laws with secular object that do not directly impinge upon the right of minority

institutions and operate generally upon all citizens do not impinge upon Article 30 of the Constitution. This has been the constitutional interpretation of Article 30 not because Article 30 admits no exception like Article 19(6) but because the right conferred under Article 30 does not extend to these areas. The laws that serve national interest do not impinge upon Article 30.

Learned counsel in elaborating his argument tried to make a distinction between the rights of aided institutions and unaided institutions. Article 29(2) places a limitation on the right of an aided institution by providing that if State aid is obtained, 'no citizen shall be denied admission on grounds only of religion, race, caste, language or any of them'. It is submitted that as a necessary corollary, no such limitation can be placed while regulating admission in an unaided minority institution which may prefer to admit students of minority community. So far as unaided minority educational institutions are concerned, the submission made is that government has no right or power, much less duty, to decide as to which method of selection of students is to be adopted by minority institutions. The role of the government is confined to ensuring that there is no mal-administration in the name of selection of students or in the fixation of fees. No doubt, the State is under a duty to prevent mal-administration, that is to control charging of capitation fees for the seats regardless of merit and commercializing education resulting in exploitation of students, but to prevent mal-administration of the above nature or on the ground that there is likelihood of such mal-administration, the State cannot take over the administration of the institutions themselves into its own hands. The likelihood of an abuse of a constitutional right cannot ever furnish justification for a denial of that right. An apprehension that a citizen may abuse his liberty does not provide justification for imposing restraints on the liberty of citizens. Similarly, the apprehension that the minorities may abuse their educational rights under Article 30 of the Constitution cannot constitute a valid basis for the State to take over those rights.

Learned senior counsel Shri Ashok Desai appearing on behalf of unaided Karnataka Private Medical Colleges (through its Association) of both categories of minority and non-minority has questioned the correctness of the directions in the case of Islamic Academy for setting up permanent committees for fixation of quota and determination of fees. According to him, as held in Pai Foundation, in the name of controlling capitation, there cannot be indirect nationalization and complete State control of unaided professional institutes. In the case of Islamic Academy, the ratio of Pai Foundation that autonomy of unaided non-minority institutions is an important facet of their right under Article 19(1)(g) and in case of minority under Article 19(1)(g) read with Article 30 of the Constitution has been ignored.

On behalf of unaided private professional colleges, learned counsel further submitted that there are many private educational institutes which have been set up by people belonging to a region or a community or a class in order to promote their own groups. As long as these groups form an unaided minority institution, they are entitled to have transparent criteria to admit students belonging to their group. For instance, scheduled castes and scheduled tribes have started Ambedkar Medical College; Lingayaths have started KLE Medical College in Belgaun and people belonging to Vokalliga community have started Kempegowda Medical College. Similarly, Edava community in Kerala has started its own colleges. Sugar cooperatives in Maharashtra have started their own colleges.

Learned counsel also highlighted an instance of a college opened in Tamil Nadu by State Transport Workers for the education of their children on the engineering side. He submitted that if the State is allowed to interfere in the admission procedure in these private institutions set up with the object of providing educational facilities to their own group, community or poorer sections, the very purpose and object of setting up a private medical college by a group or community for their own people would be defeated.

According to learned counsel, the State control in unaided private professional colleges can only be to the extent of monitoring or overseeing its working so that they do not indulge in profiteering by charging capitation fees and sacrifice merit. According to the learned counsel, in the directions contained in Islamic Academy, the main ratio of Pai Foundation that the unaided institutions should have autonomy in the matter of admission and fees structure has been totally forgotten. The learned counsel raised very serious objections to the manner in which the various permanent committees set up in several States on the directions of Islamic Academy are conducting themselves and forcing their decisions on private institutions. The proposed fee structure is required to be placed before the Committee in advance of the academic year by the institute. It is the Committee which has to decide whether the fees proposed by the institute are justified and do not amount to profiteering or charging of capitation fees. The Committee has been given liberty to approve the fee structure of the institute or to propose a different fee structure. The fee fixed by the Committee is binding for a period of three years and at the end of the said period the institute would be at liberty to apply for revision. Learned counsel gave in writing certain illustrations of decisions of the Fee Committee in few unaided colleges in the State of Karnataka and pointed out that without proper financial expertise and without studying the relevant documents and accounts, the Committee determined the fee structure by only taking into account the affordability of the parents of the students with no regard whatsoever to the viability of the institute on the basis of finances so generated. It is argued as to why private professional institutes should not be allowed to modernize its facilities and provide better professional education than government institutes. It is pointed out that in the case of non-minority unaided M.S. Ramaiaya Medical College, Bangalore, the Fee Committee initially fixed annual fee at Rs.2.55 lacs for MBBS course as against the justification shown by the institute for demanding Rs. 3.90 lacs. The decision of the Fee Committee led to the filing of writ petition by the institute in the High Court of Karnataka and agitation and demonstrations by the students' union. The Committee under the pressure of the student community reduced the annual fee to Rs.1.6 lacs which was re-affirmed after the High Court directed that the management of the unaided college should be heard before reducing the annual fee.

Thus the learned counsel on behalf of the Karnataka Private Medical College Association questioned the correctness of the directions of the Bench in Islamic Academy. It is submitted that as decided in Pai Foundation by a larger Bench, the essence of private educational institutions is the autonomy that the institution must have in its management and administration. The 'right to establish and administer' particularly comprises the right a) to admit students and b) to set up reasonable fee structure. The autonomy of the institution, therefore, predicates that all seats would be filled by the management and there can be no reservations or quotas in favour of the State. In Pai

Foundation, the only observations made were that some colleges may be required to admit a small percentage of students belonging to weaker sections of the society by granting them freeships or scholarships. It is conceded that autonomy of a private educational institution to admit students of its choice does not mean that there can be no insistence on transparency in the admission procedure and on merit being the criterion for admission. It is submitted that autonomy of a private educational institution could mean that they can, according to the objects and purposes of their institutions, give preference to a particular class or group of students like SC/ST in Ambedkar Medical College, students from backward area in Bijapur college and transport employees' children in Madras State Corporation Employees' College or the children of employees of Larson & Turbo Company in a college established by that company. The right to charge fees so as to run the college and to generate sufficient funds for its betterment and growth cannot be controlled by the State. That would seriously encroach upon the autonomy of the private unaided institution. It is submitted, by quoting Dr. S. Radhakrishnan, the then Chairman of the University Education Commission, that interests of democracy lie with the resistance of the trend towards governmental domination of the educational process. In conclusion, learned counsel representing Association of private unaided colleges in Karnataka submits that the decision in Islamic Academy and the directions made therein go far beyond the law laid down by the larger Bench in Pai Foundation. The Bench in Islamic Academy virtually reviewed the larger Bench decision in Pai Foundation in guise of implementation of the said decision and on the basis of later developments. In Islamic Academy, the Bench accepted that there could be no rigid fee structure fixed by the government for private institutions. An institute should have the freedom to fix its own fee structure for day-to-day running of the institute and to generate funds for its further growth. Only capitation and diversion of profits and surplus of the institute to any other business or enterprise was prohibited. It is submitted that Islamic Academy contrary to the legal position explained in Pai Foundation, could not set up in each State permanent committees headed by retired High Court Judges with the power to decide on the justification of the fee proposed by the institute and propose any other fees. It could also not make the fee fixed by the Committee binding for a period of three years. Learned counsel submits that once the college infrastructure and hospital facilities attached to the medical college have been approved by the Medical Counsel of India in accordance with its regulations, the total expenses of college and hospital could be taken into account by the institute to decide upon its own fee structure. Learned counsel, in criticizing the directions in Islamic Academy, submitted that although the scheme formulated in Unni Krishnan has been expressly overruled in Pai Foundation on the ground that it virtually nationalized education and resulted in surrendering total process of selection to the State, the Bench in Islamic Academy's case, in an attempt to take up preventive measures to ensure merit and check profiteering in private unaided professional institutions, cannot re-introduce quota system for the management and the State and thus infringe upon the autonomy of the institute. Such an attempt, learned counsel contends, would be unconstitutional and violative of Article 19(1)(g) of the Constitution in the case of non-minority unaided institutions and also violative of Article 30 in the case of minority unaided professional institutions. Learned counsel argued that constitutionally, as held in Pai Foundation, it is not permissible for the State to impose a Government quota, its own reservation policy, a lower scale of fees etc. on a private unaided non-

minority and unaided minority professional institutions, only by taking into consideration the interests of students. In the State of Karnataka for the academic year 2004-2005, by illustration, it is shown that 75% of the intake capacity is the Government quota in which are included 5% quota for sports, defence and NCC; 50% quota for Scheduled Castes/Economically backward classes/Scheduled Tribes/OBC, there is total 55% reservation quota in 75% of the government quota. The remaining 25% quota left for the management is also to be taken over by the Government insisting on admitting students from the select list prepared on the common entrance test conducted by the State.

Learned senior counsel Shri F. S. Nariman also supported the submissions made by other counsel on behalf of the unaided professional institutions and added that the observations of the Bench in Islamic Academy clearly go far beyond anything said by eleven judges in Pai Foundation. It is submitted that the question of quota 50:50 for State and management as referred to in St. Stephen's was in respect of aided minority educational institutions and in Pai Foundation, the Bench never suggested fixation of quota for State and management in case of unaided professional institutions. Learned senior counsel particularly pointed out that in Islamic Academy, the observations that different percentage of quota for students to be admitted by the management in each minority and non-minority unaided professional institutions shall be separately fixed on the basis of their need by the respective State Government, was a totally new direction, nowhere to be found or supported by any of the observations in any of the opinions of the 11-Judge Bench in Pai Foundation. With regard to the most controversial observations contained in paragraph 68 of the opinion prepared by Justice Kirpal (the then CJI) in Pai Foundation, learned counsel contended that the decision in Unni Krishnan having been overruled by 11-Judge Bench in Pai Foundation, the observations in paragraph 68 which are more in tune with Unni Krishnan should not be read as the ratio of the case. Senior counsel was also critical of all the observations in fixing quota for the State in unaided institutions on the basis of local needs and not the needs of the community for which the institution was set up. Learned counsel also criticized the directions in Islamic Academy which according to him are contrary to the findings in Pai Foundation that certain unaided private educational institutions which had been adopting its own admission procedure for the last 25 years be allowed to continue to do so. It is submitted that as a part of autonomy of the private unaided institution, the quantum of fees to be charged must be left to the institution and except for checking profiteering and capitation fees, the State can have no say in fixation of fees. The scheme of setting up permanent committees for even unaided minority and non-minority institutions was not at all envisaged in Pai Foundation. The Islamic Academy which was the case before a smaller Bench could not do anything beyond and contrary to what has been stated in Pai Foundation.

Learned senior counsel Shri R.F. Nariman in supporting the argument advanced against the directions in Islamic Academy submitted that any interference with the autonomy of the institution, other than to prevent mal-administration, would not be saved by Article 19(6) of the Constitution. The concept of administration includes choice in admitting students and fixing a reasonable fee structure. In the matter of admission, if objective criteria are adopted so as to reflect the merit, it would be unexceptionable. So far as fee structure is concerned, no institution can be allowed to charge capitation fees which only

means something taken over and above what the institution needs by way of revenue and capital expenditure plus a reasonable surplus. Once Unni Krishnan was overruled, private education cannot be allowed to be nationalized. It is submitted that it may be possible for the State to scrutinize the expenditure of revenue and capital expenditure of an aided and unaided institution to ensure good administration but the State cannot devise its own admission procedure and determine in advance a fee structure for the unaided private institutions. On the question of deducing ratio in Pai Foundation, learned counsel referred to Halsbury Laws of England Vol. 37 page 378 in which the meaning of ratio decidendi has been explained. It is submitted that it is only the essence of the reason or principle upon which the question before a court has been decided which is alone binding as a precedent. It is dangerous to take one or two observations out of a long judgment and to treat them as if they give the ratio decidendi of the case.

Dr. Rajiv Dhawan, learned senior counsel in assailing directions issued in Islamic Academy for setting up permanent committees to fix quota and fee structure highlighted that the State of Maharashtra has encroached upon the rights of unaided institutions by directing in one of its Government Memoranda dated 13.02.2003 that even in the quota of seats fixed for management, the unaided non-minority institutions should implement the rule of reservation (communal reservation) of the State Government.

Learned senior counsel contends that the net result of such illegal directions is that the reservation policy for schedule castes, schedule tribes and OBCs is to be applied not only for 50% seats of government quota but also for the remaining 50% of management quota of unaided non-minority institutions. Virtually, the management of non-aided institutions has been completely taken over by the state and as a result of communal reservations, the quota of seats fixed for government and quota fixed for the management may be filled by granting admissions to students of non-minority communities .

Learned senior counsel contends that in Pai Foundation, maximum autonomy is conceded in favour of unaided institutions. The only insistence is on maintenance of transparency in method of admission and fixation of such fee structure that does not permit charging of capitation fee. Interpreting provisions of Article 19(6) and Article 30 it is contended that constitutional limitation necessarily would vary in imposing reasonable restriction where the institution is unaided or aided.

On the issue of constitutional protection to the unaided minority institutions, the contention advanced that general restrictions permissible under Article 19(6) can also be applied to unaided minority institutions, it is submitted, is misconceived. The submission is that education is a recognized head of charity. The object of establishing educational institution is not to make profit. Imparting education is essentially charitable in nature. The charitable nature of the occupation of establishing and running an educational institution has been recognized in Pai Foundation. Therefore, all restrictions, which are permissible under Article 19(6) in case of other kind of professions and occupations, cannot apply to educational activities. It is submitted that restrictions imposed should satisfy the requirements of Article 30 and not only of Article 19(6).

In Pai Foundation, for determining linguistic and religious

minorities, the unit to be taken is State. Therefore, when Tamilians, who are in majority in Tamil Nadu, establish an institution for Tamil students in Karnataka, it would be a minority institution in Karnataka. What would be the rights of such an institution of linguistic minority has not been answered either in Pai Foundation or in Islamic Academy. Therefore, this Bench should decide what are the rights of such cross-border institutions.

In short, the submission made by Sr. Counsel Dr. Rajiv Dhawan is that there is nothing in Pai Foundation, which permits fixation of quotas for government seats, fixation of fee structure by the State, imposition of its reservation policy and imposition of candidates on the basis of common entrance test conducted by the State. In Pai Foundation, the State can have some controlling influence on unaided institutions for the purpose of ensuring transparency in admissions and checking the collection of capitation fee. In Pai Foundation, no preemptive action by setting up permanent committees by the State was envisaged or even indirectly approved.

The decision in Islamic Academy, it is submitted, is contrary to the decision by the larger Bench in Pai Foundation, and deserves therefore to be so declared by this Bench.

Learned senior counsel Shri U.U. Lalit appears for the sole Dental College established by Muslims in the State of Maharashtra. Apart from supporting the contention advanced by other counsel against the scheme of committees evolved in Islamic Academy, learned counsel submitted that the judgment of the Bombay High Court against which they have filed an appeal before this court has resulted in a situation where affluent students are getting admission at lesser fee and poorer students are kept out of college. It was submitted that the petitioner institute being the sole institute set up for Muslim community, their desire to cater to the educational needs of Muslim students from all over cannot be discouraged. Objecting to the fee structure prescribed by the committees in Maharashtra, the suggestion made on behalf of the institute is as under :-

(a) 25% students will be charged five times of the average fee, which was in vogue before TMA Pai’s judgment.

(b) 50% students will be charged average fee.

(c) Remaining 25% will be charged 1/4th of the average fee.

It is submitted that in the above proposed fee structure, meritorious students coming from all sections of society will be able to take admissions. At the same time, the educational institutions will be able to recover the amount required for running the educational institution in the best possible manner. It is, therefore, prayed that Bombay High Court judgment dated 23.08.2003 prescribing uniform fee structure for all the students be set aside and minority educational institutions be allowed in the exercise of their fundamental right, to prescribe fee under a three-tier system subject to the rider of non-profiteering and not charging capitation fee.

In reply, on behalf of the respondents, senior counsel, Shri K.K. Venugopal, who appeared for the States of Kerala led the

arguments. It may be noted at this stage that after the decisions in Pai Foundation and Islamic Academy, in the States of Kerala, Karnataka, Maharashtra and Tamil Nadu, their respective legislatures have passed Acts regulating admissions and charging of fee in both aided and unaided minority and non-minority private educational institutions engaged in imparting education in professional, medical, engineering and allied courses.

On behalf of the State of Kerala, it is pointed out that only 25% seats in private professional colleges have been reserved to be filled on the basis of central entrance test and remaining 75% seats are to be filled by the management. It is submitted that the group of paragraphs starting with 67 and ending with 70 in the majority opinion in Pai Foundation carries the title "Private Unaided Professional Colleges." This heading covers both unaided minority and non-minority professional colleges. Since paragraph 68 in the majority opinion in Pai Foundation has been differently understood by the High Court of Karnataka and Kerala, an occasion has arisen to resolve the controversy by a Bench of the present combination of seven judges.

To justify fixation of quota for seat sharing between State and the private management and fixing a reasonable fee structure to avoid profiteering and capitation, the learned counsel highlighted certain illicit practices, which are being resorted to, by the private institutions to exploit the student community. It is submitted both the judgments in Pai Foundation and Islamic Academy, profiteering, commercialization of education and the collection of capitation fee have been condemned. This court had expressly held that it would be open to the government to make regulations for the purpose of preventing commercialization of professional education. It is on the line suggested by this court that the Government of Kerala had made regulations both for the purpose of admissions as well as for fixing reasonable fee which will cover not only the expenditure incurred by the institution but also give them a reasonable revenue surplus for further growth and betterment of the institution.

The High Court of Kerala by its judgment of 23.08.2003 has fixed rupees 1.50 lacs provisionally per annum as the fee. The Government has fixed 1.76 lacs. What is being disclosed by Pushpgiri Medical College itself is that they had collected rupees 4.38 lacs and rupees 22 lacs from different students. The explanation given is that these collections are for the whole period of five years to prevent the students from leaving the college mid-way. This explanation on the face of it is disingenuous as rupees 22 lacs was not collected uniformly from all the students. Despite the students leaving the course mid-way, the seats would still be filled. It is due to this menace and evil practice of exploiting parents and students that a Committee was required to be set up for restricting admissions in proportion to the need of the peculiar character of the institution and to check profiteering.

It is submitted that if the scheme as evolved in Islamic Academy of setting up of permanent Committees is not allowed, education which is already commercialized to some extent would be wholly inaccessible to students coming from middle classes, lower-middle classes and poor sections of the society. To provide access to professional education even to weaker sections of the society in fifty percent quota of seats to be filled by the government, the reservation policy of the government has been applied. The fifty-fifty percent quota between government and management fixed by the government has been changed to

twenty five-seventy five per cent by the court. Similarly, the court has struck down Regulation 11 framed by the State on the ground that the State cannot foist fee of students on the institution and it would be left to the management to make provisions for poorer sections of the society through free-ships or scholarships.

In the above-mentioned background, learned counsel Shri Venugopal submits that this Bench is not considering the correctness of judgment in Islamic Academy. It will not and cannot go into the question of correctness of judgment in Pai Foundation which is of a larger Bench. This Bench has a limited jurisdiction to examine whether the 5-Judge Bench decision in Islamic Academy is in any manner inconsistent with 11-Judge Bench judgment in Pai Foundation. It is submitted that if there are certain inherent inconsistencies between various paragraphs particularly 59 and 68 of the judgment in Pai Foundation, they have to be resolved and that was exactly what was done by the five judges in Islamic Academy.

In Pai Foundation, observation in paragraph 68 under the heading "Private Unaided Professional Colleges" read with para 69 indicates appropriate machinery to be evolved to regulate admissions in both categories of private institutions to check exploiters who are charging capitation fee.

It is submitted that if the attempt by the Bench in Islamic Academy to resolve the apparent inconsistency in the judgment of Pai Foundation, indicated a reasonable and plausible interpretation of the 11-Judge Bench judgment in Pai Foundation, this court should refrain from substituting another interpretation.

It is for the first time in Pai Foundation that the question of application of Article 30 to minority professional colleges arose. All earlier judgments of this court were only concerning education in schools and colleges other than those imparting professional education. For the first time in Pai Foundation, the court held that running an educational institution is an 'occupation' and Article 19(1) (g) guarantees it as a fundamental right.

It is submitted that regulation of non-minority unaided professional institution is permissible under Article 19(6) of the Constitution to prevent profiteering, levy of capitation fee and selection of non-meritorious candidates. Such regulation also does not violate right of minority professional institutions under Article 30, which this Court has repeatedly held, is not an absolute right but is merely a protection extended to minorities against oppression by the majority.

The issue relating to reservation of seats for schedule castes, schedule tribes or OBCs, either in management quota or in Government quota did not come up for consideration either in Pai Foundation or Islamic Academy. This has to be separately dealt with by the present Bench

Similarly, it is submitted that right of minority institutions to admit students from all over the country, irrespective of their religion and community and also from abroad such as NRIs never arose directly for consideration either in Pai Foundation or Islamic Academy. In this respect, it is submitted that the status of minority both religious and linguistic is to be determined at the state level. The minority institutions cannot claim a right to cater to the educational needs of their

community from all over the country and even from abroad.

In paragraph 68 of the judgment in Pai Foundation the use of the phrase 'certain percentage based on local needs' and further phrase 'different percentages can be fixed' for minority unaided and non-minority unaided professional colleges' clearly convey that quotas can be fixed based on local needs for management and for the Government. Meritorious students from weaker sections are not to be sidelined from higher and professional education. It is argued that the phrase 'local need' as used in paragraph 68 in the judgment of Pai Foundation cannot be read to mean the needs of the institution concerned. So far as the selection based on merit is concerned, common entrance test has been suggested both for aided and non-aided professional colleges. When there is no common entrance test, merit becomes the casualty and the rich and the affluent corner the seats.

So far as the right to fix a fee structure for unaided minority or non-minority colleges or institutes is concerned, the argument that pre-fixation of fee is a serious encroachment on the rights of minority and non-minority, it is submitted, is not valid as full discretion is given to the management in fixing their fee structure. However, they would not be allowed to fix such high fee as would deny many meritorious students a chance of admission only because they come from economically weaker sections. It would be of no consolation to them to find that after admissions are over and classes have started, the fee has been lowered by the monitoring committee. If the committee is allowed to scrutinize the justification of fee fixation after the admissions and the fee is lowered, it would not be possible for the meritorious students to again seek admission. Through the Committees set up in Islamic Academy, the fee structure would be known before hand and would serve the interest of the institution as also the students seeking admission. The Committee has to fix fee for each college depending upon its peculiar conditions and its assets and availability of funds. Coming to the question of cross subsidy, it is submitted that in Pai Foundation, cross-subsidizing the weaker sections by the more affluent ones has not been held to be impermissible. The Bench in Pai Foundation overruled the judgment in Unni Krishnan. The latter provided for "marginally less merited rural or poor students bearing the burden of rich and urban students." The learned counsel suggests that solution can be to set apart fifteen percent of total seats in a local college to be filled by NRI/ person of independent origin/ foreign students who would volunteer to fill up the allotted seats on the management quota but on inter se merit. Each NRI student would subsidize two other students belonging to the economically and socially weaker sections based on an annual income of say less than rupees 2.5 lacs. This would cater to the financial needs of at least 30 out of 50 students selected on merit forming part of the Government quota and this would be a constitutionally permissible solution.

To streamline and further improve the admission procedure and fixation of fee structure, learned counsel has made the following proposals in writing submitting that they may be of practical value to the Committees directed to be set up by Islamic Academy:-

A. ADMISSION:

Six months prior to the commencement of the academic year, the Government would fix the percentage of students to be admitted by a minority

(religious/linguistic) professional college (other than engineering), taking into account the local needs of the State, the region as well as that of the minority-community. It would be a huge and cumbersome exercise in practice, to fix a percentage for each one of the institutions separately and it would be a pragmatic approach to have a fixed percentage for all the minority institutions which is fair and reasonable. A practical approach to the problem would require a very definite percentage to be fixed for minority institutions, say, 50% so that even if candidates of their choice, belonging to the minority institutions, are only 25% they would still have the right to select non-minority students to make up the 50%, of course, from the CET held by the Government.

1. The CET held by Government would ensure that the various devices adopted by professional colleges to secretly demand capitation fees and take the same in black money, thus resulting in merit being the casualty, would not take place. No prejudice will be caused to the management of the professional colleges as they could select the minority students based on inter se merit in the CET held by the Government.

2. There would equally be no disadvantage to any particular section or to Government if the same 50% rule is applied even to unaided non-minority professional colleges as well.

3. The result of following this procedure is that a consortium holding the tests for admissions is done away with and a monitoring committee, preferably headed by a retired High Court or Supreme Court judge would ensure fairness and transparency both in the minority and non-minority professional institutions.

4. .....

5. .....

B. FEES:

The Committee suggested by Islamic Academy and the procedure mentioned therein, appears to be the only safe method of ensuring that extortionate fees are not charged by the medical colleges. At the same time, it would be wrong to deny expenditure which the institution undertakes for ensuring excellence in education. Equally, a reasonable surplus should be permitted so that the fees charged cover the entire revenue expenditure and in addition leaves a reasonable surplus for future expansion. This alone would prevent the clandestine collection of capitation fees and would result in entrepreneurs investing in new medical colleges.

The Committee suggested by Islamic Academy appears to be the ideal one consisting of a chartered accountant, a representative of the MCI or AICTE as the case may be, with a retired judge of the High Court or the Supreme Court as the head.

The fee is to be fixed on the proposal of the

institution supported by documents and the procedure of fee finalization should commence at least 6 months in advance of the commencement of the academic year.

These proposals should all be by way of an interim arrangement as held by Islamic Academy in para 20 with the Parliament bringing in a law, as suggested by Islamic Academy without dragging its feet any longer."

With regard to the ambit of the constitutional guarantee of protection of educational rights of minorities under Article 30, learned counsel submits that both religious and linguistic minority, as held in Pai Foundation, are to be determined at the State level. On this understanding of the concept of 'minority', Article 30 has to be harmoniously construed with Article 19(1)(g) and in the light of the Directive Principles of the State Policy contained in the Articles 38, 41 and 46. Rights of minorities cannot be placed higher than the general welfare of the students and their right to take up professional education on the basis of their merit.

The real purpose of Article 30 is to prevent discrimination against members of the minority community and to place them on an equal footing with non-minority. Reverse discrimination was not the intention of Article 30. If running of educational institutions cannot be said to be at a higher plane than the right to carry on any other business, reasonable restriction similar to those placed on the right to carry on business can be placed on educational institutions conducting professional courses. For the purpose of these restrictions both minorities and non-minorities can be treated at par and there would not be any violation of Article 30(1), which guarantees only protection against oppression and discrimination of the minority from the majority. Activities of education being essentially charitable in nature, the educational institutions both of non-minority and minority character can be regulated and controlled so that they do not indulge in selling seats of learning to make money. They can be allowed to generate such funds as would be reasonably required to run the institute and for its further growth.

On behalf of the State of Karnataka, learned senior counsel Shri T.R. Andhyarujuna supported the judgment in Islamic Academy of setting up permanent Committees for regulating admission and fee structure. Learned senior counsel submitted that relevant parts of paragraphs 58, 59 and 68 and answer to question no. 4 in Pai Foundation have to be read and reconciled. They cannot be ignored simply as obiter. A combined reading of the relevant paragraphs and the answer to question no.4 makes it clear that regulations can be made by the State for admission in minority and non-minority private educational institutions and more so in professional institutions. The merit for admission to professional courses is generally determined by Government agencies. In Pai Foundation the reservation on certain percentage of seats by the Government to be filled up by counseling by state agency, is held permissible.

With regard to the quota fixation, learned counsel submits that paragraph 68 in Pai Foundation allows reservation of quota for management and for the Government for available seats. It is submitted that the educational institutions cannot merely read the answer to question no.4 given by judgment in Pai Foundation and ignore the other observations in other

paragraphs of the judgment.

So far as the case of minority and non-minority unaided institutions is concerned, learned counsel submits that the balancing act has been performed in the judgment of Pai Foundation by regulating the economy of educational institutions moderated by necessary State legislation. Observation in paragraph 68 in Pai Foundation does not amount to permitting nationalization or takeover of the private institutions which was the main feature found foul in the decision in Unni Krishnan and was consequently overruled. The observation in Pai Foundation in paragraph 68 strikes the balance between the academy and education. To read paragraph 68 as merely giving an instance would be to ignore the concern of the Bench in Pai Foundation of providing reservation to poorer or backward sections of society even in private institutions. The description of percentage of reservation in paragraph 68 is different from reservation policy of the State for State institutions and in State quota.

It is submitted that the reservation spoken of in paragraph 68 of Pai Foundation is to cater to the needs of poorer and weaker sections and also other students depending upon the local needs.

So far as the regulation of fee structure is concerned, it is submitted that in paragraph 69 in Pai Foundation there is a mention of "appropriate machinery to be devised by the State or University to ensure that no capitation fee is charged and profiteering is checked." The judgment in Islamic Academy merely implements the legal position explained by Pai Foundation by providing a fee determination committee. In reply to the argument that post-fixation audit may be permitted to check profiteering and capitation, the learned counsel answers that if the role of the Committee is limited to supervisory post fixation audit, it would amount to denying credible restriction to the charging of capitation fee. It is chimerical to suggest that the student should first pay the exorbitant fee fixed by the institution and later on complain about it to the post audit machinery to recover the excess through court of law. The controlling of the fee fixing machinery is necessarily to be done before it is charged otherwise it is meaningless to the benefit of the students for whom it is suggested in paragraph 69. The general principle for scrutinizing the fee structure is two-fold; (1) that education is a charity, (2) that educational institutions cannot charge such fee as is not required for the purpose of fulfilling that object which means cost plus reasonable surplus for expansion and growth of the institution. These are the parameters before the Committee whose decisions, in any case, are subject to judicial review.

So far as the admissions based on common entrance test are concerned, it is submitted that paragraphs 58 and 59 of Pai Foundation permit regulations to be framed for admission in professional institutions by State agency to ensure admission on merit. In the absence of CET and centralized counseling, private educational institutions would pick and choose candidates ignoring merit, as has been evident from the Karnataka experience. If the private professional educational institutions conceive that merit cannot be ignored in granting admission, direction to make selection based on CET does not in any manner adversely affect the character of the minority institution. The State regulation providing for CET is a reasonable restriction and it will pass the test of Article 19(6) both in respect of aided and unaided non-minority institutions. Private unaided

institutions have also to admit students on the basis of merit in a fair and transparent manner in the interest of student community. Right of private educational institutions to admit students can be regulated. Such regulations if in national and public interest do not in any manner impinge on the right of minority.

Learned counsel points out that so far as the State of Karnataka is concerned, no reservation policy is being insisted upon in the seats or quota given to the management.

Arguments were also advanced supporting the directions in Islamic Academy by learned senior counsel Shri P.P. Rao appearing for the State of Tamil Nadu. It is submitted that already a statement had been made in the High Court that the State of Tamil Nadu would not be insisting on communal reservation based on State policy in the minority institution.

Learned counsel pressed into service Article 51-A(j) providing for Fundamental Duties in the Constitution. It is submitted that fundamental duty is enjoined on citizens to so direct their individual and collective activities that the nation constantly rises to higher levels of endeavour and achievement. This duty implies that the State on its part is to facilitate discharge of duties by the citizen in relation to the professional education. The State is bound to ensure admission to colleges that are made purely on relative merit to be objectively assessed by a responsible agency. The decisions of this court rendered from time to time consistently and unanimously held that regulation could be made for achieving standards of excellence in education. Reliance is placed on Dr. Prithvi v. State of MP (1999) 7 SCC 120 at 153 and 155; Professor Yashpal v. State of Chhattisgarh (2005) 2 SCC 61 at 79 paragraph 90.

V
A few concepts

There are a few concepts which should be very clear in our minds at the very outset, as these are the concepts which flow as undercurrents in the sea of issues surfacing for resolution in all educational cases. These concepts are referable to : (i) What is 'education'? (ii) What is the inter-relationship of Articles 19(1)(g), 29 and 30 of the Constitution? (iii) In the context of minority educational institutions, what difference does it make if they are aided or unaided or if they seek recognition or affiliation or do not do so? (iv) Would it make any difference if the instructions imparted in such educational institutions relate to professional or non-professional courses of study?
Education
'Education' according to Chambers Dictionary is "bringing up or training; strengthening of the powers of body or mind; culture."

In Advanced Law Lexicon (P. Ramanatha Aiyar, 3rd Edition, 2005, Vol.2) 'education' is defined in very wide terms. It is stated : "Education is the bringing up; the process of developing and training the powers and capabilities of human beings. In its broadest sense the word comprehends not merely the instruction received at school, or college but the whole course of training moral, intellectual and physical; is not limited to the ordinary instruction of the child in the pursuits of literature. It also comprehends a proper attention to the moral and religious sentiments of the child. And it is sometimes used as synonymous with 'learning'."

In The Sole Trustee, Lok Shikshana Trust v. C.I.T.,

(1976) 1 SCC 254, the term 'education' was held to mean __ "the systematic instruction, schooling or training given to the young in preparation for the work of life. It also connotes the whole course of scholastic instruction which a person has received\005. What education connotes is the process of training and developing the knowledge, skill, mind and character of students by formal schooling."

In 'India \026 Vision 2020' published by Planning Commission of India, it is stated (at p.250) __ "Education is an important input both for the growth of the society as well as for the individual. Properly planned educational input can contribute to increase in the Gross National Products, cultural richness, build positive attitude towards technology and increase efficiency and effectiveness of the governance. Education opens new horizons for an individual, provides new aspirations and develops new values. It strengthens competencies and develops commitment. Education generates in an individual a critical outlook on social and political realities and sharpens the ability to self-examination, self-monitoring and self-criticism."

"The term 'Knowledge Society', 'Information Society' and 'Learning Society' have now become familiar expressions in the educational parlance, communicating emerging global trends with far-reaching implications for growth and development of any society. These are not to be seen as mere clichi or fads but words that are pregnant with unimaginable potentialities. Information revolution, information technologies and knowledge industries, constitute important dimensions of an information society and contribute effectively to the growth of a knowledge society." (ibid, p.246)

"Alvin Toffler (1980) has advanced the idea that power at the dawn of civilization resided in the 'muscle'. Power then got associated with money and in 20th century it shifted its focus to 'mind'. Thus the shift from physical power to wealth power to mind power is an evolution in the shifting foundations of economy. This shift supports the observation of Francis Bacon who said 'knowledge itself is power'; stressing the same point and upholding the supremacy of mind power, in his characteristic expression, Winston Churchill said, "the Empires of the future shall be empires of the mind". Thus, he corroborated Bacon and professed the emergence of the knowledge society." (ibid, p.247)

Quadri, J. has well put it in his opinion in Pai Foundation (para 287) ___ "Education plays a cardinal role in transforming a society into a civilised nation. It accelerates the progress of the country in every sphere of national activity. No section of the citizens can be ignored or left behind because it would hamper the progress of the country as a whole. It is the duty of the State to do all it could, to educate every section of citizens who need a helping hand in marching ahead along with others".

According to Dr. Zakir Hussain, a great statesman with democratic credentials, a secularist and an educationist, a true democracy is one where each and every citizen is involved in the democratic process and this end cannot be achieved unless we remove the prevailing large-scale illiteracy in our country. Unless universal education is achieved which allows every citizen to participate actively in the processes of democracy, we can never claim to be a true democracy. Dr. Zakir Hussain sought to ensure that the seeds of knowledge were germinated in the minds of as many citizens as possible, with a view to enabling them to perform their assigned roles on the stage of democracy.

[Dr. Zakir Hussain, as quoted by Justice A.M. Ahmadi, the then Chief Justice of India, (1996) 2 SCC (J) 1, at 2-3.]

Under Article 41 of the Constitution, right to education, amongst others, is obligated to be secured by the State by making effective provision therefor. Fundamental duties recognized by Article 51A include, amongst others, (i) to develop the scientific temper, humanism and the spirit of inquiry and reform; and (ii) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement. None can be achieved or ensured except by means of education. It is well accepted by the thinkers, philosophers and academicians that if JUSTICE, LIBERTY, EQUALITY and FRATERNITY, including social, economic and political justice, the golden goals set out in the Preamble to the Constitution of India are to be achieved, the Indian polity has to be educated and educated with excellence. Education is a national wealth which must be distributed equally and widely, as far as possible, in the interest of creating an egalitarian society, to enable the country to rise high and face global competition. 'Tireless striving stretching its arms towards perfection' (to borrow the expression from Rabindranath Tagore) would not be successful unless strengthened by education.

Education is "\005continual 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 in ibid, at p.20)

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 the society. And even though an occupation, it cannot be equated to a trade or a business.

In short, education is national wealth essential for the nation's progress and prosperity.

Articles 19(1)(g), 29(2) and 30(1): inter-relationship between

The right to establish an educational institution, for charity or for profit, being an occupation, is protected by Article 19(1)(g). Notwithstanding the fact that the right of a minority to establish and administer an educational institution would be protected by Article 19(1)(g) yet the Founding Fathers of the Constitution felt the need of enacting Article 30. The reasons are too obvious to require elaboration. Article 30(1) is intended to instill confidence in minorities against any executive or legislative encroachment on their right to establish and administer educational institution of their choice. Article 30(1) though styled as a right, is more in the nature of protection for

minorities. But for Article 30, an educational institution, even though based on religion or language, could have been controlled or regulated by law enacted under Clause (6) of Article 19, and so, Article 30 was enacted as a guarantee to the minorities that so far as the religious or linguistic minorities are concerned, educational institutions of their choice will enjoy protection from such legislation. However, such institutions cannot be discriminated against by the State solely on account of their being minority institutions. The minorities being numerically less qua non-minorities, may not be able to protect their religion or language and such cultural values and their educational institutions will be protected under Article 30, at the stage of law making. However, merely because Article 30(1) has been enacted, minority educational institutions do not become immune from the operation of regulatory measure because the right to administer does not include the right to mal-administer. To what extent the State regulation can go, is the issue. The real purpose sought to be achieved by Article 30 is to give minorities some additional protection. Once aided, the autonomy conferred by the protection of Article 30(1) on the minority educational institution is diluted as provisions of Article 29(2) will be attracted. Certain conditions in the nature of regulations can legitimately accompany the State aid.

As an occupation, right to impart education is a fundamental right under Article 19(1)(g) and, therefore, subject to control by clause (6) of Article 19. This right is available to all citizens without drawing a distinction between minority and non-minority. Such a right is, generally speaking, subject to laws imposing reasonable restrictions in the interest of the general public. In particular, laws may be enacted on the following subjects: (i) the professional or technical qualifications necessary for practicing any profession or carrying on any occupation, trade or business; (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. Care is taken of minorities, religious or linguistic, by protecting their right to establish and administer educational institutions of their choice under Article 30. To some extent, what may be permissible by way of restriction under Article 19(6) may fall foul of Article 30. This is the additional protection which Article 30(1) grants to the minorities.

The employment of expressions 'right to establish and administer' and 'educational institution of their choice' in Article 30(1) gives the right a very wide amplitude. Therefore, a minority educational institution has a right to admit students of its own choice, it can, as a matter of its own freewill, admit students of non-minority community. However, non-minority students cannot be forced upon it. The only restriction on the freewill of the minority educational institution admitting students belonging to non-minority community is, as spelt out by Article 30 itself, that the manner and number of such admissions should not be violative of the minority character of the institution.

Aid and affiliation or recognition, both by State, bring in some amount of regulation as a condition of receiving grant or recognition. The scope of such regulations, as spelt out by 6-Judge Bench decision in Rev. Sidhrajbhai case AIR 1963 SC 540 and 9-Judge Bench case in St. Xavier's must satisfy the following tests: (a) the regulation is reasonable and rational; (b) it is regulative of the essential character of the institution and is conducive to making the institution an effective vehicle of education for the minority community or other persons who

resort to it; (c) it is directed towards maintaining excellence of the education and efficiency of administration so as to prevent it from falling in standards. These tests have met the approval of Pai Foundation. However, Rev. Sidhrajbhai's case and St. Xavier's go on to say that no regulation can be cast in 'the interest of the nation' if it does not serve the interest of the minority as well. This proposition (except when it is read in the light of the opinion of Quadri, J.) stands overruled in Pai Foundation where Kirpal, CJ, speaking for majority has ruled (vide para 107) ___ "any regulation framed in the national interest must necessarily apply to all educational institutions, whether run by the majority or the minority. Such a limitation must necessarily be read into Article 30. The right under Article 30(1) cannot be such as to override the national interest or to prevent the Government from framing regulations in that behalf". (Also see, paras 117 to 123 and para 138 of Pai Foundation where Kirpal, CJ has dealt with St. Xavier's in details). No right can be absolute. Whether a minority or a non-minority, no community can claim its interest to be above the national interest.

'Minority' And 'Minority Educational Institutions'
The term 'minority' is not defined in the Constitution. Chief Justice Kirpal, speaking for the majority in Pai Foundation, took clue from the provisions of the State Reorganisation Act and held that in view of India having been divided into different linguistic States, carved out on the basis of the language of the majority of persons of that region, it is the State, and not the whole of India, that shall have to be taken as the unit for determining linguistic minority viz-a-viz Article 30. Inasmuch as Article 30(1) places on par religions and languages, he held that the minority status, whether by reference to language or by reference to religion, shall have to be determined by treating the State as unit. The principle would remain the same whether it is a Central legislation or a State legislation dealing with linguistic or religious minority. Khare, J. (as His Lordship then was), Quadri, J. and Variava & Bhan, JJ. in their separate concurring opinions agreed with Kirpal, CJ. According to Khare, J., take the population of any State as a unit, find out its demography and calculate if the persons speaking a particular language or following a particular religion are less than 50% of the population, then give them the status of linguistic or religious minority. The population of the entire country is irrelevant for the purpose of determining such status. Quadri, J. opined that the word 'minority' literally means 'a non-dominant' group. Ruma Pal, J. defined the word 'minority' to mean 'numerically less'. However, she refused to take the State as a unit for the purpose of determining minority status as, in her opinion, the question of minority status must be determined with reference to the country as a whole. She assigned reasons for the purpose. Needless to say, her opinion is a lone voice. Thus, with the dictum of Pai Foundation, it cannot be doubted that minority, whether linguistic or religious, is determinable only by reference to the demography of a State and not by taking into consideration the population of the country as a whole.

Such definition of minority resolves one issue but gives rise to many a questions when it comes to defining 'minority educational institution'. Whether a minority educational institution, though established by a minority, can cater to the needs of that minority only? Can there be an enquiry to identify the person or persons who have really established the institution? Can a minority institution provide cross-border or inter-State educational facilities and yet retain the character of minority educational institution?

In Kerala Education Bill, the scope and ambit of right conferred by Article 30(1) came up for consideration. Article 30(1) does not require that minorities based on religion should establish educational institutions for teaching religion only or that linguistic minority should establish educational institution for teaching its language only. The object underlying Article 30(1) is to see the desire of minorities being fulfilled that their children should be brought up properly and efficiently and acquire eligibility for higher university education and go out in the world fully equipped with such intellectual attainments as will make them fit for entering public services, educational institutions imparting higher instructions including general secular education. Thus, the twin objects sought to be achieved by Article 30(1) in the interest of minorities are: (i) to enable such minority to conserve its religion and language, and (ii) to give a thorough, good general education to the children belonging to such minority. So long as the institution retains its minority character by achieving and continuing to achieve the above said two objectives, the institution would remain a minority institution.

The learned Judges in Kerala Education Bill were posed with the issue projected by Article 29(2). What will happen if the institution was receiving aid out of State funds? The apparent conflict was resolved by the Judges employing a beautiful expression. They said, Article 29(2) and 30(1), read together, clearly contemplate a minority institution with a 'sprinkling of outsiders' admitted in it. By admitting a member of non-minority into the minority institution, it does not shed its character and cease to be a minority institution. The learned Judges went on to observe that such 'sprinkling' would enable the distinct language, script and culture of a minority being propagated amongst non-members of a particular minority community and that would indeed better serve the object of conserving the language, religion and culture of that minority.

Chief Justice Hidayatullah, speaking for the Constitution Bench in State of Kerala, Etc. v. Very Rev. Mother Provincial, Etc., (1970) 2 SCC 417, has not used the expression 'sprinkling' but has explained the reason why that was necessary. He said ___ "It matters not if a single philanthropic individual with his own means, founds the institution or the community at large contributes the funds. The position in law is the same and the intention in either case must be to found an institution for the benefit of a minority community by a member of that community. It is equally irrelevant that in addition to the minority community others from other minority communities or even from the majority community can take advantage of these institutions. Such other communities bring in income and they do not have to be turned away to enjoy the protection". (para 8)

Much of controversy can be avoided if only the nature of the right conferred by Articles 29 and 30 is clearly understood. The nature and content of these articles stands more than clarified and reconciled inter se as also with other articles if only we understand that these two articles are intended to confer protection on minorities rather than a right as such. In St. Stephen's, their Lordships clearly held (vide para 28) that Article 30(1) is "a protective measure only" and further said (vide para 59) that Article 30(1) implied certain 'privilege'. Articles 29 and 30 can be better understood and utilized if read as a protection and/or a privilege of minority rather than an abstract right.

In this background arises the complex question of trans-border operation of Article 30(1). Pai Foundation has clearly ruled in favour of the State (or a province) being the unit for the purpose of deciding minority. By this declaration of law, certain consequences follow. First, every community in India becomes a minority because in one or the other State of the country it will be in minority ___ linguistic or religious. What would happen if a minority belonging to a particular State establishes an educational institution in that State and administers it but for the benefit of members belonging to that minority domiciled in the neighbouring State where that community is in majority? Would it not be a fraud on the Constitution? In St. Stephen's, their Lordships had ruled that Article 31 is a protective measure only for the benefit of religious and linguistic minorities and "no illfit or camouflaged institution should get away with the constitutional protection" (para 28). The question need not detain us for long as it stands answered in no uncertain terms in Pai Foundation. Emphasising the need for preserving its minority character so as to enjoy the privilege of protection under Article 30(1), it is necessary that the objective of establishing the institution was not defeated. "If so, such an institution is under an obligation to admit the bulk of the students fitting into the description of the minority community. Therefore, the students of that group residing in the State in which the institution is located have to be necessarily admitted in a large measure because they constitute the linguistic minority group as far as that State is concerned. In other words, the predominance of linguistic students hailing from the State in which the minority educational institution is established should be present. The management bodies of such institutions cannot resort to the device of admitting the linguistic students of the adjoining State in which they are in a majority, under the fagade of the protection given under Article 30(1)." (para 153). The same principle applies to religious minority. If any other view was to be taken, the very objective of conferring the preferential right of admission by harmoniously constructing Articles 30(1) and 29(2), may be distorted.

It necessarily follows from the law laid down in Pai Foundation that to establish a minority institution the institution must primarily cater to the requirements of that minority of that State else its character of minority institution is lost. However, to borrow the words of Chief Justice S.R. Das (in Kerala Education Bill) a 'sprinkling' of that minority from other State on the same footing as a sprinkling of non-minority students, would be permissible and would not deprive the institution of its essential character of being a minority institution determined by reference to that State as a unit.

Minority educational institutions: classifiable in three

To establish an educational institution is a Fundamental Right. Several educational institutions have come up. In Kerala Education Bill, 'minority educational institutions' came to be classified into three categories, namely, (i) those which do not seek either aid or recognition from the State; (ii) those which want aid; and (iii) those which want only recognition but not aid. It was held that the first category protected by Article 30(1) can "exercise that right to their hearts' content" unhampered by restrictions. The second category is most significant. Most of the educational institutions would fall in that category as no educational institution can, in modern times, afford to subsist and efficiently function without some State aid. So is with the third category. An educational institution may survive without aid but would still stand in need of recognition because in the absence of recognition, education imparted therein may not really serve the purpose as for want of recognition the students

passing out from such educational institutions may not be entitled to admission in other educational institutions for higher studies and may also not be eligible for securing jobs. Once an educational institution is granted aid or aspires for recognition, the State may grant aid or recognition accompanied by certain restrictions or conditions which must be followed as essential to the grant of such aid or recognition. This Court clarified in Kerala Educational Bill that 'the right to establish and administer educational institutions' conferred by Article 30(1) does not include the right to mal-administer, and that is very obvious. Merely because an educational institution belongs to minority it cannot ask for aid or recognition though running in unhealthy surroundings, without any competent teachers and which does not maintain even a fair standard of teaching or which teaches matters subversive to the welfare of the scholars. Therefore, the State may prescribe reasonable regulations to ensure the excellence of the educational institutions to be granted aid or to be recognized. To wit, it is open to the State to lay down conditions for recognition such as, an institution must have a particular amount of funds or properties or number of students or standard of education and so on. The dividing line is that in the name of laying down conditions for aid or recognition the State cannot directly or indirectly defeat the very protection conferred by Article 30(1) on the minority to establish and administer educational institutions. Dealing with the third category of institutions, which seek only recognition but not aid, their Lordships held that 'the right to establish and administer educational institutions of their choice' must mean the right to establish real institutions which will effectively serve the needs of the community and scholars who resort to these educational institutions. The dividing line between how far the regulation would remain within the constitutional limits and when the regulations would cross the limits and be vulnerable is fine yet perceptible and has been demonstrated in several judicial pronouncements which can be cited as illustrations. They have been dealt with meticulous precision coupled with brevity by S.B. Sinha, J. in his opinion in Islamic Academy. The considerations for granting recognition to a minority educational institution and casting accompanying regulation would be similar as applicable to a non-minority institution subject to two overriding considerations: (i) the recognition is not denied solely on the ground of the educational institution being one belonging to minority, and (ii) the regulation is neither aimed at nor has the effect of depriving the institution of its minority status.

Article 30(1) speaks of 'educational institutions' generally and so does Article 29(2). These Articles do not draw any distinction between an educational institution dispensing theological education or professional or non-professional education. However, the terrain of thought as has developed through successive judicial pronouncements culminating in Pai Foundation is that looking at the concept of education, in the backdrop of constitutional provisions, the professional educational institutions constitute a class by themselves as distinguished from the educational institutions imparting non-professional education. It is not necessary for us to go deep into this aspect of the issue posed before us inasmuch as Pai Foundation has clarified that merit and excellence assume special significance in the context of professional studies. Though merit and excellence are not anathema to non-professional education, yet at that level and due to the nature of education which is more general, merit and excellence do not stand in need of that degree thereof, as is called for in the context of professional education.

Difference between professional and non-professional education institutions

Dealing with unaided minority educational institutions, Pai Foundation holds that Article 30 does not come in the way of the State stepping in for the purpose of securing transparency and recognition of merit in the matter of admissions. Regulatory measures for ensuring educational standards and maintaining excellence thereof are no anathema to the protection conferred by Article 30(1). However, a distinction is to be drawn between unaided minority educational institution of the level of schools and undergraduate colleges on one side and the institutions of higher education, in particular, those imparting professional education on the other side. In the former, the scope for merit based selection is practically nil and hence may not call for regulation. But in the case of latter, transparency and merit have to be unavoidably taken care of and cannot be compromised. There could be regulatory measures for ensuring educational standards and maintaining excellence thereof. (See para 161, Answer to Q.4, in Pai Foundation). The source of this distinction between two types of educational institutions referred to hereinabove is to be found in the principle that right to administer does not include a right to mal-administer.

S.B. Sinha, J. has, in his separate opinion in Islamic Academy, described (in para 199) the situation as a pyramid like situation and suggested the right of minority to be read along with fundamental duty. Higher the level of education, lesser are the seats and higher weighs the consideration for merit. It will, necessarily, call for more State intervention and lesser say for minority.

Educational institutions imparting higher education, i.e. graduate level and above and in particular specialized education such as technical or professional, constitutes a separate class. While embarking upon resolving issues of constitutional significance, where the letter of the Constitution is not clear, we have to keep in view the spirit of the Constitution, as spelt out by its entire scheme. Education aimed at imparting professional or technical qualifications stand on a different footing from other educational instructions. Apart from other provisions, Article 19(6) is a clear indicator and so are clauses (h) and (j) of Article 51A. Education upto undergraduate level aims at imparting knowledge just to enrich mind and shape the personality of a student. Graduate level study is a doorway to admissions in educational institutions imparting professional or technical or other higher education and, therefore, at that level, the considerations akin to those relevant for professional or technical educational institutions step in and become relevant. This is in national interest and strengthening the national wealth, education included. Education up to undergraduate level on one hand and education at graduate and post-graduate levels and in professional and technical institutions on the other are to be treated on different levels inviting not identical considerations, is a proposition not open to any more debate after Pai Foundation. A number of legislations occupying the field of education whose constitutional validity has been tested and accepted suggest that while recognition or affiliation may not be a must for education up to undergraduate level or, even if required, may be granted as a matter of routine, recognition or affiliation is a must and subject to rigorous scrutiny when it comes to educational institutions awarding degrees, graduate or post-graduate, post-graduate diplomas and degrees in technical or professional disciplines. Some such legislations are found referred in paras 81 and 82 of S.B. Sinha, J's opinion in Islamic

Academy.

Having so stated and clarified these principles which would be germane to answering the four questions posed before us, now we take up each of the four questions seriatim and answer the same.

And yet, before we do so, let us quote and reproduce paragraphs 68, 69 and 70 from Pai Foundation to enable easy reference thereto as the core of controversy touching the four questions which we are dealing with seems to have originated therefrom. These paragraphs read as under:

"68.(I) 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.

(II) 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 postgraduation non-professional colleges or institutes.

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.

70. It is well established all over the world that those who seek professional education must pay for it. The number of seats available in government and government-aided colleges is very small, compared to the number of persons seeking admission to the medical and engineering colleges. All those eligible and deserving candidates who could not be accommodated in government colleges would stand deprived of professional education. This void in the field of medical and technical education has been filled by institutions that are established in different places with the aid of donations and the active part taken by public-minded individuals. The object of establishing an institution has thus been to provide technical or professional education to the deserving candidates, and is not necessarily a commercial venture. In order that this intention is meaningful, the institution must be recognized. At the school level, the recognition or affiliation has to be sought from the educational authority or the body that conducts the school-leaving examination. It is only on the basis of that examination that a school-leaving certificate is granted, which enables a student to seek admission in further courses of study after school. A college or a professional educational institution has to get recognition from the university concerned, which normally requires certain conditions to be fulfilled before recognition. It has been held that conditions of affiliation or recognition, which pertain to the academic and educational character of the institution and ensure uniformity, efficiency and excellence in educational courses are valid, and that they do not violate even the provisions of Article 30 of the Constitution; but conditions that are laid down for granting recognition should not be such as may lead to governmental control of the administration of the private educational institutions.

In Islamic Academy the majority has (vide para 12) paraphrased the contents of para 68 by dividing it into seven parts. S.B. Sinha, J has read the same para 68 by paraphrasing it in five parts (vide para 172 of his opinion). However, we have reproduced para 68 by dividing it into two parts. A reading of the majority judgment in Pai Foundation in its entirety supports the conclusion that while the first part of para 68 is law laid down by the majority, the second part is only by way of illustration, tantamounting to just a suggestion or observation, as to how the State may devise a possible mechanism so as to take care of poor and backward sections of the society. The second part of para 68 cannot be read as law laid down by the Bench. It is only an observation in passing or an illustrative situation which may be reached by consent or agreement or persuasion.

A Comment

It was submitted at the Bar that a flourish of language or just a flow of thoughts placed on paper when read in isolation gives an impression as if such is the law laid down though in

reality even the author of the judgment had not intended to do so. A mere observation or a reasoning leading to formulation of ultimate opinion on a disputed question of law cannot be read as a ratio of the decision. Such submissions forcefully advanced at the Bar, have been kept in view by us while reading the several opinions in Pai Foundation and Islamic Academy. In Islamic Academy the petitioners-applicants were private unaided institutions (minority and non-minority both) and the petitioners-applicants before us are also private unaided institutions, non-minority and minority (religions and linguistic) both. It was submitted that the majority opinion in Islamic Academy has, while embarking upon clarifying the law laid down in Pai Foundation, not only reiterated some of the propositions of law laid down in Pai Foundation but has also added something more which was not said in Pai Foundation and the two have been so intertwined as to become inseparable and that has been the reason for a spate of litigation post Islamic Academy. S.B. Sinha, J., writing his separate opinion in Islamic Academy, has not himself chosen to say whether his is a concurring opinion or a dissenting one. However, it was pointed out that S.B. Sinha, J's opinion is analytical, clear and more in consonance with the majority opinion of Pai Foundation. It was urged that the task was difficult and unwittingly, for the sake of aiming at brevity, certain omissions have taken place. Illustratively it was pointed out that vide para 59 of Pai Foundation Kirpal, CJ, has said ___

"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."

(emphasis by us)

In Islamic Academy, vide para 70, sub-para (2)(i)(a), the abovesaid passage has been quoted as under:-

"Admission to professional colleges should be based on merit by a common entrance test conducted by the government agencies".

(emphasis by us)

It was pointed out that Pai Foundation vide para 59 was just making a note of what is 'prevailing as the usual systems' for admitting students but Islamic Academy vide para 70 gives an impression that the view taken in Pai Foundation is to confine to common entrance test conducted by the government agencies as the only source of admission to professional colleges.

While expressing their appreciation of the task performed in Islamic Academy of attempting resolution of several issues raised post Pai Foundation, the learned counsel addressing us have tried to put across and demonstrate several such anomalies which Islamic Academy read in juxta position with Pai Foundation has raised.

Having generally dealt with the several legal propositions, relevant for our purpose, now we come to specifically dealing

with the questions before us.

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

First, we shall deal with minority unaided institutions.

We have in the earlier part of this judgment referred to Kerala Education Bill and stated the three categories of minority educational institutions as classified and dealt with therein. The 7-Judge Bench decision in Kerala Education Bill still holds the field and has met the approval of 11-Judge Bench in Pai Foundation. We cull out and state what Pai Foundation has to say about such category of institutions:-

(i) Minority educational institution, unaided and unrecognized

Pai Foundation is unanimous on the view that the right to establish and administer an institution, the phrase as employed in Article 30(1) of the Constitution, comprises of the following rights: (a) to admit students; (b) to set up a reasonable fee structure; (c) to constitute a governing body; (d) to appoint staff (teaching and non-teaching); and (e) to take action if there is dereliction of duty on the part of any of the employees. (para 50)

A minority educational institution may choose not to take any aid from the State and may also not seek any recognition or affiliation. It may be imparting such instructions and may have students learning such knowledge that do not stand in need of any recognition. Such institutions would be those where instructions are imparted for the sake of instructions and learning is only for the sake of learning and acquiring knowledge. Obviously, such institutions would fall in the category of those who would exercise their right under the protection and privilege conferred by Article 30(1) "to their hearts content" unhampered by any restrictions excepting those which are in national interest based on considerations such as public safety, national security and national integrity or are aimed at preventing exploitation of students or teaching community. Such institutions cannot indulge in any activity which is violative of any law of the land.

They are free to admit all students of their own minority community if they so choose to do. (para 145, Pai Foundation)

(ii) Minority unaided educational institutions asking for affiliation or recognition

Affiliation or recognition by the State or the Board or the University competent to do so, cannot be denied solely on the ground that the institution is a minority educational institution. However, the urge or need for affiliation or recognition brings in the concept of regulation by way of laying down conditions consistent with the requirement of ensuring merit, excellence of education and preventing mal-administration. For example, provisions can be made indicating the quality of the teachers by prescribing the minimum qualifications that they must possess and the courses of studies and curricula. The existence of infrastructure sufficient for its growth can be stipulated as a pre-requisite to the grant of recognition or affiliation. However,

there cannot be interference in the day-to-day administration. The essential ingredients of the management, including admission of students, recruiting of staff and the quantum of fee to be charged, cannot be regulated. (para 55, Pai Foundation)

Apart from the generalized position of law that right to administer does not include right to mal-administer, an additional source of power to regulate by enacting condition accompanying affiliation or recognition exists. Balance has to be struck between the two objectives: (i) that of ensuring the standard of excellence of the institution, and (ii) that of preserving the right of the minority to establish and administer its educational institution. Subject to reconciliation of the two objectives, any regulation accompanying affiliation or recognition must satisfy the triple tests: (i) the test of resonableness and rationality, (ii) the test that the regulation would be conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it, and (iii) that there is no in-road on the protection conferred by Article 30(1) of the Constitution, that is, by framing the regulation the essential character of the institution being a minority educational institution, is not taken away. (para 122, Pai Foundation)

(iii) Minority educational institutions receiving State aid

Conditions which can normally be permitted to be imposed on the educational institutions receiving the grant must be related to the proper utilization of the grant and fulfillment of the objectives of the grant without diluting the minority status of the educational institution, as held in Pai Foundation (See para 143 thereof). As aided institutions are not before us and we are not called upon to deal with their cases, we leave the discussion at that only.

So far as appropriation of quota by the State and enforcement of its reservation policy is concerned, we do not see much of difference between non-minority and minority unaided educational institutions. We find great force in the submission made on behalf of the petitioners that the States have no power to insist on seat sharing in the unaided private professional educational institutions by fixing a quota of seats between the management and the State. The State cannot insist on private educational institutions which receive no aid from the State to implement State’s policy on reservation for granting admission on lesser percentage of marks, i.e. on any criterion except merit.

As per our understanding, neither in the judgment of Pai Foundation nor in the Constitution Bench decision in Kerala Education Bill, which was approved by Pai Foundation, there is anything which would allow the State to regulate or control admissions in the unaided professional educational institutions so as to compel them to give up a share of the available seats to the candidates chosen by the State, as if it was filling the seats available to be filled up at its discretion in such private institutions. This would amount to nationalization of seats which has been specifically disapproved in Pai Foundation. Such imposition of quota of State seats or enforcing reservation policy of the State on available seats in unaided professional institutions are acts constituting serious encroachment on the right and autonomy of private professional educational institutions. Such appropriation of seats can also not be held to be a regulatory measure in the interest of minority within the meaning of Article 30(1) or a reasonable restriction within the meaning of Article 19(6) of the Constitution. Merely because the resources of the State in providing professional education are

limited, private educational institutions, which intend to provide better professional education, cannot be forced by the State to make admissions available on the basis of reservation policy to less meritorious candidate. Unaided institutions, as they are not deriving any aid from State funds, can have their own admissions if fair, transparent, non-exploitative and based on merit.

The observations in paragraph 68 of the majority opinion in Pai Foundation, on which the learned counsel for the parties have been much at variance in their submissions, according to us, are not to be read disjointly from other parts of the main judgment. A few observations contained in certain paragraphs of the judgment in Pai Foundation, if read in isolation, appear conflicting or inconsistent with each other. But if the observations made and the conclusions derived are read as a whole, the judgment nowhere lays down that unaided private educational institutions of minorities and non-minorities can be forced to submit to seat sharing and reservation policy of the State. Reading relevant parts of the judgment on which learned counsel have made comments and counter comments and reading the whole judgment (in the light of previous judgments of this Court, which have been approved in Pai Foundation) in our considered opinion, observations in paragraph 68 merely permit unaided private institutions to maintain merit as the criterion of admission by voluntarily agreeing for seat sharing with the State or adopting selection based on common entrance test of the State. There are also observations saying that they may frame their own policy to give free-ships and scholarships to the needy and poor students or adopt a policy in line with the reservation policy of the state to cater to the educational needs of weaker and poorer sections of the society.

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

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

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.

For the aforesaid reasons, we cannot approve of the scheme evolved in Islamic Academy to the extent it allows States to fix quota for seat sharing between management and the States on the basis of local needs of each State, in the unaided private educational institutions of both minority and non-minority categories. That part of the judgment in Islamic Academy, in our considered opinion, does not lay down the correct law and runs counter to Pai Foundation.

NRI seats

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

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

Q.2. Admission procedure of unaided educational institutions.

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

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

and rather must, in national interest, step in. The education, knowledge and learning at this level possessed by individuals collectively constitutes national wealth.

Pai Foundation has already held that the minority status of educational institutions is to be determined by treating the States as units. Students of that community residing in other States where they are not in minority, shall not be considered to be minority in that particular State and hence their admission would be at par with other non-minority students of that State. Such admissions will be only to a limited extent that is like a 'sprinkling' of such admissions, the term we have used earlier borrowing from Kerala Education Bill, 1957. In minority educational institutions, aided or unaided, admissions shall be at the State level. Transparency and merit shall have to be assured.

Whether minority or non-minority institutions, there may be more than one similarly situated institutions imparting education in any one discipline, in any State. The same aspirant seeking admission to take education in any one discipline of education shall have to purchase admission forms from several institutions and appear at several admission tests conducted at different places on same or different dates and there may be a clash of dates. If the same candidate is required to appear in several tests, he would be subjected to unnecessary and avoidable expenditure and inconvenience. There is nothing wrong in an entrance test being held for one group of institutions imparting same or similar education. Such institutions situated in one State or in more than one State may join together and hold a common entrance test or the State may itself or through an agency arrange for holding of such test. Out of such common merit list the successful candidates can be identified and chosen for being allotted to different institutions depending on the courses of study offered, the number of seats, the kind of minority to which the institution belongs and other relevant factors. Such an agency conducting Common Entrance Test (CET, for short) must be one enjoying utmost credibility and expertise in the matter. This would better ensure the fulfillment of twin objects of transparency and merit. CET is necessary in the interest of achieving the said objectives and also for saving the student community from harassment and exploitation. Holding of such common entrance test followed by centralized counseling or, in other words, single window system regulating admissions does not cause any dent in the right of minority unaided educational institutions to admit students of their choice. Such choice can be exercised from out of list of successful candidates prepared at the CET without altering the order of merit inter se of the students so chosen.

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

institution or group of institutions, if it fails to satisfy all or any of the triple tests, indicated hereinabove, can be taken over by the State substituting its own procedure. The second question is answered accordingly.

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

Q. 3 Fee, regulation of

To set up a reasonable fee structure is also a component of "the right to establish and administer an institution" within the meaning of Article 30(1) of the Constitution, as per the law declared in Pai Foundation. Every institution is free to devise its own fee structure subject to the limitation that there can be no profiteering and no capitation fee can be charged directly or indirectly, or in any form (Paras 56 to 58 and 161 [Answer to Q.5(c)] of Pai Foundation are relevant in this regard).

Capitation Fees

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

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

Q.4. Committees formed pursuant to Islamic Academy

Most vehement attack was laid by all the learned counsel appearing for the petitioner-applicants on that part of Islamic Academy which has directed the constitution of two committees dealing with admissions and fee structure. Attention of the Court was invited to paras 35,37, 38, 45 and 161 (answer to question 9) of Pai Foundation wherein similar scheme framed in Unni Krishnan was specifically struck down. Vide para 45, Chief Justice Kirpal has clearly ruled that the decision in Unni

Krishnan insofar as it framed the scheme relating to the grant of admission and the fixing of the fee, was not correct and to that extent the said decision and the consequent directions given to UGC, AICTE, MCI, the Central and the State Governments etc. are overruled. Vide para 161, Pai Foundation upheld Unni Krishnan to the extent to which it holds the right to primary education as a fundamental right, but the scheme was overruled. However, the principle that there should not be capitation fee or profiteering was upheld. Leverage was allowed to educational institutions to generate reasonable surplus to meet cost of expansion and augmentation of facilities which would not amount to profiteering. It was submitted that Islamic Academy has once again restored such Committees which were done away with by Pai Foundation.

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

The two committees for monitoring admission procedure and determining fee structure in the judgment of Islamic Academy, are in our view, permissive as regulatory measures aimed at protecting the interest of the student community as a whole as also the minorities themselves, in maintaining required standards of professional education on non-exploitative terms in their institutions. Legal provisions made by the State Legislatures or the scheme evolved by the Court for monitoring admission procedure and fee fixation do not violate the right of minorities under 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.

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

Non-minority unaided institutions can also be subjected to similar restrictions which are found reasonable and in the interest of student community. Professional education should be made accessible on the criterion of merit and on non-exploitative terms to all eligible students on an uniform basis. Minorities or non-minorities, in exercise of their educational rights in the field of professional education have an obligation and a duty to maintain requisite standards of professional education by giving admissions based on merit and making education equally accessible to eligible students through a fair and transparent admission procedure and on a reasonable fee-structure.

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

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

However, we would like to sound a note of caution to such Committees. The learned counsel appearing for the petitioners have severely criticised the functioning of some of the Committees so constituted. It was pointed out by citing concrete examples that some of the Committees have indulged in assuming such powers and performing such functions as were never given or intended to be given to them by Islamic Academy. Certain decisions of some of the Committees were subjected to serious criticism by pointing out that the fee structure approved by them was abysmally low which has rendered the functioning of the institutions almost impossible or made the institutions run into losses. In some of the institutions, the teachers have left their job and migrated to other institutions as it was not possible for the management to retain talented and highly qualified teachers against the salary permitted by the Committees. Retired High Court Judges heading the Committees are assisted by experts in accounts and management. They also have the benefit of hearing the contending parties. We expect the Committees, so long as they remain functional, to be more sensitive and to act rationally and reasonably with due regard for realities. They should refrain from generalizing fee structures and, where needed, should go into accounts, schemes, plans and budgets of an individual institution for the purpose of finding out what would be an ideal and reasonable fee structure for that institution.

We make it clear that in case of any individual institution, if any of the Committees is found to have exceeded its powers

by unduly interfering in the administrative and financial matters of the unaided private professional institutions, the decision of the Committee being quasi-judicial in nature, would always be subject to judicial review.

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

Epilogue

We have answered the four questions formulated by us in the manner indicated hereinabove. All other issues which we leave untouched, may be dealt with by the regular Benches which will take up individual cases for decision.

We have placed on record in the earlier part of this judgment and, yet, before parting we would like to reiterate, that certain recitals, certain observations and certain findings in Pai Foundation are contradictory inter se and such conflict can only be resolved by a Bench of a coram larger than Pai Foundation. There are several questions which have remained unanswered and there are certain questions which have propped up post Pai Foundation and Islamic Academy. To the extent the area is left open, the Benches hearing individual cases after this judgment would find the answers. Issues referable to those areas which are already covered by Pai Foundation and yet open to question shall have to be answered by a Bench of a larger coram than Pai Foundation. We leave those issues to be taken care of by posterity.

We are also conscious of the fact that admission process in several professional educational institutions has already commenced. Some admissions have been made or are in the process of being made in consonance with the schemes and procedures as approved by Committees and in some cases pursuant to interim directions made by this Court or by the High Courts. This judgment shall not have the effect of disturbing the admissions already made or with regard to which the process has already commenced. The law, as laid down in this judgment, shall be given effect to from the academic year commencing next after the pronouncement of this judgment.

It is for the Central Government, or for the State Governments, in the absence of a Central legislation, to come out with a detailed well thought out legislation on the subject. Such a legislation is long awaited. States must act towards this direction. Judicial wing of the State is called upon to act when the other two wings, the Legislature and the Executive, do not

act. Earlier the Union of India and the State Governments act, the better it would be. The Committees regulating admission procedure and fee structure shall continue to exist, but only as a temporary measure and an inevitable passing phase until the Central Government or the State Governments are able to devise a suitable mechanism and appoint competent authority in consonance with the observations made hereinabove. Needless to say, any decision taken by such Committees and by the

Central or the State Governments, shall be open to judicial review in accordance with the settled parameters for the exercise of such jurisdiction.

Before parting, we would like to place on record our appreciation of the valuable assistance rendered by all the learned senior counsel and other counsel appearing in the case and who have addressed us, highlighting very many aspects of the ticklish issues in the field of professional education which have propped up for decision in the light of the 11-Judge Bench decision in Pai Foundation and Constitution Bench decision in Islamic Academy. But for their assistance, the issues would have defied resolution.

All the petitions, Civil Appeals and IAs shall now be listed before appropriate Benches for hearing.