

(2004) 08 MAD CK 0039

In the Madras High Court

Case No : Writ Appeal No's. 2707 and 2856 of 2004 and W.A.M.P. No's. 4991, 5285, 5399 and 5655 of 2004

All India Medical and Engineering Colleges Association (Reg. No. 128/2004)

APPELLANT

Vs

Permanent Committee for the conduct of Common Entrance Test, The Government of Tamil Nadu and Anna University

Permanent Committee for the conduct of Common Entrance Test and The State of Tamil Nadu Vs Consortium of Professional Arts and Science Colleges in Tamil Nadu and Anna University

RESPONDENT

Date of Decision : 25-08-2004

Acts Referred:

Constitution of India, 1950 — Article 142, 15(1), 15(4), 19, 19(1)
Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of Appointments or Posts in the Services Under the State) Act, 1993 — Section 3, 4

Citation : (2004) 4 LW 70 : (2004) 4 MLJ 1

Hon'ble Judges : Prabha Sridevan, J;P.K. Misra, J;A.K. Rajan, J

Bench : Full Bench

Advocate : N.R. Chandran, General assisted by D. Krishnakumar, Special Govt. Pleader in WA. 2856/2004, K. Selvaraj, in W.A. 2707/2004, Rajeev Dhavan, for V. Ayyadurai and R.S. Jeevarathanam, in W.A. 2920 and 3053/2004, for the Appellant; N.R. Chandran, General assisted by D. Krishnakumar, Special Govt. Pleader Respondents 1 and 2 in W.A. 2707, 2920 and 3053 of 2004, Rajeev Dhavan, for V. Ayyadurai and R.S. Jeevarathanam for 1st Respondent in W.A. 2856/04, for the Respondent

Judgement

P.K. Misra, J.—These two sets of appeals have been directed against the common order dated 13.7.2004 passed by the Hon'ble single

Judge in W.P.Nos.16034,16068,16095,16444 to 16447, 16659 to 16662 and 17383 of 2004 and the connected miscellaneous petitions.

W.A.No.2856 of 2004 has been filed by the Permanent Committee for the

conduct of Common Entrance Test and the Government of Tamil

Nadu and the other three appeals have been filed by All India Medical and Engineering Colleges Association, Forum of Tamil Nadu Minority Self

Financing Engineering Colleges and the Consortium of Professional Arts & Science Colleges in Tamil Nadu respectively.

2. The contesting respondent in the appeal filed by the State Government and the Permanent Committee is the appellant in the connected

W.A.No.3053 of 2004, wherein the State and the Permanent Committee are the contesting respondents.

3. We have heard the learned Advocate General on behalf of the Government of Tamil Nadu and the Permanent Committee and Dr.Rajeev

Dhavan, Senior Counsel for the Consortium of Professional Arts & Science Colleges in Tamil Nadu and the Forum of Tamil Nadu Minority Self

Financing Colleges. Even though some of the appeals have been filed through some other counsels, those counsels have not appeared at the time

when the appeals were taken up for hearing, obviously because of the boycott-call given by various Bar Associations. Since the questions raised in

those appeals are also raised in the appeals in which Dr.Rajeev Dhavan made submissions, we have not thought it fit to adjourn the hearing of

those matters, particularly, keeping in view the urgency in the matter of admission into unaided engineering colleges.

4. The facts and circumstances giving rise to the filing of the appeals are as follows :-

As a sequel to the decision of the Supreme Court in T.M.A. Pai Foundation and Others Vs. State of Karnataka and Others, - hereinafter referred

to as T.M.A.Pai case - rendered by the Bench consisting of eleven Judges of the Supreme court, the Constitution Bench of five Judges in the

subsequent decision Islamic Academy of Education and Another Vs. State of Karnataka and Others, -hereinafter referred to as Islamic Academy

case -, clarified certain observations and issued direction to the States to constitute permanent Committees. The relevant portion of the directions

contained in para 19 are extracted below:-

19. We now direct that the respective State Governments do appoint a permanent Committee which will ensure that the tests conducted by the

association of colleges is fair and transparent. . . . The Committee shall have

powers to oversee the tests to be conducted by the association. This would include the power to call for the proposed question paper(s), to know the names of the paper-setters and examiners and to check the method adopted to ensure papers are not leaked. The Committee shall supervise and ensure that the test is conducted in a fair and transparent manner. The Committee shall have the power to permit an institution, which has been established and which has been permitted to adopt its own admission procedure for the last, at least, 25 years, to adopt its own admission procedure and if the Committee feels that the needs of such an institute are genuine, to admit, students of their community, in excess of the quota allotted to them by the State Government. 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.

5. In the light of above direction, the Government of Tamil Nadu established a Permanent Committee under the Chairmanship of a retired Judge of this Court in G.O.Ms.No.69, Higher Education (J2) Department, dated 19.3.2004. In paragraph-4 of the said G.O., the functions of the Committee had been indicated. It is convenient to extract the aforesaid paragraph 4 of the said G.O., which is as follows :-

4. FUNCTIONS

(i) The Committee shall have powers to oversee the tests to be conducted by the association of Colleges if any. This would include the power to call for the proposed question papers, to know the names of the paper setters and examiners and to check the method adopted to ensure papers are not leaked.

(ii) The Committee shall supervise and ensure that the test is conducted in a fair

and transparent manner.

(iii) The Committee shall have power to permit an institution, which has been established and which has been permitted to adopt its own admission

procedure for the last, at least 25 years, to adopt its own admission procedure and if the Committee feels that the needs of such an institute are

genuine, to admit, students of their community, in excess of the quota allotted to them by the State Government.

(iv) Before exemption any institute or varying in percentage of quota fixed by the State, the State Government must be heard before the

Committee.

(v) 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. 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 or be granted exemption from admitting students in the

manner set out hereinabove.

6. The Committee gave opportunity of hearing to various Associations of Engineering Colleges, including the representatives of the Consortium of

Professional Arts & Science Colleges in Tamil Nadu, the appellant in some of the appeals and ultimately, by Proceeding No:SFPC/PC/00014,

dated 1.6.2004, gave certain directions. The Consortium of Professional Arts & Science Colleges in Tamil Nadu, other private Engineering

colleges and other Associations filed several writ petitions challenging various directions issued by the Committee. It is necessary to extract only

those directions, which had been specifically impugned in the various writ petitions.

A. IN THE COURSE OF CONDUCTING THE ENTRANCE TEST

(1) Consortium of self-finance professional, Arts and Science Colleges in Tamilnadu is permitted to conduct the entrance test for admission to

undergraduate engineering courses for the entire Tamilnadu to fill up vacancies in management quota on the following conditions/directions.

(a) Setting up of question papers and evaluation should be given to experts

approved by the Committee, which reserves its right to nominate its own experts also.

(b) Number of questions and papers should be same as TNPCEE and the syllabus will be of Tamilnadu (Plus 2).

(d) One person nominated by the Consortium should be made totally responsible for all activities connected with the examination, i.e. setting,

printing, transporting, etc. who should also see that there is no leakage or other malpractice. The Committee also reserves its right to give

necessary direction in this regard and also appoint such persons of its choice to supervise the activities and the person made responsible should act

according to the direction given by the person so appointed by the Committee. We make it clear that the test is conducted by the management to

fill up their quota and the Committee is only to supervise their work. In such case, if for any reason the paper is leaked, the entire test will be

cancelled and the management takes the risk of admitting students on the basis of test conducted already by Anna University.

(e) Conduct of examination should be as per procedure of TNPCEE.

(m) The examination should be completed before 15th July 2004 with notice to the Committee and the results of the examination should be

published without any delay - at any rate within ten days from the date of completion of examination.

(n) All expenses for the supervisory work should be met by the Consortium and one half of the estimated costs should be deposited with the

Director of the Technical Education. The estimated cost will be informed to the Consortium on getting information about the Schedule of the

examination.

B. AFTER THE EXAMINATION AND WHILE STUDENTS ARE BEING ADMITTED.

b. The admission should be made only on the basis of the merit list opted and deemed to have opted and should be by counselling by following

single window system as followed by Anna University under the supervision of the Committee. The venue for counselling under Single Window

System will be decided after the results are published and as directed by the Committee.

c. The admissions of candidates shall be strictly according to Government of Tamilnadu norms, regarding eligibility and policy of reservation also

shall be followed.

7. Learned single Judge disposed of the writ petitions with several directions. It is necessary to extract only the relevant directions which have nexus with the present appeals.

44. In fine and subject to the findings in the order, all the writ petitions are disposed of with the following directions :-

(1)

(2)

(3) The directions in Clause A(1)(b) and (e) are beyond the power conferred on the Permanent Committee and, accordingly, they are set aside.

(4) The direction contained in Clause A(1)(d) is in accordance with the power conferred on the Permanent Committee by the judgment in Islamic

Academy case.

(5) The direction contained in Clause A(1)(n) in directing the Consortium to bear the expenses of the experts is beyond the power of the

Permanent Committee and, accordingly, the same is set aside and the State is directed to bear the expenses.

(6)

(7) The unaided Minority institutions are entitled to fill 70% of the seats from among the candidates of their community and applied to their

institution, but strictly on the basis of merit and the unfilled seat/seats shall be surrendered to the State for being filled by following Single Window

System of admission. The unaided minority institutions need not follow the rule of reservation while admitting the students under management quota

and to the above extent the direction of the Permanent Committee contained in Clause B(b)(c) is set aside.

(8) The unaided non-minority institutions are entitled to fill 50% of the seats from among the students applied to each of the institutions, but strictly

on the basis of merit and to this extent the direction of the Permanent Committee contained in Clause B(b) is set aside.

(9) The unaided non-minority educational institutions shall follow communal rule of reservation while making admissions to the seats earmarked

under the management quota and to this extent the direction of the Permanent Committee contained in Clause B(c) is sustained.

(10)

8. In the appeal filed on behalf of the Government of Tamil Nadu and the Permanent Committee, adverse directions of the learned single Judge,

particularly the directions contained in sub-paras (3),(5) and (8) have been challenged. In the appeals filed by the Consortium of Professional Arts

& Science Colleges in Tamilnadu and others, the directions contained in sub-paras (4),(7) and (9) have been challenged.

9. Before dealing with the contentions raised by the learned Advocate General in the appeal filed by the State and the learned Senior Counsel in

the appeals filed on behalf of the Engineering Colleges, it is appropriate to keep in view the principles in the light of which the matter is required to

be examined by the High Court under Article 226 of the Constitution. As already noticed, the Committee has been established pursuant to a

direction issued by the Supreme Court in Islamic Academic case. The basic parameters of jurisdiction of such Committee have been broadly

delineated by the Supreme Court. A mere examination of the constitution of such a Committee makes it clear that the Committee which is to be

headed by a retired Judge of the High Court is to consist of experts in the field of education. The opinion of such a high-power Committee

obviously cannot be lightly brushed aside. The decision taken by such a Committee would obviously command great respect not only from the

State Government or private engineering colleges, but also from the High Court while considering the matter under Article 226 of the Constitution.

Challenge made in the High Court against such a decision of the Committee must be held to be akin to a writ of Certiorari and ordinarily the High

Court should not decide the matter as if it is sitting in appeal over the decision of the Committee. Of course, if the decision of the Committee is

demonstrated to be beyond its purview or contrary to the guidelines indicated by the Supreme Court or arbitrary and capricious, the judiciary can

step in. Ordinarily the High Court should not interfere with such decision merely because the High Court is inclined to take a different view of the

matter.

10. Learned senior counsel appearing for the appellants in the appeals filed on behalf of the Engineering Colleges has challenged to the directions

contained in A(1)(a) and A(1)(d). No serious objection can be raised regarding

the direction in para A(1)(a) to the effect that the question papers and evaluation have to be done by the experts approved by the Committee. Even though the learned Senior Counsel has submitted that such direction takes away the discretion of the Consortium, we do not see any reason to interfere on this aspect. As a matter of fact, the learned single Judge while referring to this, has observed:-

There is no controversy on this issue.

The controversy now raised should therefore be allowed to rest as such.

11. So far as direction of the committee as contained in para A(1)(d) is concerned, the effect of such direction is to ensure that some persons nominated by the Consortium should remain in charge and responsible and they may be required to act under the guidance of the nominee of the Committee. We also do not find any plausible reason to interfere with the conclusion of the Committee, which has been approved by the learned single Judge. Challenge of the Consortium on this score is unacceptable.

12. The Consortium and other appellants, who were the writ petitioners, have seriously challenged the direction of the committee as contained in B(c) to the effect that the institutions are required to follow the policy of reservation while making admission in respect of seats earmarked for the management. It is the contention of the learned Senior Counsel that in view of the observation of the Supreme Court in T.M.A.Pai case, particularly as contained in paragraphs 68 and 71, it must be taken that once the State Government carves out its own quota of 50%, which would obviously cater to the requirement regarding reservation, there is no further scope for directing the Engineering colleges to follow the principle of reservation in respect of balance 50% left to their share.

13. Learned single Judge has repelled such contention made on behalf of such writ petitioners by observing :-

Neither in T.M.A. Pai case nor in Islamic Academy case, it is held that non-minority institution need not follow rule of reservation.

14. Learned single Judge has also referred to Article 15(4) and had observed that it should be read as an exception to Article 15(1) and has also opined that the right to establish educational institutions under Article 19(1)(g) is subject to imposition of reasonable restrictions.

15. Learned senior counsel has submitted that in view of the decision of the Supreme Court in *Indra Sawhney etc. etc Vs. Union of India and*

others, etc. etc., , the observation in the earlier Supreme Court decision to the effect that Article 15(4) is to be read as an exception to Article

15(1), no longer holds the field. He has further submitted that various decisions of the Supreme Court relied upon by the learned single Judge such

as *The State of Andhra Pradesh and Others Vs. U.S.V. Balram, etc.,* , *D.N. Chanchala Ors. Vs. The State of Mysore and Others,* and *R.*

Chitralekha and Another Vs. State of Mysore and Others, relate to either Government colleges or aided colleges, and therefore, the provisions

regarding reservation in respect of such colleges cannot be held applicable to unaided colleges.

16. Even though Article 15(4) may not be considered as an exception to Article 15(1) and may be construed as a provision meant for maintaining

the right to equality, the basic fact remains that the statutory provisions have been made laying down the rules of reservation in the matter relating to

admission into educational institutions. In this connection, reference can be made to the provisions contained in *Tamil Nadu Backward Classes,*

Scheduled Castes and Scheduled Tribes (Reservation of seats in Educational Institutions and of appointments or posts in the services under the

State) Act, 1993 (Act No.45 of 1994), hereinafter referred to as the Act. Section 3(b), the definition clause under the Act defining ""educational

institution"" , clearly includes any affiliated institution. The unaided educational institutions are also affiliated institutions. In Section 4 of the Act,

provisions have been made for reservation relating to admission to all educational institutions. As a matter of fact, the Government had also issued

G.O.Ms.Nos.22 and 23, Higher Education (J.1) Department, dated 13.2.2003. Neither the provisions contained in the said Act nor the G.Os.

had been challenged. The Act has been included as Entry No.257A of the Ninth Schedule by Seventy Sixth Amendment to the Constitution of

India. Once the Act is included in the Ninth Schedule, the challenge to the Act on the ground of violation of Part III of the Constitution is out of

bounds for the Courts. Even though there can be possible challenge on the ground that the Amendment by which the Act is included in the Ninth

Schedule is impermissible on the plea that the basic structure of the Constitution has been altered, in the absence of any such specific challenge and

in the absence of Union of India as a party, we are not called upon to examine such aspect. The directions issued by the Permanent Committee are mainly on the basis of the provisions contained in the Tamil Nadu Act 45 of 1994 and the G.Os. and consequential in nature. In the absence of challenge to the provisions contained in the Act and the G.Os., it would be difficult to accept the contention of the learned counsel for the appellants / writ petitioners on this score. May be, if the provisions contained in the Act and the G.Os. would not have been there, legality of the direction issued by the Committee could be examined in the light of observations made in T.M.A.Pai case. In the face of specific statutory provisions and the G.Os. which remained unchallenged, it is very difficult to accept the contention in the form raised by the counsel for the appellants / writ petitioners.

17. The residuary contention raised by the learned Senior Counsel for the Engineering Colleges and the Consortium relates to the observation of the learned single Judge vis-a-vis the right of the minority institution. It is to be noted that so far as the minority institutions are concerned, the Government had fixed 70% as the quota available to such colleges. In respect of this also, the Government had directed that the policy of reservation should be followed. In course of hearing before the learned single Judge, the learned Advocate General has made a submission that so far as the seats to be filled up by the minority institutions are concerned, the G.O. regarding observance of quota shall not be followed, but if such institution fills up only part of the permitted seats with the concerned minority students, the balance would be reverted back to the State for the purpose of being filled by the State in accordance with their own admission system.

18. Learned single Judge observed :-

. . . While referring to G.O.Ms.No.23, Higher Education (J1) Department, dated 13.2.2003 relating to direction for unaided minority professional colleges to follow rule of reservation of the State Government, the learned Advocate General would also fairly submit that the application of communal reservation would not be insisted in the case of minority institutions. He would also submit that the said statement could be recorded.

Hence, I hold that the minority institutions are entitled to fill 70% of the seats

from among the candidates of their community but strictly on merit without reference to Single Window System of admission and communal rule of reservation and in case if any seat is not filled, the same shall be reverted back to the State. Consequently, the direction in Clause B(b)(c) in respect of minority institutions cannot be sustained.

19. This observation has been seriously challenged by the learned counsel appearing in the appeals filed on behalf of minority institutions.

20. Law is well settled that the right conferred under Article 30(1) is in addition to the fundamental right available under Article 19(1)(g), as recognised by the Supreme Court in T.M.A.Pai case. Considering the special need of the minority institutions to admit students belonging to such minority, the Supreme Court in Islamic Academy case had observed that it would be open to fix a separate percentage for such minority institutions and obviously, considering such aspect, the State Government had fixed 70% for the minority institutions. Any private institution, in view of Article 19(1)(g) as interpreted in T.M.A.Pai case, would have right to establish educational institutions, subject of course to the relevant provisions and regulations. If in respect of such unaided institutions, the State Government thought it fit to fix 50%, the minority institutions obviously cannot be placed at an inferior footing. Even though the minority institution has right or privilege to admit students belonging to such minority, its right, nay, duty to admit students belonging to other communities or linguistic groups, cannot be ignored. Neither in the G.O. issued by the Government nor in the decision taken by the Committee, any direction had been issued that in the event of such institution admitting less number of minority students than the available quota of 70%, the balance would be reverted back to the State Government. It seems that the order has emanated from the concession of the learned Advocate General to the effect that in the minority institution so far as relating to communal quota as envisaged in G.O.Ms.No.23 would not be insisted upon coupled with the submission that the balance should revert to the State. Such a statement/concession was obviously on the footing that the minority institution had right to fill up entire 70% with minority students, and therefore, if such minority institution fills up the full quota, the question of applying reservation in respect of such 70% could not obviously arise. However, if the

minority institution admits minority students in lesser quantity, there is no justification to direct that the balance should be reverted back to the State

to be filled up as per the merit test conducted by the State.

21. It is apparent that such submission made by the learned Advocate General was inspired by the last sentence contained in para 15 of the Islamic

Academy case. However, a careful reading of the entire judgment, more particularly, paras 15 and 16, it cannot be said that the ratio of the

decision is to the effect in every case where the Minority Institution fails to fill up its quota from among the "concerned minority" students, the

balance has to revert back to the State quota. As observed by the Supreme Court in the Islamic Academy case itself, the ratio of a decision can be

found by reading the judgment in its entirety and not by reading one line here or one line there in isolation. The ratio of the decision seems to be that

in case the Minority Institution has opted for the "Merit Test" held by the State after admitting minority students on the basis of such State Test, the

minority institution is to fill up other vacant seats from its quota with other students on the basis of such State Test. On the other hand, if the

minority institution has opted for any "Association Test" as envisaged under para 16 of Islamic Academy case, it can admit minority students first

on the basis of such Association Test and the residuary from among the other students on the basis of such Association Test. However, there is no

question of reversion of seats in respect of unfilled quota.

22. A question may crop up, should the policy of reservation be made applicable to minority institutions, in view of the specific concession made

by the learned Advocate General. As per the G.O., 70% had been allotted to the minority institutions. It is of course open to the minority

institutions to admit all the 70% from among the students belonging to such concerned minority, in which event, the question of applying the policy

of reservation would not arise. The concession of the learned Advocate General coupled with the submission which was apparently accepted by

the learned single Judge to the effect that, if after admitting the concerned minority student, any seat remain vacant, such seat would revert to the

State Government to be filled up in accordance with the common entrance test held by the Government. Since the submission regarding reversion

to the State made by the learned Advocate General and accepted by the learned

single Judge has been set aside, the concession made by the learned Advocate General that policy of reservation would not be applicable to such minority institution, cannot hold good for the residuary seats to be filled up by minority institutions. Therefore, it is necessary to issue a direction to the effect that in case any seat remains vacant after the minority institution admits the concerned minority student according to the merit list, the balance has to be filled up by such minority institution from among other students as per the merit list by following the process of reservation.

23. Accordingly in modification of this portion of the order, it is directed that after giving admission to the concerned minority students, such institution has right to fill up the balance seats upto 70% from other candidates, obviously on the basis of merit as found out through relevant common entrance test. In other words, if such institution opts for the test to be held by the Government, such unfilled seats can be filled up by such minority institution from among the candidates as per the merit list prepared by the State Government. On the other hand, if such institution opts for the common entrance test held by the Consortium, such unfilled seats have to be filled up from the candidates appearing from the merit list prepared by the Consortium. In respect of such unfilled seats, the rules of reservation will be applicable. The direction issued by the learned single Judge as contained in paragraph 44(7) is replaced by the aforesaid direction. The Writ Appeal Nos.2707, 2920 and 3053 of 2004 are accordingly allowed in part.

24. In Writ Appeal No.2856 of 2004, filed by the State Government and the Permanent Committee, the main thrust of the submission made by the learned Advocate General is relating to direction contained in sub-para (8), even though some murmurs of protest had been raised to the directions contained in sub-paras (3) and (5).

25. Learned Advocate General has contended that as per the direction of the Supreme Court, a Permanent Committee has to be established for the purpose of overseeing the holding of the common entrance test by the Consortium and for effectively controlling and guiding such Consortium, directions had been issued by the Permanent Committee as per paragraphs A(1) (b),(e) and (n).

26. Learned counsel appearing for the contesting respondents in such appeal, namely the writ petitioners who had challenged such clauses

contained in the Proceeding of the Permanent Committee, on the other hand has submitted that those directions were clearly beyond the scope of

the role assigned to the Permanent Committee and have been rightly set aside by the learned single Judge.

27. The learned single Judge examined the directions issued by the Permanent Committee and observed that keeping in view the guidelines issued

by the Supreme Court, the Permanent Committee had exceeded its brief in laying down the conditions enumerated in A(1)(b) and (e). It was

observed:-

. . . So long as the fairness is exhibited in the conduct of Common Entrance Test by Consortium and the direction in Clause A(1)(a) is ensured,

no further interference is contemplated as to how the question papers are set etc. How the question papers should be set and as to how the

examination should be conducted are matters to be left entirely to the discretion of the Association and the Consortium in this case, as they are

entitled to select and admit best students in their assessment.

28. After referring to the observation of the Supreme Court in Islamic Academy case as contained in paragraphs 16, it was further observed :-

. . . There is no embargo on the managements to evolve their own method in number of question papers and the conduct of examination. The

directions of the Apex Court does not suggest that common entrance test conducted by the Association/Consortium shall be only on the same

pattern followed by TNPCEE. In the absence of any such restriction and in the event the Permanent Committee ensures a fair and transparent

manner in the conduct of examination, the directions contained in Clause A(1)(b) and (e) would be beyond the power conferred on the Permanent

Committee.

29. After carefully going through the observations of the Supreme Court as contained in paragraphs 16 and 19 and the observations made by the

learned single Judge, we hardly see any scope for interference in respect of the directions contained in para 44(3) and 44(5) of the judgment of the

learned single Judge. The decision of the Committee on this aspect was clearly contrary to the observations in Islamic Academy case and the

learned single Judge had rightly interfered with such decision.

30. Last but not the least is the most contentious issue relating to the method of admission. The Committee had directed that the admission should

be made on the basis of the merit list and should be by counselling, by following single window system, as followed by Anna University under the

supervision of the Committee. It is further directed that the venue for counselling would be decided after the results are published as directed by the

Committee.

31. Learned single Judge opined :

. . . In the event the Single Window System of admission is also insisted, the autonomy in administration of management and admission of students

enjoyed by the unaided professional colleges will be frustrated or become meaningless.

It was also observed :-

. . . Single Window System of admission is only intended for the seats to be filled on the basis of common entrance test conducted by the State

agency. It is only a procedure evolved in exercise of executive power. As long as merit-based admission is ensured as directed in T.M.A. Pai

Foundation case and Islamic Academy case, the right of unaided non-minority to admit the students on the basis of common entrance conducted

by Consortium cannot be deprived. In that view, the individual institutes are entitled to admit the students who have applied to it, but strictly on the

basis of order of merit. The directions of the Permanent Committee to the Consortium to follow Single Window System of admission in case of

non-minority educational professional colleges is beyond the power and contrary to the law laid by the Apex Court and cannot therefore be

sustained.

32. The main thrust in the appeals filed by the State Government is against the aforesaid observations and directions of the learned single Judge. It

is contended by the learned Advocate General that as per the decision in T.M.A.Pai case and Islamic Academy case, the unaided professional

colleges, whether minority or non-minority, are required to admit students strictly according to merit. To that extent, the discretion of the

Management of the concerned college has been curtailed. Therefore, to ensure compliance with such direction issued by the Supreme Court, the

Committee has issued the direction to admit students on the basis of counselling through single window system. He has further submitted that as a

matter of fact, the representatives of various private colleges had clearly indicated at the threshold, while the matter was being considered by the

Committee, that :

. . . The results will be announced in a ranking order and the marks obtained by each student will be communicated to the respective students. All

the member colleges in the consortium are advised to to admit the students who have written Common Entrance Test conducted by consortium as

per the ranking and as per the method followed by Anna University.

33. Learned Advocate General has submitted that the aforesaid resolution in effect has clearly indicated that their admission has to take place by

various colleges as per the method followed by Anna University, and therefore, they cannot reprobate at a later stage to oppose the direction

regarding admission through single window system. He has further submitted that if the colleges are left to devise their own methods of counselling

and admission of students, the possibility of a more meritorious student being denied admission to a college of his choice, would loom large. He has

further submitted that even if such matters are brought to the notice of the Committee at a subsequent stage, the mischief must have been done to

the students concerned and it would be difficult to repara the damage caused to the students and at any rate, such a course of action may give rise

to unnecessary complications and litigations at a later stage, and therefore, with a view to prevent such contingency, the Committee had rightly

directed for counselling through single window system and the learned single Judge should not have interfered with such discretionary order passed

by the Committee. He has further submitted that since admission was on the basis of merit alone as the criteria, no prejudice would be caused to

the colleges if such system is followed and enforced.

34. Learned Senior Counsel appearing for the respondents on the other hand, supported the decision of the learned single Judge. He has

vehemently contended that counselling through Single Window System takes away the right and discretion of the college to admit a student and

such constitutional right of the college should not be taken away. He has further submitted that the right to establish and administer a college

obviously include a right to admit a student according to the choice of the Management, which cannot be whittled down. He has further submitted that counselling of students through single window system has the tendency of unduly interfering with the Management and at any rate, it is not conducive to the interest of the students.

35. To a pointed query as to what would be the precise method adopted by the colleges for admission of the students, the learned Senior Counsel has submitted that after the results of the common entrance test are published, the concerned student, on the basis of the marks obtained at the qualifying examination coupled with the marks obtained in the common entrance test, is required to file applications in the colleges where he intends to take admission, and thereafter, on the basis of the relative merits of the applicants in such colleges, the admission in such colleges shall take place.

36. In Islamic Academy case, the question Nos.3 and 4 as posed by the Constitution Bench were to the following effect :-

...(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.

The aforesaid aspect was considered in paragraphs 10 to 20. While discussing this matter, the Constitution Bench inter alia referred to paragraphs

68, 59 and 47 of the T.M.A. Pai case.

37. In paragraph 68 of T.M.A.Pai case, it was observed:-

68. It would be unfair to apply the same rules and regulations regulating admission to both aided and unaided professional institutions. It must be

borne in mind that unaided professional institutions are entitled to autonomy in their administration while, at the same time, they do not forego or

discard the principle of merit. It would, therefore, be permissible for the university or the Government, at the time of granting recognition, to require

a private unaided institution to provide for merit-based selection while, at the same time, giving the management sufficient discretion in admitting

students. This can be done through various methods. For instance, a certain percentage of the seats can be reserved for admission by the

management out of those students who have passed the common entrance test

held by itself or by the State/university and have applied to the college concerned for admission, while the rest of the seats may be filled up on the basis of counselling by the State agency. This will incidentally take care of poorer and backward sections of the society. The prescription of percentage for this purpose has to be done by the Government according to the local needs and different percentages can be fixed for minority unaided and non-minority unaided and professional colleges. The same principles may be applied to other non-professional but unaided educational institutions viz. graduation and postgraduation non-professional colleges or institutes.

38. Similarly, in paragraphs 58 and 59, it was observed :-

58. For admission into any professional institution, merit must play an important role. While it may not be normally possible to judge the merit of

the applicant who seeks admission into a school, while seeking admission to a professional institution and to become a competent professional, it is

necessary that meritorious candidates are not unfairly treated or put at a disadvantage by preferences shown to less meritorious but more influential

applicants. Excellence in professional education would require that greater emphasis be laid on the merit of a student seeking admission.

Appropriate regulations for this purpose may be made keeping in view the other observations made in this judgment in the context of admissions to

unaided institutions.

59. Merit is usually determined, for admission to profession 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.

39. In the Islamic Academic case, the Constitution Bench observed :-

13. . . . It appears to us that this distinction has been made (between private unaided professional colleges and other educational institutions) as

the judgment recognises that it is in national interest to have good and efficient professionals. The judgment provides that national interest would

prevail, even over minority rights. It is for this reason that in professional colleges, both minority and non-minority, merit has been made the

criterion for admission. . . . A reading of paragraphs 59 and 68 shows that in non-minority professional colleges admission of students, other than

the percentage given to the management, can only be on the basis of merit as per the common entrance tests conducted by government agencies.

The manner in which the percentage given to the management can be filled in is set out hereinafter.

It was further observed :-

15. It must be clarified that minority professional colleges can admit, in their management quota, a student of their own community/language in

preference to a student of another community even though that other student is more meritorious. However, whilst selecting/admitting students of

their community/language the inter se merit of those students cannot be ignored. In other words, whilst selecting/admitting students of their own

community/language they cannot ignore the inter se merit amongst students of their community/language. Admission, even of members of their

community/language, must strictly be on the basis of merit except that in case of their own students it has to be merit inter se those students only.

Further, if the seats cannot be filled up from members of their community/language, then the other students can be admitted only on the basis of

merit based on a common entrance test conducted by government agencies.

16. That brings us to the question as to how the management of both minority and non-minority professional colleges can admit students in the

quota allotted to them. Undoubtedly, the majority judgment has kept in mind the sad reality that there are a large number of professional colleges

which indulge in profiteering and/or charging of capitation fees. It is for this reason that the majority judgment provides that in professional colleges

admission must be on the basis of merit. As has been rightly submitted, it is impossible to control profiteering/charging of capitation fees unless it is

ensured that admission is on the basis of merit. Also, as has been rightly pointed out, if a student is required to appear at more than one entrance

test it would lead to great hardship. The application fees charged by each institute, even though they may be only Rs.500 to Rs.1000 for each

institute, would impose a heavy burden on the students who will necessarily have to apply to a number of colleges. Further, as has been rightly

pointed out, students would have to arrange for transport from and to and stay

at various places if they have to appear for individual tests conducted by each college. If a student has to go for test to each institute it is possible that he/she may not be able to reach, in time, the venue of a test of a particular institute. In our view what is necessary is a practical approach keeping in mind the need for a merit-based selection. Paragraph 68 provides that admission by the management can be by a common entrance test held by "itself or by the State/University". The words "common entrance test" clearly indicate that each institute cannot hold a separate test. We thus hold that the management could select students, of their quota, either on the basis of such common entrance test conducted by the State or on the basis of a common entrance test to be conducted by an association of all colleges of a particular type in that State e.g. medical, engineering or technical etc. The common entrance test, held by the association, must be for admission to all colleges of that type in the State. The option of choosing, between either of these tests, must be exercised before issuing of prospectus and after intimation to the concerned authority and the Committee set up hereinafter. If any professional college chooses not to admit from the common entrance test conducted by the association then that college must necessarily admit from the common entrance test and declaration of results the merit list will immediately be placed on the notice-board of all colleges which have chosen to admit as per this test. A copy of the merit list will also be forthwith sent to the concerned authority and the Committee. Selection of students must then be strictly on the basis of merit as per that merit list. Of course, as indicated earlier, minority colleges will be entitled to fill up their quota with their own students on the basis of inter se merit amongst those students. The list of students admitted, along with the rank number obtained by the student, the fees collected and all such particulars and details as may be required by the concerned authority or the Committee must be submitted to them forthwith. The question paper and the answer papers must be preserved for such period as the concerned authority or Committee may indicate. If it is found that any student has been admitted de hors merit, penalty can be imposed on that institute and in appropriate cases recognition/affiliation may also be withdrawn.

40. After giving my anxious consideration to all the aspects and after carefully

going through the observations made by the Supreme Court in

T.M.A.Pai case and Islamic Academy case, I am unable to agree with the views expressed by the learned single Judge and unable to accept the

contentions raised by the learned Senior Counsel for the respondents on this aspect.

41. It is of course that as observed by the Supreme Court in Islamic Academy case the right of administration includes the right to admit a student

of his own choice, but as emphasised by the Supreme Court, the college in question cannot ignore merit and the selection has to be on the basis of

merit alone. It may be that in a given case the college in question may refuse admission to a particular student of higher merit on some relevant

grounds such as previous misconduct of such student, but any such refusal has to be on some reasonable basis and cannot be arbitrary or

capricious.

42. First of all, a reading of the judgment in T.M.A.Pai case as well as Islamic Academy case leaves no room for doubt that the so called

discretion of the Management of a private unaided institution to admit the students of its own choice, has been curtailed and channelized. So far as

the minority institutions are concerned, of course, they have got a right to give preference to students of a particular minority for whose benefit such

minority institution has been set up. But, even then, it has been repeatedly observed by the Supreme Court that a rational selection process must be

devised and the admission must be on the basis of merit alone. Similarly, the Supreme Court also emphasised that admission to non-minority

unaided institution has to be on the basis of merit alone. The discretion left to such institution is only to the effect that instead of following the

method of selection devised by the Government, the Association of such colleges can hold their own entrance test for the purpose of finding out the

relative merit of the students. Once such a merit is found in the manner and the process contemplated by the Supreme Court, the College has no

discretion except to admit the students on the basis of merit.

43. The procedure suggested by the learned Senior Counsel appearing for the respondents has several pit-falls and there is every possibility of a

more meritorious student being denied admission to a college of his choice, if such procedure is followed. The procedure suggested also would be

detrimental to the interests of the students, as a student is required to make several applications before several colleges and yet, there is every possibility that keeping in view the number of other more meritorious applicants for very same colleges, such a student may be left in the lurch and may not get admission in those colleges.

44. To illustrate, supposing a student whose ranking in the merit list is comparatively lower, applies to 5 or 6 better known colleges for admission,

since such colleges are more sought-after than the other colleges, it is obvious that more number of candidates would be applicants for such

colleges and in the eventuality, the lesser meritorious candidate would not get admission in such colleges and by the time he is made aware of such

stark reality, the last date for application/admission in respect of some less sought-after colleges may be over. It is not practical for a student to

apply to all the colleges and ultimately a student may not get opportunity for admission in any of the colleges, even though he may be more

meritorious than some of the students who get admission in less sought-after colleges. In other words, everything would depend upon the number

of applicants in respect of the colleges. Such a contingency obviously would not arise if the selection of students for a particular college is made

through a centralised system, in which event a student must be taken to be an applicant for each of the college, which is a part of the Consortium

and depending upon the merit, such student would be slotted in an appropriate college as per his choice.

45. As already extracted, in paragraph 16 of the Islamic Academy case, the Supreme Court had observed :-

. . . Also, as has been rightly pointed out, if a student is required to appear at more than one entrance test it would lead to great hardship. The

application fees charged by each institute, even though they may be only Rs.500 to Rs.1000 for each institute, would impose a heavy burden on

the students who will necessarily have to apply to a number of colleges. Further, as has been rightly pointed out, students would have to arrange

for transport from and to and stay at various places if they have to appear for individual tests conducted by each college. If a student has to go for

test to each institute it is possible that he/she may not be able to reach, in time, the venue of a test of a particular institute. In our view what is

necessary is a practical approach keeping in mind the need for a merit-based selection. Paragraph 68 provides that admission by the management can be by a common entrance test held by "itself or by the State/University". The words "common entrance test" clearly indicate that each institute cannot hold a separate test. We thus hold that the management could select students, of their quota, either on the basis of such common entrance test conducted by the State or on the basis of a common entrance test to be conducted by an association of all colleges of a particular type in that State e.g. medical, engineering or technical etc. The common entrance test, held by the association, must be for admission to all colleges of that type in the State. The option of choosing, between either of these tests, must be exercised before issuing of prospectus and after intimation to the concerned authority and the Committee set up hereinafter.

The logic of the Supreme Court decision in Islamic Academy case in laying down that Common Entrance Test should be common to the

Association of colleges and individual college is not entitled to hold its own entrance test, is equally applicable to such a situation.

46. Since admission in a particular college has to be strictly on merit, as has been repeatedly emphasised by the Supreme Court in both the decisions, it is inconceivable as to how the right of a college is being taken away by insisting upon selection strictly on the basis of merit, which is possible only if a centralised system of counselling is adopted.

47. A student desirous of taking admission selects a particular college on the basis of several factors, such as reputation of the college, quality of the faculty available in a college, quality of the infrastructure available, logistics involved, that is to say, the distance of the college from his place of residence, availability of hostel facilities, fee structure, etc. It is obvious that only if the students are made aware of all these aspects, they can be in a position to decide by opting counselling through a centralised system. The student would be in a position to opt for the appropriate institution taking into account the aspects indicated above. It is quite obvious that in the prospectus issued by the colleges, most of the details, including fee structure would be made available much before the selection/admission process starts. By undertaking the process of counselling in a centralised manner, the student would be in a better position to select a college of his

choice, depending upon his own merit as well as his resources.

Compared to the system suggested by the learned Senior Counsel for the respondents, the system of counselling through Single Window System

would be obviously more beneficial so far as the students are concerned. Moreover, since great emphasis has been laid by the Supreme Court on

the admission purely on the basis of merit, the course suggested by the Committee is more likely to effectuate the intention of the Supreme Court.

There cannot be any two opinion that such a system would be more convenient for the students.

48. It is of course true that in the Supreme Court decisions it has not been specifically spelled out that ""single window system"" should be adopted.

Similarly, there is nothing specific in either of the decisions laying down that ""single window system"" must be abjured at any cost. On the other

hand, the observation in para 16 of the Islamic Academic case to the following effect :-

. . . The common entrance test, held by the association, must be for admission to all colleges of that type in the State. . . ."" rather buttresses the

direction issued by the Committee. In both the decisions, it has been repeatedly emphasised that selection should be on the basis of merit. The

course suggested by the Committee cannot be said to be running counter to what was directed by the Supreme Court. In the absence of any direct

conflict between the ratio of the Supreme Court decisions and the direction issued by the Committee on the above aspect, such a direction of the

Committee should not be interfered with merely because some private engineering colleges find it inconvenient. The Supreme Court itself has given

more importance to the convenience of the students vis-a-vis the right of the Management and with the aforesaid view, given a direction that all the

colleges must opt for common test by the Association or for the common test to be held by the State Government. Since the method adopted by

the Committee is likely to ensure selection strictly on the basis of merit and likely to be more convenient to the students, such a direction should not

be interfered with in exercise of discretionary jurisdiction under Article 226 of the Constitution. Since the method adopted is likely to ensure merit,

the management of a particular engineering college should not cavil at such direction.

49. I also do not see any logic in the submission made by the counsel for the respondents that such a system of counselling through an unified procedure, would take away the right of the Management of the private institutions. The right of the Management to adopt their own method of finding out merit is reflected in permitting them to hold their common entrance test. After the test is held and results are published, they do not have any right to select a candidate on any basis, save and except on the basis of merit. As a matter of fact, in view of the decisions of the Supreme Court, they have a duty to admit students only on the basis of merit.

50. Learned Senior Counsel appearing for the respondents has submitted that as per the decision of the Supreme Court and as per the decision of the Committee, the private colleges are required to furnish necessary details relating to the relative merit of the students admitted and if there is any infraction, appropriate action can be taken by the Committee. He has further submitted that the right of the Committee to supervise begins only after the admission is over and the Committee has no right to dictate the terms regarding admission.

51. I do not think that such a submission has any force. There is no doubt that if the Committee finds any infraction, appropriate action can be taken, but by then, the mischief would have been done so far as the students are concerned and it would be impossible to repara such damage already caused to the student. If the seats are already filled up, it would be difficult to restore status quo ante in respect of the particular colleges.

52. Learned Senior Counsel has rather passionately pleaded that whatever may be the position for the subsequent years, for the present year, at least the colleges should be allowed to adopt their own method of counselling and admission, as there is no sufficient time left for the purpose of counselling through Single Window System. We do not foresee any insurmountable stumbling block or rather stumbling mountain in holding a centralised counselling system by the Confederation itself.

53. In this modern age, keeping in view the rapid strides made in the sphere of Information and Technology, there cannot be any difficulty in undertaking the process of counselling through a centralised system.

54. Even though the Committee has indicated the date and venue would be decided later on, I am not inclined to approve such a direction of the

Committee. The Consortium can be left to decide the venue and the dates for counselling through a centralised procedure, wherein the students will

be required to attend the counselling and depending upon the relative merit, to give indication regarding the colleges of their choice.

55. The submission of the learned Advocate General that the Consortium has earlier suggested that they would follow the method of Anna

University and they have not raised objection for admission through Single Window System, appears to be justified. Since a common entrance test

is held for number of colleges, it is obvious that a student who undergoes such common entrance test is willing to take admission to those colleges.

The very fact that a student had applied for undertaking the common entrance test itself is an indication and thereafter, depending upon the merit,

such a student has to be slotted against a particular choice taking into account his choice and availability of seats in the college.

56. For the aforesaid reasons, I am inclined to overturn the decision of the learned single Judge on this aspect and inclined to accept the decision of

the Committee, subject of course to certain modifications. I therefore direct that the process of counselling shall be undertaken by the Consortium

or any other body authorised by such Consortium. Apart from holding the counselling at Chennai, the Consortium / such body, would be free to

hold such counselling at other different places, but the process of allotment must be done on the basis of centralised system by making comparison

through computers, E-mail or advanced system of communication. It is obvious that after preparing the merit list, the copies would be furnished to

all the authorities/Committee. The Committee would be free to send its representatives to different centres at its own discretion/expense, obviously

to be reimbursed by the Government and not by the Consortium or the Colleges. As observed by the Supreme Court, if there is any dispute

relating to any particular selection, such dispute can be brought to the notice of the Committee by the student concerned or even any other person

or authority. If the process of selection is not over by the prescribed date, it would be open to the Consortium or the association of the colleges to

approach the Committee and we have no doubt in our mind that the Committee would liberally consider any reasonable request, keeping in view

the interest of all concerned, more particularly, the students.

57. In course of submission, the learned Senior Counsel for the respondents has submitted that during previous year, many seats towards the

Government quota in private colleges had remained vacant and such a scenario may be repeated this year. We make it clear that in the event, any

seat in the private college against Government quota remains vacant, such seat may be filled up by the private colleges from and out of the

successful candidates as per the merit list relating to the common entrance test opted by such colleges.

58. In the result, Writ Appeal No.2856 of 2004 is allowed in part. No costs. Consequently, WAMP.No.5285 of 2004 is closed.

25-08-2004

59. In the result, Writ Appeal Nos.2707, 2920 and 3053 of 2004 are allowed in part without any order as to costs. Consequently,

WAMP.Nos.4991, 5399 and 5655 of 2004 are closed. In view of difference of opinion, Writ Appeal No.2856 of 2004 is referred to a third

Judge. In view of the urgency, the records may be placed before the Hon"ble the Chief Justice immediately. Undertaking given by the Consortium

shall continue till the disposal of W.A.No.2856 of 2004 by the Hon"ble Judge.

A.K. Rajan, J.—I have perused the judgment prepared by my learned Brother Justice P.K.MISRA. I respectfully agree with the view

expressed by him that admission to colleges shall be in accordance with the reservation policy of the State.

2. I also respectfully agree with the view expressed by my learned Brother Justice P.K.MISRA that unfilled seats allotted to management will not

revert back to the State quota, but that has to be filled only by the individual college based on merit and also following the reservation policy of the

State.

3. In so far as the method of admission, my learned Brother is of the view that the consortium shall also follow the method of single window system

in admission. With due respect to my learned Brother, I am unable to agree with this view on this aspect for the following reasons:

4. The Supreme Court in T.M.A. Pai Foundation and Others Vs. State of Karnataka and Others, has held that -

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.

In *Islamic Academy of Education and Another Vs. State of Karnataka and Others*, it has held as follows:

That brings us to the question as to how the management of both minority and non-minority professional colleges can admit students in the quota

allotted to them..... In our view what is necessary is a practical approach keeping in mind the need for a merit-based selection. Paragraph 68

provides that admission by the management can be by a common entrance test held by "itself or by the State/University"..... We thus hold that

the management could select students, of their quota, either on the basis of the common entrance test conducted by the State or on the basis of a

common entrance test to be conducted by an association of all colleges of a particular type in that State..... The common entrance test, held

by the association, must be for admission to all colleges of that type in the State. The option of choosing, between either of these tests, must be

exercised before issuing of prospectus and after intimation to the concerned authority and the Committee set up hereinafter. If any professional

college chooses not to admit from the common entrance test conducted by the association then that college must necessarily admit from the

common entrance test conducted by the State. After holding the common entrance test and declaration of results the merit list will immediately be

placed on the notice-board of all colleges which have chosen to admit as per this test. A copy of the merit list will also be forthwith sent to the

concerned authority and the Committee. Selection of students must then be strictly on the basis of merit as per that merit list.

Thus the Supreme Court has held that the "management could select the students". The power to select students is given to the management. But

that power is to select on the basis of merit (i.e.) based on the marks obtained in the Common Entrance Test chosen by the management.

5. In the same decision, in para 19, the Supreme Court has held that -

The Committee shall have powers to oversee the tests to be conducted by the

association..... The Committee shall supervise and ensure that the test is conducted in a fair and transparent manner.

From this it is seen that the powers of the Committee is only to oversee ""the test"" to be conducted by the association and to supervise and ensure that ""the test"" is conducted in a fair and transparent manner. Therefore, the power of the Committee does not extend to any other aspect other than the supervision of ""the test"" to be conducted by the consortium of the private institutions.

6. Pursuant to the direction given (in ISLAMIC ACADEMY's case), Tamil Nadu Government passed G.O.Ms.69, Higher Education (J2)

Department, dated 19.3.2004, whereby the Committee has been constituted. The functions of the Committee have been specified in para-4 of the said Government Order. According to 4(i) -

The Committee shall have powers to oversee the tests to be conducted by the association of Colleges if any.

Therefore, neither by the judgment of the Supreme court nor by G.O.69, the Committee gets the power to regulate ""admission"" to be made to the Colleges by the consortium or by the individual institutions.

7. Writ Appeal No.2856 of 2004 has been filed by the Committee and also by the State Government. In para 25 of the grounds of appeal it is stated as follows:

Learned judge failed to note that it is the ""Committee"" that has to "ensure" or guarantee the fairness, transparency both in the conduct of

examination and admission. The Committee cannot assure or guarantee the same, when the conditions are diluted and admission is done

individually by each college. When the Committee is made responsible or to guarantee or accountable for the actions of the management, it is

empowered to put such condition to discharge the responsibilities in an effective manner.

This shows that the Committee as well as the Government are under the impression that the Committee has power to oversee or supervise and has

the duty to supervise ""admission"" also. This assumed responsibility of the Committee does not get support either from the judgment of the Supreme

Court or from G.O.Ms.No.69. The relevant portion of G.O.Ms.No.69 is as follows:

4. FUNCTIONS:

(i) The Committee shall have powers to oversee the tests to be conducted by the association of Colleges if any. This would include the power to

call for the proposed question papers, to know the names of the paper setters and examiners and to check the method adopted to ensure papers

are not leaked.

(ii) The Committee shall supervise and ensure that the test is conducted in a fair and transparent manner.

(iii) The Committee shall have power to permit an institution, which has been established and which has been permitted to adopt its own admission

procedure for the last, at least 25 years, to adopt its own admission procedure and if the Committee feels that the needs of such an institute are

genuine, to admit, students of their community, in excess of the quota allotted to them by the State Government.

(iv) Before exempting any institute or varying in percentage of quota fixed by the State, the State Government must be heard before the

Committee.

(v) 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. 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.

Thus, the power of the Committee is only as specified above; it cannot exceed its power. But, the Committee has issued the following direction -

B. AFTER THE EXAMINATION AND WHILE STUDENTS ARE BEING ADMITTED.

a)

b) The admission should be made only on the basis of the merit list opted and deemed to have opted and should be by counselling by following

single window system as followed by Anna University under supervision of the Committee. The venue for counselling under single window system

will be decided after the results are published and as directed by the Committee. This direction is beyond the scope of the Committee. The Committee cannot by itself enlarge its scope or powers. The powers of the Committee is circumscribed in the said Government Order itself. Hence, this ground raised by the Committee is devoid of merits. Power of the Committee is only to supervise or oversee "the tests" to be conducted by the Consortium. If the Committee ensures transparency in ""the tests"", and "the tests" are fairly conducted, the power and function of the Committee ends. Even the Supreme Court, in para 19 of Islamic Academy's case, has given a direction, as follows:

We now direct that the respective State Governments do appoint a Committee which will ensure that the tests conducted by the association of colleges is fair and transparent.

Therefore, the Committee has no role to supervise or oversee the process of admission.

8. At the same time, this does not mean that the management has got unlimited power to admit any student of its choice. The literal meaning of

"management quota" would mean "discretion of the management to admit or not to admit any student. But, the Supreme Court both in -

T.M.A.Pai's case and ISLAMIC ACADEMY's case - has held that "merit cannot be ignored", by the management while admitting the students.

That is the management can admit the students only according to merit. Therefore, the power of the management to admit any student is controlled

by the judgments of the Supreme Court in the two cases, i.e. the power is conferred on the management to admit students, but it has to admit

students only according to their inter se merit. According to the Supreme Court, "merit" is nothing but the marks obtained in the examination.

Therefore, students shall be admitted only on the basis of the marks obtained in the test (C.E.T.) or examination.

9. In T.M.A.Pai's case the Supreme Court has categorically held that a device shall be found out for a rational selection process based on merit

alone. It is not as if the Supreme Court is not aware of the single window system. If the intention of the Supreme Court was that the students shall

be admitted even in case of management quota only through single window system, the Supreme Court would have definitely held that admission

shall be done following the single window system. On the other hand, the Supreme Court deliberately has held that ""a device shall be found out for rational selection process based on merit"". That is the Supreme Court is of the view that there are also other rational selection processes (other than the single window system).

10. The single window system of admission was conceived and adopted when the demand was more than the seats available, i.e. when the applicants were more in number than the seats available. In order to see that the merit did not suffer, the State Government devised the single window system. But ground situation as on today is different. Admittedly, in the last year about 25,000 seats remained unfilled in the Engineering Colleges in Tamil Nadu. The situation would not be better even in this year. Therefore, every student/applicant would get a seat in anyone of the institutions; and no person, who wants to get admitted in the Engineering Colleges would be denied admission. That apart even the single window system is not without any defects. Every system has merits and defects.

11. All the students want to get admitted in the better known colleges. One of the reasons for such option is - the fee payable in any of the institutions is the same, whether it is a better known college or a lesser known college. Therefore, there is nothing strange, that everyone opt for better known colleges. But, at the same time, the recently constituted Justice Raman Committee, which was appointed to fix the reasonable fee for Engineering Colleges, has fixed the maximum fee; it has also stated that any college is free to fix a reduced fee structure if it so desires. It is open secret that several colleges are prepared to admit students for a lesser fee (even at 50% of the fee fixed by the Government); but, that could not be done because there was no option for the colleges to collect a lesser fee. If the students are aware that they can get admitted to some of the lesser known colleges at a lesser fees, many students would opt for such colleges. The single window system would enable only the better known colleges to fill up their entire seats; thereby the task of finding out students has been taken care of by the Government rather than by the institutions themselves. At the same time, this leaves, the lesser known colleges or newly started colleges in a disadvantageous position. It is very difficult for the newly started colleges to sustain when a reasonable number of seats are not

filled up. Though they are prepared to admit students for lesser fee (than that was fixed by the Government), they were not permitted to do so. Now that hurdle is removed. The single window system benefits only the better known colleges. Further, the right of the management to select its own students is completely taken away in the single window system. Even the single window system cannot be said to be 100% fool-proof. Manipulations are possible in that system also.

12. When the students know the fees collected by each college, it is possible that many students may opt for the lesser known colleges taking into account also the nearness from their home town, its past record, reputation, etc.. The argument that in the lesser known colleges the facilities available are not adequate and hence there would be some disadvantages to the students is not acceptable because the AICTE is duty bound to ensure that all the basic facilities exists in every institution. If the AICTE is of the view that in some colleges the facilities are not adequate, then the AICTE is bound to take appropriate action. Therefore, all the colleges shall necessarily have the infrastructure as per the standards prescribed by AICTE.

13. The main argument that is advanced in favour of the single window system is "merit will not be compromised" and meritorious students will get admitted into the colleges of their own choice depending on the availability of seats in those colleges. Even if any other rational method is adopted, in view of the judgment of the Supreme court, merit cannot be ignored by any of the management. Even in the minority colleges, the students belonging to that particular minority shall be admitted only on the basis of inter se merit. The Colleges when adopting any other method for admission cannot ignore the merit or the marks obtained by the students in the qualifying examinations/Common Entrance Test. If any college is guilty of refusing admission to a more meritorious student and found giving admission to a lesser meritorious student, then the AICTE can take appropriate action when the fact is made known to it by the Committee or the Government. Then aggrieved student can always approach this Court. Therefore, all that is required to be done by the management is to adopt a rational method of admission based on merits.

14. In view of the technological advancement made in the field of communication

it is not impossible for any student to get the latest information with respect to his application for admission. After completion of the Common Entrance Test and when the marks are announced, the individual student may apply for any number of colleges even through "on-line". For this purpose no fee shall be collected by any college or by the consortium. After receiving such applications within the prescribed time, the respective colleges may scrutinise the applications and select the students and issue order of admission, and that may also be made known to individual students as well as to the Central Agency. It is possible that some students get selected in all colleges to which they applied and some may not get selected in any of the colleges to which they applied. Since there will be a time limit for joining, each college would come to know which student joined in the college. Immediately after the last date for payment of fees, the vacant seats can be filled up from among the waiting list published and maintained by each college. By this process all persons would get their choice and it may not cause much difficulty. Since the selection and the admission shall only be on the basis of merit, the merit is taken care of. This method does not cause any prejudice - either to the college or to the students. At the same time, it also enables the respective colleges to make their admissions. If a student does not get admission in any of the colleges to which he has applied for, he may apply to other colleges. At the most, this may take a few more days for completing the admission process; apart from that there is no other impediment. The appearance for Common Entrance Test conducted by the Consortium is deemed to be the application to all the colleges in the Consortium. The student has to make a choice of his college by intimating their intention to that particular college or colleges.

15. As pointed in the judgment of the Supreme Court, the Colleges have to take a decision as to whether they want to adopt the Common Entrance Test and the single window system followed by the Government or whether they want to admit students on the basis of Common Entrance Test conducted by the Consortium. When they make such an option, they shall also specify the fees collected by that college under all heads. Those particulars should be published in the prospectus itself. Thereafter, no college can make any other demand of fees under any other

head. If such a demand is made by any college that may be brought to the notice of the Consortium/Government/the AICTE. The authorities may take suitable action against such erring colleges. The AICTE shall ensure that no college demanded more fees than advertised or specified in the prospectus.

16. When the fee structure is different in different colleges, the rush for admission to a few better known colleges will not be the same. Also this will facilitate all the colleges getting sufficient students. As stated already, the available seats are more than the demand. It is possible that ultimately many seats may remain vacant even after admitting all the students.

17. After such selection is made by various colleges, list of those candidates shall be sent to the Central Agency along with the marks obtained by

them. This will ensure that the merit does not suffer; at the same time, it gives the power to the management to admit students. A student with lesser

marks cannot be admitted in preference to a student with higher marks, in the respective quota whether he belongs to a minority or non-minority.

Therefore, the admission based on merit is also guaranteed. Any violation can be remedied by approaching the Court. If, for any reason, any of the

students do not get admission in a college to which he applied, he can apply for any other college where the seats are available. No doubt, the

colleges also will be interested in filling up the vacancies available. Therefore, they would also advertise in the media. From such information,

students may apply to any such college and get admitted. For the foregoing reasons, the single window system need not be followed by the

consortium. Further, the Government Orders also do not contemplate single window system for the admission of students by the Consortium. No

system of admission is flawless. The human ingenuity can breach any regulation; and may circumvent the rules. Solution could be found as and

when the occasion arises.

18. As stated already, the function of the Committee constituted by G.O.Ms.No.69 is only to oversee the test to be conducted. This would include

the power to call for the proposed question papers, to know the names of the paper setters and examiners and to check the method adopted to

ensure papers are not leaked. The power of the Committee is only to supervise and ensure that the test is conducted in a fair and transparent

manner. It has also got the power to permit some of the institutions to have their own method of admission which has been permitted to adopt its own admission procedure for the last, at least 25 years. The Committee has also got the power to increase or decrease the quota. No other power has been conferred on the Committee. Therefore, the Committee cannot pass an order directing the self-financing colleges to follow a particular method such as the single window system for admitting the students. As found already, instructions were issued by the Committee on the mistaken view that the Committee has the power even to regulate or supervise the admission process also. Such a view does not get support either from the Government Order (G.O.Ms.No.69) or from the decisions of the Supreme Court. Therefore the instructions or directions given by the Committee with respect to the method of admission (viz) to adopt the single window system, is not legally sustainable as it is ultra vires the powers of the Committee.

19. There is no prohibition or impediment for any of the self-financing colleges or the Consortium to follow the single window system, if it so chooses; it is purely within its discretion whether to adopt the single window system or its own procedure for admission.

20. Self-financing colleges are started not for philanthropy. They are started only with the view to earn profit. Running of the self-finance colleges is nothing but a trade or business. Therefore, Art. 19(1)(g) and Art. 19(6) come into play. Hence, the State may impose any reasonable restriction in the interest of general public. Since it is a business or trade, the right guaranteed under Art. 30(1) also is subject to reasonable restrictions under Art. 19(6).

21. Therefore, the view of the learned single judge that the direction of the permanent Committee to the Consortium to follow single window system is beyond the power conferred on the Committee and also contrary to the law laid down by the Supreme Court, and therefore that direction cannot be sustained, is correct and acceptable; and it is legally sustainable. Any concession made by the Consortium or individual college will not confer a power on the Committee which has not been conferred by the Government Order by which the Committee was created or constituted. The Committee has got only limited power to supervise the test that

is to be conducted by the Consortium as per G.O.Ms.No.69.

There is no illegality in the order passed by the learned single Judge on this aspect, and hence it is confirmed. Therefore, the appeal, filed by the

State and the Committee, has no merit. Hence it is liable to be dismissed. The judgment of the learned single Judge that the Committee has no

power to direct the Consortium to follow the single window system is confirmed.

22. In the result, W.A.Nos.2707, 2920 and 3053 of 2004 are allowed in part. W.A.No.2856 of 2004 is dismissed. No costs. Consequently,

WAMP Nos.4991, 5285, 5399 and 5655 of 2004 are closed.

Prabha Sridevan, J.—While admitting students in the seats reserved for the Management, should the unaided professional

colleges/institutions (minority or non-minority) resort to some centralised counseling system akin to the Single Window System ? This is the

question that needs to be answered here.

2. The judgment in T.M.A. Pai Foundation and Others Vs. State of Karnataka and Others, considered in detail the extent of the right of

administration of the educational institutions, minority, non-minority, private and Government. The directions contained therein were understood

differently by the concerned parties and this was the genesis for the case in Islamic Academy of Education and Another Vs. State of Karnataka

and Others, . In this case, the Supreme Court laid down a procedure for admission of students by the unaided institutions and also gave directions

for the formation of a Permanent Committee to oversee the conduct of an entrance test set by an Association of such institutions as an alternative

to the test conducted by the State agency. In Tamil Nadu, the State Government issued G.O. Ms. No.69 Higher Education (J2) Department dated

19.3.2004 forming a Committee headed by Justice S.S. Subramani, specifying therein the Committee's function. The Association of Institutions

calling itself the Consortium of Professional Arts & Science Colleges in Tamil Nadu is the first respondent herein. Some clauses contained in the

proceedings of the Committee were challenged.

3. Several writ petitions were filed challenging the Proceedings of the Permanent Committee. The learned single Judge set aside some of the

directions. Against this order, four appeals were filed. The learned Judges on the Division Bench concurred in their views in all aspects except with

regard to one. And therefore, that question is referred for the opinion of the third Judge.

4. The difference of opinion arises only with regard to that clause which directs the private Professional Engineering Colleges to admit students by

counseling under the Single Window System "as followed by Anna University, under the supervision of the Committee". It also directed that "the

venue for counseling under the Single Window System will be decided after the results are published and as directed by the Committee." The

learned single Judge set aside these directions. On appeal, P.K. Misra, J. reversed this finding, but accepted the decision of the Committee subject

to certain modifications which provided for counseling to be undertaken by "the Consortium or any other body authorized by such Consortium". In

other words, admission to the Quota reserved for the Management (minority or non-minority) would be by a system similar to the Single Window

System adopted by the Anna University for admission to the Government Quota; but, A.K. Rajan, J. confirmed the view of the learned single

Judge that the direction was beyond the power conferred on the Committee and contrary to the law laid down by the Supreme Court. It is in Writ

Appeal No.2856 of 2004 filed by the Committee and the State of Tamil Nadu against the Consortium and the Anna University that there was the

difference in opinion.

5. According to the learned Advocate General, the colleges/institutions had acquiesced to the Committee's issuance of direction with regard to

adopting the Single Window System. It was also submitted that the finding that the Committee had exceeded its jurisdiction was not correct. It was

further submitted that it was not open to the colleges/institutions to rely on the judgment in T.M.A. Pai Foundation and Others Vs. State of

Karnataka and Others, , when the subsequent judgment in Islamic Academy of Education and Another Vs. State of Karnataka and Others, had

clarified and explained the earlier judgment. According to the learned Advocate General, a centralised counseling, whether under the supervision of

the Committee or conducted by the Consortium, would be the proper procedure for admitting students and in accordance with the judgment in

Islamic Academy's case.

6. Mr. R. Krishnamoorthy and Dr. Rajeev Dhavan, learned senior counsel made

their submissions on behalf of the respondents. A technical objection was raised with regard to the right of the Forum of Tamil Nadu Minority Self-Financing Engineering Colleges (on whose behalf Dr. Dhavan had appeared before the Bench) to be heard in this writ appeal when they were not parties to it. However, since the impugned direction would affect all the unaided colleges, whether minority or non-minority, Dr. Rajeev Dhavan, whether on behalf of the minority institutions as intervenor or as a senior counsel for the Consortium, was heard. Submissions were made with regard to several aspects of the matter, including the efficacy of Single Window System, the necessity of such a system, the rights of the minorities under Article 29(2) and Article 30 of the Constitution of India and the manner in which lapsed seats should be filled up. But, I will scrupulously contain myself to the question that is referred to me and whether this Court, "as a Portia man", can mould the relief in this case, since the learned Advocate General prayed that this should be done, citing the judgment in *Authorised Officer, Thanjavur and Another Vs. S. Naganatha Ayyar and Others*, .

7. In *T.M.A. Pai's* case cited supra, the eleven Judges Bench considered, amongst other questions, the question whether in case of private institutions there can be Government regulations and if so, to what extent. It was held in that case that the scheme framed in the judgment in *Unni Krishnan, J.P. and others Vs. State of Andhra Pradesh and others etc. etc.*, had the effect of nationalizing education in respect of important features, viz. the right of the institutions to admit students and their right to fix the fee. Here, we are concerned with their right to admit students.

8. The five Judge Bench judgment in *Islamic Academy's* case can only be read with *T.M.A. Pai's* case as base material as amply revealed in that judgment itself in various paragraphs. In fact, several passages in the majority judgment in *T.M.A. Pai's* case are reproduced in the judgment in *Islamic Academy's* case. Therefore, the directions or clarifications given in the judgment in *Islamic Academy's* case must be understood keeping in mind the spirit of the judgment in *T.M.A. Pai's* case.

9. Paragraphs 48 and 50 of the majority judgment in *T.M.A. Pai's* case dealing with this aspect are extracted below :-

Private unaided non-minority educational institutions.

48. Private education is one of the most dynamic and fastest-growing segments of post-secondary education at the turn of the twenty-first century.

A combination of unprecedented demand for access to higher education and the inability or unwillingness of the Government to provide the

necessary support has brought private higher education to the forefront. Private institutions, with a long history in many countries, are expanding in

scope and number, and are becoming increasingly important in parts of the world that relied almost entirely on the public sector.

50. The right to establish and administer broadly comprises 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 employees.

After quoting from the report submitted by the University Education Commission headed by Dr. S. Radhakrishnan with regard to autonomy in

education, the Supreme Court observed as follows :-

52. There cannot be a better exposition than what has been observed by these renowned educationists with regard to autonomy in education. The

aforesaid passage clearly shows that the governmental domination of the educational process must be resisted. Another pithy observation of the

Commission was that State aid was not to be confused with State control over academic policies and practices. The observations referred to

hereinabove clearly contemplate educational institutions soaring to great heights in pursuit of intellectual excellence and being free from unnecessary

governmental controls.

53. With regard to the core components of the rights under Articles 19 and 26(a), it must be held that while the State has the right to prescribe

qualifications necessary for admission, private unaided colleges have the right to admit students of their choice, subject to an objective and rational

procedure of selection and the compliance with conditions, if any, requiring admission of a small percentage of students belonging to weaker

sections of the society by granting them freeships or scholarships, if not granted by the Government.

It was reiterated here by Mr. R. Krishnamoorthy and Dr. Rajeev Dhavan, for the respondents that the right to admit students of their choice is

complete and cannot be devalued. The extent to which there can be regulations regarding the right to establish an educational institution was

declared in T.M.A. Pai's case as follows :-

54. The right to establish an educational institution can be regulated; but such regulatory measures must, in general, be to ensure the maintenance

of proper academic standards, atmosphere and infrastructure (including qualified staff) and the prevention of maladministration by those in charge

of management. The fixing of a rigid fee structure, dictating the formation and composition of a governing body, compulsory nomination of teachers

and staff for appointment or nominating students for admissions would be unacceptable restrictions.

In the majority judgment of Kirpal, C.J., it is observed that as long as an educational institution, whether belonging to the minority or the majority

community, does not receive aid, it would, "in our opinion, have the right and discretion to grant admission to such students as it chooses or select

subject to what has been clarified before us". The following paragraphs in the judgment in T.M.A. Pai's case are relevant:-

58. For admission into any professional institution, merit must play an important role. While it may not be normally possible to judge the merit of

the applicant who seeks admission into a school, while seeking admission to a professional institution and to become a competent professional, it is

necessary that meritorious candidates are not unfairly treated or put at a disadvantage by preferences shown to less meritorious but more influential

applicants. Excellence in professional education would require that greater emphasis be laid on the merit of a student seeking admission.

Appropriate regulations for this purpose may be made keeping in view the other observations made in this judgment in the context of admissions to

unaided institutions.

59. Merit is usually determined, for admission to professional and higher education colleges, by either the marks that the student obtains at the

qualifying examination or school-leaving certificate stage followed by the interview, or by a Common Entrance Test conducted by the institution, or

in the case of professional colleges, by government agencies.

68. It would be unfair to apply the same rules and regulations regulating admission to both aided and unaided professional institutions. It must be borne in mind that unaided professional institutions are entitled to autonomy in their administration while, at the same time, they do not forego or discard the principle of merit. It would, therefore, be permissible for the university or the Government, at the time of granting recognition, to require a private unaided institution to provide for merit-based selection while, at the same time, giving the management sufficient discretion in admitting students. This can be done through various methods. For instance, a certain percentage of the seats can be reserved for admission by the management out of those students who have passed the Common Entrance Test held by itself or by the State/university and have applied to the college concerned for admission, while the rest of the seats may be filled up on the basis of counseling by the State agency. This will incidentally take care of poorer and backward sections of the society. The prescription of percentage for this purpose has to be done by the Government according to the local needs and different percentages can be fixed for minority unaided and non-minority unaided and professional colleges. The same principles may be applied to other non-professional but unaided educational institutions viz. graduation and post-graduation non-professional colleges or institutes.

10. The Islamic Academy's case came up because the petitioners before the Supreme Court which were unaided professional institutions, both minority and non-minority, sought certain clarifications since the judgment in T.M.A. Pai's case was understood by various State Governments and educational institutions in different perspectives.

11. Paragraph 12 of the said judgment reads as follows:-

12. Paragraph 68 of the majority judgment in Pai case can be split into seven parts :

Firstly, it deals with the unaided minority or non-minority professional colleges.

Secondly, it will be unfair to apply the rules and regulations framed by the State Government as regards the government-aided professional colleges to the unaided professional colleges.

Thirdly, the unaided professional institutions are entitled to autonomy in their administration, while at the same time they should not forego or

discard the principles of merit.

Fourthly, it is permissible for the University or the Government at the time of granting recognition to require an unaided institution to provide for

merit-based admission while at the same time giving the management sufficient discretion in admitting students.

Fifthly, for unaided non-minority professional colleges certain percentage of seats can be reserved for admission by the management out of those

students who have passed the common test held by itself or by the State/University and for applying to the college/University for admission, while

the rest of the seats may be filled up on the basis of counseling by the State agency.

Sixthly, the provisions for poorer and backward sections of the society in unaided professional colleges are also to be provided for.

Seventhly, the prescription for percentage of seats in unaided professional colleges has to be done by the Government according to the local

needs. A different percentage of seats for admission can be fixed for minority unaided and non-minority unaided professional colleges.

The third, fourth and fifth parts must be kept in mind while drawing the boundaries of the powers of the Committee.

12. Paragraph 16 of the judgment in Islamic Academy's case is the crucial paragraph on which the question raised before this Court rests.

Paragraph 16 is extracted below :-

16. In our view what is necessary is a practical approach keeping in mind the need for a merit-based selection. Paragraph 68 provides that

admission by the management can be by a held by ""itself or by the State/University"". The words ""Common Entrance Test"" clearly indicate that each

institute cannot hold a separate test. We thus hold that the management could select students, of their quota, either on the basis of the Common

Entrance Test conducted by the State or on the basis of a Common Entrance Test to be conducted by an association of all colleges of a particular

type in that State e.g. medical, engineering or technical etc. The Common Entrance Test, held by the association, must be for admission to all

colleges of that type in the State. The option of choosing, between either of these tests, must be exercised before issuing of prospectus and after

intimation to the concerned authority and the Committee set up hereinafter. If

any professional college chooses not to admit from the Common

Entrance Test conducted by the association then that college must necessarily admit from the Common Entrance Test conducted by the State.

After holding the Common Entrance Test and declaration of results the merit list will immediately be placed on the notice-board of all colleges

which have chosen to admit as per this test. A copy of the merit list will also be forthwith sent to the concerned authority and the Committee.

Selection of students must then be strictly on the basis of merit as per that merit list. Of course, as indicated earlier, minority colleges will be entitled

to fill up their quota with their own students on the basis of inter se merit amongst those students. The list of students admitted, along with the rank

number obtained by the student, the fees collected and all such particulars and details as may be required by the concerned authority or the

Committee must be submitted to them forthwith. The question paper and the answer papers must be preserved for such period as the concerned

authority or Committee may indicate. If it is found that any student has been admitted de hors merit, penalty can be imposed on that institute and in

appropriate cases recognition/affiliation may also be withdrawn.

13. On behalf of the respondents, it was contended that when the Committee has been set up as per the direction of the Supreme Court under

Article 142 of the Constitution, the Committee can act only within the parameters laid down by the Supreme Court and there was no discretion

vested with it to extend its power beyond what was laid down in the judgment in Islamic Academy's case or the Government Order under which

the Committee was set up. This was countered by the State, submitting that the impugned direction was, in fact, in keeping with the Islamic

Academy's case.

14. Now, if we see the purpose for which the Supreme Court laid down the directions, and the manner in which the directions had to be followed,

then the answers to the questions whether the Committee had the power to issue such a direction and whether the respondents had acquiesced to

the Committee's jurisdiction, will be clear.

15. Though the question that originally came up for consideration in T.M.A. Pai's case was regarding the scope of the minorities' right under

Article 30(1) read with Article 29(2) of the Constitution, when the matter came

up for hearing, the Chief Justice formulated five issues which encompassed the entire field of education dealing not only with the rights of minority institutions, both aided and unaided, and the permissible restrictions upon those rights, but also with regard to the rights in general of non-minorities to establish and administer educational institutions, both aided and unaided. Paragraph 2 of the judgment, which is relevant, is extracted below :-

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

The judgment in Unnikrishnan's case was considered in the following paragraph :-

The scheme framed by the Supreme Court in Unni Krishnan case and thereafter followed by the Governments was one that cannot be called a reasonable restriction under Article 19(6) of the Constitution. The restrictions imposed by the scheme, made it difficult, if not impossible, for the educational institutions to run efficiently.

The scheme in Unni Krishnan case has the effect of nationalizing education in respect of important features viz. the right of a private unaided institution to give admission and to fix the fee. By framing this scheme, which

has led to the State Governments legislating in conformity with the scheme, the private institutions are indistinguishable from the government institutions; curtailing all the essential features of the right of administration of a private unaided educational institution can neither be called fair nor reasonable. It has been recognised that private educational institutions are a necessity.

Any system of student selection would be unreasonable if it deprives the private unaided institution of the right of rational selection, which it devised for itself, subject to the minimum qualification that may be prescribed and to some system of computing the equivalence between different kinds of qualifications, like a Common Entrance Test. Such a system of selection can involve both written and oral tests for selection, based on principle of fairness. Surrendering the total process of selection to the State is unreasonable, as was sought to be done in Unni Krishnan scheme.

Therefore, it follows that a private unaided institution cannot be deprived of its right to select its students, subject of course, to any minimum qualification like a Common Entrance Test, and any scheme which provides for surrender of the total process of selection to the State is unreasonable. While assuring private institutions that they had the right to select their students, the Supreme Court held as follows :-

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.

16. The manner in which the institutions could retain their autonomy without abandoning the principle of merit was indicated in paragraph 68 of the judgment in T.M.A. Pai's case, which has already been extracted above and this was clarified in the judgment in Islamic Academy's case in paragraph 16, which has also been extracted above. The Supreme Court recognised the hardship that a student could face if he had to appear at

more than one entrance test and therefore, they found that there should be a practical approach, which is indicated by the words in the judgment in

T.M.A. Pai's case itself, viz. "Common Entrance Test." Therefore, it was held that the management could select students of their quota either on

the basis of the Common Entrance Test conducted by the State or on the basis of a Common Entrance Test to be conducted by an Association of

Colleges. It is in order to conduct this Common Entrance Test that the first respondent - Consortium of Professional Arts and Science Colleges

was formed by seven Associations for admitting students in respect of the management quota or the Minority quota, as the case may be. The

institutions had to indicate which common test they would be adopting for admission to their institutions. This exercise of option shall be made

before the Prospectus was issued and it should be intimated to the Committee. The institutions had two choices - they could admit from those

students who had written the Common Entrance Test conducted by the Consortium or from those who had written the Common Entrance Test

conducted by the State. Paragraph 16 extracted above lays down the procedure which shall be adopted by the professional colleges which choose

to admit students from the Common Entrance Test. They shall publish on their notice board the merit list which shall also be sent to the Committee

and the authority concerned. The merit list shall be prepared by the Consortium on the basis of the marks obtained by the students both in the

qualifying examination and the Common Entrance Test, following the method adopted by the Anna University. This is admitted by the respondents.

The selection of students must, however, be strictly on the basis of merit. The Committee, while correctly directing that admissions shall be made

only on the basis of the merit list opted, proceeded to issue further directions that this shall be followed by the counseling under the Single Window

System.

Islamic Academy's case and the Powers of the Committee

17. The powers of the Committee have been laid down in paragraph 19 of the judgment in Islamic Academy's case, which is extracted below :-

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 proposed question paper(s), to know the names of the paper-setters and examiners and to check the method adopted to ensure papers or not leaked. The Committee shall supervise and ensure that the test is conducted in a fair and transparent manner.

The other directions are not necessary for this case.

So, the Committee has to ensure that the test is conducted in a fair and transparent manner, which commences right from the stage when the question papers can be called for and the identity of the paper setters can be ascertained. But, there is nothing in paragraph 19 to show that after the test is conducted, anything further is to be done by the Committee with regard to admissions, other than what is said in paragraph 16 with regard to receiving the merit list, the list of selected candidates and other details, and the right to ensure that merit is not overlooked.

18. The learned Advocate General referred to paragraph 14 of the judgment in *Bharati Vidyapeeth [Deemed University] and Others Vs. State of Maharashtra and Another*, and submitted that it was not open to the respondents to contend that conduct of examination is one thing and admission is another and that both form one integral whole. To this, Dr. Rajeev Dhavan would submit that the said paragraph cannot be read in isolation. In that case, the appellant, as a deemed university, allowed admissions to be made in their college upto the academic year 1995-96 through the Common Entrance Test conducted by the State. Thereafter, they decided to "keep themselves outside the scope of the State

authority". When admission rules to professional colleges were framed, whereby the colleges run by the appellant were included in the admission

proposed to be controlled by the Common Entrance Test authority, the appellant challenged the rules and contended that once it had been granted

the status of a deemed university, the State or the University cannot impose rules regarding the manner in which admissions could be made. The

Supreme Court held that since admission plays a crucial role in maintaining the high quality of education, admissions to deemed universities has to

be brought under the control of the University Grants Commission and that admission procedure to a deemed university is "fully occupied by Entry

66 of List-I and the State cannot exercise any powers over admission procedures". It is in this context that the Supreme Court observed that

selection and admission cannot be compartmentalised, but it is one single process. This cannot advance the case for a centralised counseling.

19. In fact, this paragraph in Bharathi Vidyapeeth's case can be read in favour of the Consortium. Let us again examine what paragraph 16 of the

judgment in Islamic Academy's case says. It deals with the manner in which the unaided professional colleges can admit students in the quota

allotted to them. Since many professional colleges indulged in profiteering, charging capitation fees, the majority judgment in T.M.A. Pai's case

insisted that this right of admission is subject to the principle of merit. A student who wanted to apply to any one of these colleges had to take part

in the entrance test in order to be given admission. Therefore, there are two stages - selection and admission - selection by conduct of an entrance

test and admission on the basis of merit. On the question of reservation in the Management Quota, the Division Bench was in agreement and so,

whenever I refer to the principle of merit, it should be read with the judgment of the Division Bench in mind. The Supreme Court only simplified the

procedure with regard to the first stage, viz. the entrance test. Instead of writing as many entrance tests as there were colleges to which the

students want to apply, now the students could write just one entrance test and thereafter apply to the colleges of their choice. That college would

admit the particular student at its discretion, subject to merit.

20. The selection and admission had to be done by the colleges themselves. But, instead of several separate entrance tests, they had to have a

Common Entrance Test. So, the Consortium was actually conducting the Common Entrance Test on behalf of each institution in order to save the

student the trouble of running hither and thither. But, their individual and separate rights do not merge; they remain separate, giving them the choice

of selection of their students. The Committee directed that a Single Window System be followed under the supervision of the Committee. P.K.

Misra, J. modified this and directed that the Consortium could devise a Single Window System of their choice, pursuant to which the student could

be admitted.

21. According to the appellants, the Single Window System that has to be followed now shall be as per the Single Window System adopted by

the Anna University; and that it ensured that the student has the freedom of choice, and in no way curtails the right of the institution and was in fact,

a very transparent method; nor did it "nationalise" the admission process. The system followed by the Anna University appears to be this. A

student, who opts for the Single Window System, goes to the Centre and there are several computers indicating the vacancies in each college as

also the vacancies in the particular courses. The student exercises his/her choice of college, as well as his/her choice of the subject. Depending on

his/her merit ranking, he/she is allotted a college. An allotment letter is issued by the Anna University. The allotment letter shows the college's

name. The student pays a sum of money as fees. Thereafter, he takes the allotment letter to the college whose name is shown in the letter and

according to the learned Advocate General, "The College is bound to admit the student". If this is so, the last sentence in paragraph 16 of the

judgment in Islamic Academy's case has no meaning. It is repeated here :-

If it is found that any student has been admitted de hors merit, penalty can be imposed on that institute and in appropriate cases

recognition/affiliation may also be withdrawn.

If the college is bound to admit a student who is allotted to them through the Single Window System or any other similar system, then no penalty

can be imposed on that Institute for admitting the student de hors merit. If the college had no option, no choice, how can they be penalised for

admitting a student whom they are forced to admit? Therefore, it is clear that in the Islamic Academy's case, the Supreme Court did not require

these unaided colleges to have a centralised counseling.

22. The dictionary meaning of "Counseling" as seen from the New Webster's Dictionary is "the act or process of giving professional competent

advice". "Counsel" means "information or opinion given to aid the judgment or actions of another". If so, this mechanised process adopted by

Anna University cannot be termed "counseling", but it appears that this is how it is understood and accepted.

23. As per the procedure laid down in paragraph 16 of the judgment in Islamic Academy's case, a merit list will be published. On publication of

the merit list, the students will know what their ranks are and depending upon that and on other factors like their places of residence, their

proximity to the college, the excellence of the infrastructure, the competence of the faculty etc., the students may apply to a few colleges and wait

for acceptance of their application from the colleges of their choice.

24. It was urged on behalf of the State that under the Single Window System, the student can exercise his choice, which will be deprived to him if

the Single Window System is not followed. I am afraid, this is quite untenable. The students do exercise their choice by applying to the colleges

which they prefer. What the Single Window System does is, it deprives the institution to choose its students, which right has been declared by the

Supreme Court in the judgment in T.M.A. Pai's case and also clarified in the judgment in Islamic Academy's case. Nowhere in the judgment in

Islamic Academy's case has the Supreme Court curtailed this right to the extent that its discretion in the selection of its students is taken away. It

was also submitted by the learned Advocate General that when the Supreme Court was conscious of the hardship a student will face in appearing

in numerous entrance tests, the Supreme Court would surely have also taken note of the hardship that the students will face if they have to apply

separately to several colleges and wait for admission from one of them. The fact remains that, the Supreme Court, at no point, mentions centralised

counseling. In fact, the judgments keep reiterating that the institutions have their discretion to select the students of their choice. There is no

justification to presume that the Supreme Court would have envisaged the process of centralised counseling also when there is nothing in the

judgment to support such a presumption. Like the refrain of a song, the

judgment in T.M.A. Pai's case constantly reiterates that the Principle of Merit shall not be discarded and that there should be Maximum Autonomy and greater freedom from State control; even the dissenting and separate judgments do not strike a note of dissonance to this. We cannot forget or ignore this, nor can the Committee. The freedom of the institutions to select their students is curtailed only to the extent that selection shall be on the basis of merit. It is channelised or regulated, by allowing the colleges who do not want to submit to the Common Entrance Test conducted by the State agency, to have a Common Entrance Test of their own. It is only to this extent that their right to select their students has been curtailed or channelised and not further.

25. In fact, if we look at the summary of the submissions made on behalf of the writ petitioners/applicants and on behalf of the State/Central

Governments/statutory authorities, in the judgment in Islamic Academy's case, we see that the State had, at no point of time, urged that the

percentage of seats to be reserved by the unaided colleges must also be made through a Single Window System. The following portions are

relevant:-

36. Submissions made on behalf of writ petitioners/applicants.

(I) On the fundamental rights of educational institutions -

(i)

(ii)

(iii) The right to establish and administer educational institutions comprises of the right to -

(a) admit students,

(b) set up a reasonable fee structure,

(c) constitute a governing body,

(d) appoint staff and take disciplinary action.

(iv) Although such rights are subject to reasonable restrictions, but the same must be for the betterment of the institution and as such, the right

under Article 19(1)(g) and Article 30 of the Constitution cannot be undermined.

37. Submissions made on behalf of State/Central Government/statutory authorities.

(i)

(ii)

(iii)

(iv) As merit is usually determined by either the marks of the students obtained at the qualifying examination or school-leaving certificate stage

followed by the interview or by a common entrance test conducted by the institution, the State, while framing regulations, has the requisite

jurisdiction to issue necessary directions in this behalf so that merit is not sacrificed.

(v) The plea of the minority institutions to the effect that their right to admit or reject students is absolute would not be in consonance with the

direction issued in paragraph 68 which provides for -

(a) a system to provide merit-based selection while granting sufficient discretion to the management,

(b) a certain percentage of seats have to be reserved for the management, the rest can be filled up on the basis of counseling by the State agencies

which would take care of poorer and backward sections of the society. The prescription of the percentage for the said purpose must be left with

the State.

Therefore, even on behalf of the State, it was only contended that the right of the minority institutions was subject to what was held by the Supreme

Court in paragraph 68 of the judgment in T.M.A. Pai's case. The first sentence of this paragraph itself makes it abundantly clear that there cannot

be the same rules and regulations regulating admissions to both aided and unaided professional institutions and that unaided institutions are entitled

to autonomy and this autonomy takes within it the right to admit students. The only qualifier is that the principle of merit should not be given up.

Even at the time of granting recognition, private unaided institutions are only required to provide for merit based selection, but the management had

sufficient discretion in admitting students. One of the methods of providing for merit based selection was spelt out in paragraph 68 which was,

reserving "a certain percentage of seats" for the management out of the students who have passed the common entrance test held by the institution,

then the Supreme Court directed, "the rest of the seats may be filled up on the basis of counseling by the State agency." Therefore, the filling up of

the quota reserved for these unaided institutions was not dependent on nor consequent to, the counseling done by a State agency. If so, the

Permanent Committee could not have directed the Consortium to follow the Single Window System (under the supervision of the Committee) and

to fix the venue ""as directed by the Committee"". The Committee was formed in accordance with the judgment in Islamic Academy's case which

itself was only to clarify certain features in T.M.A. Pai's case and ""to give effect to it"", in the words of Sinha, J. In fact, the Committee appears to

have been conscious of the limitation. It prefaces Paragraph B with the following words :-

We suggested to the representatives of the "Consortium" why admission should not be made on the basis of merit list conducted by the

Association of Colleges by a counseling through a single window system.

The suggestion was not accepted by the colleges/institutions since it interfered with their right of admission, and was contrary to the judgments in

Islamic Academy's and T.M.A. Pai's cases. If so, the direction cannot be imposed on them.

26. Jurisdiction

The Notification in G.O. Ms. No.69 dated 19.3.2004 forming the Permanent Committee lays down the functions of the Committee. This is strictly

in accordance with the judgment in Islamic Academy's case which has already been extracted above. In fact, the Committee itself is only ""for

ensuring fair and transparent conduct of common entrance test"" and nothing more. If the Supreme Court had intended that the Committee had to

also supervise the admission to unaided institutions, it would definitely have made that clear. For this reason and the reasons given in the previous

paragraphs, the direction for adopting a Single Window System could not have been given.

27. Acquiescence

It was submitted that the Consortium of Colleges had acquiesced to the jurisdiction of the Committee to give directions for admission through a

Single Window System. On 21.5.2004, the Consortium addressed the Chairman of the Committee in a letter where it also said that all the member

colleges in the Consortium are advised to admit the students who have written Common Entrance Test conducted by Consortium as per the

ranking and as per the method followed by Anna University. The learned Advocate General would submit that this would show that that the

Consortium was willing to adopt the Single Window System as conducted by the Anna University and having committed themselves to such a

course, it was not open for them to resile from that stand. Mr. R. Krishnamoorthy, learned senior counsel submitted that there was nothing in the

letter dated 21.5.2004 to indicate acquiescence since all along, the stand of the Consortium was that their right to admit students cannot be

curtailed. It was further submitted that the said letter was only a sequence in the correspondence between the Consortium and the Committee. On

17.5.2004, the Consortium informed the Chairman of the Committee about their formation and requested the Chairman for permission to conduct

the Common Entrance Test. On 20.5.2004, the Vice Chancellor, Anna University had written a letter to the unaided college with regard to

admission of students under management quota, which is as follows :-

After completion of admission, the Principals of the colleges have to send the details of candidates applied, their rank along with the marks,

examination considered, community, nativity etc., and the list of candidates selected for admission to the DOTE and Anna University for approval.

According to Dr. Rajeev Dhavan, when Anna University had itself required the Principals of the colleges to send the names of the candidates and

the list of candidates selected, it would only show that Anna University also understood the judgment in Islamic Academy's case as it ought to be

understood.

28. It was further submitted that the words, ""as per the method followed by Anna University"" do not refer to the Single Window System, but

would refer to the manner in which the Common Entrance Test should be conducted. It is difficult to read anything in that sentence as amounting to

acquiescence to a Single Window System; on the contrary, it appears to refer to the conduct of a Common Entrance Test. The impugned order

makes this abundantly clear. The Consortium had no intention of acquiescing to the Single Window System since paragraph B of the impugned

order reads thus :-

If the Single Window System of counseling is followed, students can get admission to the course and college of their choice which will be also

within their financial burden. The representative did not agree to the above suggestion and said merit system will be followed by individual colleges.

The management cannot refuse to accept the said system unless it affects their right to admission.

The management definitely has the right to refuse to accept the Single Window System since it clearly affects their right of admission. The learned

Advocate General informed the Court that under the Single Window System, once an allotment letter is issued by the authority who conducts the

Single Window System, whether it is Anna University or any other body, the college to which the student is allotted is bound to admit the student.

It is to be noted that the student still retains the right not to take the seat. It appears that about 8000 seats which have been allotted under the

Single Window System have gone unoccupied, perhaps because the students did not like the college that was allotted to him/her. But, the college

does not have the right to refuse a student once a student is allotted to them, in which case the right of the management to admission is definitely

affected.

29. It is clear that the concern of the Committee was to ensure that the action of the management should be transparent and admission cannot be

refused on whimsical or extraneous reasons. But, this is taken care of by the directions given in the judgment in Islamic Academy's case which

provides for imposition of penalty and even withdrawal of recognition/affiliation if a student has been admitted de hors merit. The merit list is

communicated to the Committee and the authority, the list of students admitted along with their rank, the fees collected is also communicated to the

authority of the Committee as per the judgment in Islamic Academy's case. These are all safeguards to ensure transparency, to eliminate charging

high fees, and to ensure adherence to principle of merit.

30. It is true, as observed by the learned Judges of the Division Bench, that any system will have its loopholes and a method may be found to

scuttle the object for which the system has been devised. But here, I have only to examine whether the Committee formed in accordance with the

judgment in Islamic Academy's case, could issue direction for having a centralised counseling. I find that such a power was not given to the

Committee in the judgment in Islamic Academy's case. The question of moulding the relief or adjustment of equity does not arise here, for no

student has complained that if centralised counseling is not adopted, his/her interest will suffer. We can cross the bridges if and when they come.

Whether the Single Window System is conducted by the Anna University or by an authority nominated by the Consortium as suggested by P.K.

Misra, J., it matters little. The outcome is that the right of the institutions to admit students is taken away and further, it would go contrary to the

judgment in Islamic Academy's case and T.M.A. Pai's case.

31. Learned Advocate General submitted that there may be some irregularities in the admission if it is left solely to the discretion of the individual

managements. It appears to me that the judgment in Islamic Academy's case has provided sufficient safeguards. But, if in spite of this some

irregularities are noted, then it is open to the authorities and the State to take stringent action. On this ground, the right of the individual institutions

cannot be taken away, for as observed in the majority judgment in T.M.A. Pai's case,

65. The private educational institutions have a personality of their own, and in order to maintain their atmosphere and traditions, it is but

necessary that they must have the right to choose and select the students who can be admitted to their courses of studies.

.....

Even when students are required to be selection on the basis of merit, the ultimate decision to grant admission to the students who have otherwise

qualified for the grant of admission must be left with the educational institution concerned. However, when the institution rejects such students, such

rejection must not be whimsical or for extraneous reasons.

In the separate judgment of Variava, J.,

Q.5.C.

A. Sofar as the statutory provisions regulating the facets of administration are concerned, in case of an unaided minority educational institution, the

regulatory measures of control should be minimal.

.....

32. For the above reasons, I agree with the conclusion of A.K. Rajan, J. and

answer the question accordingly.

33. Now, some time frame has to be given for completion of the admission procedure. It appears that within five days, the colleges/institutions will receive the marks obtained by the students in the 10+2 Examinations and within ten days thereafter, the merit list will be published and within a week thereafter, the counseling by the individual institutions will be concluded and the students admitted in the respective institutions. Therefore, in about three weeks" from today, the entire process shall be completed. The Consortium agrees to have a 24 hour help line for the students in order to assist them in processing the admission. The merit list shall also be published on line so that there is no delay in the students knowing where they stand in the merit list. For this year, however, in view of the long delay, I would make another suggestion to the Consortium. And that is, to permit students to apply online to the colleges of their choice and the college which finally admits the particular student can collect the application fees at the time of admission of the student. This is just a suggestion in order to facilitate and quicken the process.