

(2011) 10 AP CK 0059

In the Andhra Pradesh High Court

Case No : Writ Petitions No. 16547, 17498, 20535, 20543, 20971, 20972, 21152, 21165, 21190, 21225, 21243, 21772, 21823, 21830, 21831, 21834, 21836, 21900, 21905, 21907, 21938, 21939, 21940, 21941, 21944, 21945, 21946, 21947, 22154, 22179 and 22375 of 2010

Consortium of Engineering Colleges Managements
Association (CECMA) and others

APPELLANT

Vs

Government of Andhra Pradesh and others

RESPONDENT

Date of Decision : 29-10-2011

Acts Referred:

Andhra Pradesh Educational Institutions (Regulation of Admission and Prohibition of Capitation Fee) Act, 1983 — Section 7
Constitution of India, 1950 — Article 14, 15, 15(1), 19(1), 19(6)
Sea Customs Act, 1878 — Section 178A

Citation : (2013) 3 ALD 609 : (2012) 3 ALT 686

Hon'ble Judges : P. Durga Prasad, J;Goda Raghuram, J

Bench : Division Bench

Advocate : S. Niranjan Reddy Writ Petition No. 16547 of 2010, Writ Petition No. 16547 of 2010, Writ Petition No. 20971 of 2010, Writ Petition No. 20972 of 2010, Writ Petition No. 21772 of 2010, Writ Petition No. 21823 of 2010, Writ Petition No. 21830 of 2010, Writ Petition No. 21831 of 2010, Writ Petition No. 21834 of 2010, Writ Petition No. 21836 of 2010, Writ Petition No. 21900 of 2010, Writ Petition No. 21905 of 2010, Writ Petition No. 21907 of 2010, Writ Petition No. 21938 of 2010, Writ Petition No. 21939 of 2010, Writ Petition No. 21940 of 2010, Writ Petition No. 21941 of 2010, Writ Petition No. 21944 of 2010, Writ Petition No. 21945 of 2010, Writ Petition No. 21946 of 2010, Writ Petition No. 21947 of 2010, Writ Petition No. 22154 of 2010 and Writ Petition No. 22179 of 2010, Sri. K. Durga Prasad Writ Petition No. 20535 of 2010, Sri. RA. A Chuthanand Writ Petition No. 20543 of 2010, Sri. Sricharan Telaprolu Writ Petition No. 21152 of 2010, Writ Petition No. 21165 of 2010 and Writ Petition No. 21243 of 2010, Sri. M. Ravindranath Reddy Writ Petition No. 21190 of 2010, Sri. P. Venugopal Writ Petition No. 21225 of 2010 and Sri. Harender Prasad Writ Petition No. 22375 of 2010, for the Appellant;

Final Decision : Allowed

Judgement

1. Heard Sri Rajendra Chowdary, learned Senior Counsel instructed by Sri K. Durga Prasad; Sri Kurian George Kannanthanam -learned senior counsel instructed by Sri M. Ravindranath Reddy; Sri P. Venugopal; and Sri S. Sriram for Sri Sricharan Telaprolu and Sri S. Niranjan Reddy - learned counsel for the several petitioners; Sri K.G. Krishna Murthy the Additional Advocate-General instructed by the learned G.P. for Higher Education for the State Government; Sri C. Sudesh Anand for the Admission and Fee Regulatory Committee (AFRC) and the Andhra Pradesh State Council for Higher Education; Sri K. Rathanga Pani Reddy - standing counsel for JNTU; Sri Deepak Bhattacharjee - standing counsel for the Osmania University; and Sri Ponnamm Ashok Goud - the Asst. Solicitor General for India, for the respondents.

2. The fee structure notifications issued by the State, for private unaided educational institutions (whether minority or non-minority), imparting professional education, for the academic years 2010-2011 to 2012-2013 are challenged in this batch of Writ Petitions. The reliefs sought in the several writ petitions are distinctly structured though the common and substantive grievance is regards the fee structure notified by the State (on recommendations of the AFRC), for the several professional courses offered by private unaided educational institutions. Reliefs sought in some of the writ petitions were also amended from time to time on applications filed in those writ petitions.

3. In W.P. Nos. 20535 & 20543 of 2010, validity of the Constitution [Ninety-third Amendment] Act, 2005 - amending Article 15 by addition of Clause-5 [enabling the State to make a special provision by law for advancement of any socially and educationally backward classes of citizens or for the scheduled castes or scheduled tribes relating to their admission to educational institutions including private educational institutions, whether aided or un aided by the State, other than minority educational institutions referred to in Article 30(1)] was challenged. We, therefore, issued notice on 27-04-2011 to the learned Attorney General for India to respond on behalf of the Union to this challenge. Subsequently, however, Sri Rajendra Chowdary, learned Senior Counsel appearing in these writ petitions submitted that the challenge to the Ninety-third Amendment to the Constitution does not survive for adjudication before this Court in view of the judgment of the Supreme Court in Indian Medical Association vs. Union of India 2011 TLPRE-0-567. Accordingly, we re-opened the hearing to hear these two writ petitions along with the other cases in this batch of writ petitions on the other grounds of challenge, on 09-09-2011. Thereafter, Sri S. Niranjan Reddy, counsel in W.P.No.16547 of 2010 represented that an application filed for amendment of the reliefs; to challenge the rules issues in G.O.Ms.No.74, dated 28-07-2011, and the notifications issued in G.O.Ms.No.85 & 86, dated 02-08-2011 and 04-08-2011, respectively; be considered. Accordingly, the batch was again heard on 16-09-2011 to consider the amendment application and to hear oral arguments thereon. The amendment to the reliefs,

sought in W.P.No.16547 of 2010 (in W.P.M.P.No.28989 of 2011) was ordered on 16-09-2011 and the parties were heard.

4. Thus, in the dynamic circumstances adverted to briefly above, the hearing in this batch of writ petitions was episodic and continual. Eventually, the batch was reserved for judgment on 16-09-2011.

[A] Statutory Provisions Challenged:

(i) Validity of Section -7 of the A.P. Educational Institutions (Regulation of Admission and Prohibition of Capitation Fee) Act, 1983 (the "Capitation Fee Act");

(ii) Rule-8 of the A.P. Unaided Non-minority professional Institutions (Regulation of Admissions into under-graduate professional courses through common entrance) Rules-2006, issued in G.O.Ms.No.53, dated 10-05-2006, (G.O.Ms.No.53 Rules), as amended in G.O. Ms. No.113, dated 10-08-2009;

(iii) Rule-4 of the A.P. (Admission and Fee Regulatory Committee for professional courses offered in private unaided professional Institutions), Rules-2006, issued in G.O.Ms.No.6, Higher Education Department, dated 08-01-2007, (the AFRC Rules);

(iv) Rule-8 of the A.P. (Regulation of Admission into M.B.A./M.C.A. professional courses through common entrance) Rules, 2006, particularly Rules-3 & 6, issued in G.O.Ms.No.59 (G.O.Ms.No.59 Rules), dated 26-05-2006, as amended in G.O.Ms.No.114, dated 10-08-2009;

(v) Regulation-7(6) of the All India Council for Technical Education (Norms and guidelines for fees and guidelines for admission in profession colleges) Regulations, 1994; and

[B] Government Orders/Notifications Challenged:

(i) G.O. Ms. No.76 Higher Education (EC-2) Department, dated 13-08-2010; (the G.O.Ms.No.76 Notification).

(ii) G.O.Ms.No.77 Higher Education [EC.2] Department, dated 13-08-2010; (the G.O.Ms.No.77 Notification).

(iii) Order No.13/AFRC/FF/2010-11.41, dated 06-08-2010 passed by the Admissions and Fee Regulatory Committee [AFRC];

(iv) Order No.14/AFRC/FF/2010-11/552, dated 07-08-2010 of the AFRC; and

[C] Consequent directions/declarations sought:

(a) direction to the respondents to fix a common fee for all seats in each institution, without discriminating between category "A" and category "B" seats;

(b) permit petitioners to collect fee as proposed by each of them;

(c) direct the respondents to approve the fee structure proposed by each of

them; and

(d) direct the All India Council for Technical Education (AICTE) to fix norms and guidelines for charging tuition and other fees for private unaided technical institutions.

5. As earlier noted herein, in W.P.No.16547 of 2010, leave to amend the reliefs was sought; and the application ordered on 16-09-2011. Accordingly the A.P. Unaided Non-Minority Professional Institutions (Regulation of Admission into undergraduate and Pham. D (Dr. of Pharmacy) professional courses through Common Entrance Test) Rules, 2011 issued in G.O.Ms.No.74, dated 28-07-2011; and Notifications issued in G.O.Ms.No.85 & 86, Higher Education Department, dated 02-08-2011 and 04-08-2011, respectively are also under challenge.

6. Suffice it to record, in the context of the generic challenges presented in these writ petitions, that the rules issued in G.O.Ms.No.74, dated 28-07-2011, are a consolidation of the rules issued in G.O.Ms.No.53, dated 10-05-2006, as amended from time to time.

7. The several petitioners in this batch of writ petitions are (a) a consortia of Professional Colleges" Managements -a registered association; (b) Engineering Colleges" Managements Association; (c) the A.P. Private Engineering Colleges" Managements Association; (d) registered societies; (e) Educational Societies administering unaided minority or non-minority professional colleges imparting education in the disciplines of Engineering, Pharmacy, MCA and MBA; Recognized; (f) Affiliated Unaided Minority or Non-Minority Educational Institutions imparting professional education in the above disciplines; and (g) correspondents, secretaries and other individuals representing managements of educational societies or institutions associated with the parent societies and/or the several unaided minority or non-minority educational institutions recognized, affiliated and offering professional education in the aforementioned disciplines.

8. The common grievance in the several writ petitions is regarding the conduct of the State Government:

(a) notifying a uniform fee structure for all private unaided education institutions in the State (though separately for different disciplines i.e., Engineering, Architecture, Pharmacy, MBA, MCA etc.); and in fixing a differential fee structure for "A" & "B" category seats. The petitioners assert that the notifications issued by the State in G.O. Ms. No.76 & 77, Higher Education (EC.2) Department, both dated 13-08-2010; and G.O.Ms.Nos.85 and 86 dated 02-08-2011 and 04-08-2011 respectively, are subversive of the operational autonomy of private unaided educational institutions, whether minority or non-minority; the impugned notifications adversely impact the financial viability, the academic integrity and operational flexibility and dynamics of these institutions; and are in transgression of the law declared by the Supreme Court in T.M.A. Pai Foundation and Others Vs. State of Karnataka and Others, Islamic Academy of Education and Another Vs. State of Karnataka and Others, and P.A. Inamdar and Others Vs.

State of Maharashtra and Others,

(b) that TMA PAI Foundation, Islamic Academy of Education and PA Inamdar declared the principle that every institution is free to devise its own fee structure, subject to regulation only in the interest of preventing profiteering and to prohibit charging of capitation fee. The AFRC and the State nevertheless assume existence of power and authority to fix fee and proceed to do so;

(c) notifying differential fee for the "A" & "B" category seats (with a higher fee fixed for the "B" category seats), with the fee fixed for an "A" category seat not reflecting the per capita cost of education in the particular discipline constitutes cross-subsidy of "A" category students by "B" category students, violating the law declared in TMA Pai Foundation and reiterated in Islamic Academy of Education and another and P.A. Inamdar;

(d) the AFRC fundamentally misdirected itself and failed to consider the law, clearly and unequivocally declared by the Supreme Court delineating the contours of autonomy of private unaided educational institutions to devise their own fee structure; trenched upon the core managerial domain in this area; and failed to comprehend that fixing a uniform fee for all institutions is subversive of the institution-specific autonomy in the area of fee determination by each educational institution. The flawed recommendations of the AFRC, being the basis for the impugned notifications by the State Government, these must therefore perish;

(a) the respondents failed to recognize that neither the State nor its instrumentality --the AFRC has jurisdiction or authority to determine or fix fee for any private unaided educational institution. The regulatory domain of the State is limited to verifying the fee structure devised by an educational institution and submitted approval by the AFRC. The disapproval or modification, if any, of a fee structure devised and proposed by an educational institution would be valid only if the fee proposed by an institution incorporates profiteering or capitation. If that is not the case, then the fee proposed by an unaided private educational institution must be approved by the AFRC and notified by the Government, without demur or interference.

9. To the extent relevant and material, in the context of the generic challenges presented in this batch of Writ Petitions the averments and contentions set out in the counter Affidavit filed by the State and other State Instrumentalities are uniform in all the Writ Petitions. The Counter affidavits have been filed on behalf of the AFRC. The substantive defense presented on behalf of the AFRC is:

a) The precedents permit regulation of admissions and fee structure to ensure fairness, merit, transparency, non-exploitation in the process of admissions and for preventing profiteering and charging of capitation fee;

b) The challenged legislative and statutory provisions and notifications are valid and in accordance with the law;

c) The challenge to the G.O. Ms. Nos. 53 & 59 Rules is misconceived as their validity has been upheld in Darus Salam Educational Trust Vs. The Government of Andhra Pradesh and Others, ;

d) Since the classification between "A" & "B" category seats was upheld in Darus Salam, and fixing differential fee for "A" & "B" Categories is an integrated exercise, the challenge to the differential fee for these two categories is misconceived;

e) The alteration of the percentage of seats for the "A" & "B" categories from 80% & 20% to 70% & 30% was effected on the basis of representations made by and on behalf of managements. Such consensual arrangement and consequent orders passed by the State Government, are in accordance with the specific ruling in PA Inamdar. Enhancement of B-Category seats was also ordered by the State to enable managements of unaided institutions to meet their expenditure, since the fee fixed for Category - "B" is higher than the fee fixed for Category - "A" seats;

f) Pursuant to the AFRC notification dated 26-04-2010 (published on 27-04-2010), 62 out of 522 Engineering Colleges; 16 out of about 253 Pharmacy Course Colleges; 2 out of 5 colleges offering Architecture Course; and 1 out of 12 institutions offering Pharm. D course submitted proposals, while the majority did not;

g) The AFRC having considered and discussed the fee proposals and material submitted by various institutions and associations and report of the CA firm, agreed with the views expressed by the CA firm;

h) Since majority of the colleges did not even submit any fee proposals and in the absence of adequate material and supporting details in the proposals submitted the managements of a few colleges, the AFRC concluded that common fee structure should be arrived at and made applicable to all colleges;

i) The report of the CA firm was not furnished to the managements since they did not seek a copy, though they are aware of the same; and

j) Apart from the time fixed in the AFRC notification published on 27-04-2010, further time was given to submit their fee proposals and required material on 02-06-2007 and 12-07-2010, and only thereafter the AFRC undertook the exercise of determining the fee structure; the impugned notifications are thus issued after a fair and reasonable opportunity and therefore valid.

Permissible Contours of State Control/Regulation of Private Un-aided Professional Educational Institutions, whether Minority or Non-Minority, in the matter of determination of Fee Structure:

The Unni Krishnan Judgment:

10. Provisions of the Capitation Fee Act, the Karnataka Educational Institutions (Prohibition of Capitation Fees) Act, 1984, the Maharashtra Educational

Institutions (Prohibition of Capitation Fees) Act, 1987; the Tamil Nadu Educational Institutions (Prohibition of Collection of Capitation Fees) Act, 1992 and of the Andhra Pradesh Education Act, 1982 fell for consideration and determination in Unni Krishnan, J.P. and others Vs. State of Andhra Pradesh and others etc. etc., . Inter alia the Supreme Court considered whether a citizen has a fundamental right to establish an educational institution under Article 19(1)(g) or any other provision of the Constitution; and whether grant of permission for establishment and grant of affiliation (by a University), imposes an obligation upon an educational institution to act fairly in the matter of admission of students. Several issues were identified by the Supreme Court for analysis, but in the context of higher and professional education. Some of the observations in this judgment however are applicable to several formats and hierarchies of educational institutions and disciplines in education. The Unni Krishnan Supreme Court ruled that since bodies which grant recognition or affiliation to an educational institution are authorities of the State, it is obligatory on such public authority to insist upon conditions appropriate to ensure education of requisite standards; and fairness and equal treatment in the matter of admission of students, a duty enjoined by Article 14 of the Constitution.

11. The Court further held that the State may legitimately regulate the fee that may be charged including by un-aided private educational institutions and prohibit institutions from collecting anything other than the permitted fee, which would constitute "capitation fee"; since private educational institutions merely supplement efforts of the State in education of the people, not an independent activity but supplemental to the principal activity of the State. The Supreme Court evolved a scheme mandating a series of guidelines to be followed by the appropriate Government and recognizing and affiliating authority, in addition to such other conditions and stipulations as they might consider appropriate, as conditions for grant of permission, recognition or affiliation. The Court clarified that the scheme evolved by it is confined for the nonce to professional colleges.

12. A distinction between "free seats" and "payment seats" with a higher fee structure for payment seats was part of the scheme mandated in Unni Krishnan. The effect was a cross-subsidisation of free seats by students admitted into "payment seats". Paragraph-2 of the scheme ordained:

At least, 50% of the seats in every professional college shall be filled by the nominees of the Government or University, as the case may be, hereinafter referred to as "free seats". These students shall be selected on the basis of merit determined on the basis of a common entrance examination where it is held or in the absence of an entrance examination, by such criteria as may be determined by the competent authority or the appropriate authority, as the case may be. It is, however, desirable and appropriate to have a common entrance exam for regulating admissions to these colleges/institutions, as is done in the State of Andhra Pradesh. The remaining 50% seats (payment seats) shall be filled by those candidates who are prepared to pay the fee prescribed therefor and who

have complied with the instructions regarding deposit and furnishing of cash security/Bank guarantee for the balance of the amount. The allotment of students against payment seats shall also be done on the basis of inter se merit determined on the same basis as in the case of free seats. There shall be no quota reserved for the management or for any family, caste or community which may have established such college. The criteria of eligibility and all other conditions shall be the same in respect of both free seats and payment seats. The only distinction shall be the requirement of higher fee by the "payment students". The Management of a professional college shall not be entitled to impose or prescribe any other and further eligibility criteria or condition for admission either to free seats or to payment seats. It shall, however, be open to a professional college to provide for reservation of seats for constitutionally permissible classes with the approval of the affiliating University. Such reservations, if any, shall be made and notified to the competent authority and the appropriate authority at least one month prior to the issuance of notification calling for applications for admission to such category of colleges. In such a case, the competent authority shall allot students keeping in view the reservations provided by a college. The rule of merit shall be followed even in such reserved categories. [para 172 (2)]

13. Jeevan Reddy, J (for self and Pandian, J) held that the right to establish an educational institution falls outside the contours of trade, business or profession - rights guaranteed under Article 19(1)(g) of the Constitution. The learned Judge declined to express an opinion whether the activity falls within the ambit of "occupation", but observed that establishing an educational institution may constitute "occupation" (-perhaps it is - paragraph 197 of SCC Report). Mohan, J held that there was no fundamental right under Article 19(1)(g) to establish an educational institution, if recognition or affiliation is sought for such institution (Paragraph No.72 of the SCC Report). Sharma, CJ (for self and Bharucha, J) observed:

For the purposes of these cases, it is enough to state that there is no fundamental right to education for a professional degree that flows from Article 21. (Paragraph 5).

14. The TMA Pai Foundation Revision: Several of the issues considered in Unni Krishnan were revisited in TMA PAI Foundation. This is a judgment of a larger bench of eleven (11) Judges. Among the several issues framed for consideration in TMA PAI Foundation (we set out issues relevant to this batch of cases) are:

(a) Whether statutory provisions which regulate facets of administration including regulation of fee would interfere with the right of administration of educational institutions by minorities;

(b) Whether the decision in Unni Krishnan (except to the extent of holding that primary education is a fundamental right) and the scheme framed thereunder, require reconsideration/ modification; and

(c) Whether non-minorities have the right to establish and administer educational institutions under Article 19 and 29(1) read with Articles 14 and 15(1), in the same manner and to the same extent as minority institutions.

15. The Larger Bench opinion comprises five (5) separate judgments. Kirpal, CJ recorded the leading opinion (for self, Pattanaik, Rajendra Babu, Bal Krishnan, Venkatarama Reddi and Pasayat, JJ); Khare, J recorded a separate opinion agreeing with the learned Chief Justice; Quadri and Ruma Pal, JJ recorded separate opinions partly dissenting with the judgment of the Chief Justice (on aspects not germane to the issues arising in this batch of cases), but concurring on aspects relevant to us; Variava, J (for self and Ashok Bhan, J) recorded a separate opinion concurring with the Chief Justice on aspects relevant to the present batch of cases and with the conclusions in the judgment of Khare, J that Article 29(2) applies to Article 30, but dissenting partly on the final reasoning in the lead judgment, holding that there must be a balance between Articles 29(2) and 30(1). The majority opinion by Kirpal, CJ expounds the binding ratio on aspects relevant to the resolution of issues in the present lis. The operative TMA PAI Foundation ratio, relevant for this case is:

(i) The scheme framed in Unni Krishnan relating to grant of admission and fixing of fee and the consequent direction given to the UGC, the AICTE, the MCI and the Central and State Governments etc., is incorrect and overruled; (is unconstitutional! - para 161 - answer to question No.9); except where it holds that primary education is a fundamental right;

(ii) The establishment and running of educational institution and the concomitant activity results in imparting of knowledge to students and must necessarily be regarded as an occupation, even if there is no element of profit generation. The right to establish and maintain educational institutions is also comprehended within Article 26(a) which grants in positive terms to every religious denomination or any section thereof the right to establish and maintain institutions for religious and charitable purposes, subject to public order, morality and health; education is a recognized head of charity. Members belonging to any religious denomination, including majority religious communities are entitled to set up educational institutions. The expression "Private educational institutions" is used in contra - distinction to government institutions;

(iii) The right to establish an educational institution may be regulated, but the regulatory measures must be only to ensure the maintenance of proper academic standards, atmosphere and infrastructure (including qualified staff) and for prevention of mal-administration by the managements. Fixing of a rigid fee structure; dictating the forms and composition of a governing body; compulsory nomination of teachers and staff for appointment; or nominating students for admission, are unacceptable restrictions. The essence of a private educational institution is the autonomy that the institution must have in respect of its own management and administration. There must be a difference in the administration of private un-aided institutions and Government aided institutions.

Private un-aided institutions are entitled to maximum autonomy in the day-to-day administration and bureaucratic or governmental interference in the administration of such institutions would undermine independence. While running of an educational institution is not business; in order to examine the degree of independence that can be given to a recognized educational institution, like in a private entity that does not seek aid or assistance from the government and exists by virtue of funds generated by it, including loans and borrowings, it is important that the essential ingredients of the management of private institutions include the recruiting of students and staff, and the quantum of fee to be charged must necessarily be left to the private educational institutions that do not seek or are not dependent upon any funds from the Government. However, since the occupation of education is regarded as "charitable", the government can make regulation to ensure excellence in education while forbidding the charging of capitation fee and profiteering by the institution. The object of setting up of an educational institution being definitionally "charitable", an educational institution cannot charge such fee as is not required for the purpose of fulfilling that object. Thus in the establishment of an educational institution or in its functioning the object should not be to make profit. Reasonable revenue surplus may however be generated by the educational institution for development of education and expansion of the institution.

(iv) Conditions laid down for grant of recognition should not be such as may amount to governmental control of the administration of an educational institution; and

(v) All citizens have the right to establish and administer educational institutions under Article 19(1)(g) and 26(a). "Education" in the relevant Articles of the Constitution means and includes education at all levels from the primary up to the post graduation level, including professional education. Minority institutions however have the right to admit students belonging to the relevant minority groups in the manner spelt out in the judgment.

16. The contentions, uniformly addressed on behalf of private unaided educational institutions and by the State, as to the arbitrariness and socially counter-productive consequences of the scheme framed in Unni Krishnan (insofar as directing fixing of different fees towards "free seats" and "payment seats"); and the conclusions of the Court, in paragraphs 30 to 38 and 45 (to the extent relevant and material) are set out:

The contentions before TMA Pai Foundation (extracted):

30. The counsel for the minority institutions, as well as the Solicitor-General, have contended that the scheme framed by this Court in Unni Krishnan case was not warranted. It was represented to us that the cost incurred on educating a student in an unaided professional college was more than the total fee, which is realized on the basis of formula fixed in the scheme. This had resulted in revenue shortfalls. This Court, by interim orders subsequent to the decision in Unni

Krishnan case had permitted, within the payment seats, some percentage of seats to be allotted to non-resident Indians, against payment of a higher amount as determined by the authorities. Even thereafter, sufficient funds were not available for the development of those educational institutions. Another infirmity which was pointed out was that experience has shown that most of the " free seats" were generally occupied by students from affluent families, while students from less affluent families were required to pay much more to secure admission to "payment seats". This was for the reason that students from affluent families had better school education and the benefits of better professional coaching facilities and were, therefore, able to secure higher merit positions in the common entrance test, and thereby secured the free seats. The education of these more affluent students was in a way being cross-subsidized by the financially poorer students who, because of their lower position in the merit list, could secure only "payment seats".

31. Counsel for the institutions, as well as the Solicitor-General, submitted that the decision in Unni Krishnan case insofar as it had framed the scheme relating to the grant of admission and the fixing of the fee was unreasonable and invalid.

32. It has been submitted by the learned counsel for the parties that the implementation of the scheme by the States, which have amended their rules and regulations, has shown a number of anomalies. As already noticed, 50% of the seats are to be given on the basis of merit determined after the conduct of a common entrance test, the rate of fee being minimal. The " payment seats" which represent the balance number, therefore, cross-subsidize the "free seats". The experience of the educational institutions has been that students who come from private schools, and who belong to more affluent families, are able to secure higher positions in the merit list of the common entrance test, and are thus able to seek admission to the "free seats". Paradoxically, it is the students who come from less affluent families, who are normally able to secure, on the basis of the merit list prepared after the common entrance test, only "payment seats".

33. It was contended by the petitioners' counsel that the implementation of Unni Krishnan scheme has in fact (1) helped the privileged from richer urban families, even after they ceased to be comparatively meritorious, and (2) resulted in economic losses for the educational institutions concerned, and made them financially unviable. Data in support of this contention was placed on record in an effort to persuade this Court to hold that the scheme had failed to achieve its object.

34. Material has also been placed on the record in an effort to show that the total fee realized from the fee fixed for " free seats" and the "payment seats" is actually less than the amount of expense that is incurred on each student admitted to the professional college. It is because there was a revenue shortfall that this Court had permitted an NRI quota to be carved out of the 50% payment seats for which charging higher fee was permitted. Directions were given to UGC,

AICTE, the Medical Council of India and the Central and State Governments to regulate or fix a ceiling on fees, and to enforce the same by imposing conditions of affiliation/permission to establish and run the institutions.

Conclusions in TMA Pai Foundation (extracted):

35. It appears to us that the scheme framed by this Court and thereafter followed by the Government was one that cannot be called a reasonable restriction under Article 19(6) of the Constitution. Normally, the reason for establishing an educational institution is to impart education. The institution thus needs qualified and experienced teachers and proper facilities and equipment, all of which require capital investment. The teachers are required to be paid properly. As pointed out above, the restrictions imposed by the scheme, in Unni Krishnan case made it difficult, if not impossible, for the educational institutions to run efficiently. Thus, such restrictions cannot be said to be reasonable restrictions.

36. The private unaided educational institutions impart education, and that cannot be the reason to take away their choice in matters, inter alia, of selection of students and fixation of fees. Affiliation and recognition has to be available to every institution that fulfills the conditions for grant of such affiliation and recognition. The private institutions are right in submitting that it is not open to the court to insist that statutory authorities should impose the terms of the scheme as a condition for grant of affiliation or recognition; this completely destroys the institutional autonomy and the very objective of establishment of the institution.

37. Unni Krishnan judgment had created certain problems, and raised thorny issues. In its anxiety to check the commercialization of education, a scheme for "free" and "payment" seats was evolved on the assumption that the economic capacity of the first 50% of admitted students would be greater than the remaining 50%, whereas the converse has proved to be the reality. In this scheme, the "payment seat" student would not only pay for his own seat, but also finance the cost of a "free seat" classmate. When one considers the Constitution Bench's earlier statement that higher education is not a fundamental right, it seems unreasonable to compel a citizen to pay for the education of another; more so in the unrealistic world of competitive examinations which assess the merit for the purpose of admission solely on the basis of the marks obtained, where the urban students always have an edge over the rural students. In practice, it has been the case of the marginally less merited rural or poor student being the burden of a rich and well-exposed urban student.

38. 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.

45. In view of the discussion hereinabove, we hold that the decision in Unni Krishna case insofar as it framed the scheme relating to the grant of admission and the fixing of then fee, was not correct, and to that extent, the said decision and the consequent direction given to UGC, AICTE, the Medical Council of India, the Central and State Governments etc. are overruled.

The Islamic Academy of Education clarification:

17. As diverse interpretations as to the meaning and effect of TMA PAI Foundation were being ascribed by different stakeholders ---the educational institutions, State instrumentalities like the UGC, the AICTE, the MCI etc., Union of India and the various State Governments, explication of the true meaning and trajectory of TMA PAI Foundation was undertaken in Islamic Academy of Education. Khare, CJ (for self, Variava, Balakrishnan and Pasayat, JJ) delivered the leading opinion while Sinha, J concurred with this opinion, but for distinct reasons (on issues relevant to the present batch of cases), but dissented on aspects (not relevant for the present lis).

18. All parties, including the State and its instrumentalities synoptically contended that the scheme framed in Unni Krishnan was unwarranted, unreasonable and invalid. As a consequence of the incidence of cross-subsidisation inherent in the scheme, students from affluent families with access to better school education and benefit of professional coaching facilities are able to secure higher merit positions in the common entrance test and thereby into free seats while students from socially, economically and locationally disadvantaged backgrounds are having to pay the higher fee in "payment seats"; that the "payment seats" student ends up paying not only for his own seat but was also financing the cost of a "free seat" classmate; and that the scheme had the effect of nationalizing education and of an important feature namely the right of private unaided institutions to grant admissions and to fix fees. To this extent there was a consensus at the Bar as asserted in TMA PAI Foundation that the Unni Krishnan scheme was unreasonable and unsustainable.

19. On the issue: whether educational institutions are entitled to fix their own fee structure and the contours of this freedom, the Islamic Academy of Education majority declared:

A) No rigid fee structure can be fixed by the Government. Each institution must have the freedom to fix its own fee structure taking into consideration the need to generate funds to run the institution and to provide facilities necessary for the benefit of the students. They must also be able to generate a surplus which must be for the betterment and growth of that institution. The decision on the fee to be charged must necessarily be left to the private educational institutions that do not seek and are not dependent upon any funds from the Government. Each

institution could have its own fee structure. The fee structure for each institution must be fixed keeping in mind the infrastructure and facilities available, the investments made, salaries paid to the teachers and staff, future plans for expansion and/or betterment of the institution etc.,

B) There can be no profiteering and capitation fee cannot be charged since education is essentially charitable in nature. The surplus/profit that can be generated must be only for the benefit/use of that educational institution. Profit/surplus cannot be diverted for any other use or purpose nor can be used for personal gain or for any other business or enterprise.

C) In order to give effect to the judgment in TMA PAI Foundation the respective State Governments/concerned authorities shall set up in each State a committee headed by a retired Judge of the High Court who shall be nominated by the Chief Justice of that State. The other member who shall be nominated by the Judge should be a Chartered Accountant of repute. A representative of the MCI or AICTE depending on the type of institution, shall also be a member. The Secretary of the State Government In-charge of Medical or Technical Education, as the case may be, shall be the Member Secretary of the Committee and the committee should be free to nominate/co-opt any other independent person of repute. The total number of members of the committee shall not exceed five. Each educational institute must place before this committee well in advance of the academic year, its proposed fee structure along with all relevant documents and books of accounts, for scrutiny. The committee shall then decide whether the fee proposed by the institution is justified and does not constitute profiteering or charging of capitation fee. The committee will be at liberty to approve the fee structure or propose some other fee structure which can be charged by the institution. The fee fixed by the committee shall be binding for a period of three years at the end of which period the institution would be at liberty to apply for revision. Once the fee is fixed by the committee, institutions cannot directly or indirectly charge any other amount over the amount fixed. Other amounts charged under any other head or guise such as donation would amount to charging of capitation fees. The Government/appropriate authority must frame appropriate regulation, if not already framed, to penalize including by withdrawal of recognition or affiliation an institution charging capitation fee or indulging in profiteering.

D) While an institution can charge the prescribed fee for one semester/year, if the institution feels that any particular student may leave midstream, it may require such student to give a bond or bank guarantee ensuring payment of balance fees.

20. The architecture of the operational autonomy of un-aided private educational institutions in the matter of fee structure and the permissible degree of regulation thereupon again came to be considered in *Modern School Vs. Union of India (UOI) and Others*, . In *Modern School (5 supra)*, the Supreme Court:

(a) reiterated the governing principles and contours of academic and managerial autonomy of unaided private educational institutions including as regards the fee structure, as set out in TMA PAI Foundation (1 supra) and Islamic Academy of Education(2 supra).

(b) The Court pointed out that accounts should be maintained on the principles of accounting applicable to non-business organizations/not for profit organizations and every school (the case pertained to a challenge to hiking of fees in various schools in the National Capital Territory of Delhi) should prepare the financial statement comprising balance sheet, profit and loss account and receipts and payments account and shall file a statement of fee every year before the academic session, indicating the estimated amount derived from fees, estimated current operational expenses towards salary and allowances payable to the employees, duly indicating provisions for donation, gratuity, reserve fund and other items and savings, if any.

21. In a subsequent judgment Action Committee, Action Committee, Un-Aided Pvt. Schools and Others Vs. Director of Education, Delhi and Others, the Supreme Court clarified its judgment in Modern School (5 supra), holding that transfer of amounts from the fund of a recognized unaided school to another school under the same management, is permissible.

The P.A. Inamdar Re-clarification:

22. As TMA PAI Foundation was being interpreted differently by different stakeholders, notwithstanding the clarificatory exertion in Islamic Academy of Education, another Constitution Bench (seven Judges) embarked upon the endeavor to re-clarify the meaning and content of TMA PAI Foundation, in P.A. Inamdar.

23. On the issue whether regulation of fee structure could be taken over by the Committees (ordered to be constituted by the judgment in Islamic Academy of Education), P.A. Inamdar held:

...every institution is free to devise its own fee structure which may however be regulated to prevent profiteering, no capitation fee may be charged; a committee for determining fee structure qua the judgment in Islamic Academy of Education is permissible as a regulatory measure aimed at protecting the interests of the students community as a whole and in maintaining the required standards of professional education on non-exploitative terms in the institution. The suggestion on behalf of the institution that the purpose of the committees (for regulating fee structure) could be equally achieved by postulating post-audit or checks after the institutions have formulated their own fee structure, was rejected observing that unless the fixation of fee is regulated and controlled at the threshold stage the unfair practice of granting admissions guided by the paying capacity of the candidate cannot be curbed; further held that the committees constituted cannot be equated with the committees suggested in the scheme framed in Unni Krishnan's case.

24. As in the present case, in P.A. Inamdar as well there was a complaint of a ham-handed, insensitive and stereo-typed approach by the committees constituted to oversight fee regulation. Dealing with this criticism, in P.A. Inamdar the Court observed (extracted):

149...Certain decisions of some of the Committees were subjected to serious criticism by pointing out that the fee structure approved by them was abysmally low which had rendered the functioning of the institutions almost impossible or made the institutions run into losses. In some of the institutions, the teachers have left their jobs and migrated to other institutions as it was not possible for the management to retain talented and highly qualified teachers against the salary permitted by the Committees. Retired High Court Judges heading the Committees are assisted by experts in accounts and management. They also have the benefit of hearing the contending parties. We expect the Committees, so long as they remain functional, to be more sensitive and to act rationally and reasonably with due regard for realities. They should refrain from generalizing fee structures and, where needed, should go into accounts, schemes, plans and budgets of an individual institution for the purpose of finding out what would be an ideal and reasonable fee structure for that institution.

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

The Dialectics of Regulation of Private Educational Institutions:

25. At the dawn of our independence and for a time thereafter the State was the principal provider of educational infrastructure and the regulator of formal education across all hierarchies and tiers of education - primary, secondary, higher and professional. By and by however the State steadily withdrew from direct participation in the provision of educational infrastructure - schools and colleges. The State is now largely a supporter by way of grants-in-aid and exponentially a mere regulator, contouring and determining academic and faculty standards and infrastructural norms. With the State steadily and inexorably withdrawing from the funding and management of educational infrastructure at all levels, education is increasingly and now largely a free market commodity. With accelerating privatization and an ever-increasing demand for education, alongside well-meaning philanthropists committed to altruistic support to education, the carpet baggers entered the scene, perceiving education a profitable business. The scourge of value-sterile commercialization of education now looms large. Education is now big business and is often pursued with cynical, ruthless disregard for the matrix of intermeshing values that must substrate a rational, benign and sustainable medium of human activity so essential for the accretion, dissemination and transmission of the wealth of human knowledge. Consequent on this corrosion of a vital element of society and

a seminal index of civilization, the Indian State has now a new and emergent item on its governance agenda - containing the rampaging sociopathy, of commercialization of education and the social dissonance and inequality commercialization infuses into the social order.

Architecture of the Capitation Fee Act:

26. The A.P. Educational Institutions (Regulation of Admission and Prohibition of Capitation Fee) Act, 1983 [for short, "The Capitation Fee Act"] was the earliest legislative initiative towards curbing the menace of commercialization of education (by the charging of capitation fee). Section - 2(b) defines Capitation Fee as any amount collected in excess of the fee prescribed u/s - 7. "Prescribed" [Section 2(g)] means by rules made by the Government under the Act. Section - 7 empowers the Government by notification to regulate the tuition fee or any other fee that may be levied and collected by any educational institution in respect of each class of students; enjoins that no educational institution shall collect any fee in excess of the fee notified under sub-section (1); and ordains that every educational institution shall issue an official receipt for the fee collected by it. Section 2(c) defines "educational institution" broadly, to mean educational institutions imparting education at primary, secondary, higher, technical or professional levels, whether managed by the Government; a private body; local authority or university; but excluding a tutorial institution. Private unaided educational institutions imparting professional education are thus indisputably covered by the regulatory contours of this Act. Sections - 9 & 10 enumerate penalties for contravention of the provisions of the Act of the Rules made thereunder and offences by companies. Section - 11 enacts the power to enter and inspect an educational institution for ascertaining whether there is or has been any contravention of the Act; and Section - 15 enumerates a broad power to make rules for carrying out of all or any of the purposes of the Act.

Earlier Admission and Fee Rules:

27. In exercise of powers conferred by Sections - 3 & 15 of the Capitation Fee Act, the State in G.O. Ms. No. 33 Higher Education Department, dated 11-06-2003, notified the A.P. Unaided non-minority Professional Institutions [Regulation of Admissions into Under-graduate Professional Courses through Common Entrance Test] Rules, 2003. Broadly, these rules provide:

- (a) for a committee on admissions empowered to select and make allotment of candidates to unaided non-minority professional institutions offering engineering, pharmacy and architecture courses in the State;
- (b) for a common entrance test;
- (c) regulatory provisions for filling up seats by the convener of admissions, and management seats earmarked to be filled up by managements of unaided professional institutions; and eligibility criteria for admission;
- (d) allocation of seats (specified in percentages), between convener seats and

management seats;

(e) procedure for admissions for filling up the convener and management seats respectively;

(f) provisions for regional reservations; and for reservation for SC, ST and BC communities and for special categories such as physically handicapped, etc. and for women; and

(g) stipulating the fees payable for several disciplines such as engineering, architecture and pharmacy and with a provision for review of the fee structure.

28. A differential fee was stipulated (in Rule - 9) for candidates admitted under the convener quota (85%) and those admitted under the management quota (15%).

29. The Capitation Fee Act and the 2003 Rules were prior to and oblivious of the law declared in TMA PAI Foundation. Admission Rules post P.A. Inamdar:

30. In G.O.Ms.No.53 Higher Education Department, dated 10-05-2006, issued after P.A. Inamdar the State Government notified the A.P. Unaided non-minority Professional Institutions [Regulation of Admissions into Under-graduate Professional Courses through Common Entrance Test] Rules, 2006 in exercise of the rule-making powers under the Capitation Fee Act. The 2003 Rules were superseded by these Rules, made applicable to all unaided non-minority professional institutions imparting under-graduate professional courses in engineering (including technology) and pharmacy in the State and enforced with effect from the academic year 2006-07.

31. In G.O.Ms.No.59 Higher Education Department, dated 26-05-2006, the State notified the A.P. [Regulation of Admissions into MBA/MCA Professional Courses through Common Entrance Test] Rules, 2006.

A detailed analyses of these rules follows.

Analyses of relevant provisions of the current Admission Rules:

32. While the rules issued in G.O.Ms.No.53 are applicable only to non-minority professional institutions imparting under-graduate professional courses in the disciplines covered by those rules; the rules issued in G.O.Ms.No.59 cover both minority and non-minority professional institutions imparting professional education in the disciplines of MBA/MCA (However, separate provisions are incorporated to deal with minority professional institutions, regarding admissions).

33. Rule -2(b) of the rules issued in G.O.Ms.No.53 defines the AFRC as a Committee established and constituted by the Government for regulating admissions and fixing the fee to be charged from candidates seeking admission into unaided minority and non-minority professional institutions. Rule 2(c) defines "common entrance test" to mean EAMCET/EAMCET - AC, the examination

conducted for assigning rank or merit to candidates, the basis for admission of candidates into first year of the concerned under-graduate courses in unaided non-minority professional institutions. These rules provide for a common entrance test to be conducted by the convener of EAMCET admissions (a public authority) or the convener of EAMCET - AC admissions (a person nominated by the association/s of unaided professional colleges, for selection and allotment of qualified candidates for admission). Rule -2(k) defines "Non-resident Indian" to mean a candidate born to a parent of Indian origin residing outside the country and who has passed the qualifying examination or its equivalent; and Rule - 2(l) defines "qualified candidate" to mean one who has appeared for the common entrance test EAMCET/EAMCET - AC, as the case may be, for admission into the related professional courses and had been assigned a ranking in the common merit list. Rule - 3 stipulates the seats to be allotted in different unaided non-minority professional institutions covered by these rules, classified as category "A" & "B" category seats. Category "A" seats comprise 80% of the sanctioned intake of seats in each course and are required to be filled up with eligible candidates on the basis of the ranking obtained at the EAMCET/EAMCET - AC, as the case may be, following the provision of Rule - 6(i) and the rule of reservation stipulated in Rule - 7. Category "B" seats comprise 20% of the total intake of the seats in each course, open for admission to all eligible candidates on merit basis including candidates belonging to other States and Union Territories and NRIs, following the provisions of Rule - 6(ii) (the percentages are since revised to 70% and 30% respectively). Rule - 4 specifies eligibility criteria for admissions including for category "B" seats, NRI seats and vacant seats, if any that remain unfilled. Rule - 5 sets out general guidelines for admission of candidates. Rule - 6(i) sets out the procedure of admission to fill up category "A" seats and the methodology for counseling in respect of the two streams of EAMCET/EAMCET-AC, under a single window system. Rule - 6(i)9(a) stipulates: the candidates admitted into unaided non-minority professional institutions shall pay at the time of admission the fees payable per student per annum as prescribed by the AFRC. Rule - 6(i)(b) sets out the methodology of admission under the EAMCET-AC stream. Rule 6(ii) sets out procedure for filling up category "B" seats. Rule - 8(i) specifies that the fee payable per student per annum for disciplines of engineering (technology/architecture/ pharmacy) in each institution shall be as prescribed by the AFRC; Rule 8(ii) specifies that the fee prescribed and collected from NRIs, in excess of the fee prescribed for non-NRI candidates under category "B" shall be utilized for benefitting students from economically weaker sections of the society whose eligibility criteria shall be as notified by the Government; and that the mechanism for extending such benefit to students belonging to economically weaker sections shall be as prescribed by the AFRC.

34. The G.O.Ms.No.59 Rules (to the extent relevant to this lis) are substantially in pari materia to the G.O.Ms.No.53 Rules. The relevant provisions of these rules in brief are:

(a) Rule 2(k) defines Non-resident Indian:Non-resident Indian NRI/NRI

sponsored candidates mean a candidate, born to a parent of Indian origin residing outside the country or "ward", of a person of Indian origin residing outside the country and who has passed the qualifying examination or its equivalent;

(b) Rule - 3 dealing with allotment of seats classifies the seats into "A" & "B" category and (now) provides for 70% intake into "A" category, 30% intake for "B" category which includes candidates belonging to other States and Union Territories of India and NRIs/NRI sponsored candidates, following the provisions of Rule - 6(ii). The procedure for admissions into "A" & "B" category seats is specified in Rule - 6(i) and (ii), respectively; and

(c) Rule - 9 (instead of Rule - 8 in G.O.Ms.No.53) sets out the powers for regulation of fee for engineering (including technology)/pharmacy colleges and reads:

(i) "The fee payable per student per annum for each discipline in each institution shall be as prescribed by the AFRC.

(ii) The fee prescribed and collected from NRIs, in excess of the fees prescribed for non-NRI candidates under Category B shall be utilized for benefiting the students from economically weaker sections of the society whose eligibility criteria shall be as notified by the Government. The mechanism for extending such benefit to the students belonging to economically weaker sections shall be as prescribed by the Admission and Fee Regulatory Committee.

(iii) The Government may notify specific Fee Waiver Scheme(s) with the approval of admission and Fee Regulatory Committee for benefiting the disadvantaged sections of society.

35. On a true and fair construction of the provisions of the Rules issued in G.O.Ms.No.53 (now consolidated in G.O.Ms.No.74, dated 28-07-2011) read with the rationes and principles derived from TMA PAI Foundation, Islamic Academy of Education and PA Inamdar, it is clear that differential fee for "A" and "B" category seats is neither accommodated nor permitted; except that in case of NRIs additional fee as prescribed by the AFRC may be charged but the excess fee so collected must be utilized for benefitting students from the economically weaker sections of the society, on the basis of eligibility criteria notified by the Government with the AFRC stipulating the mechanism for extending such benefits. As is apparent from Rule - 6(ii)(2) NRIs not exceeding 15% of the sanctioned intake in each course shall be filled up on merit basis of NRI candidates who have passed the qualifying examination with not less than 60% of the aggregate marks or CGPA equivalent to 6 on a scale of 10.

36. G.O.Ms.No.59 Rules (insofar as relevant herein) (and now G.O.Ms.No.74 Rules) provide (as amended from time to time): for common entrance tests (called the I-CET/I-CET -AC); category "A" and category "B" seats now -with 70% and 30% intake respectively; for reservations including local area

reservations; for admission to NRI earmarked seats (limited to 15% of the sanctioned intake); fee payable as prescribed by the AFRC with a higher fee collectable from NRIs and for augmenting the economically weaker sections" students.

The origin and evolution of the AFRC:

37. In G.O.Ms.No.90 Higher Education dated 22-12-2003, pursuant to Islamic Academy of Education, the State Government constituted a committee headed by a retired Hon"ble Judge of this Court for fixation of fee for the students who are admitted into unaided professional educational institutions (minorities and non-minorities). Paragraph 4 of this G.O. enumerates the functions of the committee; including calling from each college well-in-advance of the academic year, its proposed fee structure with all relevant documents and books of accounts for scrutiny; determination by the committee whether the fees proposed by the institutions are justified and do not constitute profiteering or charging of capitation fee; and providing that the committee shall be at liberty to approve or propose some other fee to be charged by an institution; and stipulating the fee fixed would be operative for three years.

Statutory provisions; Government Orders; and Notifications challenged:

The Capitation Fee Act:

Section-7 of the Capitation Fee Act reads:

Sec. 7. Regulation of fees: -(1) It shall be competent for the Government by notification, to regulate the tuition fee or any other fee that may be levied and collected by any educational Institution in respect of each class of students.

(2) No educational institution shall collect any fees in excess of the fee notified under sub-section (1).

(3) Every educational institution shall issue an official receipt for the fee collected by it.

38. Section 2(c) of this Act defines "educational institution" to mean inter alia a college or other institution by whatever name called, whether managed by Government, a private body, local authority or University and carrying on the activity of imparting education therein, whether technical or otherwise, including a polytechnic, industrial training institute and the teachers training institute but not including a tutorial institution.

G.O. Ms. No. 53 Rules:

39. Rule 6 of these rules sets out the procedure of admissions. Clause (i) [Sub-clauses (a) & (b)] specifies the procedure for filling up category "A" seats (constituting 80% of the intake), whether through the EAMCET or the EAMCET-AC streams, and Clause (ii) the procedure for filling up Category "B" seats (constituting 20% of the intake). Sub-clause (2) therein specifies that NRI seats

(not exceeding 50% of the sanctioned intake in each course) shall be filled up on merit basis with NRI candidates who have passed the qualifying examination with the specified aggregate marks or CGA and sub-clause (3) enables the leftover seats to be filled by management institution with candidates from other States and Union Territories of India who have passed the qualifying examination and secured rank in AIEEE. Sub-clause 4 of Clause (ii) permits leftover vacant seats to be filled with eligible candidates including those who secured not less than 50% of the aggregate marks or 50% in the group seats in the qualifying examination.

40. Rule-2(k) defines "non-resident Indian" as meaning a candidate born to a parent of Indian origin residing outside the country and who has passed the qualifying examination or its equivalent. In G.O.Ms.No.40, Higher Education Department, dated 31-07-2008, the definition of non-resident Indian was substituted. As substituted, Rule-2(k) reads:

Non-resident Indian (NRI)/(NRI) sponsored candidate means a candidate, born to a parent of Indian origin residing outside the country or "ward" of a person of Indian origin residing outside the country, and who has passed the qualifying examination or its equivalent.

41. By this amending order, the expression "NRI"s/NRI sponsored candidates" is substituted wherever the expression " NRI"s" occur [in the Rules issued in G.O.Ms.No.53].

42. Rule-8 deals with regulation of fee for engineering (including Technology)/Pharmacy Colleges and reads:

8. FEE for Engineering (including Technology)/Pharmacy Colleges:

(i) "The fee payable per student per annum for each discipline in each institution shall be as prescribed by the AFRC.

(ii) The fee prescribed and collected from NRIs, in excess of the fees prescribed for non-NRI candidates under Category B shall be utilized for benefiting the students from economically weaker sections of the society whose eligibility criteria shall be as notified by the Government. The mechanism for extending such benefit to the students belonging to economically weaker sections shall be as prescribed by the AFRC.

43. These rules and the amendments thereto from time to time were consolidated and reissued in G.O.Ms.No.74 (relevant portions extracted supra).

The AFRC Rules:

44. These rules issued on 08-01-2007, published in the Gazette on 08-02-2007 are in exercise of powers u/s 15 read with Sections 3 & 4 of the Capitation Fee Act. Rule - 4 of these Rules is under challenge and reads:

4. FEE FIXATION:

(i) The AFRC shall call for, from each institution on, its proposed fee structure well in advance before the date of issue of notification on for admission for the academic year along with all the relevant documents and books of accounts for scrutiny.

(ii) The AFRC shall decide whether the fees proposed by the Institution is justified and does not amount to profiteering or changing of capitation fee.

(iii) The AFRC shall be at liberty to approve or alter the proposed fee for each course to be charged by the Institution. Provided that it shall give the Institution an opportunity of being heard before fixing any fee or fees.

(iv) The AFRC shall take into consideration the following factors while prescribing the fee:

a) The Location of the Professional Institution.

b) The nature of the Professional Course.

c) The cost of available infrastructure.

d) The Expenditure on administration and maintenance.

e) A reasonable surplus required for growth and development of the professional Institution.

f) The Revenue foregone on account of waiver of fee, if any, in respect of students belonging to the schedule caste schedule tribes and whenever applicable to the socially and educationally backward classes and other economically weaker sections of the society, to such extent as shall be notified by the Government from the time to time.

g) Any other relevant fact. Provided that, no such fees as may be fixed by the AFRC, shall amount to profiteering or commercialization of education.

(v) The AFRC shall communicate the fee structure as determined by it, to the Government, for notification.

(vi) The fee or scale of fee determined by the AFRC shall be valid for a period of three years.

(vii) The fee so determined shall be applicable to candidate who is admitted to an institution in that academic year and shall not be altered till the completion of his course in the institute in which he was originally admitted. No, professional educational institution shall collect at a time a fee which is more than one year's fee from candidate.

45. In G.O.Ms.No.42 Higher Education Department, dated 01-05-2007, the rules issued in G.O.Ms.No.6 (supra) were amended to provide for two retired Hon''ble Justices of the High Court, one to chair a committee relating to regulation of admissions and the other to chair the committee relating to fee fixation.

46. In G.O.Rt.No.371 Higher Education Department, dated 17-05-2007, the Government notified the composition of the two committees, one for regulating admissions and the other for fixation of fees.

G.O.Ms.No.59 Rules:

47. On 26-05-2006, the Andhra Pradesh Regulation of Admissions into MBA/MCA Professional Courses through Common Entrance Test Rules, were issued. Rule-2(c) defines "Common Entrance Test" to mean ICET or ICET-AC, corresponding to EAMCET and EAMCET-AC methodology, powers and functions, as provided in the rules issued in G.O.Ms.No.53; NRI is defined in Rule-2(m) to mean a candidate born to a parent of Indian origin residing outside the country and who has passed the qualifying examination or its equivalent. Rule-3, dealing with allotment of seats sets out provisions relating to allotment of seats in university colleges; unaided non-minority and minority professional institutions; Rule-3(ii)(a) specifies that seats allotted in each unaided institution whether minority or non-minority shall be classified as category "A" and category "B", Clause (b) specifies that "A" category seats shall comprise 80% of the sanctioned intake of seats in MBA/MCA courses to be filled with eligible candidates on the basis of the rank obtained at ICET/ICET-AC following the procedure laid down in Rule-6(ii) and the Rules of reservation set out in Rule-7; Clause-C enjoins that category "B" seats comprising 20% of the total intake shall be open for admission to all the eligible candidates including candidates belonging to other States and Union Territories and NRI's on merit basis, as per the provisions of Rule-6(iii), and that within category "B", seats not exceeding 15% of the total intake of seats may be filled, at the discretion of the institution, with NRI's. Rule-6 sets out the procedure of admissions, including the procedure for filling up category "A" and category "B" seats. Separate procedure is provided for filling up the 80% component of seats in minority and non-minority institutions. The procedure for filling up the "B" category seats including NRI seats follows the same pattern as in G.O.Ms.No.53 Rule-8 of these rules is ipsissima verba Rule-8 of the Rules issued in G.O.Ms.No.53.

48. The State Government notified amendments to the percentages of intake under the category "A" & "B" seats initially issued in G.O.Ms.No.53 & 59, dated 10-05-2006 and 26-05-2006. It is stated at the Bar that the percentage of intake for the "A" & "B" category seats is currently 70% and 30% respectively (The percentage for A and B category seats stipulated in G.O.Ms.No.53 at 80% and 20% respectively, was amended to 75% and 25% in G.O.Ms.No.110, dated 14-07-2008; and to 70% and 30% respectively in G.O.Ms.No.59, dated 13-07-2009; and similar amendment of the ratio between "A" and "B" category seats for MBA/MCA was made by orders issued in G.O.Ms.Nos.64 and 114, dated 16-07-2008 and 10-08-2009).

AFRC Notification inviting fee proposals:

49. On 27-04-2010 the AFRC, proposing to review the fee structure in private

unaided professional institutions for the academic year 2010-11 issued a notification informing managements of private unaided professional colleges to submit their proposed fee structure for each course with the necessary information on the aspects mentioned in the annexure to this notification, in justification and proof of fee proposals, for its scrutiny and decision. The notification stipulated that non-submission of proposals would be construed as willingness on the part of managements of the concerned colleges to accept the decision of the committee arrived on its own assessment on the basis of the relevant material available. It is important to note that by this notification the proposed fee structure was directed to be furnished separately in respect of A-category and B-category seats, for each course of study. The aspects on which proposals were required to provide justification and proof for the fee were set out in the annexure:

ANNEXURE Recurring and Non-recurring expenditure being incurred by the Institution relating to:

- 1 Annual expenditure on Teaching staff and Non-teaching staff.
- 2 Annual Expenditure on equipment and infrastructure such as, Laboratory, Library, Computers etc., and on Developmental work.
- 3 Annual Expenditure for maintenance of utilities such as Power, water, Transport, Tele-communications, Student Support Services, Faculty development etc.,
- 4 Annual depreciation on buildings, Computers and other equipment.
- 5 Segmental report relating to the Income and Expenditure regarding the concerned Course in case there are any other Professional Courses being run in the institution.
- 6 Audited financial Statements relating to Income and Expenditure of the Institution.
- 7 Relevant documents and Books and Accounts such as Acquittance Registers, Assets Registers, loan arrangement details etc. in justification and proof of the Fee Proposals made and the information furnished by the Institution.
- 8 Courses offered and intake of Students in each Course.
- 9 Whether Accreditation is given by the apex bodies for any Course?
- 10 Any other information felt necessary by the institution for fixation of Fee-Structures.

The Fee Notifications:

G.O. Ms. No. 76:

50. On 13-08-2010 the State notified the fee and special fee structure for under-

graduate engineering courses including Pharmacy, Planning and Architecture and Pharmacy - D courses in private unaided institutes, for the academic years 2010-11, 2011-12 & 2012-13. For under-graduate engineering courses including Pharmacy, Planning and Architecture tuition fee is fixed at Rs.31,000/-p.a. for each student for "A" category seats; up to Rs.95,000/-p.a. for each student other than NRI students in "B" category seats; and up to \$5,000/-p.a. for each NRI student admitted in "B" category seats as per the provisions of G.O.Ms.Nos.53 & 54, Higher Education Department, dated 10-05-2006, for the above academic years. For Pharmacy-D courses tuition fee is fixed at Rs.68,000/- up to Rs.1,55,000/-and up to Rs.6,000/-for the three categories as in the case of Engineering, Pharmacy, Planning and Architecture courses. Further, an extra amount of Rs.3,000/-is permitted to be collected from each student towards tuition fee for "A" & "B" category seats, over and above, the tuition fee fixed in respect of such of the courses accredited by the National Board of Accreditation in any college, during the subsistence of such accreditation. Other fees towards admission/registration/ recognition fee; for special services rendered; for common services rendered by the university; towards library deposit, laboratory deposit, etc, are also stipulated.

G.O.Ms.No.77:

51. By this order, dated 13-08-2010, on recommendations of the AFRC vide its letter, dated 05-08-2010, the State notified fee structure for MBA/MCA courses for the academic years 2010-11, 2011-12 and 2012-13. For "A" category seats, the tuition fee for both MCA/MBA courses is stipulated as Rs.27,000/-p.a. for each student and for "B" seats, up to Rs.78,000/-. No separate or higher fee for NRI students has been specified.

52. Pursuant to an earlier AFRC notification dated 22-04-2009, one of the petitioners herein the Vasavi Colleges of Engineering (WP No.21190/2010) submitted proposals for review of fee structure for B.E., M.E., and MCA; comprising one volume [of 375 pages] setting out the annual expenditure on teaching staff and non-teaching staff; annual expenditure on equipment and infrastructure; annual expenditure on maintenance of utilities, including student support services and faculty development; annual expenditure on buildings, computers and other equipment; segmental report relating to income and expenditure on other professional courses run by the institution, audited financial statements pertaining to income and expenditure; relevant documents, books of accounts such as acquittance registers, assets registers, loan arrangement details etc., in justification and proof of the fee proposal made and information furnished by the institution; particulars of courses offered and intake of students; and whether accreditation is given by apex bodies for any course. Similar voluminous documentation was furnished for ME and MCA courses as well, by this institution.

53. As directed by the AFRC, the Vasavi College of Engineering reiterated a fee structure for "A" and "B"-category seats separately and indicated fee of

Rs.1,47,256/-, Rs.1,48,000/-, and Rs.77,395/-for A-category seats; and Rs.4,47,133/-, Rs.2,97,130/-and Rs.2,11,893/-for B-category seats, for B.E., M.E., and M.C.A courses respectively.

54. After the current AFRC Notification dated 27-04-2010 the Vasavi College of Engineering furnished its fee proposals to the AFRC through a letter dated 01/24-06-2010, proposing a fee of Rs.1,82,000/-for A-category seats and Rs.5,48,000/-for B-category seats for the B.E. course; Rs.1,07,000/-and Rs.2,95,000/-for "A" and "B" category seats respectively for the M.C.A. Course; and Rs.1,14,700/-and Rs.2,29,400/-for "A" and "B"-category seats in the M.E. course. Along with the proposals, the institution asserts to have furnished supporting documents including statements of income and expenditure and working details as to how the proposed fees was arrived at by the institution.

G.O.Ms.Nos.85 and 86:

55. G.O.Ms.No.85 & 86, dated 02-08-2011 and 04-08-2011 respectively, notify the fee structure for MBA/MCA courses; and for under-graduate engineering courses including pharmacy, planning and architecture and Pharm. D courses, in private unaided colleges in the State, for the academic year 2011-12. Since the challenge in these writ petitions is only on the tuition fee aspect, the tuition

56. fee notified by the above Government Orders is as follows:

For MBA/MCA courses (G.O.Ms.No.85):

? Rs.27,000/-per annum for each student for "A" category seats, and

? Upto Rs.78,000/-per annum for each student for "B" category seats,

For Under-Graduate Engineering courses including Pharmacy, Planning and Architecture (G.O.Ms.No.86):

? Rs.31,000/-per annum for each student for "A" category seats;

? Rs.95,000/-per annum for each student other than NRI students in "B" category seats;

? Upto 5000 U.S Dollars per annum for each NRI/NRI sponsored student admitted in "B" category seats

For Pharm. D courses:

? Rs.68,000/-per annum for "A" category seats;

? Upto Rs.1,55,000/-per annum for "B" category seats excluding NRI students in this category; and

? Upto 6000 U.S. Dollars per annum for each NRI/NRI sponsored student admitted in "B" category seats.

Challenge to AICTE Regulations not pursued in this batch:

57. Though in some of the writ petitions in this batch some provisions of the All India Council for Technical Education (Norms and Guidelines for Fees and Guidelines for Admission to Professional courses) Regulations are challenged, learned counsel for the several petitioners urged that the validity of the AICTE Regulations may be considered separately in W.P.Nos.20542 & 20547 of 2010 wherein the challenge to these Regulations is exclusive and focused. We, therefore, do not consider the validity of the AICTE Regulations in this judgment; that aspect would be considered separately in W.P.Nos.20542 and 20547 of 2010.

AFRC Order NO.13/AFRC/FF/2010-11. 418 Dated 06-08-2010:

58. This order incorporates proceedings of the AFRC pertaining to fixation of Fee Structure for Under-graduate Engineering Courses including Pharmacy, Planning and Architecture, Pharm. D courses for the academic year 2010-11, 2011-12, 2012-13.

59. The AFRC records that pursuant to its notification dated 26-04-2010, 62 out of about 522 Engineering Colleges; 16 out of about 253 Colleges running Pharmacy Course; 2 out of 5 Colleges running Architecture Course, 1 out of 12 Institutions running Pharm. D courses submitted the proposals while the remaining colleges did not submit any fee proposals. The proposals along with the material submitted by the Colleges were entrusted to a Partnership Chartered Accountants firm (hereinafter, "CA firm") Mathesh & Ramana, for analysing the information and submitting its report. The CA firm submitted its report on 21-07-2010. The AFRC issued notices to various managements inviting them on 23-07-2010 for personal hearing. According to the AFRC, managements of two groups of institutions, some individual colleges and representatives of seven Associations of managements and the Consortium of Engineering Colleges Managements Association attended on 23-07-2010 and submitted their views regarding the fixation of fee structures for the courses. Some of those who attended also presented written representation at the time of personal hearing. According to this report of the AFRC, on 5-8-2010 it considered the several fee proposals and material received along therewith and views expressed by the representatives of Associations and Managements.

60. The distillate of the reasons recorded by the AFRC for fixing a uniform fee structures for all colleges in the state, separately for A and B category seats and for different courses of studies is set out in paragraphs 5 and 6 of its proceedings dated 06-08-2010 (extracted):

(5) The Committee in its meeting held on 05-08-2010 has considered in detail all the fee proposals and the other material received along with the proposals for the above said Engineering Courses including Pharmacy & Planning and Architecture, and Pharm. D Course which submitted the fee proposals and the views expressed by the representatives of the Associations and the Managements of some of the Institutions at the time of personal hearing. It is observed by the Chartered Accountants Firm that most of the Institutions which

submitted the fee proposals have just given the proposed fee structure on a paper without any basis and supporting material, that many Colleges did not submit even a single paper for fixation of proposed fee structure, that while calculating the average cost per student, the Institutions which are offering various other Courses (other than P.G. Engineering Course) have not segmented their expenditure among such different courses and in the absence of such segmentation, it will not be possible to determine the average cost per student for each Course separately and that Intuition-wise fee fixation is also difficult even in the cases where financial statements were furnished, because, on the Assets, percentage of depreciation is taken differently on similar heads as mentioned in the Report, thereby giving rise to variation in the quantum of depreciation amount on similar assets charged to income which is not a fair consideration for deciding fee structures. It is further observed by the Chartered Accountants Firm that there is no uniformity in the information provided by the Institutions, that most of the Colleges proposed their fees for consideration on estimated basis instead of calculating the same on the actual expenditure incurred, that most of the Colleges have not submitted any fee proposals or the required information as called for by the AFRC in the Notification relating to recurring and non-recurring expenditure and that the Institutions did not produce adequate and satisfactory supporting details and books of Accounts to justify their fee proposals. It is, therefore, observed by the Chartered Accountants Firm that in the absence of true and full financial particulars furnished by the Colleges, it is not possible to fix separate fee structure College-wise and as such, the Committee may consider fixing of uniform fee structure for all the Colleges.

(6) The Chartered Accountants Firm has considered and discussed in details the fee proposals and the material submitted along with those proposals by the various Institutions, and expressed their opinion in their Report about those fee proposals by giving valid and convincing reasons dealing separately with each individual proposal and the material submitted by each Institution. The Committee, after considering and discussing, the fee proposals and the material submitted by the various Institutions and the Associations and the Report of the Auditors in detail, has agreed with the views expressed by the Chartered Accountants Firm. It is noticed by the Committee that none of the managements of the Engineering including Pharmacy and Architecture Colleges which are running the above mentioned Courses has given complete and full details in their proposals for fixation of fee structure which can be of any help or assistance for the Committee to fix the fee structure for all those Institutions on their own merits separately as per the direction of the Supreme Court in its Judgment reported in ISLAMIC ACADEMY CASES AND P.A. INAMDAR CASE. None of the Institutions produced sufficient evidence to justify its fee proposals. The Institutions did not produce adequate and satisfactory supporting details and their books of accounts to justify their fee proposals inspite of sufficient opportunity given to them by the Committee even by way of personal hearing. Even out of those Colleges which submitted the fee proposals, some Colleges

submitted mere fee proposals without enclosing any material while most of the remaining Colleges enclosed only estimated income and expenditure statements and some Colleges enclosed Audited statements of income and expenditure. The Income and Expenditure statements, Audited Financial Statements, the fee particulars given in each of the fee proposals submitted by the colleges are not supported by adequate evidence and material which would be of any help to the Committee for fixing the fee for those colleges separately.

61. Paragraphs 8 and 9 of those proceedings set out the apparent justification for fixing a higher fee structure of "B"-category seats and a different fee structure for NRI candidates, as under (extracted):

(8) During the previous academic years 2006-07, 2007-08 & 2008-09, there were different fee structures for Convener seats and Management seats in Engineering including Pharmacy and Architecture. In the G.O.Ms.No.53 & 54, H.E (EC) Dept., dated 10-05-2006 and G.O.Ms.No.60, H.E.(EC) Dept., dated 26-05-2006, the seats are categorized as "A" & "B" categories. "B" category seats are to be filled up by NRI candidates, candidates from other States as well as eligible candidates from inside the State including those who seek admission on the basis of the marks secured in the qualifying examination in case there are no such NRI candidates and candidates from outside the State. However, the "A" category seats are meant to be filled by eligible candidates on the basis of merit marks secured in the relevant Common Entrance Test. The admission of students against "B" category seats is thus based on a different classification and criteria as compared to that of "A" category seats. In the Judgment of the Supreme Court in P.A. Inamdar's case, provision is made for 15% NRI quota seats and for fixation of separate higher fee for such seats. In view of such facts and circumstances, and the material available on record and in view of the terms of the above said Admission G.Os. classifying the seats in Engineering, Pharmacy & Architecture courses and Pharm. D course as "A" and "B" categories and the other relevant Clauses of the said G.Os. relating to various aspects, the Committee is of the opinion that a higher fee structure shall be fixed for "B" category seats as compared to the "A" category seats.

(9) Further, it is seen from the provisions of G.O.Ms.Nos.53 & 54 HE (EC 1) Dept., dated 10-05-2006 that 30% B-category seats are to be filled up by the Managements from the eligible candidates including candidates belonging to other States and Union Territories of India and NRIs, and within the B-Category, seats not exceeding 15% of the total intake of students may be filled at the discretion of the Institution with NRIs. As per the observations of the Supreme Court in P.INAMDAR's case, some seats can be filled up at the discretion of the Management with NRI candidates with higher fee structure. As per the relevant provisions of the above said G.O.Nos.53 and 54 dated 10-05-2006, the eligibility criteria for admission and the procedure for admission prescribed for NRI seats is quite different from the eligibility criteria and the procedure for admissions prescribed for the other seats within the B-category seats. The Supreme Court

has further observed I the above said decision that under such NRI category, less meritorious students, but who can afford to bring more money, get admission, and that such amount collected from such NRI candidates can be utilized by the Management for benefiting students such as from economically weaker sections of the Society. Therefore, out of the 30% B-Category seats, some seats not exceeding 15% of the total intake of students may be filled up with NRI candidates at the discretion of the Management while the remaining seats can be filled up with eligible candidates including the candidates belonging to other States and Union Territories of India as per the provisions of G.O.Ms.No.53 & 54 dated 10-05-2006. In view of such circumstances, the Committee is of the opinion that out of the 30% B-Category seats, a distinction can be made between the NRI candidates and the other candidates who can be admitted by the Managements under the said B-Category seats as per the provisions of G.O.Ms.Nos.53 and 54 dated 10-5-2006. As such, the Committee resolves to fix higher fee for the NRI students as compared to the fee fixed for the remaining candidates to be admitted under B-category seats and the fee fixed for the NRI candidates shall be paid in U.S. Dollars.

62. Eventually, the AFRC recommended/fixed tuition fee:

(I) For undergraduate Engineering, including Pharmacy, Planning and Architecture Courses

--at Rs.31,000/-per annum for each student for "A"-Category seats;

--Rs.95,000/-per annum (other than NRI students) for each student, for "B"-Category seats;

---upto 5,000 U.S. Dollars per annum for each NRI student admitted in B-category seats;

(II) For Pharm. D course the tuition fee fixed

--at Rs.68,000/-per annum for each student for "A"-Category seats;

--upto Rs.1,55,000/-per annum for each student for (other than NRI Student) for B-category seats; and

--upto 6,000 U.S. Dollars per annum for each NRI student admitted to "B"-category seats---

----for the academic years 2010-11, 2011-12, 2012-13.

63. Since the core grievance in these writ petitions pertains to tuition fee fixed by AFRC and notified by the Government and fixation of differential fee for "A" and "B" category seats, details of the other fees/amounts permitted are not considered.

64. The reasons recorded by the AFRC for fixing differential fee for "A" and "B" category seats (for each course of study) and for fixing a uniform fee structure for all private unaided educational institutions is set out in its report, particularly

at paragraphs 5, 6, 8 & 9 (extracted above), including the circumstance that the relevant rules, issued in G.O.Ms.No.53,54 & 60, dated 10-05-2006 and 26-05-2006 have classified seats into "A" and "B" categories. The AFRC decision to fix differential fee is based on observations of the CA firm vide its report dated 21-07-2010. In the circumstances, a brief analysis of this report is in order.

The CA Firm's report dated 21-07-2010:

66. In its report (Part-II setting out factors influencing the fixing of uniform fee structure for all institutes), the CA firm states that out of the total 522 private unaided engineering colleges (minority and non-minority), only 62 colleges submitted some details; out of the 253 B-Pharm colleges, only 17 submitted details; out of 5 B-Arch colleges, only 2 submitted some details; and out of the 12 Pharm-D colleges only 1 college submitted some details about expenditure. The report records that most of the colleges did not submit any material for fixing of acceptable fee structure and therefore in the context of non-availability of actual expenditure details in the majority of colleges, it is difficult and not possible to recommend any fee for each college separately. The report also records that wide variations were observed in the fee structure proposed by several colleges. The report illustrates that among engineering colleges, St. Mary's Engineering College, Chebrolu, proposed a uniform fee for both categories ("A" & "B"); Chalapati Institute of Technology proposed an average fee; St. Mary's College of Pharmacy proposed a fee structure for "A" category students, while two other institutions - Nizam's Institute of Pharmacy and G. Pulla Reddy College of Pharmacy proposed a different fee structure for "A" category students (different from St. Mary's College). The report concludes: In view of variations of such a magnitude, it is not possible to fix a uniform fee for such institutions. Even if we consider the fixation of institution-wise fee structure on the above basis it would result in gross injustice to category-A students

(emphasis supplied).

67. This part of the report also records that while 13 Engineering and 5 B. Pharm colleges submitted audited financial statements for the previous years none of the B. Arch & Pharm. D colleges submitted audited financial statements for the previous years; that there are wide variations in the items of expenditure, e.g. salaries, depreciation, recurring and non-recurring expenses and furtherance of education, despite standards being fixed for expenditure; that books of account, acquittance registers, assets registers, loan arrangement details, such as terms of interest, repayment and other relevant documents were not provided by most of the institutions who submitted audited statements; that in case of some of the institutions details of the total number of students were not provided; and that in the absence of full financial particulars which affects the fee structure, college-wise fee fixation is not possible. In paragraphs 5 to 17 of Chapter - II of Part - 2 of its report, the C.A. firm illustrates the variations in the factors on the basis of which computation was done for the individual fee proposals submitted by certain institutions and concluded:

- (a) that lack of uniformity in estimating salaries;
- (b) adoption of different rates of depreciation for different types of assets; and
- (c) absence of standards for enabling commonly acceptable fee structure in the context of wide variations in the expenditure statements, are factors which render it impracticable to fix institution-wise fee structures.

68. In Part-I, setting out the observations, the report classified the 62 engineering colleges which had submitted fee proposals, duly furnishing particulars, into two categories:

- (a) institutions which did not provide certified financial statements for the immediate previous year (49 in number); and
- (b) institutions which submitted certified financial statements for the immediate previous year (13 institutions).

69. The report notes that institutions which submitted statements for the previous year, did not provide details of the total number of students for that academic year. Analyses and critique of the Report of the C.A. Firm:

70. As deducible from the report, the CA firm which analyzed the fee proposals by the several institutions was engaged in an elusive search for uniformity in the proposals and in the parameters and data furnished for the proposals. While we are not aware as to the terms of reference on the basis of which the CA firm was tasked to submit its analyses, from its report it is clear that it had no knowledge whatsoever of the contours of the jurisdiction and authority of the AFRC qua the law declared in TMA PAI Foundation, and nuanced in Islamic Academy of Education and PA Inamdar.

71. As is apparent from the AFRC Rules, Rule-3(viii) empowers the AFRC to require a private unaided professional education institution to furnish (by a prescribed date), information necessary for enabling it to fix fee in respect of each professional course offered in the institution. Further Rule-4 enjoins the AFRC to requisition from each institution its proposed fee structure well-in-advance before the date of issue of notification for admission for the academic year, along with all the relevant documents and books of accounts, for its scrutiny. Clause-ii of Rule-4 enjoins the AFRC to decide whether the fee proposed by the institution is justified and does not amount to profiteering or charging of capitation fee; and under clause-iii the AFRC may either approve or alter the proposed fee for each course, to be charged by the institution. The proviso to clause-iii mandates the AFRC to give the institution an opportunity of being heard before fixing any fee or fees. Clause-iv sets out the factors to be taken into consideration by the AFRC while prescribing the fee.

72. From the law declared in TMA PAI Foundation, Islamic Academy of Education and PA Inamdar and the several provisions of the AFRC Rules as well, it is clear that the AFRC has a well-defined and clearly circumscribed functional locus -to

verify institution-wise fee proposals submitted to it; to ensure that there is no profiteering or collection of capitation fee by any institution; and to alter or modify the fee proposals only if and to the extent these proposals incorporate profiteering or capitation.

The AFRC Failure:

73. In the admitted factual scenario where only 62 of the 522 engineering colleges; 17 of the 253 B. Pharm. colleges; 2 of the 5 B.Arch. colleges; and 1 of the 12 Pharm. D colleges, submitted some details for fixation of fee, the action and conduct of the AFRC in fixing a uniform fee structure for all the colleges constitutes a clear abdication of its essential responsibility and function, viz., ensuring that collection of capitation fee and profiteering by an educational institution is prohibited and interdicted. The AFRC is seen to have reduced itself to a state of pathetic helplessness by not reigning in the vast multitude of colleges which failed to respond to its notification to submit fee proposals. In the absence of any data with regard to the income and expenditure; assets and depreciation; infrastructural, faculty and other staff matrices; other relevant parameters; and audited financial statements of those colleges (which did not submit any details or particulars), the fixing of a uniform fee structure which is applicable to the non-responsive colleges as well, is a shocking transgression by the AFRC of its essential charter. The AFRC's essential function is to ascertain how the earlier fee structure determined by it was employed by each of the colleges; whether there was any surplus in the income over expenditure; how the surplus, if any, was utilized or deposited and scrutiny of several other such areas; to ensure that profiteering or capitation is interdicted.

74. If a private unaided educational institution had failed to furnish any information or proposals for fixation of fee structure, the AFRC should have recommended that such defaulting institution/s be not permitted to collect any fee whatsoever. Both according to the CA firm and the AFRC, 460 out of the 522 engineering colleges did not furnish any particulars whatsoever. In such circumstances there was no way of ascertaining how the non-responsive institutions were dealing with the moneys collected from the existing fee structure; deployment of surplus funds; their faculty, staff and infrastructural realities and like factors. Instead of adopting such an appropriate process and procedure to ensure that profiteering or collection of capitation fee is excluded from the operations of each private unaided educational institution, the AFRC proceeded to fix a uniform fee structure for all institutions; those that submitted audited financial statements, books of accounts and other relevant particulars; and those that did not furnish any particulars whatsoever; a trauma for the compliant and a bonanza for the delinquent.

75. Observations of the CA firm, adopted by the AFRC (that in the absence of information from all educational institutions it is difficult to fix a fee structure), are founded on the fundamental misconception that data from all educational institutions is essential to verify fee proposals of each institution. From the

declared and operative law, it is clear that it is not the duty of the AFRC to fix a fee structure. Its function is to verify the proposals of each institution, (on an individual and institution-specific basis) and to either approve, modify or alter the fee structure proposed by each institution, to ensure that there is no profiteering or collection of capitation fee. The power of the AFRC in this regard is clear. It is not to fix fees or a fee structure. It must only verify the fee proposals of the several institutions to ensure that there is no element of profiteering or collection of capitation fee. The alteration or modification of a fee proposal could only be to excise profiteering, as defined by curial authority.

76. Neither in the report of the CA firm dated 21-07-2010; the minutes of the AFRC dated 05-08-2010; nor its proceedings dated 06-08-2010, is there a whisper that the fee structure proposed by those institutions which responded to its notification and submitted audited financial statements, incorporate an element of profiteering or collection of capitation fee and, if so, to what extent. On their own perception of the relevant rules, the notification of the AFRC and the specifications in the notification, the several educational institutions submitted their fee proposals and admittedly 13 of the 62 engineering colleges (for instance) submitted audited financial statements for the previous year along with acquittance registers and books of accounts.

77. On behalf of the petitioners and on this aspect of the matter certain precedents are referred to.

78. In Pushapagiri Medical Society Vs. State of Kerala and Others (2004) 8 SCC 135, (a decision prior to PA Inamdar), while considering interim arrangements which may be made pending a decision by the Supreme Court on the points involved in the Writ Petition, referred for consideration to a larger bench (later decided in PA Inamdar), the Supreme Court recorded the following observations on the provisions of Section 4 of the Kerala Self Financing Professional Colleges (Prohibition of Capitation Fees and procedure for admission and Fixation of Fees) Act, 2004:

The other question is regarding the fee structure. In terms of the decision in Islamic Academy Case, the Government of Kerala appointed a committee headed by Justice K.T. Thomas, a former Judge of this Court. The said Committee has fixed the fee at Rs.1.13lakhs as the maximum annual fee to be collected from each student of the private self-financing medical colleges. The Committee in its order dated 28-05-2004 has observed that the cross-subsidy has been disfavoured by this court in T.M.A., Pai Foundation case. (8th para)

..... Section 4 of the Act, Prima facie, brings in cross-subsidy which, prima facie, is not possible as per the decision in T.M.A. Pai Foundation Case. The question as to whether the students can afford or not the fee fixed by Justice Thomas Committee is not very relevant for the present purposes. No one stops the State Government to subsidize such students as it may deem just, fit and proper. (9th Para)

79. A learned division bench of the Kerala High Court, in *Malankara Orthodox S.C.M. College V. Fee Regulatory Committee* 2007 (4) KLT 530 invalidated an order dated 26-04-2007 passed by the Fee Regulatory Committee for Professional Colleges. Relying on the judgments of the Hon'ble Supreme Court in *TMA Pai foundation*; *Islamic Academy of Education*; *PA Inamdar* and an earlier decision of the Kerala High Court in *Lisie Medical & Educational Institutions Vs. State of Kerala* 2007 (1) KLT 409, the Malankara Court observed that the Regulatory Committee recorded no clear finding as to areas where there is an element of profiteering or capitation fee embedded in proposals of the petitioner; that fee structure has to be fixed in respect of each college or institution independently considering individual statements and the fee structure could vary from institution to institution depending upon investment on land, buildings, equipment and other infrastructural equipments; that the committee had completely ignored the claim for depreciation on equipment and machinery; that the salary expenditure was not noticed by the Committee; and that the Regulatory Committee went about fixing the fee structure on its own instead of accepting the fee structure submitted by the institution, after verifying the same for incorporation of profiteering or capitation. The court clearly observed:

In our view, if there was any element of profiteering or charging of capitation fee in the fee fixed by the management, the Committee ought to have pointed out the same to the management in clear terms so that the management could either explain the same or rectify the anomaly, if any pointed out. The Committee in our view, should point out the anomalies, if any in writing so that the area of disagreement could be narrowed down. Such a procedure, if followed, would show application of mind by the committee as well as the management and a reasonable fee structure could be arrived at, taking into consideration the overall public interest.

80. In conclusion the Malankara court set aside the fee regulatory order dated 26-04-2007 and directed the committee to point out the areas, if any, where there is any element of profiteering or capitation fee in the fee structure submitted to it; and further directed that wherever any clarification is required by the committee the same should be communicated to the petitioner in writing, with a time fixed for such communication, for the response of the petitioner institution thereto and for final disposal de-novo, by the committee.

81. Earlier in *Pushpagiri Medical Society and others Vs. State of Kerala and others* 2007(1) KHC 161, certain provisions of the Professional Colleges or Institutions (Prohibition of Capitation fee, Regulation of Admission, Fixation of Non-Exploitative fee and others Measures to Ensure Equity and Excellence in Profession Education) Act, 2006 (Kerala Act 19 of 2006) were challenged on several grounds. In *Pushpagiri Medical Society* the Kerala High Court, after an incisive but succinct analyses of the judgments from *Unnikrishnan* to *PA Inamdar* observed:

.... From the conspectus of the decisions culled out in the discussion made herein

before, it is clear that fixation of fee structure is a fundamental right of educational institutions more particularly, of those which are unaided. It is further clear that the fee has to be decided by the institutions themselves and such right of the institutions cannot be arrogated by the State. While, however, fixing the fee structure, the institutions cannot indulge into profiteering nor can charge capitation fee, even though the element of surplus income to cater to the future needs of the institutions can be definitely taken into account while fixing the fee. The committees that may be constituted or the law that may be even made could only regulate the profiteering and charging of capitation fee. The committees would themselves have every right to modify the fee structure fixed by the institutions and debar institutions by an order and if legislation is made to that effect by law, to reduce the fee in the event of its coming to a finding that the fee structure had a component of profiteering and / or capitation fee, but nothing beyond that. The fixation of fee structure is the right of an institution particularly when unaided. The right of the committees that may be constituted or the Government to legislate, in our considered view, cannot go beyond examining the fee structure to find out therein the element of profiteering or charging of capitation fee, be it by monitoring committees or by legislation. It is in this view of the law laid down by the Supreme Court, the provisions under challenge have to be examined. (para 47)

..... Tested in the anvil of the law laid down by the Supreme Court as culled out by us herein before, it appears to us that the position as available in Unnikrishnan's case has been revived. There may be some provisions in the Act that may be in consonance with the law laid down in the judicial precedents referred to above, but in so far as the right of self financing institutions to fix a fee structure as may be thought appropriate by it is concerned, the same has been completely taken away. It may be one thing to say that self financing institutions would determine their own fee structure subject to the approval of the Government, either through committees constituted by it or by law framed by it, but entirely another thing to say that every element that goes to determine the fee structure would be considered by the Committee or the Government and the fees thus fixed would be binding upon the self financing institutions. Fixation of a fee structure has indeed been held to be an important facet of establishing and administering an educational institution, be it of minority or non-minority. This right cannot be totally curtailed. This right would be straightaway infringed if it is arrogated by the State, even though there may be no infringement of such rights if it is regulated to vouchsafe non-profiteering and non-charging of capitation fee. It is no doubt true that in sub-section (4) of Section 6 of the Act, it has been stated that regulatory committee would require each unaided professional college or institution to place before it the proposed structure of fee and verify whether the fee proposed by each college is justified and does not involve profiteering or charging of capitation fee, but the right given to the fee regulatory committee to determine and fix the fee to be charged by the institution would undoubtedly infringe the right of the institution to fix its own fee

structure..... In other words, the reading down of Section 6 of the Act of 2006 thus would be to the extent that every professional college would place before the committee the fee structure as set out by it, which would be subject to verification by excluding the element of profiteering and charging of capitation fee. This reading down of the Section is necessary to protect Section 6 and such reading down shall not make any difference either to the institution or to the Government, as virtually it is in any case the right of the management to fix the fee structure and in any case the right of the Government to examine it to the extent it may have an element of profiteering or charging of capitation fee (para 48).

82. If either the CA firm or the AFRC had any lingering doubt or had noticed deficiencies in the data and documents furnished, the concerned individual educational institution(s) should have been called upon (by a written communication) to furnish specified material, documents, records, or to explain any specific discrepancy noticed; or any inadequate data or material required.

83. From the analyses of the report of the CA firm dated 21-07-2010; the minutes of the AFRC meeting dated 05-08-2010 and its proceedings dated 06-08-2010, the conclusion is irresistible that the whole exercise was calibrated towards fixing a uniform fee structure, an exercise and result wholly in transgression of the proper role and function of the AFRC qua the law declared in TMA PAI Foundation, Islamic Academy of Education and PA Inamdar; and the statutory rules under which the AFRC was conceived and established, to serve as a watchdog to regulate profiteering by private unaided educational institutions.

The legitimacy of fixation of differential fee for "A" & "B" category seats:

84. Before proceeding to analyses of the challenge on this aspect (to fixation of different fee for "A" & "B" category seats), it is essential to refer briefly to the history and evolution (through the statutory rules and Government Orders), of "A" & "B" category seats.

85. In exercise of powers under Sections 3 & 15 of the Capitation Fee Act, the State Government issued G.O. Ms. No. 33, Higher Education Department, dated 11-06-2003 (in supersession of earlier rules issued in G.O.Ms.No.184, dated 20-08-1993). These are called The A.P. Non-Minority Professional Institutions (Regulation of admissions into under-graduate professional courses through Common Entrance Test) Rules, 2003, applicable to all unaided non-minority professional institutions imparting under-graduate professional courses in Engineering (including Technology), Pharmacy and Architecture. These rules were brought into force from the academic year 2003-04. Rule-5(b) & (c) of these rules enjoin that 85% of the sanctioned intake of seats shall be filled with eligible candidates on the basis of rank obtained at EAMCET, by allotment by the Convener and following the rules of reservation stipulated by the Government; and 15% (of the total intake) seats in each course of study shall be open for admission to all eligible candidates, including candidates belonging to other

States and Union Territories of India and NRIs - the management seats, respectively. Rule-6 mandates that Convener seats shall be filled by the Convener of admissions and management seats by the management of the concerned professional colleges. Rule-7 - sets out the different parameters for filling the Convener and management seats. These rules were in force till their supersession by rules issued in G.O.Ms.No.53, post PA Inamdar.

86. The G.O.Ms.No.53 rules are stated to have been issued pursuant to the judgment in PA Inamdar. Rule-3, classifies seats to be allotted in each unaided non-minority professional institution as "A" and "B" category seats. Category "A" seats constitute 80% of the sanctioned intake of seats in each course, to be filled by eligible candidates on the basis of the rank obtained at EAMCET/EAMCET-AC and following the provisions of Rule-6(i) and the reservation laid down in Rule-7; and category "B" seats comprise 20% of the total intake of the seats, open for admission to all eligible candidates on merit basis including candidates belonging to other States and Union Territories of India and NRIs, following the provisions of Rule-6(ii); and within category "B", seats not exceeding 15% of the total intake may be filled at the discretion of the institution, with NRIs. Rule-2(k) defines NRI to mean a candidate born to a parent of Indian origin residing outside the country, who has passed the qualifying examination or its equivalent. While Rule-6(i) enumerates the procedure for filling up the 80% "A" category seats; Rule-6(ii) sets out the procedure, including eligibility criteria for filling up the 20% "B" category, including NRI seats. In G.O.Ms.No.62, Higher Education Department, dated 26-05-2006, Clause-iv of Rule-6(ii) was amended relaxing the criteria of marks, rendering eligible more candidates to fill the vacant seats existing after filling up NRI and the leftover seats.

87. In G.O.Ms.No.110, Higher Education Department, dated 14-07-2008, the percentages fixed in G.O.Ms.No.53, dated 10-05-2006, for "A" & "B" category seats was altered from 80% & 20% to 75% & 25% respectively. Again in G.O.Ms.No.59, Higher Education Department, dated 13-07-2009, the percentage fixed in G.O.Ms.No.53 and amended in G.O.Ms.No.110 (supra) was further altered to 70% & 30%, for "A" & "B" category seats respectively. In G.O.Ms.No.140, dated 31-07-2008, Higher Education Department, Rule-2(k) of the rules issued in G.O.Ms.No.53 - (defining non-resident Indian) was amended by way of substitution to enlarge the definition of a non-resident Indian to include the "ward" of a person of Indian origin, residing outside the country and who has passed the qualifying examination or its equivalent.

88. In G.O.Ms.No.175, Higher Education Department, dated 19-08-2008, further relaxation of the eligibility criteria for filling up seats remaining vacant in the "B" category were issued. Para-3 of this G.O. reveals the reason underlining these relaxations, namely - a large number of Engineering and B. Pharm. colleges were sanctioned by the AICTE, leading to an increase in the "B" category seats from 20% to 25% and the "B" seats have consequently gone up to 43,852, during the year 2008-09.

89. In G.O.Ms.No.74, dated 28-07-2011 (as earlier noticed), the G.O.Ms.No.53 rules together with all the aforementioned amendments were consolidated and re-issued.

90. From the evolutionary dynamics adverted to in the preceding paragraphs it is apparent that the State steadily increased the percentage of seats to be filled under the discretionary paradigm of institutional management (from 20% to now 30%) and has also diluted the standards and eligibility criteria for filling up these seats; besides enlarging the definition of NRIs.

91. Of the writ petitions in this batch of cases, W.P.Nos.16547 & 17498 of 2010 specifically seek a direction to the respondents to fix common fee for all seats in each course of study in each institution; without distinction between category "A" and category "B" seats. These writ petitions are filed by the Consortium of Engineering Colleges Managements" Association; and the Professional Colleges Managements" Association, respectively.

92. As apparent from the report of the CA firm dated 21-07-2010; the minutes of the meeting, and proceedings of the AFRC dated 05-08-2010 and 06-08-2010, fee proposals submitted by the several colleges were not uniform for "A" & "B" category seats. Earlier in this judgment we have noticed that even the AFRC notification dated 26-04-2010 specifically required the colleges to submit their proposed fee structures separately for "A" & "B" category seats, for each course. At the hearing of these writ petitions however, it is the conjoint submission by counsel for all the writ petitioners, that specification of differential fee for "A" & "B" category seats (excluding NRI seats in the "B" category) is contrary to the clear pronouncement of law in TMA PAI Foundation, Islamic Academy of Education and PA Inamdar; and that a higher fee is being fixed for "B" category so as to factor a subsidy of students admitted to the "A" category from the higher fee fixed for the "B" category.

93. In the circumstances, we proceed on the premise that the challenge to the fixation of differential fee for "A" & "B" category seats is the common cause and grievance in all the writ petitions in this batch.

The ambiguous bases in the report of the C.A. Firm:

94. Since the impugned fee structure notifications issued by the State are based on minutes of the meeting and proceedings of the AFRC, which in turn are based on the report dated 21-07-2010 of the CA firm, it is necessary to consider how the CA firm considered and analyzed proposals of those colleges and institutions which presented a common fee structure for "A" & "B" category seats.

95. Part-I of the report dated 21-07-2010 sets out the observations of the CA firm. Part-A thereof deals with fee proposals by engineering colleges and para-29 in this part sets out observations pertaining to fee proposals submitted by five institutions, all sponsored by Joseph Sriharsha and Mary Indraja Educational Society. The report notes that these institutions proposed a uniform fee both for

category "A" & "B" but this results in additional burden to category "A" students. In para-51, the report enumerates seventeen institutions which proposed a uniform fee for both "A" & "B" category students and no observations are recorded on this aspect. In paragraph-B of Part-I the report records observations with regard to B. Pharm. colleges. Para-2 herein sets out the names of five institutions which submitted certified financial statements for the immediate previous year and in para - 14(i) the report records the observation that these institutions had proposed a uniform fee for both categories and this would result in additional burden to category "A" students. In Part - II of the report at para-4 it is observed that since there are wide variations in the fee structure proposed by those colleges which had submitted some details and certified financial statements, it is not possible to fix a uniform fee for those institutions which had proposed the same fee for categories "A" & "B", since it would result in gross injustice to category "A" students.

96. Another CA firm (Brahmayya & Co.) also appears to have been requested by AFRC to submit its recommendations/analyses of the fee structure proposed by colleges administering MBA & MCA courses. This report dated 14-07-2010 states that applications submitted by forty-one colleges in the MBA stream and thirty-five colleges in the MCA stream were analyzed. This report also sets out particulars of some of the colleges which proposed a uniform fee structure for both "A" & "B" category seats. In this CA Firm's report however there is no analysis nor are findings recorded on the desirability of a uniform or differential fee, for "A" and "B" category seats.

The incoherent and incongruent reasons in the AFRC recommendations:

97. The minutes of the meeting dated 05-08-2010 of the AFRC (pertaining to under-graduate Engineering courses, etc.) on the aspect of "A" & "B" category seats records that while "A" category seats are meant to be filled up by eligible candidates on the basis of merit marks secured in the relevant Common Entrance Test, admission to "B" category seats is based on a different classification and criteria and that the judgment in PA Inamdar enables the provision of 15% NRI quota seats and for fixation of a separate, higher fee for such seats. The AFRC without any analyses of the reasons recorded in PA Inamdar for permitting collection of a higher fee from students admitted to the NRI quota of 15%, proceeds to extravagantly conclude:

...In view of such facts and circumstances, and the material available on record and in view of the terms of the above said Admission G.Os. classifying the seats in Engineering, Pharmacy & Architecture courses and Pharm. D Course as "A" and "B" categories and the other relevant Clauses of the said G.Os. relating to various aspects, the Committee is of the opinion that a higher fee structure shall be fixed for "B" category seats as compared to the "A" category seats.

98. In the subsequent para-8 of the minutes as well, the AFRC records equally jejune reasons for fixing higher fee for the 30% "B" category seats and a still

higher fee for the 15% NRI seats, within the "B" category. These observations are usefully reiterated. They read:

8. Further, it is seen from the provisions of G.O.Ms.Nos.53 & 54 HE (EC 1) Dept. dated 10-5-2006 that 30% B-Category seats are to be filled up by the Managements from the eligible candidates including candidates belonging to other States and Union Territories of India and NRIs, and within the B-category, seats not exceeding 15% of the total intake of students may be filled at the discretion of the Institution with NRIs. As per the observations of the Supreme Court in P.A. INAMDAR's case, some seats can be filled up at the discretion of the Management with NRI candidates with higher fee structure. As per the relevant provisions of the above said G.O. Nos.53 and 54 dated 10-5-2006, the eligibility criteria for admission and the procedure for admission prescribed for N.R.I. seats is quite different from the eligibility criteria and the procedure for admissions prescribed for the other seats within the B-Category seats. The Supreme Court has further observed in the above said decision that under such NRI category, less meritorious students, but who can afford to bring more money, get admission, and that such amount collected from such NRI candidates can be utilized by the Management for benefiting students such as from economically weaker sections of the Society. Therefore, out of the 30% B-Category seats, some seats not exceeding 15% of the total intake of students may be filled up with NRI candidates at the discretion of the Management while the remaining seats can be filled up with eligible candidates including the candidates belonging to other States and Union Territories of India as per the provisions of G.O. Ms. Nos.53 & 54 dt.10-5-2006. In view of such circumstances, the Committee is of the opinion that out of the 30% B-Category seats, a distinction can be made between the NRI candidates and the other candidates who can be admitted by the Managements under the said B-Category seats as per the provisions of G.O.Ms.Nos.53 and 54 dated 10-5-2006. As such, the Committee resolves to fix higher fee for the NRI students as compared to the fee fixed for the remaining candidates to be admitted under B-category seats and the fee fixed for the NRI candidates shall be paid in U.S. Dollars.

99. The AFRC assumes (erroneously) that "B" category (excluding the 15% NRI component therein) is generically pari-passu the NRI category; and that students admitted to the "B" category may legitimately be saddled with the burden of cross-subsidising the fee liability of "A" category seats.

100. On 05-08-2010 the AFRC also met to consider the report dated 14-07-2010 submitted by the other chartered accountant's firm - Brahmayya & Co. Paras 5 & 6 of the minutes of this meeting notice the different bases of "A" and "B" categories and NRI seats and concludes that in view of separate procedures and criteria for filling up "A" & "B" category seats in the relevant rules (G.O.Ms.No.59, dated 26-05-2006); and in view of the judgment in P.A. Inamdar enabling 15% NRI quota seats and fixing of separate higher fee for such seats, a higher fee structure must be fixed for the entire "B" category seats vis-?-vis "A"

category seats.

101. The AFRC appears to have been disproportionately concerned and preoccupied with balancing the advantages and disadvantages of fixing uniform fee qua the interest of managements of private unaided educational institutions administering professional courses. The minutes also record:

By the time the fee was revised on 6-7-2009 for M.B.A./M.C.A. Courses during the year 2009-10, A-Category seats were 75% and B-Category seats were 25% for M.B.A./M.C.A. Courses in both the Non-Minority and Minority Institutions as per the provisions of G.O.Ms.No.59 H.E. (EC-1) Department dated 26-5-2006. Subsequently, G.O.Ms.No.61 dated 13-7-2009 was issued amending G.O.Ms.No.59 HE (EC1) Department dt.26-5-2006 providing 70% seats in A-Category and 30% seats in B-Category. On account of such amendment increasing the number of seats in B.Cat. seats, additional advantage was gained by all the M.B.A./M.C.A. Institutions even as per the Fee structure finalized to them during the year 2009-10 as the tuition fee fixed for B-Category seats during that year is far higher than the fee fixed for A-Category seats. All such circumstances are also taken into consideration by this Committee while revising the fee structures during the present academic year 2010-11 for M.B.A./M.C.A. Courses.

102. The AFRC recommended a tuition fee of Rs.27,000/-p.a. for each "A" category seat and up to Rs.78,000/-p.a. for each "B" category seat, for the academic years 2010-11 to 2012-13.

The State builds on faulty foundations:

103. The State in G.O.Ms.No.76, dated 13-08-2010, notified the fee and special fee structure for under-graduate engineering course including Pharmacy, Planning and Architecture and Pharm. D courses for the three academic years 2010-11 to 2012-13 in conformity with the recommendations of the AFRC. Suffice it to record (in the context of our analyses on the validity of the fee structure for "A" & "B" category seats) that a differential fee is notified for "A" & "B" category seats and a higher fee for students admitted to the NRI quota. A similar determination of fee structure is made for MBA & MCA courses, in G.O.Ms.No.77, dated 13-08-2010. For the academic year 2011-12, the State Government notified the fee structure in G.O.Ms.Nos.85 and 86, dated 02-08-2011 and 04-08-2011, for the two generic disciplines, respectively.

104. In the absence of any independent reasons recorded by the State Government for fixation of differential fee for "A" & "B" category seats, the inference is compelling that the differential fee is fixed in view of the observations and reasons recorded by the AFRC, which in turn are based on observations and recommendations set out in the report of the CA firm dated 21-07-2010.

Do statutory provisions mandate separate fee stipulation for "A" and "B"

category seats?

105. As provisions relating to classification of "A" & "B" category seats; the criteria for filling up such seats; and for fixing fee are in pari materia for Engineering and Pharmacy courses and MBA and MCA courses as well, qua the rules issued in G.O.Ms.No.53, dated 10-05-2006 (now G.O.Ms.No.74, dated 28-07-2011) and G.O.Ms.No.59, dated 26-05-2006; and since the ratio between "A" & "B" category seats for these two sets of courses was similarly enhanced from 80% & 20% initially, to 70% & 30% as at present, we revisit but in brief the relevant provisions of the rules issued in G.O.Ms.No.74, as illustrative of the statutory environment.

106. Seats are classified into "A" & "B" category (Rule-3); the ratio prescribed for allocation of seats for these two categories is 70% and 30% [Rule 3(ii) and (iii)]; the eligibility criteria for admission to "A" & "B" category seats are substantially similar, though slightly different for NRI seats within the "B" category. The procedure of admission to the two categories of seats is however distinct. "A" category seats are to be filled up through the instrumentality of the Convener (a public authority) adopting a single window system of counseling; or by the Convener of EAMCET-AC admissions (a body constituted by the Association of Unaided Professional Colleges advising such Convener) (Rule-6).

107. Since there was no synergy amongst the private unaided professional educational institutions offering professional courses, neither the EAMCET-AC methodology nor the system of admissions under the authority or coordination of the Convener of EAMCET-AC was in operation hitherto. All admissions to the "A" category seats were hitherto exclusively through the EAMCET and by allotment by the Convener of EAMCET admissions (a public authority). We are informed at the Bar, that for the current year however there was some agreement among some private educational institutions and a separate EAMCET-AC was conducted, at which very few students appeared.

108. The methodology for filling up "B" category seats [spelt out in Rule-6(2)(i)] is stipulated to be by a fair transparent and non-exploitative manner - an admonition long on rhetoric but vacuous in effect. It is further provided that NRI seats not exceeding 15% of the sanctioned intake shall be filled on merit basis with NRI candidates (we have earlier in this judgment noticed that the definition of NRI was progressively liberalized and expanded in G.O.Ms.No.40 and in G.O.Ms.No.175, dated 19-08-2008). The percentage of marks required to be secured by a candidate for filling the vacant "B" category seats (leftover after being filled by NRI candidates and candidates -from other States and Union Territories of India who passed the qualifying examination and secured a rank in the AIEEE) was relaxed from 60% to 50%, in the aggregate or in group subjects in the qualifying examination; without having to fulfill the requirement of a rank in the EAMCET/EAMCET-AC. Rule-6(2) provides that NRI seats not exceeding 15% of the sanctioned intake in each course shall be filled on merit basis with NRI candidates who have passed the qualifying examination with the stipulated

percentage of aggregate marks or CGPA; that the leftover seats shall be filled by the management of the institution with candidates from other States and Union Territories of India who pass the qualifying examination and secure rank in AIEEE. If vacant seats subsist these may be filled with eligible candidates including those who secured not less than 50% of the aggregate marks or 50% in group subjects in the qualifying examination. It is further provided that the institution shall obtain ratification from the competent authority for all the admissions into "B" category seats and the competent authority shall send the ratified list of candidates from outside the State, NRIs and others admitted by the institution to the University concerned and to the respective institutions. Local area reservation under the Presidential Order, 1974 [The Andhra Pradesh Educational Institutions (Regulations of Admissions, Order, 1974)] is enjoined only for "A" category seats.

109. There is thus a less rigorous procedure and relaxed eligibility criteria, for admission into "B" category seats and the NRI seats within it; and local area and other reservations are also inapplicable to this category.

110. Rule-9(i) deals with "fee" and states that the fee payable by each student per annum for each discipline shall be as prescribed by the AFRC; sub-rule (ii) of Rule-9 enables collection of a higher fee from NRIs, to be utilized for benefiting students from the economically weaker sections of the society, with eligibility criteria as notified by the Government; providing for the mechanism for extending such benefit to be prescribed by the AFRC.

111. There is no specification in Rule-9 (Rule 8 in G.O.Ms.No.59, dated 25-06-2006), either expressly nor any authorization arising from any implication from the context and structure of the rules, which legitimizes fixation of a higher fee for "B" category seats over the fee fixed for "A" category seats; whereby students comprising "A" category seats are required to pay a fee less than the per capita cost and this deficit is off-set by the higher fee fixed for "B" category.

112. We therefore conclude that there is neither a statutory compulsion for statutory authorization for fixing differential fee for "A" and "B" category seats.

What the binding precedents mandate in this area:

113. We have noticed earlier in this judgment while considering the evolution of the curial doctrine from Unnikrishnan to P.A. Inamdar that:

(a) the Unnikrishnan scheme mandated a differential fee structure for "A" & "B" category seats (therein called the "free seats" and "payment seats");

(b) in TMA Pai Foundation the differential fee structure mandated by the Unnikrishnan scheme (involving cross-subsidization of "A" category students by the "B" category students) was over-ruled and in paras 30 to 38 and 45 the unanimous contentions of all the parties that the differential fee structure was arbitrary and socially counter-productive, is copiously recorded. In paras 37 & 38 TMA Pai Foundation specifically held that Unnikrishnan in effect nationalizes

education; curtails all the essential features of the right of administration of private unaided educational institutions; and that it is unreasonable to compel a citizen to pay for the education of another, more so, in the unrealistic world of competitive examinations which assesses the merit for the purpose of admission solely on the basis of marks obtained, where urban students always have an edge over rural students. TMA Pai Foundation observed that in practice the marginally less merited rural or poor student is made to bear the burden of a rich and well-exposed urban student (the clear conclusion on this aspect is set out in para 37 of TMA Pai Foundation - (extracted earlier in this judgment); and

(c) Post TMA Pai Foundation therefore fixation of differential fee for seats, classified or categorized by whatever nomenclature; whether "payment seats" and "free seats" or "A" & "B" category, whereby the fee fixed for one category is lower than for the other category and the differential fee involves subsidization by students admitted to the higher fee category of seats; the cost of education of students admitted to the lower fee category seats, is clearly impermissible. Neither Islamic Academy of Education or PA Inamdar has over-ruled, distinguished or varied this ruling of TMA Pai Foundation namely, that the cross-subsidization resulting from Unnikrishnan is inequitable, unlawful and unconstitutional;

As noticed earlier, the report of the C.A. firm dated 21-07-1990 and the order of the AFRC dated 06-08-2010 assumed; disregarding and on fundamental misconception of the declared law, that since :

1 "A" category seats are meant to be filled on the basis of merit identified through ranks obtained at the relevant Common Entrance Test and "B" category seats are to be filled on different criteria; and

2 since PA Inamdar accommodated charging of a higher fee for seats to be filled by NRI category candidates, a higher fee can be fixed for "B" category seats and a still higher fee for the NRI seats within the "B" category.

114. The AFRC embarked upon this rather athletic leap in logic counter syllogistically and unmindful of the rigor and discipline of TMA Pai Foundation which continues to hold the field, reiterated in Islamic Academy of Education and PA Inamdar.

115. The report of the CA firm and the recommendations of the AFRC clearly indicate that these two bodies were concerned about and solicitous of the welfare of students admitted to "A" category seats and proceeded on the assumption that students admitted to the "B" category seats are less meritorious, relatively affluent and can thus be made to subsidize the cost of education, of "A" category students, pro tanto.

116. Since the basis for notifying differential fee for "A" & "B" category seats is stated to be (in the report of the CA firm and the order of the AFRC) the judgment in PA Inamdar, we consider that portion of the PA Inamdar judgment

which accommodates charging of a higher fee.

117. As earlier noticed, the Constitution Bench in PA Inamdar set out to re-clarify the ratio in TMA Pai Foundation, since the clarificatory exercise undertaken in Islamic Academy of Education still left grey areas. Lahoti, CJ., delivered the unanimous opinion in PA Inamdar. In paras 26 & 27 of PA Inamdar, the four questions spelt out by the order of reference to it are set out. Of the four questions, PA Inamdar set out to answer, the following (questions 1, 3 and 4) are relevant for our purposes:

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

(3) whether Islamic Academy would have issued guidelines in the matter of regulating fee payable by the students to educational institutions? and the fourth is,

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

118. Having set-out and analyzed the several generic legal propositions falling for consideration (in paragraphs 29 to 114), PA Inamdar analyzed the first question in paragraphs 116 to 132. At para - 126, it clarified that if the observations made and conclusions derived from TMA Pai Foundation are read as a whole, it is nowhere laid down that unaided private educational institutions of minorities or non-minorities can be forced to submit to seat-sharing and the reservation policy of the State; that if the TMA Pai Foundation judgment is read as a whole and in the light of previous judgments of the Supreme Court approved in TMA Pai Foundation, the observations in para-68 merely permit unaided private institutions to maintain merit as the criterion of admission by voluntarily agreeing for seat-sharing with the State or adopting selection based on Common Entrance Test of the State. These private institutions may also frame their own policy to give free ships and scholarships to needy and poor students or may also adopt a policy complementary with the reservation policy of the State to cater to the educational needs of the weaker and poorer sections of the society.

119. The observations at para-128 of PA Inamdar are alike only in the context of the discussion as to seat-sharing arrangements between the State and private unaided institutions.

120. Sri K.G. Krishna Murthy, learned Additional Advocate General, the learned GP for Higher Education and Sri Sudesh Anand - learned counsel for the AFRC rely on para - 128 of PA Inamdar to justify not only the classification in the State rules, into "A" & "B" category seats but for notifying differential fee for "A" & "B" category seats as well.

121. In our considered view reliance by the State and its instrumentalities on the observations in para - 128 of PA Inamdar (to justify fixing of differential fee for "A" & "B" category seats), is fundamentally misconceived. At Para - 128, PA Inamdar records:

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

The summation on question no.1 was recorded in Para - 130 of PA Inamdar and reads:

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

At para-131, as part of the analysis on question no.1, PA Inamdar dealt with the question as to seats allocated for NRI's. The Court held:

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

from economically weaker sections of the society, whom, on well-defined criteria, the educational institution may admit on subsidised payment of their fee. To prevent misutilisation of such quota or any malpractice referable to NRI quota seats, suitable legislation or regulation needs to be framed. So long as the State does not do it, it will be for the Committees constituted pursuant to the direction in Islamic Academy to regulate.

122. The analyses on question no.3 (relating to regulation of fee) is set out in paras-139 to 141. The Court clearly ruled that every institution is free to devise its own fee structure but the same could be regulated in the interest of preventing profiteering and no capitation fee can be charged. Again under question no.4, dealing with the scope of powers of the Committees (ordered to be constituted by Islamic Academy, to regulate admission procedure and fee structure), the analyses is set-out at paras - 142 to 151. Observations and clarifications by PA Inamdar on the operational contours of Admission and Fee Regulatory Committees are set out in para - 149:

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

123. Inconceivably however, the report of the CA firm; the proceedings of the AFRC; and the Notifications by the State Government proceed on the assumption that classification of the seats into "A" & "B" categories legitimizes and warrants fixation of a higher fee for "B" category (factoring subsidization of a part of the cost of education of students admitted to "A" category seats by students admitted to the "B" category), despite the clear declaration of unconstitutionality of such methodology in TMA Pai Foundation; reiterated in Islamic Academy of Education and PA Inamdar.

124. Since the Unnikrishnan scheme incorporating the matrix of "free seats" and "payment seats" involving a cross-subsidy was clearly over-ruled and the cross-subsidization basis of this classification declared "unconstitutional", the non-derogable principle that clearly emerges since TMA Pai is that every student admitted to unaided private educational institutions (whether minority or non-minority) must pay the per-capita cost of education for the specific course of study. A higher fee (additional to the per capita cost) may be charged by an institution from students admitted to "NRI" category seats (of a ceiling of 15%), provided the higher amount so collected is utilized for the benefit of students such as the economically weaker sections of the society, whom, on well-defined criteria, the educational institution may admit on subsidized payment of fee. A State regulation may police this area and till then the AFRC may regulate the utilization of the amounts collected from NRI students.

125. We have not found any passage in any judgment, either TMA Pai Foundation, Islamic Academy of Education or PA Inamdar which legitimizes the extravagant methodology and policy initiated by the CA firm, consecrated by the AFRC and canonized by the State -prescribing differential fee for "A" and "B" category seats with a higher fee for "B" category seats; such higher fee subsidizing the fee otherwise payable per capita by "A" category students. The inference of cross-subsidy is compelling since neither the C.A. Firm, the AFRC or the State have chosen to spell out the per capita cost of education, institution and discipline-wise or otherwise.

126. The notification of the AFRC (dated 27-04-2010), directing managements of private unaided colleges to submit fee structure proposals, separately for "A" and "B" category seats (for each course of study), is illegal and contrary to the law declared in TMA Pai Foundation; reiterated in Islamic Academy of Education and PA Inamdar.

127. The justifications recorded in paras 8 & 9 of the AFRC proceedings dated 06-08-2010 (extracted earlier in this judgment) are fundamentally misconceived and not legitimized by any observations in PA Inamdar. The classification between "A" & "B" category seats in the relevant rules issued by the State does not justify a higher fee for "B" category seats and lower fee for "A" category seats (inhering a policy of cross-subsidization of "A" category by "B" category). The several observations in the report of the CA firm dated 21-07-2010 clearly indicate the fundamental misconception, that students admitted to the "B" category seats may be taxed to partly subsidize the cost of education of students admitted to "A" category seats, an assumption that is inconsistent with and derogates from the law declared in TMA Pai Foundation, Islamic Academy of Education and PA Inamdar.

128. While the CA firm could be assumed to have no comprehension of the legal position following from the over-ruling of the differential fee matrix propounded in Unnikrishnan; the AFRC -an expert body, chartered with the task of applying the law in TMA Pai Foundation as clarified in PA Inamdar -ought to have

bestowed adequate care to ensure that the differential fee matrix, having the effect of cross-subsidization declared unconstitutional in TMA Pai Foundation and reiterated in PA Inamdar, is not reintroduced. Unfortunately, the AFRC failed to exercise due diligence in this area. Rule-9 of the rules issued in G.O.Ms.No.74 and Rule-8 of the Rules issued in G.O.Ms.No.59 also do not justify stipulating a higher fee for "B" category students. Sub-rule(ii) (of Rule-9 and Rule-8 respectively) only enjoins that the fee prescribed and collected from NRI's, in excess of the fee prescribed for non-NRI candidates under "B" category must be utilized for benefiting students from economically weaker sections. There is nothing in the phraseology of the relevant rule, which legitimizes prescription of a higher fee for the entire block of "B" category seats.

The Darus Salam Defense:

129. On behalf of the respondents, in particular the State and the AFRC, it was contended that since the validity of Rule-8 was upheld by a learned Division Bench of this Court in Darus Salam, the challenge in the present batch of writ petitions to the differential fee fixed for "A" & "B" category seats cannot be revisited by this Court.

130. The above contention does not commend acceptance by this Court. In Darus Salam, the challenge was to the generality of the rules issued in G.O.Ms.No.54, dated 10-05-2006; G.O.Ms.No.59, dated 26-05-2006 and G.O.Ms.No.53, dated 10-05-2006. G.O.Ms.No.53 & 59 are rules issued by the State regulating admissions to under-graduate courses. The challenge was principally on the ground that the rules inhibit the guarantees contained in Articles 14, 29 & 30(1) of the Constitution and are contrary to the law declared in TMA Pai Foundation and PA Inamdar; and that prescription of a single window method of admission subverts the petitioners' rights to administer individual institutions by depriving them of their right to admit students of their choice. As is apparent from para-4 of the judgment, Rule-8 of the rules issued in G.O.Ms.No.59, was challenged on the ground that prescription of fees by the AFRC is contrary to the operational autonomy of the institutions in view of the law declared in TMA Pai Foundation and PA Inamdar. There was no challenge addressed, either expressly or by any compelling implication from the pleadings (extracted in the judgment) to the fixation of differential fee for "A" & "B" category seats. In fact, Rule-8 of the G.O.Ms.No.59 rules does not in terms permit fixing differential fee for "A" & "B" category seats. This rule merely enables charging of a higher fee for NRI students, within the "B" category. It is in the context of the specific challenge presented by the petitioners, that in para-63 the Darus Salam judgment observed:

63. The further stipulation in Rule8(1) of G.O.Ms.No.54 that the fee payable per student per annum for each discipline in each institution shall be as prescribed by the AFRC is also in accordance with the dicta of the Apex Court that the State regulation is permissible to check exploitation of students by charging exorbitant money or capitation fee and the committees for monitoring admission procedure

and determining fee structure are permissible as regulatory measure aimed at protecting the interest of the student community as a whole as also the minorities themselves and such a regulation does not violate the right under Article 30(1) of the Minorities or under Article 19(1)(g) of minorities or non-minorities and they are reasonable restrictions in the interest of minority institutions under Article 30(1) and in the interest of general public under Article 19(1)(g) of the Constitution.

131. In our considered opinion and analyses, the judgment of the learned Division Bench in Darus Salam does not spell out any ratio upholding prescription of differential fee for "A" & "B" category seats; and collection of higher fee for "B" category seats, which has the effect of pro tanto subsidising the per-capita cost of education, of students admitted to the "A" category seats.

132. The State contends that since validity of Rule-8 was upheld in Darus Salam, albeit in a different context, its validity in any other ground cannot also be urged or adjudicated. This is a contention that is misconceived and is stated to be rejected.

133. In *The Collector of Customs, Madras Vs. Nathella Sampathu Chetty and Another*, a Constitution Bench of the Supreme Court had occasion to consider the validity of Section 178A of the Sea Customs Act, 1878. Earlier in *Babulal Amthalal Mehta Vs. The Collector of Customs, Calcutta*, the validity of Section 178A was considered and upheld qua a challenge on the ground of violation of Article 14 of the Constitution. It was urged by the Solicitor General for India that the vires of Section 178A cannot be revisited in view of the earlier decision. Rejecting this contention, the Constitution Bench held [per Rajagopala Ayyangar, J]:

(16). We cannot accept the further submission either that, even if this Court did not in terms consider the validity of S.178A with reference to Art. 19(1)(f) and (g), still the reasoning by which it rejected the contention that it violated Art. 14 would be sufficient to cover the former also. No doubt, there are situations when the points regarding a violation of Art. 14 and an objection that a restriction is not reasonable so as to conform to the requirements of Art. 19(5) or (6) may converge and appear merely as presenting the same question viewed from different angles. Such, for instance, are cases when the denial of equality before the law is based on the ground that the power vested, say, in an administrative authority to affect rights guaranteed to a citizen is arbitrary, being unguided or uncanalised. The vesting of such a power would also amount to the imposition of an unreasonable restriction on the exercise of the guaranteed right to trade or carry on a business etc. Where, however, there is guidance and the legislation is challenged on the ground that the law with the definite guidance for which it provides has outstepped the limits of the Constitution by imposing a restraint which is either uncalled for or unreasonable in the circumstances, the scope and content of the enquiry is far removed from the tests of conformity to rational classification adopted for judging whether the law has contravened the

requirement of equal protection under Art. 14.

134. It is axiomatic that the essence of stare decisis is that it is the ratio decidendi (the reasons for the decision) that has precedential value and is binding in a future adjudicatory circumstance. As observed by LORD DUNEDIN: General observations cannot decide individual cases. In order that a certain proposition of law as judicially expounded can have the binding effect of ratio decidendi it must be relatable to the facts found material for the decision and the decision itself *Great Western Rly 60 vs. Owners of SS Mostyn* (1928) AC 57 . In a classic formulation of the principle LORD HALSBURY in *Quinn v. Leathem* (1901) AC 495 at 496 observed: Every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law but govern and are qualified by the particular facts of the case in which such expressions are to be found. Dr. GOODHART *Essays on Jurisdictions and the Common Law* points out: a conclusion based on a fact the existence of which had not been determined by the Court, cannot establish a principle. In *B. Shama Rao Vs. The Union Territory of Pondicherry*, Shelat J., reiterated the principle by observing: It is trite to say that a decision is binding not because of its conclusion, but in regard to its ratio and the principles laid down therein.

135. Since the petitioners in *Darus Salam* did not assume that Rule-8(i) either enables or authorises determination of a differential fee for "A" & "B" categories nor challenged the fixation of differential fee and since the conclusion of the learned Division Bench at paragraph - 63 (extracted above) sets out no analyses of the validity of Rule - 8 (on the aspect of whether it enables fixation of a differential fee) we hold that *Darus Salam* is not an authority for the proposition that every State action/decision/notification issued purportedly under the authority of Rule - 8 was also considered and upheld as intra vires, the unspecified and unexplored amplitude of the provisions of Rule - 8.

136. In any event, we have earlier herein concluded that Rule - 8 does not textually enjoin or authorize the fixation of differential fee for "A" & "B" category seats. No such implication of this Rule is legitimate in view of the law declared in *TMA Pai Foundation*, and reiterated in *PA Inamdar*.

Conclusions on differential fee:

137. On the aforesaid analyses, we hold that the Notification, dated 27-04-2010, issued by the AFRC; the report of the CA firm dated 21-07-2010; orders of the AFRC dated 06-08-2010 and 07-08-2010 (containing recommendations on the fee structure); and notifications by the State Government in G.O.Ms.No.76 & 77, both dated 13-08-2010 and G.O.Ms.Nos.85 and 86, dated 02-08-2011 and 04-08-2011, respectively, insofar as these instruments:

(a) call for submission of proposed fee structure from private unaided professional colleges, separately for "A" & "B" category seats, for each course of study;

(b) recommend notification (by the State Government) of a higher tuition fee for "B" category seats vis-?-vis the fee for "A" category seats, approving the report of the CA firm; and

(c) notify tuition fee separately for "A" & "B" category seats, with a higher fee for "B" category seats vis-?-vis "A" category seats;

(d) are illegal, contrary to the law declared in TMA Pai Foundation, Islamic Academy of Education and PA Inamdar; are de hors the pale of Rule-8 of the rules issued in G.O.Ms.Nos.53 & 59, dated 10-05-2006 and 26-05-2006, and Rule-9 of G.O.Ms.No.74, dated 28-07-2011, and are inoperative.

138. We also consider it appropriate to direct the AFRC to clearly and specifically work out and specify the per capita cost of education for each course of study in respect of each institution, duly considering the infrastructure and facilities available; the investments made; the salaries paid/payable to the teachers and staff; and factor a reasonable surplus towards future development, maintenance or expansion and/or betterment of the institution. Once the per capita fee for each course of study, for each private educational institution, is computed as above, that must be the fee recommended by the AFRC and notified by the State Government for all students irrespective of whether they are admitted to the "A" or "B" category seats, for that specific institution.

139. The State is however at liberty to formulate a policy of funding the cost of education of any student falling within a rationally classified class, either by way of grant, a loan or otherwise. It is also open to the management of a private educational institution to evolve a policy of waiving the whole or part of a fee to any student or class of students or to grant a scholarship or freeship, which in the opinion of the institution and within its economic capacity, is eligible for such benefit.

140. We further declare and reiterate (the PA Inamdar declared law) that the AFRC may properly recommend and the State Government legitimately notify a higher fee structure, but only for students admitted to the NRI category (for seats not exceeding 15% of the total authorized intake/seats for each course of study in an institution). We direct the differential/higher fee so collected/charged by the institution for this (NRI) category students shall be deposited into a separate account to be employed for the benefit of students from economically weaker sections of the society, admitted to seats whether in the "A" or "B" category, whom, on well-defined, transparent and notified criteria, the educational institution considers appropriate to waive or subsidize payment of their fee. This direction is subject to regulations that may be issued by the State or guidelines formulated by the AFRC.

Validity of Section - 7 of the Capitation Fee Act and Rule -4 of The AFRC Rules:

141. The Capitation Fee Act is a State legislation that precedes the Unnikrishnan judgment by a decade and fell for consideration therein. The "free seats" and

"payment seats" matrix propounded in Unnikrishnan with a cross-subsidization formula thrown in was however not the product of the textual authority of any provision of the Capitation Fee Act. The classification of seats and the cross-subsidization methodology was a curial evolved formula integrated in the scheme evolved in Unnikrishnan.

142. Section - 7 enables the Government by notification to regulate the tuition fee or any other fee that may be levied and collected by an educational institution in respect of each class of students; and enjoins that no educational institution shall collect a fee in excess of the fee notified under sub-section -1 thereof. As the Unni Krishnan scheme was invalidated in TMA Pai Foundation which also declared the contours of operational administrative autonomy of private unaided educational institutions but preserved authority of the State or its instrument, the AFRC to regulate a fee structure proposed by a private unaided educational institution only to ensure exclusion of profiteering and capitation, the powers consecrated to the State u/s - 7 must be interpreted consistent with the redefined architecture of the State's regulatory power, post Unnikrishnan and in the legal environment consequent on TMA Pai Foundation, Islamic Academy of Education and PA Inamdar.

143. On a grammatical construction of Rule - 4 (of the AFRC Rules) particularly, sub-rules (iii), (iv)(g) & (v), it is possible to infer that under the provisions of Section - 7 of the Capitation Fee Act read with provisions of this Rule, the AFRC is empowered to fix or determine the fee itself. On a true and fair construction of the pluri-signative phraseology of Rule - 4 and interpreted to confirm to the law declared in TMA Pai Foundation, Islamic Academy of Education and PA Inamdar however, the provisions of Section 7 and the prescriptions of Rule - 4 must be read down. PA Inamdar inter alia set out to clarify whether regulation of fee structure could be taken over by the Committees ordered to be constituted by the judgment in Islamic Academy of Education; and held:

...every institution is free to devise its own fee structure which may however be regulated to prevent profiteering, no capitation fee may be charged; a committee for determining fee structure qua the judgment in Islamic Academy of Education is permissible as a regulatory measure aimed at protecting the interests of the students community as a whole and in maintaining the required standards of professional education on non-exploitative terms in the institution.

144. This judgment also dealt with the criticism as to the ham-handed, insensitive and stereo-typical approach by Committees while dealing with oversight of fee regulation. The observations on this aspect are found in paras 49 & 150 of PA Inamdar (extracted herein above).

145. In the light of the principles evolving from TMA Pai Foundation to PA Inamdar and to sustain the provisions of Section - 7 and Rule - 4, we consider it appropriate to read down these provisions; (i) as enabling the AFRC to consider institution-specific fee proposals, course-wise on the bases of the parameters

indicated in clauses (a) to (e) and (g) of sub-rule - (iv) of Rule - 4; (ii) to analyze fee proposals to verify whether they incorporate or camouflage any profiteering or capitation fee; and (iii) to approve, modify or alter the fee structure proposed by each institution, only for the purpose of excising pro tanto any element of profiteering/capitation fee. If fee proposals of an institution, duly substantiated by relevant data, audited accounts and balance-sheets, do not incorporate elements of profiteering or capitation fee (on analyses of the proposals within the contours of the guidelines in Rule-4), the AFRC must accept the same. The AFRC cannot transgress the law declared in TMA Pai Foundation, Islamic Academy of Education and PA Inamdar (that every institution enjoys the operational autonomy to devise its own fee structure) by resorting to a misconceived mission, of formulating a common fee structure for private unaided educational institutions.

146. Clause - (f) of Rule - 4 requires the AFRC to consider the revenue foregone on account of waiver of fee, if any, in respect of students belonging to scheduled castes, scheduled tribes and wherever applicable, the socially and educationally backward classes and other economically weaker sections of the society, to the extent periodically notified by the Government. Since the operational autonomy vouchsafed to private unaided educational institutions by TMA Pai Foundation does not accommodate any authority in the State to thrust its affirmative policies of fee subsidy or waiver on private unaided educational institutions, we declare clause - (f) of Rule - 4 invalid.

147. However, in view of the higher fee that may be charged from NRI students and the conditions subject to which such higher fee may be collected (para 131 of PA Inamdar), every private unaided educational institution must deposit the excess (higher) fee collected from NRI category of students (fee in excess of the fee approved for the generality of students whether belonging to "A" or "B" category) into a separate fund, for being expended on specified class of students rationally entitled to affirmative support by way of fee waiver or subsidy. It is open to the State to formulate an administrative or statutory policy, for extending by way of a grant or loan, to fund the cost of education of any rationally identified class of students, so however that the State shall bear the cost of the fee subsidy or fee waiver; apart from deploying the amounts available from the additional fee collected from NRI category students.

148. The AFRC is not however permitted to recommend nor the State entitled to notify a fee structure that incorporates a cross-subsidy of one category of students by another. Declarations and Directions:

149. On analyses of the relevant facts; statutory provisions; reports, minutes and recommendations of the AFRC; and eventual notifications issued by the State Government, considered in the light of the declared law deducible and expressed in binding precedential authority, this Court:

Declares/Directs:

(i) Section-7 of the Capitation Fee Act (insofar as Regulations issued thereunder pertain to private unaided educational institutions -whether minority or non-minority), enables issue of Regulation of fee structure proposed by an educational institution, only insofar as modification or alteration of the proposed fee structure is to ensure that the institution does not indulge in profiteering or collection of capitation fee. Section -7 does not enable the State itself to fix and notify a fee structure; that would impermissibly trench upon the operational autonomy of self-financing educational institution/s;

(ii) Section-7 enacts a power coupled with a corresponding obligation on the State. Therefore, appropriate Regulations must be issued and executed to ensure oversight and excision of profiteering or collection of capitation fee by every private unaided educational institution. Consequently, neither the State nor its instrumentality -the AFRC, may recommend or notify a fee structure or permit collection of fee by any unaided private educational institution that does not submit its fee proposals together with the relevant data (of income and expenditure, developmental needs and audited books of accounts, for verification and scrutiny;

(iii) Since cross-subsidy of the fee payable by one class of students by the other is unconstitutional and thus impermissible, the AFRC while calling for applications for recommending the fee structure; and the State Government while notifying the fee structure shall not call for or notify differential fee structure for different classes of seats, whether called "A" or "B" categories or otherwise, which does not represent the per capita cost and therefore incorporates elements of cross-subsidy;

(iv) The fee chargeable from every student admitted to a specific course of study in a specific discipline in each private unaided educational institution shall reflect the per capita cost of such education, on the parameters enumerated in Rule - (iv), clauses (a) to (e) & (g) of the Rules issued in G.O.Ms.No.6, Higher Education Department, dated 08-01-2007 (The AFRC Rules);

(v) The AFRC may recommend and the State Government notify a higher fee for students admitted to 15% of the sanctioned intake in each course of study in each private unaided educational institution (presently categorized as NRI/NRI sponsored); so however that the higher (over and above the fee fixed for generality of seats whether called "A" category or "B" category) fee so collected shall be deposited by the private educational institution in a separate account to be employed for the benefit of students from economically weaker sections of society, whom, on well-defined criteria, the educational institution may admit on subsidized payment of their fee. To regulate proper utilization and audit of the amount in this separate account, the State shall issue specific regulation and till such regulation is issued, the AFRC may formulate guidelines for identifying the class or category of students in whose favour the fee subsidy or waiver may be made, duly specifying the criteria for identifying such student or class of students and the manner in which the funds from this special account shall be deployed;

(vi) The AFRC while issuing a notification calling for fee proposals shall clearly specify that such proposals should incorporate a uniform fee for all category of students, whether admitted to "A" or "B" categories and that the proposals may indicate the higher fee proposed to be charged from NRI/NRI sponsored candidates (and to the limit of 15% of the sanctioned intake) for each course of study in each private unaided educational institution;

(vii) Clause (f) of Rule - (iv) of the AFRC rules impairs the operational autonomy available to private unaided educational institutions, as delineated in the judgments of the Supreme Court in TMA Pai Foundation, Islamic Academy of Education and PA Inamdar, and is declared invalid;

(viii) The AFRC shall specify in the notification to be issued (calling for fee proposals from private unaided educational institutions) that an institution which is unresponsive or does not submit statements of income and expenditure, audited balance sheets, and requirements for developmental needs for the immediately preceding year; particulars of expenditure incurred on salaries and infrastructure and other particulars as may be specified (with supporting bills, vouchers or receipts, etc.), shall not be permitted to collect any fee. While notifying a fee structure, exercising power u/s - 7 of the Capitation Fee Act, the State shall record a similar stipulation;

(ix) The AFRC is required to recommend and the State Government notify institution-specific fee structure and for the generic variety of institutions offering different courses of study. Therefore, the AFRC shall issue notification(s) calling for fee proposals well-in-advance of commencement of the academic year (whether for fixing block fee structure, applicable for three academic years or revising fee structure already notified for any particular academic year), by the first week of December preceding the relevant academic year for which the fee structure notification or revision is to be issued by the State Government;

(x) Where the AFRC considers it appropriate to outsource the administrative function of vetting or verification of fee proposals received from the several private unaided educational institutions (whether to a chartered accountant firm or otherwise), the details of the functions entrusted by the AFRC to such agency(ies) shall be placed in the public domain and published in English and local language newspapers having sufficient circulation in the State, to enable public information of particulars of such entrustment;

(xi) The AFRC shall instruct the agency or agencies (to whom it entrusts the function of vetting or verification of fee proposals along with the accompanying records and data) to specifically verify and identify whether there is an element of profiteering or collection of capitation fee and to record observations on this aspect, in respect of each private educational institution which submits fee structure proposals;

(xii) Copies of the report/recommendations prepared and forwarded by such entrusted agency/agencies to the AFRC (which would be the material considered

by the AFRC in formulating its recommendations on institution-specific proposals and these would also be the material for the eventual fee structure notifications by the State) shall be furnished to each private unaided educational institution which responds to the AFRC notification (inviting fee proposals) and has duly submitted the relevant data, documents and particulars, requisitioned by the AFRC for submission along with fee proposals;

(xiii) The reports/recommendations prepared by the entrusted agency/agencies and the recommendations by the AFRC submitted to the State Government shall simultaneously be placed in the public domain;

(xiv) The State Government shall issue the fee structure notifications by the 1st week of March, preceding the academic year or block of academic years, as the case may be, for which the fee structure notifications are intended to apply;

(xv) As a consequence of the above analyses, declarations and directions, the fee structure Notifications issued in G.O.Ms.No.76, Higher Education Department, dated 13-08-2010; G.O.Ms.No.77, Higher Education Department, dated 13-08-2010; G.O.Ms.No.85, Higher Education Department, dated 02-08-2011 and G.O.Ms.No.86, Higher Education Department, dated 04-08-2011; together with the recommendations of the AFRC contained in Order No.13/AFRC/FF/2010-11.41, dated 06-08-2010 and Order No.14/AFRC/FF/2010-11/552, dated 07-08-2010, are declared invalid and quashed;

(xvi) For the academic years 2010-11, 2011-12 & 2012-13, the AFRC shall now consider afresh the fee structure proposals submitted by those private educational institutions which have responded (to its notification dated 27-04-2010) and forwarded fee structure proposals together with the particulars spelt out by the AFRC in the annexure to the said notification (either wholly or substantially) and shall verify the same for identifying whether the proposals incorporate elements of profiteering or capitation fee (institution and course-wise). If any further particulars, documents, registers or data are required, the AFRC may issue a written notice to the concerned educational institution to furnish the specified particulars, documents, registers or data required by it. After scrutiny and verification of the material available, the AFRC shall draw-up a report containing its recommendations on the fee structure for each course of study in respect of each responsive institution; duly incorporating in its report the seat-wise cost in respect of each course of study in specific institutions; recommending a uniform fee for "A" & "B" category students. The AFRC may however recommend a higher fee for 15% of the sanctioned intake earmarked for NRI/NRI category students. This exercise shall be in accordance with the observations and directions in this judgment.

(xvii) The State shall notify fee structure proposals afresh for the academic years 2010-11, 2011-12 & 2012-13 after due consideration of the recommendations of the AFRC and in the light of the principles and directions contained in this judgment; and

(xviii)The relevant exercise by the AFRC and the State, as directed in sub-paras (xvi) and (xvii), shall be expeditiously processed and concluded, including by the issuance of appropriate notifications by the State, in any case within a period of three (3) months from today.

The several writ petitions are allowed as above, but in the circumstances without costs.