IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1726 OF 2001

…

1 St. Xavier's College
through its Principal,
Fr. J.M. Dias,
Mahapalika Marg,
Mumbai 400 001.

2 Maharashtra Association of Minority
Educational Institutions
a Society registered under the
Societies Registration Act, 1860
through its President and having
its office at Kashimira Road,
Thane – 401 104. ....Petitioners

V/S

1 University of Mumbai
Through its Vice Chancellor,
Fort, Mumbai 400 023.

2 The Registrar,
University of Mumbai
Fort, Mumbai – 400 023.

3 State of Maharashtra
through Government Pleader
Annexue Building, High Court,
Bombay. ....Respondents

…

Dr.Birenda Saraf with Mr.Jai Chhabria, Mr. Vishesh Malviya and Ms.Ayushi Anandpara i/by Federal & Rashmikant for Petitioners.
Mr.Rui Rodrigues for Respondent Nos.1 & 2.
Mr.Abhay Patki, Addl.Govt.Pleader for Respondent No.3.

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CORAM : A.A. SAYED &
M. S. KARNIK, JJ
DATE : 12 OCTOBER 2017

JUDGMENT: (Per A.A.Sayed, J.)

The challenge in this Petition under Article 226 of the Constitution is to the Circular dated 30-05-2001 issued by the Respondent No.1 University directing reservation for students belonging to backward classes in educational institutions conducting courses in Arts, Commerce, Science and other professional courses affiliated to the Respondent No.1 University including such educational institutions established and administered by minorities.

2. The Petitioner No.1 is a College established by the Bombay St.Xavier's College Association which imparts education to students pursuing degree courses in Arts, Science and Commerce streams, registered under the Societies Registration Act, 1860 and the Bombay Public Trust Act 1960. The Petitioner No.2 is the

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Association of the Educational Institutions registered under the Societies Registration Act, 1860, which are stated to have either religious or minority status. It represents the Colleges enumerated in the list annexed at Exh.A to the Petition. Respondent No.1 is a University constituted under the Bombay Universities Act 1974 which was replaced by the Maharashtra Universities Act, 1994. Respondent No.2 is the Registrar of the Respondent No.1 University. Respondent No.3 is the State of Maharashtra.

3. The impugned Circular stipulates reservation for students belonging to backward classes for admission to various courses to the extent of 50% of seats by implementing the reservation policy of the Government of Maharashtra as notified vide Government Resolution dated 11-07-1997. The percentage of reservation prescribed is as under :

1. S.C. : 13%
2. S.T. : 7%
3. D.T. (A) : 3%
4. N.T. (B) : 2.5%
5. N.T. (C) : 3.5%
6. N.T. (D) : 2%
7. O.B.C : 19%

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The impugned Circular, makes a reference to the judgment of the Apex Court in the case of **Shahal H. Musalia and anr. Vs. State of Kerala & ors. JT 1993(4) S.C. 584** and lays down the following criteria for admission and reservation of seats in minority colleges:

> (a) Fifty per cent of the total intake in the minority colleges shall be permitted to be filled up by candidates selected by the agencies of the State Government/University on the basis of centralised admissions scheme.
>
> (b) The remaining fifty per cent of the intake may be regularized by the minority colleges to admit candidates belonging to the particular religious or linguistic minority. However, the selection shall be made strictly on the basis of merit among the candidates seeking admission to the institutions. Such merit shall be determined on the basis of the academic performance at the qualifying examination; or on the basis of any objective test that the institution might itself apply to determine such relative and competing merits; or on the basis of performance of the results of the selection tests if such test is held by the State Government/University. It is optional for the minority colleges to adopt any one of these three modes and apply it uniformly.

4. On 15-06-2001 when the Petition came up for admission, the learned Counsel on behalf of the Respondent No.1 University stated before the Court that the impugned Circular relates only to seats other than minority quota and therefore various instructions contained in the impugned Circular will not apply to the minority

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quota of 50% as per the decision of the Supreme Court in **St. Stephen's College vs. University of Delhi, 1992 (1) SCC 588**. On 06 June 2002 in a Notice of Motion No. 230 of 2002 taken out by the Petitioners, this Court passed the following order:

> "The Petitioners are permitted to admit minority students in 47 per cent quota of seats strictly on the basis of merits amongst the minority students and 3 per cent seats are reserved for the categories namely (i) Handicapped Students (ii) Children/Grandchildren of Freedom Fighters (iii) Children of Defence Personnels, ex-servicemen (iv) Children of Parents transferred while working with Central/State Government (v) Sports, District, State and National (vi) Students having distinguished and exceptional performance in cultural activities strictly on merits. The balance 50 per cent seats should be filled in either through a common entrance test held by the University/State or any such agency or in the event no such common entrance test is provided, the admissions will be based on the merit of performance at the qualifying examination for the admission in such cases by non-minority students. It is made clear that there will be no reservation whatsoever with regard to balance 50 per cent seats (i.e. non-minority quota), however, the candidates from reserved category would be entitled to compete with the other students strictly on merits for these seats. The learned counsel for the parties submit that in some of the minority institutions, already reserved category students have been admitted on the basis of reservation in non-minority quota. If any such admissions were granted to reserved category students till yesterday, the same shall not be disturbed."

The aforesaid order was corrected by Court on 21 June 2002 and it was clarified that the 3% reservations for six categories will be out

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of the 50% seats in open category and not in the 50% seats meant for minority quota.

5 We called upon learned Additional Government Pleader to state the stand of the Respondent No.3 State of Maharashtra as to whether reservation policy mentioned in the Government Resolution dated 11/07/1997 applies to the minority institutions also. Learned AGP on instructions submits that there in nothing in the Government Resolution dated 11/07/1997 which states that the reservation policy is applicable to minority Educational Institutions.

6. The issue for consideration before the Court essentially is whether there can be any reservation for backward class of students in minority colleges. There is no averment in the Petition whether the Petitioner No.1 or the member colleges of the Petitioner No.2 Association, a list thereof is annexed to Petition, are aided or unaided. Though the Petition which was filed in the year 2001 proceeds on the basis that there cannot be any reservation for backward class students in the 50% minority quota, this issue will also be required to be considered in the backdrop of the

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subsequent events after filing of the Petition and in particular on the touchstone of Article 15(5) which was inserted to the Constitution of India vide the Constitution (Ninety-third Amendment) Act 2005 and the decisions of the Apex Court.

7. We have heard learned Counsel for the parties. We have perused the following judgments cited by the learned Counsel on behalf of the Petitioners:

i) Khan Abdul Hamid Abdul Razzak Vs. Mohamed Haji Saboo Siddik Polytechnic 1985 Mh.L.J. 400.

ii) St.Stephen's College Vs. University of Delhi (1992) 1 SCC 558.

iii) St.Francis De Sales Education Society Nagpur & Anr. Vs. State of Maharashtra (2001) 3 MhLJ 261.

iv) T.M.A. Pai Foundation & anr. Vs. State of Maharashtra & Ors. (2002) 8 SCC 481.

v) P. A. Inamdar & Ors. Vs. State of Maharashtra & Ors. (2005) 6 SCC 537.

vi) Ashoka Kumar Thakur Vs. Union of India and Ors. (2008) 6 Supreme Court Cases 1

vii) Secretary, Malankara Syrian Catholic College Vs. T. Jose & Ors. (2007) 1 SCC 386.

viii) Sindhi Education Society & anr. Vs. Chief Secretary, Government of NCT of Delhi & Ors., 2010 (8) SCC 49.

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ix) Pramati Educational and Cultural Trust Vs. Union of India (2014) 8 SCC 1.

8. Article 30 of the Constitution provides for right of minorities to establish and administer educational institutions. It reads thus :

> **"30 (1)**: All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice
>
> (1A) …
>
> (2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language."

Article 29 of the Constitution deals with protection of interest of minorities. It reads as under:

> "29 (1) …
>
> (2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them."

Article 15 of the Constitution prohibits discrimination on the grounds of religion, race, caste, sex or place of birth. Article 15(4) is relevant for our purposes. It reads thus :

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> "Article 15(4) : Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."

The legal position prior to insertion of Article 15(5) of the Constitution

9. In **St.Stephen's College Vs. University of Delhi** (supra), the 5-Judge Constitution Bench of the Supreme Court by majority held as follows:

> **"60.**The right to select students for admission is a part of administration. It is indeed an important facet of administration. This power also could be regulated but the regulation must be reasonable just like any other regulation. It should be conducive to the welfare of the minority institution or for the betterment of those who resort to it. …
>
> **88.** Second, the receipt of State aid does not impair the rights in Article 30(1). The State can lay down reasonable conditions for obtaining grant-in-aid and for its proper utilisation. The State has no power to compel minority institutions to give up their rights under Article 30(1). (See: *Re, Kerala Education Bill case* [1959 SCR 995 : AIR 1958 SC 956] and *Sidhajbhai case* [(1963) 3 SCR 837 : AIR 1963 SC 540] .) In the latter case, this Court observed (at SCR pp. 856-57) that the regulation which may lawfully be imposed as a condition of receiving grant must be directed in making the institution an effective minority educational institution. The regulation cannot change the character of the minority institution. Such regulations must satisfy a dual test; the test of reasonableness, and the test that it is regulative of the educational character of the institution. It

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must be conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it. It is thus evident that the rights under Article 30(1) remain unaffected even after securing financial assistance from the government.

102. In the light of all these principles and factors, and in view of the importance which the Constitution attaches to protective measures to minorities under Article 30(1), the minority aided educational institutions are entitled to prefer their community candidates to maintain the minority character of the institutions subject of course to conformity with the University standard. The State may regulate the intake in this category with due regard to the need of the community in the area which the institution is intended to serve. But in no case such intake shall exceed 50 per cent of the annual admission. The minority institutions shall make available at least 50 per cent of the annual admission to members of communities other than the minority community. The admission of other community candidates shall be done purely on the basis of merit."

(emphasis supplied)

10. In **T.M.A. Pai Foundation & Anr. Vs. State of Maharashtra & Ors.** (supra), eleven questions were referred to the 11-Judge Constitution Bench of the Supreme Court. Some of the questions and answers thereto in the majority judgment which are material in the context of the present case are extracted hereinbelow:

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

A. Admission of students to unaided minority educational institutions viz. schools and undergraduate colleges where the scope for merit-based selection is practically nil, cannot be regulated by the State or university concerned, except for providing the qualifications and minimum conditions of eligibility in the interest of academic standards.

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The right to admit students being an essential facet of the right to administer educational institutions of their choice, as contemplated under Article 30 of the Constitution, the State Government or the university may not be entitled to interfere with that right, so long as the admission to the unaided educational institutions is on a transparent basis and the merit is adequately taken care of. The right to administer, not being absolute, there could be regulatory measures for ensuring educational standards and maintaining excellence thereof, and it is more so in the matter of admissions to professional institutions.

A minority institution does not cease to be so, the moment grant-in-aid is received by the institution. An aided minority educational institution, therefore, would be entitled to have the right of admission of students belonging to the minority group and at the same time, would be required to admit a reasonable extent of non-minority students, so that the rights under Article 30(1) are not substantially impaired and further the citizens' rights under Article 29(2) are not infringed. What would be a reasonable extent, would vary from the types of institution, the courses of education for which admission is being sought and other factors like educational needs. The State Government concerned has to notify the percentage of the non-minority students to be admitted in the light of the above observations. Observance of *inter se* merit amongst the applicants belonging to the minority group could be ensured. In the case of aided professional institutions, it can also be stipulated that passing of the common entrance test held by the State agency is necessary to seek admission. As regards non-minority students who are eligible to seek admission for the remaining seats, admission should normally be on the basis of the common entrance test held by the State agency followed by counselling wherever it exists.

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

A. A minority institution may have its own procedure and method of admission as well as selection of students, but such a procedure must be fair and transparent, and the selection of students in professional and higher education colleges should be on the basis of merit. The procedure adopted or selection made should not be tantamount to maladministration. Even an unaided minority institution ought not to ignore the merit of the students for

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admission, while exercising its right to admit students to the colleges aforesaid, as in that event, the institution will fail to achieve excellence.

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

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

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

A. So far as the statutory provisions regulating the facets of administration are concerned, in case of an unaided minority educational institution, the regulatory measure of control should be minimal and the conditions of recognition as well as the conditions of affiliation to a university or board have to be complied with, but in the matter of day-to-day management, like the appointment of staff, teaching and

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non-teaching, and administrative control over them, the management should have the freedom and there should not be any external controlling agency. However, a rational procedure for the selection of teaching staff and for taking disciplinary action has to be evolved by the management itself.

For redressing the grievances of employees of aided and unaided institutions who are subjected to punishment or termination from service, a mechanism will have to be evolved, and in our opinion, appropriate tribunals could be constituted, and till then, such tribunals could be presided over by a judicial officer of the rank of District Judge.

The State or other controlling authorities, however, can always prescribe the minimum qualification, experience and other conditions bearing on the merit of an individual for being appointed as a teacher or a principal of any educational institution.

Regulations can be framed governing service conditions for teaching and other staff for whom aid is provided by the State, without interfering with the overall administrative control of the management over the staff.

Fees to be charged by unaided institutions cannot be regulated but no institution should charge capitation fee

Q. 8. Whether the ratio laid down by this Court in *St. Stephen's case* [(1992) 1 SCC 558] (*St. Stephen's College* v. *University of Delhi*) is correct? If no, what order?

A. The basic ratio laid down by this Court in *St. Stephen's College case* [(1992) 1 SCC 558] is correct, as indicated in this judgment. However, rigid percentage cannot be stipulated. It has to be left to authorities to prescribe a reasonable percentage having regard to the type of institution, population and educational needs of minorities.

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

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> ***A.*** The scheme framed by this Court in *Unni Krishnan case* [(1993) 1 SCC 645] and the direction to impose the same, except where it holds that primary education is a fundamental right, is unconstitutional. However, the principle that there should not be capitation fee or profiteering is correct. Reasonable surplus to meet cost of expansion and augmentation of facilities does not, however, amount to profiteering."
>
> (emphasis supplied)

11. In **Islamic Academy of Education v/s. State of Karnataka & Ors.** (supra), the 5-Judge Constitution Bench of the Supreme Court has observed that the Bench was constituted so that doubts/anomalies, if any, in the judgment of the 11-Judge Bench in **T.M.A. Pai Foundation & Anr. Vs. State of Maharashtra & Ors**. could be clarified.

12. In **P.A. Inamdar & Ors. Vs. State of Mahrashtra & Ors** (supra), the 7-Judge Constitution Bench of the Apex Court observed as under:

> **"4.** The events following *Islamic Academy* [(2003) 6 SCC 697] judgment show that some of the main questions have remained unsettled even after the exercise undertaken by the Constitution Bench in *Islamic Academy* [(2003) 6 SCC 697] in clarification of the eleven-Judge Bench decision in *Pai Foundation* [(2002) 8 SCC 481] . A few of those unsettled questions as also some aspects of clarification are before us calling for settlement by this Bench of seven Judges which we hopefully propose to do.
>
> ***The questions spelled out by orders of reference***
>
> **27.** In the light of the two orders of reference, referred to hereinabove, we propose to confine our discussion to the

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questions set out hereunder which, according to us, arise for decision:

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

(*2*) Whether unaided (minority and non-minority) educational institutions are free to devise their own admission procedure or whether the direction made in *Islamic Academy* [(2003) 6 SCC 697] for compulsorily holding an entrance test by the State or association of institutions and to choose therefrom the students entitled to admission in such institutions, can be sustained in light of the law laid down in *Pai Foundation* [(2002) 8 SCC 481]?

(*3*) Whether *Islamic Academy* [(2003) 6 SCC 697] could have issued guidelines in the matter of regulating the fee payable by the students to the educational institutions?

(*4*) Can the admission procedure and fee structure be regulated or taken over by the Committees ordered to be constituted by *Islamic Academy* [(2003) 6 SCC 697] ?

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

116. First, we shall deal with minority unaided institutions.

117. We have in the earlier part of this judgment referred to *Kerala Education Bill*[1959 SCR 995 : AIR 1958 SC 956] and stated the three categories of minority educational institutions as classified and dealt with therein. The seven-Judge Bench decision in *Kerala Education Bill* [1959 SCR 995 : AIR 1958 SC 956] still holds the field and has met the approval of the eleven-Judge Bench in *Pai Foundation* [(2002) 8 SCC 481] . We cull out and state what *Pai Foundation* [(2002) 8 SCC 481] has to say about such category of institutions:

(i) Minority educational institution, unaided and unrecognised

118.*Pai Foundation* [(2002) 8 SCC 481] is unanimous on the view that the right to establish and administer an institution, the phrase as employed in Article 30(1) of the Constitution, comprises of the following rights: (*a*) to admit students; (*b*) to set up a reasonable fee structure; (*c*) to constitute a governing body; (*d*) to appoint staff

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(teaching and non-teaching); and (*e*) to take action if there is dereliction of duty on the part of any of the employees. (Para 50).

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

120. They are free to admit all students of their own minority community if they so choose to do. (Para 145, *Pai Foundation* [(2002) 8 SCC 481])

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

121. Affiliation or recognition by the State or the Board or the university competent to do so, cannot be denied solely on the ground that the institution is a minority educational institution. However, the urge or need for affiliation or recognition brings in the concept of regulation by way of laying down conditions consistent with the requirement of ensuring merit, excellence of education and preventing maladministration. For example, provisions can be made indicating the quality of the teachers by prescribing the minimum qualifications that they must possess and the courses of studies and curricula. The existence of infrastructure sufficient for its growth can be stipulated as a prerequisite to the grant of recognition or affiliation. However, there cannot be interference in the day-to-day administration. The essential ingredients of the management, including admission of students, recruiting of staff and the quantum of fee to be charged, cannot be regulated. (Para 55, *Pai Foundation*[(2002) 8 SCC 481]).

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122. Apart from the generalised position of law that the right to administer does not include the right to maladminister, an additional source of power to regulate by enacting conditions accompanying affiliation or recognition exists. A balance has to be struck between the two objectives: (*i*) that of ensuring the standard of excellence of the institution, and (*ii*) that of preserving the right of the minority to establish and administer its educational institution. Subject to a reconciliation of the two objectives, any regulation accompanying affiliation or recognition must satisfy the triple tests: (*i*) the test of reasonableness and rationality, (*ii*) the test that the regulation would be conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it, and (*iii*) that there is no inroad into the protection conferred by Article 30(1) of the Constitution, that is, by framing the regulation the essential character of the institution being a minority educational institution, is not taken away. (Para 122, *Pai Foundation* [(2002) 8 SCC 481])

(iii) Minority educational institutions receiving State aid

123. Conditions which can normally be permitted to be imposed on the educational institutions receiving the grant must be related to the proper utilisation of the grant and fulfilment of the objectives of the grant without diluting the minority status of the educational institution, as held in *Pai Foundation* [(2002) 8 SCC 481] (see para 143 thereof). As aided institutions are not before us and we are not called upon to deal with their cases, we leave the discussion at that only.

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

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125. As per our understanding, neither in the judgment of *Pai Foundation*[(2002) 8 SCC 481] nor in the Constitution Bench decision in *Kerala Education Bill*[1959 SCR 995 : AIR 1958 SC 956] which was approved by *Pai Foundation* [(2002) 8 SCC 481] is there anything which would allow the State to regulate or control admissions in the unaided professional educational institutions so as to compel them to give up a share of the available seats to the candidates chosen by the State, as if it was filling the seats available to be filled up at its discretion in such private institutions. This would amount to nationalisation of seats which has been specifically disapproved in *Pai Foundation* [(2002) 8 SCC 481]. Such imposition of quota of State seats or enforcing reservation policy of the State on available seats in unaided professional institutions are acts constituting serious encroachment on the right and autonomy of private professional educational institutions. Such appropriation of seats can also not be held to be a regulatory measure in the interest of the minority within the meaning of Article 30(1) or a reasonable restriction within the meaning of Article 19(6) of the Constitution. Merely because the resources of the State in providing professional education are limited, private educational institutions, which intend to provide better professional education, cannot be forced by the State to make admissions available on the basis of reservation policy to less meritorious candidates. Unaided institutions, as they are not deriving any aid from State funds, can have their own admissions if fair, transparent, non-exploitative and based on merit.

126. The observations in para 68 of the majority opinion in *Pai Foundation*[(2002) 8 SCC 481] on which the learned counsel for the parties have been much at variance in their submissions, according to us, are not to be read disjointly from other parts of the main judgment. A few observations contained in certain paragraphs of the judgment in *Pai Foundation* [(2002) 8 SCC 481] if read in isolation, appear conflicting or inconsistent with each other. But if the observations made and the conclusions derived are read as a whole, the judgment nowhere lays down that unaided private educational institutions of minorities and non-minorities can be forced to submit to seat-sharing and reservation policy of the State. Reading relevant parts of the judgment on which learned counsel have made comments and counter-comments and reading the whole judgment (in the light of previous judgments of this Court, which have been approved in *Pai*

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Foundation [(2002) 8 SCC 481]) in our considered opinion, 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. There are also observations saying that they may frame their own policy to give freeships and scholarships to the needy and poor students or adopt a policy in line with the reservation policy of the State to cater to the educational needs of the weaker and poorer sections of the society.

127. Nowhere in *Pai Foundation* [(2002) 8 SCC 481] either in the majority or in the minority opinion, have we found any justification for imposing seat-sharing quota by the State on unaided private professional educational institutions and reservation policy of the State or State quota seats or management seats.

128. We make it clear that the observations in *Pai Foundation* [(2002) 8 SCC 481] 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.

129. In *Pai Foundation* [(2002) 8 SCC 481] it has been very clearly held at several places that unaided professional institutions should be given greater autonomy in determination of admission procedure and fee structure. State regulation should be minimal and only with a view to maintain fairness and transparency in admission procedure and to check exploitation of the students by charging exorbitant money or capitation fees.

130. For the aforesaid reasons, we cannot approve of the scheme evolved in *Islamic Academy* [(2003) 6 SCC 697] 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* [(2003) 6 SCC 697] in our considered opinion, does not lay down the correct law and runs counter to *Pai Foundation* [(2002) 8 SCC 481] .

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> **132.** Our answer to the first question is that neither the policy of reservation can be enforced by the State nor any quota or percentage of admissions can be carved out to be appropriated by the State in a minority or non-minority unaided educational institution. Minority institutions are free to admit students of their own choice including students of non-minority community as also members of their own community from other States, both to a limited extent only and not in a manner and to such an extent that their minority educational institution status is lost. If they do so, they lose the protection of Article 30(1)."
>
> (emphasis applied)

13. From the enunciation of law discussed above, what emerges is that prior to the insertion of Article 15(5) to the Constitution so far as aided minority institutions were concerned, the reservation policy of the State could be enforced only to the extent of non-minority quota of students as prescribed by the Authorities.

The legal position post insertion of Article 15(5) of the Constitution (w.e.f. 20-01-2006)

14 The judgments in **T.M.A. Pai Foundation & Anr. vs. State of Maharashtra & Ors.** (supra) and **P.A. Inamdar & Ors. vs. State of Maharashtra & Ors.** (supra) clearly laid down that the State cannot enforce its reservation policy and insist on reservation seats for

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Backward Class citizens in private unaided educational institutions (minority and non-minority). The above rulings disabled the State from imposing reservation policy on unaided institutions as observed in paragraph 54 of the Constitution Bench Judgment of the Apex Court in **Ashoka Kumar Thakur vs. Union of India** (supra). The Constitution was accordingly amended by adding sub-clause (5) in Article 15 by Constitution (Ninety-Third Amendment) Act, 2005 which came into effect from 20.01.2006. Article 15(5) reads as follows:

> "Article 15 (5) : Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.

The Statement of Objects and Reasons of the Constitution (Ninety-third Amendment) Act, 2005 reads as follows:

> "At present, the number of seats available in aided or State-maintained institutions, particularly in respect of professional education, is limited in comparison to those in private unaided institutions.

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> To promote the educational advancement of the socially and educationally backward classes of citizens i.e. the OBCs or the Scheduled Castes and Scheduled Tribes in matters of admission of students belonging to these categories in unaided educational institutions other than the Minority Educational Institutions referred to in Clause (1) of Article 30 of the Constitution, it is proposed to amplify Article 15. The new Clause (5) shall enable Parliament as well as the State Legislatures to make appropriate laws for the purposes mentioned above."
>
> (emphasis supplied)

15. In **Ashoka Kumar Thakur Vs. Union of India** (supra) the Constitution (Ninety-third Amendment) Act, 2005 was challenged [apart from the challenge to the Central Educational Institutions (Reservation in Admission) Act, 2006]. The 5-Judge Constitution Bench by majority held as follows:

> **"108.** The Constitution (Ninety-third Amendment) Act, 2005, by which Clause (5) was added to Article 15 of the Constitution, is an enabling provision which states that nothing in Article 15 or in sub-clause (*g*) of Clause (1) of Article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes insofar as such special provisions relate to their admission to the educational institutions including private educational institutions, whether aided or unaided by the State. Of course, minority educational institutions referred to in Clause (1) of Article 30 are excluded. Thus, the newly added Clause (5) of Article 15 is sought to be applied to educational institutions whether aided or unaided. In other words, this newly added constitutional provision would enable the State to make any special provision by law for admission in private educational institutions whether aided or unaided.
>
> **126.** It is a well-settled principle of constitution interpretation that while interpreting the provisions of the Constitution, effect shall be given to all the provisions of the Constitution and no provision shall be interpreted in a manner as to make any other provision in the Constitution inoperative or otiose. If the intention of Parliament

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was to exclude Article 15(4), they could have very well deleted Article 15(4) of the Constitution. Minority institutions are also entitled to the exercise of fundamental rights under Article 19(1)(g) of the Constitution, whether they be aided or unaided. But in the case of Article 15(5), the minority educational institutions, whether aided or unaided, are excluded from the purview of Article 15(5) of the Constitution. … …

127. Another contention raised by the petitioners' counsel is that the exclusion of minority institutions under Article 15(5) itself is violative of Article 14 of the Constitution. It was contended that the exclusion by itself is not severable from the rest of the provision. This plea also is not tenable because the minority institutions have been given a separate treatment in view of Article 30 of the Constitution. Such classification has been held to be in accordance with the provisions of the Constitution. The exemption of minority educational institutions has been allowed to conform Article 15(5) with the mandate of Article 30 of the Constitution. Moreover, both Articles 15(4) and 15(5) are operative and the plea of non-severability is not applicable.

128. The learned Senior Counsel Dr. Rajeev Dhavan and learned counsel Shri Sushil Kumar Jain appearing for the petitioners contended that the Constitution (Ninety-third Amendment) would violate the equality principles enshrined in Articles 14, 19 and 21 and thereby the “Golden Triangle” of these three articles could be seriously violated. The learned counsel also contended that exclusion of minorities from the operation of Article 15(5) is also violative of Article 14 of the Constitution. We do not find much force in this contention. It has been held that Article 15(4) and Article 16(4) are not exceptions to Article 15(1) and Article 16(1) respectively. It may also be noted that if at all there is any violation of Article 14 or any other equality principle, the affected educational institution should have approached this Court to vindicate their rights. No such petition has been filed before this Court. Therefore, we hold that the exclusion of minority educational institutions from Article 15(5) is not violative of Article 14 of the Constitution as the minority educational institutions, by themselves, are a separate class and their rights are protected by other constitutional provisions.

221. The Constitution (Ninety-third Amendment) Act, 2005 does not violate the “basic structure” of the Constitution so far as it

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> relates to the State maintained institutions and aided educational institutions. Question whether the Constitution (Ninety-third Amendment) Act, 2005 would be constitutionally valid or not so far as "private unaided" educational institutions are concerned, is left open to be decided in an appropriate case.
> (Paras 120 to 122 and 108 to 111)"
>
> (emphasis supplied)

Thus, the 5-Judge Constitution Bench in the aforesaid case of **Ashoka Kumar Thakur vs. Union of India** (supra) by majority (4:1) upheld the constitutional validity of Article 15(5), so far as State maintained and aided educational institutions are concerned. However, the constitutional validity of Article 15(5) insofar as private unaided education institutions are concerned, was not considered and was left open to be decided in an appropriate case. His Lordship Justice Dalveer Bhandari in his judgment (minority view) however went into the said issue and held that Article 15(5) was not constitutionally valid even so far as private unaided education institutions are concerned, which view was overruled in **Pramati Educational and Cultural Trust vs. Union of India** (supra). So far as 'minority' educational institutions are concerned, the Constitution Bench has held that such minority educational institutions, whether aided or unaided, are excluded from the purview of Article 15(5) of the Constitution.

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16. In **Pramati Educational and Cultural Trust vs. Union of India** (supra) the constitutional validity of Article 15(5) was again questioned. This time by private unaided educational institution. The 5-Judge Constitution Bench of the Apex Court in the said judgment observed as follows:

> "This is a reference made by a three-Judge Bench of this Court by order dated 6-9-2010 in *Society for Unaided Private Schools of Rajasthan* v. *Union of India, (2012) 6 SCC 102* to a Constitution Bench. As per the aforesaid order dated 6-9-2010, *(2012) 6 SCC 102,* we are called upon to decide on the validity of clause (5) of Article 15 of the Constitution inserted by the Constitution (Ninety-third Amendment) Act, 2005 with effect from 20-1-2006 and on the validity of Article 21-A of the Constitution inserted by the Constitution (Eighty-sixth Amendment) Act, 2002 with effect from 1-4-2010.
>
> 4**.** Article 21-A of the Constitution reads as follows:
>
> "**21-A.** ***Right to education***.—The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine."
>
> Thus, Article 21-A of the Constitution, provides that the State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine. Parliament has made the law contemplated by Article 21-A by enacting the Right of Children to Free and Compulsory Education Act, 2009 (for short "the 2009 Act"). The constitutional validity of the 2009 Act was considered by a three-Judge Bench of the Court in *Society for Unaided Private Schools of Rajasthan* v. *Union of India,* (2012) 6 SCC 1. Two of the three Judges have held the 2009 Act to be constitutionally valid, but they have also held that the 2009 Act is not applicable to unaided minority schools protected under Article 30(1) of the Constitution. In the aforesaid case, however, the three-Judge Bench did not go into the question whether

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clause (5) of Article 15 or Article 21-A of the Constitution is valid and does not violate the basic structure of the Constitution. In this batch of writ petitions filed by the private unaided institutions, the constitutional validity of clause (5) of Article 15 and of Article 21-A has to be decided by this Constitution Bench.

5. **…** Hence, we are called upon to decide in this reference the following two substantial questions of law:

5.1 (*i*) Whether by inserting clause (5) in Article 15 of the Constitution by the Constitution (Ninety-third Amendment) Act, 2005, Parliament has altered the basic structure or framework of the Constitution?

5.2. (*ii*) Whether by inserting Article 21-A of the Constitution by the Constitution (Eighty-sixth Amendment) Act, 2002, Parliament has altered the basic structure or framework of the Constitution?

21. We have considered the submissions of learned counsel for the parties and we find that the object of clause (5) of Article 15 is to enable the State to give equal opportunity to socially and educationally backward classes of citizens or to the Scheduled Castes and the Scheduled Tribes to study in all educational institutions other than minority educational institutions referred in clause (1) of Article 30 of the Constitution. This will be clear from the Statement of Objects and Reasons of the Bill, which after enactment became the Constitution (Ninety-Third Amendment) Act, 2005 extracted hereinbelow:

"1. Greater access to higher education including professional education to a larger number of students belonging to the socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes has been a matter of major concern. At present, the number of seats available in aided or State maintained institutions, particularly in respect of professional education, is limited in comparison to those in private unaided institutions.

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2. It is laid down in Article 46, as a directive principle of State policy, that the State shall promote with special care the educational and economic interests of the weaker sections of the people and protect them from social injustice. To promote the educational advancement of the socially and educationally backward classes of citizens or of the Scheduled Castes and Scheduled Tribes in matters of admission of students belonging to these categories in unaided educational institutions, other than the minority educational institutions referred to in clause (1) of Article 30 of the Constitution, it is proposed to amplify Article 15.

3. The Bill seeks to achieve the above objects."

34. Clause (5) of Article 15 of the Constitution enables the State to make a special provision, by law, for the advancement of socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes. Such admissions of socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes who may belong to communities other than the minority community which has established the institution, may affect the right of the minority educational institutions referred to in clause (1) of Article 30 of the Constitution. In other words, the minority character of the minority educational institutions referred to in clause (1) of Article 30 of the Constitution, whether aided or unaided, may be affected by admissions of socially and educationally backward classes of citizens or the Scheduled Castes and the Scheduled Tribes and it is for this reason that minority institutions, aided or unaided, are kept outside the enabling power of the State under clause (5) of Article 15 with a view to protect the minority institutions from a law made by the majority. As has been held by the Constitution Bench of this Court in *Ashoka Kumar Thakur* v. *Union of India*[19], the minority educational institutions, by themselves, are a separate class and their rights are protected under Article 30 of the Constitution, and, therefore, the exclusion of minority educational institutions from Article 15(5) is not violative of Article 14 of the Constitution.

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> **38.** We accordingly hold that none of the rights under Articles 14, 19(1)(*g*) and 21 of the Constitution have been abrogated by clause (5) of Article 15 of the Constitution and the view taken by Bhandari, J. in *Ashoka Kumar Thakur* v. *Union of India*[19] that the imposition of reservation on unaided institutions by the Ninety-third Amendment has abrogated Article 19(1)(*g*), a basic feature of the Constitution is not correct. Instead, we hold that the Constitution (Ninety-third Amendment) Act, 2005 inserting clause (5) of Article 15 of the Constitution is valid.
>
> **55.** …. In our view, if the 2009 Act is made applicable to minority school, aided or unaided the right of the minorities under Article 30(1) of the Constitution will be abrogated. Therefore, the 2009 Act insofar it is made applicable to minority schools referred in clause (1) of Article 30 of the Constitution is ultra vires the Constitution. We are thus of the view that the majority judgment of this Court in Society for Unaided Private Schools of Rajasthan v. Union of India, 3 (2012) 6 SCC 1 insofar as it holds that the 2009 Act is applicable to aided minority schools is not correct.
>
> **56.** In the result, we hold that the Constitution (Ninety-third Amendment) Act, 2005 inserting clause (5) of Article 15 of the Constitution and the Constitution (Eighty-sixth Amendment) Act, 2002 inserting Article 21-A of the Constitution do not alter the basic structure or framework of the Constitution and are constitutionally valid. We also hold that the 2009 Act is not ultra vires Article 19(1)(*g*) of the Constitution. We, however, hold that the 2009 Act insofar as it applies to minority schools, aided or unaided, covered under clause (1) of Article 30 of the Constitution is ultra vires the Constitution.
>
> (emphasis supplied)

The 5-Judge Constitution Bench in the aforesaid case of **Pramati Educational Trust vs. Union of India** (supra), has thus held that 'minority' educational institutions, aided or unaided, are kept outside the enabling power of the State under Article 15(5) of the Constitution.

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17 To sum up, upon insertion of Article 15(5) to the Constitution, the 'minority' educational institutions (both aided and unaided) are exempted from enforcement of the reservation policy of the State in respect of backward class of citizens as interpreted by the judgments of the Constitution Benches of the Apex Court in **Ashoka Kumar Thakur vs. Union of India** (supra) and **Pramati Educational and Cultural Trust vs. Union of India** (supra), whilst upholding the validity of Article 15(5) of the Constitution.

18. The upshot of the above discussion is that the impugned Circular to the extent it provides for reservation of seats for students of backward class for admission in minority colleges, cannot be sustained. The impugned Circular is violative of Article 30(1) read with Article 15 (5) of the Constitution of India. Hence, the following order:

O R D E R

i) The Writ Petition is allowed.

ii) The impugned Circular dated 30/05/2001 to the extent it provides 50% reservation of seats for backward class

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students for admission to all courses as mentioned in the impugned Circular in minority colleges is quashed and set aside.

iii) Rule is made absolute accordingly. There shall be no order as to costs.

(iv) It is clarified that we have not gone into the issue whether the members of the Petitioners' Association, list whereof is annexed to the Petition, are in fact minority institutions and the verification in that regard is left to the Respondents.

(M.S.KARNIK, J.) **(A.A.SAYED,J.)**

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